



Federal Communications Commission
Washington, D.C. 20554

January 25, 2023

In Reply Refer to:
1800B3-PL

Educational Communications of
Colorado Springs, Inc.
1665 Briargate Blvd. Suite 100
Colorado Springs, CO 80920

In re: KBEI(FM), Brush, CO
Facility ID No. 173749
File No. 0000190315
Minor Modification

KTLF(FM), Colorado Springs, CO
Facility ID No. 18796
File No. 0000191348
Modification of License

Dear Applicant:

This letter refers to the above-captioned minor modification and modification of license applications filed by Educational Communications of Colorado Springs, Inc. (ECCS) to move KBEI(FM) to a new tower location. ECCS requests waiver of Section 73.509 of the Commission's rules (Rules)¹ for KBEI to receive prohibited contour overlap from co-channel station KTLF. Concurrently, ECCS requests that KTLF's license be modified to accept the overlap proposed by KBEI. For the reasons stated below, we deny the waiver request and dismiss both applications.

Waiver Request. An engineering review of KBEI's application reveals that the proposed minor change would violate section 73.509 of the Rules with respect to the co-channel Class C0 licensed facility (BLED-20040225AAB) of KTLF(FM), Colorado Springs, CO. Specifically, the proposed KBEI protected contour (60 dBu) would receive 40 square kilometers of prohibited overlap from the KTLF interfering contour (40 dBu). ECCS recognizes this violation and requests waiver of section 73.509 of the Rules.

In support of the waiver request, ECCS claims that KBEI's situation is technically analogous to a typical "Raleigh Waiver."² ECCS states that KBEI's proposed facility will provide service to an estimated 23,782 persons, which is an increase of 20%. ECCS claims that the population calculated to receive overlap is 200 persons or 0.0052% of the total population in the 60 dBu contour service area of KTLF. Finally, ECCS believes that since both KBEI and KTLF are co-owned stations and duplicate programming, and

¹ 47 CFR § 73.509.

² See *Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207, 2208 (1991) (*Raleigh*). The Commission has delegated authority to the Bureau to waive 47 CFR § 73.509(a) when overlap received is 10 percent or less of the proposed service area. *Changes in the Rules Relating to Noncommercial, Educational FM Broadcast Stations*, Memorandum Opinion and Order, 50 FR 27954, 27960 (1985).

KTLF has consented to the overlap, that the waiver of section 73.509 of the Rules is warranted in this instance.

Discussion. The Commission's rules may be waived for good cause shown.³ When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.⁴ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”⁵ and must support its waiver request with a compelling showing.⁶ Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.⁷

In this case, ECCS’s request fails to present good cause for waiver of section 73.509 of the Rules. ECCS has not shown sufficiently unique “special” circumstances, *i.e.*, rare and exceptional circumstances beyond its control to justify a waiver of section 73.509 of the Rules. Finally, we find that the facts and circumstances set forth in the justification are insufficient to establish that granting waiver of section 73.509 of the Rules would be in the public interest.

Specifically, section 73.509 of the Rules addresses overlap area rather than population in the overlap area. Therefore, although the population in the overlap area is small, this alone is not sufficient to waive the core interference protection requirement. In addition, ECCS fails to demonstrate that any readily available rule compliant technical solution, like a directional antenna, could not be used to eliminate the prohibited overlap. Finally, ECCS has not cited any published decisions where the Commission granted a waiver under circumstances similar to the ones presented here.

Generally, allowing applicants to create new prohibited contour overlap effectively nullifies the protection mandated by section 73.509 of the Rules to noncommercial educational FM stations’ 60 dBu protected service areas. In particular, the affected station would lose service area and population served without receiving any benefit in return. This interference would interrupt the continuity of service provided by KBEI throughout its protected service area, and thus diminish the quality of FM service provided by the afflicted station. Over time, the grant of numerous similar waivers would degrade the quality of FM reception from stations throughout the entire noncommercial educational FM band. As the Commission stated in *Open Media Corp.*⁸

It is the overall scheme of [noncommercial educational FM] allocations which is paramount, and when faced with a choice between a larger service area with overlap received on one hand, and lesser coverage with no prohibited overlap on the other, the Commission favors the latter. See *Educational Information Corporation*, 6 FCC Rcd 2207, 2208 (1991).

³ 47 CFR § 1.3.

⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, para. 2 (D.C. Cir. 1969) (*WAIT Radio*).

⁵ *WAIT Radio*, 418 F.2d at 1157, para. 2.

⁶ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090, 7094, para. 9 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

⁷ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (1990)).

⁸ *Open Media Corp.*, 8 FCC Rcd 4070, 4071 (1993).

Further, the fact that ECCS is also the licensee of KTLF does not warrant waiver of the rule. It is the Commission's charge, not applicants' or licensees', to establish definitions of protected service and to ensure that protected service does not suffer interference. The goal of section 73.509 of the Rules is to prevent overcrowding of FM stations and provide a consistent, fair, efficient, and equitable distribution of FM facilities as required by section 307(b) of the Communications Act.⁹ The Commission has stated that the public interest is not served by allowing applicants and licensees to negotiate among themselves which areas may receive interference.¹⁰ Therefore, since we cannot find that the public interest is served by this proposal, the consent of KTLF is of limited utility.

The Commission has granted waivers of section 73.509 of the Rules where existing noncommercial educational stations sought to increase the 60 dBu service contour so as to overlap the interfering contour of another noncommercial educational station and thereby receive overlap from *second*-adjacent and *third*-adjacent noncommercial educational FM stations.¹¹ Here, ECCS proposes to create new overlap received from a *co-channel* station. Therefore, the requested waiver of section 73.509 of the Rules does not fall within the precedent set forth in the *Raleigh* decision. Accordingly, the applicant's request for waiver of section 73.509 of the Rules will be denied.

Conclusion. In light of the above, ECCS's request for waiver of 47 CFR section 73.509 IS HEREBY DENIED. Application File No. 0000190315, being unacceptable for filing, IS HEREBY DISMISSED. Furthermore, Application File No. 0000191348 IS DISMISSED AS MOOT. This action is taken pursuant to section 0.283 of the Rules.¹²

Sincerely,



Rodolfo F. Bonacci
Assistant Division Chief
Audio Division
Media Bureau

cc: Aaron P. Shainis (via email)
Jim Turvaville (via email)

⁹ See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5358 (1991) at para. 13.

¹⁰ *Open Media Corp.*, 8 FCC RCD 4070 (1993)

¹¹ See *Educational Information Corp.*, 6 FCC Rcd 2207 (1991).

¹² 47 CFR § 0.283.