

POSTED

TRIPLICATE

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

In the Matter of )  
EDUCATIONAL MEDIA FOUNDATION ) File No. BPED-20040315ACB  
Application for a minor change to the license )  
for FM Station KLDV, FID 12354, Channel )  
216, 91.1 MHz, Morrison, CO )  
To: Secretary, Federal Communications Commission  
Attn: The Commission, *en banc*

Filed  
1/4/06

APPLICATION FOR REVIEW

LONGMONT COMMUNITY RADIO (LCR), licensee of KGUD (formerly KCDC), Channel 214, 90.7 MHz, Longmont, CO, by its attorney, respectfully submits its application to the Federal Communications Commission for review and reversal of the grant of the captioned application by the Audio Division, Media Bureau (the "AD").<sup>1</sup> In the captioned application, the AD granted licensee Educational Media Foundation an increase in the service (60 dBu) contour of KLDV, Channel 216, 91.1 MHz, Morrison, CO, predicated on a waiver of Section 73.509 of the Commission's rules, 47 C.F.R. §73.509, which otherwise prohibits KLDV's 60 dBu contour from overlapping KGUD's 100 dBu contour. Review and reversal of the grant is warranted because the waiver has not been and cannot be supported by the public interest findings for a rule waiver required by law.

In support of its Application for Review, LCR respectfully states:

---

<sup>1</sup> Public notice of KLDV's application grant, and denial of KGUD's Informal Objection, was given by Report No. 46124, dated December 5, 2005. This Application for Review thus is timely filed.

### Background

The captioned application requests authorization to convert the licensed directional antenna to an omnidirectional antenna, when the effect of the proposed change would be that KLDV's resulting 60 dBu (service) contour would completely overlap and encompass KGUD's 100 dBu (interfering) contour in violation of Section 73.509 of the Commission's rules, 47 C.F.R. §73.509. A waiver of §73.509 is therefore required in order to avoid dismissal of KLDV's modification application as defective; but the waiver papers were not included with the current application and were only incorporated by reference from a previous application -- since relinquished -- in File No. BPED-20010601AGJ.<sup>2</sup> Citing a Longley-Rice analysis and the unusual terrain and other circumstances (proximity of the Boulder quiet zone) in the affected area, KGUD objected to the proposed modification on the strength of its consulting engineer's conclusion that "KGUD is at serious risk of being harmed by the proposed application" because it does not "compl[y] with the protection contemplated" by §73.509. (KGUD Initial Engineering Statement at p. 2).<sup>3</sup>

In its Opposition, KLDV explained that it requested a waiver of §73.509 on the theory that its *received* interference from KGUD would be *de minimis*;<sup>4</sup> and it asserted that grant of the

---

<sup>2</sup> In the captioned application, KLDV recited that it voluntarily relinquished this construction permit on March 15, 2004, and that it "will continue to operate KLDV pursuant to the parameters authorized in its license, BLED-19860908KB, pending grant of the instant application". See Form 340 dated March 4, 2004, at Exhibit 1. Additionally, as KGUD pointed out in its informal objection, that grant occurred at a time when KGUD was silent due to financial difficulties of its licensee school board, but KGUD has since been reorganized as a community radio station. (See Informal Objection at p. 2).

<sup>3</sup> KLDV does not dispute KGUD's Longley-Rice analysis; instead KLDV argues that it is legally irrelevant. (Opposition at p. 4).

<sup>4</sup> KLDV incorrectly asserted that it would receive overlap of KGUD's 100 dBu contour to "0 people" within KLDV's proposed 60 dBu contour. (Opposition at p. 2). Contrary to KLDV's assertion, however, George Baskos, Director of Longmont Community Radio, personally surveyed the area of proposed interference and found that it includes 27 residences, including a newly developing subdivision, "Summit Estates". Using the 2000 census relationship of 2.9 persons per household, that translates into approximately 78 persons (and growing) living in the over-

requested waiver would be consistent with Commission precedent because the “benefit of providing expanded noncommercial educational service to the Morrison community” was said to “heavily outweigh[]” the potential for interference to KLDV’s service area.<sup>5</sup> (Opposition at p. 2). KLDV ultimately concluded “there is no rationale that would justify denial of the request.” (*Id.* at p. 4).

In granting the KLDV’s application and denying KGUD’s informal objection, the AD largely missed, or simply ignored, the thrust of KGUD’s argument. The AD first recited the Commission’s familiar policy barring use of supplemental showings such as a Longley-Rice analysis “for the purpose of determining interference or prohibited contour overlap between FM broadcast stations,”<sup>6</sup> without acknowledging or addressing the fact that such was *not* the direct purpose for which KGUD proffered the analysis. The AD then recited that other waivers of Section 73.509 of the rules have been granted under other circumstances, without acknowledging or addressing the differences in the factual circumstances of the present case, but conceding, nonetheless, that the Commission’s “emphasis is to avoid authorizing new overlap”. (*Id.* at p. 3).

Finally, the AD speculated that “*it may be possible* [for KGUD] to use a booster or translator to fill in weak signal areas.” (*Id.* at p. 3 & n. 6). (Emphasis added). In doing so, the AD implicitly acknowledged that the granted modification to KLDV’s station does in fact compromise KGUD’s signal coverage within its protected contour, precisely as demonstrated by

---

lap area. (See Reply to Opposition at p. 2 & n. 1). While this error by KLDV obviously undermines the factual support for KLDV’s theory, it was wholly ignored by the AD in granting the captioned application.

<sup>5</sup> In fact, however, the asserted “benefit of providing expanded noncommercial educational service to the Morrison community” provides no justification whatsoever for the requested waiver. As KGUD’s consulting engineer points out (KGUD Reply Engineering Statement at p. 2), had that been EMF’s objective it would have proposed a different modification.

<sup>6</sup> AD Letter dated November 30, 2005, denying KGUD’s informal objection and granting KLDV’s application (the “AD Letter”) at p. 2.

KGUD's Longley-Rice analysis, and that the proximity of the Boulder Colorado quiet zone restricts KGUD's technical options in attempting to deal with this adverse impact.

#### Grounds for Review

This Application for Review presents the question of whether a Longley-Rice analysis properly can be used to defeat a request for *waiver* of Section 73.509 of the rules (prohibiting overlap of KGUD's 100 dBu contour and KLDV's 60 dBu contour), when unusual terrain and other conditions are present, since the Longley-Rice analysis undermines the Commission's ability to find, as it lawfully must, that grant of the waiver is consistent with the public interest. This case thus involves either "a question of law or policy which has not been previously resolved by the Commission" (*see* 47 C.F.R. §1.115(b)(2)(ii)), or "application of a . . . policy which should be overturned or revised" (*see* 47 C.F.R. §1.115(b)(2)(iii)). That is, if the Commission's policy limiting the use of a Longley-Rice analysis is indeed as broad as evidently thought by the AD, that policy should be revised to allow use of Longley-Rice where, as here, an applicant seeks a *waiver* of existing rules (*i.e.*, requests that existing rules *not* be adhered to) and a Longley-Rice analysis demonstrates that there is a valid, *bona fide* factual basis for finding that such waiver is not consistent with the public interest.

On the other hand, if, as KGUD believes, it seeks to employ a Longley-Rice analysis in a perfectly legitimate fashion not previously addressed by the Commission, *viz.*, to undermine KLDV's factual predicate for waiving the Commission's rules, then the case presents a novel question of policy which should be addressed by the Commission.

#### Argument for Review and Reversal

As noted by KGUD in prior pleadings, the Commission may exercise its discretion to waive a rule only "where particular facts would make strict compliance inconsistent with the

public interest.”<sup>7</sup> “Waiver of the Commission’s rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.”<sup>8</sup>

Contrary to the norm in a waiver request case, the “special circumstances” in this case emphatically *support* strict adherence to the Commission’s rules and *undermine* KLDV’s request to waive the rule. Even if true,<sup>9</sup> it is not a sufficient public interest analysis to say that a *de minimis* number of KLDV’s potential listeners will receive interference from KGUD. Rather, the evidence in this case, as demonstrated by Longley-Rice, is that due to the unusual terrain involved in this case and the proximity of the Boulder quiet zone, a significant number of *KGUD listeners within its 60 dBu contour* will in fact receive *interference from KLDV* as a result of the proposed modification. The validity of using a Longley-Rice analysis for this purpose is not in dispute; the Commission routinely utilizes it precisely in this way in a variety of other contexts.

Nor, contrary to the AD’s analysis, is Longley-Rice being used in this case to claim unlawful interference between two stations that are otherwise permissibly operating under the Commission’s rules. Nor, again contrary to the AD’s analysis, does use of Longley-Rice in this case embroil the Commission in making difficult decisions, thereby undermining its ability to decide cases expeditiously. The AD’s legal analysis in granting the waiver thus is obviously misplaced and should be set aside.

The pertinent point is that KLDV has not shown that grant of a waiver of §73.509 of the rules is consistent with the public interest, because its proposed modification will also have an

---

<sup>7</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (DC Cir. 1990), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (DC Cir. 1969).

<sup>8</sup> *Telephone Number Portability*, DA 04-1455, released May 24, 2004 (WTB) at p. 3 & ¶5, citing *WAIT Radio*, *supra*, 418 F.2d at 1159.

<sup>9</sup> See note 3, *supra*, refuting the factual predicate for KLDV’s *de minimis* argument. Moreover, while the AD recited that KLDV made its *de minimis* argument, the AD did not explicitly adopt KLDV’s argument in this regard.

adverse impact on KGUD's listeners within its 60 dBu contour due to the unusual terrain and other factors in this case. Under such circumstances, the findings lawfully required to support a waiver cannot be made and the waiver request properly should be denied.

Finally, the AD's speculation that that KGUD might be able to ameliorate the adverse effects of KLDV's modification plainly is not a lawful substitute for the findings necessary to grant a waiver request. If KLDV had demonstrated in its application papers the feasibility of such a technique and had agreed to pay for the necessary facilities, that would present a different case. But KLDV didn't and hasn't; and the AD cannot lawfully make up for this omission by its speculation.

#### Conclusion

For the reasons stated above, the Commission should review and reverse the AD's grant of the captioned application, and upon review should deny KLDV's waiver request and dismiss its application as defective.

Respectfully submitted,

LONGMONT COMMUNITY RADIO

By: 

Kenneth E. Hardman  
2154 Wisconsin Avenue, NW, Suite 250  
Washington, DC 20007  
Telephone: (202) 223-3772  
Facsimile: (202) 315-3587  
[kenhardman@att.net](mailto:kenhardman@att.net)

*Its Attorney*

January 4, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this 4<sup>th</sup> day of January, 2006, served the foregoing Application for Review upon Educational Media Foundation by mailing a true copy thereof, first class postage prepaid, to its attorney David Oxenford, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, N.W., Washington, DC 20037-1128.

A handwritten signature in black ink, appearing to read "Kenneth E. Hardman", written over a horizontal line.

Kenneth E. Hardman

**David Trout**

---

**From:** Ken Hardman [kenhardman@att.net]  
**Sent:** Wednesday, January 04, 2006 4:50 PM  
**To:** MMBSecretary  
**Cc:** David Trout; david.oxenford@pillsburylaw.com  
**Subject:** Educational Media Foundation, F/N BPED-20040315ACB

Transmitted herewith for filing in electronic form on behalf of Longmont Community Radio is its Application for Review in File No. BPED-20040315ACB. Any questions concerning this filing should be directed to the undersigned.

Kenneth E. Hardman  
Attorney At Law  
2154 Wisconsin Avenue, NW, Ste 250  
Washington, DC 20007-2280  
Direct Dial: (202) 223-3772  
Facsimile: (202) 315-3587  
[kenhardman@att.net](mailto:kenhardman@att.net)

(Please note new street address and fax number effective December 17, 2005)

1/5/2006