Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of	)	
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SADDLEBACK COMMUNITY COLLEGE	)	File No. BPED - 930503IF
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	)	
For modification of facilities of	)	
Noncommercial Educational Station	)	
KSBR(FM), Mission Viejo, California	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1996 **Released: September 26, 1996**

By the Commission:

1. The Commission has under consideration: (1) an Application for Review filed on November 30, 1995 by Saddleback Community College ("Saddleback"), licensee of noncommercial educational Station KSBR(FM), Mission Viejo, California; (2) an Opposition filed by California State University, Northridge ("California"), licensee of noncommercial educational Station KCSN(FM), Northridge, California on January 16, 1996; and (3) a Reply filed by Saddleback on January 31, 1996.

2. Saddleback requests review of an action by the Assistant Chief, Audio Services Division, returning the above-captioned application to modify its facilities. By letter to Saddleback Community College et al., dated October 31, 1995, the staff denied Saddleback's petition for reconsideration, returned a contingent amendment as unacceptable for filing, and denied an associated request for waiver concerning the prohibited contour overlap provisions of 47 C.F.R. Section 73.509.[1]

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[1] On April 22, 1994, the staff returned Saddleback's original application as unacceptable for filing after denying two requests for waiver of Section 73.509. Saddleback was afforded a thirty-day period to resubmit its application with a corrective amendment in order to gain acceptance of its proposal on a nunc pro tunc basis. See 47 C.F.R. Section 73.4015; Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications, Public Notice, 49 Fed. Reg. 47,331 [56 RR 2d 776] (1984) ("1984 Policy Statement on Incomplete and Defective Applications") (permitting one-time only amendment of dismissed or returned applications and cautioning that a second amendment would not be afforded nunc pro tunc rights in comparative

3. In the Application for Review, Saddleback contends that the staff erred in the following respects: (1) the staff's letter contained a material factual error in finding that Saddleback had "failed to provide the population gained within its proposed 60 dBu contour" in support of the waiver request; (2) Saddleback has not been given notice of the Commission's standards for waiving Section 73.509; (3) the staff has not presented any justification for using a case-by-case approach rather than notice and comment rulemaking to define its waiver policy with respect to Section 73.509; and (4) the staff has not demonstrated why it would not be appropriate to hold a hearing to determine where the public interest lies with respect to the mutually exclusive applications of Saddleback and California.

4. Background. Saddleback timely filed the above-captioned application in response to the May 3, 1993 "A" cut-off date of California's major change application for KCSN (File No. BPED-930115MB).[2] Saddleback sought to increase its effective radiated power (ERP) from 0.50 kW nondirectional to 1.80 kW directional, at an antenna height above average terrain of 180 meters. This change would have increased KSBR's signal strength in areas primarily north of KSBR's facilities. The staff, in its April 22, 1994 letter returning the application, noted that the application created two areas of prohibited signal contour overlap in violation of 47 C.F.R. Section 73.509:[3] (1) with first-adjacent channel Station KSPC(FM), Claremont, California; and (2) with second-adjacent channel Station KUCI(FM), Irvine, California. The staff found that Saddleback had failed to provide sufficient justification to warrant waivers of first-adjacent and second-adjacent channel overlap. Additionally, the staff denied a requested waiver of co-channel overlap with California's pending and mutually exclusive application for KCSN. While denial of the waiver request with respect to first-adjacent channel Station KSPC rendered the original application unacceptable for filing, denial of the waiver request with respect to the pending application for co-channel Station KCSN alone would merely have left Saddleback's application mutually exclusive with California's application for KCSN.

5. With respect to the waiver request regarding second-adjacent channel Station KUCI, the staff found that Saddleback had failed to present sufficient information to warrant waiver of the rule. The staff explained that to support such waiver request, the population within the area

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proceedings).

[2] Section 73.3573(e) of the Commission's rules provides that the Commission will periodically release a Public Notice listing applications for reserved band FM broadcast stations that have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and/or petitions to deny the listed applications must be filed. See 47 C.F.R. Section 73.3573(e).

[3] Section 73.509(a) of the Commission's rules provides, in pertinent part, that an application for a new or modified noncommercial educational FM station will not be accepted if the proposed station's 1 mV/m (60 dBu) contour would overlap the 0.1 mV/m (40 dBu) contour of a co-channel station operating in the reserved band, or the 0.5 mV/m (54 dBu) contour of a first-adjacent channel station operating in the reserved band, or the 10 mV/m (80 dBu) contour of a second-adjacent channel station operating in the reserved band. See 47 C.F.R. Section 73.509(a). These rules govern interference received by proposed noncommercial educational stations.

of overlap must be provided by the waiver's proponent, along with a showing of "how the benefit of increased noncommercial educational service so heavily outweighs the potential for interference in very small areas." After observing that Saddleback had not provided this information, the staff denied Saddleback's waiver request. The staff returned Saddleback's application, cautioning that although a properly amended application would be accepted nunc pro tunc, further reinstatement would not be entertained if such resubmitted application proved otherwise defective.

6. Saddleback submitted a petition for reconsideration of the staff's April 22, 1994 return of its application, along with a contingent amendment. The staff, finding it had committed no error that would warrant reinstatement of Saddleback's original application, denied Saddleback's petition for reconsideration. Next, considering the contingent amendment, the staff found that the specified facilities eliminated the prohibited contour overlap with first-adjacent channel Station KSPC. Saddleback again requested waivers of Section 73.509 for overlap with second-adjacent channel Station KUCI and with California's cut-off application for co-channel Station KCSN. According to the contingent amendment, KSBR would receive prohibited overlap from second-adjacent channel Station KUCI corresponding to 3.6 percent of the population (18,571 persons) and 2.12 percent of the land area within KSBR's 60 dBu contour. The staff observed that, "[i]n general, to obtain waiver of § 73.509 to receive prohibited contour overlap, an applicant has been required to compare the area and population gained within the requesting station's service contour versus the area and population lost within the interfering contour of the opposite station." The staff further noted that, upon reconsideration, Saddleback "has not met this requirement. Specifically, Saddleback has failed to provide [information concerning] the population gained within its proposed 60 dBu contour." The staff reasoned that without such information, it could not determine whether waiver of the rule was warranted with respect to the second-adjacent channel station. Moreover, the staff noted, while the area of prohibited contour overlap with KUCI was small, so too was the gain to be realized by KSBR. According to California, 20 sq. km (32%) of the 62.4 sq. km of land area gained by KSBR would receive prohibited contour overlap from KUCI. Thus, the staff rejected the waiver request with respect to KUCI, and consequently returned the amendment as unacceptable.

7. The staff also concluded that while the overlap area between the amended 60 dBu contour of KSBR and the proposed interfering contour of the pending application for California's co-channel Station KCSN was "somewhat reduced" from the original KSBR proposal, the request for waiver "remains unacceptable for the reasons stated in the staff's April 22, 1994 letter." The staff then denied the request for waiver of overlap with the co-channel application.

8. Discussion. This case turns on the sufficiency of the waiver request for received overlap of the interfering contour of second-adjacent channel Station KUCI. In Educational Information Corp., 6 FCC Rcd 2207 (1991), the Commission noted that it would be inclined to grant waivers of second- or third-adjacent channel overlap in circumstances where the benefit of increased noncommercial educational service heavily outweighs the potential for interference in very small areas. Educational Information Corp., 6 FCC Rcd at 2208. In that case, the Commission granted two waivers for second-adjacent channel overlap, one of which affected only

0.45 percent of the applicant's service area and the other of which affected only 0.39 percent of the applicant's service area, and the amount of interference received in both instances was minimal compared to the amount of new service provided. See id. at 2207-08.

9. Saddleback argues that the staff erred when it found that Saddleback "has failed to provide [information concerning] the population gained within its proposed 60 dBu contour." According to a statement by Saddleback's consulting engineer, its responsive pleading included information advising that "[t]he KSBR 60 dBu gain area encompasses a population of 100,250 persons."[4] However, this information was first provided in Saddleback's reply to opposition to petition for reconsideration dated July 27, 1994, and Saddleback concedes that this information, i.e., detailed calculations of the 60 dBu gain area and population, was not included in the originally filed application or the contingent amendment. Furthermore, the applicant provides no explanation for such omission. The 1984 Policy Statement on Incomplete and Defective Applications, supra, allows for a one-time only amendment. By submitting data crucial to evaluation of the waiver request in a reply pleading, Saddleback was inappropriately attempting to amend its application a second time. As the 1984 Policy Statement made clear, nunc pro tunc acceptance of such second amendments is unfair to other applicants in a comparative proceeding who have prepared properly executed applications. In this case, California's application, which is still pending, did not contain associated waiver requests and was accepted for filing on March 29, 1993, nearly 16 months before Saddleback finally provided the population within the additional area to be gained as a result of its proposed power increase. Consequently, Saddleback's belated attempt to supply such information prejudiced California because of the attendant delay in processing California's application. Saddleback has not provided any argument that would persuade us to depart from the policy announced in the 1984 Policy Statement. We therefore find that the staff was not in error in refusing to consider the population in KSBR's proposed gain area.

10. In addition, we find that the staff's denial of the waiver was adequately supported on other grounds, and that even considering the population gain, a waiver of Section 73.509 is still not warranted. It is well established that the burden is on a waiver applicant to "plead with particularity the facts and circumstances which warrant such action." WAIT Radio, 418 F.2d 1153, 1157 (D.C. Cir. 1969). We cannot conclude that Saddleback has satisfied its burden under WAIT Radio in connection with its technical showing in the instant case. In returning Saddleback's original application, the staff noted that to support its waiver request, Saddleback must provide a showing which demonstrates, consistent with the requirements announced in Educational Information Corp., "how the benefit of increased noncommercial educational service so heavily outweighs the potential for interference in very small areas." In this case, Saddleback submits that KSBR would receive prohibited overlap corresponding to 3.6 percent (18,571 persons) of the population and 2.12 percent of the land area within KSBR's 60 dBu contour. This is much greater than the 0.45 percent and 0.39 percent overlaps underlying the waiver

[4] The "gain area" is the additional land within an applicant's signal contour as a result of a modification of facilities.

requests in Educational Information Corp.

11. The staff also rejected Saddleback's amendment in part based on California's analysis that 32% of the gain area would receive prohibited contour overlap from KUCI, which is undisputed by Saddleback. As we have stated in response to previous requests for waiver concerning Section 73.509:

> [i]ncreased coverage alone is insufficient to warrant a waiver of the rule. Power increase proposals which increase overlap received are, with rare exceptions, accompanied by increased coverage. However, when faced with a choice between increased coverage with increased interference received on one hand, and lesser but adequate coverage without prohibited interference on the other, the Commission favors the latter.

Educational Information Corp., 6 FCC Rcd at 2208 (quoting Board of Education of the City of Atlanta, 82 FCC 2d 125, 127 (1980). Thus, even if the staff had given the weight to the increased population in the gain area that the applicant untimely filed, Saddleback has still not presented facts and circumstances that would warrant a waiver of the rule, especially where there is no prohibited received overlap of KUCI's signal contour with the presently authorized facilities. An overlap area nearly one-third the size of the gain area, and which contains nearly one-fifth of the total population gained, cannot be deemed to be insubstantial, and Saddleback has identified no precedent for granting a waiver under these circumstances.

12. Saddleback also rejects the staff's characterization of the waiver standard of Section 73.509 as requiring a calculation of the population within the 60 dBu gain area at the threshold level. We agree with the staff that population gain is an important consideration in determining whether a waiver of the second and third adjacent channel overlap provisions of Section 73.509 is warranted. Without being provided information concerning the difference between the number of persons an applicant is proposing to serve and the number of persons presently served by such applicant, the Commission has no way of determining whether a public benefit such as "increased noncommercial educational service" actually exists in order to justify a waiver of the rule. However, we emphasize that Saddleback failed to justify its waiver request because it did not provide a showing that increased service would "heavily outweigh" the potential for interference "in very small areas." Saddleback failed to present circumstances that would warrant a waiver, whether population gain is considered (18,571 persons in overlap area vs. 100,250 persons in gain area) or whether the overlap area is compared with the proposed 60 dBu contour (3.6 percent of population or 2.12 percent of land vs. 0.45 percent, the larger percentage of received overlap of 60 dBu contour in Educational Information Corp.).

13. We also reject Saddleback's argument that the Commission was required to establish its Section 73.509 waiver policy through notice and comment rulemaking. Saddleback relies on United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994), where the court held that the Commission's penalty schedule for assessing forfeitures more closely resembled a substantive rule than a policy statement and therefore should have been subject to public comment under the

Administrative Procedure Act. United States Telephone Association did not involve the establishment of waiver standards concerning technical rules, which the Commission is permitted to express in published decisions such as Educational Information Corp. See WAIT Radio, 418 F.2d at 1159. Moreover, the staff decision at issue here did not announce any new standards, but merely applied a standard announced in Educational Information Corp. concerning waivers of second-adjacent and third-adjacent channel overlap.

14. Saddleback also argues that the staff has not demonstrated why it would not be appropriate to hold a hearing to determine where the public interest lies with respect to the "mutually exclusive" applications of Saddleback and California. As the staff noted in the October 31, 1995 decision letter, Saddleback's amended application would have been mutually exclusive with that of California if the amendment had been found to be acceptable for filing. Since Saddleback's application relied upon a request for waiver of received second-adjacent channel overlap, which was denied, Saddleback's application was dismissed and can no longer be deemed to be mutually exclusive with California's application. Thus, no hearing is appropriate in view of the procedural posture of this case. See United States v. Storer Broadcasting Co., 351 U.S. 192, 201-03 (1956); Columbia Communications Corp. v. FCC, 832 F.2d 189, 193 (D.C. Cir. 1987) (explaining that the Commission need not hold a hearing on applications it rejects for failure to meet its technical acceptance rules).

15. Accordingly, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. Section 1.115(g), the Application for Review filed by Saddleback Community College on November 30, 1995 IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary