

12 FCC Recd 6911

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)	
)	
EDUCATIONAL INFORMATION)	File No. BPED-930125IH
CORPORATION)	
)	
For Modification of Noncommercial)	
Educational Station WCPE(FM))	
Raleigh, North Carolina)	

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 1997

Released: May 20, 1997

By the Commission:

1. The Commission has before it an application for review filed by Educational Information Corporation ("EIC"), the licensee of noncommercial educational ("NCE") FM station WCPE(FM), Raleigh, North Carolina of an August 4, 1995 letter decision from the Chief, Audio Services Division. Specifically, EIC contests the denial of its request for a waiver of 47 C.F.R. § 73.509 to permit the 80 dBu interfering contour of WCPE(FM) to overlap the protected 60 dBu service contour of second adjacent channel NCE station WXYC(FM), Chapel Hill, North Carolina and the related return as unacceptable for filing of EIC's October 20, 1994 amendment (the "Amendment") to the above-captioned application. We deny the application for review for the reasons set forth below.

Background

2. On January 25, 1993, EIC filed an application to increase its antenna height above average terrain ("HAAT") from 207 meters to 362 meters at its licensed site. The application specified a directional antenna to prevent prohibited overlap of WCPE(FM)'s interfering contour and WXYC(FM)'s protected service contour. EIC also requested a 47 C.F.R. § 73.509 waiver to permit WCPE(FM) to receive additional contour overlap from WCCE(FM), Buies Creek, North Carolina within WCPE(FM)'s protected service contour. In a letter decision dated May 26, 1993, the staff granted the 47 C.F.R. § 73.509 waiver with respect to overlap received from WCCE(FM) and withheld further action on the WCPE(FM)

application to permit the submission of additional necessary amendments.

3. Subsequently, EIC submitted the Amendment in which it proposed to operate non-directionally. The proposed facility would result for the first time in WCPE(FM) causing prohibited overlap to the protected service area of station WXYC(FM). The Amendment included a request to waive 47 C.F.R. § 73.509 to permit the new overlap caused by WCPE(FM) and a "no objection" letter from WXYC(FM), a 400 watt Class A station with a coverage area of less than 600 square kilometers. On May 10, 1995, the Audio Services Division issued a letter decision (the "Letter Decision") denying the waiver request, returning the Amendment, and granting the initially-filed application which specifies a directional antenna. The 100,000 watt Class C facilities authorized in the staff action would give WCPE(FM) a coverage area of over 18,000 square kilometers and permit the station to serve more than ninety-nine percent of the area that would be reached with non-directional facilities. EIC now seeks review of this staff action. On August 4, 1995, the Audio Services Division denied a request for reconsideration of this staff action.

Discussion

4. EIC essentially reiterates the arguments raised on reconsideration in its application for review. It asserts that the proposed Section 73.509 waiver is similar to that granted by the Commission in Educational Information Corporation, 6 FCC Rcd 2207 (1991). We disagree. 47 C.F.R. § 73.509 specifies two types of prohibited signal contour overlap. "Overlap received" occurs when a station proposes to extend its service contour so that it overlaps a second station's interfering contour. "Overlap caused" occurs when a station proposes to expand its interfering contour so that it overlaps a second station's protected service contour. Except in certain narrow circumstances that are distinguishable from the facts here, the Commission has consistently rejected "overlap caused" proposals in order to safeguard the ability of licensed stations to provide interference-free service within their protected service areas. See Educational Information Corporation, 6 FCC Rcd at 2208; Board of Education of the City of Atlanta (WABE(FM)), 11 FCC Rcd 7763 (1996) ("WABE(FM)"). In Educational Information Corporation we expressed concern about the impact of approving a received overlap waiver on the station "causing" the overlap. Strict application of the NCE interference rules could perpetually restrict such a station to its current facilities. Accordingly, we announced that where the interfering contour of a station has been partially or wholly encompassed by the expanded protected service contour of a station which obtains a received overlap waiver, we would view "favorably" a waiver request by the encompassed station "where there is clearly a public benefit." Id. at 2209.

5. Although clearly delineated in the rules and in case precedent, EIC ignores the critical distinction between these two types of prohibited overlap. The staff correctly found

area can result in the withdrawal of that station's service from the public without altering the preclusionary effect that the station has on other facilities. See Open Media Corporation, 8 FCC Rcd at 4071; WABE(FM), 11 FCC Rcd at 7766-67.

10. These statutory requirements and technical concerns, however, do not preclude the Commission from taking into account the views of the stations regarding their desired service areas. In effect, interference agreements reflect the shared determination of two stations as to those areas where service from one station will preclude service from the second and those areas which will receive no listenable signal from either station. We are obligated to consider all facts and circumstances presented, including the views of the stations affected by a technical proposal. See id. at 7767 n.5. To the extent that the Letter Decision may suggest that the Commission will not give weight to the fact that those broadcasters most directly at risk of experiencing increased interference support a proposed facilities modification, we repudiate that position. However, for the reasons stated above, the Commission must remain the final arbiter of interference agreements. 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, 5361 (1991). In this case we find that the relatively small service improvements tied to the Amendment are insufficient to justify the prohibited overlap it would cause to WXYC.

11. EIC identifies two additional service-related improvements tied to its non-directional proposal. First, it calculates that 31,000 persons are currently affected by prohibited overlap "caused" to WCPE(FM) by WXYC(FM) within WXYC(FM)'s 80 dBu contour and claims that "implementation of the WCPE and WXYC proposals" would eliminate overlap for 25,000 persons.⁴ This contention, however, provides no support for the requested waiver. In the 1991 Educational Information Corporation decision, the Commission waived 47 C.F.R. § 73.509 to permit WCPE(FM)'s 60 dBu contour to completely encompass WXYC(FM)'s 80 dBu contour, *i.e.*, approved a proposal under which WCPE(FM) would receive overlap from WXYC(FM) within WCPE(FM)'s protected service contour. Both the authorized directional facilities and requested non-directional facilities here at issue would simply maintain this overlap. The claimed reduction in overlap received is not a result of the Amendment. Rather, it is wholly attributable to a proposed and unrelated WXYC(FM) transmitter site move to a less populated area and is properly considered in connection with the WXYC(FM) application.

12. Secondly, EIC contends that we should waive our rules "to alleviate interference for WCPE(FM) listeners in troublesome, low-lying areas that are presently shadowed and

⁴ EIC Application for Review at 4.

receive an unusually strong signal from WXYC."⁵ As we have previously indicated, overlap caused and overlap received are opposite sides of the same coin. See Educational Information Corporation, 6 FCC Rcd at 2209. In essence, EIC argues that WCPE(FM) should be permitted to operate at higher power toward WXYC(FM) to offset the overlap "caused" by the Chapel Hill station. This position ignores, of course, the fact that the 1991 Educational Information Corporation decision waived Section 73.509 to permit WCPE(FM) to receive prohibited overlap from WXYC(FM), i.e., the WCPE(FM) facilities improvement created the prohibited overlap. EIC cannot have it both ways, on the one hand agreeing to receive overlap from WXYC(FM) in connection with the 1991 action granting its facilities improvement and, on the other hand, now complaining that it cannot adequately serve areas in the immediate vicinity of the WXYC(FM) transmitter which receive an "unusually strong" WXYC(FM) signal.

13. The staff also correctly declined to consider as a relevant factor the pendency of the WXYC(FM) application to change transmitter site, power, and HAAT and, we note, to use a directional antenna. Although grant of the WXYC(FM) application would lessen the overlap caused by WCPE(FM), the WXYC(FM) application is mutually exclusive with two new NCE FM station applications in Spring Lake, North Carolina, and therefore subject to the NCE comparative proceeding freeze.⁶ Although the proposed WXYC site change presents an opportunity for WXYC and WCPE to resolve their technical conflict and speed the grant of several applications, no settlement has been filed. It is futile to speculate on the outcome of the WXYC proceeding and certainly inappropriate to base our decision here on such speculation. Moreover, even the timing of these applications' processing cannot be predicted.

14. Finally, EIC seems to argue that had the Commission considered the WCPE(FM)-WXYC(FM) interference issue under commercial FM station standards, a different result would obtain. It claims that WCPE(FM) "could be shown to meet the separation rules under 47 C.F.R. § 73.215(a)(2)" and argues that the staff's denial of the Section 73.509 waiver request was "arbitrary and capricious."⁷ We find that the staff's rejection of EIC's contention

⁵ Statement in Support of an Engineering Amendment to BMPED-930125IH at 2.

⁶ See Notice of Proposed Rulemaking, Reexamination of the Comparative Standards for New Noncommercial Educational Applicants, 10 FCC Rcd 2877 (1995).

⁷ EIC Application for Review at 7. EIC has not submitted a Section 73.215 study. A Commission analysis of the WCPE(FM) proposal establishes that it does not, in fact, satisfy the commercial short-spaced station separation requirements which are set forth at subsection (e), not (a)(2), of Section 73.215. Specifically, our analysis reveals, contrary to EIC's assertion, that the WCPE(FM) facilities would be 41.6 kilometers short-spaced to WXYC(FM) under 47 C.F.R. § 73.215(e). Given this excessive short-spacing, favorable consideration of the relevant commercial rule waiver would be exceedingly unlikely.

that Educational Information Corporation does not countenance overlap caused where, as here, none previously existed. Similarly, EIC's reliance on Public Notice, Delegation of Authority to the Chief of the Broadcast Bureau to Waive Small Amounts of Interference Received by Non-Commercial Educational Proposals, 49 R.R. 2d 1524 (1981), is misplaced. This Public Notice and the subsequent order conforming the Bureau's delegated authority to the 1985 amendment to 47 C.F.R. § 73.509, see Memorandum Opinion and Order, Changes in the Rules Relating to Noncommercial, Educational FM Broadcast Stations, 58 R.R.2d 629, 639 (1985) ("NCE Assignment Order"), are explicitly limited to waiver requests involving small amounts of interference and overlap received, not caused.¹

6. The technical facilities approved by the staff on May 10, 1995 would result in a forty percent increase in WCPE(FM)'s protected service contour, permitting the station to serve an additional 5275 square kilometers and almost 270,000 additional listeners. Thus, EIC's initial 47 C.F.R. § 73.509 waiver request to permit a small amount of overlap received from WCCE(FM) presented a situation in which the "benefit of increased noncommercial service so heavily outweighs the potential for interference in very small areas," Educational Information Corporation, 6 FCC Rcd at 2208, that a waiver of the noncommercial FM station interference rule served the public interest. Notwithstanding EIC's characterization of the Amendment as proposing "substantially enhanced" facilities, the issue now before the Commission involves a comparatively insignificant 0.8 percent further increase in the WCPE(FM) 60 dBu service area. The Amendment would permit WCPE(FM) to expand its service area by 148 square kilometers. EIC estimates that approximately 10,000 potential new WCPE(FM) listeners reside in this area. Educational Information Corporation provides no support for EIC's request to cause overlap to WXYC(FM) to achieve minor service gains. The Commission has never approved an overlap caused waiver proposal where no overlap previously existed, such as EIC advocates here, on the basis of a larger service area. Although we are bound to consider carefully all waiver requests, WAIT Radio v. FCC, 418 F.2d 1135, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972), we conclude that this minimal WCPE(FM) service expansion is wholly insufficient to counterbalance diminished service by a second station within the second station's protected service contour.

7. Nor does the fact that EIC claims that it must expend "extra" funds for a directional antenna support a different result.² NCE stations are routinely required, as is

¹ In NCE Assignment Order, the Commission recognized that interference would result only in portions of the area where prohibited contour overlap occurs. Because the overlap area is often roughly twice the interference area, the Commission increased the staff's waiver ceiling from five to ten percent of the proposed service area to permit waivers consistent with those approved under the previous processing standard.

² EIC Application for Review at 7 n.7.

WCPE(FM) here, to use directional antennas to protect nearby stations. EIC could have chosen to significantly expand its coverage with a non-directional antenna while avoiding any overlap between WCPE(FM)'s interfering and WXYC(FM)'s protected contours. However, in its January 25, 1993 application EIC chose a directional antenna to maximize coverage. In these circumstances EIC's undocumented expense claims cannot justify a departure from the fundamental licensing principle, embodied in the interference protection standards of Section 73.509, to protect WXYC(FM) within its service area.

8. EIC also contends that the Commission should give "significant, if not dispositive" weight to the fact that WXYC(FM) supports grant of the Amendment.³ The staff concluded that the WXYC(FM) "no objection" letter is of "limited utility." Historically, the Commission has given little or no weight to agreements between FM applicants and licensees to accept interference. E.g., WABE(FM), 11 FCC Rcd at 7766-67. The Commission's obligation to look beyond the consents of affected stations is grounded on the requirements of Section 307(b) of the Communications Act, 47 U.S.C. § 307(b). Under that provision, the Commission must ensure the "fair, efficient and equitable distribution of radio service" throughout the country. Plainly, the Commission is required to scrutinize negotiated interference agreements against this statutory standard where, as here, two stations agree to compromise radio service within one of the station's protected service areas. There is no reason to assume that the economic incentives which underlie any particular negotiated agreement would ensure either the "fair" or "equitable" distribution of service. To the contrary, Congress intended Section 307(b) to check the inevitable economic pressure to concentrate broadcast services in urban areas at the expense of service to smaller communities and rural areas. See Pasadena Broadcasting Co. v. FCC, 555 F.2d 1046, 1050 (D.C. Cir. 1977). A sensitivity to these economic realities is particularly appropriate here, when a smaller station, with one-thirtieth of the larger station's coverage area, agrees to a proposal which would diminish its potential audience and exacerbate station coverage disparities.

9. We are generally concerned that giving licensees unfettered discretion to determine acceptable levels of interference within their station service areas would be inconsistent with the statute's mandate to ensure "efficient" use of the spectrum. The Commission's technical requirements promote spectrum efficiency by protecting licensed NCE facilities from impermissible interference within their service areas. The interference rules necessarily limit construction or modification of other nearby facilities. Underlying these interference standards and their attendant "preclusionary" effect is the basic premise that licensed facilities will provide adequate service throughout their protected service area. Prohibited overlap is presumptively disfavored because it results in a diminished protected service area. Permitting licensees themselves to determine when circumstances warrant modifying a protected service

³ EIC Application for Review at 3.

was well founded. As the staff correctly concluded, EIC's argument is inappropriately made in the context of a construction permit application. If accepted, this approach would fundamentally alter interference standards for all noncommercial educational FM stations. EIC's position ignores the fundamental differences in reserved and non-reserved band licensing procedures and the correspondingly different interference protection methodologies. Assignments in the non-reserved band are subject both to technical allocations restrictions and minimum mileage separation requirements. In contrast, noncommercial assignments are based solely on a signal strength contour methodology. We are not persuaded that adoption of the untested proposal to apply selectively commercial interference standards to NCE applications would provide adequate interference protection to operating NCE stations. Nor is it clear that this approach is consistent with our Section 307(b) mandate or a basis for a waiver of our rules. In any event, we find that the staff's reasoned application of the relevant noncommercial interference rules to the Amendment was proper.

15. EIC requests grant of the Application, as amended. However, on January 11, 1996 Positive Alternative Radio, Inc. ("PAR"), the licensee of NCE station WWMO(FM), Ashboro, North Carolina filed an application to modify its licensed facilities. File No. BMPED-960111LP. PAR's application is mutually exclusive with the Amendment. Because applications for minor modifications of NCE stations are not "cut off" from competing applications until grant, the staff properly accepted the PAR application. See 47 C.F.R. § 73.3573(f); Public Notice, Broadcast Applications, Report No. 23674 (released February 14, 1996). In these circumstances granting the EIC Amendment without comparative consideration of the WWMO modification application would violate PAR's Ashbacker rights. Thus, even if we had found that a Section 73.509 waiver would serve the public interest, EIC could not at this point obtain the relief which it seeks.

Conclusion

16. The directional facilities approved by the Mass Media Bureau would permit EIC to significantly expand its listenership. As a result of this staff action WCPE(FM) is now authorized to serve 99.2 percent of the area that would be covered by the proposed non-directional facility. With regard to the remaining eight-tenths of one percent expansion in WCPE(FM)'s proposed service area, we fully concur with the staff for the reasons set forth above that EIC's waiver arguments are without merit. The question, then, is whether the public interest benefit of a minute increase in WCPE(FM)'s service area is sufficient, by itself, to warrant a waiver of 47 C.F.R. § 73.509. In similar circumstances the Commission has consistently held that absent additional compelling facts and circumstances, enhanced service cannot overcome the longstanding prohibition against occurrences of harmful signal contour overlap, particularly overlap caused. See Board of Education of the City of Atlanta (WABE-FM), 82 FCC 2d 125, 127 (1980) (increased coverage alone is insufficient to warrant

waiver of the interference rule; Commission favors lesser but adequate coverage where proposal would not result in prohibited overlap); Open Media Corporation, 8 FCC Rcd at 4071; Educational Media Corporation, 6 FCC Rcd at 2208. EIC's application, as initially submitted and granted by the staff, demonstrates that EIC can expand service substantially without causing prohibited overlap to WXYC(FM). The Amendment, therefore, reflects EIC's bare interest in both avoiding the "added" cost of a directional antenna and in extending its signal in a manner where any service gains would necessarily create new prohibited overlap. Such a justification for incursion within WXYC(FM)'s protected service contour under the circumstances of this case is unquestionably inadequate. We conclude that a waiver of 47 C.F.R. § 73.509 is unwarranted.

17. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Educational Information Corporation on September 5, 1995 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary