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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

DISPATCHED BY

October 12, 1995

IN REPLY REFER TO:
1800B3-RPC

Mr. Robert J. Kerrigan, President
Pensacola Charities, Inc.
400 East Government Street
Pensacola, FL 32501

Re: New(FM), Pace, FL
Pensacola Charities, Inc.
Petition For Reconsideration
BPED-93011 IMA

Dear Mr. Kerrigan:

The staff has before it a July 20, 1993 Petition for Reconsideration filed by Pensacola Charities, Inc. ("PCI") seeking reconsideration of the June 1, 1993, return of its application for a new(FM) station to serve Pace, Florida on Channel 205A. By this letter we will deny PCI's petition.

Petition

PCI's petition asserts that the staff's decision erred in three respects: (1) the staff mistakenly applied the Commission's decision in *Educational Information Corp.* ("*Educational*"), 6 FCC Rcd 2207 (1992), to allow liberal waivers of second and third adjacent channel contour overlap only in situations where existing stations seek to increase their facilities; (2) the staff failed to evaluate its waiver request under the *de minimis* standard; and (3) the staff unfairly and incorrectly minimized or ignored the supplemental showings submitted by PCI to support its request for waiver of the overlap provisions of § 73.509.

Discussion

In order to be favorably considered, a petition for reconsideration must establish that the action taken by the Commission or designated authority for which reconsideration is sought involved findings of fact and/or conclusions of law which were erroneous. See 47 C.F.R. § 1.106(d)(2). As detailed below, PCI's petition fails to establish that such errors were made.

PCI argues that the staff erred in its conclusion that the *Educational* decision only applies to existing stations proposing facility increases.¹ To support its argument, PCI cites the actions taken in *Fordham University* ("*Fordham*") dated

¹ In *Educational*, the Commission reexamined prohibited contour overlap under § 73.509 in the context of existing second- and third-adjacent stations seeking increases in facilities. In that proceeding, the Commission indicated that it was inclined to grant waivers of second- and third-adjacent overlap where the benefit of noncommercial educational service heavily outweighed the potential for interference in very small areas.

September 30, 1992, where two applications for new(FM) stations² involving second-adjacent channel overlap were granted in contradiction of § 73.509, and *Lehigh Valley Community Broadcasters* ("Lehigh"), where the Commission dismissed an application for a new(FM) station which requested waiver of § 73.509 to receive first-adjacent channel overlap. The cases cited are inapposite to PCI's proposal to cause third-adjacent overlap, for the first time, within a licensed station's existing protected service area. As stated in the staff's return letter, *Educational* did not extend to the situation where, for the first time, a new second or third adjacent channel station would create a "hole" of interference within a licensed station's existing protected service area. In *Fordham*, existing licensed stations were proposing increases in their service areas which encompassed the second-adjacent proposals of *Westchester* and *Penn-Jersey*. The resulting overlap received by the licensed stations occurred in their proposed new service areas and not within the licensed stations' existing protected service areas. The licensed stations requested waivers of § 73.509 to receive the overlap from the *Westchester* and *Penn-Jersey* proposals. These waiver requests were acceptable under the guidelines established in *Educational*. The staff did not grant waivers of § 73.509 to *Westchester* and *Penn-Jersey* to cause second-adjacent channel overlap within the existing licensed stations service areas. In *Lehigh*, the Commission denied a request for waiver of § 73.509 for a new(FM) proposal to receive first-adjacent channel overlap from a licensed station and returned the application. Clearly, *Lehigh* is not similar to PCI's situation. Therefore, PCI has failed to establish that the staff erred in not extending *Educational* to its proposal.

Secondly, PCI argues that the staff failed to evaluate its waiver request pursuant to the *de minimis* standard. PCI cites *El Cerrito High School* ("El Cerrito"), 62 FCC 2d 960 (1977), and *Widener College* ("Widener"), 60 FCC 2d 924 (1976), to support its contention. Both *El Cerrito* and *Widener* applied the *de minimis* standard to low power 10 watt Class D proposals.³ The *de minimis* standard has not been applied to a situation, such as here, where a new Class A proposal will cause interference within a licensed stations existing protected service area. Accordingly, PCI's reliance on *El Cerrito* and *Widener* is misplaced and PCI has failed to establish that its proposed waiver request qualified for consideration under the *de minimis* standard applied to Class D proposals.

Lastly, PCI cites *Northern Sound Public Radio* ("Northern Sound"), 4 FCC Rcd 5495, to support its assertion that the staff incorrectly declined to consider its supplemental showings demonstrating that very little interference would occur. PCI's reliance on *Northern Sound* is inappropriate. In *Northern Sound* the Commission considered the preclusionary effects of numerous vacant Canadian allotments in the non-commercial band which did not permit implementation of any interference-free proposal in the Bellingham, Washington area. The Commission reviewed the supplemental showings submitted in *Northern Sound* and decided to waive § 73.509 to allow a domestic proposal for a new(FM) station to receive co-channel overlap from a vacant Canadian allotment. PCI's proposal does not involve receiving co-channel overlap from a vacant Canadian allotment. Instead it involves causing third-adjacent channel overlap to a licensed domestic station. Further, PCI's use of supplemental showings to demonstrate a lack of interference between its proposed facilities and the licensed facilities of WPCS(FM), Pensacola, Florida is not persuasive. The provisions of § 73.509 differ from the provisions relied upon in PCI's supplemental showings. In particular, Section 73.509(a) prohibits acceptance of a non-commercial educational application which proposes operation involving overlap of signal

² See applications for new(FM) stations filed by *Westchester Council for Public Broadcasting* ("Westchester") File No. BPED-8404231C and *Penn Jersey Educational Radio Corporation* ("Penn-Jersey") File No. BPED-910715MG.

³ Except in Alaska, authorizations for new Class D stations are no longer granted. See *Second Report and Order* in Docket 20735, 69 FCC 2d 240, recon. denied, 70 FCC 972 (1979).

strength contours with existing licensed stations in the reserved band (Channels 200-220). Subsection (c) of § 73.509 defines the method to be used in computing distances to the pertinent contours specifying Figures 1 and 1a of § 73.333, the F(50,50) and F(50,10) curves, respectively. No provision for supplemental showings, in determining the extent of interfering contours or protected contours between non-commercial educational stations, is contained within § 73.509. Thus, PCI has failed to establish that the staff either minimized or ignored its supplemental showings which supported its waiver request.

Accordingly, in view of the foregoing, the July 20, 1993 Petition for Reconsideration filed by Pensacola Charities, Inc. IS HEREBY DENIED. This action is taken pursuant to 47 C.F.R. § 0.283.

Sincerely,

Linda B. Blair by RJC

Linda Blair
Acting Chief
Audio Services Division
Mass Media Bureau

cc: Lukas, McGowan, Nance & Gutierrez
Communications Technologies, Inc.