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In Reply Refer to:

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In re: **Centenary College**
New NCE-FM Station, Budd Lake, NJ
Facility ID No. 174324
File No. BNPED-20071019AYI

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed December 27, 2007, by Centenary College ("Centenary"), applicant for a new noncommercial educational ("NCE") FM station at Budd Lake, New Jersey (the "Application"). Centenary seeks reconsideration of the November 27, 2007, letter¹ denying Centenary's waiver request² and dismissing the Application as unacceptable for filing.³ For the reasons set forth below, we deny the Petition.

Background. Centenary filed the Application during the NCE filing window in October 2007.⁴ A staff engineering review of the Application revealed that the Application failed to comply with Section 73.509 of the Rules with respect to co-owned station WNTI(FM), Hackettstown, New Jersey (the "Station").⁵ Specifically, the interfering contour (100 dBu) of the proposed Budd Lake station was totally within the protected contour (60 dBu) of the Station, which operates on a third-adjacent channel. Centenary recognized this violation and requested a waiver. In support of the waiver request, Centenary stated that the interference caused by its proposal to the Station was *de minimis*. In addition, Centenary claimed that there were no other fully compliant channels available to serve Budd Lake. Moreover,

¹ Letter to Centenary College (MB rel. Nov. 27, 2007) ("*Division Letter*").

² Centenary had requested a waiver of the contour overlap provisions of 47 C.F.R. § 73.509 of the Commission's Rules (the "Rules").

³ See *Division Letter* at 3.

⁴ The filing window opened on Friday, October 12, 2007. See *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 2726 (MB 2007); *Media Bureau to Extend Window for NCE FM New Station and Major Change Applications; Window Will Close on October 22, 2007*, Public Notice, 22 FCC Rcd 18680 (MB 2007).

⁵ File No. BMLED-19940422KB.

Centenary stated that it would provide a first local service to Budd Lake. Centenary also cited two cases in which the Commission allegedly granted similar waivers.⁶

In the *Division Letter*, the staff determined that operation of the proposed station would result in the loss of service to existing Station listeners. The staff recognized that the Commission has granted Section 73.509 waivers where an *existing* NCE station sought to extend its 60 dBu service contour so as to overlap the interfering contour of another NCE station and thereby create new received overlap. In these cases, the overlap occurs in areas not currently served by the existing station. In contrast, the Application involves a new station proposal with the prohibited overlap occurring over areas currently served by the existing station. Therefore, the staff found that the requested waiver of Section 73.509 did not fall within that precedent. Accordingly, the staff denied the waiver request and dismissed the Application.

In its Petition, Centenary states that the staff's denial of Centenary's waiver request is inconsistent with the Commission's decision in *EIC*.⁷ Centenary also argues that the staff's decision to deny the waiver is in contrast to the flexible approach mandated by the recent low-power FM ("LPMF") proceeding.⁸ Finally, Centenary argues that the Application is in the public interest because it will provide a first local service to a sizable community in a very congested portion of New Jersey where it is unlikely that a local service could ever be established in the future. Centenary requests, therefore, that the Commission grant its waiver request and reinstate the Application.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of petitioner's last opportunity to present such matters.⁹ Centenary has not met those threshold requirements in its Petition.

When an applicant seeks waiver of a rule, its burden is to plead with particularity the facts and circumstances which warrant such action.¹⁰ Thus, an applicant for waiver "faces a high hurdle even at the starting gate."¹¹ While the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted.¹² "A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public

⁶ See *Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207 (1991) ("*EIC*").

⁷ *EIC*, 6 FCC Rcd 2207 (1991).

⁸ See *Creation of a Low Power Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912 (2007) ("*LPMF Third R&O and Second FNPRM*").

⁹ See 47 C.F.R. § 1.106. See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sum nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁰ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968) (per curiam)).

¹¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*").

¹² *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC2d 1011, 1012 (1974)) ("*Greater Media*").

interest.”¹³ In its Petition, Centenary reiterates its assertion that there are compelling reasons for waiver of Section 73.509 of the Rules to reinstate the Application even though its proposed facility would cause prohibited interference to the Station. In support of its request, Centenary claims that the benefits to the public interest of its proposal outweigh the *de minimis* overlap caused to its co-owned Station.¹⁴ Specifically, Centenary argues that its proposed NCE-FM station’s interfering contour encompasses only 25 persons, or .0043 percent of the service area of the Station. Nevertheless, we agree with the decision in the *Division Letter* and find waiver of Section 73.509 unwarranted on the facts of this case.

Section 73.509 states in pertinent part: “An application for a new or modified NCE-FM station other than a Class D (secondary) station will not be accepted if the proposed operation would involve overlap of signal strength contours with any other station licensed by the Commission and operating in the reserved band . . . [contour overlap standards are set forth in a chart included in the rule].” Centenary argues that the staff erred in denying Centenary’s waiver request on the basis that the Application would *cause* prohibited overlap rather than *receive* prohibited overlap. Centenary contends that the Commission in *EIC* “recognized that there was no practical difference between waivers for stations that cause overlap and waivers for stations that receive overlap.”¹⁵ Further, Centenary states that the Commission in *EIC* stated that it was inclined to “view waiver requests . . . favorably where there is clearly a public interest benefit,”¹⁶ as Centenary claims there is here.

The Commission's policy with regard to prohibited NCE received overlap is well settled. On July 16, 1981, the Commission, *en banc*, delegated authority to the staff to waive Section 73.509 to permit small amounts of received interference by the NCE-FM station proposing a facility improvement, provided such interference did not exceed roughly five percent of the proposed service area. On July 17, 1981, the Commission released a Public Notice stating that “these waivers will only be granted when the applicant provides sufficient justification such as a lack of alternative transmitter sites and/or frequencies.”¹⁷ A decade later, the Commission elaborated on this policy in *EIC*, noting that this delegation “did not . . . nullify the longstanding prohibition against occurrences of harmful overlap,

¹³ *Northwest Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio*, 418 F.2d at 1157).

¹⁴ Petition at 4 and 7.

¹⁵ Petition at 4; *see also EIC*, 6 FCC Rcd at 2209 (1991).

¹⁶ *Id.*

¹⁷ *See Delegation of Authority to the Chief of the Broadcast Bureau to Waive Small Amounts of Interference Received by Non-Commercial Educational FM Proposals*, Public Notice, 49 RR2d 1524 (1981). The Commission replaced this signal strength ratio methodology with a contour overlap standard in 1985. *See Changes In The Rules Relating To Noncommercial Educational FM Broadcast Stations*, Memorandum Opinion and Order, MM Docket No. 20735, 50 Fed. Reg. 27954 (July 9, 1985) (“1985 Order”). The signal strength ratio method served to identify the area in which the quality of service was predicted to fall below the minimally acceptable level. The contour overlap method identifies not only the area in which quality of service falls below the minimally acceptable level, but also the larger area in which the quality of service is predicted to be better than minimally acceptable overall, but nonetheless may be diminished for some listeners. *See Board of Education of City of Atlanta (WABE-FM)*, Memorandum Opinion and Order, 11 FCC Rcd 7763, 7764 n. 1 (1996) (“*WABE-FM*”). The 1985 Order also modified the Bureau's delegated authority to grant waivers to conform to this new methodology. Specifically, such authority is now limited to 10 percent “overlap” received compared to five percent “interference” received under the old policy. *See 1985 Order*, 50 Fed. Reg. at 27959-27960.

including overlap received.”¹⁸ In so doing, it reaffirmed the principle that Section 73.509 is designed both to prevent each NCE station from causing harmful interference to other NCE stations and to ensure interference-free service within each NCE station's own service contour.¹⁹

The Commission has repeatedly affirmed the foundational technical licensing principle that any increase in total interference, caused or received, is not in the public interest.²⁰ However, the Commission has recognized, as Centenary notes, that there is a need for some flexibility. We find that this flexible approach is borne out in the Commission’s holding on *received* overlap as opposed to *caused* overlap in *EIC* and the policy initially established by the Commission in 1981.²¹ In particular, we note that the Commission has held that it will not countenance new overlap caused where, as here, none existed previously.²²

Moreover, as stated in the *Division Letter*, while requests for waivers of second-and third-adjacent channel overlap for new stations may have individual appeal, routine waivers of Section 73.509, such as Centenary’s proposal in the instant context, would undermine the Commission’s well-settled NCE-FM licensing scheme. It would result in vast increases in interference levels in the congested reserved band while causing disruption to existing listening patterns. This interference interrupts the continuity of existing service provided by the Station throughout its protected service area, and thus diminishes the quality of FM service provided by the Station. Over time, the grant of numerous similar waivers would degrade the quality of existing FM reception within stations’ theoretically protected 60 dBu service contours throughout the entire NCE-FM band.²³

The fact that Centenary is also the licensee of the Station and has agreed to accept the interference that the Budd Lake station would cause does not warrant waiver of the rule. As also observed in the *Division Letter*, it is the Commission’s responsibility to establish and enforce signal protection requirements and to ensure that existing protected service does not suffer interference. The goal of Section 73.509 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 of 1934, as amended (the “Act”).²⁴ The Act mandates that the "Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to

¹⁸ *EIC*, 6 FCC Rcd at 2208 (1991).

¹⁹ See *Lakeside Telecommunications, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 763, 764 (2005).

²⁰ See, e.g., *Grandfathered Short-Spaced FM Stations*, Report and Order, 12 FCC Rcd 18840, 18844 (1997).

²¹ See *EIC*, 6 FCC Rcd 2207(1991); see also *Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, Memorandum Opinion and Order, 58 RR2d 629, 639 (1985) and *Delegation of Authority to the Chief of the Broadcast Bureau to Waive Small Amounts of Interference Received by Non-Commercial Educational Proposals*, Public Notice, 49 RR2d 1524 (1981).

²² See *Educational Information Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 6917, 6918-19 (1997).

²³ *Division Letter* at 2, n.2. This has been called the "Swiss cheese" effect, where a station's protected service contour is punctured by "holes" of interference from multiple second-and-third-adjacent channel FM stations. *Revision of FM Rules*, Notice of Proposed Rulemaking, 21 RR 1655, 1674 (1961).

²⁴ *Division Letter* at 2. See 47 U.S.C. 307(b); see also *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, Memorandum Opinion and Order, 6 FCC Rcd 5356, 5358 ¶ 13 (1991).

provide a fair, efficient, and equitable distribution to each of the same."²⁵ 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.²⁶ Accordingly, we do not find this circumstance supports waiver of Section 73.509.

In addition, Centenary argues that the staff erred in finding that the waiver policy delineated in *EIC* is limited to *existing* NCE-FM stations rather than to *new* NCE-FM stations.²⁷ Centenary contends that nowhere in *EIC* did the Commission expressly state that its decision was limited to existing stations. We disagree. In *EIC*, the Commission states that “historically, both Congress and the Commission have recognized the special standing of the noncommercial educational service. Most notable is the spectrum reservation policy whereby noncommercial stations are afforded protected frequency allocations for their exclusive use.”²⁸ The allocations system, as the Commission expressly states in *EIC*, “was designed to anticipate . . . enlargements in coverage of *existing* stations and to protect . . . [the] needs [of existing stations] against any possible encroachment.”²⁹ We are unaware of a single case in which the Commission has relied on the reasoning in *EIC* in a new station context.

Finally, Centenary argues that its waiver request is also based on a “new standard”³⁰ established for second-adjacent channel, 100-watt stations in the *LPFM Third R&O and Second FNPRM*. Specifically, Centenary states that even though the proposed Budd Lake 100 dBu contour overlaps the Station’s 60 dBu contour, there is no actual interference.³¹ Thus, Centenary states that the 25 persons who are theoretically impacted will not experience any actual interference.³² Centenary notes that a “new standard” was established when the Commission stated: “[A]s demonstrated by the significant number of FM translator proposals submitted in the 2003 filing window, [the Commission] believe[s] that permitting D/U ratio showings to establish ‘lack of population’ subject to interference provides ample licensing flexibility.”³³ In sum, Centenary argues that a limited extension of this standard to 100-watt or comparable facilities regardless of whether they happen to be full-service facilities is in the public interest where it can be shown that there is no actual interference under established criteria.³⁴

²⁵ 47 U.S.C. 307(b).

²⁶ See, e.g., *Open Media Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 4070 (1993).

²⁷ Petition at 5.

²⁸ See *EIC*, 6 FCC Rcd 2207 n.3 (1991) (emphasis added).

²⁹ *Id.*

³⁰ Petition at 5.

³¹ *Id.*; see also Engineering Statement at Attachment, Exhibit II.

³² *Id.*

³³ Petition at 5, citing *LPFM Third R&O and Second FNPRM*, 22 FCC Rcd at 21945 (2007). In addition, Centenary cites to a “processing policy” related to second adjacent channel, 100-watt stations that the Commission established to avoid LPFM station displacement while it seeks comment on any LPFM Rule changes, as the standard by which Centenary’s waiver request should be granted. See Petition at 3, citing *LPFM Third R&O and Second FNPRM*, 22 FCC Rcd at 21939 (2007).

³⁴ Petition at 7.

The technical licensing rules for the LPFM and FM translator services are very different than those used to license full-service NCE-FM stations. The attempt to apply the licensing principles applicable to the LPFM and FM translator services and a proposed LPFM rule change which the Commission has not yet adopted to the NCE-FM service, is both misguided and unsupported. With regard to LPFM, Centenary is relying on a processing policy developed to mitigate the potential displacement of existing LPFM stations by full-service stations, a situation which has no applicability in the NCE-FM licensing context. Moreover, we note that Congress has mandated the use of a distance separation methodology to protect full-service FM stations from LPFM station interference by directing the Commission to prescribe co-, first-, second-, and third-adjacent channel “minimum distance separations” for LPFM stations.³⁵ This is a fundamentally different licensing methodology than the contour methodology used in NCE-FM licensing.³⁶ All FM translator licensing is backstopped by an absolute prohibition on causing interference to any full-service station.³⁷ There is no comparable NCE-FM licensing requirement that would protect listeners against service losses.

We note that the factors presented here in support of the request for waiver of the rule are generally true for applicants which seek waiver of the rule for second-and third-adjacent channel contour overlap caused to another station. In addition, we find unpersuasive Centenary’s argument that a waiver is warranted in situations in which spectrum licensing prevents the licensing of rule-compliant new station proposals. Acceptance of this argument would result in increased spectrum congestion and interference levels in areas which are already most impacted by these problems. As a result, we cannot find that grant of Centenary's request for waiver of Section 73.509 would outweigh the benefits conferred by adherence to the rule. The fundamental policy change advocated by Centenary would be most appropriately considered in a rulemaking proceeding.

Conclusion/Action. Centenary has not shown a material error or omission in the *Division Letter*. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Centenary College, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Centenary College

³⁵ See *Making Appropriations for the Government of The District of Columbia for FY 2001 Act*, Pub L. No. 106-552, § 632, 114 Stat. 2762, 27620A-111 (2000).

³⁶ See, e.g., *WABE-FM*, 11 FCC Rcd 7763, 7764 (1996) (staff denies request for waiver, holding that the use of the undesired-to-desired signal strength ratio method was inappropriate, as Section 73.509 requires compliance with a contour overlap standard, not an interference ratio criterion).

³⁷ 47 C.F.R. § 73.1203(a). See also *Living Way Ministries*, Memorandum Opinion and Order, FCC 08-242 (rel. Oct. 10, 2008).