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In re: NEW(FX), New Albany, IN
Facility Identification No. 91916
Educational Media Foundation
File No. BPFT-19981021TF

Petition for Reconsideration

Dear Mr. Jackson *et al*:

The Media Bureau has before it an April 26, 2004, Petition for Reconsideration ("Petition"), filed by National Public Radio ("NPR"), seeking reexamination of the Commission's *Memorandum Opinion and Order* in *Educational Media Foundation*.[1] For the reasons set forth below, we dismiss the Petition as procedurally defective.

Background. This case involves a staff grant of an application (the "Application") filed by Educational Media Foundation ("EMF") for a new FM translator station in New Albany, Indiana, notwithstanding the fact that the 100 dBμ interfering contour of the proposed FM translator station lies entirely within the 60 dBμ protected contour of second-adjacent channel Station WFPL(FM), Louisville, Kentucky. Section 74.1204(a) of the Commission's Rules (the "Rules") provides, in pertinent part, that a translator application will not be accepted for filing if the proposed operation would involve overlap of its predicted interfering contour and the protected contour of an existing full-service FM station. However, subsection (d) of the rule provides that:

> [A]n application otherwise precluded by this section will be accepted if it can be demonstrated that no actual interference will occur due to intervening terrain, lack of population or such other factors as may be applicable.[2]

EMF sought to demonstrate, based on an undesired-to-desired ("U/D") signal strength ratio interference prediction methodology showing,[3] that the actual area of interference within WFPL(FM)'s

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[1] *Educational Media Foundation*, Memorandum Opinion and Order, 19 FCC Rcd 5843 (2004) ("*EMF I*").

protected contour would be relatively small and that it contained no population. Kentucky Public Radio ("KPR"), licensee of WFPL(FM), petitioned to deny the Application, arguing that EMF's proposal would result in prohibited contour overlap with WFPL(FM) in violation of Section 74.1204(a).

The staff rejected KPR's argument and accepted EMF's U/D signal strength ratio showing, stating that it routinely accepts translator applications utilizing such methodology with respect to second- and third-adjacent-channel stations.[4] The staff calculated the relevant signal strength ratios and determined that interference to WFPL(FM) is predicted only at locations where the signal strength of the translator would be at least 138 dBμ[5] and that this minute area at the transmitter site within this contour is unpopulated. Accordingly, it concluded that EMF's application complied with subsection (d).[6]

KPR filed an application for review of the *Staff Decision*, arguing that the staff, by utilizing the signal strength ratio methodology, improperly changed a Commission rule and that the U/D signal strength ratio methodology is "technically flawed" and "unreliable inside a station's protected service (60 dBμ) contour at the high signal levels involved in this case. The Commission denied review, noting that it had recently addressed and approved the staff's practice of permitting translator applicants to use the U/D signal strength ratio methodology to demonstrate that no actual interference will occur due to "lack of population" under Section 74.1204(d) of the Rules.[7] For the reasons set forth in *Living Way I*, the Commission rejected KPR's argument that the staff's reliance on the signal strength ratio methodology in this case departed from established Commission policy. It also rejected KPR's argument that the U/D signal strength ratio methodology was flawed, holding that, in certain contexts, such as the modification of "grandfathered" short-spaced FM stations,[8] the Commission has *required* use of the signal strength ratio methodology to predict an interference area within a station's protected contour.[9] Given the power disparity between EMF's proposed 10-Watt translator facility and WFPL(FM)'s 21 kW operation and the

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"interfering") signal is at least 40 dB greater than the "desired" (or "protected") signal. *See* 47 C.F.R. § 74.1204(a)(3).

[4] *Letter to Fisher Wayland Cooper Leader & Zaragoza LLP* (MMB May 18, 2000) ("*Staff Decision*").

[5] EMF proposes a 10-Watt translator facility. Its 138 dBμ contour would extend 2.6 meters from the transmitting antenna. WFPL(FM) operates with an effective radiated power of 21 kW.

[6] Subsequent to the Staff decision, the Commission modified the second adjacent channel NCE contour overlap standard, from +20 dB to +40 dB, to conform commercial and NCE protection standards. *See Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules,* Second Report and Order, 15 FCC Rcd 21649, 21669 (2000) (amending 47 C.F.R. §§ 73.509 and 741204). Thus, under current rules, interference would be predicted to occur at locations where the signal strength of the translator would be at least 158 dBμ. Application of this standard results in a very slightly *smaller* interference area in this case and does not in any way change the underlying staff analysis.

[7] *EMF I,* 19 FCC Rcd at 5844, citing *Living Way Ministries, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 17054, 17056 (2002) ("when demonstrating that 'no actual interference will occur due to . . . other factors' pursuant to Section 74.1204(d), an applicant may use the undesired-to-desired signal ratio method") ("*Living Way I*").

[8] *EMF I,* 19 FCC Rcd at 5845. Grandfathered short-spaced FM stations are stations that do not meet the minimum spacing requirements set forth in 47 C.F.R. Section 73.207 but which were authorized prior to the adoption of the FM Table of Allotments and spacing standards, *i.e.*, prior to November 16, 1964.

[9] *EMF I,* 19 FCC Rcd at 5845, citing *Grandfathered Short-Spaced FM Stations*, Report and Order, 12 FCC Rcd 11840, 11843, ¶ 7 (1997) (ratio method most appropriate method of determining areas of interference for grandfathered short-spaced FM stations where contour overlap already existed); *Board of Education of the City of Atlanta (WABE(FM))*, Memorandum Opinion and Order, 11 FCC Rcd 7763, 7764, note 1 (1996); and 47 C.F.R. § 73.213(a).

proximity of the stations' transmitter sites -- they are separated by only 1.2 kilometers – the Commission stated its belief believe that the "flaw" identified by KPR would not be manifested.[10] It stated that the signal strength ratio methodology, in fact, would provide a more accurate prediction of the likely interference area in this case than a strict application of the contour overlap standard.

KPR did not seek reconsideration of *EMF I*. NPR, however, did.[11] NPR notes that it had filed a Petition for Reconsideration of the *Living Way I* decision, and argues that it was not a proper exercise of agency discretion for the Commission to apply the U/D signal strength methodology without first deciding the appeal of *Living Way I*.[12] It also argues that, to the extent the Commission considered the merits of the U/D methodology in *EMF I*, its analysis is flawed,[13] that the decision in *EMF I* improperly modified Section 74.1204 of the Rules, and that the Commission must follow notice and comment procedures to modify this Rule.[14]

Discussion. *Standing*. NPR acknowledges that it did not participate earlier in this proceeding as specified in Section 1.106(b)(1) of the Rules,[15] but argues that it has "associational standing" as a membership organization representing hundreds of noncommercial educational stations with a fundamental interest in the application of the Commission's rules and policies to the operation of broadcast stations.[16] It states that under the principle of associational standing, it may intervene on behalf of any or all of its member station licensees, including KPR with respect to WFPL(FM).[17] It includes an Affidavit from David A. Ball, Chairman of KPR's Board of Directors, indicating that KPR is and has been a member of NPR and "endorsing" NPR's Petition.[18] NPR alternatively claims that it was not possible for it to participate in the earlier stages of this proceeding because: (1) it "reasonably could not have anticipated the Commission's application of [*Living Way I*] to decide the merits of this case" while its petition for reconsideration of *Living Way I* was pending;[19] and (2) it reasonably could not have anticipated at the time of the filing and grant of this application that the Commission would unilaterally adopt a U/D signal strength ratio methodology *in lieu* of the more rigorous standard in Section 74.1204 of the Rules.[20]

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[10] *EMF I,* 19 FCC Rcd at 5845.

[11] EMF filed an Opposition to the Petition on May 18, 2004, to which NPR replied on May 28, 2004.

[12] Petition at 4.

[13] *Id.* at 5-6.

[14] *Id.* at 8-9.

[15] 47 C.F.R. § 1.106(b)(1), which states in pertinent part that:

If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the actions taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

[16] Petition at 2.

[17] *Id.* NPR also states that, "as a producer of news, cultural, and informational programming broadcast over public radio stations nationwide, including WFPL(FM), NPR is adversely affected by the Commission's decision to the extent it will impair the public's ability to receive NPR-produced and distributed programming." *Id.*

[18] *Id.*, Exhibit 3.

[19] *Id.* at 3.

[20] *Id.*

In its Opposition, EMF argues that NPR is not a party to this proceeding, because it neither objected to the Application prior to grant nor filed a petition for reconsideration of the grant of the Application. It dismisses as "absurd" NPR's claim that it was "not possible" for it to object earlier because it could not have "reasonably anticipated" that the Commission would apply the U/D methodology to the Application. The appropriateness of the U/D signal strength methodology was squarely before the Commission from the time the Application was filed, states EMF. It notes that KPR filed a petition to deny specifically challenging the use of the U/D methodology.[21]

Under Section 1.106(b)(1), if a petition for reconsideration is filed by a person who is not a party to the proceeding, "it shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."[22] NPR's reliance on the doctrine of associational standing[23] to avoid this subsection (b)(1) restriction is misplaced. Although NPR may have had standing to participate in this application proceeding, that fact is simply not relevant in determining whether it has impermissibly sat on its rights. Its claimed inability to foresee future Commission actions also is not an adequate justification for its failure to participate in the earlier stages of this proceeding.[24] Thus, NPR is barred by Section 1.106(b)(1) of the Rules from participating in this proceeding at this late date.

Repetitious Pleading. Even were we to find that NPR had standing to file a petition for reconsideration of *EMF 1*, we would dismiss the Petition as repetitious. Section 1.106(b)(3) of the Rules provides that where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (i) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, or (ii) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.[25] Section 1.106(b)(3) provides that "[a] petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious."[26]

In its Petition, NPR does not cite to facts or events that occurred or circumstances that have changed since its last opportunity to present such matters, or that were unknown to NPR and could not have been learned through the exercise of ordinary diligence. In fact, NPR presents no new evidence whatsoever. Rather than arguing new facts or changed circumstances, NPR uses the Petition merely to reassert the arguments KPR made in its Application for Review – that the U/D signal strength methodology is "flawed" – and to point out what it considers to be errors in *EMF 1*.[27] It is settled

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[21] Opposition at 2-3.

[22] 47 C.F.R. § 1.106(b)(1).

[23] *See American Legal Foundation v. FCC*, 808 F.2d 84, 89 (D.C. Cir. 1987), and *Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, Memorandum Opinion and Order, 82 FCC2d 89, 96 (1980) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

[24] *See, e.g., AT&T Corp.*, Order on Reconsideration, 20 FCC Rcd 8578, 8580 (2000) (rejecting petitioner's argument that it "could not have anticipated" Commission resolution of the matter and holding that "'surprise' at the outcome of a Commission proceeding does not ordinarily excuse a failure to attempt to participate earlier in the proceeding").

[25] 47 C.F. R. § 1.106 (b)(2).

[26] 47 C.F. R. § 1.106 (b)(3).

[27] *See* Petition at 4-9. NPR argues that: (1) it had filed a Petition for Reconsideration of the *Living Way I* decision, and it was not a proper exercise of agency discretion for the Commission to apply the U/D signal strength

Commission policy that "petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected,"[28] and NPR's advancement of new arguments based on the same facts and circumstances previously considered by the full Commission does not meet the requirement set forth in Section 1.106(b)(3) of the Rules.[29]

Accordingly, the April 26, 2004, Petition for Reconsideration filed by National Public Radio IS DISMISSED.

Sincerely,

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Media Bureau

David D. Oxenford, Esq.
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methodology without first deciding the pending challenge to *Living Way I*; and (2) the decision in *EMF I* constituted an unlawful modification of the terms of Section 74.1204 in the context of an individual translator application rather than through a notice and comment rulemaking and without either providing affected parties any opportunity to comment on the proposed changes or providing any significant explanation "for their departure from established views."

[28] *Quest Communications Corporation*, Third Order on Reconsideration, 25 FCC Rcd 3422 (2010); *Barry D. Wood, Esq.*, Letter, 24 FCC Rcd 13666, 13667 (MB 2009).

[29] *See, e.g., Green Valley Broadcasters, Inc.*, Order on Reconsideration, 20 FCC Rcd 17236, 17237 (MB 2005) (dismissing as repetitious a petition for reconsideration of a Commission order denying an application for review when petitioner raised no new facts or circumstances but merely pointed out what it termed "Commission errors" and reiterated arguments made in the application for review).