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Iowa State University of Science &
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Ames, IA 50011

In re: KNSX(FM), Menville, IA
Facility ID# 184659
Iowa State University of Science &
Technology ("ISU")
BMPED-20120817ABX

This letter is in reference to (1) the above-captioned minor change application and; (2) the request for waiver of 47 C.F.R. § 73.202(a)(1)(ii). For reasons set forth below, we deny the waiver and dismiss the application.

Waiver Request

An engineering study of the proposed minor change application reveals that the application does not meet the third channel reservation standard requirements.¹ Specifically, the proposed facility fails to provide a first and/or second NCE radio service to at least ten percent of the population within the proposed 1mV/m (60 dBu) contour. ISU recognizes this violation and requests waiver of § 73.202(a)(1)(ii).

In support of the waiver request, ISU states that the proposed Class C3 facility will completely encompass the currently authorized construction permit. ISU claims that the proposal would greatly increase its 60 dBu coverage and second service population without losing any actual persons. ISU alleges that, as a result of the increase in overall coverage, the second NCE radio service is only 5.4 percent of the population within the proposed 60 dBu contour. ISU contends that if they are required to build the original facility, this would involve building a tower on a site that makes no sense for its long term future use. ISU further believes that grant of the waiver will in no way frustrate the FCC's goals of providing new NCE service and it would benefit the public in furtherance of the Commission's objectives.

¹ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691 (2003) ("*NCE Second Report and Order*").

Discussion

In the *NCE Second Report and Order* the Commission adopted a third test for channel reservation (the “third channel reservation standard”). Under the third channel reservation standard, a reservation proponent must demonstrate that (1) it is technically precluded from using a reserved band channel, and (2) it would provide a first and/or second NCE radio service to at least ten percent of the population within the 60 dBu (1 mV/m) contour of its proposed station, and that such population is at least 2,000 people. The Commission specifically advised prospective NCE applicants that the first or second NCE service requirement remains applicable at the application stage.² Therefore, if the third channel reservation standard served as the basis for reservation of the allotment, applicants for that allotment must provide a first or second NCE service to at least ten percent of the population within the proposed station's service area and that population must be at least 2,000 people.

The third channel reservation standard is a basic qualifying test, not a comparative standard. All applicants proposing to operate on a vacant FM allotment in the non-reserved portion of the FM band that has been reserved for NCE use must show that they satisfy the third channel reservation standard by making the required population showing. However, an application implementing an allotment reserved under these procedures that fails to satisfy this requirement is eliminated and will not proceed to the point system analysis.³ Had ISU originally filed for the proposed facility, it would have been disqualified.

We have carefully considered all of the arguments submitted by ISU and have concluded that the waiver request is inconsistent with Commission precedent. The record before us does not present unique circumstances sufficient to justify grant of the waiver request. Furthermore, ISU has not cited any cases where the Commission has waived § 73.202(a)(1)(ii) for similar reasons. Therefore, pursuant to § 73.202(a)(1)(ii), the application is unacceptable for filing.

Conclusion

The Commission's rules may be waived only for good cause shown.⁴ An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.⁵ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”⁶ and must support its waiver request with a

² See *NCE Second Report and Order*, 18 FCC Rcd at 6705 (“Reserved allotments will be conditioned on the construction and licensing of an NCE station that provides the requisite level of first and second NCE service. In the event that all applications for a reserved band allotment fail to propose such service, the allotment will become unreserved by operation of law and subject to the Commission's competitive bidding licensing procedures.”). See also 47 C.F.R. § 73.202(a)(1)(ii).

³ *Comparative Consideration Order*, 26 FCC Rcd at 7009.

⁴ 47 C.F.R. § 1.3

⁵ 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)).

⁶ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (“WAIT Radio”). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

compelling showing.⁷ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁸ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁹ However, waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.¹⁰ ISU's request fails to present good cause for waiver of § 73.202(a)(1)(ii). ISU has not shown sufficiently unique "special" circumstances, i.e., rare and exceptional circumstances beyond its control to justify a waiver of § 73.202(a)(1)(ii). Finally, we find that the facts and circumstances set forth in the justification are insufficient to establish that granting waiver of § 73.202(a)(1)(ii) would be in the public interest.

In light of the above, the request for waiver of 47 C.F.R. § 73.202(a)(1)(ii) IS HEREBY DENIED and Application BMPED-20120817ABX IS HEREBY DISMISSED. These actions are taken pursuant to 47 C.F.R. § 0.283.

Sincerely,



Edna V. Prado
Supervisory Engineer
Audio Division
Media Bureau

cc: Margaret L. Miller, Esquire
Doug Vernier

⁷ Greater Media Radio Co., Inc., Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing Stoner Broadcasting System, Inc., Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

⁸ Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("Northeast Cellular").

⁹ WAIT Radio, 418 F.2d at 1159; Northeast Cellular, 897 F.2d at 1166.

¹⁰ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir 2008) ("*Network IP*"); *Northeast Cellular*, 897 F.2d at 1166.