

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

In re Application of	)	
	)	
LAKESIDE TELECOMMUNICATIONS, INC.	)	File No. BPED-20000314ABN
	)	Facility ID No. 36428
	)	
For a Construction Permit to Modify	)	
NCE Class D Station WSSD(FM)	)	
at Chicago, Illinois	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 28, 2004**

**Released: January 5, 2005**

By the Commission:

1. The Commission has before it the January 15, 2003, Application for Review filed by Lakeside Telecommunications, Inc. (“Lakeside”), licensee of noncommercial educational FM (“NCE FM”) Class D Station WSSD(FM), Chicago, Illinois and applicant for a construction permit to modify the WSSD facilities. Lakeside seeks review of a January 3, 2003, Media Bureau (“Bureau”) decision (“Reconsideration Decision”)<sup>1</sup> denying reconsideration of the July 31, 2001, staff action dismissing the modification application (“Letter Decision”).<sup>2</sup> For the reasons discussed below, we deny the Application for Review.

2. **Background.** The Commission initially licensed Class D NCE FM stations to serve limited areas with low-powered facilities.<sup>3</sup> Over time, concerns arose about the increasing demand for NCE FM spectrum and the inherent inefficiencies of licensing 10-watt Class D stations. In 1978 the Commission concluded that the continued licensing of these stations could impede the development of the emerging NCE FM radio service.<sup>4</sup> The *NCE FM Order* required Class D stations to migrate to the non-reserved portion of the FM band or to Channel 200, where they would be considered secondary operations. If neither of these options was available however, a Class D station was required to move to a reserved band channel with “the least preclusionary impact on other potential stations.”<sup>5</sup> In addition, the Commission ended Class D stations’ protection against interference and imposed a permanent freeze on

<sup>1</sup> *Letter to Lakeside Telecommunications, Inc.* (MB Jan. 3, 2003).

<sup>2</sup> *Letter to Lakeside Telecommunications, Inc.*, Ref. No. 1800B3-AED (MMB July 31, 2001).

<sup>3</sup> Unlike other FM stations whose facilities are based on an effective radiated power (“ERP”) and a computed figure for height above average terrain, Class D stations were allowed 10 watts transmitter power output and were assumed to have an antenna height not exceeding 100 feet. *Changes In The Rules Relating To Noncommercial Educational FM Broadcast Stations, Second Report and Order*, 69 F.C.C.2d 240, 242 n.6 (1978) (“*NCE FM Order*”). See 47 C.F.R. § 73.506(a)(1).

<sup>4</sup> *NCE FM Order*, 69 F.C.C.2d at 244-51; see also *Notice of Inquiry*, 5 F.C.C.2d 587, 588-89 (1966).

<sup>5</sup> *NCE FM Order*, 69 F.C.C.2d at 249.

the filing of applications for new Class D facilities. The rules adopted in this proceeding also provided for exemption from these relocation directives if the Class D station modified its facility to at least the minimum Class A level of 100 watts ERP.<sup>6</sup> Stations were given until January 1, 1980, to file the necessary application to upgrade their facilities to Class A status. WSSD did not file an application for Class A facilities at that time.

3. WSSD(FM) is currently licensed to operate on channel 201D (88.1 MHz) with an ERP of 10 watts. On March 14, 2000, Lakeside filed the above-referenced application to increase power to 240 watts and to change WSSD(FM)'s status to a Class A station. The application was accompanied by a request for waiver of Section 73.509 of the Commission's rules<sup>7</sup> because, as proposed, WSSD(FM) would receive pervasive prohibited contour overlap from each of two co-channel stations, WCRX(FM), Chicago, Illinois and WBMF(FM), Crete, Illinois.<sup>8</sup> With the exception of a small area falling entirely over water, WSSD's proposed 60 dBu contour would be completely encompassed by WBMF's 40 dBu interfering contour. Similarly, WCRX's 40 dBu contour would overlap 86 percent of the proposed WSSD service area. In its Letter Decision, the staff concluded that Lakeside had failed to provide sufficient support to justify a waiver of the Commission's core NCE technical rules and dismissed Lakeside's application for failure to comply with Section 73.509(a), (b), and (d).<sup>9</sup> Lakeside sought and the staff denied reconsideration. The Bureau noted that the Commission has consistently held that, absent compelling facts and circumstances, enhanced service cannot overcome the longstanding prohibition against destructive co-channel signal contour overlap.<sup>10</sup>

4. **Discussion.** When an applicant seeks waiver of a rule, its burden is to plead with particularity the facts and circumstances which warrant such action.<sup>11</sup> Thus, an applicant for waiver "faces a high hurdle even at the starting gate."<sup>12</sup> While the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted.<sup>13</sup> "A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."<sup>14</sup> In its Application for Review, Lakeside reiterates its assertion that there are compelling reasons for waiver of Section 73.509 of the Commission's rules to allow Station

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<sup>6</sup> See generally 47 C.F.R. § 73.512.

<sup>7</sup> Lakeside Petition for Waiver and For Acceptance and Grant, dated March 14, 2000.

<sup>8</sup> A station would "receive" prohibited co-channel overlap when it proposes new or modified facilities that would result in an overlap of the proposed station's 60 dBu contour and the 40 dBu contour of a nearby co-channel station. See 47 C.F.R. § 73.509.

<sup>9</sup> 47 C.F.R. § 73.509(a), (b), (d).

<sup>10</sup> See *City of Atlanta (WABE-FM)*, 82 F.C.C.2d 125 (1980) (Section 73.509 waiver denied based on level of interference received from both co-channel and third adjacent channel stations).

<sup>11</sup> 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)).

<sup>12</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*").

<sup>13</sup> *Greater Media Radio Co., Inc.*, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, 49 F.C.C.2d 1011, 1012 (1974)) ("*Greater Media*").

<sup>14</sup> *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).

WSSD(FM) to upgrade to a Class A facility and receive prohibited interference. In support of its request, Lakeside claims that its proposal would increase the WSSD(FM) service area, would allow it to continue to provide minority programming, and would not create any undesirable precedent.<sup>15</sup> We agree with the Bureau and find waiver of Section 73.509 unwarranted on the facts of this case.

5. Lakeside argues that grant of its Class A application will increase the area served from 20 square kilometers to 50 square kilometers and will increase the population served from 92,791 persons to 228,822 persons.<sup>16</sup> According to Lakeside, almost all of these persons are African-American residents of Chicago's inner city, and the station is programmed and will continue to be programmed to cater specifically to their needs.<sup>17</sup> The Commission has consistently held, however, that enhanced service cannot overcome the longstanding prohibition against increases in harmful signal contour overlap,<sup>18</sup> absent compelling facts and circumstances.<sup>19</sup> Here, Lakeside has made no showing that the benefits of increased coverage outweigh the detriment of the nearly 100 % interference that will be received. Lakeside has also not shown that the proposed gain area is underserved. When faced with a choice between increased coverage on one hand, and lesser but adequate coverage without prohibited interference on the other, the Commission favors the latter.<sup>20</sup> It is also well established that the Commission will not, absent extraordinary circumstances, waive core technical rules based upon ownership or programming considerations.<sup>21</sup> Neither the pledge of particular program offerings, nor the specific audience demographic of Station WSSD(FM), justifies waiver of the Commission's interference protection rules.

6. As additional support for waiver, Lakeside contends that, since grant of the application will not cause interference to any other stations,<sup>22</sup> Section 73.509 can be waived without creating undesirable precedent. We reject this contention. The Commission's policy with regard to prohibited NCE received overlap is well settled. Since 1981, the Commission has delegated authority to staff to waive Section 73.509 "when warranted, provided such [received] interference did not exceed roughly five percent of the proposed service area."<sup>23</sup> A decade later the Commission elaborated on this policy in

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<sup>15</sup> Lakeside contends that this is a unique situation because Station WSSD(FM) is a Class D station operating in a very crowded urban environment in Chicago, Illinois. Over time, Lakeside argues, other NCE FM allotments have been made and now the station is in danger of "becoming extinct." Lakeside Application for Review at 5.

<sup>16</sup> *Id.* This analysis impermissibly relies on the "undesired-to-desired" signal strength ratio method rather than the applicable contour overlap standards. See *infra* note 23.

<sup>17</sup> Lakeside Application for Review at 7.

<sup>18</sup> See, e.g., *Greater Media*, 15 FCC Rcd at 7101-7102; *City of Atlanta (WABE-FM)*, 82 F.C.C.2d at 127.

<sup>19</sup> *City of Atlanta (WABE-FM)*, 82 F.C.C.2d at 127 (denying overlap waiver when service to community of license is adequate and gain area is well served); *Open Media Corp.*, 8 FCC Rcd 4070, 4071 (1993) (upholding staff action denying a § 73.509(a) waiver request where applicant failed to show that service to the community of license was deficient).

<sup>20</sup> See *City of Atlanta (WABE-FM)*, 82 F.C.C.2d at 127.

<sup>21</sup> *Open Media Corp.*, 8 FCC Rcd at 4071(citing U.S.C. § 303(f)).

<sup>22</sup> Lakeside Application for Review at 8.

<sup>23</sup> *Delegation of Authority to the Chief of the Broadcast Bureau to Waive Small Amounts of Interference Received by Non-Commercial Educational FM Proposals*, 49 R.R.2d 1524 (1981) (emphasis added). The Commission replaced this signal strength ratio methodology with a contour overlap standard in 1985. *Changes In The Rules Relating To*

*Educational Information Corporation*, noting that this delegation “did not . . . nullify the longstanding prohibition against occurrences of harmful overlap, including overlap received.”<sup>24</sup> 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. The WSSD(FM) proposal is in fundamental conflict with this policy. As Lakeside concedes, only 50 square kilometers of the 110 square kilometers within the station’s protected service area would enjoy interference-free service.

7. In *EIC*, the Commission also reexamined the Section 73.509 waiver policy. It explicitly rejected any relaxation of this policy for “more serious” co- and first adjacent channel interference that can result in the loss of service over a wide area. Thus, the Lakeside proposal is in fundamental conflict with established Commission precedent. Grant of the Lakeside application would turn this core technical requirement on its head by authorizing a Class A station that would receive nearly 100 percent co-channel overlap from two other stations. We note, however, that dismissal of the Lakeside application will not preclude WSSD from continuing its present operation, nor does it preclude Lakeside from filing a technically viable proposal using any non-interfering channel.<sup>25</sup>

8. As a final matter, Lakeside claims that grant of this application will correct an “historical anomaly.”<sup>26</sup> According to Lakeside, a 1983 renewal challenge engendered substantial confusion at the station and caused it to miss the previously provided Class D filing period. In the *NCE FM Order*, the Commission provided Class D stations with generous opportunities to enable continued operation.<sup>27</sup> For example, Class D stations were given the opportunity to upgrade to Class A operations. To benefit from this offer, Class D stations needed only to have filed the requisite construction permit application by January 1, 1980. WSSD(FM) did not avail itself of this opportunity and has not explained why a renewal challenge raised more than three years after this filing deadline has relevance to its failure to timely pursue this potential relief. Moreover, Lakeside has not attempted to demonstrate that it had any viable technical option to upgrade to Class A status or that the Commission approved similarly defective technical proposals filed by the January 1, 1980, deadline. We decline to grant WSSD’s untimely request for relief that would be well beyond that afforded any other Class D station.

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*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)*, 11 FCC Rcd 7763, 7764 n.1 (1996). 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 % “overlap” received compared to 5 % “interference” received under the old policy. *1985 Order*, 50 Fed. Reg. at 27959-27960.

<sup>24</sup> *Educational Information Corp.*, 6 FCC Rcd 2207, 2208 (1991) (“*EIC*”).

<sup>25</sup> See 47 C.F.R. § § 73.506(b); 73.512(d). See also *Quinnipiac College*, 8 FCC Rcd 6285, 6286 (1993) (“If Class D FM stations . . . are unable to . . . comply with applicable Commission rules, they may remain as secondary Class D FM stations and continue to provide the service they have always provided unless and until it causes interference to another primary NCE station.”).

<sup>26</sup> Lakeside Application for Review at 8.

<sup>27</sup> See *supra* para. 2.

9. **Conclusion.** For the foregoing reasons, Lakeside's Application for Review **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary