

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

In re Application of)
)
CHEHALIS VALLEY EDUCATIONAL) File No. BPED-20160314AAD
FOUNDATION) Facility ID #10685
)
For a Construction Permit to Modify)
Noncommercial FM Station KACS)
Chehalis, Washington)

TO: The Secretary
ATTN: The Commission

APPLICATION FOR REVIEW

Chehalis Valley Educational Foundation (“CVEF”), by counsel and pursuant to §1.115 of the Commission’s rules, hereby submits to the Commission its Application for Review of the Media Bureau’s dismissal of the above-identified application, filed pursuant to §73.3573(g) of the Commission’s rules, proposing to change the community of license for noncommercial FM station KACS from Chehalis, Washington, to Rainier, Washington, and otherwise to modify the station’s facilities. The Bureau initially dismissed the application by way of a *Letter Decision* dated September 8, 2017.¹ CVEF filed a Petition for Reconsideration on October 13, 2017. The Bureau denied the Petition for Reconsideration in a second *Letter Decision*, dated July 31, 2018 (the “Reconsideration Letter”).^{2 3}

¹ *Donald Martin, Esq.*, Ref. 1800B3-RFS, MB, rel. September 8, 2017.

² *Donald E. Martin, Esq.*, Ref 1800B3-AYD, MB, rel. July 31, 2018.

³ Public notice of the Bureau’s action on reconsideration was published in *Broadcast Applications*, Report No. 29291, released August 2, 2018. The 30-day period for filing an application for review expired on September 1, 2018, which was not a business day. This

Background

CVEF demonstrated in its application that adopting Rainier as the station's community of license would present a preferred arrangement of allotments. It claimed a Priority (3) preference pursuant to *Revision of FM Assignment Policies and Procedures*⁴ because the station would be the first transmission service for Rainier. At least four local transmission services would remain in Chehalis.

Believing that the "Urbanized Area Presumption" ("UAP") set out in *Rural Radio*,⁵ would only be triggered if the proposed 70 dBu contour covered more than 50 percent of an urbanized area, CVEF presented a map in its application to show that its proposed 70 dBu contour would not provide such coverage.⁶ CVEF further stated in its application that it "was unable to identify any existing tower site from which the proposed facility could . . . provide a 70 dBu contour to more than 50% of the Olympia-Lacey UA or Seattle UA."⁷

The Media Bureau determined that over 53.6 percent of the Olympia-Lacey, Washington urbanized area would be covered by the 60 dBu contour of the proposed facility at Rainier, and

pleading is being filed on the first business day thereafter.

⁴ *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982).

⁵ *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 26 FCC Rc 2556 (2011) ("*Rural Radio*").

⁶ Application, Exhibit 25, at 4.

⁷ Application, Exhibit 25, at 3.

concluded that this would implicate the UAP.⁸ The Bureau's conclusion was premised on the notion that the 60 dBu contour, rather than the 70 dBu contour, is the principal community contour for noncommercial FM stations. This meant that the service needs of Chehalis would have to be compared to those of the entire Olympia-Lacey urbanized area rather than just to those of Rainier. Consequently, the proposed change of community would not merit a Priority (3) preference, and the Bureau dismissed the application, finding that retaining the KACS transmission service in Chehalis would maintain the preferred arrangement of allotments.

In its Petition for Reconsideration, CVEF reiterated its argument that the noncommercial 70 dBu contour should be the trigger for purposes of the UAP. The Bureau rejected this claim and affirmed the dismissal of the application.

Question Presented

The question presented for review is whether, for purposes of analysis under the Urbanized Area Presumption prescribed by *Rural Radio*, the principal community contour for a noncommercial FM station should be the 70 dBu contour or the 60 dBu contour. It is the Bureau's position that the 60 dBu contour should be the measure. However, that position is contrary to the Commission's rules and policies. This appears to be a case of first impression with respect to the use of the UAP in analyzing a noncommercial FM broadcast application.

Argument

The Bureau's ruling is erroneous because it relies on the proposed 60 dBu contour to trigger the UAP. According to *Rural Radio*, if the principal community contour of a proposed facility will cover 50 percent or more of an urbanized area, there is a rebuttable presumption that

⁸ *Letter Decision*, at 1.

the proposed facility would serve the urbanized area rather than merely the community of license.⁹ *Rural Radio* does not define “principal community contour.” Consequently, the reader must search for a definition in the Commission’s established regulations or precedent. The Bureau does not expressly explain, but its reasoning in the *Letter Decision* appears to spring from an assumption that because KACS is a noncommercial station operating on a reserved channel, its principal community contour is the 60 dBu rather than the 70 dBu contour. It is true that noncommercial FM stations need only cover their communities of license with a 60 dBu contour while both commercial and noncommercial stations on the non-reserved band must cover the community of license with a 70 dBu signal. However, the Commission’s rules do not define the noncommercial 60 dBu contour as the “principal community contour.”

In the Reconsideration Letter, the Bureau does cite a passage in the *Rural Radio Notice of Proposed Rulemaking* where the 60 dBu contour is referred to as the principal community contour for noncommercial FM stations.¹⁰ However, the cited passage is not concerned with the definition of the principal community contour, per se. Rather, it comes in a discussion of technical issues about how to measure signal strength at a given contour and off-handedly refers to the 60 dBu contour as the noncommercial FM principal community contour. This passage appears to be the *only* place in all of the Commission’s published rulings and decisions where the noncommercial FM 60 dBu contour is explicitly identified as the “principal community contour.” Such an appellation is inconsistent with other published decisions and with the Commission’s

⁹ *Rural Radio* 26 FCC Rcd, at 2572-2573, 2575-2576.

¹⁰ Reconsideration Letter, at 2, *citing*, *Policies to Promote Rule Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rulemaking, 24 FCC Rcd 5239, 5258, para.50 (2009).

rules. As such, it is simply mistaken dicta and does not set precedent or provide any basis for a rational decision in this case.

The Bureau conflates the requirement that a noncommercial station need only provide a 60 dBu signal to its community of license (as opposed to the 70 dBu requirement for commercial stations) with the concept of the principal community contour for noncommercial stations. The Bureau merges these concepts without citing authority for doing so other than the *Rural Radio NPRM* referenced in the preceding paragraph.

To the contrary, the Commission's rulemakings and regulations have made it clear for quite some time that the noncommercial FM principal community contour is the 70 dBu contour. Prior to 1987, broadcast stations were required to maintain their main studios in the community of license. That year, in the rulemaking proceeding in Docket 86-406, the Commission relaxed this rule and listed several alternative criteria for locating the studio – one of which was to be within the “principal community contour.”¹¹ The FM principal community contour was defined as the 70 dBu contour in §73.315(a). Each commercial station was required to cover its community of license with its principal community contour. A note to §73.315(a) exempted noncommercial stations from any specific coverage of the community of license. Nonetheless, noncommercial stations had the same main studio obligations as commercial stations. Despite the differences in community coverage requirements, both categories of stations had the option to maintain their studios within the “principal community contour.” The Commission stated that

¹¹ *In the Matter of Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules*, Report and Order, 2 FCC Rcd 3215 (1987).

“for the purposes of this rule . . . the contour found in §73.315(a) [i.e., the 70 dBu contour,] will be applicable to noncommercial educational FM stations.”¹²

In 1997, in the course of considering rule amendments to address the procedures for seeking certain modifications to broadcast facilities, the Commission adopted §73.1690(c)(8). A subsection of this rule, §73.1690(c)(8)(i), read as follows:

Commercial FM stations must continue to provide a 70 dBu principal community contour over the community of license, as required by §73.315(a). Noncommercial educational stations must continue to provide a 60 dBu contour over at least a portion of the community of license.

In this regulation, the 70 dBu contour is identified as the “principal community contour” while the 60 dBu contour is pointedly not described that way. The next subsection of the rule was more explicit in naming the 70 dBu contour as the “principal community contour” for both commercial and noncommercial stations. Pertinent to the former main studio rule, §73.1690(c)(8)(ii) stated:

For both commercial FM and noncommercial educational FM stations, the location of the main studio remains within the 70 dBu principal community contour, as required by §73.1125, or otherwise complies with that rule.

This subsection was deleted upon elimination of the main studio rule. Nonetheless, it clearly shows the Commission’s intention to identify the 70 dBu contour as the principal community contour for noncommercial FM stations.

Subsequently, in 2000, the Commission deleted the note to §315(a) concerning noncommercial stations and adopted a new §73.515, which requires noncommercial stations to

¹² *Ibid.*, Appendix C, Final Regulatory Flexibility Analysis, at 42-43.

cover at least 50 percent of the community of license with a 60 dBu contour.¹³ However, nowhere in this rulemaking did the Commission refer to the 60 dBu contour as the “principal community contour.” Rather, the subject matter of the rule was described as a community coverage requirement. Furthermore, the definition of the noncommercial principal community contour as the 70 dBu contour in §73.1690(c)(8)(ii) remained intact and unchanged for an additional 17 years until the Commission abolished the main studio rule in 2017.¹⁴ Of course, the demise of the main studio rule should have no effect on the use of the noncommercial 70 dBu “principal community contour” as a marker for other purposes, such as the *Rural Radio* UAP.

The Bureau observes that “The 60 dBu coverage standard ensures that NCE stations have sufficient flexibility in siting facilities and reaching target audiences.”¹⁵ However, inconsistently, the Bureau completely fails to address the fact that its ruling would drastically reduce that flexibility for KACS by precluding the kind of a move that CVEF proposes in this case. The Bureau would apparently have no objection to this application if KACS were a commercial station. Everyone agrees that the UAP would not be triggered in that event because the 70 dBu contour does not cover any significant portion of an urbanized area. Thus, the inappropriate imposition of the 60 dBu contour as the UAP trigger has the perverse effect of

¹³ *In the Matter of 1998 Biennial Regulatory Review –Streamling of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules*, Second Report and Order, 15 FCC Rcd 21649, 21670 (2000).

¹⁴ *In the Matter of Elimination of the Main Studio Rule*, Report and Order, 32 FCC Rcd 8158 (2017).

¹⁵ Reconsideration Letter, at 2, *citing Streamlining of Radio Technical Rules*, 15 FCC Rcd 21649, 21670, para. 42 (2000).

substantially restricting a move by a noncommercial station that a commercial station could easily effectuate with the blessings of *Rural Radio* and the Bureau. That makes no sense.

Surely the outcome produced by the Bureau's decision in this case was not intended by *Rural Radio*. The Commission's decisions in that proceeding never indicated that commercial stations and noncommercial stations in rural areas should be treated differently with respect to their geographic relationship to an urbanized area. If there were any rationale for treating them differently, the public interest would support giving the greater degree of flexibility to noncommercial stations rather than to commercial stations for the same reasons that noncommercial stations need only cover the community of license with a 60 dBu signal. The adoption of the 70 dBu contour as the UAP trigger for a commercial station allows that station to cover a hypothetically unrestricted amount of an urbanized area with its 60 dBu contour. If such a move by a commercial station does not violate the letter or the spirit of *Rural Radio*, why would it be improper to allow a noncommercial station the same development? The Bureau has not explained what public interest purpose there could be in treating commercial and noncommercial stations differently in this context. The Bureau's failure to offer an explanation renders its decision arbitrary and capricious.

Conclusion

The Media Bureau has improperly invoked the UAP to dismiss CVEF's application by relying upon a mistaken definition of the "principal community contour" for a noncommercial FM station. Absent any guidance in *Rural Radio* as to the specific signal strength values to be used to trigger the UAP, the Bureau must employ the values established by rule and precedent. It is well established that the principal community contour for noncommercial FM stations is the 70

dBu contour. When evaluating CVEF's application in that light, it does not trigger the UAP and the proposal to relocate KACS to Rainier is entitled to the Priority (3) preference that CVEF originally claimed. The Bureau's decision to dismiss the application on those grounds was in error and should be reversed. CVEF respectfully requests that its application be reinstated *nunc pro tunc*, and granted.

Respectfully submitted,

CHEHALIS VALLEY
EDUCATIONAL FOUNDATION

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