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In Reply Refer to:
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In re: **NCE October 2007 Window
MX Group 38**

NEW(NCE-FM), Brookings, Oregon
State of Oregon Acting by and Through the
State Board of Higher Education for the Benefit
of Southern Oregon University
Facility ID No. 122143
File No. BNPED-20071018DEO

Petition for Reconsideration

Dear Counsel:

We have before us a January 10, 2011, Petition for Reconsideration ("Petition") filed by the State of Oregon Acting by and Through the Oregon State Board of Higher Education for Southern Oregon University ("Oregon").¹ The Petition requests reconsideration of the dismissal of Oregon's above-referenced application for a new noncommercial educational ("NCE") FM station in Brookings, Oregon. For the reasons stated below, we deny the Petition.

Background. The Oregon application and the application of IHR Educational Broadcasting ("IHR") for a new NCE FM station in Fort Dick, California, were designated NCE MX Group 38. Pursuant to established procedures,² on February 16, 2010, the Commission tentatively selected IHR's

¹ IHR Educational Broadcasting filed an "Opposition to Petition for Reconsideration" on January 20, 2011. Oregon filed a "Reply to Opposition to Petition for Reconsideration" on January 31, 2011. Although Oregon claimed it would submit a Petition to Stay (Petition at 16), we have not received such a pleading.

² See 47 C.F.R. § 73.7003 (point system selection procedures); *see also Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Notice of Proposed Rulemaking, 10 FCC Rcd 2877 (1995), *further rules proposed*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167 (1998), *rules adopted*, Report and Order, 15 FCC Rcd 7386 (2000), *vacated in part on other grounds sub nom., National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 ("NCE MO&O"), Erratum, 16 FCC Rcd 10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC

application.³ Only Oregon certified eligibility for a fair distribution preference based on second service, but the Commission rejected this claim because Oregon did not consider aural service provided by KJKL(FM), Selma, Oregon.⁴ Thus, both proposals proceeded to a point hearing. Oregon claimed three points as an established local applicant. IHR did not. Each claimed two points for diversity of ownership, but due to Oregon's failure to support its claim, only IHR received two points. IHR qualified for points under the best technical proposal criterion because its proposal served at least 25 percent more area and population than the Oregon proposal. IHR became the tentative selectee in Group 38 with four points, one more than Oregon. Thus, the *Comparative Order* accepted IHR's application for filing, set a 30-day period for filing petitions to deny that application, and indicated that, if, after that 30-day petition period had run, there was no substantial and material question concerning IHR's application, it would, by Public Notice, dismiss the other mutually exclusive applications and grant IHR's application.⁵

On March 17, 2010, Oregon filed a Petition to Deny IHR's application. It first claimed that the Commission erred in finding that Oregon was ineligible for a preference under the fair distribution criterion based on second service, arguing that KJKL(FM)'s signal did not reach Oregon's proposed contour due to the area's mountainous terrain. To that end, Oregon requested waiver of the standard predictive formula, which predicts signal coverage.

Oregon next asserted that the Commission incorrectly failed to award it two points for diversity of ownership and two points for superior technical parameters. It requested waiver of the commitment to diversity documentation requirement in Section IV, Question 2(a) of FCC Form 340,⁶ asserting that its status as a state entity justified a waiver grant.

On December 9, 2010, the Bureau denied Oregon's Petition to Deny, dismissed the Oregon application, and granted IHR's application.⁷ It first rejected Oregon's request for waiver of the standard predictive formula, holding that the Commission does not consider alternate engineering showings to rebut a showing of predicted coverage under its standard method.⁸ It also found, among other things, that Oregon was not entitled to a waiver of the requirement to submit documentation at the time of application filing to establish its commitment to diversity. The Commission permits a governmental entity, unlike all other types of applicants, to establish such a commitment by means other than governing documents.⁹ The Letter Decision noted that Oregon had not provided "*any* documentation"¹⁰ and rejected the argument that a waiver is warranted based merely on Oregon's status as a governmental entity.¹¹

Rcd 13132 (2002), *aff'd sub nom. American Family Ass'n v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004) ("*American Family*"), *cert. denied*, 125 S.Ct. 634 (2004).

³ See *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1693-94 (2010) ("*Comparative Order*").

⁴ *Id.* at 1693.

⁵ *Comparative Order*, 25 FCC Rcd at 1720.

⁶ FCC Form 340, Section IV, Question 2 ("Applicant certifies that . . . its governing documents require that such diversity be maintained, and that it . . . has submitted to the Commission copies of the documentation").

⁷ Letter to Ernest T. Sanchez, Esq., and Dennis J. Kelly, Esq., from Peter H. Doyle, Chief, Audio Division, Media Bureau (Dec. 9, 2010) ("*Letter Decision*").

⁸ Letter Decision at 2-3. See also *Comparative Order*, 25 FCC Rcd at 1693.

⁹ See *Comparative Order*, 25 FCC Rcd at 1694 and n.44.

¹⁰ Letter Decision at 4 (emphasis in original).

¹¹ *Id.*

Oregon's January 10, 2011, Petition claims that the Letter Decision: (1) made material errors in refusing to grant waiver of the Commission's standard predictive formula based on terrain shielding between the KJKL(FM) service area and Brookings;¹² and (2) failed to thoroughly review its waiver request regarding the commitment to diversity documentation requirement.

Discussion. Reconsideration is warranted only if the petitioner sets forth an error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact that otherwise warrant reconsideration of the prior action.¹³ Oregon has not met this burden.

Fair Distribution Preference. Oregon argues on three grounds that the Commission should have waived its policy against considering alternative showings in this circumstance.¹⁴ First, it states that it is inconsistent for the Commission to allow alternative contour prediction methodologies such as Longley-Rice to determine signal coverage to show adequate coverage but disallow it to demonstrate that coverage is, "in fact," inadequate.¹⁵ We disagree. The Commission has authority to issue waivers for good cause when enforcing a rule fails to serve the public interest.¹⁶ As the Commission has stated previously, our policy on supplemental showings is that they "have not been accepted, nor will be accepted, for the purpose of determining interference or prohibited contour overlap between FM broadcast stations."¹⁷ Moreover, the Commission has never permitted other parties to use alternate propagation methodologies "offensively," *i.e.*, to diminish a station's protected or service contour as calculated in accordance with the standard FM propagation methodology.¹⁸ To do so here would represent a fundamental change in the

¹² Petition at 6-7. The Petition included a supporting argument from Mr. Ronald Kramer, Executive Director of Jefferson Public Radio, a network of stations licensed to Oregon, regarding the signal of KJKL(FM). His statement, made under penalty of perjury, is hearsay. It describes "a series of email exchanges" he had with Mr. Joseph Miller, Assistant Treasurer of Educational Media Foundation, licensee of KJKL(FM), in which Mr. Miller shed light on the source and availability of KJKL(FM)'s signal in the Brookings area. The Commission has found accounts of conversations with third parties to be inadmissible hearsay. *See, e.g., Living Proof, Inc.*, Letter, 24 FCC Rcd 2382, 2385 n.29 (MB 2009) (declining to credit hearsay statements of third party). The weight to be accorded to a hearsay statement depends on its truthfulness, reasonableness, and credibility. *Johnson v. United States*, 628 F.2d 187, 190-191 (D.C. Cir. 1980). Here, we can accord little weight to Mr. Kramer's statements, because he is an executive of the company that operates Oregon's stations.

¹³ *See* 47 C.F.R. § 1.106.

¹⁴ Petition at 8.

¹⁵ Petition at 9-10.

¹⁶ 47 C.F.R. §§ 0.201, 0.283 and 1.3. *See also WAIT Radio v. FCC*, 418 F.2d 1153, 1156-57 (DC Cir. 1969) (Commission may waive any provision of its rules if it determines that good cause has been shown and that grant of the waiver does not undermine the policies set forth by the rule).

¹⁷ *Amendments of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12402-03 (1997) ("*Minor Change R&O*") (stating that alternative supplemental showings are not routine by nature, and are often controversial, engendering an uncertainty that is inappropriate in a license application).

¹⁸ *See, e.g., Shaw Communications, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 5852 (2009) (rejecting petitioner's attempt to discount new FM translator proposal in conformity with the standard prediction methodology by use of an alternative propagation methodology that allegedly proved that translator could not receive the primary station's signal direct off air, as required by Section 73.1231(b) ("*Shaw*"); *c.f. CMP Houston-KD, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 10656 (2008) ("*CMP Houston*") (affirming staff decision to accept minor modification application that used a Longley-Rice supplemental showing to verify 70 dBu community coverage as required by Section 73.313). *See also Ithaca Community Radio, Inc.*, Letter, 23 FCC Rcd 12910 (MB 2008) ("*Ithaca*") (rejecting petitioner's attempt to apply an alternative propagation methodology to disqualify a grantable NCE FM construction permit application based on alleged interference); *WIIZ(FM), Battle Ground, IN*, Letter, 10 FCC Rcd 3159, 3160 (MMB 1995) (rejecting petitioner's attempt to disqualify an assignment application that had demonstrated compliance with Section 73.3555 using standard calculation methods set forth in Section 73.313, holding that requiring applicants with conforming applications to defend applications against alternative

way in which applications which are subject to contour protection requirements are processed. This dramatic change in licensing standards could only be adopted through notice and comment rulemaking procedures because it could potentially impact thousands of stations and the manner in which the Commission protects stations' service areas from interference.¹⁹ Resolving conflicts between competing propagation studies also could significantly slow application processing.

Oregon also argues that a waiver would benefit the public interest by fostering localism, and cites as support the concurring opinions of Commissioners Copps and Adelstein in the *Shaw* and *CMP Houston* decisions.²⁰ Commissioner Copps in particular argues that the engineering rules regarding the standard method were manipulated in those decisions, resulting in erosion of localism. Oregon argues that the erosion of localism statements have "equal applicability" here.²¹ We disagree. We find Oregon's argument unpersuasive. Oregon appears to argue that localism is "eroded" whenever an "established local" applicant loses to a non-local applicant in an NCE MX Group and that a waiver of settled technical processing policies is warranted to avoid this outcome. However, the Commission designed the NCE comparative standard to promote a number of goals, including but not limited to the licensing of stations to established local entities. The concurring opinions relied on by Oregon do not raise any concerns about these other licensing criteria. Moreover, a waiver based on Oregon's rationale could render irrelevant the other applicant and service aspects that the comparative standard is designed to promote. We conclude that Oregon's argument rests, ultimately, on a disagreement with the outcomes that the NCE comparative standard routinely permits and therefore, that this argument would be more appropriately raised in a petition for rulemaking to modify these licensing rules.

Oregon's last waiver argument claims that the Letter Decision ignored the uniqueness of its situation.²² Waiver requests must show that special circumstances warrant a deviation from the general rule and that such deviation will serve the public interest.²³ The facts here, involving a mountain range

prediction methodologies would result in unreasonable delay to the applicants and unnecessary administrative burden upon the limited technological resources available to the Commission for evaluating alternative prediction studies).

¹⁹ *Minor Change R&O*, 12 FCC Rcd at 12402; *see also, Ithaca*, 23 FCC Rcd at 12912.

²⁰ Petition at 12. *Shaw*, 24 FCC Rcd at 5857-58.

²¹ Commissioner Copps' concurring statement juxtaposed the *Shaw* decision against the *CMP Houston* decision, as the former rejected and the latter allowed use of an alternate predictive method. Oregon is apparently pointing to Commissioner Copps' concurring statement to argue that the Commission should allow waiver of the standard predictive method in "offensive" situations such as *Shaw*. In *Shaw*, the supplemental showing submitted to demonstrate diminished service due to mountainous terrain was rejected, while in *CMP Houston*, the use of a supplemental showing submitted to demonstrate adequate service based on unusually flat terrain was accepted. While it is unclear how these facts necessarily support Oregon's argument in support of its waiver request, for the reasons discussed above, the Commission does not accept alternate propagation methodologies to demonstrate a station's diminished protected or service contour. The *Shaw* and *CMP Houston* decisions, as well as the instant decision, are consistent with this practice.

²² For example, Oregon argues that *Federal-State Joint Board on Universal Service*, Order, 16 FCC Rcd 21511 (2001) ("*Joint Board*"), in which the Commission found that special circumstances warranted waiver, offers the "same type of special circumstances," found here, namely, "geographic anomalies that would, in combination with overly strict enforcement of a rule, unreasonably deprive a community of needed service." (Reply to Opposition at 7). We disagree. In *Joint Board*, the Commission granted the State of Alaska a limited waiver of Section 54.504(b)(2)(v) of the Rules to allow members of certain remote communities to use excess service obtained with E-rate support when the services were not in use by schools or libraries. In requesting the waiver, State of Alaska cited the high cost of Internet service in Alaska and the remoteness of the communities involved (some reachable only by air or water). Here, the Brookings area is not underserved by radio services, nor is it even nearly as inaccessible as some of the communities cited in *Joint Board*. Furthermore, Oregon's argument unnecessarily conflates service issues, namely terrain shielding, with territorial isolation.

²³ *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

separating two cities, are not so unique that many other radio providers could not claim the same. Accordingly, we find that the Letter Decision properly rejected Oregon's waiver request.

Diversity Documentation. Oregon next argues that the Letter Decision failed to thoroughly review its waiver request regarding the commitment to diversity documentation requirement. Oregon argues that, as a state (versus a state-chartered entity), it is unable to provide a commitment to diversity certification and, thus, the Commission should have waived this requirement.²⁴ We disagree. Oregon has failed to adequately explain why it failed to satisfy the flexible guidelines for establishing that an applicant's governing documents ensure the requisite diversity commitment.²⁵ For example, the Commission stated that it would accept a certification making a commitment to maintain the Board characteristics on which it bases its diversity claim from an applicant that cannot amend its governing documents without legislative action making, accompanied by a description of procedures the applicant has in place to effectively notify appointing officials and board members, both current and future, of their need to act consistently with the applicant's diversity representations to the Commission.²⁶ Moreover, we find that the Letter Decision correctly found Oregon's request to be essentially an attempt to compensate for errors in its original application, which is a prohibited post-window enhancement. The Public Notice establishing the procedures for the October 2007 NCE window explicitly stated that the "Commission will not take into account any enhancement in an applicant's comparative position after the close of the window."²⁷ Oregon did not file an amendment, nor did it submit a waiver request, before the NCE window closed on October 22, 2007. Indeed, its application lacked *any* documentation regarding commitment to diversity. To grant its post-window waiver request would be unfair to the other applicants in MX Group 38 and would undermine the integrity of the NCE licensing process. Accordingly, we find that the Letter Decision correctly rejected Oregon's late-filed waiver request, dismissing it as a latent attempt to fix the defects in Oregon's original application.

²⁴ Petition at 15; Reply to Opposition at 8. Oregon's reliance on *American Family*, 365 F.3d 1156 (2004), in support of its waiver argument is unclear. *American Family* stated that the Commission's policy regarding the diversity credit may need to be reevaluated if and when experience proves that the premises upon which the policy was based appear to be erroneous. *Id.* at 1166. Oregon argues that *American Family*'s "warning" shows that the policy was, at the outset, viewed with skepticism, as if the court predicted that the diversity credit would be applied in an "arbitrary and capricious" manner, and therefore applicants such as Oregon would be entitled to a waiver. However, this argument is not sound because the premise is not logically related to the conclusion. *American Family* advocates reevaluating the policy if the assumptions upon which the policy lies prove to be incorrect. Granting a waiver does not logically follow. Because Oregon does not assert that the policy underlying the diversity credit is unsound or is otherwise arbitrary and capricious, we will not consider this issue further.

²⁵ See *NCE MO&O*, 16 FCC Rcd at 5095.

²⁶ See *id.* The *NCE MO&O* provided applicants additional flexibility by noting, "[w]e will consider alternative safeguards from such organizations if they reasonably assure that board characteristics will be maintained during the four-year holding period." *Id.* The flexibility is meant for various types of entities, including those whose governing documents cannot be amended without legislative action. *Id.*

²⁷ *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12 – October 19, 2007 Window; Limited Application Filing Freeze to Commence on September 8, 2007*, Public Notice, 22 FCC Rcd 15050, 15052 (MB 2007).

Conclusion/Actions. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed on January 10, 2011, by State of Oregon Acting by and Through the State Board of Higher Education for the Benefit of Southern Oregon University, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau