



Federal Communications Commission  
Washington, D.C. 20554

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**DA 12-1100**

*In Reply Refer to:*

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In re: Calvary Chapel of Costa Mesa, Inc.  
KWVE-FM, San Clemente, CA  
Facility ID No. 8410  
File No. BPH-20070919ABO

**Application for Modification of License**

**Petition for Reconsideration**

Dear Counsel:

We have before us a July 15, 2008, Petition for Reconsideration (the "Petition") filed by Calvary Chapel of Costa Mesa, Inc. ("Calvary"), licensee of KWVE-FM ("KWVE"), San Clemente, California. The Petition seeks reconsideration of a June 24, 2008, staff decision<sup>1</sup> denying Calvary's request for a waiver of Section 73.215 of the Commission's Rules (the "Rules")<sup>2</sup> and dismissing the above-referenced application (the "Application") to modify the licensed facilities of KWVE.<sup>3</sup> We also have before us Calvary's July 17, 2009, "Motion for Leave to Supplement Petition for Reconsideration" (the "Supplement"), which generated a new round of pleadings.<sup>4</sup> For the reasons set forth below, we deny the Petition and dismiss the Supplement and subsequent pleadings.

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<sup>1</sup> See *Calvary Chapel of Costa Mesa, Inc.*, Letter, 23 FCC Rcd 9971 (2008) ("Staff Decision").

<sup>2</sup> 47 C.F.R. § 73.215.

<sup>3</sup> On July 28, 2008, Owens One Company, Inc. ("Owens") filed an Opposition, to which Calvary replied on August 6, 2008.

<sup>4</sup> The Supplement resulted in a surfeit of new pleadings: (1) Opposition to Motion for Leave to Supplement Petition for Reconsideration, filed August 7, 2009, by Owens; (2) Reply to Opposition to Motion for Leave to Supplement Petition for Reconsideration, filed August 14, 2009, by Calvary; (3) Supplement to Reply to Opposition to Motion for Leave to Supplement Petition for Reconsideration, filed September 29, 2009, by Calvary; (4) Further Supplement to Reply to Opposition to Motion for Leave to Supplement Petition for Reconsideration, filed December . . . (continued . . .)

**Background.** KWVE is “short-spaced” to co-channel Station KUZZ-FM (“KUZZ”), Bakersfield, California.<sup>5</sup> Section 73.215 of the Rules<sup>6</sup> allows such short-spacings as exists here only if the service and interference contours of the affected stations do not overlap.<sup>7</sup> Accordingly, to avoid contour overlap with KUZZ, KWVE currently employs a directional antenna. In the Application, Calvary proposed to replace KWVE’s directional antenna with a non-directional antenna. Because the modification would result in an 800 square km overlap of the KUZZ interference and KWVE service contours, Calvary sought a waiver of Section 73.215 of the Rules. Calvary asserted that actual overlap of the interference and service contours will not occur because there is high and rough intervening terrain between the two stations. To support its “no actual overlap” conclusion, Calvary provided studies utilizing both Longley-Rice and Point to Point propagation analyses.

In the *Staff Decision*, the staff rejected Calvary’s proffer of alternative propagation analyses to show that prohibited contour overlap, as calculated in accordance with the standard FM signal propagation methodology, would not occur due to the terrain between the two stations. Further, the staff concluded that “the Commission has waived Section 73.215(a) to allow otherwise-prohibited contour overlap only in a very few and very narrow circumstances, none of which is present here.”<sup>8</sup> Accordingly, the staff denied the waiver request and dismissed the Application.

In its Petition, Calvary seeks reconsideration, arguing that the decision is “fatally flawed by a serious mistake of fact and by a misunderstanding” of its arguments.<sup>9</sup> Specifically, Calvary asserts that the staff was misled by Owens’ false statement that the KWVE directional antenna currently protects KUZZ. Calvary explains that, to the contrary, the directional antenna was installed to prevent KWVE from “receiving prohibited contour overlap *from* Station KUZZ.”<sup>10</sup> Further, Calvary contends the staff

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11, 2009, by Calvary; (5) Additional Motion for Leave to Supplement Petition for Reconsideration, filed July 26, 2010, by Calvary; (6) Opposition to Additional Motion for Leave to Supplement Petition for Reconsideration, filed October 8, 2010, by Owens; and (7) Reply to Opposition to Additional Motion for Leave to Supplement Petition for Reconsideration, filed October 14, 2010, by Calvary.

<sup>5</sup> See 47 C.F.R. § 73.207(b)(1). “Short spacing” occurs when stations are separated by less than the minimum distance specified in Section 73.207(b)(1) of the Rules. KWVE and KUZZ are 221.3 km apart, 19.7 km less than the 241 km spacing minimum required by this Rule. See FCC File No. BMLH-20110201ACF (KUZZ coordinate correction application granted February 2, 2012, which reduced the spacing between KUZZ and KWVE from 221.410 km to 221.317 km).

<sup>6</sup> 47 C.F.R. § 73.215.

<sup>7</sup> KWVE and KUZZ are co-channel, Class B stations. The protected service contour of a Class B station is 54 dBu, determined by application of the Commission’s F(50,50) curves; the interference contour at the boundary of a protected station’s 54 dBu contour must not exceed 34 dBu, determined by application of the Commission’s F(50,10) curves. See 47 C.F.R. §§ 73.215(a)(1)-(2), 73.313, 73.699, Fig. 9 and 9a.

<sup>8</sup> *Staff Decision* at 3-4. Calvary relied on *Greater Media Radio Co., Inc.* and *R&S Media* for the proposition that the Commission previously considered waiver of the Section 73.215(a) contour overlap prohibition. See *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999); *R&S Media*, Memorandum Opinion and Order, 19 FCC Rcd 6300 (MB 2004). As the staff explained, in *R&S Media*, there were exceptional circumstances militating toward the ultimate grant of the waiver, i.e., the fact that a directional antenna would not have sufficed to eliminate the contour overlap and that there were no alternative sites.

<sup>9</sup> Calvary Petition at 6.

<sup>10</sup> *Id.* at 2-3.

misunderstood its basic argument in favor of a waiver: “regardless of what methods of prediction are used, there can be no interference from Station KUZZ to KWVE because there is a range of mountains between the transmitter site of the two stations, and no signal can possibly penetrate those mountains.”<sup>11</sup> To buttress its claim, Calvary supplies, for the first time, terrain studies to “show that the mountains are, in fact, impenetrable.”<sup>12</sup>

**Discussion. Procedural Matters.** As an initial matter, we will deny Calvary’s Motion and dismiss its Supplement and all subsequent pleadings. Section 1.106(f) of the Rules provides that supplements to petitions for reconsideration be filed “within 30 days from the date of public notice of the final Commission action” unless leave to file is granted pursuant to a separate request.<sup>13</sup> The Commission does not generally or readily accept late-filed supplements to petitions for reconsideration.<sup>14</sup> Calvary’s supplement, which was filed almost one year after the close of the pleading cycle,<sup>15</sup> includes field intensity measurements to illustrate the “impenetrability” of the mountains separating KUZZ and KWVE. This is data that Calvary could have presented, but did not, within the 30-day statutory deadline, and Calvary provides no explanation as to why this information could not have been submitted earlier. Accordingly, because Calvary has not demonstrated good cause to consider its untimely Supplement, we will dismiss its Supplement and all subsequent pleadings.<sup>16</sup>

**Substantive Matters.** The Commission will consider a Petition for Reconsideration only when the petitioner shows either a material error in the Commission’s original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner’s last opportunity to present such matters.<sup>17</sup> As set forth below, Calvary has not met this test.

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<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 4 and Exhibit B.

<sup>13</sup> 47 C.F.R. § 1.106(f).

<sup>14</sup> *See, e.g., In the Matter of Alpine PCS, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 469, 480 (2010); *John Joseph McVeigh*, Letter, 24 FCC Rcd 3572, 3573 (MB 2010); *see also Richard R. Zaragoza, et al.*, Letter, 24 FCC Rcd 5743, 5746 (MB 2009); *21<sup>st</sup> Century Telesis Joint Venture v. FCC*, 319 F.3d 192, 199-200 (D.C. Cir. 2003)(affirming the Commission’s decision not to exercise its discretion to hear late-filed supplements when the petitioner offered no plausible explanation for why supplemental arguments were not made in its initial petition). The Commission has explained that a strict enforcement of Section 1.106(f)’s filing period is “both necessary and desirable” to avert the “grave danger of the staff being overwhelmed by a seemingly never-ending flow of pleadings.” *Pathfinder Communications Corp.*, Memorandum Opinion and Order, 3 FCC Rcd 4146 (1988).

<sup>15</sup> Calvary was required to file its petition for reconsideration and any supplement thereto no later than July 24, 2008. Its initial supplement was not filed until July 17, 2009. Calvary’s final supplement was filed July 26, 2010, over two years after the close of the pleading cycle.

<sup>16</sup> The Commission’s long-standing policy is to not accept late-filed supplements that raise new arguments that could have been presented within the 30-day deadline prescribed by section 1.106(f) of the Rules. *See supra*, note 12. Moreover, even if we were to consider the Supplement, we note that the Commission has repeatedly rejected the use of field strength measurements in analyzing specific waiver requests. *See* 47 C.F.R. § 73.314(a)(limiting field strength measurement submissions to rulemaking proceedings concerning general technical standards); *see also Board of Education of City of Atlanta*, Memorandum Opinion and Order, 11 FCC Rcd 7763, 7766 (1996) (rejecting offer to submit field strength measurements).

<sup>17</sup> *See* 47 C.F.R § 1.106, *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *In re National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

First, Calvary contends that the staff's decision is predicated on a mistake of fact. Specifically, Calvary asserts that the staff erroneously relied on a statement, set forth in Owens' initial opposition to the Application, that the KWVE directional antenna "currently protects KUZZ at KWVE's existing site."<sup>18</sup> Rather, Calvary explains that the directional antenna was installed to prevent KWVE from receiving prohibited contour overlap from KUZZ. We acknowledge that the staff cited Owens' allegedly incorrect statement in the factual background of the *Staff Decision*. However, we find this was a harmless step, and not a "fatal flaw," as Calvary asserts.

The staff did not, as Calvary contends, rely on the Owens' statement, but rather correctly observed that "KWVE employs a directional antenna to avoid contour overlap with KUZZ."<sup>19</sup> Moreover, the fact that KWVE is directionalized to avoid received, rather than caused, predicted contour overlap is irrelevant. We are concerned with both received and caused interference.<sup>20</sup> Finally, irrespective of Calvary's intention in utilizing its directional antenna, the fact remains that there currently is no predicted overlap between KWVE and KUZZ, while the Application will create an 800 square km overlap of the KUZZ interfering and KWVE protected service contours. The staff's determination to that effect was not erroneous.

Next, Calvary asserts that the Bureau misunderstood its basic argument in favor of the waiver: that "there can be no interference from KUZZ to KWVE because there is a range of mountains between the transmitter sites."<sup>21</sup> We disagree. In the *Staff Decision* the Bureau comprehended and clearly articulated Calvary's principle argument: that "actual overlap of the interference and service contours will not occur because there is high and rough intervening terrain between the two stations."<sup>22</sup> The Bureau then rejected the Longley-Rice and PTP methodology showings Calvary submitted to support its no interference conclusion.<sup>23</sup>

On reconsideration, Calvary reiterates the same argument and also attempts to submit additional engineering information to support the same conclusion. Calvary also provides new terrain studies to "show that the mountains are impenetrable."<sup>24</sup> We reject these new studies.<sup>25</sup> As the Commission has explained: "We cannot allow a party to 'sit back' and hope that a decision will be in its favor, and when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could

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<sup>18</sup> *Staff Decision* at 3, citing Owens Opposition to Petition for Waiver at 2.

<sup>19</sup> *Staff Decision* at 1-2, citing Calvary's Petition, Engineering Statement at 1.

<sup>20</sup> See, e.g., *Grandfathered Short-spaced FM Stations*, Report and Order, 12 FCC Rcd 11840, 11844 (1997) ("interference caused and interference received are opposite sides of the same coin. Both represent an inefficient use of the spectrum.").

<sup>21</sup> Calvary Petition at 3.

<sup>22</sup> *Staff Decision* at 2.

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.*

<sup>25</sup> See 47 C.F.R. § 1.106(c). Calvary has not, as required by our rules, shown that this new data arose from any changed circumstances or that this information could not have been submitted earlier. As Owens highlights, we can assume that the "mountains on which Calvary's waiver request is based have been there for quite some time." Opposition at 4.

operate efficiently or accurately if such a procedure were allowed.”<sup>26</sup> Calvary’s improper use of new studies to resurrect arguments, which were previously rejected by the Bureau, constitutes just such an attempt.<sup>27</sup> Calvary has not shown that the *Staff Decision* was erroneous or flawed, and we will deny the Petition.

**Conclusion/Actions.** Accordingly, for the reasons discussed above, IT IS ORDERED, that Calvary Chapel of Costa Mesa, Inc.’s, July 15, 2008, Petition for Reconsideration IS DENIED.

IT IS FURTHER ORDERED, that Calvary Chapel of Costa Mesa, Inc.’s , July 17, 2009, Motion for Leave to Supplement Petition for Reconsideration, IS DENIED, and the Supplement to the Petition for Reconsideration, and all of the subsequent unauthorized pleadings filed in this application proceeding, ARE DISMISSED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>26</sup> See *Canyon Area Residents*, Memorandum Opinion and Order, 14 FCC Rcd 8153, 8154 ¶ 7 (1999) quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941); see also *Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Banks, Redmond, Sunriver and Corvallis Oregon)*, Memorandum Opinion and Order, 19 FCC Rcd 10068 (2004).

<sup>27</sup> See *Idaho Broadcasting Consortium, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5264 (1996) (Commission need not examine terrain obstruction/coverage study on reconsideration, when original petition to deny did not include that study). Moreover, we note that the “Commission has never sanctioned the use of terrain shielding, terrain roughness or similar alternative prediction methodologies in connection with Section 73.215 showings.” *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, Memorandum Opinion and Order, 6 FCC Rcd 5356, 5358 (1991).