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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ORIGINAL
FILE

Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

ATTN: The Honorable Edward J. Kuhlmann

RE: Central Florida Educational Foundation, Inc., et. al., MM
Docket No. 92-33

Dear Ms. Searcy:

Transmitted herewith, on behalf of Central Florida Educational Foundation, Inc., is an original and six copies of its Opposition to Petition For Leave to Amend filed in connection with the above-referenced docketed proceeding.

Should any questions arise concerning this matter, kindly contact the undersigned directly.

Respectfully submitted,

MAY & DUNNE, CHARTERED

By: Joseph E. Dunne III
Joseph E. Dunne III
Attorney for Central Florida
Educational Foundation, Inc.

JED:gmcA41
enclosures

xc: All Per Attached Certificate of Service
James S. Hoge

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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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JUL 9 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 92-33
)	
CENTRAL FLORIDA EDUCATIONAL)	File No. BPED-881207MA
FOUNDATION, INC.)	
Channel 203C3)	
Union Park, Florida)	
)	
BIBLE BROADCASTING NETWORK, INC.)	File No. BPED-890412MJ
Channel 202C2)	
Conway, Florida)	
)	
SOUTHWEST FLORIDA COMMUNITY RADIO,)	File No. BPED-891127MC
INC.)	
Channel 202C2)	
Conway, Florida)	
)	
MIMS COMMUNITY RADIO, INC.)	File No. BPED-891127MD
Channel 202C1)	
Oak Hill, Florida)	
)	
HISPANIC BROADCAST SYSTEM, INC.)	File No. BPED-891128ME
Channel 202C3)	
Lake Mary, Florida)	
)	
For Construction Permit for a)	
New Noncommercial Educational FM)	
Station)	

TO: The Honorable Edward J. Kuhlmann
Administrative Law Judge

OPPOSITION TO PETITION FOR LEAVE TO AMEND

Central Florida Educational Foundation, Inc. (CFEF), by its undersigned attorney and pursuant to section 1.294 of the Commission's rules and regulations, 47 C.F.R. § 1.294 (1992), hereby submits this opposition to the "Petition for Leave To Amend" ("Petition) filed by Mims Community Radio, Inc. (Mims) on July 1, 1992. As grounds for its opposition, CFEF shows and states as follows.

1. Mims petition requests leave to amend its application to submit a wholly new technical proposal, changing its site, its frequency (to channel 204C3) and its power. The acceptance of this amendment will require the waiver of section 73.3571 of the Commission's rules (the cut-off rule) because it is requesting a new frequency. Mims has requested a waiver of the cut-off rule on the basis of the fact that the proposed amendment allegedly removes the mutual exclusivity between Mims' amended application and the remaining four applicants for channel 202, thereby streamlining the hearing scheduled on July 21 and offering the Commission an opportunity to authorize two FM radio stations instead of one. These public interest benefits, according to Mims, satisfy the criteria for good cause for post designation amendments set forth in Edwin O'Connor Broadcasting Co., 22 F.C.C.2d 140 (Rev. Bd. 1970). An examination of the facts, however, shows that Mims contentions are factually or legally untenable.

2. At the outset, CFEF notes that the FCC decision attached to the motion is inapposite in a fundamental way. The Commission approved of an applicant amending to a new frequency and waived section 73.3571 in the context of a universal settlement--i.e., the amendment was filed as part of an agreement entered into by all parties to settle the case and avoid the expense and uncertainty of a hearing. That is not the case here. There has been no universal settlement in this proceeding and, to CFEF's knowledge, there is no agreement concerning the filing of Mims' amendment. Without the pendency of a universal settlement, then, Mims amendment must be

considered in light of the standard good cause criteria for post designation amendments.

3. The general elements of a good cause showing to justify a post-designation amendment are: the moving party must show (1) that it has acted with due diligence; (2) that the proposed amendment is not required by its voluntary act; (3) that no modification or addition of issues or parties will be necessitated; (4) that the proposed amendment will not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) that the other parties will not be unfairly prejudiced; and, (6) that the applicant will not gain a comparative advantage. Horizon Broadcasting, Inc., 101 F.C.C.2d 659, 59 R.R.2d 1349, 1350 (Rev. Bd. 1986). At the outset, Mims' amendment cannot be squared with these criteria because, upon information and belief, channel 6, WCPX-TV, will petition to intervene in this proceeding because of the interference to the WCPX-TV signal that will result from the construction of the facilities proposed in Mims' amendment. Clearly, rather than ending the need for a hearing, Mims' amendment will simply add a new party.

4. Mims amendment also transparently prejudices at least two other applicants in this proceeding. Despite its assertions that acceptance of Mims amendment will remove the mutual exclusivity between the parties, that contention is simply wrong. Mims' Figure 1 and Figure 2, where it plots the interference contours of the opposing applicants, uses the facilities specified by Bible Broadcasting Network, Inc. (BBN) and Southwest Florida Community

Radio, Inc. (Southwest) prior to the B cut-off in this proceeding. Both applicants amended to specify the WCPX-TV site after the B cut-off, and those amendments were accepted in the Hearing Designation Order (see ¶ 5). In fact, as shown in Attachment A, there is a substantial area of prohibited overlap in a populous area between Mims' amended proposal and the facilities specified by BBN and Southwest. Mims' proposed amendment does not comply with the Commission's interference criteria and does not protect the specified facilities of two different applicants. Clearly they, at least, will be prejudiced by the acceptance of Mims' amendment.

5. Finally, Mims' proposal suffers from a more fundamental and incurable defect. In a Petition to Enlarge Issues filed today CFEF submits a Verified Statement from Ms. Doherty, the owner of the WPGS tower which is Mims' presently specified site, which states under penalty of perjury that no representative of Mims has ever sought her permission to use the site, that she has never granted such permission, and, if such permission were sought, that she would not likely grant such permission for technical reasons. To summarize, then, the Petition raises a substantial and material question concerning whether Mims has authority to use its specified site, and, therefore, whether Mims has a viable technical proposal. If Mims does not have the permission of the current owner of its specified site to use the site the Commission precedent is quite clear--an applicant which does not have reasonable assurance of its present site cannot have "good cause" to amend to a new site. It is well settled that "an applicant will not be permitted to amend

where it did not have reasonable assurance to begin with." South Florida Broadcasting Co., 99 F.C.C.2d 8840, 845, 57 R.R.2d 495, n.12 (Rev. Bd. 1984). See also, Classic Vision, Inc., 104 F.C.C.2d 1271, 1273, 60 R.R.2d 1681 (Rev. Bd. 1986), rev. denied, 2 FCC Rcd. 2376 (1987); 62 Broadcasting, Inc., 4 FCC Rcd. 1768, 65 R.R.2d 1829 (Rev. Bd. 1989), rev. denied FCC 90-48 (released May 13, 1990). In another oft quoted statement, the Commission has held that: "[past] and recent Commission precedent establish that an applicant must have reasonable assurance that its transmitter site is available at the time its application is either filed or amended." George Edward Gunter, 104 F.C.C.2d 13663, 1364, 60 R.R.2d 1662 (Rev. Bd. 1986), quoting Alden Communications Corp., 59 R.R.2d 259 (Rev. Bd. 1985). Indeed, in one recent case the Commission held that an applicant which had reasonable assurance of its antenna site and then admittedly lost its site had not complied with the "due diligence" test when it attempted to file an amendment specifying a new site some eight months after the first site became unavailable. National Communications Industries, 6 FCC Rcd. 1978, 69 R.R.2d 51 (Rev. Bd. 1991). See also, Progressive Communications, Inc., 3 FCC Rcd. 5758, 65 R.R.2d 497 (Rev. Bd. 1988). Accordingly, regardless of whatever other defects affect Mims' proposed amendment, a substantial and material question has been raised concerning whether Mims had permission to use its specified site, and, therefore, whether it has acted with due diligence in finding another. Accordingly, its proffered amendment may not be accepted.

WHEREFORE, the premises considered, Central Florida Educational Foundation, Inc. hereby requests the Petition for Leave To Amend filed by Mims Community Radio, Inc., be denied, and its proffered amendment dismissed.

Respectfully submitted,

**CENTRAL FLORIDA EDUCATIONAL
FOUNDATION, INC.**

By:


Joseph E. Dunne III
Its Attorney

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July 9, 1992

ATTACHMENT A

ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC. (CFEF), applicant for a new noncommercial FM station on Channel 202C2 in Union Park, Florida (BPED-881207MA), in support of its Opposition to the amendment filed by Mims Community Radio, Inc. (Mims), an applicant for a new noncommercial FM station in Oak Hill, Florida.

In it's original application (BPED-891127MD), Mims specified operation on Channel 202C1 from a site within 10 miles of that proposed by CFEF. Those applications became mutually exclusive with other proposals for Channel 202 in the same area, and they all are designated for hearing under MM Docket No. 92-33. Mims has filed a Petition For Leave to Amend its application to now specify operation on Channel 204C3 from a new site, located 30 miles north of the CFEF site.

In the referenced amendment, an interference study was performed in support of Mims' assertion that it could be extricated from the Channel 202 proceeding since it proposed an operation which did not cause prohibited overlap between interfering and protected contours of its Channel 204C3 facility and the remaining Channel 202 facilities.

The interference study contains an error which ignores predicted interference which the Mims facility causes to the facility proposed by Southwest Florida Community Radio, Inc. (SFCR), in its amendment to its Application for Construction Permit (BPED-891127MC) filed on October 3, 1990. In that amendment, SFCR proposes to change its transmitter location to that of WCPX-TV, and operate with 1.9 kw (directional) at an

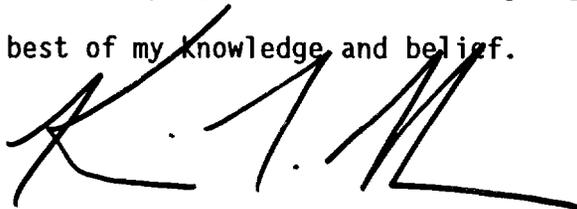
effective antenna height of 1463 feet above average terrain. In Exhibit E-6 of the Mims amendment, the SFCR facility analyzed was that first proposed in BPED-891127MC. Although for comparative coverage purposes the amended SFCR proposal cannot be considered, it remains a "cut-off" application, to which no new mutually exclusive applications can be filed.

The protected 60 dbu contour of the amended SFCR proposal is plotted on the attached map. Likewise, the interfering 80 dbu contour for the amended Mims proposal on Channel 204C3 is plotted thereon. Obviously, the Mims facility causes predicted interference to the amended SFCR facility.

Likewise, the Mims amendment is mutually exclusive with the facility proposed by Bible Broadcasting Network, Inc. (BBN). BBN filed an amendment to BPED-890412MJ on August 22, 1990, essentially specifying the same facilities as those of SFCR. Overlap of the amended Mims 80 dbu interfering contour with the protected 60 dbu contour of the amended BBN proposal is therefore similar to that shown on the attached map.

Since both the SFCR and BBN amendments have been accepted for filing by the FCC and have passed cut-off procedures, the mutually exclusive amendment filed by Mims should be dismissed as procedurally defective.

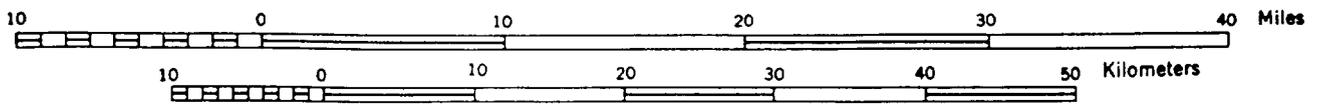
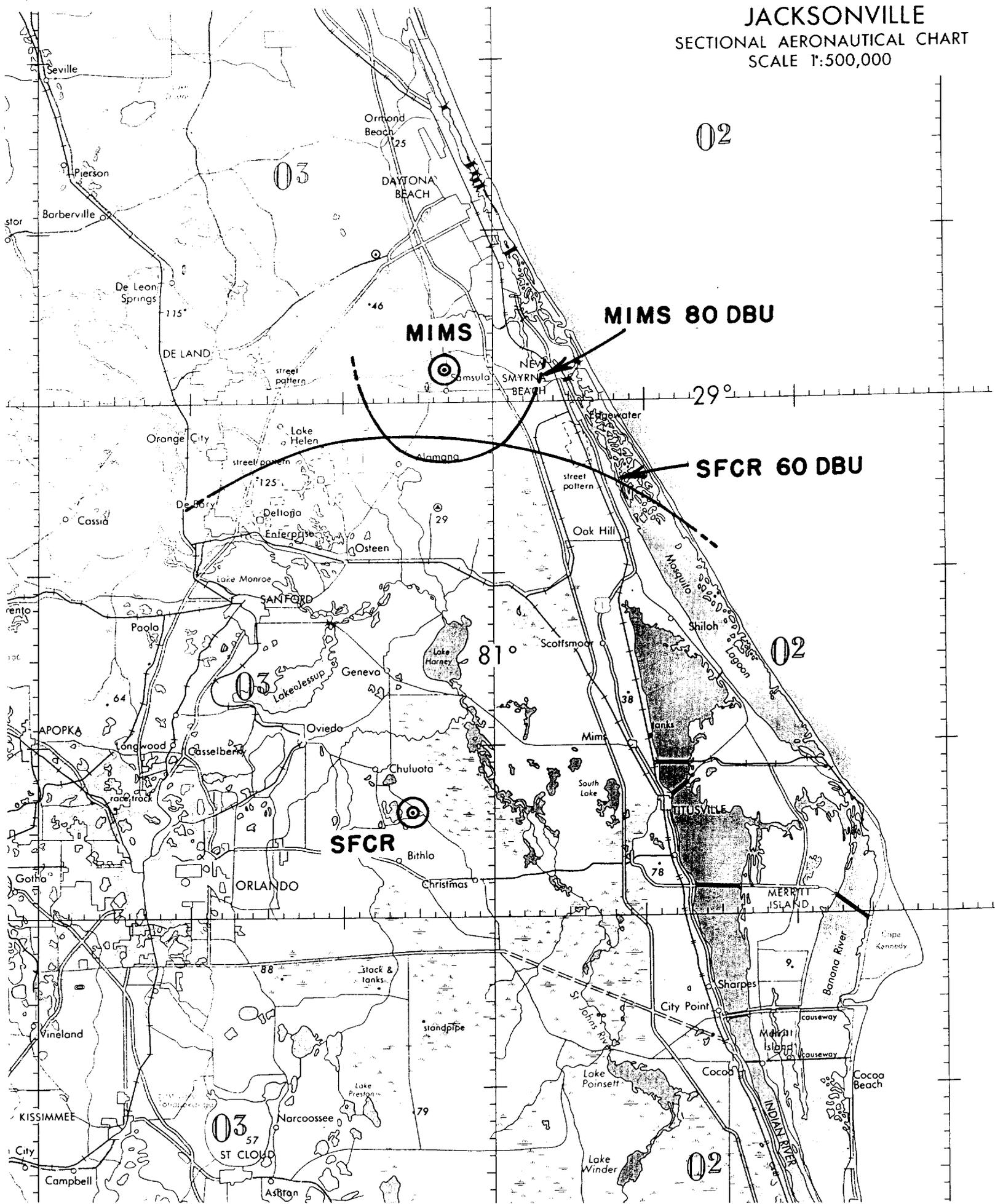
I declare, under penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge and belief.



KEVIN T. FISHER

July 8, 1992

JACKSONVILLE
SECTIONAL AERONAUTICAL CHART
SCALE 1:500,000



CERTIFICATE OF SERVICE

I, Glinda M. Corbin, a secretary in the law offices of May & Dunne, Chartered, hereby certify that I have caused to be hand delivered this 9th day of July 1992, a true and correct copy of the foregoing OPPOSITION TO PETITION FOR LEAVE TO AMEND to the following:

*The Honorable Edward J. Kuhlmann
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By: Glinda M. Corbin
Glinda M. Corbin

*via Telecopier