

APR 14 1993

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of	)	MM Docket No. <u>93-37</u>
)	
LEHIGH VALLEY COMMUNITY BROADCASTERS	)	FCC File No.
ASSOCIATION, INC.	)	BPED-891019MF
Allentown, Pennsylvania)	
)	
BEACON BROADCASTING CORPORATION	)	FCC File No.
Allentown, Pennsylvania	)	BPED-900905ML
)	
NORTHAMPTON COMMUNITY COLLEGE	)	FCC File No.
Bethlehem Township, Pennsylvania	)	BPED-900202MC
)	
For Construction Permit for a New)	
Noncommercial, Educational FM Station)	

To: Administrative Law Judge
Joseph Chackin

JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT

Lehigh Valley Community Broadcasters Association, Inc. ("Lehigh") and Beacon Broadcasting Corporation ("Beacon") (collectively the "Parties"), through their attorneys and pursuant to Section 73.3525 of the rules, hereby respectively request that the Presiding Officer approve the attached Settlement Agreement. The Settlement Agreement effectively resolves the mutual exclusivity of the Lehigh and Beacon applications in this proceeding.¹ In support thereof, the following is shown:

¹ The Parties previously filed appropriate amendments responsive to the Hearing Designation Order ("HDO") (DA 93-154, released March 9, 1993) in this proceeding. Simultaneously herewith, Lehigh is filing a motion for summary decision with respect to the financial issue designated in the HDO with respect to its application. The Parties respectfully request that the Presiding Officer act on all of these outstanding matters at the same time that he acts on the Joint Request.

No. of Copies rec'd
List A B C D E

Handwritten signature/initials

1. The Parties are mutually exclusive applicants for construction permits for a new noncommercial educational FM radio station on Channel 207A at Allentown, Pennsylvania. The application of Northampton Community College was dismissed in the Hearing Designation Order designating the Lehigh and Beacon applications for hearing

2. The Parties agree that the hearing proceedings are likely to be protracted, expensive and a burden upon the Commission's resources. Further, in order to facilitate the early implementation of service to the public and to assure implementation of two rather than one new noncommercial educational FM service, the Parties have entered into an agreement to resolve the mutual exclusivity between their applications.

3. The Parties have executed a Settlement Agreement, a copy of which is attached as Attachment A. The Settlement Agreement provides for Lehigh's amendment of its application to specify new technical facilities, including in particular Channel 201A. Lehigh's amendment will eliminate the electrical exclusivity between its application and Beacon's application. Work on Lehigh's amendment is in progress at this time. The Parties expect that the amendment and Lehigh's request for acceptance thereof will be tendered as a supplement to this Joint Motion within the next week.

4. In several comparable noncommercial educational hearing proceedings, the respective Presiding Officers have approved engineering amendments, including channel changes to

applications as part of joint settlements between or among applicants.² In Cabrini College, FCC 89M-2039, released August 8, 1989, the Presiding Officer granted channel change amendments by three competing applicants, even though prohibited contour overlap would occur between the applicants. In Yolo County Public Radio, FCC 90M-477, released March 9, 1990, the Presiding Officer granted Family Stations, Inc. leave to amend its application by specifying operation on a different channel, even though the amendment would create "donut interference". In Lakeshore Communications, Inc.

Section 1 of the Settlement Agreement, and that there be a stay issued by the Presiding Officer on all procedural dates, except for comments by the Mass Media Bureau on the Settlement Agreement, the amendments required with HDO and Lehigh's channel change amendment, including the comment period with respect to Lehigh's motion for summary decision. In addition, the Parties request that, upon acceptance of the amendment by Lehigh that will eliminate the mutual exclusivity of the current applications and review of other information requested pursuant to the HDO, Beacon's application be granted and Lehigh's application, as amended, be processed to grant through action on the summary judgment motion. Upon grant of Beacon's application, the stay may be lifted on procedural dates in connection with Lehigh's summary judgment motion.

6. Attachments C and D contain the required declarations from each party pursuant to Section 73.3525 of the rules stating: (1) the Settlement Agreement is in the public interest and that neither party filed its application for the purpose of reaching or carrying out a Settlement Agreement; (2) that neither the applicants nor any principals of the applicants will receive or has received any money or other consideration in excess of the legitimate and prudent expenses of the applicants; and (3) that the Settlement Agreement reflects the only consideration exchanged and to be exchanged by the Parties. The Settlement Agreement and related declarations comply in all respects with the Report and Order, Amendment of Section 73.3525 of the Commission's Rules

Regarding Settlement Agreements Among Applicants for Construction
Permits, 6 FCC Rcd. 2901 (1991).

WHEREFORE, for the foregoing reasons, the Parties
respectfully request approval of the attached Settlement Agreement.

Respectfully submitted,

LEHIGH VALLEY COMMUNITY BROADCASTERS
ASSOCIATION

By: Malcolm G. Stevenson
Malcolm G. Stevenson
Schwartz, Woods & Miller
1350 Connecticut Ave., NW, #300
Washington, D.C. 20036
(202) 833-1700

BEACON BROADCASTING CORPORATION

By: Jeffrey D. Southmayd
Jeffrey D. Southmayd
Southmayd & Miller
1233 - 20th Street, NW, #205
Washington, D.C. 20036
(202) 331-4100

ATTACHMENT A

Settlement Agreement

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into this 31st day of March, 1993 by and between Lehigh Valley Community Broadcasters Association, Inc., a Pennsylvania non-profit corporation ("Lehigh") and Beacon Broadcasting Corporation, a Pennsylvania non-profit corporation ("Beacon") (each a "Party" and collectively the "Parties").

WHEREAS, Lehigh has filed an application (FCC File No. BPED-891019MF) with the Federal Communications Commission ("FCC") for authority to construct a new noncommercial educational FM radio station on Channel 207A at Allentown, Pennsylvania; and

WHEREAS, Beacon has filed an application (FCC File No. BPED-900905ML) with the FCC for authority to construct a new non-commercial educational FM station on Channel 207A at Allentown, Pennsylvania; and

WHEREAS, the Lehigh and Beacon applications are mutually exclusive and have been designated for a comparative hearing in a Hearing Designation Order ("HDO") issued in MM Docket 93-37; and

WHEREAS, Lehigh and Beacon have agreed to resolve the mutual exclusivity between their applications through a plan which would permit uncontested grant of Beacon's application and Lehigh's application, as amended, subject to satisfaction of all of the terms and conditions of this Agreement and FCC approval thereof; and

WHEREAS, resolution of the mutual exclusivity between Lehigh and Beacon pursuant to this Settlement Agreement would

serve the public interest in conserving the resources of the FCC and the applicants, expediting the grant of both the Lehigh application, as amended, and the Beacon application, and permitting the implementation of two new local noncommercial educational radio services at Allentown, Pennsylvania;

NOW, THEREFORE, in consideration of the premises and the mutual obligations of the Parties set forth herein, and subject to the requirements of Section 73.3525 of the FCC's rules, the Parties agree as follows:

1. Technical Amendment. Just as soon as possible, and within ten (10) days of the execution date hereof, Lehigh will request acceptance and grant of an amendment to its pending application to specify new technical facilities, including the frequency 201A. Acceptance of this amendment will resolve the mutual exclusivity with Beacon's application for Channel 207A. Beacon agrees to pay Lehigh one-half of Lehigh's documented legitimate and prudent engineering costs, up to a total of \$2,000, associated with the preparation and filing of its amendment and any additional technical amendments or information in response to an FCC request for further information, clarification or modification of Lehigh's technical proposal, as amended. Payments under this provision shall be made within ten (10) days of the date on which grant of Beacon's application becomes final as defined in Section 7 hereof. It is further understood and agreed that Lehigh will not be required to accept FCC conditions in connection with its technical proposal, as amended, which would result in a predicted protected coverage area which is smaller than that proposed in Lehigh's current application.

2. FCC Approval. This Settlement Agreement is expressly conditioned upon and subject to the prior consent and approval of the FCC and upon grant of the Beacon application, acceptance of the Lehigh application, as amended and retention by both applicants of their current application file numbers and cut-off status upon and after the acceptance of any amendments. The Parties agree that they will provide all information reasonably necessary in order to obtain approval of this Settlement Agreement and grant of the joint request for approval thereof.

3. Joint Request. Within five (5) days after execution of this Settlement Agreement, the Parties will, at their own respective expense, prepare, execute and file with the Presiding Officer all declarations and/or other supporting documentation required by Section 73.3525 of the FCC's Rules, which are necessary to secure approval of this Settlement Agreement. Lehigh ~~will prepare the joint request for approval of this Settlement~~

4. Additional Acts and Documents. Both parties agree to take such additional acts and file such additional documents as may be necessary to secure approval of and perform their respective obligations under this Settlement Agreement. In particular, Beacon and Lehigh will each file amendments responsive to the requests set for clarification and/or additional information set forth in the HDO. In addition, it is understood that, simultaneous with the filing of the Settlement Agreement, Lehigh will file an appropriate request for favorable resolution through summary judgment of the financial issue designated in connection with its application. However, Lehigh agrees that, in order to preserve Beacon's right to oppose this summary judgment request, Lehigh will support an appropriate request for deferral of all procedural dates until after the Presiding Officer rules on the Joint Request so that, in the event that the Presiding Officer denies the Joint Request, Beacon shall retain its right to oppose Lehigh's summary judgment request.

5. Entire Agreement. This Settlement Agreement contains the entire understanding of the Parties with respect to the subject matter hereof, supersedes all prior understandings, agreements, negotiations, discussions and representations, written or oral, and may not be modified, extended or terminated except by an instrument in writing executed by the Parties.

6. Scope and Binding Effect. This Settlement Agreement shall be binding upon and shall inure to the benefit of the Parties, their heirs, successors and assigns. Each individual executing this Settlement Agreement warrants and represents that he has the authority to bind to this Settlement Agreement the

Party for whom he is signing. Each of the Parties represents that this Settlement Agreement is a legal, valid and binding obligation of the Party, enforceable in accordance with its terms, except as such enforcement may be limited by bankruptcy, insolvency, or similar laws affecting creditors' rights generally, or by court-applied equitable remedies.

7. Termination. Should the FCC or the Presiding Officer for any reason fail or refuse to grant Beacon's application by an order or orders which shall have become final (that is, granted by an order or orders which is not reversed, stayed, set aside, enjoined or suspended and with respect to which no requests for administrative or judicial review or stay are pending, and as to which the time for filing such a petition or appeal, or for the FCC to set aside its consent on its own motion, has expired) or accept Lehigh's amendment in accordance with the terms of this Agreement within twelve (12) months after the submission of the joint request, then this Agreement shall become null and void, and Lehigh and Beacon shall be free to resume prosecution of their respective applications before the FCC, unless the Parties agree in writing to continue to seek approval of their respective applications in accordance with this Agreement, except that this Agreement shall automatically be extended in the event that action and/or inaction by the FCC upon the joint request is the sole cause of the delay.

8. Notices. Any notices required to be given pursuant to this Settlement Agreement shall be in writing and shall be deemed to have been given if delivered personally by the Party to the Party to whom such notice is directed or, if mailed, sent

by certified mail, postage prepaid, to the following addresses:

Lehigh: Mr. Charles James
Lehigh Valley Community Broadcasters
Association, Inc.
P.O. Box 1456
Allentown, Pennsylvania 18105

Copy to: Malcolm G. Stevenson, Esquire
Schwartz, Woods & Miller
1350 Connecticut Avenue, NW, #300
Washington, D.C. 20036

Beacon: Dr. John Hentosh
401 North 17th Street
Allentown, PA 18104

Copy to: Jeffrey D. Southmayd, Esquire
Southmayd & Miller
1233 - 20th Street, NW, #205
Washington, D.C. 20036

9. Partial Invalidity. In the event that any provision of this Agreement shall be deemed invalid, such invalidity shall not affect the enforceability of any other provision of his Agreement, unless the invalidity would cause a material change in the rights or obligations of either Party, in which case the

~~Party or Parties affected may seek to amend the Settlement Agree-~~

11. Specific Performance. In the event of a breach of this Settlement Agreement by either party, then the non-breaching Party shall be entitled to secure specific performance of this Settlement Agreement, it being understood and agreed by the Parties that any legal remedy or remedies that otherwise might be available would not be adequate to cure or compensate for such breach of this Settlement Agreement.

12. Counterparts. This Settlement Agreement may be executed in counterparts, both of which together shall constitute the original.

13. Governing Law; Litigation Expense. The Parties agree that this Settlement Agreement shall be construed under the laws of the Commonwealth of Pennsylvania without reference to Pennsylvania's choice of law provisions. In any litigation arising out of this Settlement Agreement, the prevailing party shall have the right to recover from the other party its reasonable costs and expenses, including reasonable attorneys' fees.

IN WITNESS WHEREOF, the Parties have duly executed this Settlement Agreement as of the date first above written.

LEHIGH VALLEY COMMUNITY
BROADCASTERS ASSOCIATION, INC.

BEACON BROADCASTING
CORPORATION

By: Charles James

By: _____

Title: President

Title: _____

11. Specific Performance. In the event of a breach of this Settlement Agreement by either party, then the non-breaching Party shall be entitled to secure specific performance of this Settlement Agreement, it being understood and agreed by the Parties that any legal remedy or remedies that otherwise might be available would not be adequate to cure or compensate for such breach of this Settlement Agreement.

12. Counterparts. This Settlement Agreement may be executed in counterparts, both of which together shall constitute the original.

13. Governing Law; Litigation Expenses. The Parties agree that this Settlement Agreement shall be construed under the laws of the Commonwealth of Pennsylvania without reference to Pennsylvania's choice of law provisions. In any litigation arising out of this Settlement Agreement, the prevailing party shall have the right to recover from the other party its reasonable costs and expenses, including reasonable attorneys' fees.

IN WITNESS WHEREOF, the Parties have duly executed this Settlement Agreement as of the date first above written.

LEHIGH VALLEY COMMUNITY
BROADCASTERS ASSOCIATION, INC.

BEACON BROADCASTING
CORPORATION

By: _____

By: John P. [Signature]

Title: _____

Title: PRESIDENT

ATTACHMENT B

Courtesy Copies of Cases

FCC MAIL ROOM
DOCKET FILE COPY ORIGINAL

AUG 7 1989

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Signed By
Mailed By

FCC 89M-2039

In re Applications of	)	MM Docket No. 89-309	011236
)		
CABRINI COLLEGE	)	File No. BPED-860725MH	
Radnor Township, Pennsylvania)		
)		
VILLANOVA UNIVERSITY IN THE)		
STATE OF PENNSYLVANIA	)	File No. BPED-870402KA	
Villanova, Pennsylvania)		
)		
BUX-MONT EDUCATIONAL RADIO ASSOCIATION	)	File No. BPED-870514MN	
Sellersville, Pennsylvania)		
)		
TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA	)	File No. BPED-870515OE	
Philadelphia, Pennsylvania)		
)		
For a Construction Permit for a)		
Non-Commercial Educational FM station)		

MEMORANDUM OPINION AND ORDER

Issued: August 3, 1989; Released: August 7, 1989

1. Under consideration are the following: Petition for Leave to Amend, filed July 10, 1989, by Cabrini College ("Cabrini"); Petition for Leave to Amend, filed July 10, 1989, by Villanova University in the State of Pennsylvania ("Villanova"); Petition for Leave to Amend, filed July 10, 1989, by Bux-Mont Educational Radio Association ("Bux-Mont"); Joint Motion for Approval of Agreement, filed July 10, 1989, by Cabrini, Villanova, Bux-Mont and the Trustees of the University of Pennsylvania ("Penn"); Petition for Leave to Amend, filed July 24, 1989, by Villanova; Petition for Leave to Amend, filed July 25, 1989, by Bux-Mont; Petition for Leave to Amend and Amendment to Application, filed July 25, 1989, by Penn; and Comments on Joint Motion for Approval of Agreement, filed July 28, 1989, by Mass Media Bureau.

2. The joint agreement proposes that the applications of Cabrini, Villanova and Bux-Mont each be granted, subject to the acceptance of an amendment to each applicant's engineering proposal. An engineering amendment to each of these applications was filed simultaneously with the filing of the joint agreement. In addition, the joint agreement contemplates a grant of Penn's pending application with the result that the coverage area of Penn's existing station, WXPB, will expand.

3. The engineering amendments of Cabrini, Villanova and Bux-Mont propose a change in frequency. Cabrini and Villanova propose identical technical facilities. Cabrini and Villanova, which propose a shared-time operation, seek to amend their applications to propose operation on Channel 206A,

rather than Channel 203A. Bux-Mont seeks to amend its application to propose operation on Channel 205A, rather than Channel 204A. The applicants contend that a grant of these amendments will provide an aggregate of 2,259,284 people residing in an area of 5,188 square kilometers with the opportunity to receive new non-commercial FM service.

4. The engineering amendments will result in some contour overlap among the applicants. The applicants, therefore, request a waiver of Section 73.509 of the Commission's Rules which prohibits such overlap. The applicants note that the interference will not result in the loss of any present service to any listener. The applicants also note that the Penn proposal involves a relocation of WXPB's transmitter and a sharing with Station WPVI(TV), Philadelphia, of a diplexed antenna. This co-location and diplexing, they contend, will eliminate the interference between WXPB and WPVI(TV), thereby providing additional service to the public.

5. The Mass Media Bureau supports acceptance of the applicants' amendments and approval of the joint agreement and has offered the following comments. Here, the benefit of authorizing new and improved service outweighs the limited interference which will result. Significantly, none of the proposals will result in interference to a non-party to this proceeding, and each of the parties to this proceeding has agreed to accept interference as a condition of receiving a grant. Moreover, as noted by the applicants, no one currently receiving service will lose service as a result of acceptance of the applicants' amendments.

6. Additionally, it is noted that the parties have complied with Section 73.3525 of the Commission's Rules. The documents submitted include declarations from each of the parties asserting that their respective applications were not filed for the purpose of reaching or carrying out the joint settlement agreement. Approval of the agreement is in the public interest because it will eliminate the need for a hearing thereby conserving the resources of the non-commercial applicants and the Commission and further will expedite additional service to the public in the Philadelphia area.

7. In light of the foregoing, the engineering amendments will be accepted and a waiver of Section 73.509 will be granted. The joint agreement will be approved.

8. On July 24, 1989 and July 25, 1989, Villanova, Bux-Mont and Penn filed petitions for leave to amend their applications to provide information called for by the Hearing Designation Order ("HDO"). The Mass Media Bureau has reviewed these amendments and agrees with the applicants that they have met the HDO's requirements.

Accordingly, IT IS ORDERED that the Petitions for Leave to Amend, filed July 10, 1989, by Cabrini, Villanova and Bux-Mont ARE GRANTED, and the amendments ARE ACCEPTED.

IT IS FURTHER ORDERED that a waiver of Section 73.509 of the Commissions Rules IS GRANTED.

IT IS FURTHER ORDERED that the Petition for Leave to Amend, filed July 24, 1989, by Villanova, the Petition for Leave to Amend, filed July 25, 1989, by Bux-Mont and the Petition for Leave to Amend and Amendment to Application, filed July 25, 1989, by Penn ARE GRANTED, and the amendments ARE ACCEPTED.

IT IS FURTHER ORDERED that the Joint Motion for Approval of Agreement, filed July 10, 1989, by Cabrini, Villanova, Bux-Mont and Penn IS GRANTED and the joint agreement IS APPROVED, the application of the Trustees of the University of Pennsylvania IS GRANTED, the applications of Cabrini College, Villanova University in the State of Pennsylvania and Bux-Mont Educational Radio Association, as amended, ARE GRANTED and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

D. L. Smith

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 90M-477

In re Applications of	)	MM Docket No. 89-111	1900
)		
YOLO COUNTY PUBLIC RADIO	)	File No. BPED-851217MG	
West Sacramento, California)		
)		
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT	)	File No. BPED-860226MC	
Sacramento, California)		
)		
CALIFORNIA STATE UNIVERSITY, SACRAMENTO	)	File No. BPED-860613MA	
Sacramento, California)		
)		
FAMILY STATIONS, INC.	)	File No. BPED-861023MB	
Ione, California)		
)		
FAMILY STATIONS, INC.	)	File No. BPED-861023MF	
North Highlands, California)		
)		
For Construction Permit for a New)		
Non-Commercial Education FM Station)		

MEMORANDUM OPINION AND ORDER

Issued: March 7, 1990; Released: March 9, 1990

1. Under consideration are the following:

Joint Petition for Waiver of Section 73.509 of the Commission's Rules, filed December 22, 1989, by Family Stations, Inc. ("Family") and California State University, Sacramento ("University");

Petition for Leave to Amend, filed December 22, 1989 on behalf of Family Stations, Inc.;

Amendment by Family Stations, Inc. to Application BPED-861023MB, Ione, California, filed December 22, 1989;

Amendment by Family Stations, Inc. to Application BPED-861023MF, North Highlands, California, filed December 22, 1989;

Joint Request for Approval of Settlement Agreement, filed December 22, 1989, by the University, Sacramento City Unified School District ("School District"), Family, and Yolo County Public Radio ("Yolo");

Mass Media Bureau's ("Bureau") Opposition to Petition for Leave to Amend and Joint Petition for Waiver of Section 73.509 of the Commission's Rules, filed January 26, 1990;

Mass Media Bureau's Comments on Joint Request for Approval of Settlement Agreement, filed January 3, 1990; and

Joint Reply to Opposition of Mass Media Bureau, filed February 14, 1990, by California State University, Sacramento ("University") and Family Stations, Inc. ("Family").

2. The settlement agreement provides for the dismissal with prejudice of Yolo's application for a stated monetary consideration to be paid by the University and Family. Family has concurrently filed a petition for leave to amend both its North Highlands application (to eliminate the mutual exclusivity between that application and the School District) and its Ione application (to eliminate the mutual exclusivity between that application and the University). Family and the University have concurrently petitioned for a waiver of the adjacent channel signal strength overlap requirements of Section 73.509 of the Commission's rules. It is alleged that a grant of the waiver would resolve the mutual exclusivity between Family's amended North Highlands application and the University, thereby permitting a grant of both applications. Approval of the settlement agreement and grant of the filed Joint Petition for Waiver and Petition for Leave to Amend, will obviate the need for a protracted administrative proceeding and will result in the expeditious implementation of local non-commercial radio service to the residents of Sacramento, North Highlands and Ione, California. Service to North Highlands and Ione, California would be the first local FM radio service to each area.

3. The settlement agreement comports with the requirements of Section 73.3525 of the Commission's Rules. Specifically, the parties have all completed the declarations required by Section 73.3525 of the Commission's Rules. The settlement and declarations enumerate the public interest reasons for settlement and establish that Yolo, the sole dismissing applicant, did not file its application for the purpose of reaching or carrying out a settlement agreement.

4. Family proposes to amend its Ione application by specifying operation on Channel 201A in lieu of Channel 202A. Family also proposes to amend its North Highlands application by specifying a new transmitter site, reducing effective radiated power, and utilizing a directional antenna. The amendment to Family's North Highland's application will create a situation involving so-called "donut interference," in which the transmitter site for the undesired station is encompassed within the 60 dBu contour of the desired station. Specifically, the 80 dBu contour of Family's amended proposal for

Channel 207 at North Highlands will lie almost entirely within the 60 dBu contour of University's proposal on Channel 205B at Sacramento. According to Family and the University, the overlap area would encompass 96 square kilometers or approximately 2.4 percent of the total area within the University's 60 dBu contour. The population within the overlap area would be approximately 8,791 persons or 1.0 percent of the total population within the University's 60 dBu contour. There will be no overlap of the University's 80 dBu contour by Family's North Highlands amended 60 dBu contour. Existing FM stations will receive no interference. Family and the University further maintain that approval of the settlement agreement would allow the inauguration of four new non-commercial FM services in the Sacramento area serving in the aggregate more than 1.3 million persons. Additionally, these service gains will be effected, according to Family, without any loss of existing service.

5. The Bureau opposes the joint waiver request on the grounds that the movants present no extraordinary reasons to justify a waiver of the Commission policy of avoiding the creation of "donut interference." The Bureau distinguishes the authority cited by the movants, Applications of Cabrini College, MM Docket 89-309, (ALJ, August 7, 1989), stating that the Cabrini case involved the provision of new services to more than 2.2 million persons in the highly congested northeast corridor (about twice the amount herein). Further, the Bureau states that there has been no demonstration that the parties are so deadlocked in their proposals that a resolution consistent with the Commission's rules and policies cannot be worked out. It is for these reasons the Bureau believes that the settlement agreement is inconsistent with the public interest.

6. As noted in the joint petition, in Cabrini, the Bureau supported a waiver of Section 73.509 of the Rules because the resulting "donut" interference would not cause loss of any present service and would enhance TV Channel 6 protection through co-location of the antennas of WXPN(FM) and WPVI(TV). Similarly, in the instant case, there would also be no loss of any present service (only new service is involved) and co-location of the antennas of the University and KVIE-TV will enhance TV Channel 6 protection for the public. Moreover, as is set forth in the supporting Engineering Statement (Attachment C) of John Kean, the non-commercial FM frequency spectrum in the Sacramento area will be fully saturated with the grant of the applications of the University, Family and Sacramento City Unified School District; because of TV Channel 6 protection requirements (Section 73.525) and the prohibited overlap requirements of Section 73.509 of the Rules, future new service is unlikely in the event a waiver of Section 73.509 is denied.

7. The joint petitioners point out that the dissimilarities between Cabrini and the instant situation also support a waiver of Section 73.509 of the Commission's Rules. In Cabrini, Station WXPN proposed an upgrade of facilities, i.e., change in frequency from Channel 205A to Channel 203B and a modification in facilities from 1.90 kW effective radiated power (ERP) at 85 meters height above average terrain (HAAT) to 3.1 kW at 332 meters HAAT. Also, the transmitter site of both a proposed Sellersville, Pennsylvania station (Channel 205A) and a proposed Radnor Township/Villanova, Pennsylvania station (206A) were wholly encompassed by the 60 dBu contour of WXPN's proposed facilities. Joint petitioners then maintain that there were two instances of "donut" interference

to WXPB whereas in the instant case there is only one instance of "donut" interference to the University. Moreover, it is claimed that WXPB proposed an upgrade in facilities and could have avoided "donut" interference by using a directional antenna or a reduction in power, options which are not really available to the University.

8. Joint petitioners also state that Cabrini also required an additional waiver of Section 73.509 of the Rules to permit co-channel interference between Station WWFM (Channel 206A), Trenton, New Jersey and the proposed operation of the Radnor Township/Villanova station on Channel 206A. The instant case does not appear to involve any adjacent or co-channel interference which, can result in an interference area where service is lost to both stations rather than merely to one station as is the case here.

9. The joint petitioners also argue that in order to avoid "donut" interference, there are arguably two possible options. First, the University could reduce its 60 dBu contour through use of a directional antenna or a reduction in effective radiated power so that Family's North Highlands transmitter would be located beyond the University's 60 dBu contour. Secondly, Family could locate its proposed North Highlands transmitter so that it is outside of the University's protected 60 dBu contour. The Engineering Statement notes that either option would result in an overall reduction in service to the public vis a vis granting a waiver of the "donut" interference policy. As a hypothetical, if the University were to avoid "donut" interference by contracting its service area to conform with the contour overlap requirements of Section 73.509 of the Rules, this would result in a reduction of the currently proposed interference free contours of the University from 3,823 square kilometers and 841,198 people to 2,280 square kilometers and 546,624 people -- a difference of 1,543 square kilometers and 294,574 people or a 42 percent reduction in area and a 35 percent reduction in people. This contrasts unfavorably with the currently proposed "donut" interference area of the University, comprising only 96 square kilometers and 8,791 people or 2.4 percent of its proposed service area and 1.0 percent of the proposed population, which would not receive new service due to interference received from Family's proposed North Highlands station.

10. On the other hand, the hypothetical relocation of Family's North Highlands transmitter site beyond the University's 60 dBu contour and in conformance with the contour overlap requirements of Section 73.509 of the Rules would result in a reduction in population served from the current 325,377 persons to 103,958 persons -- a reduction of 221,419 persons or 25 times the number of people within the current overlap area for which a waiver is requested.

11. Lastly, the joint petitioners note that the applicants in this proceeding have been attempting to resolve this mutually exclusive situation since April 14, 1988 when they were directed by the FM Branch to explore options which would avoid a comparative proceeding. For the better part of two years, the applicants have acted diligently and in good faith to resolve application conflicts, avoid a protracted and expensive comparative proceeding and initiate new service to the public. It is maintained that the proposed settlement,

related amendments and waiver request represent the best efforts of the applicants and comport with the public interest and are deserving of the Bureau's support.

12. In light of the foregoing, it is concluded that good cause exists for and that public interest would best be served by the grant of the submitted petitions.

Accordingly, IT IS ORDERED that the Joint Petition for Waiver of Section 73.509 of the Commission's Rules, filed December 22, 1989, by Family Stations, Inc. and California State University, Sacramento; IS GRANTED, the Petition for Leave to Amend, filed December 22, 1989 on behalf of Family Stations, Inc.; the Amendment by Family Stations, Inc., Ione, California, filed December 22, 1989; and the Amendment by Family Stations, Inc., North Highlands, California, filed December 22, 1989 ARE GRANTED and the amendments ARE ACCEPTED.

IT IS FURTHER ORDERED that the application of Yolo County Public Radio (File No. BPED-851217MG) IS DISMISSED with prejudice; the Joint Request for Approval of Settlement Agreement, filed December 22, 1989 IS GRANTED; the Agreement IS APPROVED; the applications of Sacramento City Unified School District (File No. BPED-860226MC), California State University, Sacramento (File No. BPED-860613MA), Family Stations, Inc., Ione, California, (File No. BPED-861023MB), as amended, Family Stations, Inc., North Highlands, California (BPED-861023MF) as amended, ARE GRANTED; and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



John M. Frysia
Administrative Law Judge

DOCKET FILE COPY
DUPLICATE

FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION

FCC 91R-1428
4041

APR 25 10 02 AM '91
Washington, D.C. 20554

In re Applications of	)	MM DOCKET NO. 90-606 ✓
LAKESHORE COMMUNICATIONS, INC.	)	File No. BPED-880406MK
Channel 203)	
Green Bay, Wisconsin)	
CATHOLIC DIOCESE OF GREEN BAY	)	File No. BPED-880303MB
WISCONSIN)	
Channel 201C)	
Green Bay, Wisconsin)	
For Construction Permit for a)	
Non-Commercial Educational)	
FM Station)	
EVANGEL MINISTRIES, INC.	)	File No. BPED-890224MA
Milladore, Wisconsin)	
For Modification of Facilities of)	
Station WGNV(FM))	
Channel 203C1)	
Milladore, Wisconsin)	

MEMORANDUM OPINION AND ORDER

Issued: April 22, 1991

Released: April 24, 1991

1. Evangel Ministries, Inc. (Evangel), Lakeshore Communications, Inc. (Lakeshore), and Catholic Diocese of Green Bay (Catholic) have submitted a settlement package for ruling. It consists of (1) a Joint Request for Approval of Settlement Agreement filed April 3, 1991; (2) a Supplement to that Request filed by Catholic on April 16, 1991; (3) a Petition for Leave to Amend that Lakeshore filed on April 4, 1991; and (4) a Supplement to Petition For Leave to Amend that Lakeshore filed on April 16, 1991.

2. The Mass Media Bureau filed " ... Consolidated Comments on Joint Request for Approval of Settlement Agreement and Petition For Leave to Amend" on April 17, 1991.

Lakeshore's Petition For Leave to Amend

3. The Trial Judge must rule on Lakeshore's April 4, 1991 amendment request first. That request is a condition precedent to considering the April

3, 1991 joint request since the Lakeshore application submitted under the Settlement Agreement is the Lakeshore application as amended.

4. Lakeshore proffers an engineering amendment that will remove the mutual exclusivity among the three applications, and permit all three to be granted.

5. Lakeshore proposes to:

- (a) Change frequency from Channel 203 (88.5 MHz) to Channel 211 (90.1 MHz);
- (b) Increase the station's effective radiated power from 3 Kw to 6 Kw;
- (c) Relocate the transmitting antenna;
- (d) Decrease the height of the Antenna Radiation Center above average terrain (HAAT) and mean sea level (MSL);
- (e) Increase the height of the Antenna Radiation Center above ground level (AGL); and
- (f) Decrease the elevation on the top of the antenna supporting structure (including antenna, all other appurtenance and lighting) above ground level (AGL) and mean sea level (MSL).

6. The Mass Media Bureau says Lakeshore's engineering proffer complies with the Commission's technical rules; that good cause has been demonstrated for amending; and " ... that the Presiding Judge has jurisdiction to grant Lakeshore's request to amend from Channel 203 to 211" and the grant the amended application.¹

¹ Thus the Bureau takes the position that 47 CFR 73.3522(c) doesn't apply to this postdesignation amendment. That subsection provides:

"Notwithstanding the provisions of paragraph (b) of this section, and subject to compliance with the provisions of §73.3525, a petition for leave to amend may be granted, provided it is requested that the application as amended may be removed from the hearing docket and returned to the processing line. See §73.3571."