

FIS MAIL SECTION

Federal Communications Commission

Aug 15 11 45 AM '97

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 97M-138
71663

In re Applications of)	MM DOCKET NO. 97-79
)	
PATAPHYSICAL BROADCASTING FOUNDATION)	File No. BPED-940316MB
Channel 219B)	
San Ardo, California)	
)	
CENTRAL COAST EDUCATIONAL)	File No. BPED-940606MB
BROADCASTERS)	
Channel 217A)	
King City, California)	
)	
For Construction Permit for a New Noncommercial)	
Educational FM Station)	

MEMORANDUM AND ORDER

Issued: August 11, 1997 ; Released: August 12, 1997

1. Under consideration are the following:

Joint Request for Approval of Settlement Agreement and Motion for Leave to Amend and Amendment, filed July 16, 1997, by Pataphysical Broadcasting Foundation ("Pataphysical") and Central Coast Educational Broadcasters ("Central"); and

Consolidated Comments on Joint Request for Approval of Settlement Agreement and Petition for Leave to Amend, filed July 28, 1997, by the Mass Media Bureau ("Bureau").

2. The settlement agreement contemplates the grant of the Pataphysical application as originally filed and the grant of the Central application as amended. Pataphysical and Central state that approval of the settlement agreement will serve the public interest by hastening the inauguration of new noncommercial educational FM services in San Ardo and King City. Both applicants also declare, under penalty of perjury, that neither has been paid or promised any consideration by the other, whether directly or indirectly, and that neither application was filed for the purpose of reaching or carrying out a settlement. The agreement is contingent upon acceptance and grant of Central's amendment as well as grant of requested waivers of Sections 73.509 and 73.3522(b) of the Commission's Rules.

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3. The Joint Request satisfies the requirements of Section 73.3525 of the Commission's Rules, which implements Section 311(c)(3) of the Communications Act of 1934, as amended. Specifically, the applicants have timely filed a copy of the settlement agreement, and, except as specified with respect to the proposed amendment to Central's application, they have established that approval of the agreement is in the public interest and that neither application was filed for an improper purpose.

4. Central proposes to amend its application by moving its tower and transmitter. The reason for the move is to reduce the number of persons affected by "donut interference" resulting from the complete overlap of Central's 80 dBu contour by Pataphysical's 60 dBu contour. As originally filed, the applications would result in an overlap covering 17.91 square kilometers affecting 7,634 persons. While grant of Central's amendment would result in a larger overlap area, namely 45.63 square kilometers (or .54 percent of Pataphysical's 60 dBu contour), only 11 households would be affected. Pataphysical and Central contend that, although grant of their applications will still result in some objectionable interference to both, the overlap is de minimis, and both state that they will accept the proposed overlap as a condition of receiving a grant. Further, the applicants contend that their proposals will not result in interference to a non-party and that the overlap will not result in a loss of any present service. In light of the foregoing, the applicants request waiver of Section 73.509 of the Commission's Rules. Finally, Central and Pataphysical jointly request waiver of Section 73.3522(b) of the Rules to facilitate the acceptance, processing, and grant of Central's amendment. In this regard, Central argues that good cause exists to accept its amendment because acceptance will permit the prompt authorization of two new noncommercial educational services and will avoid the expense and delay of a hearing.

5. Central acknowledges in its application that its proposed tower move will result in a 60 dBu contour that is 63.5 percent different from the area presently proposed. Central contends that, nevertheless, its amended application should not be returned to the processing line, citing Yolo County Public Radio, FCC 90M-477, released March 9, 1990.

6. The Bureau's engineering staff has analyzed the proffered amendment and has determined that waiver of Section 73.509 is appropriate. In pertinent part, Section 73.509 provides that an application for a new noncommercial FM station will not be accepted if the proposed operation would result in overlap of specified signal strength contours. Such a prohibited overlap is proposed here. However, the Commission has granted waivers in second adjacent channel overlap situations such as this one where the benefit of increased service heavily outweighs the potential for interference in very small areas. See Educational Information Corporation, 6 FCC Rcd. 2207, 2208 (1992). See also, Saddleback Community College, 4 Communications Reg. (P & F) 1156 (1996). Considering the size of the overlap, the number of persons affected, and the acceptance of potential interference by both applicants, the Bureau concurs that grant of a waiver of Section 73.509 is appropriate. With that waiver, acceptance of

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Central's amendment will eliminate the mutual exclusivity between the applicants, ultimately permitting the grant of both applications.

7. Although Central's amendment can be accepted, its application cannot now be granted. In this regard, the Bureau notes that Central has not yet furnished a determination of no hazard for its amended facilities from the Federal Aviation Administration. In addition, Central has not yet registered the tower at its amended site with the Support Services Branch of the Customer Service Division of the Commission's Wireless Telecommunications Bureau as required by Section 17.4 of the Commission's Rules. Thus, before Central's application can be granted, it must furnish a determination of no air hazard for its amended facilities from the Federal Aviation Administration, and it must register its proposed tower with the Support Services Branch of the Wireless Telecommunications Bureau's Customer Service Division.

8. Central's amended application must be returned to the processing line before it can be granted. Section 73.3606(b)(3) of the Rules state:

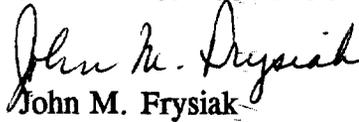
In any case where a conflict between applications will be removed by an agreement for an engineering amendment to an application, the amended application shall be removed from hearing status upon final approval of the agreement and acceptance of the amendment.

Here, the applicants propose a settlement to remove a conflict by amending Central's engineering. According to the rule, Central's amended application should be removed from hearing status upon final approval and acceptance of the amendment. In Santa Monica Community College District, 11 FCC Rcd 1123 (1996), the Commission waived the rule in order to retain in hearing status an application that had been amended in order to remove a conflict with another application. In so doing, however, the Commission suggested that the past practice of retaining the amended application in hearing status notwithstanding the plain wording of the rule may be inappropriate. In this regard, the Commission noted that, because the amending applicant had been the first to express an interest in the channel, equitable considerations dictated that the amending applicant not be exposed to an additional challenge. In this case, Central was the first applicant to file for Channel 217 but the second applicant to file in the area to be served by Pataphysical. Consequently, absent waiver of Section 73.3605(b) of the Commission's Rules, upon acceptance of Central's amendment, its application will be removed from hearing status and returned to the Audio Services Division for the establishment of an appropriate opportunity for the filing of petitions to deny.

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Accordingly, IT IS ORDERED that the Joint Request for Approval of Settlement Agreement, filed July 16, 1997, IS GRANTED, the Settlement Agreement IS APPROVED; the application of Pataphysical IS GRANTED; the Motion to Amend and Amendment, filed July 16, 1997 by Central IS GRANTED, and the Amendment IS ACCEPTED; Central's application IS RETURNED to the Audio Services Bureau; and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



John M. Frysiak
Administrative Law Judge