

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

Application of

WKLX, INC.

No. BLH-880506KB

For License to Cover Construction
Permit for WKLX(FM), Rochester
New York

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1991; Released: January 14, 1991

By the Commission:

1. The Commission has under consideration: (1) a "Petition for Reconsideration of Grant of License to WKLX(FM)" ("Petition"), filed on December 16, 1988, by Stoner Broadcasting System, Inc. ("Stoner"), licensee of WCMF(FM), Rochester, New York, against the November 7, 1988 grant of the license application for WKLX(FM), Rochester, New York, filed by WKLX, Inc. ("WKLX"), licensee of WKLX(FM); and (2) responsive pleadings.¹

2. Stoner claims that objectionable interference is being caused to WCMF(FM) by the operation of WKLX(FM) in implementing program test authority ("PTA") under BMPH-880314IG (granted April 11, 1988). Specifically, Stoner claims that WCMF(FM) has been receiving interference as a result of Receiver Induced Third Order Intermodulation Effect ("RITOIE") since WKLX(FM)'s move to a new transmitter site pursuant to BMPH-880314IG.² On this basis, Stoner filed, on September 9, 1988, an "Informal Objection" to WKLX's September 1, 1988 letter in which WKLX requested that it be granted standard PTA and that its pending Form 302 license application be granted.³ Stoner objected to the grant on the grounds that: (1) contrary to the claims of WKLX(FM), WCMF(FM) continues to suffer interference as a result of WKLX(FM)'s recent site move; (2) nothing has been done about complaints involving mobile receivers; and (3) many of the "fixes" are likely to be undone by listeners if they want to receive stations other than WCMF(FM). In response, by letter dated September 29, 1989, WKLX stated that it had clearly documented that WKLX has resolved "every verified complaint . . . it received about reception on non-mobile radios of WCMF's signal." In a letter dated November 7, 1988, the Chief, Audio Services Division, Mass Media Bureau ("Bureau"), found that while WKLX(FM)'s move to its new site had initially resulted in RITOIE-based service disruptions, its efforts to resolve the problem were sufficient to fully discharge its responsibility in this matter. In so ruling, the Bureau upheld WKLX's exclusion of mobile and battery-powered receivers from the scope of its RITOIE resolution efforts. Accordingly, the Bureau granted WKLX's license application and denied Stoner's September 9, 1988 Informal Objection, finding that Stoner had failed to state a claim on which relief can be granted.

3. Stoner requests reconsideration of the grant of the license on the grounds that: (1) WKLX made a material misrepresentation in its application by claiming that no receiver-induced intermodulation interference would result from the proposed move; (2) the grant of WKLX(FM)'s license constitutes a modification of WCMF(FM)'s license without notice and opportunity to be heard in violation of Section 316 of the Communications Act; (3) the Bureau erred in finding that WKLX's interference resolution efforts were sufficient to fully discharge its responsibility in this matter; and (4) the Bureau's decision to exclude mobile and battery-powered receivers from the scope of RITOIE resolution violates Commission precedent and lacks the reasoned decision making required by the Administrative Procedure Act. Stoner further requests that the Commission: (1) designate the WKLX(FM) license for hearing on the misrepresentation issue and to determine whether the modification of the WCMF(FM) license would be in the public interest; and (2) in the meantime, suspend program test authority for WKLX(FM) and compel it to return to its former transmitter site or, at a minimum, bear the cost of remedying all aspects of the interference.

4. In its opposition, WKLX argues that Stoner's Petition should be dismissed or denied as procedurally defective under Section 1.106 of the Rules, or as moot because Stoner filed an application (BPH-881209ID) to relocate its transmitter to the WKLX(FM) site to eliminate the RITOIE. Alternatively, WKLX contends that Stoner's Petition should be denied for lack of substantive merit on the grounds that: (1) WKLX's applications and amendments contain no misrepresentations or lack of candor; (2) WKLX(FM)'s grant does not modify Stoner's license in violation of Section 316 of the Communications Act; (3) WKLX's complaint resolution program fully discharges its interference resolution responsibility; and (4) WKLX is not required to resolve mobile or battery-powered receiver complaints. WKLX also requests that, pursuant to Section 1.106(a)(1) of the Commission's Rules, Stoner's Petition be referred to the Commission and treated as an application for review of the Bureau's letter instead of as a petition for reconsideration.

5. In its reply, Stoner: (1) contends that its Petition is procedurally proper, and is not moot because it has requested the withdrawal of its relocation application;⁴ and (2) reiterates the four arguments it advanced in its Petition.

6. *Procedural Issue.* WKLX has requested that Stoner's Petition be treated as an application for review and referred to the Commission. Treating the Petition in this manner should assist in expeditiously resolving the matters at issue in this proceeding and the Petition will accordingly be treated as an application for review. As such, and notwithstanding the procedural concerns raised by WKLX referenced in paragraph 4 above, we find it to be procedurally acceptable under Section 1.115 of the Rules.

7. *License Modification.* Stoner argues that WCMF(FM)'s license was modified without notice and opportunity to be heard in violation of Section 316 of the Communications Act, which provides that a license "modification" shall not become final until the licensee is notified in writing and given a reasonable opportunity to protest. 47 U.S.C. § 316(a)(1). Specifically, Stoner contends that the grant of the WKLX(FM) license constitutes an "indirect modification" of WCMF(FM)'s license which

presents a "substantial and material question of fact" requiring a hearing under Section 316. 47 U.S.C. §§ 316(a)(3) and 309(d)(2). Stoner claims this indirect license modification is caused by the RITOIE that results from the interaction of the operating frequencies of newly collocated WKLX(FM) and WRMM(FM), which generates within many receivers a signal on the same frequency as WCMF(FM) and results in WCMF(FM)'s signal not being receivable on many receivers within its protected service contour.

8. In response, WKLX argues that RITOIE is not the type of interference cognizable as a matter of law or fact under Section 316 as an indirect license modification, because implicit in the Section 316 license modification concept is: (1) a permanent loss of radio service which listeners are accustomed to receiving; and (2) which is directly caused by another licensed broadcast facility, citing in support *Pike - Mo Broadcasting Co.*, 2 FCC 2d 207, 208-09 (1965). WKLX claims that Stoner has not met this evidentiary standard because RITOIE is both receiver-generated and receiver-specific and thus, as a technical engineering matter, is neither: (1) a persistent or consistent interference problem; nor (2) "WKLX-caused." Additionally, WKLX argues that there does not now exist a consistent or persistent interference problem amounting to a permanent loss of radio service because all verifiable non-mobile service disruption complaints have been resolved.

9. Stoner counters that the two-part test laid out by WKLX is met in this case because: (1) listeners previously accustomed to receiving WCMF(FM) have now permanently lost that service; and (2) notwithstanding the fact that receiver-induced interference is generated in the receiver and is receiver-specific, it is still caused by WKLX(FM) because "but for WKLX's operation at its new transmitter site, the receiver induced interference would not exist."

10. We have examined the arguments and find that Stoner is not entitled to a hearing under Section 316. Disruption of service created as the result of the transmission of undesired signals, where not dependent upon receiver characteristics, may create a Section 316 right if uncorrected. See, e.g., *Western Broadcasting Co. v. FCC*, 674 F.2d 44 (D.C. Cir. 1982); *FCC v. National Broadcasting Company (KOA)*, 319 U.S. 239 (1943); and *Pike - Mo, supra*. In the case of RITOIE, the transmitted signals fully comply with all of our emission standards and requirements but nonetheless, because of the particular characteristics of certain receivers, result in service disruption within those receivers, and not others. We do not believe that service disruption to particular receivers because of their particular characteristics establishes a *prima facie* case of license modification.⁵ However, where such reception problems occur after a station begins operation, the Commission may find it in the public interest to require resolution of individual complaints. In the present case, the applicant has taken appropriate measures. As the Bureau stated in its November 7, 1988 letter: (1) WKLX's technical and educational efforts are sufficient to "fully discharge" its responsibility in this matter; and (2) Stoner "submitted no supporting documentation" with its September 9, 1988 Informal Objection demonstrating the existence of any new unresolved non-mobile service disruption complaints.

11. *Service Disruption: Non - Mobile Receivers.* Stoner claims that under the Commission's longstanding "newcomer" policy, WKLX is required to eliminate objectionable interference to existing licensees such as WCMF(FM), citing in support *Midnight Sun Broadcasting Co. v. FCC*, 11 FCC 1119 (1947) and *Sudbrink Broadcasting of Georgia, Inc. v. FCC*, 65 FCC 2d 691 (1977). Stoner argues that the Bureau erred in ruling that WKLX's efforts were "sufficient to fully discharge" its responsibilities in this matter because "WKLX should be responsible for a solution that eliminates the interference, not just addresses some reported cases of it." Stoner contends that in order to eliminate the RITOIE disruption the Commission should: (1) deny WKLX(FM)'s license application and require it to return to its old site; or (2) permit WCMF(FM) to relocate its facilities to the same tower from which WKLX(FM) transmits⁶; and (3) require WKLX to be fully responsible, financially and otherwise, for effectuating either of these two solutions.

12. WKLX counters that while *Midnight Sun* and *Sudbrink* require elimination of objectionable interference, they do not: (1) require WKLX to resolve the interference beyond addressing the reported cases; or (2) impose any moral or financial responsibility to undertake and pay for a solution that permanently eliminates the interference. WKLX asserts that *Midnight Sun* "holds only that the 'newcomer' station would be obligated 'to satisfy any complaints of interaction [interference],'" 11 FCC at 1120 (emphasis added); and that *Sudbrink*, while recognizing a station's financial responsibility to resolve interaction between transmitting facilities, also emphasizes that it is appropriate for the paying licensee "to assure that excessive and needless costs are not being incurred," 65 FCC 2d at 693. WKLX claims that since it satisfied the interference complaints in compliance with *Midnight Sun*, thereby eliminating any cognizable interference problem, Stoner's desire to effect a permanent solution by relocating its transmitter is the "very kind of 'excessive and needless costs' that *Sudbrink* holds are voluntary." Thus, WKLX argues that the Bureau was correct in deciding that WKLX had "fully discharge[d]" its interference resolution responsibilities by addressing individual complaints and that WKLX thus would not be held financially responsible for any further actions WCMF(FM) might wish to take.

13. In reply, Stoner contends that WKLX's efforts have not discharged its responsibilities,⁷ and states that while *Sudbrink* permits the reimbursing station's engineers "to participate to the extent necessary to assure that excessive and needless costs are not being incurred" in the elimination of the interference, 65 FCC 2d at 693, this "has never been held to require only a second-rate solution."

14. The Commission has consistently found it to be in the public interest to require a "newcomer" to make reasonable efforts to alleviate RITOIE-based service disruptions to reception of an existing FM licensee where actual listener complaints have been received. Further, it has also been established policy to permit RITOIE resolution on a "complaint-by-complaint" basis and, consistent with *Sudbrink*, at minimum cost to the paying licensee. See, e.g., *Letter to Bible Broadcasting Network, Inc. and WCMS Radio Norfolk, Inc.*, reference 8920-DEB/GRM (Chief, FM Branch, April 11, 1986). In accordance with these policies, WKLX was ordered to resolve the RITOIE complaints. Subsequently, WKLX submitted documented reports detailing the corrective action taken and, in a

letter dated September 29, 1988, stated that it had resolved "every verified complaint" it had received about reception of WCMF(FM)'s signal on non-mobile radios. By letter dated November 7, 1988, the Bureau: (1) accepted this showing; (2) found that WKLX's efforts were sufficient to fully discharge its responsibility in this matter; and (3) held that WKLX would thus not be held financially responsible for any further action WCMF(FM) might wish to take. Upon review of Stoner's Petition, we find no reason to modify this decision. Accordingly, we affirm that WKLX has satisfactorily cured the service disruption to WCMF(FM)'s signal with respect to non-mobile receivers.

15. *Service Disruption: Mobile and Battery - Powered Receivers.* Stoner contends that the Bureau erred in excluding mobile and battery-powered receivers from the scope of the complaints WKLX was required to address under its RITOIE resolution program. Stoner alleges that the Bureau's exclusion of mobile receivers, by relying on a Commission ruling excluding mobile receivers from consideration when dealing with FM blanketing interference, is erroneous because RITOIE and blanketing are significantly different and thus should not be treated similarly, a fact Stoner claims the Commission itself acknowledged when it declined to address RITOIE in the blanketing interference Rule Making. See *FM Broadcast Station Blanketing Interference ("FM Blanketing")*, 57 RR 2d 126, 130 (1984). Stoner claims this incorrect application of the policy in *FM Blanketing* violates the duty imposed by the Administrative Procedure Act (APA) to proceed with reasoned decisions supported by substantial evidence and to explain fully all departures from earlier rules. Stoner also contends that the Bureau erred in accepting, without stating any reasoned basis therefor, WKLX's assertion that battery-powered receivers fall within the definition of mobile receivers. Stoner claims that mobile receivers are those "contained in a vehicle" and that the inclusion of battery-powered receivers in this category is without precedent.

16. WKLX contends that the Bureau's explanation of its decision to exclude mobile and battery-powered receivers from the scope of WKLX's interference resolution responsibility fully meets the requirements of the APA and Commission precedent. In support, WKLX argues that: (1) neither exclusion constitutes a new policy decision; (2) the Bureau's reliance on *FM Blanketing* to exclude mobile receivers from RITOIE consideration is justified; (3) it has been the Bureau's past practice to exclude mobile receivers in RITOIE cases; and (4) battery-powered receivers are as mobile and transient as car radios and thus warrant similar treatment. Nonetheless, WKLX notes that it has voluntarily undertaken to rectify interference problems of home portable radios where their locations are reasonably constant.

17. We have reviewed the matter and find that the decision to exclude mobile and battery-powered receivers from the scope of RITOIE resolution is not a departure from precedent and is not in violation of the APA. It has been past Commission policy to exclude mobile receivers from consideration with respect to blanketing interference. See *FM Blanketing* at 130, para. 25. The Bureau's reliance on the principles set forth in *FM Blanketing* in support of its decision in this case regarding RITOIE is justified. The Commission decided not to include RITOIE under the scope of the blanketing Rule Making because it was not within the definition of blanketing interference in

the *Notice of Proposed Rule Making* in that proceeding.⁸ See *FM Blanketing* at 130, para. 29. The Commission defined blanketing as interference that occurs when "an FM station's signal strength or signal power density is of such magnitude that it causes receivers near the transmitting antenna to be partially or completely blocked from receiving other broadcast stations." *Notice* at para. 2; *FM Blanketing* at 126, para. 2. In contrast, RITOIE occurs when the signals of two stations interact within a receiver to generate a third signal which disrupts the reception of any station operating on the same frequency as the receiver-generated signal. In other words, RITOIE "is similar in its effects to blanketing but different in origin." *FM Blanketing* at 127, para. 7. Given this difference in origin, the Commission's decision not to include RITOIE under the scope of the blanketing Rule Making was an acknowledgment only that notice had not been given with regard to RITOIE. It did not, however, preclude similar treatment of RITOIE where similar treatment is warranted.⁹ The Commission has the discretion to proceed by adjudication rather than Rule Making here, see *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and nothing in the APA or elsewhere precludes us from using the principles set forth in a Rule Making decision to decide an adjudication on a similar issue not precisely covered by the Rule Making. With respect to mobile receivers, the basis for their exclusion from blanketing considerations is their "inherent transient nature." *FM Blanketing* at 130, para. 25. This factor is equally salient with respect to RITOIE because, as is the case with FM blanketing, a mobile receiver moving through the potential interference area will encounter constantly varying propagation paths and signal strengths from the pertinent stations, resulting in a continuously varying potential for interference (ranging from a high likelihood to none at all) depending on the particular receiver's susceptibility to RITOIE. Accordingly, similar treatment of mobile receivers with respect to both blanketing and RITOIE is warranted. Further, battery-powered receivers are also characterized by an "inherent transient nature." Accordingly, excluding them from the scope of both blanketing and RITOIE resolution efforts is equally justified. Thus, we uphold the Bureau's exclusion of both mobile and battery-powered receivers from RITOIE resolution requirements.

18. *Misrepresentation.* Stoner also argues that WKLX, in its July 1987 amendment to its pending modification application (BMPH-860714IB), "misrepresented to the Commission by its answer to [Item 14, Section V-B, FCC Form 301 (October 1986)]¹⁰, that there were not any authorized FM transmitters within 10 kilometers of the proposed antenna which may produce receiver induced intermodulation interference." Stoner charges that: (1) this misrepresentation was "reckless, if not intentional"; (2) WKLX "must have known of the possibility" of RITOIE, yet nevertheless "gave a misleadingly incomplete answer [to Item 14], with no mention of receiver induced interference"; (3) WKLX "knew, or ought to have known" that collocation was "likely to cause interference"; (4) the "possibility of RITOIE interference would be apparent to any responsible engineer" and is mathematically calculable; (5) WKLX "did not disclose" the problem prior to construction; (6) WKLX "concealed" the interference problem; and (7) the "principals of WKLX have publicly admitted that they 'anticipated' interference problems."

19. WKLX claims that Stoner's charges are procedurally defective because they are not supported by any declaration or affidavit by someone with personal knowledge of the facts in violation of the general pleading requirements of Section 309(d) of the Communications Act and Section 1.229(d) of the Commission's Rules for designation of hearing issues. WKLX also charges that Stoner's allegations are "plainly incorrect as a matter of fact and law" because: (1) WKLX's July 1987 application amendment, which first proposed collocation with WRMM(FM), answered "Yes" to Item 14's inquiry regarding the existence of "transmitters which may produce receiver-induced intermodulation interference"; (2) Exhibit E-1 of the amendment referenced (without call signs) ten FM and five TV stations that were located within 10 kilometers of the proposed site; (3) "neither WKLX nor its consulting engineers had any *actual* knowledge that there would be any interference at any time throughout the filing and application processing period leading to grant of the construction permit"; and (4) WKLX "had no reason to specifically anticipate a RITIOE problem" in this case because "as of July 7, 1987, there had only been three RITIOE cases known to have been reported to the Commission out of the hundreds of collocated facilities in the United States." WKLX argues that, "[i]n light of these indisputable facts[,] . . . it provided as much interference 'notice' in its filings as the engineering state-of-the-art and the requirements of Commission Krules and policies dictated and warranted."

20. In response, Stoner contends that: (1) its misrepresentation claim is procedurally proper because the evidence on which it is based is all a matter of public record for which no affidavit is required; and (2) notwithstanding the answer of "Yes" to Item 14, WKLX did not comply with Item 14's instructions to provide "a description of any expected, undesired effects of operations and remedial steps to be pursued if necessary, and a statement accepting full responsibility for the elimination of any objectionable interference (including that caused by receiver induced or other types of modulation)." Stoner argues that WKLX: (1) "made not a single mention of receiver-induced or 'RITIOE' interference" in its amendment application; (2) did not describe any remedial steps to be pursued; and (3) promised only to rectify all complaints of interference pursuant to Section 73.318 which deals solely with blanketing interference.

21. With respect to the procedural aspect of this issue, we will consider Stoner's allegations only to the extent that they are based on facts of which official notice may be taken. As for the arguments on the merits, we disagree with Stoner's claim that WKLX's answer to Item 14 indicates that "there were not any authorized FM transmitters within 10 kilometers of the proposed antenna which may produce receiver induced intermodulation interference." WKLX complied with the Commission's reporting requirements through its affirmative answer to Item 14, which put others on notice of the possibility of interference, including service disruption caused by receiver-induced intermodulation. As to WKLX's failure to provide a description of any expected interference and remedial steps it would take, Stoner has provided no factual basis to suggest that at the time WKLX filed its application it "expected" any such interference and therefore in some way intended to deceive the Commission by its silence, which traditionally has been the *sine qua non* of a misrepresentation issue. *CBS, Inc.*, 49 FCC 2d 1214, 1223

(1974), cited in *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (1980). Accordingly, we find that Stoner has not made a *prima facie* showing under Section 309(d) that WKLX engaged in misrepresentation. In any event, in light of WKLX's sworn statements that it in fact had no knowledge of any expected interference, and given that RITIOE is a rare occurrence, we believe no substantial and material questions of fact exist regarding possible misrepresentation.

22. In conclusion, the Bureau's letter articulated positions which we believe are sound. Thus, having given full and detailed consideration to the Petition, we find that Stoner has failed to state a claim on which relief can be granted. Accordingly, Stoner's Petition for Reconsideration IS DENIED. Additionally, the license grant of WKLX(FM) to WKLX, Inc., File No. BLH-880506KB, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ These include the January 10, 1989 "Opposition to Petition for Reconsideration" filed by WKLX and the January 24, 1989 "Reply of Stoner Broadcasting System, Inc." filed by Stoner.

² RITIOE occurs when strong signals from two stations interact within a receiver to generate a signal on a third frequency. This receiver-generated signal will disrupt reception of any station operating on this third frequency. RITIOE arises in the instant case because the carriers of WKLX(FM) (98.9 MHz) and WRMM(FM) (101.3 MHz), which operate from the same transmitter site, enter into a two-frequency third order intermodulation product (98.9 x 2 - 101.3 = 96.5 MHz) that is co-channel with WCMF(FM).

³ Prior to the filing of its Informal Objection, Stoner complained to the Commission on April 29, 1988. The Field Operations Bureau verified the service disruption on April 29 and May 3, 1988. Accordingly, the Commission suspended PTA on May 3, 1988 and granted limited PTA on May 6, 1988 to enable WKLX to resolve the complaints. On May 18, June 2 (supplemented June 3), and August 31, 1988, WKLX submitted reports detailing the corrective action taken. We note that the Commission has not received any additional complaints of interference since that time. By letter dated September 1, 1988, WKLX stated that its August 31 report clearly demonstrated that all documented complaints to WCMF(FM) stemming from the WKLX(FM) tower move have been resolved and that no further problem exists, and requested that WKLX(FM) be immediately granted standard PTA and that its pending Form 302 license application (filed May 6, 1988) be promptly granted.

⁴ The application was subsequently dismissed on February 10, 1989.

⁵ Even if such service disruption did constitute a *prima facie* case of license modification, because Stoner's objection includes no documentation of any unresolved non-mobile disruption complaints, no substantial and material questions of fact would remain with regard to non-mobile service disruption. Each of the 164 verified non-mobile complaints received as of June 1,

1988 (the date of WKLX' "Final Report" to the Commission on resolution of the complaints) has been resolved to the satisfaction of the Commission.

⁶ On December 9, 1988, Stoner filed an application for construction permit (BPH-881209ID) to relocate WCMF(FM)'s transmitter to WKLX(FM)'s present site. On January 24, 1989, Stoner requested that its application be dismissed. See "Reply of Stoner Broadcasting System, Inc.," Attachment A, January 24, 1989. The application was dismissed on February 10, 1989.

⁷ Stoner claims that WKLX "did not treat 15 percent of the complaints simply because it was unable to contact the listener or because it arbitrarily determined that the listener lived too far away." Additionally, Stoner noted that mobile and battery-powered receivers, which constitute 57 percent of the complaints, were not treated at all.

⁸ *Notice of Proposed Rule Making (Notice)* in BC Docket No. 82-186, 47 Fed. Reg. 18,936 (1982).

⁹ *Cf. New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (D.C. Cir. 1987) (similar circumstances require similar treatment; the Commission has the expertise to determine when circumstances are similar).

¹⁰ Item 14 asks: "Are there . . . within ten (10) kilometers of the proposed antenna, any proposed or authorized FM or TV transmitters which may produce receiver-induced intermodulation interference?"