

EXHIBIT F

Request for Waiver

A. INTRODUCTION

In this application, The Trustees of Columbia University in the City of New York (“Columbia” or “Applicant”), licensee of noncommercial radio station WKCR-FM (Facility No. 68270), New York, New York, are seeking a construction permit to locate the station’s facilities at 4 Times Square in midtown Manhattan. In connection with this proposed minor change, and for the reasons stated below, Columbia respectfully requests a waiver of the contour overlap provisions of the Commission’s rules.¹

WKCR-FM currently is licensed to operate atop the World Trade Center, but its broadcast facilities were destroyed on September 11, 2001. Since that time, the station has been operating pursuant to grants of special temporary authority (“STA”), first from a site on Columbia University’s campus² and subsequently from 4 Times Square.³ The service area covered by operations under these STAs is substantially smaller than WKCR-FM’s licensed (*i.e.*, World Trade Center) service area. Although the facilities proposed in this minor change application also would produce a service area that is smaller than what WKCR-FM enjoyed at the World Trade Center site, the proposed

¹ 47 C.F.R. § 73.509.

² File No. BSTA-20010917ABR, as extended.

³ File No. BSTA-20030509ACK, as extended and modified (authorizing Columbia to operate WKCR-FM on an interim basis at 4 Times Square with temporary antenna facilities and, subsequently, with a replacement antenna).

facilities will enable WKCR-FM to restore service to substantial numbers of listeners who have been unable to receive the station reliably.

Operation with the facilities proposed herein will create new overlap caused to WSOU(FM) and received from WHPC(FM). Columbia, therefore, requests a waiver of Section 73.509 of the Commission's rules.⁴ Columbia demonstrates below that there is good cause for its waiver request.⁵ It shows that the loss of the World Trade Center site is an "exceptional circumstance"⁶ and that grant of a waiver would be consistent with the policy underlying Section 73.509 and would serve the public interest.⁷

⁴ Columbia hereby incorporates by reference in support of this application: (i) its previous application for relocation to the Riverside Church (File No. BPED-20000604ABA); (ii) related filings, which include: Reply to Supplemental Submission (Feb. 14, 2003); Supplemental Comments (Feb. 7, 2003); Letter from Joseph A. Godles, Attorney for the Trustees of Columbia University in the City of New York, to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 7, 2003); Letter from Henry Goldberg, Attorney for the Trustees of Columbia University in the City of New York, to Roy J. Stewart, Chief, Broadcast License Policy, Media Bureau, Federal Communications Commission (Jan. 3, 2003); Letter from Henry Goldberg, Attorney for the Trustees of Columbia University in the City of New York, to Roy J. Stewart, Chief Broadcast License Policy, Media Bureau, Federal Communications Commission (Dec. 17, 2002); Opposition to Petition to Deny (Oct. 10, 2002); Second Supplement to Request for Waiver (Sept. 25, 2002); Supplement to Request for Waiver (Aug. 19, 2002); Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station (June 4, 2002); and (iii) its previous application for relocation to the Empire State Building (File No. BPED-20040809ABO).

⁵ See 47 C.F.R. § 1.3.

⁶ Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, Federal Communications Commission, to The Trustees of Columbia University in the City of New York, Seton Hall University, and City College of New York at 9 (April 25, 2003) (hereinafter "Letter Decision").

⁷ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *Peninsula Communications, Inc.*, Memorandum Opinion & Order, FCC 03-47, 18 FCC Rcd 4027 at ¶3 (rel. March 10, 2003).

B. BACKGROUND

Since shortly after loss of its World Trade Center site, Columbia has been pursuing facilities that would allow it to replicate its former coverage as closely as possible. Columbia initially filed an application to relocate to Riverside Church in upper Manhattan. After interested parties raised concerns about relocation to the Riverside Church and suggested alternate locations, Columbia explored and pursued a variety of other options for WKCR-FM's relocation.⁸ The Media Bureau ultimately dismissed Columbia's application to relocate its transmitter to the Riverside Church in upper Manhattan and denied its accompanying request for a waiver of 47 C.F.R. § 73.509.⁹ Columbia subsequently relocated WKCR-FM's transmitter to one of the alternate locations it had been exploring, 4 Times Square, and has been operating the station from that site with reduced facilities pursuant to STAs.¹⁰

In August 2004, Columbia filed a minor change application to relocate WKCR-FM's facilities to the Empire State Building.¹¹ The Empire State Building application, like the application for the Riverside Church and this application for 4 Times Square, was accompanied by a request for waiver of Section 73.509 of the rules. In all three

⁸ See, e.g., sources cited *supra* note 4.

⁹ Letter Decision.

¹⁰ Letter from Edward P. De La Hunt, Assistant Chief, Audio Services Division, Mass Media Bureau, Federal Communications Commission, to Henry Goldberg, Attorney for Trustees of the Columbia University in the City of New York (May 12, 2003) (hereinafter "4 Times Square STA Grant"). The Bureau has since modified and extended this grant.

¹¹ File No. BPED-20040809ABO.

cases, a waiver was required because the proposed facilities would increase, to varying degrees, the contour overlap caused to WSOU(FM). In the case of the Empire State Building application and this application, a waiver also was required because the proposed facilities would increase the contour overlap received from WHPC(FM). On March 4, 2005, the Media Bureau granted the Empire State Building application and associated waiver request.¹²

When it filed its Empire State Building application, Columbia had been told by the building's management that space would be made available to WKCR-FM at well below commercial market rates based on the fact that WKCR-FM is a student-run, non-commercial educational station.¹³ Since then, however, there has been a change in the building management's personnel, and the lease rate offered to WKCR-FM is cost prohibitive for a station with a budget the size of WKCR-FM's. In practical terms, therefore, the Empire State Building site is no longer available to the station, and contemporaneously with the filing of this application Columbia is submitting its Empire State Building construction permit for cancellation.

¹² Letter from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, Federal Communications Commission to Joseph A. Godles, Goldberg Godles Wiener & Wright (March 4, 2005) ("Second Letter Decision").

¹³ The lease that Columbia had when WKCR-FM transmitted from the World Trade Center also was well below market.

In lieu of relocating to the Empire State Building, Columbia has arranged to continue operating WKCR-FM at 4 Times Square, where the station has been transmitting pursuant to an STA. The lease rate that is available to WKCR-FM at 4 Times Square is well below the quote the station had been given for operation at the Empire State Building. In this minor modification application, Columbia is requesting a construction permit for the 4 Times Square site.

C. REQUEST FOR WAIVER

Applicant requests a waiver of Section 73.509 with respect to the change in the overlap received from WHPC(FM), Garden City, New York, and the change in the overlap caused to WSOU(FM), South Orange, New Jersey, that will be created by operating at 4 Times Square as proposed herein.¹⁴

1. Waiver of Section 73.509 is Warranted with Respect to Overlap Received from WHPC(FM).

Applicant requests a waiver of Section 73.509 with respect to the overlap between WHPC(FM)'s interfering contour and WKCR-FM's (60 dBμ) service contour that would be created by operating at 4 Times Square with the facilities proposed in this application. The minimal increase in predicted interference would affect WKCR-FM alone, and no actual loss of service would result. Accordingly, grant of this waiver

¹⁴ WSOU(FM) and WHPC(FM) are the only stations that would be subject to new contour overlap from the proposed operations at 4 Times Square. See Exhibit D-1 at 2.

request is consistent with the purpose of Section 73.509 and would serve the public interest.

The population within the area overlapping WKCR-FM's proposed 60 dBμ contour is only 158 persons, or less than 0.01 percent of the 12,183,974 persons within the proposed contour.¹⁵ Furthermore, because the overlap falls in an area not previously receiving predicted 60 dBμ service from WKCR-FM, there will be no actual loss of service.¹⁶ Consequently, the overlap is *de minimis*. The overlap, moreover, is less than that which was approved on a waiver basis by the Media Bureau with regard to the Empire State Building facility.¹⁷

Waiver is further warranted because Columbia could not eliminate the overlap with WHPC(FM) without causing a much larger reduction in WKCR-FM's service area. As detailed in the attached Engineering Statement, to eliminate the overlap for that facility WKCR-FM would have to reduce its proposed power from 1.35 kw to 0.88 kw.¹⁸ Operation at this reduced power would decrease the population within the station's 60 dBμ coverage by 160,587 persons.¹⁹ The public interest would not be served by

¹⁵ Exhibit D-1 at 2-3.

¹⁶ Exhibit D-1 at 2.

¹⁷ The overlap population within the proposed 60 dBμ contour for the Empire State Building location was 1,277 persons, or 0.01 percent of the 12,338,765 persons in the proposed 60 dBμ contour. See Second Letter Decision at 2.

¹⁸ Exhibit D-1 at 3.

¹⁹ Exhibit D-1 at 3. Because it will be using a shared antenna that is not directional, Columbia only can eliminate the received overlap by reducing its power omnidirectionally.

depriving 160,587 persons of service in order to eliminate overlap affecting only 158 persons - persons who are not even within WKCR-FM's authorized service area at present.

Accordingly, grant of the waiver requested with respect to overlap with WHPC(FM) is in the public interest and serves the underlying purpose of Section 73.509. Consistent with the condition that was imposed when the Media Bureau granted a waiver in connection with WKCR-FM's application for the Empire State Building site, Columbia agrees that further modification of WHPC(FM) will not be construed as a *per se* modification of WKCR-FM's construction permit.

2. Waiver of Section 73.509 is Warranted with Respect to Overlap Caused to WSOU(FM).

The Media Bureau's order granting Columbia's Empire State Building application establishes the framework for evaluating a waiver permitting an increase in the overlap caused to WSOU(FM). In that order, the Bureau recognized that the loss of WKCR-FM's transmitter at the World Trade Center constitutes an "exceptional circumstance"²⁰ and took cognizance of the fact that "all of the potential sites will have some degree of increased overlap to WSOU" when compared with WKCR-FM's licensed operations at the World Trade Center.²¹ The Media Bureau concluded it was

²⁰ Second Letter Decision at 2; *see also* Letter Decision at 10.

²¹ Second Letter Decision at 2.

necessary to “balance[] Columbia’s legitimate desire to restore service to former levels with WSOU’s interest in preserving service to its listeners.”²² As part of this evaluation, the Media Bureau took into account the fact that WSOU had not objected to the proposed change.

Columbia’s proposed operations at 4 Times Square strike a reasonable balance between its need to restore service and WSOU(FM)’s interest in preserving its service. Like Columbia’s application for the Empire State Building, the instant application is rooted in the “exceptional circumstance” of the loss of WKCR-FM’s World Trade Center transmitter. Also like Columbia’s application for the Empire State Building, the contour overlap associated with the instant application represents a reduction from the overlap associated with the Riverside Church application.²³ In addition, as with Columbia’s application for the Empire State Building, grant of the instant application would enable WKCR-FM to restore service to a large number of listeners who are outside the area the station is authorized to serve at present on an STA basis.²⁴ And as in the case of

²² Second Letter Decision at 2.

²³ In its Letter Decision, the Media Bureau found that there were 325,301 persons within the overlap area with WSOU(FM) that would be created by operating at Riverside Church. Letter Decision at 10. The corresponding figure for the proposed operations at 4 Times Square is 292,213 persons. See Exhibit D-1 at 3.

²⁴ The population within WKCR-FM’s licensed service area is 12,273,020. Exhibit D-1 at 2. The population within the service area authorized by WKCR-FM’s STA is 11,284,259. *Id.* The population within WKCR-FM’s proposed service area for 4 Times Square is 12,183,974. *Id.*

Columbia's application for the Empire State Building, WSOU(FM) has no objection to a grant of this application.²⁵

Reducing WKCR-FM's power at 4 Times Square, on the other hand, would not achieve the reasonable balance between the needs of WKCR-FM and WSOU(FM) that the Bureau envisioned. In order to limit the overlap population associated with the proposed 4 Times Square operations to the overlap population that is associated with WKCR-FM's licensed operations, WKCR-FM would be required to reduce its ERP to 0.28 kw, which would reduce its 60 dBμ contour population by 1,809,507 persons.²⁶ Such a reduction would be devastating; it would have the effect of preventing Columbia from restoring service to major portions of its currently-licensed service area.

Two additional factors further support a waiver. First, the area covered by the contour overlap with WSOU(FM) is comparable on a percentage basis to the area covered by contour overlap that the Commission approved previously in granting a waiver of Section 73.509.²⁷ Accordingly, granting a waiver would be consistent with Commission precedent.

²⁵ See Email from Cary Tepper, Counsel for Seaton Hall, to Henry Goldberg, Counsel for Columbia (Attachment 1 hereto).

²⁶ Exhibit D-1 at 3.

²⁷ In *Educational Information Corporation*, 6 FCC Rcd 2207 (1991), the Commission granted a waiver of Section 73.509 permitting an increase in overlap caused from 58.9 square km (0.45 percent of the service area of the station receiving overlap) to 106.9 square km (0.8 percent of the service area of the station receiving overlap). *Id.* at ¶ 12. No population figures for the overlap area were provided. The waiver requested herein would increase the overlap caused to

Second, Columbia has taken steps to minimize the impact on WSOU(FM). When Columbia filed its Empire State Building application, it proposed a service (60 dBμ) contour that was equivalent in size to the licensed service contour for the World Trade Center. The service contour Columbia is proposing for operation at 4 Times Square, however, is smaller than the licensed service contour for the World Trade Center and is completely contained within the Empire State Building service contour that had been authorized previously.²⁸ By shrinking the WKCR-FM service contour to a less-than-equivalent level, Columbia was able to reduce the number of persons who are potentially affected by contour overlap with WSOU(FM) by more than 36,000.²⁹ Accordingly, Columbia's proposed operations strike a reasonable balance between the need to restore WKCR-FM's service and the need to preserve WSOU(FM)'s service.

In sum, there is good cause for granting Columbia's waiver request with respect to WSOU(FM) because: (1) a waiver would enable WKCR-FM to restore service to substantial numbers of listeners; (2) a waiver is warranted under Section 73.509 precedent; and (3) the proposed operation at 4 Times Square strikes a reasonable balance between the needs of WKCR-FM and WSOU(FM). Consistent with the

WSOU(FM) from the 10.2 square km (0.6 percent of the service area of WSOU(FM)) that was approved for operations at 4 Times Square to 16.2 square km (1.0 percent of the service area of WSOU(FM)). See Exhibit D-1 at 3.

²⁸ See Exhibit D-1 at 1.

²⁹ See Exhibit D-1 at 3.

The Trustees of Columbia University
in the City of New York
Station WKCR-FM
Form 340

condition that was imposed when the Media Bureau granted a waiver in connection with WKCR-FM's application for the Empire State Building site, Columbia agrees that further modification of WSOU(FM) will not be construed as a *per se* modification of WKCR-FM's construction permit.

ATTACHMENT 1

From: Tepperlaw@aol.com [mailto:Tepperlaw@aol.com]
Sent: Friday, September 15, 2006 10:58 AM
To: Henry Goldberg
Cc: lmizrahi@commtechrf.com; kiernaca@shu.edu; mabenmar@shu.edu
Subject: WKCR-FM (Consent from Seton Hall)

Henry --

I just received word from Seton Hall University that WKCR may proceed with the 4 Times Square filing as set forth in your email to me dated August 22, 2006. I will also call you to let you know this email has been sent.

Please let me know when the WKCR application is on file, OK?

Thank you.

Cary Tepper