

WBHX(FM) Waiver Request

WBHX(FM), Tuckerton, New Jersey, hereby requests a waiver of the second adjacent channel spacing requirements contained in Section 73.213(c)(1) of the Commission's rules in order to remain on the air. WBHX lost its licensed transmitter site in December, 2017. Since that time, WBHX has operated under FCC Special Temporary Authority. There are no fully-spaced, or Section 73.215(e) spaced, transmitter sites available for WBHX.

Attached to this application are a "Technical Report" of Anderson Associates, Broadcast Consultants (the "Technical Report") providing the engineering bases for the waiver, and a March 22, 2020 Statement of Richard T. Morena, Chief Operating Officer / Chief Financial Officer, of the WBHX licensee, Press Communications, LLC (the "Morena Statement") providing the factual bases for the waiver.

The requested waiver will serve the FCC's goal of maintaining WBHX service to the public. Also, as shown in detail in the Technical Statement, a grant of the waiver will reduce existing caused interference as compared with the presently licensed transmitter site.

INTRODUCTION

Section 1.3 of the Commission's rules states that rule provisions may be waived "for good cause shown." Section 73.3566(a) of the Commission's rules provides that requests for waiver "shall show the nature of the waiver or exception desired and shall set

forth the reasons in support thereof.” The Media Bureau utilizes a case-by-case analysis governed by decisional precedent.¹

THE REQUESTED WAIVER WILL ENABLE WBHX TO STAY ON THE AIR

WBHX is seeking a waiver of the required 27 kilometer spacing between it and second-adjacent channel WJRZ(FM), Manahawkin, NJ under Section 73.213(c)(1) of the Commission’s rules². WBHX is a Class A FM station under Section 73.213(c)(1) that became short spaced on October 1, 1989, as a result of the revision of Section 73.207 in the Second Report and Order in MM Docket No. 88-375.³

WBHX recognizes that the Commission has placed particular emphasis on the importance of maintaining the integrity of its FM allocation plan, including strict adherence to the mileage separation requirements. The Commission will deviate from its mileage separation requirements, and grant waivers, only in the most compelling circumstances.⁴ The applicant must also affirmatively demonstrate that grant of the requested waiver would further the public interest and that non-short spaced sites are unavailable.⁵

WBHX is not asking the FCC to sacrifice the integrity of the FM system of allocations to foster an improvement in broadcast service. WBHX is already a short-

¹ See *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). See also *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) (“a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest”).

² The actual spacing will be 22.58 kilometers.

³ *Power Increase for Class A Stations* (Second Report and Order in MM Docket No. 88-375), 4 FCC Rcd 6375 (1985).

⁴ See *Carroll-Harrison Broadcasting, Inc.*, 67 FCC2d 254 (1977).

⁵ See *Townsend Broadcasting Corp.*, 62 FCC2d 511 (1976).

spaced station operating under Section 73.213(c)(1). Rather, WBHX is simply seeking to remain on the air under unique circumstances where a station located literally on a sliver of sand two blocks from the Atlantic Ocean has lost its precarious transmitter site through no fault of its own.⁶

To justify the requested waiver, WBHX shows in the Technical Report that there will be lesser caused interference to the short-spaced station than is now existing at its current licensed transmitter site. Thus, there is in actuality less harm from newly predicted interference that is by any metric *de minimis*, than currently results from the now lost licensed transmitter site.

Just as in past cases where the Commission does not rely upon any single factor, here the loss of the licensed transmitter site coupled with the unique location of that site as being almost in the Atlantic Ocean and consequent spacings, along with an actual reduction in interference to the subject second-adjacent channel station and the reduction in short-spacing to another short-spaced station,⁷ heavily balances the considerations in favor of waiving the spacing requirements contained in Section 73.213(c)(1) of the Commission's rules.⁸

WBHX recognizes that to some extent each waiver of a spacing rule increases the crowding of stations in the FM band and undermines the Commission's statutory obligation to ensure fair and equitable distribution of service. If Section 73.215(e) could accommodate this one viable transmitter site to which WBHX can move and

⁶ See Morena Statement

⁷ See Technical Report at Exhibit E3 – Short-spacing to WZBZ(FM), Pleasantville, NJ licensed and construction permit transmitter site reduced.

⁸ See e.g. Beasley Broadcasting of Philadelphia, Inc. (WXTU), 100 FCC 2d 106 (1985) (several factors tilt scales in favor of spacing waiver).

continue service to the public, WBHX would not be justified in seeking this waiver. Rather, Section 73.215(e) simply does not offer the flexibility for WBHX to move to this one viable transmitter site with respect to the subject second adjacent channel station.⁹ There are simply no fully-spaced, or Section 73.215(e) spaced, transmitter sites available for WBHX.

The Commission's grant of a short-spacing waiver of Section 73.213(c)(1) is rare. One analogous situation in which the Commission granted a waiver of Section 73.213(c) arose with WKTU(FM), Lake Success, NY.¹⁰ WKTU(FM), rather than being located on a sliver of sand two blocks from the Atlantic Ocean, was located on the tallest building in America when its transmitter site was tragically lost.

WKTU(FM) lost its licensed transmitter site atop the former World Trade Center. To justify its waiver of Section 73.213(c), WKTU(FM) provided a detailed map showing that, due to spacing constraints with other stations, there was no area in which a fully-spaced transmitter site could be located. There were, however, other transmitter sites available to WKTU(FM). The applied-for site (the Empire State Building) was deemed the most suitable of the short-spaced sites available, it being the only location that WKTU(FM) could relocate in New York and "offer comparable service as was provided at the WTC".¹¹ In addition, all other sites had similar or greater short-spacings, community coverage deficiencies, or other

⁹ It is noted that Section 73.215(e) is employed for the spacing to WJBR-FM, Wilmington, DE.

¹⁰ *Letter to Dorann Bunkin, Esq.* WKTU(FM), Lake Success, NY (FCC File No. BPH-20011001AAV), dated August 23, 2002 (the "WKTU(FM) Letter").

¹¹ *WKTU Letter*, at page 2.

interference concerns. Most importantly, just like the applied-for WBHX transmitter site, the granted WKTU(FM) site resulted in an overall net reduction in interference.

The attached Morena Statement details the extensive, considerable multi-years efforts expended by WBHX to find a fully-spaced transmitter site in which a spacing waiver would not be needed. The Morena Statement also details the circumstances leading up to the loss of the WBHX licensed transmitter site.¹² The Morena Statement details the search for a fully-spaced existing tower or vacant land upon which to construct a new tower. Neither existed. The facts and circumstances detailed in the Morena Statement are incorporated by reference into this waiver request.

The requested waiver of Section 73.213(c)(1) will serve the public interest in the following ways:

- WBHX will remain on the air serving its community of license and surrounding areas;
- WBHX will decrease the population receiving caused interference to WJRZ-FM from 164 persons to 38 persons;¹³
- The population and area served by WBHX will increase by 64,953 persons (+156%) and 529.5 square kilometers (+65.4%);¹⁴ and

¹² The first substantive paragraph of the Morena Statement describes how WBHX was offered the opportunity to purchase the beach-adjacent property constituting the licensed WBHX transmitter site. WBHX offered \$250K which was rejected in lieu of a sale of the prime beachfront land to developers for well over \$1M. The value of WBHX, being a rural station serving the mid-Jersey shore, is at best \$300K. Purchasing the transmitter site for over \$1M would not have made WBHX worth more. It would have only sent WBHX into bankruptcy.

¹³ See Technical Report. While the area of interference does nominally increase from 0.64 square kilometers to 5.62 square kilometers, only 0.3 square kilometers of that area of interference is populated with the remaining 99.95% of that area being heavily forested and unpopulated.

¹⁴ The Technical Report also notes that there will also be a small area (2.8 square kilometers) of received interference to WBHX created with a population of 835 persons. This is 0.78% of the WBHX 60 dBμ population served, a percentage that is *de minimis* and in an area located on the outer fringe of the WBHX 60 dBμ contour. The increase in WBHX population served far out-balances any peripheral interference received.

- Even if land existed for the construction of a new tower, the use of an existing tower will negate any environmental concerns from new tower construction in parkland, beachfront or residential areas.

Accordingly, a waiver of Section 73.213(c)(1) is respectfully requested to enable WBHX to continue serving the public.