



Federal Communications Commission
Washington, D.C. 20554

March 11, 2022

In Reply Refer to:
1800B3-RFB

New Hampshire Public Radio, Incorporated
Randy Woods
2 Pillsbury Street, Suite 600
Concord, NH 03301
admin@nhpr.org

In re: WEVF(FM), Colebrook, NH
Facility ID No. 173434
New Hampshire Public Radio,
Incorporated
File No. 0000133271

Dear Applicant:

This refers to the above-captioned minor change application filed by New Hampshire Public Radio Incorporated (“NHPR”) to increase the authorized effective radiated power from 0.27 kilowatt to 0.85 kilowatt. NHPR also requests waiver of the contour overlap provisions of Section 73.509 of the Commission’s rules (Rules).¹ For the reasons stated below, we deny the waiver request and dismiss the application.

Waiver Request. An engineering review of the application reveals that the proposed minor change would violate section 73.509 of the Rules with respect to the first-adjacent Class C licensed facility (BLED-19990525KB) of WMEA(FM), Portland, ME. Specifically, the proposed protected contour (60 dBu) would receive 40 square kilometers of prohibited overlap from the interfering contour (54 dBu) of WMEA. NHPR recognizes this violation and requests waiver of section 73.509 of the Rules.

In support of the waiver request, NHPR states that the proposed facilities would provide a net increase of its overall coverage area by 1038 square kilometers (a 74% increase). In addition, NHPR indicates that the proposed facilities will provide new service to an estimated 941 persons, which is an increase of 15%. NHPR claims that the area calculated to receive overlap is 39 square kilometers or 1.6% of the total 60 dBu contour service area. Furthermore, NHPR states that the population contained within the overlap area is zero persons. Finally, NHPR believes that the overlap area is overstated and provides a terrain profile and a plot using Longley Rice propagation methodology to demonstrate that there will be no actual overlap due to intervening terrain. Thus, NHPR asserts that waiver of section 73.509 of the Rules is warranted in this instance.

Discussion. The Commission's rules may be waived for good cause shown.² When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.³ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high

¹ 47 CFR § 73.509.

² 47 CFR § 1.3.

³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, para. 2 (D.C. Cir. 1969) (*WAIT Radio*).

hurdle even at the starting gate”⁴ and must support its waiver request with a compelling showing.⁵ Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.⁶

In this case, NHPR’s request fails to present good cause for waiver of section 73.509 of the Rules. NHPR has not shown sufficiently unique “special” circumstances, *i.e.*, rare and exceptional circumstances beyond its control to justify a waiver of section 73.509 of the Rules. Finally, we find that the facts and circumstances set forth in the justification are insufficient to establish that granting waiver of section 73.509 of the Rules would be in the public interest.

Specifically, section 73.509 of the Rules addresses overlap area rather than population in the overlap area. Therefore, lack of population in the overlap area alone is not sufficient to waive this core interference protection requirement. In addition, NHPR fails to demonstrate that any readily available rule compliant technical solution, like a directional antenna, could not be used to eliminate the prohibited overlap. Finally, NHPR has not cited any published decisions where the Commission granted a waiver under circumstances similar to the ones presented here.

In addition, we find that waiver of section 73.509 of the Rules to permit the acceptance of your supplemental showing is not warranted. In *Certain Minor Changes Without a Construction Permit*,⁷ the Commission stated its policy with respect to supplemental showings pertaining to interference calculations:

First and foremost, we want to emphasize that supplemental showings have not been accepted, nor will be accepted, for the purpose of demonstrating interference or prohibited contour overlap between FM broadcast stations. . . . To employ supplemental showings in this manner would represent a fundamental change as to how contour protection applications are processed, and would require a separate rulemaking proceeding to specify standards, methods and assumptions, and possibly revised definitions for protected service areas and interference.

That policy has not changed.⁸ Nor has the applicant provided compelling justification why the longstanding prohibition against using supplemental analyses for predicting interference or contour overlap in the FM radio service should be set aside in this instance, apart from the obvious fact that such

⁴ *WAIT Radio*, 418 F.2d at 1157, para. 2.

⁵ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090, 7094, para. 9 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

⁶ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (1990)).

⁷ *Amendments of Part 73 and 74 of the Commission’s Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, 12 FCC Rcd 12371, 12401-12403 (1997).

⁸ In MM Docket 98-93, the Commission initiated consideration of the point-to-point propagation method for use in the FM service. However, in the *Second Report and Order* in MM Docket 98-93, *1998 Biennial Regulatory Review-Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules*, 15 FCC Rcd 21649 (2000) at Paragraph 8, the Commission stated that it was likely that “several program modifications” were under consideration that could affect the results obtained from the analysis. As of this time the point-to-point method is still being reviewed.

results favor the applicant. Therefore we cannot accept the supplemental analysis showing lack of prohibited contour overlap.

Generally, allowing applicants to create new prohibited contour overlap effectively nullifies the protection mandated by section 73.509 of the Rules to noncommercial educational FM stations' 60 dBu protected service areas. In particular, the affected station would lose service area and population served without receiving any benefit in return. This interference would interrupt the continuity of service provided by WEVF throughout its protected service area, and thus diminish the quality of FM service provided by the afflicted station. Over time, the grant of numerous similar waivers would degrade the quality of FM reception from stations throughout the entire noncommercial educational FM band. As the Commission stated in *Open Media Corp.*:⁹

It is the overall scheme of [noncommercial educational FM] allocations which is paramount, and when faced with a choice between a larger service area with overlap received on one hand, and lesser coverage with no prohibited overlap on the other, the Commission favors the latter. See *Educational Information Corporation*, 6 FCC Rcd 2207, 2208 (1991).

Further, it is the Commission's charge, not applicants' or licensees', to establish definitions of protected service and to ensure that protected service does not suffer interference. The goal of section 73.509 of the Rules is to prevent overcrowding of FM stations and provide a consistent, fair, efficient, and equitable distribution of FM facilities as required by section 307(b) of the Communications Act.¹⁰

The Commission has granted waivers of section 73.509 of the Rules where existing noncommercial educational stations sought to increase the 60 dBu service contour so as to overlap the interfering contour of another noncommercial educational station and thereby receive overlap from *second*-adjacent and *third*-adjacent noncommercial educational FM stations. ¹¹Here, NHPR proposes to create new overlap received from a *first*-adjacent channel station. Therefore, the requested waiver of section 73.509 of the Rules does not fall within that precedent. Accordingly, the applicant's request for waiver of section 73.509 of the Rules will be denied.

⁹ *Open Media Corp.*, 8 FCC Rcd 4070, 4071 (1993).

¹⁰ See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5358 (1991) at para. 13.

¹¹ See *Educational Information Corp.*, 6 FCC Rcd 2207 (1991).

Conclusion. In light of the above, NHPR's request for waiver of 47 CFR section 73.509 IS HEREBY DENIED. Furthermore, Application File No. 0000133271, being unacceptable for filing, IS HEREBY DISMISSED. This action is taken pursuant to section 0.283 of the Rules.¹²

Sincerely,

Rodolfo Bonacci

Rodolfo F. Bonacci
Assistant Division Chief
Audio Division
Media Bureau

cc: Brad C Deutsch (via email)
Robert M Smith, Jr.(via email)

¹² 47 CFR § 0.283.