



Federal Communications Commission
Washington, D.C. 20554

September 6, 2023

In Reply Refer to:
1800B3-CEG

Riverton Radio Project Association
c/o Michelle Bradley, CBT
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staff@delmarvafm.org

In re: **New NCE FM, Sharptown, Maryland**
Facility ID No. 762053
Application File No. 165974

Dear Applicant:

We have before us the above-referenced application (Application) for a new noncommercial educational (NCE) FM station at Sharptown, Maryland, filed by Riverton Radio Project Association (Riverton) on November 3, 2021. The Application does not satisfy the contour overlap requirements for NCE stations set out in section 73.509(a) with respect to second-adjacent channel full service NCE station WSCL(FM), Salisbury, Maryland (WSCL).¹ Therefore, Riverton seeks a waiver of section 73.509(a) (Waiver Request). For the reasons set forth below, we deny the Waiver Request and dismiss the Application for failure to satisfy the Commission's NCE contour overlap requirements.²

Background. The new NCE facility specified in the Application would cause, but not receive, prohibited contour overlap with WSCL.³ Typically, the Commission only considers waivers of section 73.509 where an *existing* NCE station seeks to modify its facilities and, as a result, would consequently: (1) receive—not cause—overlap from (2) a second- or third- adjacent channel station(s), and (3) the public interest benefit of increased NCE service heavily outweighs the potential for interference in a very small area.⁴ This type of waiver is known as a *Raleigh* waiver. Under a *Raleigh* waiver, the causing station is not “perpetually restricted” to its current facilities but may modify its facilities without requesting a further waiver regarding changes in the caused overlap.⁵ Granting waivers in these limited

¹ See 47 CFR § 73.509(a). The WSCL licensee, Salisbury University, did not file a pleading in this proceeding. However, in a subsequent modification application for WSCL filed on June 20, 2023 (Application File No. 216857) (Salisbury Application), Salisbury University states that the Application is “ungrantable as it would cause impermissible interference to WSCL within the current WSCL protected 60 dBu contour.” Salisbury Application, attach. entitled “WSCL 45kW Consolidated Engineering Exhibit” at 5.

² This Letter Decision does not assess the acceptability of the Application other than to the extent specifically discussed herein.

³ Prohibited overlap occurs when a station's interference contour overlaps another station's service contour. The terms “overlap caused” and “overlap received” are used in reference to a specific station proposing a facility change. If Station A is proposing to expand its service contour and the new service contour will be overlapped by Station B's interference contour, Station A is said to receive overlap from B. If station B is proposing to increase its facilities so that its proposed interference contour would overlap Station A's service contour, Station B is said to cause overlap.

⁴ See *Educational Information Corp.*, Memorandum Opinion and Order, 6 FCC Rcd 2207, 2208 (1991) (*Raleigh*). The Commission has delegated authority to the Bureau to waive 47 CFR § 73.509 when overlap received is 10% or less of the proposed service area. *Changes in the Rules Relating to Noncommercial, Educational FM Broadcast Stations*, Memorandum Opinion and Order, 50 FR 27954, 27960 (1985).

⁵ *Call Comm's Grp., Inc.*, Letter Decision, 2023 WL 1926869 at 2 (MB 2023) (citing *Raleigh*, 6 FCC Rcd at 2208-2209, paras. 12-14).

circumstances provides flexibility for NCE stations to modify their service areas while protecting existing service from interference.⁶

In this case, Riverton urges us to expand the *Raleigh* policy to new as well as existing stations and caused as well as received overlap. Such an expansion is justified, according to Riverton, because under the existing NCE contour overlap rules, stations serving larger urbanized areas often preclude first transmission service to nearby smaller communities such as Sharptown.⁷ Riverton states that its proposed station would provide first transmission service to Sharptown and would not cover any urbanized area.⁸ Furthermore, Riverton claims that its proposed facility is unlikely to cause actual interference to listener reception, due to improved receiver standards and the history of technically similar translator and LPFM operations rarely causing interference complaints.⁹ Moreover, the population and land area of the proposed contour overlap would be very small: 1.7 square kilometers of land area compared to WSCL's 60 dBu coverage contour of 6,390 square kilometers (0.03%), with a population of 94 persons compared to the WSCL's covered population of 432,793 persons (0.02%).¹⁰ If it were permitted to use the U/D signal ratio methodology normally applicable only to the translator and LPFM services, Riverton estimates that only 17 persons would live within the U/D defined area of potential interference.¹¹ Lastly, Riverton points to a number of other situations in which the Commission has allowed a limited amount of caused contour overlap, such as pre-1964 grandfathered short-spaced station groups,¹² permitted overlap between certain FM and TV Channel 6 stations,¹³ and LPFM stations processed under the pre-LCRA interim second-adjacent-channel waiver policy, under which the Bureau, when considering caused overlap waivers, would "balance the potential for new interference to the full-service station against the potential loss of an LPFM station."¹⁴

⁶ See *Dennis J. Kelly, Esq.*, Letter Decision, 32 FCC Rcd 7441, 7443 (MB 2017) (*Coggon*).

⁷ Waiver Request at 2-3 (citing 47 U.S.C. § 307(b) and urging the Commission to re-examine the second- and third-adjacent channel protection requirements "from both a technical perspective and from the aspect of fair distribution of radio channels among the state in accordance with Section 307(b) of the Communications Act").

⁸ Waiver Request at 9.

⁹ Waiver Request at 3, 9-10.

¹⁰ Waiver Request at 8.

¹¹ Waiver Request at 8; see also *Living Way Ministries, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 17054 (2002) ("[I]nterference is predicted to occur where the translator's undesired signal exceeds the protected station's desired signal by more than 40 dB"). In the case of second-adjacent stations, interference is predicted to occur where the translator's undesired signal exceeds the protected station's desired signal by more than 40 dB. Currently, the U/D methodology may be used only by FM translator applicants to satisfy the section 74.1204(d) "lack of population" exception to the contour overlap requirements of section 74.1204(a) and LPFM applicants seeking second- and third-adjacent channel contour overlap waivers. *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15429, para. 78 (2012); 47 CFR § 73.807(e)(1).

¹² Waiver Request at 5, 9.

¹³ Waiver Request at 5 (citing 47 CFR § 73.525(c), 73.213(a)(4)).

¹⁴ Waiver Request at 4 (citing *Creation of a Low Power Radio Service*, Third Report and Order, 22 FCC Rcd 21912, 21939, paras. 64-67 (2007)). The interim waiver processing policy was superseded by 47 CFR § 73.807(e)(1), which implements the Local Community Radio Act, Pub. L. No. 111-371, 124 Stat. 4072 (2011) (LCRA), Section 3(b)(2)(A), and provides for second-adjacent channel waivers only if the proposed operations "will not result in interference to any authorized radio service." See *Creation of a Low Power Service*, Sixth Report and Order, 27 FCC Rcd 15402, 15424, para. 70 (2012).

Discussion. We conclude that the Waiver Request does not demonstrate the special circumstances necessary to justify waiver and, therefore, deny it. The Commission's rules may be waived for good cause shown.¹⁵ When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.¹⁶ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”¹⁷ and must support its waiver request with a compelling showing.¹⁸ 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.¹⁹ The Commission has long held that it will grant waivers to depart from its core allocation rules, such as contour overlap limitations, “only in the most compelling circumstances.”²⁰ Waivers of section 73.509, in particular, are generally considered only when an existing NCE station seeks to receive, not cause, overlap from a second- or third-adjacent channel station over a very small area.²¹

Riverton does not satisfy the *Raleigh* criteria, nor does it demonstrate additional special circumstances that would justify a departure from the *Raleigh* policy in this case. First, Riverton’s proposal relates to a new station rather than preserving or expanding existing NCE service. It has long been established that *Raleigh* waivers are not available to applicants for new NCE stations.²² The Bureau recently affirmed this approach, denying similar requests arising from the 2021 NCE filing window.²³ Second, the proposed facility would cause prohibited overlap with WSCL and thus does not satisfy the *Raleigh* criterion that the proposed facility receive, but not cause, overlap.²⁴ The proposed NCE station does not fall into any of the specific—and rare—circumstances under which the Commission has authorized a small degree of caused contour overlap, most notably, it is not seeking to modify existing

¹⁵ 47 CFR § 1.3.

¹⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, para. 2 (D.C. Cir. 1969) (*WAIT Radio*).

¹⁷ *Id.*

¹⁸ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090, 7094, para. 9 (1999) (*Greater Media*) (citing *Stoner Broadcasting System, Inc.*, 49 FCC 2d 1011, 1012, para. 6 (1974)).

¹⁹ *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)).

²⁰ *Carroll-Harrison B’casting, Inc.*, Memorandum Opinion and Order, 67 FCC 2d 254, 256, para. 8 (1977).

²¹ *Educational Information Corp.*, Memorandum Opinion and Order, 6 FCC Rcd 2207, 2208 (1991) (*Raleigh*).

²² See generally, *Coggon*, 32 FCC Rcd at 7443 (distinguishing between *Raleigh* waivers to NCE permittees and NCE applicants whose “proposal has yet to undergo the NCE comparative allocations process”); *Centenary College*, Letter Decision, 23 FCC Rcd 17317, 17321-22 (MB 2008) (*Centenary College*) (“[W]hile requests for waivers of second-and third-adjacent channel overlap for new stations may have individual appeal, routine waivers of Section 73.509 . . . would undermine the Commission's well-settled NCE-FM licensing scheme. It would result in vast increases in interference levels in the congested reserved band while causing disruption to existing listening patterns. This interference interrupts the continuity of existing service provided by the Station throughout its protected service area, and thus diminishes the quality of FM service provided by the Station. Over time, the grant of numerous similar waivers would degrade the quality of existing FM reception within stations' theoretically protected 60 dBu service contours throughout the entire NCE-FM band.”).

²³ See *Park Public Radio, Inc.*, Letter Decision, 2023 WL 3685869 (MB 2023); *Rhode Island Public Radio*, Letter Decision, 22 WL 16918812 (MB 2022).

²⁴ See, e.g., *Spirit Radio of North Florida, Inc.*, Letter Decision, 24 FCC Rcd 2958, 2960 (MB 2009); *Educational Information Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 6917, 6918-19, paras. 4-5 (1997) (*Raleigh Order on Review*) (emphasizing the “critical distinction” between received and caused prohibited overlap).

caused overlap created by an earlier *Raleigh* waiver.²⁵ Again, the Commission has consistently rejected waiver requests that seek to create new caused interference to other stations.²⁶ The Bureau has also considered and rejected the argument that policies currently applicable to LPFM and translator stations should be extended to NCE stations.²⁷ Such a waiver policy would systemically undermine the second- and third-adjacent protections governing NCE stations, which—unlike secondary services such as LPFM and translator stations—are not required to resolve actual interference should it occur.²⁸ Riverton’s contention that it should receive a waiver because the current rules prevent service to small communities, or because technical considerations make second-adjacent interference unlikely, represent fundamental policy changes that must be considered after the development of a full record in a notice-and-comment rulemaking, not in an individual adjudication.²⁹ Relatedly, many licensees may seek to operate on second-adjacent channels or to serve communities that are within the protected contours of larger stations serving other communities. Therefore, these are not “special circumstances” warranting waiver of the Commission’s core FM allocations rules.

For all of these reasons, we find that the public interest would not be served by waiving the Commission’s core allocations rules for NCE stations in this case.

Conclusion. Accordingly, IT IS ORDERED that Riverton Radio Project Association’s request for waiver IS DENIED and its construction permit application for a new NCE FM station at Sharptown, Maryland, filed on November 3, 2021, (Application File No. 165974) IS DISMISSED for failure to comply with section 73.509(a) of the Commission’s rules.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

²⁵ See *Raleigh*, 6 FCC Rcd at 2209, para. 14.

²⁶ See, e.g., *Raleigh Order on Review*, 12 FCC Rcd at 6918, paras. 4-5; *Centenary College*, 23 FCC Rcd at 17320.

²⁷ *Centenary College*, 23 FCC Rcd at 17321-22.

²⁸ *Id.* (“All FM translator licensing is backstopped by an absolute prohibition on causing interference to any full-service station. There is no comparable NCE-FM licensing requirement that would protect listeners against service losses.”).

²⁹ See generally, 47 U.S.C. § 553; *Capital Cities/ABC, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5841, 5888, para. 87 (1996) (“We do not believe . . . that it is appropriate to amend waiver policies of broad applicability in a restricted adjudicatory proceeding in which third parties, including those with substantial stakes in the outcome, have had no opportunity to participate, and in which we, as a result, have not had the benefit of a full and well-counseled record.”).