

## **Request for Temporary Waiver of Section 73.525**

New Noncommercial Educational FM Station, Gloucester Point, Virginia

Hampton Roads Educational Telecommunications Association (“HRETA”) requests a temporary waiver of Section 73.525 of the Commission’s Rules for a new noncommercial educational FM (“NCE-FM”) station in Gloucester Point, Virginia (the “Station”). The affected television channel 6 station, Station WTVR-TV in Richmond, Virginia (“WTVR”) will no longer require interference protection after the February 17, 2009 analog giveback date (the “DTV Transition”). Waiver of Section 73.525 will thus best serve the public interest, by permitting the processing and grant of a permit for the Station with no impact on television channel 6 viewers.

### **Background**

HRETA is the long-time licensee of noncommercial educational TV Station WHRO-TV, Hampton-Norfolk, Virginia and noncommercial educational radio stations WHRO-FM and WHRV(FM), Norfolk, Virginia. HRETA serves the Tidewater area of southeastern Virginia and northeastern North Carolina with public broadcasting services, and its local ties to these areas are extensive. HRETA was formed and is controlled by 17 public school system members in the Tidewater/Hampton Roads area (which includes communities on the peninsula as far west as Williamsburg and north through the Virginia Middle Peninsula and the Eastern Shore). The school system members elect the board of directors of Hampton Roads, and provide input regarding its educational mission. Members of the board include not only educators, but others community residents, including leaders of local financial institutions, law firms, transportation firms, the print media and the military.

HRETA has long sought to extend its noncommercial educational FM radio service throughout the entire region served by its constituent public school districts. The NCE Filing Window represents the first opportunity in over a decade for HRETA to do so. This application proposes new service to 63,775 persons, including first service to 14,361 persons and second NCE-FM service to 36,983 persons. Combined, the Station would provide first or second NCE-FM service to over 80 percent of its coverage area – and provide noncommercial educational FM service to the communities of Gloucester Point and surrounding areas, which are served by the HRETA-member school districts of Gloucester, Matthews and Middlesex.

Section 73.525 of the Commission’s Rules requires that new applicants for a noncommercial educational FM station must demonstrate that the predicted interference area resulting from the proposed facility contains no more than 3,000 persons. NCE-FM applicants may subtract up to 1,000 persons from the population within the predicted interference area if, for each person subtracted, the applicant installs one filter after commencing program tests.

The Station would result in predicted interference to WTVR in excess of the population limit permitted in Section 73.525.<sup>1</sup> However, WTVR has elected to vacate television channel 6 and operate on DTV channel 25 after the DTV Transition. In addition, no other television station has elected to operate on television channel 6 in the area of the Station after the DTV Transition.

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<sup>1</sup> See Engineering Exhibit at Attachment 22.

Consequently, neither WTVR, nor any other television station, will require interference protection from the Station after the DTV Transition.

### **Justification**

Waiver of Section 73.525 would best serve the public interest by furthering the underlying purpose of the rule. Waiver is also appropriate in light of the special circumstances that exist in this case. Finally, HRETA requests only a temporary waiver of Section 73.525, because waiver will no longer be necessary after the DTV Transition.

#### **Waiver of Section 73.525 Would Best Serve the Public Interest**

Waiver of Section 73.525 of the Commission's Rules would best serve the public interest because it would allow for the expansion of noncommercial educational FM service with minimal impact on television channel 6 viewers. The Commission has recognized that "[i]t is necessary to strike a balance between the conflicting goals of limiting TV Channel 6 interference and providing a viable educational FM service."<sup>2</sup> The need for such a balance is reflected in the Commission's stated goals for addressing the problem of television channel 6 interference under Section 73.525: (1) to allow for the expansion of noncommercial educational FM service; (2) to have minimal impact on television channel 6 viewers; and (3) to offer a "realistic approach for satisfying the needs of all interested parties."<sup>3</sup>

Waiver of Section 73.525 in this case would serve all three of the Commission's goals for resolving television channel 6 interference. *First*, the Station would expand noncommercial educational FM service to an area that is currently unserved and underserved by such service. As noted above, over 80 percent of the Station's coverage area would receive first or second noncommercial educational FM service.

*Second*, operation of the Station would have minimal impact on television channel 6 viewers. The affected television channel 6 station, WTVR, has elected to vacate television channel 6 and operate on DTV channel 25 after the DTV Transition. No other television station has chosen to operate on television channel 6 in the area of the Station. Thus, no television channel 6 viewers would be impacted by the operation of the Station after the DTV Transition.

*Finally*, a temporary waiver of Section 73.525 would provide the most realistic solution to the potential problem of television channel 6 interference in this case. Such a waiver would recognize the reality of two important facts present here – that the Station will not commence operation until after the DTV Transition; and that, following the vacation of television channel 6 by WTVR after the DTV transition, there will be no television channel 6 viewers to protect.

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<sup>2</sup> See *Changes in the Rules Relating to Noncommercial, Education FM Broadcast Stations*, Second Further Notice of Proposed Rule Making, FCC 82-225, 47 Fed Reg. 24,148 (June 3, 1982).

<sup>3</sup> See *Changes in the Rules Relating to Noncommercial, Education FM Broadcast Stations*, Memorandum Opinion and Order, FCC 85-328, 58 R.R. 2d 629 at ¶ 4 (rel. June 27, 1985).

Waiver of Section 73.525 would also further Congressional goals as set forth in Section 396 of the Communications Act. Grant of the requested waiver would benefit the public interest, as codified in Section 396(a) of the Communications Act of 1934, which declares that the public interest is served by extending noncommercial educational broadcasting service to unserved and underserved areas.<sup>4</sup> As noted above, the proposed station would provide substantial first and second public radio service to over 80 percent of the proposed coverage area. This substantial increase in noncommercial educational radio service would directly further the Congressional mandate in Section 396 of the Communications Act, which states that “it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distributions technologies.”<sup>5</sup>

#### Waiver of Section 73.525 Is Appropriate in this Case

Waiver of Section 73.525 is appropriate in this case, due to special circumstances related to the DTV Transition. *WAIT Radio* states that the Commission may waive any provision of its rules or orders if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. *Northwest Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) *citing* *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (“*WAIT Radio*”). The Court of Appeals for the D.C. Circuit has stated that waiver may permit a more rigorous adherence to an effective regulation by allowing the agency to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individualized basis. *WAIT Radio*, 418 F.2d at 1157.

The impending DTV Transition has created special circumstances that strongly militate against application of Section 73.525 in this case. As discussed above, WTVR, the affected television channel 6 station has elected to vacate television channel 6 after the DTV Transition. In addition, no other television station has elected to broadcast on the channel post-transition. Therefore, television channel 6 in the area of the Station will be left vacant following the DTV Transition. At the same time, the Station will not be ready to commence operation prior to the DTV Transition; and thus poses no threat of interference to existing television channel 6 viewers of WTVR.

Consequently, application of Section 73.525 to this application would have the opposite effect intended by the rule. It would prevent the expansion of noncommercial educational FM service to an unserved and underserved area. And it would provide no protection to affected

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<sup>4</sup> See 47 U.S.C. §396(a)(6) (“[I]t is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities.”).

<sup>5</sup> See 47 U.S.C. § 396(a)(9). See also 47 U.S.C. §396(a)(7), which states that the federal government is to “complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States” (emphasis added).

television channel 6 viewers – because there will be no television channel 6 viewers in the area of the Station by the time it is ready to commence operation. In direct contrast, waiver of the rule would serve the underlying purpose of the rule – by allowing the expansion of noncommercial educational FM service to the area of the Station with no impact on television channel 6 viewers.

#### HRETA Only Requests a Temporary Waiver of Section 73.525

HRETA is only requesting a temporary waiver of Section 73.525. Once television channel 6 becomes vacant in the area of the Station, waiver of Section 73.525 will no longer be necessary. To protect television channel 6 viewers from interference prior to the DTV Transition, HRETA certifies that it will not commence program tests or operation of the Station until after WTVR has ceased all analog transmissions on February 17, 2009 pursuant to the deadline set in the Digital Television and Public Safety Act of 2005, 47 U.S.C. § 309(j)(14)(A).

HRETA suggests that the Commission adopt a version of the language below for use in this circumstance, which is derived from a special operation condition on the DTV authorization for HRETA's own Station WHRO-DT):

“The grant of this authorization is subject to the condition that, except as otherwise agreed to by the licensee of Station WTVR-TV, Richmond, Virginia, HRETA shall not commence program tests on this radio station until after the date on which Station WTVR-TV ceases operation as an analog television station pursuant to the transition to digital television.”

#### Conclusion

The impending DTV Transition has opened up the potential for new noncommercial educational FM stations to operate within the congested band of channels reserved for noncommercial educational use. Waiver of Section 73.525 of the Commission's Rules in this case would not only allow HRETA to take advantage of this opportunity, but would also serve the underlying purpose of the rule – to allow expansion of noncommercial educational FM service with minimal impact on television channel 6 viewers.

For all the reasons stated above, HRETA respectfully requests a temporary waiver of Section 73.525 of the Commission's Rules.