

are inclined to view waiver requests such as WCCE's favorably where there is clearly a public benefit.

6 FCC Rod at 14. The overlap caused by WFMU(FM) to WFUV(FM)'s licensed facilities and vice versa is consistent with the public interest calculus set forth in WCPE. Accordingly, waiver of 47 C.F.R. § 73.509 to allow WFMU(FM) to cause and receive overlap with respect to WFUV(FM) is warranted. Likewise, in order to resolve the mutual exclusivity linkages which exist in this complex case involving seven applications, we will, on our own motion, waive 47 C.F.R. § 73.509 to permit WFUV(FM) to cause and receive overlap with respect to the licensed and proposed facilities of WFMU(FM). Appropriate conditions will be attached.⁸ In light of the above, the informal objection filed by Upsala against Fordham's June 11, 1991, amendment regarding violation of 47 C.F.R. § 73.509 will be denied. Also, Fordham's informal objection against Upsala's application will be denied in part to the extent that it pertains to prohibited overlap between Stations WFUV(FM) and WFMU(FM). This will remove the mutual exclusivity between the proposals of Fordham and Upsala.

Our Antenna Survey Branch has advised us that they are not in receipt of the Federal Aviation Administration's (FAA) final airspace determination for the tower structure proposed in Fordham's application. Accordingly, Fordham must submit a copy of this determination (if available) to the FM Branch in order to facilitate processing of its application. If a determination has not been released, Fordham must notify the Commission in writing of this fact and provide the status of any negotiations with the FAA.

F. Mutual Exclusivity Between WFUV(FM) and Westchester

On March 20, 1984, Fordham's application was placed on an "A" list specifying a cut-off date of April 23, 1984. On April 23, 1984, during the cut-off period for Fordham's application, Westchester Council for Public Broadcasting filed its application for a new second adjacent channel noncommercial educational FM station on Channel 212A in Ossining, NY. An engineering study reveals that WFUV(FM)'s proposed 60 dBu coverage contour would encompass the 80 dBu interfering contour proposed by Westchester's application. See Appendix B, Exhibit B-8.

G. Agreement Between WFUV(FM) and Westchester

Westchester's application was placed on a "B" list on December 12, 1991 specifying a cut-off date of January 15, 1992. On January 15, 1992, Fordham and Westchester submitted an agreement to resolve the mutual exclusivity of the their applications. As set forth in the agreement, on February 27, 1992, Westchester filed a minor amendment to its application specifying nondirectional operation from a site further removed from WFUV(FM) at reduced power. Although overlap still exists, the encompassment of Westchester's 80 dBu contour by WFUV(FM)'s 60 dBu contour is consistent with the public interest calculus set forth in WCPE. Accordingly, waiver of 47 C.F.R. § 73.509 with an

⁸ See Footnote 1.

appropriate condition is warranted.⁹ This action would remove the mutual exclusivity between Westchester's application and Fordham's application and permit the grant of both. See, e.g., Letter from Chief, Audio Services Division to Memphis Community Television Foundation and Memphis State University (8920-EPD), dated March 11, 1992.

II. The WSHU Group:

A. Interference Between WEMU(FM) and WSHU(FM)

Sacred Heart University, Inc., is licensed to operate Station WSHU(FM), Fairfield, CT, on Channel 216B with an ERP of 12.5 kilowatts (H&V) and an antenna HAAT of 181 meters. On January 26, 1990, SHU filed a major change application (File No. BPED-900126IB) to increase the ERP of WSHU(FM) to 20.0 kilowatts and the HAAT to 189 meters. SHU also proposed to modify the existing directional antenna pattern. Staff studies indicate that WSHU(FM)'s licensed facilities neither cause nor receive any prohibited overlap with respect to WEMU(FM)'s co-channel licensed facilities but would receive prohibited overlap from WEMU(FM)'s proposed facilities.¹⁰ See Appendix B, Exhibit B-9. Additionally, although SHU's proposal would not cause prohibited overlap to WEMU(FM)'s licensed facilities, it would cause prohibited overlap to WEMU(FM)'s proposed facilities. Also, SHU's proposal would receive prohibited overlap from both WEMU(FM)'s licensed facilities and proposed facilities. Upsala has requested a general waiver of 47 C.F.R. § 73.509. SHU has not specifically requested waiver of 47 C.F.R. § 73.509 with respect to WEMU(FM).

Minor change applications for noncommercial educational FM stations operating in the reserved band are not processed under the "first-come first-served" rule applicable to commercial stations. Therefore, they are subject to mutually exclusive applications until the time of grant. Accordingly, although Upsala's application was filed prior to SHU's application, SHU's application is considered to be timely and mutually exclusive with Upsala's application.¹¹ Options as to resolving this mutual exclusivity are addressed in Section VI of this document.

⁹ Ibid.

¹⁰ SHU's application was originally filed as a minor change application. However, staff studies indicated that the application constituted a major change pursuant to 47 C.F.R. § 73.3573. On June 13, 1991, application BPED-900126IB was placed on an "A" list which specified a cut-off date of July 15, 1991.

¹¹ Because of its mutual exclusivity with SHU's major change application, Upsala's minor change application takes on the cut-off date of SHU's application, ie., July 15, 1991. This also corresponds with the cut-off date of Application BPED-900202IA of Mercer County Community College.