

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

New Noncommercial Educational FM Station, Gloucester Point, Virginia

Hampton Roads Educational Telecommunications Association (HRETA) requests a waiver of Section 73.525 of the FCC's Rules on TV Channel 6 protection, to the extent necessary, for a new noncommercial educational FM station in Gloucester Point, Virginia (the "Station"). Waiver of this rule, the TV Channel 6 protection rule in Section 73.525, would permit the processing and grant of a permit for the Station, given that the affected TV Channel 6 Station (Station WTVR-TV in Richmond, Virginia) will no longer need protection after the February 17, 2009 analog giveback date mandated by Congress.

### **Background**

HRETA is the long-time licensee of noncommercial educational TV Station WHRO-TV, Hampton-Norfolk, Virginia and noncommercial 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 drawn from the community, including leaders from local financial institutions, law firms, transportation firms, the print media and the military.

HRETA has long sought to expand its public radio service throughout the region covered by its school system members. This NCE Filing Window represents the first such opportunity in over a decade. Moreover, the impending giveback of TV Channel 6 by Station WTVR-TV has opened up the potential for new stations within the congested reserved band on the channels that are set aside for noncommercial educational use. This application proposes new service to 63,775 persons, including first service to 14,361 persons and second NCE service to 36,983 persons for a combined total of first/second service of 51,334 persons (over 80% of the coverage area.)

### **Justification**

*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. Thus, under the *WAIT Radio* doctrine,

the Commission is bound to consider waiver requests. *Id.* at 1158. In this case, waiver is justified based on the *WAIT Radio* standard.

To protect TV Channel 6, HRETA certifies that it will not commence program tests or operation of the new noncommercial educational FM radio station until after the affected analog TV Ch. 6 (WTVR-TV) has ceased all its analog transmissions pursuant to the deadline set in the Digital Television and Public Safety Act of 2005, 47 U.S.C. § 309(j)(14)(A). Station WTVR-TV, presently on TV Ch. 6 for analog operations, has selected DTV Channel 25 as its “permanent” DTV Channel and the Final DTV Table of Allotments so reflects. See attached Engineering Exhibit. After WTVR-TV ceases operation on analog TV Ch. 6, there is no point in “protecting” a TV Ch. 6 station that no longer exists.

In addition, waiver would 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. As noted above, the proposed station would provide substantial first and second public radio service to over 80% of the proposed coverage area. This substantial increase in noncommercial educational radio service will 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>1</sup>

The FCC’s Audio Services Division routinely grants conditional construction permits in which an FM station’s change in facilities is contingent upon one or more other FM stations making changes in facilities. An example of the special operating condition on the authorization is as follows:

“Program tests for KXXX (Facility ID Number #00000) will not commence on Channel 2XXXC0 with facilities authorized herein until program tests for KYYY (Facility ID Number #11111) commence on Channel 2XXXC3 with the facilities authorized in FCC File No \_\_\_\_\_ and a license will not be granted for KXXX on Channel 2XXXC0 with facilities authorized herein until a license is granted for KYYY on Channel 2XXXC3 with the facilities authorized in \_\_\_\_\_.”

Since the FCC grants conditional construction permits in this FM context, it should grant conditional construction permits in the TV Channel 6 context as well. There is no good policy rationale for not granting HRETA a construction permit for the Station conditioned on the

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<sup>1</sup> 47 U.S.C. § 396(a)(9). *See also* 47 U.S.C. § 396(a)(6), which provides that “it 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” and 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).

giveback of analog TV Channel 6. We suggest the FCC adapt the language above for use in this circumstance, or use the following language (derived from a special operation condition on the DTV authorization for HRETA's own Station WHRO-DT) as a model:

"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."

Finally, as the FCC may well recall, the current iteration of Section 73.525 was a "compromise" between the interests of TV and NCE radio broadcasters. The rule was promulgated to: "(1) allow for expansion of the NCE-FM Service, (2) have minimal negative impact on the TV-6 viewers, and (3) offer a realistic approach for satisfying the needs of all interested parties."<sup>2</sup> All of these goals for the original rule would be fulfilled by waiver of the rule in this instance.

For these reasons, HRETA respectfully requests waiver of Section 73.525 of the FCC rules.

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<sup>2</sup> *Changes in the Rules Relating to Noncommercial, Educational FM Broadcast Stations*, Memorandum Opinion and Order, 50 Fed. Reg. 27954, FCC 85-328, ¶ 4 (1985).