

REQUEST FOR WAIVER OF SECTION 73.215(a)

Optima Communications, Inc. ("Optima"), licensee of Station KSKX(FM), Security, Colorado, by its counsel, respectfully requests a waiver of Section 73.215(a) of the Commission's Rules. A waiver is warranted because the Commission's Rules (specifically Sections 73.207 and 73.215) do not accurately account for the impact of the unique terrain in the Rocky Mountains region on the facilities of Stations KSKX(FM) and KJAC(FM). Grant of this application is also in the public interest because, as discussed herein and in the engineering exhibit, a waiver will allow current listeners of Station KSKX(FM) to continue to receive service from the Station, it will permit the service to be extended to larger and more populated areas, and it will not result in any new contour overlap. Finally, because of the unique terrain associated with the Rocky Mountains region, if the Bureau grants this waiver request, it will not be establishing precedent that can be used by other stations to seek waivers of Section 73.215(a) except in very unusual circumstances.

I. BACKGROUND

Station KSKX(FM) is currently licensed to operate on Channel 288C3 at an established multi-use communications site on Cheyenne Mountain. As a Class C3 station, KSKX(FM) is properly spaced to all other facilities under Section 73.207 of the Commission's Rules. However, as the attached engineering exhibit demonstrates, because of the highly irregular terrain in the region, Station KSKX(FM)'s protected contour (60 dBu) receives interference from the interfering contour (40 dBu) of Station KJAC(FM), Timnath, Colorado, as a result of the most recent permit (BMPH-20031027AAB) and associated license (BLH-20040420AAQ) issued

to Station KJAC(FM).¹ Despite these overlapping contours, neither station (KSKX(FM) nor KJAC(FM)) operates under Section 73.215 of the Commission's Rules in regard to each other.

In order to upgrade Station KSKX(FM) to Class C2 facilities, Optima filed a petition for rule making that was granted by the Media Bureau pursuant to the *Report and Order* in MB Docket No. 04-367.² Optima recognized that it could not upgrade Station KSKX(FM) from a Class C3 to a Class C2 station at its current site under the Commission's spacing rules. Thus, Optima specified new coordinates at the allotment stage in order to comply with Section 73.207. However, Optima has been unable to locate a suitable tower site for the new facilities and, in the instant application, it proposes the Station's current transmitter site with a directional antenna to maintain the preexisting overlap that currently exists between Stations KSKX(FM) and KJAC(FM).³ Thus, there is a need for a waiver of Section 73.215(a).⁴

II. WAIVER REQUEST⁵

The purpose of Section 73.215(a) is to afford applicants greater flexibility in specifying transmitter sites while also ensuring that new interference is not created between radio stations to

¹ The Commission granted the KJAC(FM) applications which, due to the unusual terrain along the base of the Rocky Mountains, resulted in received interference to Station KSKX(FM) even though the two stations are properly spaced pursuant to Section 73.207. Under such circumstances the overlap at Station KSKX(FM)'s current site cannot be eliminated without a severe decrease in power by Station KSKX(FM) regardless of its class of channel.

² 20 FCC Rcd 418 (2005).

³ Optima has filed a number of extension of time requests because, *inter alia*, it was evaluating alternative tower sites. However, as discussed in the engineering exhibit, for a variety of reasons, primarily multi-path over the city of license, no other site except the established antenna farm on Cheyenne Mountain is practical or technically feasible. As indicated in the Engineering Exhibit, Optima is aware of one other attempt to locate a tower in the non-short spaced area, but multi-path interference caused the station to be relocated and the tower to be abandoned.

⁴ The facilities specified by Station KSKX(FM) in the instant application comply with the mileage separation requirements of Section 73.215(e) of the Commission's Rules. *See* 47 C.F.R. § 73.215(e)

⁵ A waiver of Section 73.215(a) is warranted in this situation pursuant to Section 1.3 of the Commission's Rules. Under Section 1.3, the Commission is required to consider the public interest in individualized cases, and must provide for waiver of its rules when doing so would not undermine the policy served by those rules. *See* 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

the detriment of the listening public.⁶ This policy would be furthered here because Optima would not have to locate at a new transmitter site (in an area that has no existing broadcast towers) which would result in multi-path interference over the community of license as well as over a large portion of its service area.⁷ See Engineering Exhibit. The purpose behind Section 73.215(a) would also be furthered because, as demonstrated in the attached engineering exhibit, the overlap between Stations KSKX(FM) and KJAC(FM) already exists.⁸ To avoid any overlap, the power would need to be reduced to approximately 100 Watts along the azimuth in the direction of Station KJAC(FM).

Optima recognizes that, because of the Commission's two-step process for modifying the facilities of an FM broadcast station (rule making and application), it is "creating" overlap. However, in actuality, it is maintaining preexisting overlap which has not been acknowledged before due to the fact that the two stations are properly spaced. That is why a waiver of Section 73.215(a) is necessary. Station KSKX(FM) (as currently licensed) is fully spaced to Station KJAC(FM) by over a kilometer. This means that Station KSKX(FM) could actually move 1 kilometer closer to Station KJAC(FM) and still be in compliance with Section 73.207 even though this would increase the received interference to Station KSKX(FM) and the overlap between the two stations. This demonstrates the failure of the Commission's rules to accurately depict the actual facilities of Stations KSKX(FM) and KJAC(FM) in this unusual situation. However, instead of moving closer to Station KJAC(FM) as a Class C3 and increase overlap, Optima is merely asking the Commission to maintain overlap that already exists.

⁶ See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments Using Directional Antennas, Report and Order*, 4 FCC Rcd 1681 (1989).

⁷ Without a waiver, Optima could not locate the transmitter site for Station KSKX(FM) on Cheyenne Mountain.

⁸ The Commission has previously permitted stations to modify their facilities where overlap exists so long as the overlap is not increased. See, e.g., *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments Using Directional Antennas, Memorandum Opinion and Order*, 6 FCC Rcd 5356, ¶ 54 (1989).

If the Commission does not grant this waiver request, it will actually be harming the listening public who were able to listen to Station KSKX(FM) as a Class C3, but will not be able to listen to the Station as a Class C2 because at its present site Optima will have to pull in its signal in the direction of Station KJAC(FM). Due to the unique terrain in the region, this will harm the 78,395 persons within the 70 dBu contour who currently receive the signal because they will be more susceptible to receiving interference from Station KJAC(FM). *See* Engineering Exhibit.

This waiver request is not unprecedented. In fact, the Commission modified Section 73.215 to account for the unique terrain in Puerto Rico and the Virgin Islands. Specifically, “because, in many circumstances, contour overlap already exists, even between fully spaced stations” the contour protection standards of Section 73.215 did not accurately depict the contours of the stations.⁹ Thus, the Commission modified Section 73.215 to add a separate contour protection table for Puerto Rico and the Virgin Islands and the co-channel protected contours were increased by as much as 7 dBu.¹⁰ Here, the contour protection standard for co-channel Stations KSKX(FM) and KJAC(FM) also do not accurately depict the contours of the stations because of the unique terrain.¹¹ Thus, Optima submits that the Commission should, in support of this waiver, treat these unique terrain circumstances like the terrain circumstances in Puerto Rico and the Virgin Islands. As demonstrated in the engineering exhibit, the Commission would only have to modify the protected contour of Station KSKX(FM) by 2 dB (from 60 dBu to 62 dBu) and the interfering contour of Station KJAC(FM) by 2 dB (from 40 dBu to 42 dBu) in

⁹ *WAVI: Christiansted, VI*, 8 FCC Rcd 7329 (1993).

¹⁰ *See* 47 C.F.R. § 73.215(a)(4).

¹¹ To demonstrate how unique the terrain in this area is, Optima’s consulting engineer performed a delta h study for Stations KSKX(FM) and KJAC(FM) in the direction of the overlap. For Station KJAC(FM) the delta h was between 166m and 553m and for Station KSKX(FM) the delta h was between 241m to 740m.

order to depict the true contours of these stations. *See* Engineering Exhibit, Figure 5B. The desired to undesired ratio of 20 dB would be maintained just as it is for Puerto Rico and the Virgin Islands.

NRC Broadcasting Inc., licensee of Station KJAC(FM), does not oppose this waiver request because, as discussed above, it will not increase the actual interference that exists between the two stations and because the Station KJAC(FM) does not currently, and will not if this application is granted, receive any interference from Station KSKX(FM). A statement attesting to this will be provided. Also, to the extent that the Commission is concerned that grant of this waiver will create precedent that will allow other licenses to circumvent the contour protection requirements of Section 73.215(a), it should not be. The unique terrain associated with the Rocky Mountains (as with Puerto Rico and the Virgin Islands) has created this situation where overlap exists even though the two stations at issue are fully-spaced under Section 73.207. There are few if any other stations that are faced with this situation. Evidence of this fact can be discerned by the extensive research performed by counsel which has not turned up any cases where a waiver has been requested under comparable circumstances.

Optima is urging the Commission to use a common sense approach under its discretion to waive the rules where (1) no other sites are available primarily due to multi-path interference; (2) preexisting overlap is maintained with no detriment to any listeners or other stations; (3) substantial and unnecessary diminution of service to listeners is avoided; and (4) it is unlikely that there will be many cases that rely on this precedent because of the highly unusual terrain in this area.

Therefore, for the foregoing reasons, the Bureau should grant Optima's request for a waiver of Section 73.215(a) of the Commission's Rules.