



Federal Communications Commission
Washington, D.C. 20554

In Reply Refer to:
1800B3-RFB

MAY 23 2014

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In re: **WPAT(FM), Paterson, NJ**
Facility ID No. 51663
WPAT Licensing, Inc.
File No. BPH-20021107AAD

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed by WPAT Licensing, Inc. ("WPAT Licensing") on August 21, 2003.¹ WPAT Licensing seeks reconsideration of a July 28, 2003, letter decision by the Audio Division, Media Bureau ("Bureau") denying WPAT Licensing's request for waiver of Section 73.213(a) of the Commission's rules ("Rules") ("Section 73.213(a)") and dismissing the above-referenced minor modification application ("Application") to relocate Station WPAT(FM) ("Station") from the World Trade Center ("WTC") to the Empire State Building ("ESB") as unacceptable for filing.² For the reasons stated below, we deny the Petition.

Background. The Application proposed to relocate the transmitter site from the WTC to the ESB and increase its effective radiated power from 5.4 kilowatts to 6 kilowatts. The proposed facility would not meet the minimum distance separations set out in Section 73.207 of the Rules.³ Specifically, it would be short-spaced to co-channel Station WHYN(FM), Springfield, Massachusetts and first-adjacent Station WMMR(FM), Philadelphia, Pennsylvania. Therefore, WPAT Licensing requested processing under Section 73.213(a) of the Rules, which allows short spacing provided that the stations originally became short-spaced before November 1964, remain short-spaced, and comply with the specified interference requirements. Under Section 73.213(a), a co-channel or first-adjacent channel may modify its facilities if the applicant demonstrates that there is no increase in either the total predicted interference

¹ CC Licenses, Inc. ("CC Licenses"), licensee of Station WHYN-FM, Springfield, Massachusetts, filed an Opposition to Petition for Reconsideration on September 4, 2003, and WPAT Licensing filed a Reply to Opposition on September 22, 2003.

² See *WPAT Licensing, Inc.*, Letter, Ref. No. 1800B3 (July 28, 2003) ("*Letter Decision*"); 47 C.F.R. § 73.213.

³ 47 C.F.R. § 73.207.

area (caused and received) or the associated population, and that there is no increase in interference caused by the proposal to any other individual grandfathered short-spaced station. The Application fails to comply with Section 73.213(a) because the proposal increases both the predicted interference area caused to WHYN and the total overall predicted interference area (caused and received).

Accordingly, WPAT Licensing requested waiver of Section 73.213(a), arguing that on September 11, 2001, its currently licensed main transmitter site at the WTC was destroyed by terrorists and is no longer available. In addition, it claimed that there are no fully-spaced sites to relocate to and the proposed site is the least short-spaced site available.⁴ WPAT Licensing also believed that the ESB is the only multi-use FM site which could offer service comparable to the former WPAT WTC facility. Finally, WPAT Licensing indicated that the ESB proposal would result in a negligible overall increase in interference.

In the *Letter Decision*, the Bureau acknowledged that WPAT's licensed operation from the WTC resulted in interference caused to WHYN, and recognized the difficulty WPAT Licensing has faced in finding a site that replicated its WTC licensed site, formerly the tallest building in New York City. However, the Bureau rejected WPAT Licensing's claim that the overall increase in interference is negligible and noted the significant increase in interference caused to WHYN.⁵ Finally, the Bureau found that, notwithstanding the special circumstances involved in the loss of the WPAT transmitter site, waiver of Section 73.213(a) was not warranted because WPAT Licensing has the opportunity to specify alternative facilities at the ESB site that would cause less interference to WHYN and reduce the total predicted interference area, while providing service to millions of listeners in the New York metropolitan area.⁶ Therefore, in light of this alternative that would lessen the adverse impact of WPAT's relocation on WHYN, we denied WPAT Licensing's waiver request and dismissed the Application.

In its Petition, WPAT Licensing contends that, in the *Letter Decision*, the Bureau's alternative proposal would severely diminish WPAT's previous service area and lead to a further curtailment of service when the WTC is rebuilt. Furthermore, it believes that "the additional power is essential for WPAT's signal to penetrate the dense concentration of high-rise buildings in an urban area."⁷ WPAT Licensing also utilizes the Longley Rice prediction methodology to determine that the actual interference area is *de minimis*.⁸ Finally, WPAT Licensing claims that grant of the requested waiver under these circumstances would create no precedent for the Bureau.

In its Opposition, CC Licenses claims that the staff has never accepted Longley Rice propagation methodology for interference showings. Furthermore, it believes that the *Letter Decision* specified a viable, rule compliant, alternative – operation from the ESB at 4.9 kilowatts. Finally, CC Licenses states

⁴ WPAT Licensing indicated that of the 101 tower sites studied, only one site (Station WNYE site) improved all the short-spacings. However, WPAT Licensing stated that they cannot provide the required city-grade coverage from the WNYE site.

⁵ The *Letter Decision* stated that the proposal will increase the interference within WHYN's protected service contour by a population of 23,354 people.

⁶ The *Letter Decision* stated that if the effective radiated power were reduced to 4.9 kilowatts, the proposed facility would comply with Section 73.213(a).

⁷ Petition at 6.

⁸ Petition at 8.

that WPAT Licensing has not cited any case where an interference waiver of this magnitude has been granted.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.⁹ WPAT Licensing has failed to meet this burden.

In the Petition, WPAT Licensing relies on the same facts and arguments that it advanced in the Application. These arguments were addressed and disposed of in the *Letter Decision*, which expressly rejected WPAT Licensing's argument that the increased interference was negligible. It is settled Commission policy that petitions for reconsideration are not to be used for the mere re-argument of points previously advanced and rejected.¹⁰ Therefore, we deny the Petition on procedural grounds.

Even if we were to consider the Petition on the merits, WPAT Licensing fails to show any material error in the *Letter Decision*. The Commission's Rules may be waived only for good cause shown.¹¹ The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"¹² and must support its waiver request with a compelling showing.¹³ 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.¹⁴

We disagree with WPAT Licensing's arguments regarding the Bureau's alternative proposal. While WPAT Licensing emphasizes the loss of coverage from specifying a rule compliant proposal, the Commission has long and repeatedly held that it favors lesser but adequate coverage to greater coverage from facilities that do not comply with core interference rules.¹⁵ In an analogous circumstance regarding increased interference with a waiver of 47 C.F.R Section 73.215 of the Rules,¹⁶ the Commission concluded that it "*need not consider* the alleged public interest benefits" advanced by an applicant seeking increased overlap in a Section 73.215(a) waiver.¹⁷

⁹ See 47 C.F.R § 1.106(c),(d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁰ See, e.g., *John F. Garziglia, Esq.*, Letter, 28 FCC Rcd 15738 (MB 2013).

¹¹ 47 C.F.R. § 1.3.

¹² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted).

¹³ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹⁴ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁵ See *Board of Education of the City of Atlanta (WABE-FM)*, 82 FCC 2d 125, 127 (1980); *Open Media Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 4070, 4071 (1993); *Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207, 2208 (1991).

¹⁶ 47 C.F.R. § 73.215.

¹⁷ *Greater Media Radio Company, Inc.* Memorandum Opinion and Order, 15 FCC Rcd 7090, 7099 (1991).

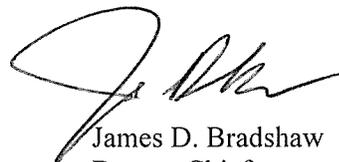
Finally, we find that waiver of Section 73.213(a) to permit the acceptance of WPAT Licensing's supplemental interference showing is not warranted. In *Certain Minor Changes Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12401-12403 (1997), the Commission stated its policy with respect to supplemental showings pertaining to interference calculations:

First and foremost, we want to emphasize that supplemental showings have not been accepted, nor will be accepted, for the purpose of demonstrating interference or prohibited contour overlap between FM broadcast stations. ... To employ supplemental showings in this manner would represent a fundamental change as to how contour protection applications are processed, and would require a separate rulemaking proceeding to specify standards, methods and assumptions, and possibly revised definitions for protected service areas and interference.

That policy has not changed.¹⁸ Nor has the applicant provided compelling justification why the longstanding prohibition against using supplemental analyses for predicting interference or contour overlap in the FM radio service should be set aside in this instance, apart from the obvious fact that such results favor the applicant. Therefore we cannot accept the supplemental interference analysis showing a "*de minimis*" increase in interference to WHYN-FM. Notably, WPAT Licensing fails to cite to any case in which the Commission has granted an interference waiver using a supplemental contour prediction methodology. If WPAT Licensing wishes to petition for a change in the rule, the appropriate vehicle would be a petition for rulemaking, not a waiver request.

Conclusion/Actions. For the reasons stated above, IT IS ORDERED that the Petition for Reconsideration filed by WPAT Licensing, Inc. on August 21, 2003, IS DENIED.

Sincerely,



James D. Bradshaw
Deputy Chief
Audio Division
Media Bureau

¹⁸ In MM Docket 98-93, the Commission initiated consideration of the point-to-point propagation method for use in the FM service. However, in the *Second Report and Order* in MM Docket 98-93, 15 RCD 16149 (2000) at Paragraph 8, the Commission stated that it was likely that "several program modifications" were under consideration that could affect the results obtained from the analysis. As of this time the point-to-point method is still being reviewed.