

## SECTION 74.1235 WAIVER REQUEST

The purpose of this statement is to respond to a request from FCC staff to address the power limitations set forth in Section 74.1235(a), (b) and (j) of the Commission's Rules in order for Sacred Heart University ("SHU") to support its request to continue the superpowered status of W219BA. The original grant of excess power for this translator station was based, in part, on the provision of noncommercial educational ("NCE") "white area" service. As a result, the FCC staff has asked SHU for a showing as to whether there is any remaining NCE white area. SHU will demonstrate that the Commission has waived its rules to permit excessive ERP for reasons other than the provision of service to unserved areas in cases where (1) the channel change is necessitated by displacement to avoid interference to a new or existing NCE station, (2) the retention of the superpower waiver has overriding public interest benefits and (3) there is a showing that no interference will be created by the substitute channel.

### Background

Translator Station W219BA was approved as part of a settlement which resolved two comparative hearings involving mutually exclusive applications between four parties (MM Docket Nos. 91-157 and 91-206).<sup>1</sup> SHU had applied for a new NCE station at Shirley, New York (BPED-19891215MD). Despite receiving a 307(b) preference for the proposed new station, SHU accepted four 250 watt translators as part of the settlement instead. The full Commission granted the applications for these superpowered translators because each covered different areas of Long Island and at that time provided some amount of NCE white and grey area service. In the *Memorandum Opinion and Order* ("MO&O"), 8 FCC Rcd 672 (1993), approving the superpowered translators, the Commission stated at paragraph 7- -

SHU's translator applications and settlement of two protracted comparative hearing proceedings present the Commission with a unique situation and an unusual opportunity to afford NCE service to unserved and underserved areas...Grant of the Selden, Huntington Station, Ridge and Noyack translators applications will immediately provide first NCE service to 136,523 people (emphasis added).

When the Ridge translator application was granted in 1993, followed by grants for Stations WLIU(FM), Southampton and WUSB(FM), Stony Brook, New York (which were part of the settlement), the proposed white area was immediately eliminated.<sup>2</sup> The elimination of the white area service as a result of the subsequent grants of permits to

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<sup>1</sup> *Sacred Heart University, Inc.* 8 FCC Rcd 4108 (Rev. Bd. 1993).

<sup>2</sup> To clarify, the SHU translator permits were issued prior to the WUSB and WLIU permits by approx. 7 months. As a result, the NCE white areas were recognized when the translator permits were granted. However, once the WUSB and WLIU permits were issued, the white areas were eliminated and became grey areas.

Stations WLIU and WUSB was a fact known to the Commission at the time the Ridge translator was granted. That is why the Commission's decision made reference to the underserved areas in its *MO&O*. Nevertheless, the Commission found there were additional public interest benefits in providing new NCE service to these underserved areas of Long Island. As will be shown, the provision of NCE service to this underserved area by W219BA has not changed since 1993. Thus, for this reason, along with other public interest factors to be discussed, the Media Bureau should grant the requested waiver of Section 74.1235 and continue the service provided by W219BA.

### **Public Interest Factors**

As described in the attached Engineering Statement and shown on the two contour maps (Figures 1 and 2) depicting the situation in 1993 and today, the lack of NCE service to certain areas within the W219BA 60 dBu contour has not changed since 1993. The public has benefited and continues to benefit from the service provided by the Ridge translator. The contour map depicting the current situation shows that substantially all of the grey area still exists and thus, the need for NCE service has not diminished over time. Indeed, the residents of eastern Long Island listen to the SHU superpowered translators by significantly greater numbers than any full service NCE station serving this portion of Long Island.<sup>3</sup>

In 1994, SHU faced displacement of one of the other four SHU translators (Selden translator Station W289AD) under the same circumstances as SHU faces now. When the Selden translator commenced service in 1993 on Channel 284, complaints of interference from a first adjacent station [WELJ(FM)(formerly WBEA), Montauk, NY] caused SHU to file a displacement application to specify nonadjacent Channel 289 (BPFT-19940502TF). There was no remaining white area due to the permit issued to Station WUSB (as mentioned earlier in connection with the Ridge translator). Nevertheless, the Media Bureau granted the permit and retained the superpowered status of this translator without holding that white area coverage must be provided. The instant Ridge translator application has the exact same situation. Both moves are/were involuntary. Based on the showing provided in Figures 1 and 2, there was no first NCE service at the time that the Selden translator was displaced. But there was and still is grey area containing a substantial underserved population.<sup>4</sup> This factor was recognized as a public interest

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<sup>3</sup> Recent Arbitron data for Suffolk County shows that Station WSHU (the primary station) has more listeners by a substantial margin than any other NCE station. See Exhibit 1 attached.

<sup>4</sup> The provision of grey area or service to underserved populations has been recognized by the Commission as a very important factor in the NCE allocation process and in the selection of NCE applications in comparative proceedings. For example, the Commission established criteria by which a rule making proponent may reserve an FM allotment for NCE use. *See In the Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report and Order*, 15 FCC Rcd 7386 (2000); Under the expanded criteria, a proponent must demonstrate that it would provide a first and/or second NCE radio service to at least 10 percent of the population within the 1 mV/m (60 dBu) contour of the proposed station and such population must exceed 2,000 persons. In the Ridge translator application this 10% grey area showing and at least 2,000 pop. factors are easily met. Similar criteria have been established in the Commission's comparative point system evaluation for awarding new NCE permits.

benefit in the Commission decision (*MO&O*) mentioned above and should continue to be a basis for the waiver in the instant Ridge application. The Selden translator provided service to underserved NCE areas encompassing 75.2% of its overall 60 dBu population in an area encompassing 75.6% of the 60 dBu contour area. The licensed Ridge translator's underserved areas and pop. percentages are comparable--68.9% population and 49.7% of the coverage area. See Engineering Statement.

### Past Case Law

In addition to the Selden case which should be controlling precedent for the instant Ridge displacement application, there are other cases in which superpowered status was retained after a channel change without a showing of white area service. In *Indian Springs, Nevada, Mountain Pass, California, Kingman, Arizona and St. George, Utah*, 14 FCC Rcd 10568 (MMB 1999), a superpowered FM station was ordered to show cause to another channel of the same class. The station argued that it should be able to retain its current superpowered status on the new channel. The Bureau stated at paragraph 19, that since no interference would occur on the new channel,

the optimum result in this case is to upgrade Station KPXC(FM), Indian Springs on Channel 257C and to modify the license for Station KHYZ(FM) at Mountain Pass to operate on Channel 259B with the same superpower facilities that it currently has on Channel 258B. Such a result permits the Indian Springs station to serve a much greater number of listeners than would be possible on nonadjacent Channel 272C and at the same time, preserves the public interest benefits flowing from the prior grant of Station KHYZ(FM)'s waiver of Section 73.211 of the Commission's Rules.

The same considerations are present with respect to the W219BA channel change. As shown in the application, there is no interference created on the new channel. The same public interest benefits flow from maintaining the superpowered status including service to a substantial number of underserved listeners in need of NCE service. Furthermore, the continuation of the previous waiver in the *Indian Springs, Nevada* case was granted based on the fact that the original public interest factors that existed for the excess ERP have not materially changed and thus, there was no reason to deny this service to existing listeners. The same situation exists for the Ridge translator—the original public interest benefits have not materially changed and there are no countervailing reasons to warrant elimination of the superpowered status at this time.

Similarly, in *Golden West Broadcasters*, 4 FCC Rcd 2097 (1989), the Commission reversed a decision by the Mass Media Bureau and reinstated an application for a superpowered station even though its previous authority for the excessive power was relinquished approximately 20 years earlier. The applicant argued that the relinquishment

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by a previous licensee was involuntary and that more power is needed to overcome the deficient signal strength over the community of license. The Commission granted the waiver request and the superpower status reasoning that, in addition to providing the required principal community coverage, the Commission was following a strong policy of allowing superpower stations that must make facility modifications to retain the superpowered status. This case also demonstrates that the Commission will grant a waiver of the power limitations for reasons other than providing NCE white area.

The maps provided in the Engineering Statement demonstrate the current state of the grey area service taking into account all authorized full service NCE stations. The Ridge translator provides service to underserved NCE areas encompassing 37,228 persons (34.6% of the overall 60 dBu contour population) within an area of 101 sq. km. (19.2% of the area within this contour). This compares to the proposed 70 watt facility on the new channel which will provide an increase in grey area service to 41,945 persons (34.7% of the proposed 60 dBu contour population) in an area of 142 sq. km (25.8% of the contour area). Thus the proposed facility will increase the grey area population by 112% and increase the land area by 140% compared to the licensed W219BA facility.

Additionally, the licensed W219BA facility currently serves 107,356 persons within its 60 dBu contour. By dropping the ERP to 10 watts to conform to the rule, the population would decrease to 33,782—eliminating 73,574 potential listeners or 68.5% of its current population coverage. In addition, most of the current grey area and population would be removed. See Engineering Statement.

### **Loss of Service**

As indicated, the instant Ridge application (like the other cited cases) is being filed on an involuntary basis to avoid displacement by the expected grant of a co-channel application for a new station in Riverhead, NY (BNPED-20071019AVG) located only 4.5 miles from the current Ridge translator.

The Commission has been extremely reluctant to eliminate service provided by existing translator stations unless there are no other solutions to interference complaints. Here, if the Ridge translator is required to reduce power to 10 watts, nearly 70% of the current population, including much of the grey area service within its existing coverage area, will be deprived of the NCE service provided by this station. As described in the Engineering Statement, a reduction in power to 10 watts will reduce the grey area population from its current 37,228 to 12,748 (a reduction of 65.8%) and would cover only 59 sq. km of grey area (a reduction of 41.6%). These reductions and the corresponding loss of service are contrary to the public interest. Furthermore there are no overriding reasons for the Commission to eliminate the currently authorized superpowered status in the context of an involuntary displacement application.

SHU has a strong commitment to serve the Long Island community through these superpowered translators. The translators provide unique, quality programs not offered by any other NCE stations in this area. These translators rebroadcast the WSHU-FM

programming which offers highly respected NPR News programs such as *Morning Edition* and *All Things Considered*, as well as *Car Talk*, *Marketplace* and *A Prairie Home Companion*. WSHU has made a special effort to provide local service to its Long Island listeners ever since the translators commenced service. Over the past two years, WSHU has expanded its focus on local news. This focus on local programming of interest to Long Island listeners has been recognized by several prestigious awards for the local service which include:

- **FOLIO Awards, from the Fair Media Council on Long Island**
  - “Latino Hate Crimes”
  - “Foreclosure Avoidance”
  - “Gualaceo”
- **National and Regional Edward R. Murrow Awards from RTDNA**
  - “A Community Victimized in the Shadows”
- **Public Radio News Directors, Inc.**
  - “Latino Victimization”

SHU broadcasts news reports every hour which includes news directed specifically to the residents of Suffolk County, New York. SHU is able to provide this news by having two news reporters in Long Island as well as affiliating with other local news sources. WSHU also offers classical music programming that is entirely locally produced. Two of WSHU’s four music on-air hosts are residents of Suffolk County. Classical programming has become even more essential to this area since Station WQXR became a Class A FM station and this New York classical music station's signal no longer reaches central and eastern Long Island.

As a NCE station, WSHU relies on listener donations. Long Island residents appreciate the local programming so much that a significant amount of the contributions come from Suffolk County listeners. As mentioned earlier, the Arbitron data in Exhibit 1, confirms that the WSHU programming provided by these translators are more popular with listeners than any other NCE station received in Suffolk County. If the Ridge translator could not continue broadcasting as a superpowered translator, a large population of Suffolk County would again become underserved, and listeners who for years donated to support the service of local and national news, and cultural programs, would lose the ability to hear programs that they enjoy and depend upon.

## CONCLUSION

SHU requests that its Ridge translator station be permitted to continue to serve its existing listeners on the proposed new channel. SHU is not filing this application voluntarily. It will clearly be forced off its channel as soon as the pending Riverhead, NY application is granted and constructed.<sup>5</sup> In such involuntary circumstances, the waiver criteria should not be strictly applied. As discussed, it is not essential that NCE

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<sup>5</sup> If for some reason, this application is not granted, there are 5 other applications in MX Group 394 any of which will also have the same impact on this translator.

white area coverage exists in order to justify the retention of grandfathered superpowered status. The Commission has considered grey area service as a high priority for NCE service in a number of contexts. The Commission has previously granted a displacement channel to another one of the SHU translators under the same exact circumstances and without having to show white area coverage. Under the public interest factors, this translator serves a substantial underserved area providing valuable programming both of a local nature and NPR programming of national interest. The proposed service on the new channel will actually increase the grey area service. As demonstrated, there is no reason to force this translator to reduce its coverage by nearly 70%. There is no recognizable interference that will be caused by the proposed new channel and the Commission has a strong policy against eliminating existing service without some countervailing benefit. Indeed, eliminating the existing coverage to the underserved area is manifestly contrary to the public interest without any benefit to the public. Accordingly, SHU urges grant of this waiver request and issuance of a permit on Channel 293 with the proposed superpowered facilities.

## **EXHIBIT 1**

# ListenerPC

Produced by RRC LPC Version 3.0 from Arbitron Diary Data

New York - Fall 2006

Persons 12+ in Selected Counties

	Cume	Gross	AQH
WBAI-FM Mon-Sun 6A-12M	7800	117000	200
WBGO-FM Mon-Sun 6A-12M	2300	45800	100
WEDW-FM Mon-Sun 6A-12M	0	0	0
WFME-FM Mon-Sun 6A-12M	2800	19000	0
WFMU-FM Mon-Sun 6A-12M	0	0	0
WFUV-FM Mon-Sun 6A-12M	22800	561200	1100
WHPC-FM Mon-Sun 6A-12M	0	0	0
WLIU-FM Mon-Sun 6A-12M	15800	507100	1000
WCWP-FM Mon-Sun 6A-12M	0	0	0
WKCR-FM Mon-Sun 6A-12M	2600	10300	0
WNPR-FM Mon-Sun 6A-12M	3800	102400	200
WNYC-AM Mon-Sun 6A-12M	4800	76600	200
WNYC-FM Mon-Sun 6A-12M	25600	546000	1100
WNYE-FM Mon-Sun 6A-12M	1700	39300	100
WPKN-FM Mon-Sun 6A-12M	4000	68200	100
WRLI-FM Mon-Sun 6A-12M	2600	50900	100
WSHR-FM Mon-Sun 6A-12M	16900	416300	800
WSHU-FM Mon-Sun 6A-12M	49400	967300	1900
WSUF-FM Mon-Sun 6A-12M	17900	331400	700
<b>TOTAL For Group 1 ....</b>	<b>126100</b>	<b>3858900</b>	<b>7700</b>

Custom County List:

Suffolk NY

Report Type: Stations and Dayparts File Name: \$current.csv

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