

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Attn: Media Bureau

Thursday, March 5, 2014

REQUEST FOR WAIVER OF SECTION 73.215 OF THE COMMISSION'S RULES

SUMMARY

In its application herein, Applicant has requested facilities that are in violation of Section 73.215(b)(2)(ii) of the Commission's Rules, pertaining to contour protection of short-spaced assignments. For the reasons detailed below, Applicant respectfully requests that the Commission waive Section 73.215(b)(2)(ii).

The Commission may grant a waiver of its Rules in a particular case, only if the relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest. Furthermore, a waiver from the Commission is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. Applicant respectfully asserts that its request conclusively satisfies the criteria required for the Commission to grant a waiver of its Rules, and would not undermine the statutory and regulatory purposes of Section 73.215(b)(2)(ii).

WAIVER JUSTIFICATION

The Commission has long held that "an applicant seeking a waiver of a Rule has the burden to plead with particularity the facts and circumstances that warrant such action. Thus, an applicant for waiver 'faces a high hurdle even at the starting gate.' Although the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted. Waiver is appropriate only if both (1) special circumstances warrant deviation from the general rule,

and (2) such deviation better serves the public interest" (WAIT Radio v. FCC, 1969, 1972). Applicant respectfully asserts that special circumstances warrant a waiver of Section 73.215(b)(2)(ii) in this situation, and that the public interest would be better served by deviation from the general rule.

Until now, Applicant has been unable to construct a full Class A FM facility at its existing tower site due to a subset of the Commission's Rules regarding contour protection of short-spaced assignments, Section 73.215(b)(2)(ii), which requires an applicant employing Section 73.215 to treat an adjacent station authorized solely under Section 73.207 as if it were operating under the maximum effective radiated power and reference antenna height above average terrain to its respective class. Applicant's licensed facility is short-spaced to station WFFX 103.7 FM at Hattiesburg, Mississippi, a Class C0 FM facility authorized under 73.207 of the Commission's Rules, with an effective radiated power level of 100,000 Watts from a reference antenna height above average terrain of 324 meters. Despite the fact that WFFX has operated for many decades with an antenna height 126 meters under that of a full (450 meters HAAT) Class C0 FM facility, Applicant has had to protect its own service area as if WFFX were actually broadcasting from a significantly higher structure. Although Applicant is prepared to make an *immediate and specific* service improvement to its licensed facility, it is unable to do so in order to preserve some unspecified nebulous future option afforded to WFFX to construct a full Class C0 FM facility, which it has failed to do ever since signing on the air in 1966. Consequently, Applicant has operated with licensed power and antenna height parameters less than those of a full Class A FM facility.

Applicant is fully cognizant that, in order for the Commission to waive its Rules, there must be good cause and special conditions to justify such an action. Applicant further recognizes that any future application of such a waiver request should affect, at best, only a "small number" (Greater Media, 15 FCC Rcd 7090) of stations in similar situations, and that such circumstances should not be so common as to undermine the integrity of the waived Rule as a whole. Applicant contends that exceedingly unusual conditions do, in fact, exist in this situation, which merit a waiver of Section

73.215(b)(2)(ii) of the Commission's Rules. Specifically, CC Licenses, LLC, ("CCL") which owns (among other stations) both WFFX 103.7 FM at Hattiesburg, Mississippi and WNSL 100.3 FM at Laurel, Mississippi, and, via subsidiary company Capstar Radio, the tower (Antenna Structure Registration Number 1041960) upon which both stations are situated, has had at least *two* separate specific opportunities to conclusively confirm its plan to construct a taller structure for WFFX and WNSL, and in both cases, did not do so. Therefore, given two open demonstrations of CCL/Capstar's failure in constructing a full facility for WFFX / WNSL, Applicant requests that it be allowed to protect its own service contours based upon the actual operating parameters of said stations, rather than those of a hypothetical maximum Class C0 FM facility.

On August 8, 2002, Capstar Radio applied to the Federal Aviation Administration for the right to increase the overall height of its tower (ASRN 1041960) to 1,478 feet above ground level from its then height of approximately 1,000 feet AGL (see FAA Study 2002-ASO-4898-OE). The additional tower height would have provided an opportunity for both WFFX and WNSL to improve to full Class C0 facilities, and possibly would have allowed both stations to preserve their (then) FM Class C designations. The FAA responded to Capstar's request with a Determination of Presumed Hazard to air navigation (see FAA Determination from Earl P. Newalu, Jr. to Capstar Radio, October 21, 2002). The FAA notified Capstar that any tower in excess of 1,166 feet AGL would "result in a substantial adverse effect and would warrant a Determination of Hazard to Air Navigation." The FAA then gave Capstar an additional sixty days to amend its aeronautical study so as to not present a hazard to air navigation. Capstar did not move to cure its defective application within the sixty day window, nor since that time, representing the first failure of CCL/Capstar to construct a substantially larger tower for WFFX / WNSL.

Applicant asserts that Capstar's continued inaction after its unfavorable 2002 FAA determination is overwhelmingly adequate evidence of the fact that neither WFFX nor WNSL will ever achieve full FM Class C0 status. Applicant fully realizes, however, that many other stations may have

received a similarly fatal FAA determination, which, by itself, would not provide a sufficiently unique or special condition in which a waiver request may be granted to the benefit of a competing station's application. In light of this presumption, Applicant conducted an exhaustive study (attached hereto) of FM facilities that had attempted to construct full facilities and were unable to do so. The study produced 130 such subject stations in the non-reserved band, a comparatively small number against the entirety of licensed FM radio stations, but not so small as to support the 'unique' status of Applicant's waiver request herein. Were Applicant simply one station seeking a waiver of Section 73.215(b)(2)(ii) adjacent to any of the 130 FM facilities in largely the same FAA situation as WFFX / WNSL, then Applicant concedes that the Commission's grant of a waiver would be inappropriate, as many other facilities could claim similar circumstances, potentially undermining the underlying Rule. In this particular case, however, Capstar was presented with a subsequent additional occasion in to build a taller tower for WFFX / WNSL, and failed to do so.

In August, 2005, Capstar's tower (ASRN 1041960) for WFFX / WNSL was compromised due to the impact of Hurricane Katrina. Although many stations in the region suffered effects of the event, CCL/Capstar was forced to completely rebuild its physical plant for WFFX / WNSL. Rather than seek to erect a structure capable of supporting a full Class C0 FM facility, or even the previously FAA-acknowledged maximum acceptable height of 1,166 feet AGL, Capstar constructed a 1,000 foot tall support structure for the stations. This new facility is appreciably the same height as the prior tower, but significantly shorter than what would be required to realize full Class C0 status for either station. Regardless of intent or circumstance, CCL / Capstar did, in fact, construct a wholly new tower for WNSL / WFFX incapable of supporting a full Class C0 FM facility.

Applicant contends that these *two separate occasions* in which CCL/Capstar could have conclusively demonstrated its plan to construct a larger structure for WFFX / WNSL (and subsequent failure to do so) precisely define the distinct nature of the situation facing the Applicant, thereby providing justification for a waiver of Section 73.215(b)(2)(ii) of the Commission's Rules.

CCL/Capstar faced two separate scenarios in which it could have substantially increased the tower height of the WFFX / WNSL facility. In the first instance, CCL/Capstar applied to the FAA to increase its tower height to a level worthy of a full Class C0 FM standard, then had its proposal rejected without any further contention. In the second instance, CCL/Capstar was forced to construct an entirely new tower for WFFX / WNSL and built a structure appreciably the same height as what had already been in place, despite possessing unambiguous documentation that the FAA would have allowed a higher structure at the same site. CCL/Capstar has failed to construct a full Class C0 FM facility for WFFX / WNSL on *two separate occasions*.

To further support its conclusion that Applicant is facing "special circumstances," as required in order for the Commission to grant a waiver request, Applicant narrowed its above-referenced list of 130 FM stations (that had applied for and were unable to construct full facilities) to those that had subsequently rebuilt their tower sites and erected a structure of appreciably the same height as what had previously been in place. In effect, Applicant attempted to determine how many other "underbuilt" stations had not built out a full facility twice. The revised list included just a handful of affected stations in the entire country, with only WFFX / WNSL ultimately operating without subsequent 73.215 designations: WSUN-FM at Holiday, Florida (which has already lost its upgrade opportunity by the time it rebuilt its tower and was already operating under a Section 73.215 authorization), WWGR at Fort Myers, Florida (which later took a Section 73.215 authorization), and WFFX / WNSL. Applicant respectfully asserts that, given the two separate failed chances that CCL/Capstar has had to construct a taller tower for WFFX / WNSL, it has presented sufficient compelling evidence of the point that it should be relieved of protecting its own service contour based on the hypothetical maximum interfering contours of WFFX / WNSL. Finally, given the fact that WFFX / WNSL would be the only affected stations in the country by such a waiver, Applicant has demonstrated that special circumstances do exist in this instance.

RULEMAKING CONSIDERATION

When an applicant seeking a waiver of the Commission's Rules is denied, the Commission will often suggest that the applicant would be best served by pursuing a change to the Rule(s) as part of a broader Rulemaking Proceeding. With respect to radio broadcasting, this view was reaffirmed most recently during DA 14-661 on May 15, 2014: *Maricopa County Community College District's request to relax Sections 73.503(d) and 73.621(e) of the Commission's Rules, reconsidered on 11/24/2014 (FCC 14-187)*. In *Maricopa*, the Commission declared to the applicant that:

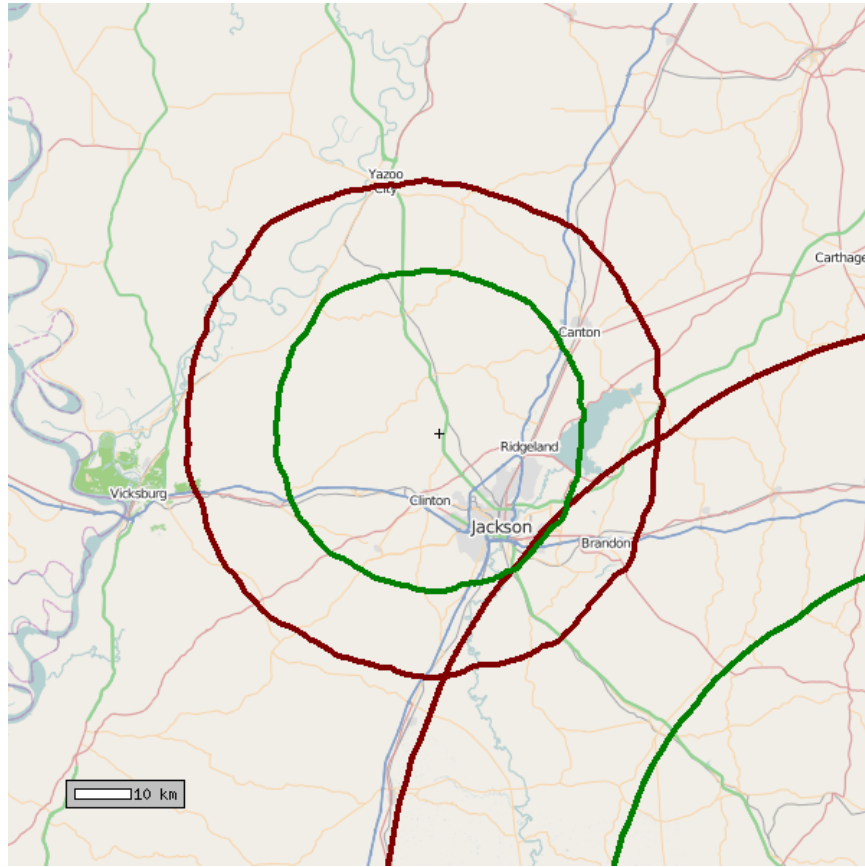
"...Maricopa's stated purposes for the waiver - to adopt measures to address the economic challenges due to decreased funding from federal and state sources and the prolonged economic recovery - while laudatory, are not so unique and unusual in itself as to warrant a waiver of the underwriting Rules and policies. Many NCE licensees face similar circumstances and Maricopa fails to identify any special circumstances that distinguish it from all other NCE licensees. If Maricopa wishes to petition for a change in the rule, the appropriate vehicle would be a petition for rulemaking, not a waiver request."

Applicant respectfully asserts that, not only do unique and unusual circumstances exist (see previous section and accompanying study) that distinguish it from other licensees, but that it has *already participated in two separate petitions for rulemaking* that, if implemented, would achieve the same net effect as the waiver request considered herein: RM-11643 in 2011 and RM-11727 in 2014, neither of which advanced to the Notice of Proposed Rulemaking phase. RM-11643 sought to diminish the importance of the allocations process in commercial FM application processing and incorporate many of the same interference protection standards of the reserved FM band, while much of the focus of RM-11727 was the broader application of Section 73.215 to certain Section 73.207-licensed stations. Applicant helped author the initial Petitions for Rulemaking and filed favorable comments in each proceeding. If the Commission were to consider either proposal, then the overall impact would be to benefit a great number of stations, so while Applicant continues to wholly support both RM-11643 and RM-11727, it respectfully contends that, independent of any ongoing rulemaking efforts, its present situation is sufficiently unique as to warrant a waiver of Section 73.215(b)(2)(ii).

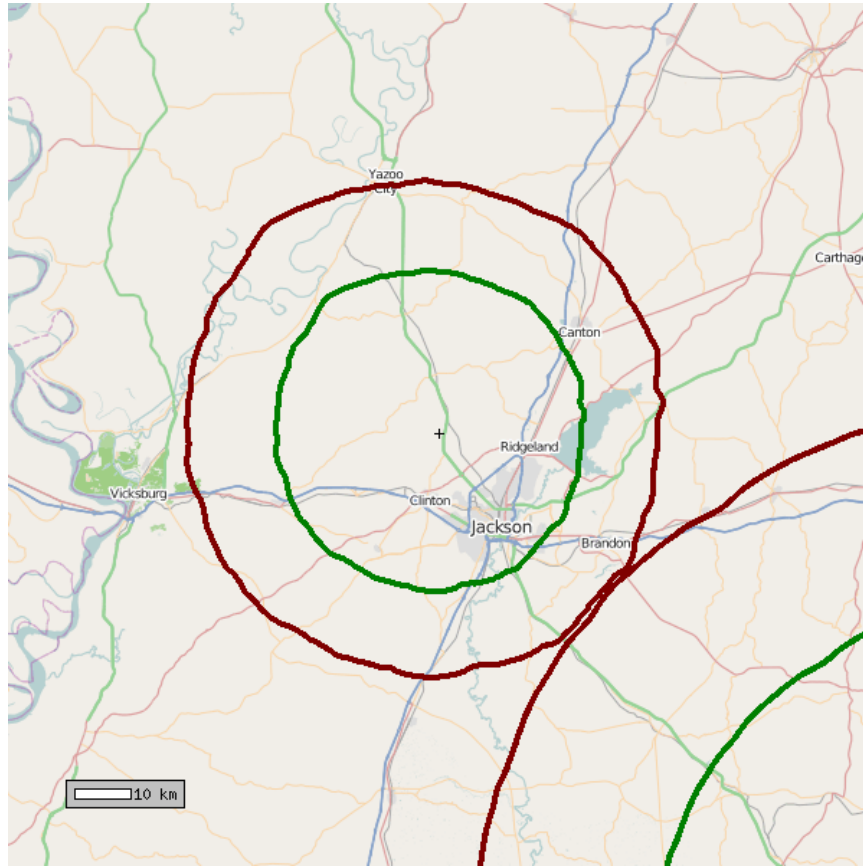
PUBLIC INTEREST SHOWING

As stated above, Applicant believes that its ability to improve its station to a full Class A FM facility is clearly in the public interest. In its application herein, Applicant has respected WFFX using its actual licensed parameters, as opposed to its hypothetical maximum effective radiated power and antenna height. Applicant has requested a full FM Class A facility (6,000 Watts of effective radiated power from a reference antenna height above average terrain of 100 meters) from its authorized broadcast tower using an omnidirectional antenna. Using block centroid data from the 2010 United States Census, Applicant has determined that 298,409 persons currently reside within its F(50,50) 60 dBu protected service contour, bounded by a total area of 2,285.2 square kilometers. Applicant has requested a facility that would encompass 313,339 persons within an area of 2,508.4 square kilometers, for increases of 5.00% in population and 9.77% in total area served.

It is important to note that Applicant would be able to significantly increase its population and area served without causing any predicted interference to WFFX, nor would any actual interference be received to Applicant's facility:



The above depiction of Applicant's requested F(50,50) 60 dBu (green) and F(50,10) 54 dBu (dark red) contours versus WFFX's corresponding F(50,50) 60 dBu and F(50,10) 54 dBu contours respects WFFX as if it were operating under the maximum effective radiated power level and antenna height above average terrain to its class (FM Class C0). Even under this scenario, Applicant would cause no interference to WFFX, and would receive only phantom hypothetical interference within its F(50,50) 60 dBu service contour, as if WFFX were truly operating with a maximum Class C0 FM facility. If Applicant were allowed to consider WFFX under its actual licensed parameters, however, then no prohibited overlap would exist whatsoever:



Not only would Applicant fail to receive interference from or cause interference to WFFX, there is no point at which even the F(50,10) 54 dBu interference contours of each station intersect. Absent a waiver of Section 73.215(b)(2)(ii), Applicant must provide WFFX with approximately 10.0 dB of "bonus contour protection" from its current tower site, all in the name of preserving some nebulous and unspecified future buildout opportunity for CCL/Capstar, which has twice already failed to pursue. Applicant's specific and immediate upgrade request (which would take mere hours to implement) is clearly to the benefit of the public, while preservation of a twice unimplemented opportunity for CCL/Capstar is not.

HISTORICAL CONTEXT

Applicant recognizes that many licensees and permittees have approached the Commission with 73.215 waiver requests in the past, resulting in varying degrees of success. Recently, in the matter of *DA 13-249: Tower Investment Trust, Inc., WBNK(FM) Pine Knoll Shores, North Carolina*, the Commission denied an initial and reconsideration request of the licensee of station WBNK(FM), Tower

Investment Trust, Inc., for a waiver of Section 73.215(a). On the surface, it may appear as if Tower Investment invoked similar arguments to that of the Applicant's herein: that no actual interference would be caused or received to either facility; that the adjacent station, WERO(FM), had no reasonable hope to ever construct full facilities; that the Federal Aviation Administration was likely to deny a higher structure for the adjacent station, et cetera. Although Tower Investment made several engineering claims that seemingly parallel those of the Applicant's herein, unlike the Applicant, Tower Investment failed to prove with particularity why its situation was unique or special, thus warranting a waiver of the Commission's Rules.

On two separate occasions, the Commission denied Tower Investment's waiver request, initially stating that:

“...we wish to make clear that we will not entertain Section 73.215(a) waiver requests based on the theory that the short-spaced station cannot construct, or is highly unlikely to construct, maximum class facilities. FM non-reserved band stations which are fully spaced to co- and adjacent channel stations enjoy protection as if they operated at maximum class facilities. This core technical licensing principle provides both protection for these stations and flexibility for site relocations and service improvements.”

Applicant challenges the notion that it is “theorizing” that CCL/Capstar will be “highly unlikely to construct a maximum class facility” for WFFX / WNSL. Whereas a theorist strives to generalize an explanation of a phenomenon, Applicant has clearly demonstrated that it is faced with specific and particular circumstances: CCL/Capstar has twice publicly expressed no interest in constructing a taller tower for WFFX / WNSL, and that similar scenarios are exceedingly uncommon. Applicant is not operating under the general conditions that a theory might characterize, which would (rightly) apply to the vast majority of broadcast licensees and permittees. Also, the ability or “flexibility” of WFFX to relocate will not be compromised by grant of this waiver request, as the separation gap between the service contour of Applicant's station and the interfering contour of WFFX will still be quite large.

In denying the Tower Investment waiver request for WBNK(FM), the Commission correctly noted that the licensee could have used a directional antenna to eliminate prohibited overlap between

its facility and WERO(FM), further stated that it favors “less, but adequate coverage to greater coverage from facilities that do not comply with core interference rules,” and that it “need not consider the alleged public interest benefits” of the request. Applicant freely concedes that it has made seemingly similar arguments in its present application: primarily that it could employ a directional antenna to remedy any prohibited overlap, and that it is proposing greater overall coverage when adequate coverage may exist. These uncontested facts are not applicable, however, to Applicant's waiver request herein. Unlike the Tower Investment case (and almost every other situation in which a Section 73.215 waiver request has failed), Applicant has conclusively demonstrated its unique status (via Exhibit A, attached hereto) that the WNSL/WFFX antenna tower is the only support structure in the country against which this type of waiver could be applied. In Tower Investment, as opposed to this case, the licensee of WERO(FM) had not had refused two open and separate opportunities to construct a taller tower to fully achieve its Class C status. At present, there are no other instances of a licensee of an underbuilt facility getting “two bites at the apple” and failing to achieve a hypothetical service improvement opportunity, such is the case in this situation. The Commission requires special circumstances in order to justify grant of a waiver request. Applicant contends that this precise situation exists in its waiver request herein.

Applicant asserts that the opening paragraph Section 301 of the Communications Act of 1934 (revised, 1996) is appropriately applied in this situation:

“It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”

Section 301 of the Communications Act of 1934 plainly states that no Federally-issued radio license shall carry rights beyond the terms, conditions, and periods of the license itself. Thus, Applicant respectfully states that there is no legal requirement of the Commission to provide additional protections to a licensee beyond the terms of its license, such as those reserved for the purposes of

“flexibility for site relocations and service improvements,” offered in the case of *Tower Investment*.

The Commission has granted waivers of Section 73.215 in the past. In *R&S Media / KBNH (FM) Homedale, ID, MO&O DA 04-960*, the Commission waived both Sections 73.215(a) and 73.215(e) for an applicant that had requested a full omnidirectional facility for its station from its preferred tower site, which would have been otherwise in violation of both rules. In *R&S*, the Commission allowed the applicant to construct full facilities at its requested tower site via waiver, despite the fact that other fully-spaced locations existed for KBNH to construct a tower. In *R&S*, the Commission found that a waiver of Section 73.215(e) was appropriate, as the applicant would have incurred significant expense and near-certain siting opposition in constructing a tower tall enough to adequately serve its community of license from a fully-spaced location. The Commission allowed such a waiver, even though the applicant had not formally applied for (nor been denied) a suitable fully-spaced tower site.

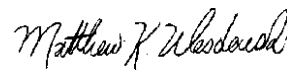
Much as in the *R&S* example, were enough time and financial resources devoted to such a project (likely several hundred thousand dollars and at least two years of effort), Applicant freely offers that it would be reasonable for anyone to conclude that it could construct a fully-spaced facility from a new tower location. This supposition, however, completely ignores and fails to address Applicant's overriding contention, in that it is prepared to carry an immediate and specific improvement to its service area now (which could be implemented in hours simply by turning up its transmitter output power to twenty percent over its current level), weighed against the inferior public interest argument of retaining a twice-rejected future buildout opportunity for WFFX / WNSL. While Applicant could carry out a specific service improvement on the *same day* it receives a grant of its construction permit application, it is prevented from doing so in the name of retaining some nebulous and unspecified scenario in which WFFX / WNSL may or may not build out a full Class C0 FM facility. Retention of such an opportunity for WFFX / WNSL, which CCL/Capstar has openly passed over twice already, is contrary to the public interest. Thus, coupled with the fact that no other stations can demonstrably

make such a claim, this scenario precisely represents an instance in which a waiver would "better serve the public interest than strict adherence to the general rule."

CONCLUSION

The Commission has allowed waivers of Section 73.215 in the past to stations that have been in less unusual circumstances than those of the Applicant's, and the public interest would be served by such an action. If Applicant were somehow able to construct a new tower elsewhere, not only would it incur an enormous financial burden, but the population served by the new installation would shrink significantly, to the detriment of the public interest. Therefore, Applicant simply proposes to respect a station with no twice-demonstrated interest to fully build out its facility to its actual service and interfering contours. Applicant is not seeking to downgrade a competing station nor lessen or interfere with its service area in any way whatsoever. It is not a theory that CCL/Capstar has failed to construct a larger tower for WNSL / WFFX, it is a twice-demonstrated fact, and the only instance of such a situation in the country. The Commission has stated that an applicant seeking a waiver of the Rules faces a "high hurdle" in gaining approval, but the hurdle is not a solid barrier, nor is it impossibly high. Applicant respectfully asks that the Commission fully consider its request herein and give it the "hard look" afforded to applicants seeking waiver of a Rule.

Respectfully,



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