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In re: **Radio One Licenses, LLC**
WWIN-FM, Glen Burnie, Maryland
Facility ID No. 54710
File No. BPH-20080701ACS

**Application for Minor Modification
to Licensed Facility**

Dear Counsel:

We have before us the application of Radio One Licenses, LLC (“Radio One”) for a minor modification to station WWIN-FM, Glen Burnie, Maryland (the “Application”).¹ Radio One seeks to change WWIN-FM’s community of license from Glen Burnie to Arbutus, Maryland. Also before us are informal objections to the Application filed by CBS Radio of Maryland, Inc. (“CBS”),² licensee of station WPGC-FM, Morningside, Maryland; Howard University (“Howard”), licensee of WHUR-FM, Washington, DC; and Prettyman Broadcasting Company (“Prettyman”), licensee of WICL(FM), Williamsport, Maryland, as well as Radio One’s Opposition to Informal Objections. For the reasons set forth below, we grant the informal objections and dismiss the Application.

Background. WWIN-FM is a pre-1964 grandfathered short-spaced station licensed at Glen Burnie, Maryland, currently operating with 3 kilowatts effective radiated power (“ERP”) with an antenna at 91 meters height above average terrain (“HAAT”). It proposes to provide Arbutus with a first local transmission service from the current WWIN-FM transmitter site, stating that no other fully spaced allotment coordinates exist for an FM allotment at Arbutus, and that the current WWIN-FM transmitter site is the only possible site from which to serve Arbutus. Radio One does, however, request an increase in power from 3 kilowatts to 6 kilowatts ERP. In order to prosecute the Application as a minor modification to the WWIN-FM facilities, Radio One seeks waiver of Section 73.3573(g)(4) of the Commission’s Rules (which requires that such applications demonstrate the existence of a suitable assignment or allotment site that fully complies with Sections 73.207 and 73.315 of the Rules without resort to Sections 73.213 or 73.215),³ and Section 73.213(a) of the Rules (which requires that any modification to the facilities of a pre-1964 short-spaced station not increase the area and population of interference to any other co-channel or first-adjacent channel station).⁴ Radio One contends that no existing short spacings will be exacerbated, as no change in the antenna, antenna height, or transmitter location is proposed, and that the only impermissible increase in interference will be to first-adjacent channel WSOX(FM), Red Lion, Pennsylvania, whose licensee, Susquehanna License Co., LLC, (“Susquehanna”) has consented to the increased interference. Ultimately, Radio One argues, any interference or other concerns are overridden by the public interest benefits of providing first local transmission service at Arbutus, a Census Designated Place with a 2000 Census population of 20,116.

CBS, Howard, and Prettyman each contend that the Application cannot be granted, principally because it would increase the amount of interference to first-adjacent channel WSOX(FM), and that the Commission precedent cited by Radio One can be distinguished on the ground that, in those cases, interference was neither increased nor exacerbated. CBS and Howard also insist that grant of the Application would increase interference to second-adjacent channel WPGC-FM and WHUR-FM, while Prettyman argues that grant of the application would increase interference to co-channel WICL(FM). Radio One counters that Section 73.213 does not apply to second-adjacent channel stations as to which short spacing has existed since prior to November 16, 1964; disputes Prettyman’s claim of additional

¹ File No. BPH-20080701ACS.

² CBS’s filing is styled “Comments in Opposition of CBS Radio Inc. of Maryland.” We shall treat it as an informal objection.

³ 47 C.F.R. § 73.3573(g)(4).

⁴ *Id.*, § 73.213(a).

interference to its protected contour; and reiterates its contention that the provision of first local transmission service at Arbutus constitutes a “persuasive” case for waiver of Section 73.213(a)(2) of the Rules.

Discussion. We note at the outset that this application is subject to the new standards of evaluation under Section 307(b) of the Communications Act,⁵ as announced in the Second Report and Order in *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*.⁶ As both Glen Burnie and Arbutus, Maryland, are located in the Baltimore Urbanized Area, Radio One correctly notes that it is not required to provide a showing of community independence under *Faye and Richard Tuck*.⁷ However, under our new policies, Radio One may not simply claim that the Application proposes a preferential arrangement of allotments because it would constitute first local transmission service at Arbutus under Priority (3) of the Commission’s allotment priorities.⁸ Rather, it must make its showing under Priority (4), other public interest matters, by demonstrating from which of the two communities the station would provide service to a greater area and population within the urbanized area.⁹ Radio One did not make such a supplemental showing pursuant to the new Section 307(b) standards, although from the technical exhibit submitted it is apparent that the proposed facility would cover more of the Baltimore Urbanized Area than the current WWIN-FM facility.¹⁰ For the reasons discussed below, however, we dismiss the Application and deny Radio One’s request for waiver of the Rules.

When seeking waiver of a rule, an applicant’s burden is to plead with particularity the facts and circumstances that warrant such action.¹¹ Thus, an applicant for waiver “faces a high hurdle even at the starting gate.”¹² While the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted.¹³ “A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹⁴ In this case Radio One seeks not one but two waivers: waiver of Section 73.3573(g)(4), so that it may “resort” to Section 73.213; and waiver of Section 73.213(a), because Radio One’s proposal

⁵ 47 U.S.C. § 307(b) (“Section 307(b)”).

⁶ Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2576-78 (2011) (“*Rural Second R&O*”).

⁷ Memorandum Opinion and Order, 3 FCC Rcd 5374, 5376 (1988).

⁸ *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 F.C.C.2d 88, 91-93 (1982).

⁹ See, e.g., *Gearhart, Madras, Manzanita, and Seaside, Oregon*, Report and Order, 26 FCC Rcd 10259 (MB 2011).

¹⁰ Radio One claims that the WWIN-FM facility modification will result in a net population gain in interference-free, protected service to 228,858 persons, or 17.9 percent, although it does not state what proportion of that population resides in the Baltimore Urbanized Area.

¹¹ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987), citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968).

¹² *WAIT Radio*, 418 F.2d at 1157.

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 *Northeast Cellular*, 897 F.2d at 1166.

would increase first-adjacent channel interference to WSOX(FM). The only special circumstances cited in support of the waiver requests are Radio One's inability to change its transmitter site, based on the grandfathered short spacing, and the claimed public interest benefit of providing a first local transmission service at Arbutus.

We agree with the objectors that both the text of Section 73.213, and the cases Radio One cites in support of its Application and waiver requests, do not contemplate a situation in which the areas and populations affected by interference from a grandfathered pre-1964 station to a co- or first-adjacent channel station are increased. Under Section 73.213, modifications of stations that have been short-spaced prior to November 16, 1964, may only occur upon a showing that any area predicted to receive interference lies completely within any area currently predicted to receive co-channel or first-adjacent channel interference, or a showing that the total area and population subject to such interference, caused and received, would be maintained or decreased.¹⁵ The rule section, in short, does not allow modifications that would increase the areas or populations receiving co-channel or first-adjacent channel interference. Radio One cites a number of cases as prelude to a request that we extend existing policies regarding changes of community of license for grandfathered short-spaced stations. First, Radio One cites *Newnan and Peachtree City, Georgia*,¹⁶ in which the staff granted an application to change an FM station's community of license, when the allotment at the new community created no new short spacings and there was no change in technical facilities. Next, it cites *Albemarle and Indian Trail, North Carolina*,¹⁷ which unlike *Newnan* and its progeny did not involve maintaining a station's technical *status quo*. However, while the applicant in *Albemarle* did propose changes to the station's technical facilities, the proposed modifications eliminated two existing short spacings and significantly reduced a third. In other words, while our precedent allows pre-1964 short-spaced stations to propose community changes that would either maintain or reduce short spacings or the amount of interference caused, nothing suggests that we would or should allow increases in the amount of interference caused to other stations. The instant proposal would maintain existing short spacings and increase interference.

Radio One states that the "overarching" public interest benefit of providing first local transmission service to an unincorporated Census Designated Place of over 20,000 population, located within the Baltimore Urbanized Area, justifies extending our policies to allow such increased interference.¹⁸ Given the Commission's presumption of urbanized area service, as articulated in the *Rural Second R&O*, we cannot agree.¹⁹ Moreover, the Commission has a long-standing policy of refusing to base waivers of rules designed to prevent interference on non-technical considerations such as ownership or programming.²⁰ Finally, except in certain narrowly defined, rule-based circumstances,²¹ the

¹⁵ 47 C.F.R. § 73.213.

¹⁶ Report and Order, 7 FCC Rcd 6307, 6308 (MMB 1992) ("*Newnan*"). See also *Oceanside and Encinitas, California*, Report and Order, 14 FCC Rcd 15302, 15304 (MMB 1999); *Berlin and North Conway, New Hampshire*, Report and Order, 14 FCC Rcd 15307, 15308 (MMB 1999).

¹⁷ Report and Order, 16 FCC Rcd 13876 (MMB 2001) ("*Albemarle*").

¹⁸ Section 307(b) Showing, Request for Waiver of Section 73.3573(g)(4) of the Commission's Rules, and Request for Waiver of Section 73.213(a) of the Commission's Rules (Attachment 35 to Application) at 3.

¹⁹ *Rural Second R&O*, 26 FCC Rcd at 2572, 2577.

²⁰ See, e.g., *Open Media Corporation, Northern Illinois University, and Rockford Educational Broadcasting Foundation*, Memorandum Opinion and Order, 8 FCC Rcd 4070, 4071 (1993); *Walter F. Faber, Jr.*, Memorandum

Commission has a long-standing prohibition against negotiated or otherwise consensual interference in the FM broadcast band.²² Although the Commission has stated that it is in the public interest to consider allowing negotiated interference agreements among FM licensees, to date it has not lifted this general prohibition, and it is not appropriate for us to implement such a policy change in this adjudicatory context.²³ Thus, while Susquehanna has consented to the additional interference that station WSOX(FM) would receive as a result of Radio One's proposal, a broadcaster's acquiescence to increased interference is not decisive, because it is the listeners in the affected area who are the beneficiaries of the Commission's spacing rules and other policies designed to limit interference.²⁴ In summary, we find that a proposed community of license change from one community in an urbanized area to another within the same urbanized area does not constitute sufficient special circumstances to justify waiver of two separate rules that underlie important Commission policies regarding FM interference.

Conclusion / Ordering Clauses. For the reasons set forth above, the waiver request filed by Radio One Licenses, LLC, IS DENIED. The informal objections filed by CBS, Howard, and Prettyman ARE GRANTED, and the Application filed by Radio One Licenses, LLC, File No. BPH-20080701ACS IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

Opinion and Order, 4 FCC Rcd 5492, 5493 (1989), *recon. denied*, 6 FCC Rcd 3601 (1991), *aff'd sub nom. Walter F. Faber, Jr. v. FCC*, No. 91-177, 962 F.2d 1076 (D.C. Cir. June 4, 1992), *reh'g denied* (D.C. Cir. July 30, 1992).

²¹ See, e.g., 47 C.F.R. § 73.213(c)(2).

²² 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Notice of Proposed Rule Making, 13 FCC Rcd 14849, 14853-54 (1998).

²³ 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Second Report and Order, 15 FCC Rcd 21649, 21651 (2000).

²⁴ See *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, Report and Order, 6 FCC Rcd 6580, 6583 n.20 (MMB 1991), quoting *Millington, Maryland*, Memorandum Opinion and Order, 45 R.R.2d 1689, 1691 (BB 1979).