

FEDERAL COMMUNICATIONS COMMISSION  
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Vineyard Public Radio  
4 Linden Street  
Winchester, MA 01890

In re: WMEX(FM), Edgartown, MA  
Facility ID No.: 175715  
Vineyard Public Radio ("Vineyard")  
BMPED-20110512AAA

Dear Applicant:

This refers to the above-captioned minor change application, as amended on May 24, 2011, to increase the authorized effective radiated power ("ERP") from 0.4 kilowatt to 1.0 kilowatt. Vineyard also requests waiver of the contour overlap provisions of 47 C.F.R Section 73.509. For the reasons stated below, we deny the waiver request and dismiss the application.

**Waiver Request.** An engineering study of the application reveals that it is in violation of Section 73.509 with respect to co-channel Class A authorized facility (BMPED-20090824AGX) for WJMF(FM), Smithfield, RI. Specifically, the proposed protected contour (60 dBu) would receive prohibited overlap from the interfering contour (40 dBu) of WJMF. Vineyard recognizes this violation and requests waiver of Section 73.509.

In support of the waiver request, Vineyard states that it will not cause interference to WJMF. Vineyard claims that the proposed facilities would provide a net increase of its overall coverage area by 382 square kilometers (a 64% increase). Furthermore, Vineyard claims that the proposed facilities will provide new service to an estimated 36,702 persons, which is an increase of 67%. Vineyard indicates that the overlap area consists of areas of Naushon and Pasque Islands which are uninhabited, and the population contained within the contour overlap is zero persons. Moreover, Vineyard states that both the Naushon and Pasque Islands are privately owned and residential development is not permitted. Finally, Vineyard believes that there is little difference between overlap over water, which is allowed, and overlap over small unpopulated islands. Vineyard considers the affected area to be *de minimis* and when considered along with the increased service area, Vineyard concludes that waiver of Section 73.509 is warranted in this case.

**Discussion.** While the area of overlap currently may be undeveloped, lack of population alone is not sufficient to waive this core interference protection requirement. Also, while Vineyard contends that the islands are privately owned and that development is unlikely, it can not be definitively concluded that residential establishments will not ever exist in that area in the future. In any event, Section 73.509 specifically addresses overlap area rather than the population in the

overlap area. Furthermore, Vineyard fails to demonstrate that any readily available rule compliant technical solution, like a directional antenna, could not be used to eliminate the prohibited overlap. Moreover, Vineyard has not cited any published decisions where the Commission granted a waiver under circumstances similar to the ones presented here.

Allowing applicants to create new prohibited contour overlap effectively nullifies the protection mandated by Section 73.509 to noncommercial educational FM stations' 60 dBu protected service areas. In particular, the affected station would lose service area and population served without receiving any benefit in return. This interference interrupts the continuity of service provided by WMEX throughout its protected service area, and thus diminishes the quality of FM service provided by the afflicted station. Over time, the grant of numerous similar waivers would degrade the quality of FM reception from stations throughout the entire noncommercial educational FM band. As the Commission stated in *Open Media Corp.*, 8 FCC Rcd at 4070, 4071:

It is the overall scheme of [noncommercial educational FM] allocations which is paramount, and when faced with a choice between a larger service area with overlap received on one hand, and lesser coverage with no prohibited overlap on the other, the Commission favors the latter. See *Educational Information Corporation*, 6 FCC Rcd 2207, 2208 (1991)

Further, it is the Commission's charge, not applicants or licensees, to establish definitions of protected service and to ensure that protected service does not suffer interference. The goal of Section 73.509 is to prevent overcrowding of FM stations and provide a consistent, fair, efficient, and equitable distribution of FM facilities as required by Section 307(b) of the Communications Act.<sup>1</sup>

The Commission has granted waivers of Section 73.509 where existing noncommercial educational stations sought to increase the 60 dBu service contour so as to overlap the interfering contour of another noncommercial educational station and thereby receive overlap from second-adjacent and third adjacent noncommercial educational FM stations. See *Educational Information Corp.*, 6 FCC Rcd 2207 (1991). Here, Vineyard proposes to create new overlap received from a co-channel station. Therefore, the requested waiver of Section 73.509 does not fall within that precedent. Accordingly, the applicant's request for waiver of 47 C.F.R. Section 73.509 will be denied.

**Conclusion.** The Commission's rules may be waived only for good cause shown.<sup>2</sup> An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.<sup>3</sup> The Commission must give waiver requests "a hard look," but an applicant

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<sup>1</sup> See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5358 (1991) (para. 13).

<sup>2</sup> 47 C.F.R. § 1.3.

<sup>3</sup> 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)).

for waiver “faces a high hurdle even at the starting gate”<sup>4</sup> and must support its waiver request with a compelling showing.<sup>5</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>6</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>7</sup> However, waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.<sup>8</sup> Vineyard's request fails to present good cause for waiver of Section 73.509. Vineyard has not shown sufficiently unique “special” circumstances, *i.e.*, rare and exceptional circumstances beyond its control to justify a waiver of Section 73.509. Finally, we find that the facts and circumstances set forth in the justification are insufficient to establish that granting waiver of Section 73.509 would be in the public interest.

In light of the above, Vineyard's request for waiver of Section 73.509 IS HEREBY DENIED. Furthermore, Application File No. BMPED-20110512AAA, as amended on May 24, 2011, being unacceptable for filing, IS HEREBY DISMISSED. This action is taken pursuant to Section 0.283 of the Rules.

Sincerely,



Rodolfo F. Bonacci  
Assistant Chief  
Audio Division  
Media Bureau

cc: Dennis Jackson, Engr.

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<sup>4</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (“*WAIT Radio*”). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

<sup>5</sup> *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)).

<sup>6</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

<sup>7</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

<sup>8</sup> *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (“*Network IP*”); *Northeast Cellular*, 897 F.2d at 1166.