

**FEDERAL COMMUNICATIONS COMMISSION**  
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**WASHINGTON DC 20554**

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**AUDIO DIVISION**  
**APPLICATION STATUS:** (202) 418-2730  
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May 27, 2015

The City College of New York  
160 Convent Avenue  
NAC 1/513  
New York, NY 10031

In re: WHCR-FM, New York, NY  
The City College of New York  
Facility ID No.: 11412  
BPED-20140313AAT

Dear Applicant:

This letter refers to the above-captioned minor change application filed by The City College of New York ("City") for noncommercial educational Class D FM Station WHCR-FM to change from Channel 212D to Channel 220D. In the application, City requests waiver of the contour overlap provisions of 47 C.F.R. § 73.509(b). For the reasons stated below, we deny City's waiver request and dismiss the application.

**Waiver Request**

An engineering study of the application reveals that the proposed facility would cause prohibited contour overlap, in violation § 73.509(b) to the following facilities: (1) second-adjacent channel Class B1 Station WNYE(FM), New York, New York (Facility ID No. 3539) on Channel 218; and (2) second-adjacent channel Class B Station WBMP(FM), New York, New York (Facility ID No. 58579) on Channel 222. Specifically, WHCR's proposed 100 dBu interfering contour would be completely encompassed by the 60 dBu protected contours of both Station WNYE and Station WBMP. City recognizes these violations and requests waiver of the contour overlap provisions of § 73.509(b).

In support of the waiver request, City states WHCR's present channel (Channel 212) is highly congested. City argues that the station is surrounded by other stations and that its present signal is diminished in all directions. It also argues that, although the proposed operation would receive co-channel interference from two stations, operation on Channel 220 would be significantly quieter than the present operation on Channel 212. City contends that there is no channel in the area that is interference free and that operation on Channel 220 is the best choice. City states that the actual interference caused to WNYE's protected contour would be only 2.55 square kilometers and that the actual interference caused to WBMP's protected contour would be only 0.79 square kilometer. City further argues that, due to the height of the antenna, the actual interference area would never reach the ground. Finally, City cites *Educational Information Corporation*, 6 FCC Rcd 2207 (1991), as evidence of the Commission's willingness to consider waivers of such overlap in certain instances. Therefore, City concludes that waiver of § 73.509(b) is warranted in this case.

## Discussion

We disagree. While requests for waivers of new second- and third-adjacent channel overlap for stations are individually appealing due to the relatively large area and population served as compared to the small area receiving prohibited contour overlap, they lose this appeal when considered against the Commission's allocations scheme. Allowing applicants to create new prohibited contour overlap effectively nullifies the protection mandated by Section 73.509 to a station's protected service area. In particular, the affected station would lose service area and potential population to be served without receiving any benefit in return.<sup>1</sup> This interference interrupts the continuity of existing service provided by WNYE and WBMP throughout their protected service areas<sup>2</sup>, and thus diminishes the quality of FM service provided by the afflicted stations.<sup>3</sup> Over time, the grant of numerous similar waivers would degrade the quality of existing FM reception from stations. 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).

In view of the limited interference potential between second-adjacent channel FM stations, the Commission has granted waivers of Section 73.509 where a noncommercial educational station sought to increase the 60 dBu service contour so as to overlap the interfering contour of another noncommercial educational station and thereby receive overlap. See *Educational Information Corp.*, 6 FCC Rcd 2207 (1991). Here, WHCR proposes to cause prohibited overlap and create new interference. 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(b) will be denied.

## Conclusion

The Commission's rules may be waived only for good cause shown.<sup>4</sup> An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.<sup>5</sup> The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"<sup>6</sup> and must support its waiver request with a compelling showing.<sup>7</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance

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<sup>1</sup> Contrast this with the situation of WCPE, Raleigh, NC in *Educational Information Corp.*, 6 FCC Rcd 2207 (1991), wherein licensed FM station WCPE agreed to accept a small amount of interference received in exchange for a large increase in its 60 dBu service area.

<sup>2</sup> Please note, the application did not include documentation showing that WNYE or WBMP consented to the grant of the application. Therefore, grant of the application would constitute a modification of their licenses.

<sup>3</sup> This has been called the "swiss cheese" effect, where a station's protected service contour is punctured by "holes" of interference from multiple second- and third-adjacent channel FM stations. *Revision of FM Rules (Notice of Proposed Rulemaking)*, 21 RR 1655, 1674 (1961).

<sup>4</sup> 47 C.F.R. § 1.3.

<sup>5</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)).

<sup>6</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>7</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)).

inconsistent with the public interest.<sup>8</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>9</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>10</sup> City's request fails to present good cause for waiver of Section 73.509(b). City has not shown sufficiently unique "special" circumstances, *i.e.*, rare and exceptional circumstances beyond its control to justify a waiver of Section 73.509(b). Finally, we find that the facts and circumstances set forth in the justification are insufficient to establish that granting waiver of Section 73.509(b) would be in the public interest.

In light of the above, The City College of New York's request for waiver of 47 C.F.R. § 73.509(b) IS HEREBY DENIED and Application File Number BPED-20140313AAT IS HEREBY DISMISSED as unacceptable for filing.<sup>11</sup> This action is taken pursuant to 47 C.F.R. § 0.283.

Sincerely,



Rodolfo F. Bonacci  
Assistant Chief  
Audio Division  
Media Bureau

cc: Cohn and Marks LLP  
Charles A. Hecht & Associates

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<sup>8</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

<sup>9</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

<sup>10</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.

<sup>11</sup> Please note, we have contacted City numerous times in the past year and provided it with numerous opportunities to improve the waiver request or amend the application. As of this date, no amendment has been filed.