

**FEDERAL COMMUNICATIONS COMMISSION**  
**445 TWELFTH STREET, SW**  
**WASHINGTON DC 20554**

**MEDIA BUREAU**  
**AUDIO DIVISION**  
**APPLICATION STATUS:** (202) 418-2730  
**HOME PAGE:** [www.fcc.gov/media/radio/audio-division](http://www.fcc.gov/media/radio/audio-division)

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July 15, 2016

Mims Community Radio, Inc.  
900 Old Mission Road  
New Smyrna Beach, FL 32168

In re: WKTO(FM), Edgewater, FL  
Mims Community Radio, Inc.  
Facility ID No.: 42684  
BPED-20151224AAO

Dear Applicant:

This letter refers to the above-captioned minor change application filed by Mims Community Radio, Inc. ("Mims") for noncommercial educational FM Station WKTO(FM) to change from a circularly polarized antenna (both horizontal and vertical polarization) to a vertically polarized only antenna. In the application, Mims requests waiver of 47 C.F.R. § 73.316(a) to allow the vertically polarized only antenna operation. For the reasons stated below, we deny Mims' waiver request and dismiss the application.

### **Waiver Request**

In support of the waiver request, Mims states that vertically only polarization is needed to protect a vacant TV Channel 6 allocation in Orlando, Florida and any future station that may apply for that allocation. Mims contends that since it was previously licensed as a vertically polarized only station, and the Commission has allowed other stations to maintain their vertically polarized only operation, WKTO should be allowed to now return to vertically polarized only facilities.

### **Discussion**

We disagree. Pursuant to § 73.316(a), the vertical ERP cannot exceed the horizontal ERP. Specifically, § 73.316(a) states that it shall be standard to employ horizontal polarization. Section 73.316(a) further states that the supplemental vertically polarized ERP required for circular or elliptical polarization shall not exceed the ERP authorized. Section 73.525 of the Commission's Rules (47 C.F.R. § 73.525) makes an exception for FM stations that are required to protect a TV Channel 6 station. However, there are no TV Channel 6 stations, that require protection, within the distances specified in § 73.525(a) to WKTO. Specifically, there is no

requirement in the rules for an FM station to protect a TV Channel 6 allocation. Therefore, WKTO is not eligible for this exception. Furthermore, we will not grant an application that violates the rules solely to protect this allocation. Finally, we will not grant a waiver based on future events. We note that the FM stations that were permitted to keep their vertically polarized only operations, even though they no longer needed to protect a TV Channel 6 station, had been vertically polarized continuously. WKTO became circularly polarized on its own accord because it no longer needed to protect a TV Channel 6 station.<sup>1</sup> Accordingly, Mims' request for waiver of § 73.316(a) 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 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> Mims' request fails to present good cause for waiver of § 73.316(a). Mims has not shown sufficiently unique "special" circumstances, *i.e.*, rare and exceptional circumstances beyond its control to justify a waiver of § 73.316(a). Finally, we find that the facts and circumstances set forth in the justification are insufficient to establish that granting waiver of § 73.316(a) would be in the public interest.

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<sup>1</sup> See Construction Permit BMPED-20091104AHD, granted November 30, 2009 and the subsequent License BLED-20110603AAS, granted June 13, 2011.

<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)).

<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.

In light of the above, Mims Community Radio, Inc.'s request for waiver of 47 C.F.R. § 73.316(a) IS HEREBY DENIED and Application File Number BPED-20151224AAO IS HEREBY DISMISSED as unacceptable for filing. These actions are taken pursuant to 47 C.F.R. § 0.283.

Sincerely,

*Arthur E. Doak*

Arthur E. Doak  
Senior Engineer  
Audio Division  
Media Bureau

cc: Mr. Randy Henry