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February 19, 2004

Mr. William H. Fitz
Covington & Burling
1201 Pennsylvania Avenue NW
Washington, D.C. 20004

In re: WGBH (FM), Boston, Massachusetts
WGBH Educational Foundation ("Foundation")
Petition for reconsideration of August 28, 2002
dismissal of BPED-20000303ACI

Dear Mr. Fitz:

By letter dated August 28, 2002, the staff denied WGBH's request for waiver of 47 CFR Section 73.509 to increase the area of prohibited contour overlap with third-adjacent channel station WZBC, Newton, MA and dismissed the above-captioned construction permit application. On September 27, 2002, Foundation filed a petition for reconsideration of that action, seeking reinstatement and grant of the subject application. Additional information to justify the waiver request was provided in a supplement dated November 19, 2002.¹

On reconsideration as supplemented, Foundation argues that the staff erred for the following reasons: 1) the staff should have subtracted the area in common between WGBH's proposed 100 dBu overlap area and the existing 100 dBu overlap area created by third-adjacent channel station WBUR-FM; 2) the staff should compare a "similar" recently granted waiver to WBUR-FM under the precedent in *Educational Information Corporation (WCPE)*;² 3) the staff failed to give proper weight to the reduction of potential interference to reception of TV Channel 6; 4) the staff should permit interference prediction based on undesired-to-desired (U/D) ratios; and 5) the staff should allow Foundation to conserve resources by

¹ In general, 47 CFR Section 1.106 prohibits the filing of new information in a petition for reconsideration. However, an exception is made where the "petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters" (Section 1.106(c), referring to Section 1.106(b)(2)(i)). The information in the November 19, 2002 filing relates to grant of an application for WBUR-FM (as discussed below) -- clearly an event that occurred after dismissal of the subject application -- of which Foundation could not have had prior knowledge. Because that information is germane to the proposal for which reconsideration is sought, we will, on our own motion, accept the supplement and consider it with the petition for reconsideration.

² 6 FCC Rcd 2207 (1991).

permitting collocation of its FM and TV operations at a shared antenna site.³ By this letter we conclude that the staff fully considered the salient issues and issued a correct decision.

Effect of WBUR-FM: Third-Adjacent Channel Prohibited Contour Overlap Caused by WBUR-FM to WZBC. Foundation's primary basis for reconsideration (as supplemented) is based on the staff's subsequent grant of a waiver of Section 73.509 to WBUR-FM.⁴ Foundation reasons that the WGBH and WBUR-FM waiver requests are sufficiently similar as to warrant grant. Foundation deducts the prohibited contour overlap area created by WBUR-FM to WZBC from the total that the proposed WGBH operation would create to WZBC, and concludes that there will be an overall net reduction (11.5 sq. km or 1.6%) in the overlap area caused to WZBC by WGBH, as compared to WGBH's licensed operation.

We do not concur. Foundation's reduced-interference argument does not differ from the "masked interference" argument rejected in *Greater Media Radio Company, Inc.*, 15 FCC Rcd 7090 (1999), *petition for reconsideration denied*, 15 FCC Rcd 20485 (2000).⁵ We maintain our original finding that WGBH's proposal would *increase* (and relocate) prohibited contour overlap to WZBC from 99.4 sq. km to 132 sq. km.⁶

Judging on the merits of each station's waiver request, we find that the WGBH and WBUR-FM are *not* similar, and the same outcome (grant of the requested waiver of Section 73.509) is not warranted for WGBH. In the case of WBUR-FM, much of the 100 dBu interfering contour created by the newly-granted construction permit was common to the already existing 100 dBu interfering contour of WBUR-FM's license, and did not have a major impact on WZBC.⁷ To support its waiver request, WBUR-FM showed it would gain 862 sq. km containing 266,467 persons within its 60 dBu service area

³ WGBH sought to relocate WGBH (FM) by 14.9 km northwestward, to a site collocated with its TV station, WGBH-TV. WGBH (FM) proposes to operate with facilities of 21.0 kW ERP / 323 meters HAAT.

⁴ On October 9, 2002 the staff granted application BPED-19910617IB to WBUR-FM, Boston, MA. That grant included a waiver of Section 73.509 with respect to WZBC which permitted WBUR-FM to increase its 100 dBu interfering contour within the 60 dBu service contour of WZBC. Like WGBH, WBUR-FM operates on a third adjacent channel with respect to WZBC.

⁵ By "masked interference" we refer to the situation where prohibited overlap from one station covers the same area as prohibited contour overlap created by a second station. Foundation's proposal illustrates a telling argument against grant of waivers based on deductions of existing prohibited contour overlap from other stations. Assuming that we granted the requested waiver for WGBH (FM), WBUR-FM could immediately apply the same masking argument in a construction permit application. Not only could it deduct ALL of that station's existing prohibited contour overlap with WZBC, but it could apply for a significant increase prohibited contour overlap with that station (assuming no other constraints for the moment). This could have deleterious effects on the reception of WZBC in the overlap areas. Were this principle applied to all stations with similar conditions, the effect would be a net reduction in listenable noncommercial educational service nationwide.

⁶ In its petition as supplemented, Foundation revises these figures from 99.4 sq km to 98.8 sq. km, and 132 sq km to 135.5 sq. km. These small changes do not affect our determination.

⁷ WBUR-FM's 100 dBu interfering contour increased in size from 36.0 sq. km containing 46,518 persons to 48.2 sq. km containing 64,033 persons. These numbers translate to increases from 5.1% to 6.8% of WZBC's licensed 60 dBu service contour, and 3.0% to 4.1% of the population within that area. The increase in prohibited contour overlap primarily comes from a protrusion of WBUR-FM's 100 dBu interfering contour, caused by that station's directional operation, in the direction of Needham, MA.

(land only), increases of 19.8% and 7.8% respectively. ⁸ The staff deemed the WBUR-FM gains sufficiently compelling to merit grant under *Educational Information Corporation, supra*.

In stark contrast, the Foundation proposal results in *reduced* coverage with an increased interference impact to WZBC.⁹ Nor has Foundation demonstrated that its proposed changes would benefit the public.¹⁰ The underlying facts clearly show that the WBUR-FM waiver request and the WGBH waiver request are *not* similarly situated despite the geographical proximity of the two stations. The WBUR-FM waiver request does not support Foundation's case for waiver; instead it supports the staff's August 28, 2002 finding that waiver of Section 73.509 was not justified under the *Educational Information Corporation* precedent.¹¹

Reduction of interference to TV Channel 6 reception. Foundation's petition for reconsideration restates its contention that the reduction of 355,665 persons in the predicted interference area to TV Channel 6 station WLNE-TV, New Bedford, MA (determined using the provisions of Section 73.525) provides support for WGBH's transmitter site relocation. However, *Educational Information Corporation* does not support waivers of Section 73.509 based on TV Channel 6 considerations, and we are not aware of any case where this factor merited waiver of the FM contour protection rule. Accordingly, the reduction of predicted TV 6 interference does not provide strong support for waiver of Section 73.509.¹²

Use of undesired/desired (U/D) ratio method to predict interference areas. The staff's dismissal letter stated that WGBH had provided no information that would justify the use of U/D ratios in this instance. The letter also stated that the staff was not aware of any case where U/D ratios resulted in grant of an application subsequent to *Educational Information Corporation (WCPE), supra*. In reply, WGBH cites to another staff letter wherein the staff indicated that there was no objection to use of U/D ratios in support of a waiver request of Section 73.509, though that case did not result in a grant.¹³

⁸ These figures were filed by WBUR-FM in its "Point Supplement to FCC Form 340" on July 19, 2001, using 1990 census data.

⁹ Foundation's proposes to shift the present overlap caused to WZBC from the edge of WZBC's service area to a new area at the core of WZBC's protected service area. Concurrently, WGBH's 60 dBu coverage would be reduced by 689 sq. km, and 340,652 persons would lose 60 dBu service.

¹⁰ WGBH provides information showing that 137,266 persons in 525.7 sq. km would receive a first noncommercial educational aural service, while 33,256 persons in 178.2 sq. km would lose such service. Such specialized area / population counts do not form the basis for comparisons under *Educational Information Corporation (WCPE)*, and must be treated as secondary public interest considerations in support of a waiver request of Section 73.509. Similarly, improvement in line-of-sight coverage to the community of license, in the absence of demonstrated patently deficient coverage, does not warrant strong consideration.

¹¹ See also *See Saddleback Community College*, FCC 96-369, 11 FCC Rcd 11938 (1996) (32 sq. km gain insufficient to warrant waiver of Section 73.509).

¹² In the 19 years that Section 73.525 has been in effect, we are not aware of any case where the predicted interference to reception of TV Channel 6 mirrored the actual interference generated. Interference predicted under this rule section frequently does not occur, or occurs only in a very limited number of viewers.

¹³ *Letter from Dennis Williams, Assistant Chief, Audio Services Division, re: Carl Sandberg High School*, dated October 30, 1997. WGBH also refers to a reference to U/D ratios in a pending rulemaking proceeding (*1998 Regulatory Review -- Streamlining of Radio Technical Rules*, MM Docket 98-93, FCC 98-117 (1998) at paragraph 23), which is explanatory only and does not sanction use in an application context. Similarly, WGBH's reference to use of U/D ratios in international agreements does not support use in an application context since such provisions only apply to cross-border situations, not between domestic stations.

Site change will conserve Foundation's resources. In its petition for reconsideration, WGBH also states that its present site is on state park land, and that it presently has no long term lease for the site. The station is said to be involved in long and complex negotiations regarding continued use of the site. At the proposed site, the station has a long term lease, and would be collocated with the Foundation's TV station, WGBH-TV, with attendant labor and equipment cost savings. However, these factors testify to the benefits that Foundation would receive by the move, not the public. Economic considerations and operating convenience, in and of themselves, do not warrant grant of a waiver.¹⁴

Conclusion. Accordingly, we find that the staff correctly denied Foundation's request for waiver of 47 CFR Section 73.509 and dismissed the application. Foundation's petition for reconsideration IS DENIED. This action is taken pursuant to 47 CFR Section 0.283 of the Commission's rules.

Sincerely,



Edward P. De La Hunt
Associate Chief
Audio Division
Media Bureau

cc: WGBH Educational Foundation

¹⁴ Requests for waiver of the Commission's technical standards on the basis of non-technical considerations has been routinely rejected by the Commission in the past. *North Texas Media, Inc. v. FCC*, FCC 84-456, released October 5, 1984, *aff'd*, Case No. 84-1511, slip. op. (D.C. Cir. December 6, 1985); *Pyramid Radio and Television Co., Inc.*, 20 RR 2d 341 (1970), *Broadcasters, Inc.*, 23 FCC 2d 15. (1970).