



Federal Communications Commission  
Washington, D.C. 20554

**DA 20-145**  
***In Reply Refer to:***  
**1800B3-CEG**  
**Released February 10, 2021**

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In re: **WRTM-FM, Sharon, Mississippi**  
Facility ID No. 19864  
File No. BPH-20180716AAC

Informal Objection

Dear Applicant, Objector and Commenters:

We have before us Commander Communications Corp's. (Commander) modification application (Application) seeking to upgrade its Class A FM station, WRTM-FM, Sharon, Mississippi (Station), to operate with the proposed Class C4 parameters advocated by SSR Communications, Inc. (SSR) in the ongoing *Class C4 NOI* proceeding.<sup>1</sup> Commander filed the Application on July 16, 2018, and amended it on December 12, 2019, and February 4, 2020. The Application seeks to upgrade the Station from a Class A to a "limited" Class C3 station, increasing its ERP from 4.6 kW to 9.2 kW in order to reach a larger

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<sup>1</sup> *Amendment of Part 73 of the Commission's Rules to Provide for a New FM Radio Broadcast Class C4 and to Modify the Requirements for Designating Short-Spaced Assignments*, Notice of Inquiry, 33 FCC Rcd 5495 (2018) (*Class C4 NOI*). The *Class C4 NOI* seeks comment on the following proposals: (1) creating an intermediate class of FM broadcast between Class A and Class C3, to be designated Class C4; and (2) establishing a procedure whereby an FM station could be designated as a Section 73.215 facility, resulting in such station receiving interference protection based on its actual authorized operating parameters rather than the maximum predicted parameters for its station class.

audience.<sup>2</sup> The Application does not specify a fully-spaced assignment site as required by sections 73.203(b) and 73.207, nor does it satisfy the section 73.215(e) minimum distance separation requirements for a short-spaced station with respect to station WNSL(FM), Laurel, Mississippi (WNSL).<sup>3</sup> Therefore, Commander seeks a waiver of sections 73.207 and 73.215(e) (Waiver Request) in order to operate the Station at a higher power level than our rules permit for a Class A station.<sup>4</sup>

For the reasons set forth below, we deny the Waiver Request and dismiss the Application for failure to comply with sections 73.203(b) and 73.215(e).<sup>5</sup>

**Background.** In order to prevent interference, FM stations are subject to the minimum distance separation requirements set out in section 73.207(b)(1).<sup>6</sup> If a station does not meet the section 73.207(b)(1) requirements for a fully-spaced station, it may still be authorized under section 73.215, which allows short-spaced stations if they do not result in prohibited contour overlap and satisfy the less restrictive spacing requirements of section 73.215(e). To upgrade to a higher station class, an applicant must demonstrate the existence of a suitable assignment site that fully complies with section 73.207, without resort to section 73.215.<sup>7</sup>

The Station is licensed as a short-spaced station under section 73.215. Neighboring station WNSL (WNSL) is authorized as a fully spaced station under section 73.207. Pursuant to our rules, when calculating protected and interfering contour overlap, a station authorized under section 73.215 must protect a non-section-73.215 station as though it were operating at the hypothetical maximum Effective

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<sup>2</sup> On June 21, 2018, Commander filed substantially the same modification application without a filing fee (File No. BMPH-20180621AAK) (First WRTM-FM Application), which Bureau staff accordingly dismissed on July 12, 2018. *Carl Haynes*, Letter Decision, Ref. No. 1800B3-AED (MB July 12, 2018). On June 24, 2018, REC Networks (REC) filed an informal objection to the First WRTM-FM Application (WRTM-FM REC Informal Objection). Because this pleading was not filed against the Application, it will not be considered here. However, REC's concerns are also raised or incorporated by iHM Licenses in the present proceedings and thus are not addressed separately. On November 7, 2018, CC Licenses, LLC, as Debtor-in-Possession (now iHM Licenses) filed an informal objection to the Application (Informal Objection). On November 16, 2018, Max One Communications, Inc. (Max One) filed an opposition to the Informal Objection (Max One Opposition). On November 21, 2018, SSR filed an opposition to the Informal Objection (SSR Opposition). On November 21, 2018, Commander filed an opposition to the Informal Objection (Commander Opposition) (collectively, Oppositions). On July 30, 2019, iHM Licenses filed a reply to the Oppositions (Reply). On August 14, 2019, Commander filed a response to the Reply (Response). On January 1, 2020, iHM Licenses filed a supplement to its informal objection (Supplement).

<sup>3</sup> See 47 CFR §§ 73.203(b) (requiring applicants for change in station class to specify an assignment site that meets the minimum spacing requirements of section 73.207); 73.207 (establishing distance separation requirements for fully-spaced stations); and 73.215(e) (establishing minimum distance separations for short-spaced stations). As amended, the Application satisfies the section 73.215(e) spacing requirements with respect to station WDMS, Greenville, Mississippi (WDMS).

<sup>4</sup> Commander also requests a "waiver" of section 73.210 to limit the Station to the proposed Class C4 reference contour distance of greater than 28 km, but less than or equal to 33 km rather than the full Class C3 contour distance.

<sup>5</sup> This Letter Decision does not assess the acceptability of the Application other than to the extent specifically discussed herein. For example, because we dismiss the Application on other grounds, we do not reach the issue of whether it satisfies the contour overlap requirements of 47 CFR § 73.215(a).

<sup>6</sup> 47 CFR §§ 73.207(a), (b)(1).

<sup>7</sup> 47 CFR § 73.203(b).

Radiated Power (ERP) and Height Above Average Terrain (HAAT) for its class rather than its actual predicted contours.<sup>8</sup>

In the Waiver Request, Commander specifies an ERP and reference contour that exceed Class A limits but fall within the proposed Class C4 parameters. Commander states that its proposal would not cause or receive prohibited contour overlap with another station, due to its use of a directional antenna. However, the proposed WRTM-FM facilities would require waiver of the section 73.215(e) minimum distance separation requirements for short-spaced stations with respect to WNSL and the section 73.203(b) minimum spacing requirements. Commander cites the following circumstances as justification for the Waiver Request: (1) Station is a Zone II Class A FM station; (2) approval of the requested facilities would not displace any LPFM or translator station; and (3) the proposed modification would not change Station's community of license.<sup>9</sup> Commander also argues that waiver would take effect much more quickly than a rulemaking and provide the Commission information about potential Class C4 facilities.<sup>10</sup>

In its Informal Objection (Informal Objection), iHM Licenses contends that Commander seeks a waiver "which, if entertained, would pre-judge a pending notice of inquiry rulemaking proceeding."<sup>11</sup> Such fundamental changes, iHM Licenses argues, should be the result of the record in the rulemaking proceeding, not implemented through a waiver process or as an interim measure.<sup>12</sup> It notes that an involuntary section 73.215 designation is a "highly controversial aspect" of the *Class C4 NOI* proceeding because it would preclude WNSL from increasing its power to its class maximum in the future and potentially limit or eliminate options to relocate the station.<sup>13</sup> iHM Licenses suggests that even if the Commission's consideration of the creation of a Class C4 could benefit from seeing a concrete example, that "does not mean the Commission should actually *grant* an unprecedented waiver while the theory is still under evaluation."<sup>14</sup> iHM Licenses asserts that even if the Waiver Request was granted, the reduced interference protection would constitute a license modification to WNSL requiring an order to show cause

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<sup>8</sup> 47 CFR § 73.215(b)(2)(ii).

<sup>9</sup> Waiver Request at 2.

<sup>10</sup> *Id.* at 3. In the Max One Opposition, Max One expresses general support for the Application and states that Commander's proposed operation would not interfere with Max One's translator in Meridian, Mississippi. Max One Opposition at 1.

<sup>11</sup> Informal Objection at 1. iHM Licenses also protests that SSR filed improper *ex parte* comments addressing the Waiver Request in the *Class C4 NOI* proceeding (MB Docket 18-184). While iHM Licenses does not provide the dates of the specific comments, it appears to refer to comments and reply comments SSR filed on August 13, 2018, and September 11, 2018, respectively. Because the Informal Objection was filed on November 7, 2018, iHM Licenses was not a party to the Application proceeding when SSR filed its *Class C4 NOI* proceeding comments. Therefore, iHM Licenses was not entitled to service under the Commission's *ex parte* rules. See 47 CFR § 1.1202. Likewise, Commander was under no obligation to serve iHM Licenses with a copy of the Application, which was placed on public notice on July 18, 2018. See *Broadcast Applications*, Public Notice, Report No. 29280 (MB July 18, 2018); *First Century Broadcasting, Inc.*, Memorandum Opinion and Order, 100 FCC.2d 761, 766, para. 11 (1985) (holding that an applicant does not have a duty to serve a copy of its application on others).

<sup>12</sup> Supplement at 7-9 (citing *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861, 19894-95, para. 84 (2001) (*Multiple Ownership NPRM*)).

<sup>13</sup> Supplement at 9.

<sup>14</sup> Supplement at 7-8.

as set out in 47 U.S.C. § 316(a)(1).<sup>15</sup> Finally, iHM Licenses asserts that section 73.215(e) waivers are extremely rare, citing to *R&S Media*, in which the waiver requestor had to demonstrate that the original site was no longer available, that suitable non-short-spaced sites were unavailable, that the selected site was the least short-spaced of all available sites, and that the waiver would be in the public interest.<sup>16</sup>

In the Oppositions, SSR and Commander reiterate that the Waiver Request serves a purpose as “proof of concept” for the *Class C4 NOI* proceeding.<sup>17</sup>

**Discussion.** We conclude that the Waiver Request does not demonstrate the special circumstances necessary to justify granting the request and, therefore, deny it. The Commission's rules may be waived for good cause shown.<sup>18</sup> When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.<sup>19</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>20</sup> and must support its waiver request with a compelling showing.<sup>21</sup> Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.<sup>22</sup> The Commission has long held that it will grant waivers to depart from its core allocation rules, in particular, “only in the most compelling circumstances.”<sup>23</sup>

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<sup>15</sup> Informal Objection at 4, n.10; *see* 47 U.S.C. § 316(a)(1) (“No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification . . .”).

<sup>16</sup> Supplement at 3-4 (citing *R&S Media*, Memorandum Opinion and Order and Order to Show Cause, 19 FCC Rcd 6300, 6303, paras. 7-9 (MB 2004) (*R&S Media*) and noting that the section 73.215(e) waiver in *R&S Media* required an order to show cause).

<sup>17</sup> Commander Opposition at 2; SSR Opposition at 1. A number of factual contentions in the pleadings lack legal significance and thus are not examined further herein. These include: (1) whether iHM Licenses demonstrates that WNSL would be harmed by Station’s proposed operation (Commander Opposition at 5) (under 47 CFR § 73.3587, there is no standing requirement for informal objections); (2) whether iHM Licenses should have filed the Reply sooner (Commander Response at 1-2) (under 47 CFR § 73.3587, there is no deadline for informal objections prior to action on the subject application); and (3) whether Commission or Bureau staff suggested that an example Class C4 application would be helpful in the context of the *Class C4 NOI* proceeding (Commander Opposition at 2) (pursuant to, *inter alia*, *EADS B’casting Corp.*, Memorandum Opinion and Order, 9 FCC Rcd 2859, 2860, n.3 (1994), informal staff advice is not binding on the Commission).

<sup>18</sup> 47 CFR § 1.3.

<sup>19</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, para. 2 (D.C. Cir. 1969) (*WAIT Radio*).

<sup>20</sup> *WAIT Radio*, 418 F.2d at 1157, para. 2.

<sup>21</sup> *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090, 7094, para. 9 (1999) (citing *Stoner*, 49 FCC 2d at 1012, para. 6).

<sup>22</sup> *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (1990)).

<sup>23</sup> *Carroll-Harrison B’casting, Inc.*, Memorandum Opinion and Order, 67 FCC 2d 254, 256, para. 8 (1977); *see also*, *e.g.*, *R&S Media*, 19 FCC Rcd at 6303, 6305, paras. 7-9, 13 (granting waiver of section 73.215(e) spacing requirements only where applicant submitted evidence establishing that the original site was no longer available, that suitable non-short-spaced sites were unavailable, that the selected site was the least short-spaced of all available sites); *Thunderbolt B’casting Co.*, Memorandum Opinion and Order, 13 FCC Rcd 6959, 6962, para. 9 (1998) (*Thunderbolt*) (rejecting “unprecedented” section 73.203(b) waiver request on the basis that “[m]aintaining our allotment separations is important to prevent overcrowding and to promote a more even distribution of stations.

We do not find Commander's affirmative reasons for seeking waiver-based upgrades persuasive. Commander argues the requested upgrade would permit Station to reach more listeners, with an improved signal; and the requested upgrade would result in a more efficient use of spectrum. First, there is nothing special or unique about a licensee's desire to provide signal coverage to a greater population. As the Commission has long held, "a mere increase in population served is not sufficient to warrant waiver when the area is presently neither unserved nor underserved."<sup>24</sup> Therefore, this factor does not support the Waiver Request. Second, as the Bureau made clear in the *Tower Investment* decision, we will not entertain a section 73.215 waiver request based on the theory that the short-spaced station cannot construct, or is unlikely to construct, maximum class facilities.<sup>25</sup> Maximum class protection under section 73.215(b)(2)(ii) is not a "waste" of spectrum; rather, it serves the public interest by preserving interference-free service while providing flexibility for future site relocations and service improvements.<sup>26</sup> Finally, a fundamental aspect of the allocations framework is that section 73.215 designation is voluntary. We will not force WNSL to accept diminished protection based on Commander's assessment of whether WNSL (or the tower owner) could or should have capitalized on previous opportunities to upgrade. For these reasons, we find that Commander has failed to provide any affirmative reason to justify grant of the Waiver Request.

The remaining factors Commander sets out do not directly relate to its reasons for seeking waiver and do not satisfy the "special circumstances" requirement for waiver. They either state a fact that does not weigh either for or against grant of the Waiver Request (such as that the subject station is currently a Class A station) or go toward Commander's claim that its proposed operation would not cause harm. Many stations seeking a similar upgrade also could claim they would not cause harm by avoiding displacing secondary service stations, changing their communities of license, causing predicted contour overlap, or affecting television spectrum repacking. Commander's attempt to create a composite "special circumstance" by enumerating several otherwise commonplace circumstances is unavailing. Moreover, to the extent that other stations could make the same claims, these factors appear to represent an attempt to establish a broadly applicable set of standardized upgrade criteria based on the proposals in the *Class C4 NOI* proceeding. Commander seeks waiver of well-established rules that are fundamental to the Commission's core mission of providing a "fair, efficient, and equitable distribution of radio service."<sup>27</sup> We agree with iHM Licenses that changes such as the creation of a new class of FM station or reducing protections for stations operating at below class maximums should be the result of careful consideration of a complete rulemaking record, not implemented piecemeal through the waiver process or to allow for a "proof of concept" of the Class C4 proposal.<sup>28</sup>

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This system works to the benefit of all licensees . . ."); *Greater Media Radio Company, Inc.*, Memorandum Opinion and Order, 59 FCC 2d 796, 797, para. 5 (1979) (rejecting waiver request of section 73.215(e) because "minimum mileage separation standards offer the best means for achieving an orderly, efficient, and effective development of the commercial FM broadcast service"); *Boone Biblical College*, Memorandum Opinion and Order, 19 FCC 2d 155, 155-156, para. 4 (1969) (rejecting waiver request on the basis that "strict enforcement of the mileage separation rules is of paramount importance to the integrity of the entire FM assignment plan.").

<sup>24</sup> *Stoner*, 49 FCC 2d at 1012, para. 6.

<sup>25</sup> *Tower Investment Trust, Inc.*, Letter Decision, 28 FCC Rcd 1331, 1331-32 (MB 2013).

<sup>26</sup> See, e.g., *Thunderbolt*, 13 FCC Rcd at 6962, para. 11.

<sup>27</sup> See 47 U.S.C. § 307(b).

<sup>28</sup> The *Class C4 NOI* proceeding is not sufficiently advanced to justify granting a permanent waiver for a short-term proof of concept that would have a potentially detrimental impact on iHM Licenses' station. In this respect, we note

For the above reasons, we find that Commander has not established that special circumstances exist or that the public interest would be served by departing from the Commission's fundamental rules relating to station power limits, contour overlap prohibitions, and minimum distance separations. Therefore, we deny the Waiver Request and dismiss the Application for failure to comply with sections 73.203(b) and 73.215(e).

**Conclusion.** Accordingly, IT IS ORDERED that Commander's request for waiver is HEREBY DENIED and the modification application filed on July 16, 2018, (File No. BPH-20180716AAC) IS DISMISSED.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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that the Commission choose to initiate a record concerning the Class C4 proposal through a notice of inquiry, not a notice of proposed rulemaking, and did not contemplate interim processing using the rulemaking proposals.