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Washington, D.C. 20554**

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In Reply Refer to:

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In re: **WRIU(FM), Kingston, Rhode Island**
Facility ID No. 69206

WNPB(FM), Portsmouth, Rhode Island
Facility ID No. 53078
Application File No. 161410

Order to Show Cause

Dear Counsel:

We have before us the above-referenced application (Application) for a minor modification of the facilities of noncommercial educational (NCE) station WNPB(FM), Portsmouth, Rhode Island (WNPB or Station), filed by Rhode Island Public Radio d/b/a The Public's Radio (TPR) on September 30, 2021. In the Application, TPR requests waiver of section 73.509(a) of the Commission's rules (Rules)¹ to allow otherwise prohibited contour overlap with second-adjacent channel NCE station WRIU(FM), Kingston, Rhode Island (WRIU). The University of Rhode Island (URI), licensee of WRIU, filed an informal objection to the Application on May 11, 2022 (Objection).² In accordance with section 316(a) of the Communications Act of 1934, as amended (Act), we hereby notify URI of our proposed actions and afford it 30 days to respond.³

¹ See 47 CFR § 73.509(a).

² Pleading File No. 190453. On May 23, 2022, TPR filed an opposition to the Objection (Pleading File No. 191291) (Opposition). On June 3, 2022, URI filed a reply to the Opposition (Pleading File No. 192908) (Reply).

³ See 47 U.S.C. § 316(a), 47 CFR § 1.87; *Modification of FM and Television Licenses Pursuant to Section 316 of the Communications Act*, Order, 2 FCC Rcd 3327 (1987). Section 316(a) permits the Commission to modify a license or construction permit if such action is in the public interest, after notifying the affected station of the proposed action, stating the grounds and reasons for the proposed action, and affording the affected licensee at least 30 days to

URI relocated the WRIU transmitter to its present site in 1981, where it received, and continues to receive, prohibited contour overlap from WNPk (formerly WJHD) pursuant to a pre-*Raleigh* section 509(a) waiver.⁴ In November 2021, TPR acquired WNPk⁵ and filed the Application, seeking authorization to move the Station off the Portsmouth Abbey School campus.⁶ The proposed WNPk facility violates section 73.509(a) with respect to WRIU because it would: (1) increase and move the existing area of contour overlap caused by WNPk to WRIU (Caused Overlap Area); and (2) create a new area of contour overlap received by WNPk from WRIU (Received Overlap Area).⁷ Therefore, TPR requests waivers of section 73.509(a) to both cause and receive prohibited overlap with WRIU.⁸

The Commission's rules may be waived for good cause shown.⁹ When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.¹⁰ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”¹¹ and must support its waiver request with a compelling showing.¹² 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.¹³

respond. This provision applies to both “direct” and “indirect” modification of station licenses. *Western Broadcasting Company v. FCC*, 674 F.2d 44, 49 (D.C. Cir. 1982).

⁴ See Application File Nos. BPED-19810129AJ (new location) and BPED-19821013AO (power increase). The Bureau issued a license to cover the WRIU Modification Applications on September 20, 1985. Application File No. BLED-19830921AD; *Broadcast Actions*, Public Notice, Report No. 41291 (Sept. 23, 1985).

⁵ See Application File No. 160713 (granted Nov. 17, 2021).

⁶ WNPk is licensed to operate as a Class A NCE station on 90.7 MHz with power of .36 kw and an antenna height of 24 meters above average terrain. The Application, as amended, seeks authority to move the WNPk transmitter site to a location 19.4 km from their licensed transmitter location. In addition, TPR seeks a power increase to 5 kw using a directional antenna, and an antenna height increase to 88 meters above average terrain. The first site TPR proposed did not place the required 60 dBu signal over at least 50% of the Station's community of license. See 47 CFR § 73.515; informal objection filed by Connecticut Public Broadcasting, Inc. on October 29, 2021, (Pleading File No. 165298) (CPB Objection). On December 10, 2021, TPR filed an opposition to the CPB Objection, explaining that an amendment had been concurrently filed to specify the current proposed site. (Pleading File No. 177096).

⁷ See 47 CFR § 73.509(a) (Section 73.509(a)). Prohibited overlap occurs when a station's interference contour overlaps another station's service contour. The terms “overlap caused” and “overlap received” are used in reference to a specific station proposing a facility change. If Station A is proposing to expand its service contour and the new service contour will be overlapped by Station B's interference contour, Station A is said to receive overlap from B. If station B is proposing to increase its facilities so that its proposed interference contour would overlap Station A's service contour, Station B is said to cause overlap. Under some circumstances, as here, a proposal may both cause and receive overlap.

⁸ Application Technical Exhibit at 4.

⁹ 47 CFR § 1.3.

¹⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, para. 2 (D.C. Cir. 1969) (*WAIT Radio*).

¹¹ *WAIT Radio*, 418 F.2d at 1157, para. 2.

¹² *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090, 7094, para. 9 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹³ *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)).

Raleigh waiver request. With respect to the Received Overlap Area, TPR requests a so-called *Raleigh* waiver to allow WNPk to receive—not cause—contour overlap from second-adjacent channel station WRIU.¹⁴ The Commission has held that a *Raleigh* waiver is justified where an NCE station seeks to: (1) receive overlap from (2) second- or third- adjacent channel stations, and (3) the benefit of increased NCE service heavily outweighs the potential for interference in a very small area.¹⁵ The Commission has delegated authority to the Bureau to waive Section 73.509 when the overlap received is 10% or less of the proposed service area.¹⁶ Granting waivers in these limited circumstances provides flexibility for NCE stations to modify their service areas while protecting existing service from interference.

When a station receives a *Raleigh* waiver, it routinely accepts a condition on its license acknowledging that future modifications to the station causing the overlap will not constitute a per se modification of the receiving station’s license.¹⁷ The rationale for this condition is “to avoid perpetually restricting such stations [causing interference] to their current facilities.”¹⁸ The condition does not limit the size or location of any future modified caused overlap area.

Here, TPR states that the proposed modification will increase WNPk’s coverage area by 338.4%, from 232.1 square kilometers to 1017.6 square kilometers, and will provide service to an additional population of 105,222 persons within its 60 dBμ contour (a 297.4% increase in population served).¹⁹ TPR also states that: (1) the proposed area of received overlap from WRIU is 21.1 square kilometers, or 2.07% of the total area and 4.65% of the population served by the proposed WNPk facility.²⁰ Finally, TPR contends that there are no alternative transmitter sites that do not result in the same contour overlap issue or “are unsuitable for other reasons.”²¹ In these circumstances, TPR concludes, the basic requirements for a *Raleigh* waiver are met—i.e., the proposed increase in NCE service would heavily outweigh the potential for second-adjacent channel interference in a very small area.

Caused overlap waiver. In addition to the *Raleigh* waiver, TPR requests a separate waiver of section 73.509(a) to allow it to expand the Caused Overlap Area (the existing area of contour overlap caused by WNPk to WRIU—approximately 4.4 square kilometers with a population of 243) and move the Caused Overlap Area closer to the WRIU transmitter site. TPR argues that the proposed increase in the existing overlap is *de minimis* because the proposed Caused Overlap Area “represents 0.8 percent of [WRIU’s] primary service area and 1.5% of the population within its service area. As in [*Raleigh*], these are very small numbers indeed. They warrant waiver in the public interest.”²² URI contends that the Caused Overlap Area is not *de minimis* because, at 9.2 square kilometers and 2,195 persons, it will “more

¹⁴ See *Educational Information Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2207, 2208 (1991) (*Raleigh*).

¹⁵ *Raleigh*, 6 FCC Rcd at 2208.

¹⁶ *Changes in the Rules Relating to Noncommercial, Educational FM Broadcast Stations*, Memorandum Opinion and Order, 50 FR 27954, 27960 (1985).

¹⁷ See *Raleigh*, 6 FCC Rcd at 2209; see also, e.g., *Dennis J. Kelly, Esq.*, Letter Decision, 32 FCC Rcd 7441, 7444 (MB 2017).

¹⁸ See *Raleigh*, 6 FCC Rcd at 2209.

¹⁹ *Id.* at 2208.

²⁰ *Id.*

²¹ *Id.*

²² Opposition at 2.

than double the existing area size and [cover] more than eight times the existing population.”²³ In addition, URI argues, the proposed Caused Overlap Area should not be permitted because it will be “much closer to the WRIU transmitter site.”²⁴ (URI does not provide any technical details on how this proximity might affect the respective stations’ operation or reception.) URI also challenges TPR’s assertion that no alternative transmitter sites exist, alleging that “at least 4 suitable transmitter sites exist substantially closer to Portsmouth, one only 1.7 km from WNPB’s existing transmitter site which is currently available.”²⁵ URI objects that TPR failed to consider alternative frequencies as well as alternative transmitter sites.²⁶ Finally, citing to a pre-*Raleigh* decision, *Atlanta*, URI argues that an increase in coverage is insufficient as the sole basis for a contour overlap waiver²⁷

In response, TPR points out that, in *Raleigh*, the Commission not only granted a waiver of overlap received but also allowed the station causing the overlap to subsequently modify and expand the caused overlap area.²⁸ TPR also provides an engineering analysis of available channels, concluding that “WNPB is completely precluded from considering an alternative frequency.”²⁹ Regarding expanded service as a basis for NCE waivers, TPR argues that *Raleigh* changed the Commission’s policy on such waivers, “effectively eclipsing *Atlanta*.”³⁰

Tentative conclusions. We tentatively conclude that grant of TPR’s waiver requests and the Application would be consistent with the policy set out in *Raleigh* and subsequent decisions. With respect to the proposed Received Overlap Area, the basic requirements for a *Raleigh* waiver are met—i.e., the proposed increase in NCE service would heavily outweigh the potential for second-adjacent channel interference in a very small area.³¹ This part of the waiver request does not present any novel issues, so we propose to approve the Received Overlap Area.

Regarding the relocation and expansion of the existing Caused Overlap Area, we find that TPR’s proposal fits within the *Raleigh* framework even though the existing contour overlap between these two stations predates *Raleigh*. Under the *Raleigh* policy, the Commission has consistently rejected proposals involving caused overlap, *except* where the interfering contour of the requesting station was previously partially or wholly encompassed by the voluntary expansion of the protected service contour of the other

²³ Informal Objection at 3; Reply at 2.

²⁴ Informal Objection at 3; Reply at 2.

²⁵ Informal Objection at 3; Reply at 2-3.

²⁶ Informal Objection at 3.

²⁷ *Id.* at 4 (citing *Board of Education of the City of Atlanta (WABE-FM)*, Memorandum Opinion and Order, 82 FCC 2d 125, 127, para. 7 (1980) (*Atlanta*) (denying a waiver request for an NCE station to receive prohibited overlap)).

²⁸ Opposition at 2.

²⁹ Opposition at 3, Technical Exhibit.

³⁰ Opposition at 2.

³¹ TPR’s proposal does not satisfy the exception for stations with grandfathered prohibited overlap set out in 47 CFR § 73.509(d), which allows facility modifications “that would not aggravate the existing interference.” *Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, Third Report and Order, FCC 84-515, 57 R.R.2d 107, 116, paras. 42-44 (1984). Specifically, section 73.509(d) allows a station with existing prohibited overlap to relocate if: (1) the total area of overlap with the subject station would not increase; (2) the area of overlap with any other station would not increase; (3) the area of overlap does not move significantly closer to the station receiving the overlap; and (4) no area of overlap would be created with any station with which the overlap does not now exist). 47 CFR § 73.509(d). Here, the Application does not satisfy conditions (1) and (3).

station under a received overlap waiver.³² In such cases, the encompassed station is permitted to modify the caused overlap area in the future, and a condition is placed on the requesting station's license stating that future modifications to the other station causing the overlap will not constitute a per se modification of its license.³³ Although in this case WRIU's original prohibited contour overlap received from WNPB was authorized in 1981, prior to *Raleigh*, and thus no condition was appended to the WRIU license, the reasoning set out in *Raleigh* and subsequent cases still applies. WRIU voluntarily sought and obtained a waiver to receive overlap from WNPB, and WNPB's interfering contour was consequently encompassed by the expansion of WRIU's protected contour. Therefore, for the reasons set forth in *Raleigh*, we decline to perpetually restrict WNPB to its original site (or to section 73.509(d)-compliant sites only). We propose to grant TPR's request to relocate and increase the area of the existing Caused Overlap Area.

For the reasons stated above, we find that TPR has demonstrated sufficient public interest benefits to justify the issuance of this *Order to Show Cause*. Accordingly, IT IS ORDERED, that pursuant to Section 316(a) of the Communications Act of 1934, as amended, and Section 1.87 of the Commission's Rules, the University of Rhode Island SHALL SHOW CAUSE why the license of WRIU(FM), Kingston, Rhode Island, SHOULD NOT BE MODIFIED to permit WNPB(FM), Portsmouth, Rhode Island, to operate at the site proposed in the Application.

Pursuant to section 1.87, URI may, not later than March 1, 2023, file a written statement showing with particularity why the license of WRIU should not be modified as proposed.³⁴ Under Section 316(c) of the Act,³⁵ a protest to a license modification is subject to the requirements of Section 309 of the Act³⁶ for petitions to deny, namely, the affected station must demonstrate a substantial and material question of fact to obtain a hearing under Section 316(a)(2).³⁷ The Commission may call upon URI to furnish additional information. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date specified above, URI will be deemed to have consented to the modification and its license will be modified as proposed in this *Order to Show Cause*.³⁸

Further action on the subject application will be withheld for thirty days from the date of this letter to provide an opportunity to reply. Responses must either be submitted electronically in LMS as a pleading under the Application file number (our recommended option) or mailed to the Office of the Secretary, Federal Communications Commission, 45 L Street NE, Washington, D.C. 22045, ATTN: Albert Shuldiner, Chief, Audio Division, Media Bureau, with a copy served on the applicant. Regardless of the filing option chosen, electronic copies of any such pleading must also be sent to

³² *Educational Information Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 6917, 6918 (1997) (rejecting a waiver request to cause contour overlap where none had previously existed); *Centenary College*, Letter Decision, 23 FCC Rcd 17317, 17320 (MB 2008) (same).

³³ See *supra*, note 17.

³⁴ See 47 CFR § 1.87(a).

³⁵ 47 U.S.C. § 316(c).

³⁶ 47 U.S.C. § 309.

³⁷ See *Paul and Nancy Schumacher*, Memorandum Opinion and Order, 3 FCC Rcd 7148 n.1 (MMB 1988); *Pacific Gas and Electric Company*, Memorandum Opinion and Order on Reconsideration, 17 FCC Rcd 20900, 20906 (2002) (requiring affidavit to support factual allegations).

³⁸ See, e.g., *Pacific Gas and Electric Company*, Memorandum Opinion and Order, 17 FCC Rcd 98, 101-102 (WTB 2001).

rodolfo.bonacci@fcc.gov and christine.goepp@fcc.gov. Please note that copies of any responses must all be served on all parties.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau