

Before the
Federal Communications Commission
Washington, D.C. 20554

In re: Application of
Greater Media Radio Company, Inc.
For Construction Permit and Related
Short-Spacing Waiver Requests for
Station WPLY(FM), Media, Pennsylvania
Application for Review
File No. BPH-940513IB

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 1999

Released: October 1, 1999

By the Commission: Commissioners Powell and Tristani dissenting and issuing a joint statement.

1. The Commission has before it an Application for Review filed September 23, 1996 by Greater Media Radio Company, Inc. ("Greater Media"), challenging the Mass Media Bureau's ("Bureau") action denying its application for a construction permit and related short-spacing waiver requests. Letter from Linda Blair, Chief, Audio Services Division to Edwin N. Lavergne, Esq., Reference No. 1800B3-DEB/KDY (August 19, 1996) ("Bureau Letter"). For the reasons set forth below, we deny the Application for Review.

Background

2. Greater Media proposes to relocate the transmission facilities of Class B station WPLY(FM), Media, Pennsylvania, from their present site in Newtown Square, Pennsylvania, to the Roxboro antenna farm in Philadelphia. It seeks three FM spacing rule waivers in connection with its proposal: (1) waiver of 47 C.F.R. § 73.215 to move WPLY 3.1 kilometers closer than the rule allows to first-adjacent-channel Class

1 The Application for Review is 41 pages in length, with an additional 29 pages of attachments. This length exceeds the 25-page limit imposed by Section 1.115(f)(1) of the Commission's rules. Despite Greater Media's failure to request leave to exceed the limit, we will address the merits of its Application. See Michael Steven Levinson, 9 FCC Rcd 3018 n. 1 (1994). In the future, however, we will seriously consider dismissing any application for review with similar procedural defects.

In addition, on December 8, 1997, Greater Media also submitted a 17-page Supplement to Application for Review with approximately 78 pages of additional attachments. This supplement was submitted without request or authorization by the Commission and, therefore, in violation of Section 1.45(c) of the Commission's rules. Accordingly, we will not consider the Supplement.

2 The Roxboro site is a de facto antenna farm comprised of a number of towers at which the transmission facilities of a number of FM and television stations in the Philadelphia market are clustered. See Beasley Broadcasting of Philadelphia, Inc., 100 FCC 2d 106, 108 (1985).

A station WJRZ-FM, Manahawkin, New Jersey; (2) waiver of Section 73.213(a) to move WPLY 5.3 kilometers closer than allowed to second-adjacent-channel Class B station WFMZ(FM), Allentown, Pennsylvania; and (3) waiver of Section 73.213(a) to move WPLY 16.9 kilometers closer than allowed to co-channel Class B station WHTZ(FM), Newark, New Jersey.

3. In its construction permit application, Greater Media contended that WPLY's present site is unsuitable because of Receiver-Induced Third Order Intermodulation Effect ("RITOIE")³ and multipath interference. Specifically, Greater Media alleged RITOIE-based service disruptions to WPLY's signal within a 5.5 kilometer radius of the Roxboro antenna farm from radio facilities operating there, affecting approximately 138,000 residents of the area, an undetermined number of workers in office buildings, and an average of 83,000 vehicles travelling a 10 kilometer portion of the Schuylkill Expressway daily. Greater Media alleged that terrain obstructions also contributed to the RITOIE. In addition, Greater Media alleged pockets of multipath interference to WPLY's signal in eastern Delaware County, including Upper Darby Township, which has a population of over 81,000. The areas of alleged RITOIE and multipath interference are within WPLY's 70 dBu principal community coverage contour but outside of Media, its community of license. Greater Media also contended that there were no non-short-spaced sites available, and that the Roxboro antenna farm was the least short-spaced site available.

4. In addition, Greater Media identified a number of alleged public interest benefits associated with its proposal: (1) eliminating the above-referenced RITOIE and multipath interference and improving WPLY's service within its 60 dBu and 70 dBu contours; (2) increasing the distance between WPLY and co-channel WBIG-FM, Washington, D.C., and reducing or eliminating existing predicted interference from WPLY's signal to WBIG, WHTZ and WFMZ;⁴ and (3) enabling WQIC(FM), Lebanon, PA and WJRZ to increase their power to full Class A facilities of 6,000 watts.⁵ Greater Media also asserted that increased

³ RITOIE is a type of interference created when strong signals from two stations interact within a receiver to generate a signal on a third frequency. This receiver-generated signal may disrupt reception of any station operating on this third frequency. See *WK LX, Inc.*, 6 FCC Rcd 225, 228 n. 2 (1991).

⁴ According to Greater Media, interference to WBIG would be eliminated as a result of increased distance separation between it and WPLY, and interference to WHTZ would be reduced by the use of a directional antenna. Additionally, interference to WFMZ would be reduced because the proposed WPLY transmitter site and technical facilities would result in the elimination of an existing overlap area of 33.6 square kilometers of WFMZ's 54 dBu contour by WPLY's 94 dBu contour, and any resulting overlap would be completely encompassed by the existing 94 dBu signal of second-adjacent channel station WBEB-FM, Philadelphia. Therefore, WFMZ will lose the interference presently caused by WPLY, but lose no service because any new overlap will be in an area where WFMZ already receives 94 dBu overlap from WBEB-FM. Thus, Greater Media treats the elimination of the existing WFMZ/WPLY overlap area as a net reduction in interference caused to WFMZ.

⁵ The Bureau correctly concluded that the allegation regarding increase of WQIC's power was insufficiently supported without a detailed engineering analysis, and Greater Media has not challenged this conclusion in its Application. In addition, Greater Media no longer claims that its proposal will enable WJRZ to increase its power to full Class A facilities; rather, it contends in the Application that WJRZ cannot increase from its current operating power of 3,000 watts because it is already short-spaced to three stations.

short-spacing to WJRZ and WFMZ under its proposal would create no actual interference because WPLY's antenna would be directionalized towards WJRZ, and predicted new interference to WFMZ (from WPLY) and to WPLY (from WJRZ) would be "masked" by existing interference from other stations.⁶ In addition, Greater Media contended that the Commission granted similar spacing waivers in *Beasley Broadcasting of Philadelphia, Inc.*, 100 FCC 2d 106 (1985), and other cases.

5. In denying the construction permit application and waiver requests, the Bureau first addressed Greater Media's request for waiver of Section 73.215 to move WPLY closer to WJRZ.⁷ This request satisfies neither the contour protection nor the minimum distance separation requirements of the rule. *See* 47 C.F.R. § 73.215(a), (e). The Bureau rejected Greater Media's masking argument that prohibited contour overlap under Section 73.215(a) should be allowed because predicted co-channel interference to WPLY from WHTZ in the area in question would mask any actual interference from first-adjacent-channel station WJRZ. The Bureau reasoned that due to the statistical nature of FM propagation and reception, as well as local factors, service may occur where interference is expected, so that listeners of WPLY might actually receive a useable signal despite predicted interference from WHTZ. The Bureau concluded that additional interference from WJRZ in the area in question would diminish the probability of satisfactory reception of WPLY. The Bureau also refused to waive Section 73.215(e)'s spacing requirements, observing that each such waiver to some extent undermines the goal of insuring fair distribution of FM service. The Bureau stated that it was unaware of any case in which the Commission waived a short-spacing of the magnitude proposed between WPLY and WJRZ, and that Greater Media had offered no sufficient justification for such a waiver.⁸

6. The Bureau also held that waiver of Section 73.213(a) with respect to WFMZ was not in the public interest. Whereas the proposed move would eliminate interference to WFMZ from WPLY affecting a 33.6 square kilometer area with a population of 9,162, the Bureau noted that it also would create interference within WFMZ's protected service contour affecting an 88 square kilometer area with a population of 131,476 persons. The Bureau rejected a masking argument regarding the latter area. *See supra*, n. 6. Concerning Greater Media's request for waiver of Section 73.213(a) with regard to WHTZ, the Bureau acknowledged that interference between the two stations would be reduced by the use of a directional antenna and, therefore, stated that it would be inclined to waive the increased short-spacing to WHTZ and grant the application had Greater Media demonstrated that the other spacing waivers were in the

⁶ Greater Media's "masking" argument may be summarized as follows: predicted new interference to station A from station B is inconsequential where, even in the absence of such interference, existing interference from station C would prevent reception of station A's signal in areas where interference to A from B is predicted.

⁷ WPLY is already short-spaced to WJRZ pursuant to Section 73.213(c)(1). *See infra*, para. 17. As the Bureau noted, the proposed increased short-spacing between WPLY and WJRZ does not meet Section 73.213(c)(1) spacing requirements. The Bureau evaluated the proposed short-spacing under Section 73.215 because Greater Media requested such evaluation and proposed contour protection.

⁸ The Bureau measured the proposed short-spacing to WJRZ as 20.1 kilometers, based on the spacing requirements of Section 73.207. *See infra*, para. 17.

public interest.

7. Furthermore, the Bureau rejected Greater Media's contention that WPLY's present transmitter site is unsuitable. The Bureau declined to consider mobile receivers on the Schuylkill Expressway because of their inherent transient nature, relying on *WKLY, Inc.*, 6 FCC Rcd 225, 227 (1991). The alleged RITOE and multipath interference to non-mobile receivers do not render WPLY's present transmitter site unsuitable, the Bureau held, because they do not occur within Media, WPLY's community of license. The Bureau also found that Greater Media had not demonstrated that the Roxboro antenna farm was the least short-spaced site available, as it had investigated only sites within or just outside of the Philadelphia radio market, without considering sites west of Media.⁹ In addition, the Bureau concluded that the proposal's claimed benefits did not outweigh its disadvantages. The Bureau distinguished the precedent cited by Greater Media on grounds that, among other things, all of the cases involved interference within the stations' communities of license.

8. Greater Media presents numerous challenges to the Bureau's decision in its Application for Review. Our conclusion that the Bureau properly denied Greater Media's request for waiver of Section 73.215 moots its two Section 73.213(a) waiver requests. *See Colonial Communication, Inc.*, 6 FCC Rcd 2296, 2296 (1991) ("An agency, like a court, need not decide questions which are not relevant to its decision.") (*quoting Deep South Broadcasting Co. v. FCC*, 287 F.2d 264, 266 (D.C.Cir. 1960)).¹⁰ We also shall not address a number of arguments in the Application for Review that either rely on questions of fact and law not presented to the Bureau, in violation of 47 C.F.R. § 1.115(c), *see, e.g., Heartland Radio, Inc.*, 11 FCC Rcd 1698, 1699 (1996), or were considered and rejected in *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, Report and Order* in MM Docket 87-121, 4 FCC Rcd 1681 (1989) ("*Contour Protection Order*"), *recon. granted in part and denied in part*, 6 FCC Rcd 5356 (1991) ("*Reconsideration Order*"). *Cf. Patteson Brothers, Inc.*, 8 FCC Rcd 7595, 7596 (1993) (rejecting proposed method for defining relevant market as untimely request to reconsider radio ownership rulemaking proceeding).¹¹

⁹ Media is approximately seven miles west of Philadelphia. In its Application for Review, Greater Media simply stated that a site west of Media would not alleviate the RITOE and multipath interference problems.

¹⁰ We note that, since the filing of the instant Application, the Commission has revised Section 73.213(a) to, among other things, (1) permit co- and first-adjacent-channel grandfathered short-spaced stations to change transmitter location based on a public interest showing and (2) eliminate second- and third-adjacent-channel spacing requirements for grandfathered short-spaced stations. *Grandfathered Short-Spaced FM Stations, Report and Order* in MM Docket 96-120, 12 FCC Rcd 11840 (1997) ("*Grandfathered Short-Spaced Stations*"). These revisions eliminate the need for a Section 73.213(a) waiver to move WPLY closer to second-adjacent-channel WFMZ(FM) and, given the Bureau's analysis, *see supra*, para. 6, would militate in favor of a Section 73.213(a) waiver to move WPLY closer to co-channel WHTZ(FM). *See Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd at 11851 n. 16 (directing that revised standards be applied to pending applications). These developments are of no decisional significance, however, in light of our conclusion that the Bureau properly denied Greater Media's request for waiver of Section 73.215.

¹¹ The following arguments in the Application for Review improperly rely on questions of fact and law not presented to the Bureau: (1) the Bureau placed undue emphasis on adherence to the spacing rules because WJRZ cannot upgrade from its current operating power to its maximum permitted power of 6,000 watts, as it is already short-spaced to three

Discussion

9. *Section 73.215(a) and (e) Waiver Standards.* The spacing rules were put into force as "the best means for achieving an orderly, efficient, and effective development of the commercial FM broadcast service." *Greater Media, Inc.*, 59 FCC 2d 796, 797 (1976);¹² *see ECI License Company, L.P. (WYUU)*, 11 FCC Rcd 3545, 3546 ("WYUU") (spacing rules "adopted in part to promote a fair distribution of FM service across the country, as required by 307(b) of the Communications Act, avoiding undue concentration of stations in urban areas (particularly major markets).") (citations omitted), *aff'd*, 106 F.3d 442 (D.C.Cir. 1996). The Commission has long held that "strict enforcement of the mileage separation rules is of paramount importance to the integrity of the entire FM assignment plan." *Boone Biblical College*, 19 FCC 2d 155, 156 (1969); *see WAIT Radio v. FCC*, 418 F.2d 1135, 1159 (D.C.Cir. 1969) ("applicant for waiver faces a high hurdle even at the starting gate."). Therefore, while the Commission is bound to consider carefully all spacing rule waiver requests, *see id.*, such requests must be supported by a "compelling showing" in order to be granted. *Stoner Broadcasting System, Inc.*, 49 FCC 2d 1011, 1012 (1974).

10. Section 73.215, which went into effect in 1989, specifies a procedure by which an applicant may obtain relief from the spacing requirements of Section 73.207. 47 C.F.R. § 73.215; *see Contour Protection Order*, 4 FCC Rcd at 1682. Prior to 1989, applicants for waiver of former Section 73.207 were required to make a three-part threshold showing that (1) the present transmitter site was no longer suitable, (2) non-short-spaced sites were unavailable, and (3) the proposed new site was the least short-spaced site available. *Townsend Broadcasting Corp.*, 62 FCC 2d 511, 512 (1976). In addition, applicants had to demonstrate that grant of waiver would serve the public interest. *Id.* Section 73.215 affords applicants additional flexibility in antenna site selection, allowing them to avoid the spacing requirements of Section 73.207; under Section 73.215, applicants need only demonstrate that no prohibited contour overlap (and

stations (rather than contending that WJRZ cannot upgrade, Greater Media urged the Bureau that one of its proposal's benefits was to enable WJRZ to upgrade without receiving interference from WPLY, *see supra*, para. 4); (2) the spacing rules do not promote a fair and equitable distribution of FM service in the Philadelphia area, because the reallocation of WJRZ to Manahawkin from Ship Bottom, New Jersey in 1979 deprived Ship Bottom of local service and increased the short-spacing created by the current proposal; and (3) predicted new interference to WPLY from WJRZ under Greater Media's proposal is insignificant because the area of interference is presently served by numerous other FM stations.

Two additional arguments in the Application for Review were considered and rejected in the contour protection rule making: (1) the "next lower class" limits in Section 73.215(e) are arbitrary, *see Reconsideration Order*, 6 FCC Rcd at 5359; and (2) predicted new interference to an area that is outside a station's current service contour (such as interference to WPLY from WJRZ under Greater Media's proposal) is not a public interest detriment. *See id.* at 5361.

¹² Greater Media, Inc. is not affiliated with Greater Media Radio Company, Inc., the licensee of WPLY, a point stressed in the Application for Review because the Bureau apparently attributed the former's comments in the *Contour Protection Order*, 4 FCC Rcd at 1683, to the latter. *See Bureau Letter* at 6. This attribution was of no decisional significance.

hence interference) between short-spaced stations is created, and that the short-spacing meets the less restrictive spacing requirements of Section 73.215(e). *See WYUU*, 11 FCC Rcd at 3546. Adoption of Section 73.215 allowed the Commission to discontinue granting waivers of Section 73.207. *See Reconsideration Order*, 6 FCC Rcd at 5359-60.

11. The Commission acknowledged in the contour protection reconsideration that waiver of the contour protection requirements under Section 73.215(a) may be appropriate in "a very small number of cases . . . to permit greater power in a short-spaced station's direction where it is demonstrated that such a facility is necessary to allow use of a multiplexed transmitting antenna and that its authorization would otherwise serve the public interest, for example, by allowing retention of existing service to an underserved area." *Id.* at 5360 n. 27.

12. The Commission has not addressed the issue of what standard is applicable to requests for waiver of Section 73.215(e)'s spacing requirements. We conclude that the threshold and public interest criteria formerly used to analyze Section 73.207 waiver requests are applicable to requests for waiver of Section 73.215(e). This conclusion follows from the Commission's longstanding practice of strict enforcement of the mileage separation rules, and enables the Commission to utilize the rich body of precedent under Section 73.207.¹³ We note, however, that the bar for obtaining short-spacing waivers is higher under Section 73.215(e) than it was under Section 73.207: the interest in adhering to our technical rules is all the more compelling now that the Commission has provided for site selection flexibility in those exceptional circumstances where no fully spaced sites are available by adopting Section 73.215. *See Reconsideration Order*, 6 FCC Rcd. at 5360.

13. *Application of Waiver Standards.* Greater Media's proposal to move WPLY closer to WJRZ requires waiver of both the contour protection and spacing requirements of Section 73.215. *See* 47 C.F.R. § 73.215(a), (e). Turning first to the spacing requirements, Greater Media has failed to satisfy the first threshold criterion for waiver: unsuitability of the present site. Greater Media's primary justification for the proposed move is to improve WPLY's service to areas outside its licensed community where its signal is allegedly subject to RITOIE and multipath interference. Unsuitability based on coverage problems may be demonstrated by showing that (1) the station's present coverage of its community of license is "patently inadequate[.]" *Greater Media, Inc.*, 59 FCC 2d at 797 (denying request for waiver of Section 73.207 to increase service area where station provided complete (70 dBu) coverage of its city of license), or (2) the station's signal does not reach areas outside of its community of license that are either unserved or underserved. *Cf. Stoner*, 49 FCC 2d 1012 (denying waiver of Section 73.207 based on service gains to area served by at least nine other stations). Greater Media alleges no deficiency in WPLY's coverage of Media, its community of license, and has not shown that any of the alleged areas of RITOIE and multipath interference to WPLY's signal outside of Media are either unserved or underserved.¹⁴

¹³ To the extent that it suggests otherwise, we hereby overrule the Bureau's statement in *ECI License Company, Inc.* (*KNRK*), 11 FCC Rcd 1797, 1799 (M.M.Bur. 1996), which was cited in the Bureau's underlying decision here, that "[t]he former § 73.207 threshold criteria are not applicable to requests for waiver of § 73.215(e)." *Id.* (italics in original).

¹⁴ We note that Greater Media's reliance on *Sarkes Tarzian, Inc.*, 6 FCC Rcd 2465, 2467 (1991), is misplaced. In that

14. Greater Media contends that it has demonstrated patently inadequate service within WPLY's "true community of license," consisting of the area encompassed by the Station's 70 dBu principal community coverage contour, including all of Delaware County ("County"). Application for Review at 15. In support of this contention, it argues, among other things, that the Commission accepted a broader definition of WPLY's community of license by granting it a Class B license when a Class A license would have sufficed to serve Media.¹⁵ We reject this contention. Greater Media does not, and indeed cannot, dispute that WPLY is licensed solely to Media. See 47 C.F.R. § 73.202(b). The Commission previously rejected an attempt to expand a broadcast station's community of license beyond the municipal or corporate limits of the town in question, and Greater Media cites no precedent in which its broader definition of the term was accepted by the Commission. See *WCSV, Inc.*, 46 FCC 2d 159, 159-60 (1974) (upholding denial of overlap rule waiver request). The Commission also previously rejected the argument that grant of a certain class of license militates waiver of the spacing rules. See *Stoner*, 49 FCC Rcd at 1013 (Commission policies respecting maximum potential facilities for Class C stations would not be advanced by spacing rule waiver where service gains were not to an underserved area).¹⁶

15. Greater Media also contends that WPLY cannot serve Media adequately without improving its coverage outside of Media, because Media residents are most likely to listen to the Station outside their homes but within WPLY's 70 dBu contour, while commuting on the Schuylkill Expressway or working in Philadelphia. Furthermore, it contends that by disregarding mobile receivers' reception of WPLY on the Schuylkill Expressway, the Bureau retreated from the Commission's "commitment to provide service to mobile radio listeners[.]" Application for Review at 20 (citing *Amendment of Section 73.202(b), Table of Allotments, Memorandum Opinion and Order*, 4 FCC Rcd 3843, 3845 (1989)). These contentions are essentially variations on Greater Media's contention that WPLY's community of license is substantially larger than Media. The "commitment" cited by Greater Media was simply a recognition that FM commercial broadcasters have an economic incentive to provide service to the widest area possible because, among other things, "FM radio draws substantial revenues from providing service to persons utilizing

case, the Commission waived the spacing standards of Section 73.610(d) where, among other things, the proposed operation would provide a first service to over 40,000 people outside of the television station's community of license but within its Grade B service contour. *Id.* Here, in contrast, Greater Media has not demonstrated that the areas of improved service within WPLY's 70 dBu contour are either unserved or underserved.

¹⁵ Greater Media also argues that WPLY is the County's only licensed radio station, that Media is the County seat, that Greater Media serves the entire County's interest in planning and presenting WPLY's public affairs programming, and that Media is a tiny municipality with a population of only 5,957, whereas the population of the County is 547,651.

¹⁶ Elsewhere in the Application, Greater Media also challenges the Bureau's conclusion that it did not demonstrate that the Roxboro antenna farm was the least short-spaced suitable site available, arguing that the only way to correct RITOE and interference to WPLY's signal from the Roxboro antenna farm is by relocating WPLY's transmitter to the Roxboro site, not by moving it further west of Philadelphia. This argument fails because, as noted above, a site's suitability is determined by service issues within a station's community of license, not other areas within its service contour. Greater Media's contention that it cannot "shoehorn" service into the Philadelphia market because WPLY already serves that market fails for the same reason.

automobile radios," who have a great deal of mobility. *Id.* The existence of such an incentive does not provide a basis for waiver of the spacing rules, as Commission precedent makes patently clear. *See WYUU*, 11 FCC Rcd at 3546 (denying waiver of Section 73.215 "for the sole purpose of improving service to a near-by larger community that is already well-served.").¹⁷

16. In addition, Greater Media contends that the Bureau placed undue emphasis on adherence to the spacing rules. It argues that Commission policy objectives would not be undermined by grant of a spacing waiver here due to the nature of the Philadelphia radio market and the limited interference that would result from WPLY's operations at the proposed site.¹⁸ This argument lacks merit. Every waiver of the spacing rules incrementally undermines the effectiveness of the FM assignment plan. Moreover, by serving as precedent for additional waivers, the unprecedented technical waivers that Greater Media seeks would substantially erode the protections afforded by the spacing rules. In this regard, we note that many

¹⁷ We need not address Greater Media's related contention that the Bureau's reliance on *WKLX, Inc.*, 6 FCC Rcd at 225, was misplaced. *See supra*, para. 7. Regardless of whether the alleged RITOIE and multipath interference to WPLY's signal involve mobile or non-mobile receivers, they occur in areas outside of Media that, based upon the record before us, are neither unserved nor underserved. Thus, they do not render WPLY's present site unsuitable. *See Stoner*, 49 FCC 2d at 1012.

The foregoing analysis establishes that even if Greater Media's allegations of RITOIE and multipath interference are accepted as true, controlling Commission precedent fully supports the Bureau's decision. We also note that the Greater Media RITOIE showing is both factually and legally deficient. Greater Media's RITOIE showing consists of (1) a handful of listener complaints, (2) an audio tape of WPLY's signal made while driving along a stretch of highway near the Roxboro antenna farm, and (3) a study analyzing *potential* sources of RITOIE, terrain obstacles between WPLY and the Roxboro antenna farm, and WPLY's signal strength in the 95-square kilometer area within which WPLY's signal allegedly suffers significant RITOIE-based service disruptions. Greater Media has made no effort to contact the likely RITOIE contributors to resolve the handful of listener complaints in the record. *See WKLX, Inc.*, 6 FCC Rcd at 226 (Commission's established policy for resolving RITOIE complaints is to require newcomer licensees to resolve them on a complaint-by-complaint basis). The audio tape demonstrates only that the particular receiver Greater Media used was susceptible to RITOIE, because RITOIE is a receiver-based phenomenon. *See id.* at 227. Generally, the Commission has rejected measurements or tape recordings taken at preselected points because this type of analysis permits applicants to "cherry pick" observation points. A statistically valid survey must use data acquired at points evenly spaced throughout the area of alleged service disruptions. We are certainly unprepared to reach any conclusion about reception difficulties either along one portion of one highway or within significant portions of Philadelphia on the basis of this single, unmonitored test. With regard to (3), the Commission rejects the premise of Greater Media's study that RITOIE necessarily occurs where the signal strengths of other stations exceed 100 dBu. In fact, staff experience with RITOIE interference issues has shown that there is no reliable methodology for predicting accurately the locations where this receiver-specific signal disruption would occur. *Id.* at 227.

¹⁸ Specifically, Greater Media contends that: (1) every FM station in the Philadelphia area is already short-spaced, and none (other than WXTU, the station involved in *Beasley*) provide contour protection by use of a directional antenna, as will WPLY; (2) the proposed move will not preclude future allotments in the area because every possible allotment has already been made; (3) no community will be deprived of service as a result of the proposed move; and (4) the proposed move will actually reduce spectral crowding because the increased antenna height at the Roxboro antenna farm will enable WPLY to reduce its effective radiated power.

stations experience similar signal disruptions in urban areas. Staff analysis indicates, as does Greater Media's study, that the alleged disruptions to WPLY's signal in the Roxboro area are probably due to a combination of factors including RITOE, terrain obstacles that weaken WPLY's signal relative to other station signals at certain locations, multipath interference and blanketing interference. *See supra*, n. 17. Although the Commission's technical rules are designed to protect a station's signal from interference within its principal community coverage contour, these same rules are premised on a statistical methodology that recognizes that a station will not deliver a listenable signal at all locations within this contour. Thus, WPLY's alleged signal reception difficulties are neither anomalous nor unique, and do not justify the unprecedented technical waivers that Greater Media seeks. The Commission previously has recognized that localized signal reception difficulties affect numerous FM stations operating in urban environments. *See, e.g., WYUU*, 11 FCC Rcd at 3546 n. 6 (denying spacing waiver request based on disturbances to FM reception caused by changing atmospheric conditions faced by numerous FM broadcast stations in the Gulf Coast region). Thus, favorable action on Greater Media's waiver request would change fundamentally the Commission's policy with regard to spacing waiver requests based on substandard service by suburban stations to nearby urban areas, and could severely impair the staff's ability to enforce the spacing rules, which are of central importance to the integrity of the entire FM assignment plan.

17. Greater Media further contends that the Bureau erred by measuring the proposed short-spacing to WJRZ as approximately 20 kilometers based on the Section 73.207 spacing table, rather than as 12 kilometers based on the Section 73.213(c)(1) spacing table, for purposes of comparing Greater Media's waiver request to prior requests for waiver of Section 73.207.¹⁹ The Commission has not resolved whether Section 73.213(c)(1) or Section 73.207 is the appropriate measure in situations like the present one, where the spacing requirements for the two stations involved are grandfathered under Section 73.213(c)(1).²⁰ We need not decide this issue here, however, because it is of no decisional significance. Even if we treat the proposed short-spacing as 12 kilometers, Greater Media is not excused from the threshold showing, which it has failed to satisfy.

18. Turning to the other component of Greater Media's Section 73.215 waiver request, the Commission indicated in the *Reconsideration Order* that waiver of the directional antenna requirements of Section 73.215(a) would be appropriate only in "a very small number of cases" where, among other things,

¹⁹ The Bureau used the Section 73.207 spacing table because of the Commission's holding in *WYUU* that a proposed Section 73.215(e) short-spacing cannot be compared directly with prior Section 73.207 short-spacing waivers, as in most cases the Section 73.215(e) table affords substantial relief from the Section 73.207 spacing requirements. *See WYUU*, 11 FCC Rcd at 3546, n. 4 (where Section 73.215(e) table afforded 12 kilometers of relief from Section 73.207 spacing requirements, proposed 5.1 kilometer Section 73.215(e) short-spacing should be compared to Section 73.207 waiver cases involving 17.1 kilometer short-spacings).

²⁰ The Section 73.213(c)(1) spacing table preserves the former, less restrictive Section 73.207 spacing requirements for stations that became short-spaced as a result of the Commission's increase of Class A spacing requirements in conjunction with its Order permitting six kilowatt Class A stations. *See Amendment of Part 73 of the Rules to Increase the Maximum Transmitting Power for Class A FM Stations, Second Report and Order*, MM Docket 88-375, 4 FCC Rcd 6375 (1989), *aff'd in relevant part*, 6 FCC Rcd 3417 (1991).

such waiver is demonstrated to be necessary to allow use of a multiplexed or multi-user transmitting antenna that cannot be directionalized for individual frequencies. *Reconsideration Order*, 6 FCC Rcd at 5360 and n. 26-27. Greater Media's proposal, however, involves a single-user antenna that can be directionalized to protect co- and adjacent-channel stations. Indeed, the record is devoid of any showing that the proposed antenna cannot be directionalized to avoid creation of new predicted interference to WPLY in violation of the rule. Accordingly, waiver of prohibited contour overlap under Section 73.215(a) is not justified. *Id.* at n. 27.

19. Greater Media contends that adherence to the contour protection standard is arbitrary here because fully-spaced stations under Section 73.207 may have equal or greater contour overlap than is prohibited between WPLY and WJRZ under Section 73.215(a).²¹ This argument impermissibly mixes distinct FM interference standards. The contour protection standard takes into account the variability of terrain surrounding stations, and permits no overlap between the predicted interfering and protected contours of short-spaced stations. 47 C.F.R. § 73.215(a). Section 73.207 spacing requirements, on the other hand, accord interference protection "solely by the mileage separation, power, and antenna height limitations set forth in the Commission's rules, without regard to the concept of protected and interfering contours." *Florissant Broadcasting Co., Inc.*, 63 FCC 2d 1041, 1043 (1977); see *Contour Protection Order*, 4 FCC Rcd at 1685 ("the separation requirements are based on average terrain assumed to be equal in all compass directions. . . . Obviously, this failure to account for variations in the height of terrain means that the separation requirements sometimes overprotect, and sometimes underprotect, FM service."). The amount of theoretical contour overlap permitted under Section 73.207 is irrelevant to a Section 73.215 waiver request. *Cf. Florissant*, 63 FCC 2d at 1043 (lack of interference based on noncommercial FM standards irrelevant to Section 73.207 waiver request). In sum, therefore, we conclude that Greater Media has failed to make a compelling showing in support of its Section 73.215 waiver request. See *Stoner*, 49 FCC 2d at 1012.

20. *Additional Arguments Presented by Greater Media.* We turn next to Greater Media's many (and sometimes contradictory, see, e.g., *infra* n. 24) arguments in support of the contention that the Bureau erred by holding that public interest considerations do not warrant waiver of the spacing rules here. As we already have stated, Greater Media has wholly failed to demonstrate that the licensed WPLY site is unsuitable, a threshold requirement for waiver under Section 73.215(e). Moreover, this is not a multiplex antenna proposal that could justify a Section 73.215(a) waiver. We emphasize that in these circumstances, we need not consider the alleged public interest benefits advanced by Greater Media. Nevertheless, we briefly address Greater Media's arguments and conclude that the Bureau properly rejected them.

21. Greater Media repeats its masking argument regarding predicted new interference to WPLY from WJRZ and to WFMZ from WPLY, see *supra*, para. 4 and n. 6, contending that the Commission accepted a masking argument similar to Greater Media's in granting a spacing waiver in *Golden West Broadcasters*, 11 FCC Rcd 3377 (1995). The Commission specifically stated that its holding in *Golden*

²¹ Specifically, Greater Media contends that, based on average terrain, there will be 11.6 kilometers of overlap between fully-spaced, first-adjacent Class B and Class A stations under Section 73.207, whereas under its proposal there will be 10.6 kilometers of overlap between WPLY and WJRZ.

West was based on the "unique circumstances" involved there. *Golden West*, 11 FCC Rcd at 3383.²² Furthermore, the conclusion that there would be no actual interference in that case was based on field strength measurements demonstrating a complete absence of coverage by the affected station,²³ rather than the propagation curves predicting interference upon which Greater Media relies. *Id.* The Commission more recently rejected a masking argument similar to Greater Media's, demonstrating that the Bureau's reasoning here was consistent with precedent. *See Board of Education of City of Atlanta*, 11 FCC Rcd 7763, 7766 (1996) ("Adding an interfering signal to the area will clearly diminish the probability of satisfactory reception in this area.").

22. Although Greater Media did not specifically rely on WPLY's proposed relocation to Roxboro antenna farm as a ground supporting the construction permit application, it now argues that the Bureau erred by failing to consider this factor. Location at a *de facto* antenna farm is "a positive factor to be weighed in requests in FM spacing waivers," but it is not a sufficient basis for waiver of the spacing rules. *Beasley*, 100 FCC 2d at 109 n. 6 (granting waiver of Section 73.207 where, *inter alia*, applicant showed that station only provided 70 dBu coverage to 48% of its city of license). Greater Media argues that location at an antenna farm was a determinative factor in *WTCN Television, Inc.*, 14 FCC 2d 870 (1968). That case is distinguishable, however, because it involved extraordinary aeronautical safety issues not present here. *See id.* at 889-890; *see also Amendment of Parts 1, 17, and 73 to Provide for the Establishment and Use of Antenna Farm Areas, Report and Order*, 8 FCC 2d 559, 566 (1967) ("if extraordinary reasons of aeronautical safety indicate that a particular antenna structure should be located within the antenna farm, the Commission may authorize a short spacing to accommodate a particular antenna."). Accordingly, assuming *arguendo* that the Bureau did not consider the antenna farm factor in its decision, we conclude that its error was of no decisional significance.

23. Finally, Greater Media contends that the overall benefits of increased service under its proposal outweigh the detriments of new predicted interference. Specifically, it argues that (1) its proposal would result in a net increase in service to an area of 169.1 square kilometers with a population of 149,930, based on subtraction of the area and population of increased interference to WFMZ from the areas and populations of reduced and eliminated predicted interference to WHTZ and WBIG under the proposal;²⁴ (2) the Bureau

²² Specifically, waiver was granted based upon the applicant's submission of evidence that "terrain barriers will preclude actual, as opposed to theoretical, resultant increases in interference to other stations, there are mutual facilities increase agreements with all potentially affected stations, there is an acknowledged lack of ample city grade coverage of KLIT's community of license, and a grant of Golden West's application will not open the floodgates to a spate of similar requests." *Golden West*, 11 FCC Rcd at 3383. Greater Media's argument elsewhere in the Application that, based on *Golden West*, the Commission allows "shoehorning" despite its clear policy to the contrary, is specious. *Cf. WYUU*, 11 FCC Rcd at 3546 (one purpose served by Section 73.215(e) spacing table is to prevent "shoehorning").

²³ The Commission stressed that, as a general rule, such measurements may not be considered in analyzing FM spacing waiver requests. *See Golden West*, 11 FCC Rcd at 3384; *see also Board of Education of City of Atlanta*, 11 FCC Rcd 7763, 7766 (1996) (rejecting offer to submit field strength measurements).

²⁴ This argument ignores the predicted new interference to WPLY from WJRZ under the proposal. *See infra*, n. 25. It also contradicts Greater Media's argument elsewhere in the Application that 54 dBu coverage of an urban area is by definition inadequate to provide quality reception. *See Application for Review* at 10. Under the logic of this argument,

gave excessive weight to new predicted interference to WPLY from WJRZ under its proposal because such interference would affect only a small population in an area outside of WPLY's city of license;²⁵ (3) reduced interference to co-channel station WBIG under its proposal should have outweighed predicted new interference to second-adjacent-channel station WFMZ because co-channel interference is more significant than second-adjacent-channel interference, relying in part on the Commission's proposal, which was subsequently adopted in *Grandfathered Short-Spaced Stations*, 12 FCC Rcd at 11840, to eliminate second-adjacent-channel protection criteria under Section 73.213(a);²⁶ and (4) the Bureau gave insufficient weight to weigh proposed service increases outside of WPLY's community of license but within WPLY's 70 dBu contour. Even assuming that total service gains exceed losses under Greater Media's proposal, however, service gains do not necessarily offset the creation of new prohibited interference. "[W]hen faced with a choice between increased coverage with increased interference received on one hand, and lesser but adequate coverage without prohibited interference on the other, the Commission favors the latter." *Board of Education of City of Atlanta*, 82 FCC 2d 125, 127 (1980).²⁷ In any event, as we already have made clear, the Commission will not waive the spacing rules for the purpose of allowing a station to improve coverage unless its present site is unsuitable, regardless of whether the proposed move results in a net increase in service. See *Stoner*, 49 FCC 2d at 1012 ("a mere increase in population served is not sufficient to warrant

the Bureau should have ignored reduced interference to WBIG, as the area of reduced interference is urban and receives "inadequate" 54 dBu coverage from WBIG.

²⁵ Greater Media revised its statement of the population of the area in question without explanation from 20,329 in the construction permit application to 12,044 in the Application. We note that Greater Media's contention that the Bureau erred by stating that the benefits of reduced interference to WBIG under its proposal were "outweighed by the . . . increase in interference presented to . . . WJRZ-FM[.]" *Bureau Letter* at 10, lacks merit. A fair reading of the Bureau's decision clearly demonstrates its awareness that interference to WPLY from WJRZ, not the reverse, was at issue. See *id.* at 5-7.

²⁶ This argument misrepresents the nature of the Bureau's decision, which clearly did not consist of a simple weighing of reduced interference to WBIG against predicted new interference to WFMZ. Furthermore, we note that the Bureau did not err by considering predicted new interference to WFMZ under Greater Media's proposal, because at the time of its decision the Commission's proposal to eliminate second-adjacent-channel protection criteria for grandfathered short-spaced stations had not been adopted. See, e.g., *Palm Beach Cable Television Co.*, 78 FCC 2d 1180, 1183 (1980) (until such time as a Commission policy has been modified or changed, it must be applied according to its terms). As stated earlier, the Commission's revisions to Section 73.213(a) do not affect our decision in this matter: Greater Media's failure to meet the threshold requirements for waiver of Section 73.215(e), or to justify a Section 73.215(a) waiver, are determinative here. See *supra*, n. 10.

²⁷ We note that the Commission has proposed a standard for allowing unilateral proposals involving received interference, such as that involved here, where the applicant demonstrates, among other things, a total service gain at least five times as great as the increase in total interference, in terms of both area and population served. *1998 Biennial Review --Streamlining of Radio Technical Rules, Notice of Proposed Rule Making* in MM Docket No. 98-93, 13 FCC Rcd 14849 at para. 20 (1998). Our examination of the record suggests that Greater Media's proposal would not satisfy this criterion. In any event, Greater Media's application would not be grantable under the proposed standard because it does not comply with the Section 73.215(e) spacing table. See *id.*

waiver when the area is presently neither unserved nor underserved.").²⁸

June 16, 1999 Pleading

24. On June 16, 1999, Greater Media filed an "exhibit" styled as a "Supplement to Application for Minor Change in Facilities." This filing purports to present an "alternative approach" to its Section 73.215(e) waiver request. Specifically, Greater Media proposes that the Commission waive Section 73.210 to permit the reclassification of WPLY as a Class C2 station. Alternatively, it asks the Commission to amend its rules to permit the equivalent of Class C2 facilities in Zone II, an argument previously raised by Greater Media in its comments and reply comments in the radio technical rules streamlining proceeding. *See 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Notice of Proposed Rulemaking and Order* in MM Docket No. 98-93, 13 FCC Rcd 14649 (1998). Each of these alternatives has the same goal -- to permit WPLY to demonstrate compliance with Section 73.215 distance separation and contour overlap protection requirements on the basis of the station's 60 dBu contour, rather than on the basis of its more expansive, and therefore more preclusive, 54 dBu contour.

25. As a preliminary matter, Greater Media's filing, an exhibit submitted by Greater Media's counsel, is patently defective. Any "supplement" to its application must be in the form of an amendment and signed by an officer of the corporate applicant. *See* 47 C.F.R. § 73.3513. Regardless of Greater Media's characterization of the filing, however, the supplement is, in fact, a further supplement to its application for review. It advances new legal arguments to show that the staff erred in denying Greater Media's Section 73.215 waiver requests, and therefore, that Commission review of the Bureau's decision is warranted. Thus, the filing continues Greater Media's pattern of disregarding basic procedural requirements. *See supra*, n. 1. Moreover, it relies on questions of law upon which the Mass Media Bureau has been afforded no opportunity to pass and it is dismissed on this basis. *See* n. 11 and accompanying text.

26. Nevertheless, we wish to make certain observations about these arguments. Greater Media's "alternative approach" is merely a request to substitute one unprecedented waiver request for another, specifically to waive Section 73.210 which permits the authorization of Class B (but not Class C2) stations in Zone II where the proposed WPLY transmitter would be located. For the reasons set forth in paragraph 16, we are reluctant to entertain such requests on a case-by-case basis. In any case, we believe that Greater Media has wholly failed to adduce either unique or compelling facts that would justify a waiver of foundational broadcast technical rules. We emphatically reject its view that we should entertain requests for lesser station protection levels where stations receive interference within currently protected contours from a number of other, short-spaced stations. We believe that such a policy, if accepted, would fundamentally and inevitably threaten the Commission's efforts to manage the radio spectrum.

²⁸ Greater Media's argument that the Bureau improperly considered each of its public interest reasons individually rather than as a whole is without merit. Examination of the Bureau's decision reveals that it did consider Greater Media's showing "as a whole[.]" *Bureau Letter* at 9. This statement, as well as the Bureau's specific discussion of the Section 73.213(a) waiver request to move closer to WHTZ, also refutes Greater Media's contention that the Bureau failed to consider alleged reduced interference to WHTZ.

27. Plainly, Greater Media's proposal is more appropriately considered in the context of a rulemaking. In this regard, we note that the Commission explicitly rejected in the Docket 80-90 proceeding the option of adopting a 60 dBu protected service contour for Class B stations. *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, Report and Order*, 94 FCC 2d 152, 174-75 (1983) (subsequent history omitted). It observed that the 54 dBu contour was adopted in 1963 to promote wide-area service to the large and sprawling metropolitan communities of the Northeast. The Commission also recognized that adopting a 60 dBu standard would have a substantial impact on the primary service areas of existing Class B stations. Interestingly, the Association for Broadcast Engineering Standards, Inc. ("ABES") contended in comments in that proceeding that a 60 dBu Class B protected contour standard would exacerbate the precise problems on which Greater Media relies for the requested waiver. ABES claimed that adoption of a Class B 60 dBu service contour would result in "unlistenable" signals from mobile receivers used on highways in the spectrum-congested cities of the Northeast, including Philadelphia, where stations now operate with "limited coverage and myriads of interference." *Id.*

28. For the foregoing reasons, we find that Greater Media has failed to make the requisite compelling showing in support of its Section 73.215 waiver request and, therefore, the Bureau properly denied the construction permit application. ACCORDINGLY, IT IS ORDERED, That the Supplement to Application for Minor Change in Facilities filed on June 16, 1999 IS DISMISSED and the Application for Review filed September 23, 1996 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Joint Dissenting Statement of Commissioners Powell and Tristani

Re: Application of Greater Media Radio Company, Inc. File No. BPH-940513IB

We respectfully dissent from this decision denying Greater Media's request to relocate the transmission facilities of station WPLY(FM), Media, Pennsylvania. As noted below, we would give greater consideration to the public interest benefits that could accrue from a grant of this waiver.

As an initial matter, we note that today's decision seems inconsistent with the thrust if not the letter of the Commission's recent *Report and Order in Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd 11840 (1997) (*Grandfathered Short-Spaced Rulemaking*). In the *Grandfathered Short-Spaced Rulemaking*, we took actions designed to provide grandfathered FM stations with greater flexibility to change their transmitter locations and modify their existing facilities. Indeed, as today's opinion recognizes at footnote 10, the action in the *Grandfathered Short-Spaced Rulemaking* plainly would "militate in favor" the Section 73.213(a) waiver originally requested by Greater Media. And, although the *Grandfathered Short-Spaced Rulemaking* did not eliminate the need for Greater Media to obtain a waiver of the FM spacing rule in Section 73.215, a fair reading of that order suggests that the Commission has shifted its approach to FM spacing issues. The staff decision affirmed in this opinion was adopted before the *Grandfathered Short-Spaced Rulemaking* and did not take this shift into account. As a result, it utilizes, in our opinion, an excessively narrow waiver standard. In today's radio marketplace, we do not believe that such a narrow standard is appropriate.

More specifically, we believe that the Commission should have given full consideration to all of Greater Media's arguments and greater weight to the public interest benefits of granting the waiver request. In various places, the order declines to address arguments presented by Greater Media. See, e.g. paras. 8 and 23 and footnote 11. It seems unnecessarily rigid to us not to look carefully at all reasonable arguments presented by the applicant in this case. Thus, we would not, for example, discount Greater Media's showing that allowing it to relocate would reduce the amount of interference WPLY currently causes to stations in Washington, D.C. and Newark. Similarly, we would give greater credence to the applicant's showing of its need to reduce interference and increase service outside its immediate community of license as well as the environmental value of moving WPLY's antenna to an antenna farm. Consideration of all the public interest benefits in this case would, in our minds, tip the balance in favor of granting Greater Media's requested waiver. For these reasons, we respectfully dissent.