Federal Communications Commission
Washington, D.C. 20554

September 1, 2006

DA 06-1741
In Reply Refer to:
1800B3-TH
Released: September 1, 2006

David D. Oxenford, Esq.
Davis Wright Tremaine LLP
1500 K Street, N.W.
Suite 450
Washington, D.C. 20005-1272

In re: KEGK(FM), Wahpeton, ND
Facility ID No. 25533

Petition for Waiver

Dear Mr. Oxenford:

We have before us your "Petition for Waiver" ("Petition") filed on February 26, 2006 on behalf of Triad Broadcasting Company, LLC and Monterey Licenses, LLC[1] (collectively, "Triad"). The waiver request pertains to a Joint Sales Agreement ("JSA") involving KEGK(FM), Wahpeton, North Dakota, which was not an attributable interest for Triad when it commenced in 2002, but became an attributable interest under the local radio ownership rule that went into effect on September 3, 2004.[2] Triad requests a waiver of the Commission's requirement that an attributable JSA that causes a party to exceed the Commission's local radio ownership limits be terminated within two years (*i.e.*, by September 3, 2006). For the reasons set forth below, we grant a temporary waiver as described below.

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[1] Monterey Licenses, LLC, which is 100% owned by Triad Broadcasting Company, LLC, is the licensee of two AM stations and four FM stations in the Fargo, North Dakota – Moorhead, Minnesota radio market (the "Fargo Market"): KQWB(FM) and KVOX(FM), Moorhead, Minnesota, KBMW(AM) and KLTA(FM), Breckenridge, Minnesota, KPFX(FM), Fargo, North Dakota, and KQWB(AM), West Fargo, North Dakota.

[2] *See* 47 C.F.R. § 73.3555(a)(1)(iii) (in a market with between 15 and 29 full-power radio stations, no party may hold attributable interests in more than six commercial radio stations in total or more than four commercial radio stations in the same service (AM or FM) and Notes 1 and 2(k) (a joint sales agreement is an attributable interest if it permits a party with an attributable interest in another radio station in the same market to sell more than 15 percent of the station's advertising time per week). This standard was adopted by the Commission in 2003, temporarily stayed on appeal, and then released from the stay on September 3, 2004. *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13711-47 (2003) ("*2002 Biennial Review Order*"), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (2004) ("*Prometheus*"), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sep. 3, 2004) ("*Prometheus Rehearing Order*"), *cert. denied*, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177). The Commission recently issued a Further Notice of Proposed Rule Making in response to *Prometheus*. *See 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, FCC 06-93 (rel. July 24, 2006).

Background. KEGK(FM), licensed to Guderian Broadcasting, Inc., is one of 15 operating commercial radio stations in the Fargo Market.[3] Since May 2002, Triad has purchased substantially all of the advertising time on the station for resale in combination with its six other stations in the Fargo Market.[4] The *2002 Biennial Review Order* determined that such an in-market JSA is an attributable interest.[5] In situations such as this one, where an attributable interest exceeded the revised ownership limits being adopted, parties were given two years from the effective date of the order to terminate the JSA or otherwise come into compliance with the revised limits.[6] Pursuant to the *Prometheus Rehearing Order*, the revised rule became effective on September 3, 2004. Under the revised rule, Triad holds attributable interests in five FM stations and seven stations altogether. Accordingly, absent a waiver, the JSA must be terminated or an attributable interest in one of the FM stations must be divested so that Triad will be within the allowed subcap of four FM stations and six stations altogether for the Fargo Market. In response to the *2002 Biennial Review Order*, Triad filed a petition for reconsideration regarding the attribution of radio JSAs and the termination requirement, and then filed the instant Petition.

Triad states that the stations attributable to it accounted for 41.2% of the radio revenue in the Fargo Market in 2005, of which approximately 2.7% was generated by KEGK(FM).[7] The other principal competitor in the Fargo Market is Clear Channel Communications, Inc. ("Clear Channel"). Clear Channel, under the ownership limits in effect prior to the *2002 Biennial Review Order*, acquired and currently holds attributable interests in five FM stations and seven stations altogether in the Fargo Market.[8] However, the *2002 Biennial Review Order* did not require divestiture of owned interests that exceed the revised local radio ownership limits.[9] Accordingly, Clear Channel is not required to divest any of those interests. Triad states that Clear Channel's stations generated 49.4% of the radio revenue in the Fargo Market in 2005.

Triad seeks a permanent waiver of the requirement in the *2002 Biennial Review Order* that it come into compliance with the revised local radio ownership limits in the Fargo Market by September 3, 2006. Triad argues that the Commission's decision to require divestiture of an interest by Triad, but not by Clear Channel, is unfair and contrary to the public interest because it will diminish Triad's ability to compete against Clear Channel in the Fargo Market.[10] Triad argues that its position is consistent with the *Prometheus* Court's critique of the methodology supporting the revised local radio ownership rule.[11]

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[3] The Fargo Market has 22 stations altogether. Seven stations are owned by public radio or religious entities. Petition at 2 and n. 3.

[4] The KEGK JSA was referenced previously in a 2003 Media Bureau decision. *See Letter to Harry C. Martin*, 18 FCC Rcd 1498 (Media Bur. 2003).

[5] *2002 Biennial Review Order*, 18 FCC Rcd at 13745 ¶ 321.

[6] *Id*., 18 FCC Rcd at 13746 ¶ 325. *See also Media Bureau Announces Requirement to File Certain Radio Joint Sales Agreements*, 20 FCC Rcd 1 n.8 (2005).

[7] Petition at 3.

[8] *Id*. at 2 and n. 3.

[9] *See* 47 C.F.R. § 73.3555, Note 4; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13808 ¶ 484.

[10] Petition at 4-5.

[11] *Id*. at 5

Discussion. A party seeking a waiver "faces a high hurdle"[12] and must demonstrate that deviation from the general rule is warranted by special circumstances and will serve the public interest.[13] In this case, we conclude that the competitive balance in the Fargo Market is a special circumstance supporting a waiver. We further conclude that granting a waiver will serve the public interest by maintaining the current competitive balance while the Commission reviews the local radio ownership rule in the pending rule making proceeding and reviews Triad's petition for reconsideration of the *2002 Biennial Review Order*.

When the Commission addressed the grandfathering situation in the *2002 Biennial Review Order*, it recognized that, as with all grandfathering decisions, "some disparity will exist between grandfathered and non-grandfathered owners [but we] do not believe this fact outweighs the equitable considerations that persuade us to grandfather existing combinations."[14] The Commission noted several equitable considerations warranting grandfathering of existing combinations that exceed the revised rule. First, the Commission noted that requiring divestiture would unfairly penalize parties who bought stations in good faith in accordance with the existing rules.[15] Second, the Commission stated that licensees of current combinations should be afforded an opportunity to retain the value of their investments made in reliance on the Commission's rules and orders.[16] Third, the Commission stated that required divestiture would be too disruptive to the industry.[17] In contrast, JSAs did not present similar concerns because JSAs do not involve investments in stations, can be unwound more easily than purchases, and were not so widespread as to present an issue of disruption to the industry.

While the distinction between grandfathered ownership situations and non-grandfathered JSAs is clear as a general matter, the particular circumstances of the Fargo Market support a temporary waiver. This is not a situation where the JSA provides Triad with an unfair competitive advantage. In fact, termination of the KEGK(FM) JSA could diminish Triad's ability to compete in the Fargo Market, given the existence of a competitor with a greater share of market revenue. Therefore, we conclude that waiver of the termination requirement until six months after the date on which the Commission addresses Triad's Petition for Reconsideration serves the public interest.

Accordingly, IT IS ORDERED that the Commission's requirement that Triad Broadcasting Company, LLC either terminate its Joint Sales Agreement with Guderian Broadcasting, Inc. with respect to KEGK(FM), Wahpeton, North Dakota, or otherwise come into compliance with Section §73.3555(a)(1)(iii) of the Commission's rules[18] in the Fargo, North Dakota – Moorhead, Minnesota radio market by September 3, 2006, IS WAIVED for a period terminating on the date which is six (6) months after the date on which the

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[12] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*").

[13] *See Northeast Cellular Telephone Co. v F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio*, 418 F.2d at 1157-59).

[14] *2002 Biennial Review Order*, 18 FCC Rcd at 13809 ¶ 485.

[15] *Id*., 18 FCC Rcd at 13808 ¶ 484.

[16] Id.

[17] Id.

[18] 47 C.F.R. § 73.3555(a)(1)(iii).

Commission releases its decision on the Petition for Reconsideration of the *2002 Biennial Review Order* filed by Triad Broadcasting Company, LLC.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Guderian Broadcasting, Inc.