



Federal Communications Commission
Washington, D.C. 20554

March 23, 2006

DA 06-644
In Reply Refer to:
1800B3-KV

Galaxy Communications, L.P.
c/o Sally A. Buckman, Esq.
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2000 K Street, NW
Suite 600
Washington, D.C. 20006

In re: WTKV(FM), Oswego, NY
Facility ID No. 24131
BPH-20031209ABV
Application for Minor Modification of License

Dear Ms. Buckman:

This letter refers to the above-captioned application, as amended (the "Application"), for a minor modification of the license for Station WTKV(FM), Channel 288A, Oswego, New York, filed by Galaxy Communications, L.P. ("Galaxy"). The Application proposes to implement a change in WTKV(FM)'s community of license and seeks a waiver of a provision in Note 4 to Section 73.3555 of the Commission's rules (the "Waiver Request").¹ For the reasons set forth below, we deny the Waiver Request and dismiss the Application for failure to comply with the local radio ownership rule, Section 73.3555(a).²

Background

On September 12, 2001, the staff granted Galaxy's rulemaking petition to change WTKV(FM)'s community of license from Oswego to Granby, New York.³ Subsequently, Galaxy filed the Application to implement the approved change. It proposes moving the transmitter site 16.7 kilometers and other technical changes.⁴ Under the radio ownership rule now in effect,⁵ for radio stations located in an

¹ 47 C.F.R. § 73.3555, Note 4. Galaxy submitted its waiver request as an amendment to the Application (at Exhibit 5) on November 9, 2004.

² 47 C.F.R. § 73.3555(a).

³ See *Oswego and Granby, New York*, Report and Order, 16 FCC Rcd 16927 (MMB 2001) ("Rulemaking Order").

⁴ Galaxy proposes to relocate the transmitter from its current site in Oswego, New York, located at 43-24-56 North Latitude and 76-27-54 West Longitude, to a site in Granby, New York, located at 43-16-23 North Latitude and 76-24-5 West Longitude. Galaxy also proposes to operate at an effective radiated power of 3.9kW with an omnidirectional antenna, to be located on a new support structure, at a height above average terrain of 125 meters.

⁵ 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, 13711-13747 (2003)

Arbitron Metro Survey Area (“Metro”), the Metro is the relevant market for evaluating compliance with the Commission’s numerical limits.⁶ According to BIA, WTKV(FM) is “home” to Arbitron’s Syracuse Metro.⁷ BIA reports the Syracuse Metro as having 40 commercial and noncommercial home stations, and therefore a party may have a cognizable interest in up to seven commercial stations, with not more than four in the same service (AM or FM).⁸ Currently, Galaxy has a cognizable interest in nine stations (3AM and 6 FM) in the Syracuse Metro: WKRH(FM), Minetto; WKRL(FM), North Syracuse; WSCP(AM), Sandy Creek; WSCP-FM, Pulaski; WSGO(AM), Oswego; WTKW(FM), Bridgeport; WTLA(AM), North Syracuse; WZUN(FM), Phoenix; and the subject station, WTKV(FM), Oswego. Thus, Galaxy holds two more stations -- and two more FM stations -- than currently permitted by the relevant local ownership cap and same service subcap, respectively.

In the *Ownership Order*, the Commission grandfathered existing ownership combinations like Galaxy’s that had been authorized under prior rules.⁹ However, Note 4 to Section 73.3555 states that the new local ownership rules will apply when a licensee files “applications for minor changes to existing stations that implement an approved change in an FM radio station’s community of license”¹⁰ Thus, grant of the Application requires either a waiver or Galaxy’s prior divestiture of two FM stations.

Galaxy argues that a waiver is warranted because it does not raise competition concerns. According to Galaxy, as long as there is no change in the number of stations it owns in the Metro, a reallocation of the community of license within that Metro has no net effect on the concentration of radio ownership in that market.”¹¹ Galaxy also argues that, in light of the Commission’s determination in the *Rulemaking Order* that reallocation of WTKV(FM)’s community of license serves the public interest, we must find that grant of the Application serves the public interest. Strict application of Note 4 to the WTKV(FM) Application, Galaxy contends, “neither advances the Commission’s ownership goals nor furthers the fulfillment of the Commission’s established allotment priorities.”¹²

Discussion

An applicant seeking a waiver “faces a high hurdle.”¹³ It must demonstrate that deviation from the general rule is warranted by special circumstances and will serve the public interest.¹⁴ We have given

(“*Ownership Order*”), *aff’d in part and remanded in part, Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (2004), *stay modified on reh’g*, No. 03-3388 (3d Cir. Sept. 3, 2004), *cert. denied*, 125 S. Ct. 2902, 2903, 2904 (2005).

⁶ See *Ownership Order*, 18 FCC Rcd at 13724-28.

⁷ For Arbitron-rated markets, the Commission relies on BIA data in determining compliance with 47 C.F.R. § 73.3555(a). See *id.*, 18 FCC Rcd at 13727. In addition, if a full power commercial or noncommercial radio station’s community of license is within the Metro’s geographic boundary, the Commission includes the station as home to the Metro regardless of the station’s BIA status. See, e.g., *id.*, 18 FCC Rcd at 13727.

⁸ See 47 C.F.R. § 73.3555(a)(ii).

⁹ See *Ownership Order*, 18 FCC Rcd at 13808-09.

¹⁰ 47 C.F.R. § 73.3555, Note 4.

¹¹ Application, Exhibit 5 at 6.

¹² *Id.* at 4.

¹³ *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“*WAIT Radio*”).

Galaxy's waiver request the requisite "hard look,"¹⁵ but conclude that a waiver is not warranted in this case.¹⁶

To grant a waiver under the circumstances presented here would eviscerate the plain language of Note 4. The new local ownership rule applies to any application "to implement an approved change in an FM radio station's community of license"¹⁷ The Commission was concerned that "[g]randfathered combinations, by definition, exceed the numerical limits that we find promote the public interest as related to competition . . . [and] were created pursuant to a market definition that we conclude fails to adequately reflect competitive conditions."¹⁸ As the Commission explained, the "decision to grandfather existing combinations simply reflects the substantial equitable considerations . . . that we conclude outweigh our interest in improving the precision of our radio market definition in these particular cases."¹⁹ The Commission did not carve out an exception for intra-market city of license modifications. To the contrary, it explicitly included such proposals within the scope of the new rules. Were we to waive the relevant provision of Note 4 on grounds that the community of license change does not create new or increased ownership concentration, it would be tantamount to amending the rule adopted by the Commission without notice and comment as required by the Administrative Procedure Act.²⁰

As for Galaxy's argument concerning the Commission's finding in the *Rulemaking Order* that the proposed reallocation serves the public interest, we find it does not constitute a "special circumstance." This same contention could be raised by all licensees seeking to implement intra-market city of license modifications. Potential ownership issues are not considered in reallocation rulemakings. Rather, "it is established policy . . . to consider such issues . . . in conjunction with the applications to implement the reallocation."²¹ This unambiguous policy anticipates that, at the application stage, the issue of non-compliance with Section 73.3555 may arise, but also permits a licensee to divest other interests by the time the modification application is filed. It leaves to the discretion of the applicant the option of pursuing the required divestiture of other broadcast interests that would permit the rule-compliant implementation of the reallocation.

On the record before us, we cannot find good cause to waive the local radio ownership rule. Accordingly, IT IS ORDERED, That Galaxy's request for waiver to permit the change in community of

¹⁴ 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).

¹⁵ *WAIT Radio*, 418 F.2d at 1157.

¹⁶ See 47 C.F.R. § 1.3 (rule may be waived "for good cause shown") (cited in *Ownership Order*, 18 FCC Rcd at 13747).

¹⁷ 47 C.F.R. § 73.3555, Note 4 (emphasis added).

¹⁸ *Id.*, 18 FCC Rcd at 13810.

¹⁹ *Id.*, 18 FCC Rcd at 13809.

²⁰ See 5 U.S.C. §§ 551(5), 553. See also *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988) (agency generally may not repeal a substantive rule without providing notice and comment).

²¹ See *Chillicothe, Dublin, Hillsboro, and Marion, Ohio*, Report and Order, 20 FCC Rcd 6305 (MB 2005) (footnote omitted).

license for Station WTKV(FM), from Oswego to Granby, New York, IS DENIED. IT IS FURTHER ORDERED, That the application to modify the license for Station WTKV(FM) (File No. BPH-20031209ABV) IS DISMISSED for failure to comply with 47 C.F.R. Section 73.3555(a).

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau