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Multicultural Radio Broadcasting Licensee, LLC
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Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006

In Re: WNYG(AM), Babylon, NY
Facility ID No. 5208
BP-20070601BDE

**Application for Minor Change in Licensed
Facilities**

Dear Counsel:

We have before us the above-captioned application (the "Application") of Multicultural Radio Broadcasting Licensee, LLC ("MRBL") for a minor modification of the license for Station WNYG(AM), Babylon, New York. The Application proposes to implement a change in WNYG(AM)'s community of license and seeks a six-month waiver (the "Waiver Request") of a provision in Note 4 to the local radio ownership rule, Section 73.3555 of the Commission's Rules (the "Rules").¹ For the reasons set forth below, we grant the Waiver Request and the Application.

Background. In its Application MRBL proposes to change the community of license of Station WNYG(AM) from Babylon to Medford, New York.² WNYG(AM) is currently, and upon implementation of the proposed modification will remain, one of 149 radio stations in the New York, New York Arbitron Metro Market ("New York Market").³ Consequently, a party may have a cognizable interest in up to eight radio stations, and up to five stations in a single service (AM or FM), in this Market.⁴ Currently, MRBL has a cognizable interest in six AM stations in the New York Market.⁵ Accordingly, MRBL holds one more AM station than currently permitted under the Rules. The existing

¹ 47 C.F.R. § 73.3555, Note 4. The Application and Waiver Request are uncontested.

² The Application was filed as a minor modification application in accordance with Section 73.3571(j) of the Commission's Rules. *See* 47 C.F.R. § 73.3571(j).

³ *See* BIA Database Report, FCC Geographic Market Definition for New York, NY.

⁴ *See* 47 C.F.R. § 73.3555(a)(1).

⁵ MRBL is the licensee of: WJDM(AM), Elizabeth, New Jersey; WZRC(AM), New York, New York; WNSW(AM), Newark, New Jersey; WPAT(AM), Paterson, New Jersey; WWRU(AM), Jersey City, New Jersey; and the subject station, WNYG(AM), Babylon, New York.

combination, however, is grandfathered.⁶ Note 4 to Section 73.3555 of the Rules, however, requires compliance with the numerical ownership limits in order to change a station's community of license.⁷ Accordingly, grant of the Application requires either a waiver or MRBL's prior divestiture of one AM station in the New York Market.

MRBL states that it intends to comply with the Rule by divesting WNYG(AM) prior to commencing operations at the new community of license. MRBL, however, also seeks a temporary ownership waiver of six months to complete the sale of the station. MRBL argues that a waiver is warranted and grant of the Application will serve the public interest. Specifically, MRBL explains that grant of the instant Application is necessary to accommodate the move of its co-owned first-adjacent channel Station WNSW(AM), which recently lost its tower lease, and to thus avoid "having to discontinue operations of WNSW(AM) or WNYG(AM)."⁸ Station WNSW(AM) will be co-locating on an existing tower site in which MRBL Station WPAT(AM) currently operates.⁹ MRBL states that in order for Station WNSW to relocate to its new tower site, Station WNYG must also relocate to protect WNSW, which is the purpose of the instant Application. According to MRBL, it spent many months searching for another resolution, but in light of the "difficult allocation situation for Station WNYG with several grandfathered overlapping contours, and the lack of available land for tower sites in this area of Long Island," the current proposal is the only feasible solution.¹⁰

Discussion. An applicant for waiver "faces a high hurdle"¹¹ and must demonstrate that deviation from the general rule is warranted by special circumstances and will serve the public interest.¹² We have given MRBL's Waiver Request the requisite "hard look"¹³ and, for the reasons set forth below, find that a temporary waiver of Section 73.3555 of the Rules is warranted and that grant of the Application would serve the public interest.

⁶ 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, Report and Order, 18 FCC Rcd 13620 (2003) ("Ownership Order"), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (3rd Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005). In the *Ownership Order*, the Commission grandfathered existing ownership combinations such as MRBL's that had been authorized under prior rules. See *Ownership Order*, 18 FCC Rcd at 13807-09.

⁷ See 47 C.F.R. § 73.3555, Note 4; see also *Galaxy Communications*, Letter, 21 FCC Rcd 2994 (2006). The Commission did not carve out an exception for such intra-market city of license modifications.

⁸ See BP-20070601BDE at Exhibit 19 ("Section 307(b) Exhibit").

⁹ See BP-20070117AFN. The WNSW modification application was granted July 24, 2007. MRBL has not yet filed a covering license application.

¹⁰ See BP-20070601BDE at Exhibit 5 ("Multiple Ownership Exhibit").

¹¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir 1969) ("*WAIT Radio*"), *cited in Ownership Order*, 18 FCC Rcd at 13647.

¹² See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir 1990) (citing *WAIT Radio*); see also 47 C.F.R. § 1.3 (stating that rule provisions may be waived "for good cause shown"). The Commission declined to adopt any specific waiver criteria relating to radio station ownership in the *Ownership Order*, but stated that "[p]arties who believe that the particular facts of their case warrant a waiver of the local radio ownership rule may seek a waiver under the general 'good cause' waiver standard in our rules." *Ownership Order*, 18 FCC Rcd at 13746-47 (citing 47 C.F.R. § 1.3).

¹³ *WAIT Radio*, 418 F.2d at 1157.

In evaluating a request for waiver of the multiple ownership rules, the Commission weighs public interest concerns on a case-by-case basis in order to insure that the waiver does not unduly compromise the twin purposes of fostering diversity and economic competition that underlie the multiple ownership rules.¹⁴ The Commission has stated that waivers of limited duration have less impact on diversity and competition and may be analyzed within this context.¹⁵

We find that a temporary continuation of MRBL's grandfathered combination will not be anticompetitive or result in a lack of diversity. In fact, temporarily maintaining the status quo in the New York Market will enable MRBL to divest WNYG(AM) in an orderly manner and thereby ultimately eliminate a grandfathered combination and enhance competition in the New York Market.¹⁶ As we have recognized in prior waiver cases, by permitting a reasonable time to find qualified buyers, we encourage diversity in the ownership of the mass media.¹⁷ We find that the benefits ultimately derived in this case, specifically heightening competition and salvaging a radio station,¹⁸ support grant of a temporary waiver to enable MRBL to come into compliance with the Commission's ownership restrictions. Accordingly, we conclude that in light of the limited duration of the waiver and MRBL's commitment to divest Station WNYG(AM) prior to commencing operations at the new community of license, a temporary waiver of the Rule is consistent with the public interest.

Finally, we have evaluated MRBL's Application and find that it complies with all pertinent statutory and regulatory provisions and that its grant would further the public interest, convenience, and necessity and result in a preferential arrangement of allotments.¹⁹ Specifically, grant of the Application will provide a first local service to the community of Medford while Babylon will continue to receive

¹⁴ See *Multimedia, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 4883, 4884-4885 (1995).

¹⁵ See, e.g., *Shareholders of Univision Communications, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 5842, 5851-5852 (2007).

¹⁶ The Commission recognized that “[g]randfathered combinations, by definition, exceed the numerical limits that we find promote the public interest as related to competition . . . [and], in the case of radio ownership, . . . were created pursuant to a market definition that we conclude fails to adequately reflect competitive conditions.” *Ownership Order*, 18 FCC Rcd at 13810.

¹⁷ See, e.g., *Metromedia Radio and Television, Inc.*, Memorandum Opinion and Order, 102 FCC 2d 1334, 1351 (1985) (finding that compelling a quick sale presents a likelihood that only buyers with immediate access to large amounts of capital would be successful bidders); *Twentieth Holdings Corporation*, Letter, 1 FCC Rcd 1201 (1986). In seeking to divest Station WNYG(AM), we encourage MRBL to make every effort to provide notice to women and minorities of the availability of the station for sale.

¹⁸ See BP-20070601BDE at Exhibit 5 (stating that “[a] grant of this application will avoid having Station WNYG forfeit its license permanently.”).

¹⁹ 47 U.S.C. § 307(b); see also *Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990). The FM allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988). The FM allotment priorities are applied to Section 307(b) determinations for community change proposals for AM stations. See *Allesandro Broadcasting Co.*, Decision, 99 FCC 2d 1 (Rev. Bd. 1984).

local service from Station WBAB(FM).²⁰ Moreover, we find that the net loss created by the re-location is not decisional because Babylon will retain ample local service, and the "loss area" is well-served by other stations.²¹

Accordingly, IT IS ORDERED, that the request by Multicultural Radio Broadcasting Licensee, LLC for a temporary six-month waiver of the local radio ownership rule, 47 CFR § 73.3555, IS GRANTED. IT IS FURTHER ORDERED, That the application (File No. BP-20070601BDE) for a minor modification of the license for Station WNYG(AM), Babylon, New York IS GRANTED SUBJECT TO THE FOLLOWING CONDITIONS:

- (1) MRBL shall, within six months of the grant of this Application, come into compliance with the local radio ownership rule, 47 C.F.R. § 73.3555(a), either by filing an application to divest itself of its interest in WNYG(AM) or taking such other action as may be necessary to bring it into compliance with 47 C.F.R. § 73.3555(a). Any request to extend this temporary period should be filed at least 45 days prior to the end of the period and will be closely scrutinized;
- (2) The automatic test provisions of Section 73.1620 of the Commission's Rules shall not apply to the referenced construction permit, File No. BP-20070601BDE. MRBL shall file a formal request for program test authority in conjunction with FCC Form 302-AM, Application for License. This request should be submitted at least 10 days prior to the date on which MRBL desires to commence program tests. This request shall contain documentation which demonstrates that MRBL has divested a station or otherwise come into compliance with Section 73.3555(a) of the Commission's Rules. Program tests may not commence without written notification from the Commission.
- (3) A license application to cover the WNYG facilities authorized by this construction permit must be filed and granted before Program Test Authority and a license to cover the WNSW(AM), Facility ID No. 73332, Newark, NJ, facilities authorized by construction permit File No. BP-20070117AFN are granted. See condition #8 on WNSW construction permit File No. BP-20070117AFN for more information.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁰ Under well settled policies, the establishment of a first local service at Medford, priority (3), is preferred to the retention of a second local service, a priority (4) consideration. *See supra*, note 19.

²¹ MRBL has shown that the loss area created by the re-location is served by in excess of five other stations. *See* BP-20070601BDE at Exhibit 19. The Commission has considered five or more reception services to be "abundant." *Family Broadcasting Group*, Decision, 53 RR 2d 662 (Rev. Bd. 1983), *review denied*, FCC 83-559 (Nov. 29, 1983); *see also LaGrange and Rollingwood, Texas*, Memorandum Opinion and Order, 10 FCC Rcd 3337 (1995).