



Federal Communications Commission  
Washington, D.C. 20554

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**DA 08-1891**

*In Reply Refer to:*

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In re: WWHK(FM) (Formerly WOTX-FM)  
Concord, New Hampshire  
Facility Id No. 8683  
Capitol Broadcasting Corporation, Inc.  
File No. BTCH-20050105ACS

**Request for Temporary Waiver  
and/or Stay**

Dear Counsel:

We have before us an April 30, 2008, "Request for Temporary Waiver and/or Stay" ("Request") filed on behalf of Nassau Broadcasting I, LLC ("Nassau"). The Request seeks a temporary waiver of the Commission's attribution rule for in-market Joint Sales Agreements ("JSA") or, in the alternative, a temporary stay of Section 73.3555 Note 2(k)(1) ("Note 2") until the final disposition of Nassau's pending Application for Review of the Media Bureau's March 31, 2008, decision dismissing the referenced application (the "Application").<sup>1</sup> For the reasons set forth below, we deny the Request for both waiver and stay.

**Background.** On January 5, 2005, the parties filed the Application, which sought Commission approval for transfer of control of Capitol Broadcasting Corporation ("Capitol"), licensee of Station WWHK(FM), Concord, New Hampshire (the "Station"), from Concord Broadcasting, LLC, ("Concord"), the 100 percent shareholder of Capitol, to Nassau. In the Application, Nassau and Concord claimed that, after the transaction, Nassau would own four stations in the Manchester, New Hampshire, Metro market ("Manchester Metro"). Included in the Application was a JSA between Nassau and Capitol, executed on July 16, 2004, pursuant to which Nassau would sell advertising on WWHK(FM), manage the station's traffic and billing functions, and receive all revenue from the sale of advertising on the station.<sup>2</sup> In September of 2004, Arbitron announced the creation of the new Concord, New Hampshire, Metro market

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<sup>1</sup> *Letter to Capitol Broadcasting Corporation, Concord Broadcasting, LLC, and Nassau Broadcasting I, LLC*, 23 FCC Rcd 5478 (MB 2008) ("WWHK Order").

<sup>2</sup> *See* Application, Attachment 6, Joint Sales Agreement, at Section 4.1.

(“Concord Metro”). On January 26, 2005 – before the staff had finished its evaluation of the transfer application and before the statutory petition to deny period had run, WWHK(FM) was first reported as “home” to the Concord Metro.<sup>3</sup> Utilizing the most recent data available in analyzing the application, the staff determined that only one of Nassau’s four stations would be in the Manchester Metro, while the remaining three would be in the newly created Concord Metro. Because Nassau already owns five stations in the 26-station Concord Metro, consummation of the proposed transaction would result in Nassau holding seven FM stations and one AM station in the Concord Metro. This would exceed the six-station total market limit and four-station FM sub cap limit for the Concord Metro.<sup>4</sup> The Bureau Staff therefore dismissed the Application on February 3, 2006.<sup>5</sup> Nassau and Concord sought reconsideration of that decision, arguing that there should be a two-year waiting period before a change in an Arbitron Metro would bar a desired station acquisition. The staff rejected that argument and denied reconsideration in the *WWHK Order*. Nassau subsequently filed a timely Application for Review of that decision by the full Commission. It also filed the instant Request directed to the Media Bureau.

In its Request, Nassau first asks that the Bureau waive Section 73.3555, Note 2(k)(1) of the Commission’s Rules (the “Rules”)<sup>6</sup> to enable WWHK(FM) to maintain its in-market JSA for WWKH(FM) until the Commission acts on the Application for Review.<sup>7</sup> Nassau argues that a waiver is warranted because it would allow Nassau to continue to prosecute its Application for Review. If the Bureau fails to grant a waiver of the in-market JSA attribution rule, it continues, “then it will have effectively denied the Nassau Petition by concluding WWHK is part of the Concord Arbitron Metro Market rather than the Manchester Arbitron Metro Market, the station’s designation when the parties entered into the [stock purchase] Agreement and the WWHK(FM) JSA.”<sup>8</sup> It contends that it is requesting the waiver “solely to allow it to maintain its ability to operate WWHK(FM) under the JSA until the Commission decides the Nassau Application for Review on the merits.”<sup>9</sup> Nassau asserts that the Commission has deferred required divestitures pending the outcome of a rulemaking to determine if relaxation of the “one-to-a-market” rule was in the public interest,<sup>10</sup> and states that grant of the instant waiver request will not frustrate the intent of the Commission’s multiple ownership rules.

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<sup>3</sup> *WWHK Order*, 23 FCC Rcd at 5480.

<sup>4</sup> See 47 C.F.R. § 73.3555(a)(1)(iii).

<sup>5</sup> See *Broadcast Actions*, Public Notice, Report No. 46168 (Feb. 8, 2006)(“Public Notice”).

<sup>6</sup> 47 C.F.R. §73.3555 Note 2(k)(1) (“Note 2”).

<sup>7</sup> Pursuant to Section 73.3555 Note 2(k)(1), a JSA that exceeds 15 percent of the weekly advertising time of a station is attributable to a party that owns other stations in the same market. Nassau has an attributable interest in the Station giving it interests which exceed the number of attributable interests allowed to an entity in a market the size of the Concord Metro pursuant to Section 73.3555(a)(1)(iii) of the Rules.

<sup>8</sup> Request at 5 – 6.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> Request at 6, citing *Letter to Capital Cities/ABC, Inc.*, By Direction Letter, 2 FCC Rcd 2539 (1987). There, the Commission stayed the need for divestiture due to its proposal in a separate proceeding to eliminate the AM/VHF cross-ownership rule because of the public interest benefits such cross-ownership could bring.

In the alternative, Nassau requests a stay of the Commission's rule requiring attribution of in-market JSAs to enable it to continue its JSA for WWHK(FM). Nassau considers it likely that it will prevail on the merits of its application for review and that both it and Capitol will suffer irreparable harm absent grant of a stay. Without the stay, Nassau contends, Capitol will be forced to operate the station on a stand-alone basis in a market it decided to exit when it entered into the stock purchase agreement with Nassau. It also claims that both Capitol and Nassau will suffer financial loss as a result of the termination of the JSA. Nassau will lose the advertising revenue it collects under the JSA, and Capitol "will be forced to rush to find alternatives to run the station and to find advertising for WWHK if the JSA is required to be unwound."<sup>11</sup> Granting the stay, Nassau continues, will allow both Nassau and Capitol to maintain the status quo and the interim arrangements they entered into while the Commission considers their Application for Review. For these same reasons, Nassau believes that a stay is in the public interest.

**Discussion.** Our longstanding case law on waivers provides that deviation from the general rule (in this case Section 73.3555 Note 2(k)(1) of the Rules) is justified only where special circumstances exist and the public interest will be served.<sup>12</sup> Additionally, requests for waiver must demonstrate that the underlying purpose of the rule of which waiver is sought would not be served or would be frustrated by application to the particular case and that a grant of the request for waiver would be in the public interest.<sup>13</sup> As discussed below, Nassau has not met these criteria.

*Waiver Request.* The Commission has previously determined that, where the brokering entity owns or has an attributable interest in one or more stations in the local market and the joint advertising sales amount to more than 15 percent of the brokered station's weekly advertising time, the brokering entity should be attributed with an interest in the brokered station.<sup>14</sup> The Commission undertook this action because of its concerns regarding the impact of in-market JSAs on competition in local radio markets. Specifically, it determined that, where one station owner controls a large percentage of the advertising time in a particular market, it has the ability potentially to exercise market power.<sup>15</sup> Thus, it concluded, JSAs raise concerns regarding the ability of smaller broadcasters to compete and may negatively affect the health of the local radio industry generally.<sup>16</sup> For this reason, the Commission determined, and the Third Circuit Court of Appeals agreed, that in-market JSAs involving more than 15 percent of the brokered station's weekly advertising time provided the brokering entity with a level of control or influence that would realistically allow holders of such influence to affect core operating

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<sup>11</sup> Request at 8.

<sup>12</sup> See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)(citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)(“*WAIT Radio*”).

<sup>13</sup> See *WAIT Radio*, 418 F.2d at 1157.

<sup>14</sup> 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), *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).

<sup>15</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13744.

<sup>16</sup> *Id.*

functions of a station, and give them an incentive to do so.<sup>17</sup> It provided all licensees with a two-year period to come into compliance. The deadline for terminating non-compliant JSAs was September 3, 2006.<sup>18</sup>

Nassau has not demonstrated any reason or special circumstance why it should be permitted to prolong an arrangement the Commission has determined is inimical to competition or explained why the Commission's concerns with the competitive effects of such JSAs would be better served by waiver of the rule. Instead, it simply points to the pendency of its Application for Review and the fact that the Arbitron Metro definition changed causing certain stations to be reclassified as in-market stations. As the court found in upholding the Commission's in-market JSA attribution decision, "station owners have no vested right in the continuation of any particular regulatory scheme."<sup>19</sup> Nassau had no legitimate expectation that a Concord Arbitron Metro would not be created; on the contrary, it knew at the time the Application was filed of the imminent creation of the Concord Arbitron Metro. Nor has it demonstrated any special circumstances that would cause us not to attribute the JSA now that WWHK(FM) is in that market.

Moreover, Nassau's reference to instances in which the Commission deferred required divestitures pending the outcome of a rulemaking to determine if relaxation of the "one-to-a-market" rule was in the public interest is inapposite here. The Commission has already spoken to the issue of JSAs and required the termination of all noncompliant JSAs by September 3, 2006. While a waiver might serve Nassau's private interests, it has made no showing that it would serve the public interest. We believe that the public interest in maintaining a competitive balance in the Concord Metro is best served by terminating the JSA so that it will comply with the ownership limit for the Concord market.

*Request for Stay.* Nassau's request to stay the effectiveness of Note 2 is subject to dismissal on numerous procedural grounds. As an initial matter, Section 1.44(e) of the Rules requires that a stay request must be filed as a separate pleading.<sup>20</sup> Nassau, however, combined its waiver and stay requests in a single pleading. The Request, thus, is subject to dismissal on this basis alone.

Pursuant to Section 1.429(k) of the Rules, "upon good cause shown, the Commission will stay the effective date of a rule pending a decision on the petition for reconsideration."<sup>21</sup> Nassau filed its request with the Media Bureau. Even if we were to ignore clear and contrary Commission pronouncements on Note 2, the Bureau is without authority to stay any Commission order. Accordingly, the Bureau cannot grant the relief which Nassau seeks. The purpose of this section is to avoid irreparable harm while the Commission considers petitions for reconsiderations challenging newly adopted rules. However, Note 2

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<sup>17</sup> *Id.* at 13745. See also *Prometheus*, 373 F.3d at 429.

<sup>18</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13746 ¶ 325. See also *Media Bureau Announces Requirement to File Certain Radio Joint Sales Agreements*, Public Notice, 20 FCC Rcd 1, 2 n.8 (MB 2005). As a result of a partial stay of the new rules, all licensees were given more than three years from the adoption of the new rule to terminate non-compliant JSAs.

<sup>19</sup> *Prometheus*, 373 F.3d at 430, citing *Folden v. United States*, 56 Fed. Cl. 43, 61 (2003).

<sup>20</sup> 47 C.F.R. § 1.44(e) ("Any such request which is not filed as a separate pleading will not be considered by the Commission.").

<sup>21</sup> 47 C.F.R. § 1.429(k).

is not in this procedural posture, *i.e.*, there are no pending petitions for reconsideration. To the contrary, the Commission released an order several months prior to the filing of the Request in which it specifically declined to reconsider the decision to attribute JSAs and denied numerous petitions challenging various aspects of the new JSA rule.<sup>22</sup> Accordingly, the stay request also is subject to dismissal on this basis. Finally, we note that the stay request concerns a Rule that has been in effect for nearly four years. In similar circumstances, the Commission concluded that a stay would be “impossible” and treated the request as one for a waiver of the disputed rule.<sup>23</sup>

Notwithstanding these many procedural infirmities, we also note that Nassau also has failed to demonstrate that a stay is appropriate. In evaluating a request for stay, we must ask the following: 1) has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal; 2) has the petitioner shown that without such relief it will be irreparably injured; 3) would the issuance of a stay substantially harm other parties interested in the proceedings; and 4) where is the public interest.<sup>24</sup> Nassau has failed to demonstrate a likelihood it will prevail on the merits, that absent a stay it will suffer irreparable harm, and that the public interest dictates a stay should be granted.

With regard to the merits, as noted above, the Commission recently and explicitly declined to reconsider its decision in the *2002 Biennial Review Order* to attribute in-market JSAs.<sup>25</sup> It also specifically declined to reconsider its “grandfathering and transition” issues such as the two-year period for terminating non-compliant JSAs.<sup>26</sup>

Moreover, as the staff clearly explained in the *WWHK Order*, the Commission generally requires applicants to provide the most current relevant information available and relies on that information. However, the Commission created an exception to this policy in the *2002 Biennial Review Order* in one specific circumstance: a party may not receive the *benefit* of a change in Arbitron Metro boundaries unless that change has been in place for at least two years. This exception safeguards against companies successfully petitioning Arbitron to change Metro boundaries and manipulating data to circumvent the local radio ownership rule.<sup>27</sup> As pointed out in the *WWHK Order*, there is no reason to have a similar waiting period in cases such as the present one, because we do not believe an applicant would manipulate Arbitron data in a manner adverse to its interests. Nassau has not demonstrated to the staff why the two-year waiting period should apply in its case. To the contrary, the exception appears inapplicable on its face to the present circumstances.

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<sup>22</sup> See *2006 Quadrennial 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 and Order on Reconsideration, 23 FCC Rcd 2010, 2081 ¶ 137 (2008) (“*2006 Quadrennial Review*”).

<sup>23</sup> *Southern Bell Telephone and Telegraph Company’s Petition for Limited Stay and Waiver of the Commission’s Third Computer Inquiry Rules Governing Common Carrier Provision of Low Level Protocol Conversion*, 4 FCC Rcd 2748, 2749 and n.34 (Com. Car. Bur. 1989).

<sup>24</sup> *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1971).

<sup>25</sup> See *2006 Quadrennial Review*, 23 FCC Rcd at 2081.

<sup>26</sup> *Id.* at 2081-2.

<sup>27</sup> See *2002 Biennial Review Order*, 18 FCC Rcd at 13726.

Nassau has also failed to demonstrate irreparable harm. To constitute “irreparable harm,” the injury must be “both certain and great [and] it must be actual and not theoretical.”<sup>28</sup> Therefore, to demonstrate irreparable harm, Nassau must provide “proof indicating that the harm [it alleges] is certain to occur in the near future.”<sup>29</sup> Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business.<sup>30</sup>

Nassau simply alleges that “[w]ithout a stay, Capitol will be operating a station on a stand-alone basis in a market that it decided to exit when it entered into the original agreement with Nassau. Nassau will suffer financial loss as a result of the termination of the WWHK JSA and Capitol will be forced to make other, last minute and temporary arrangements for selling advertising on WWHK.”<sup>31</sup> Nowhere does it allege that these harms are certain and great or anything more than theoretical. Nor do they threaten the very existence of either party’s business. Requiring a licensee to sell advertising time on its own station is unlikely to threaten that station’s viability. Indeed, any losses are speculative and may be of limited duration, as the parties may of course reinstitute the JSA should the Commission overturn the *WWHK Order*.

There is no public interest in prolonging an arrangement that provides Nassau with attributable interests in Concord Metro stations above the limit which the Commission considers necessary to protect competition in this local radio market. While Nassau has pointed to (speculative) harms to the private interests of both it and Capitol that would result from the denial of its stay request, Nassau has not demonstrated any public interest benefit to grant of a stay while it pursues its Application for Review, and we discern no such benefits. As discussed above in connection with Nassau’s waiver request, we believe that the public interest is better served here by requiring Nassau to comply with the local radio ownership rules. We note that, although the JSA here was executed on July 16, 2004, prior to the effective date of the in-market JSA attribution rule, it was not terminated prior to September 3, 2006, despite the explicit Commission directive that all non-compliant JSAs be terminated by that date and despite the fact that the Application had been dismissed on February 6, 2006. We believe, therefore, that Nassau has been in violation of Section 73.3555 of the Rules since September 3, 2006, and we will refer this matter to the Enforcement Bureau.

**Ordering Clauses.** Accordingly, IT IS ORDERED that the “Request for Temporary Waiver and/or Stay” filed by Nassau Broadcasting I, LLC, IS DENIED. Nassau IS ORDERED to take all steps necessary to come into compliance immediately with the Commission’s Rules.

IT IS FURTHER ORDERED that the Joint Sales Agreement between Nassau Broadcasting I, LLC, and Concord Broadcasting LLC, with regard to Station WWHK(FM) Concord, New Hampshire, SHALL BE TERMINATED IMMEDIATELY AND THE COMMISSION SHALL BE NOTIFIED of such termination within 10 days of the release of this decision.<sup>32</sup> No request for reconsideration or other

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<sup>28</sup> See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

<sup>29</sup> *Id.*

<sup>30</sup> *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d at 843 n.2.

<sup>31</sup> Request at 7 – 8.

<sup>32</sup> Notification of the termination shall be made by letter to Peter H. Doyle, Chief, Audio Division, Media Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington, DC 20554.

appeal shall excuse compliance with these orders. Upon notification of the termination of the JSA, the Media Bureau will address the enforcement issues relating to Nassau's violation of Section 73.3555(a) of the Commission's Rules.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: David G. O'Neil, Esq.  
Capitol Broadcasting Corporation, Inc.  
Concord Broadcasting, LLC