

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

In re Application of)	
)	
Multicultural Radio Broadcasting, Inc.)	
(Assignor))	
and)	File No. BALH-971202GX
WADO-AM License Corporation)	NAL/Acct. No. X18100001
(Assignee))	
)	
For Assignment of License of)	
Station WNWK(FM), Newark, New Jersey)	Facility ID No. 46978
)	
In Re Applications of)	
)	
WADO-AM License Corporation)	
For License to Cover Construction Permit)	File No. BLH-970327KA
and)	
For Minor Modification of Construction Permit)	File No. BMPH-980728IC
and)	
Extension of Construction Permit)	File No. BMPH-980728JB
and)	
Renewal of License)	File No. BRH-980202V3

**MEMORANDUM OPINION AND ORDER
AND NOTICE OF APPARENT LIABILITY**

Adopted: October 17, 2000

Released: October 20, 2000

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

Introduction

1. The Commission has under consideration an application for review filed February 2, 1998, by Emil Antonoff ("Antonoff"). Antonoff seeks reexamination of the January 30, 1998, action by the Mass Media Bureau denying Antonoff's Petition to Deny, and granting the above referenced assignment application of WNWK(FM),¹ Newark, New Jersey from Multicultural Radio Broadcasting, Inc. ("Multicultural") to WADO-AM License Corporation ("WADO Corp."). Multicultural filed an opposition to the application for review, to which Antonoff filed a reply. Also before the Commission is a petition to deny the license renewal application of WNWK filed by Antonoff on February 3, 1998, and Multicultural's opposition. In addition, we review WADO Corp.'s (a) July 28, 1998, application for minor modification of a construction permit issued January 30, 1998, simultaneously with the grant of the assignment application; and (b) informal objections to these two applications. For the reasons set forth below, we deny the application for review and grant the application to renew the license of WNWK.² We also deny WADO

¹On May 27, 1998, WNWK changed its call sign letters to WCAA. For purposes of this Order we will continue to refer to the station by its original call sign.

²On February 2, 1998 Antonoff filed an "Emergency Petition for Immediate Recession and Request for Stay of

Corp.'s application for minor modification and issue a Notice of Apparent Liability to Multicultural for constructing and operating WNWK(FM) at variance from its authorization.

Background

2. The factual background of this case became unusually complicated when construction delays at the Empire State Building, the site specified in Multicultural's construction permit issued July 13, 1992 ("1992 permit"), precluded prompt operation of WNWK. Due to these difficulties, Multicultural was granted a separate construction permit for a facility at the Chanin Building, New York, New York, ("Chanin permit") pending completion of construction at the Empire State Building.³ Upon resolution of these difficulties in March 1997, Multicultural commenced operations at the Empire State Building site. Multicultural then filed a license application to cover the 1992 permit. The license application, which remains pending, represents that the facilities were constructed in accordance with the 1992 permit. On March 27, 1997, Multicultural filed an application to make the Chanin facility an auxiliary station.⁴

3. On December 2, 1997, Multicultural filed the above captioned application to assign the license of WNWK to WADO Corp. Antonoff filed a petition to deny on January 10, 1998. In his petition, Antonoff claimed that grant of the assignment application would result in abandonment of WNWK's unique multi-ethnic foreign language programming format, to the detriment of the public interest in the listening area. Antonoff also alleged that Multicultural was engaged in unauthorized operation of the station. Specifically, Antonoff stated that the station was authorized by the 1992 permit to operate with 810 watts effective radiated power (ERP) at 373 meters antenna height above average terrain (HAAT), but was actually operating at 415 meters HAAT and that a "substantial population" is receiving the unauthorized coverage. Antonoff charged that Multicultural misrepresented its antenna system to the Commission and requested an evidentiary hearing to determine whether grant of the assignment would be in the public interest.

4. Neither Multicultural nor WADO Corp. responded to the petition to deny. Instead, on January 20, 1998, Multicultural and WADO Corp. filed a joint motion for expedited action.⁵ In this motion the parties acknowledged an "inadvertent" error concerning WNWK's ERP and the station's antenna position. The parties asserted that although the station was operating at 415 meters HAAT, 42 meters higher than authorized, it was operating at only 659 watts; therefore the facilities were operating at the equivalent of the authorized value. Multicultural also filed simultaneously (a) a minor modification application ("corrective modification application")⁶ for WNWK's facilities to operate at these equivalent values, and (b) a request for Special Temporary Authorization ("STA") to continue operating at the

Action Taken Pursuant to Delegated Authority" to which Multicultural filed an opposition. Because we address Antonoff's Application for Review, we dismiss the Emergency Petition as moot.

³The Chanin permit was granted on July 30, 1992. A license to cover the Chanin permit was granted on March 10, 1993.

⁴This application, File No. BMLH-970327KB, remains pending. A formerly licensed main facility may be granted an auxiliary license after licensing of the new main facility. See 47 C.F.R. § 73.1675.

⁵ The parties sought review of the application before the WNWK license renewal was to be filed in February 1998 based on the Commission's policy of deferring actions on single station assignments while renewals are pending. See *Stockholders of CBS, Inc.*, 11 FCC Rcd 3733 (1995).

⁶File No. BMPH-980120IG.

unauthorized ERP and HAAT pending approval of the corrective modification application. Antonoff replied to the joint motion claiming it was an opposition "in disguise," filed in contravention of the

Commission's rules because the parties failed to file an affidavit or sworn declaration with the pleading as required by Section 309 of the Communications Act.

5. *Application for Review.* On January 30, 1998, the Mass Media Bureau issued a letter decision ("Letter Decision") granting the assignment application, granting the corrective modification application in part, and dismissing the request for STA as moot. In rejecting Antonoff's claim concerning loss of multi-ethnic programming, the staff noted the Commission's established policy of not taking format into consideration in making licensing decisions, and concluded it would be inappropriate to deviate from the policy in this case. As to Antonoff's claim of unauthorized operation, the staff concluded that the nature and extent of Multicultural's technical malfeasance did not rise to the level necessary to warrant an evidentiary hearing. The staff based this conclusion on its independent review and finding that the facilities as constructed are roughly equivalent to those authorized, with similar coverage areas. The staff found there was no evidence of a motive to mislead the Commission.

6. In addition, the staff stated that a grant of the corrective modification application filed by Multicultural would result in a violation of Section 73.213(a) of our rules, because the proposed facilities would increase predicted interference to several grandfathered short spaced stations. *See* 47 C.F.R. § 72.213(a). The staff noted, however, that reducing the ERP from 659 watts to 610 watts would bring the facilities into compliance. The staff then, on its own motion, granted the corrective modification application with an ERP of 610 watts ("1998 permit"). The staff advised that, pursuant to 47 C.F.R. §1.110, Multicultural had 30 days to reject the limitation and, if it did so, that the staff would vacate the grant and return the application to pending status, necessitating rescission of the assignment application. On February 26, 1998, Multicultural and Heftel (WADO Corp.'s parent company) submitted a letter to the Chief, Audio Services Division, Mass Media Bureau, stating it was not seeking reconsideration, but requesting a "clarification" of the staff's finding and asking the Commission to authorize an ERP of 659 watts.

7. *Minor Modification Application and Extension Applications.* The parties consummated the assignment on May 22, 1998. On July 28, 1998, WADO Corp. filed an application for minor modification of the 1998 permit, seeking to increase the ERP of the station to 660 watts.⁷ WADO Corp. claims the staff erred in applying Section 73.213(a), but states the public interest will be served by granting a waiver of the rule if necessary to grant the application. In support of its waiver request, WADO Corp. asserts that the application should be studied under a prior version of Section 73.213(a) because its license application for the 1992 permit was pending before the rule was modified in November 1997. WADO Corp. claims that though the information contained in the application was erroneous, the Commission staff "contributed" to the error because when the staff issued WNWK's 1992 permit, it specified an incorrect antenna type and height. Inaccurate data filed in the license application merely reflected the inaccurate data on the permit. Alternatively, WADO Corp. states that if the current version of Section 73.213(a) is applied, the rule should be waived due to the ambiguity in the specifications set forth in the 1992 permit and because the modified rule was intended to increase, not decrease, the range of possibilities for improvement of short-spaced stations such as WNWK.

8. On August 18, 1998, Antonoff filed an informal objection addressing the minor modification application. Antonoff states that the modification application is an attempt to obtain

⁷File No. BMPH-980728IC.

authorization to operate at 660 watts without rescinding the assignment application. See ¶ 6, *supra*. Further, on September 23, 1998, Chancellor Media Pennsylvania, Corp. ("Chancellor"), licensee of WJJZ(FM), Philadelphia, Pennsylvania, submitted an informal objection to the modification. Chancellor

asserts that the minor modification application violates the Commission's short spacing rules in Section 73.213. Specifically, Chancellor claims that WNWK's proposed facilities would increase the prohibited overlap of the interfering [WNWK] contour within the protected service area of WJJZ, and unreasonably limit the ability of other short-spaced stations to make site or facility changes. An objection was also filed by Cox Radio, Inc. ("Cox Radio") on October 29, 1998. Cox Radio, licensee of WBLI(FM), Patchogue, New York, states the minor modification application and contingent waiver should be denied because: (a) WADO Corp. failed to meet the procedural requirements of 47 C.F.R. § 73.213(a)(3), requiring service of applications proposing new interference to short-spaced stations on the licensees of those stations; and (b) failed to meet the substantive requirements of Section 73.213(a) because the proposed power increase would cause interference to station WBLI(FM).

9. *Petition to Deny License Renewal Application.* Antonoff's pleading is procedurally defective as a petition to deny. Section 309(d)(1) of the Communications Act of 1934, as amended, and Section 73.3584 of the Commission's Rules requires that petitions to deny be supported by affidavits or declarations under penalty of perjury from persons with personal knowledge of the facts set forth in the petition. See *Columbia Broadcasting System, Inc.*, 46 FCC 2d 903 (1994). Antonoff failed to provide an affidavit or declaration; nonetheless, we will treat Antonoff's pleading as an informal objection pursuant to 47 C.F.R. § 73.3587. In this pleading, Antonoff asserts that the unauthorized operation of WNWK demonstrates that Multicultural does not have the character qualifications to be a Commission licensee. Antonoff claims that Multicultural misrepresented its operation of WNWK to the Commission; therefore, the renewal of license application for the Chanin facility should be denied, or designated for evidentiary hearing. In its response, Multicultural states that it made no deliberate misrepresentations to the Commission and that Antonoff has no basis to support this allegation.

Discussion

10. *Programming Format.* The staff correctly concluded that it would not be appropriate in this case to depart from the Commission's general policy of leaving format issues to the discretion of the licensee as influenced by market forces. See *Changes in the Entertainment Formats of Broadcast Stations*, 60 FCC 2d 858 (1976). The Supreme Court has upheld this policy and the Commission's determination that the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters. *FCC v. WNCN Listener's Guild*, 450 U.S. 582, 585 (1981). Antonoff attempts to discredit this conclusion by emphasizing that WNWK provides a format of "multi-ethnic" programming, premising his request for review on the Supreme Court's statement that the Commission's policy on entertainment programming did not apply to a broadcaster's obligation to respond to community needs in the area of informational programming. See *FCC v. WNCN Listener's Guild*, 450 U.S. at 604 n.46 (1981).

11. We need not reach the question here whether our general policy of declining to take proposed format changes into account when reviewing assignment or transfer applications should be altered where the proposed transaction may deprive the listening public of foreign language or ethnic informational programming. We note initially that in its opposition to Antonoff's application for review, Multicultural claims that it intends to continue its "multi-ethnic" programming format on WPAT(AM), Patterson, New Jersey, a station it acquired as part of the same transaction in which it sold WNWK, and in fact

WPAT(AM) is airing Multicultural's ethnic format.⁸ Furthermore, we note that any concerns we might have about the instant transaction are mitigated by the fact that diverse programming is offered by other broadcasters in the WNWK service area. Indeed, our independent review shows there are over 33 AM and 27 FM radio stations which share all or substantially all of the WNWK listening audience. These stations broadcast in a variety of formats including ethnic/foreign language and multicultural programming.⁹

12. *Unauthorized Operation.* Concerning WNWK's unauthorized operation, Antonoff argues that the staff erred in accepting at face value and without supporting documentation Multicultural's assertion that, although it was operating at a height greater than authorized, its technical facilities were equivalent to the facilities authorized by the 1992 permit because WNWK was also operating at reduced power. Specifically, Antonoff argues that without a sworn affidavit the staff had no way of knowing that WNWK had not decreased its power as a result of the petition to deny in order to create the "equivalency" argument and render the allegations of misrepresentation meaningless. We concur that the staff's assumption that WNWK had consistently operated with facilities "roughly equivalent" to those authorized appears to be unsupported by the record. However, Multicultural has, in its opposition to the application for review, stated it has operated at 659 watts since beginning operations in March 1997, and claims the error in specifying the wrong ERP/HAAT on the license application to cover the 1992 permit stemmed from a miscommunication between the on-site engineer and the consulting engineer at the time it commenced operations, as well as from incorrect information on its permit. Multicultural also submitted a sworn statement from its engineering firm indicating that (1) the master antenna used by WNWK is in fact located at 415 meters HAAT; (2) WNWK did not and could not operate at an ERP of greater than 659 watts, because the maximum ERP that can be generated with the transmitter and antenna combination employed by WNWK is 659 watts; and (3) WNWK's authorized operations and actual operations are in fact equivalent.

13. Based on the information contained in the referenced engineering affidavit, Multicultural's claim that it was technically incapable of operating WNWK at a power in excess of 659 watts appears to be correct. We therefore reject Antonoff's contention that Multicultural may have reduced power to that level from 810 watts only in response to the filing of a petition to deny. Furthermore, because the staff has concluded that WNWK's actual operation at 659 watts at 415 meters HAAT was "roughly equivalent" to its authorized operating power of 810 watts at 373 meters HAAT, we agree with the staff that Multicultural had no motive to misrepresent its actions on its March 1997 license application to cover the 1992 permit.¹⁰ See *WMOZ, Inc.*, 36 FCC 202 (1964) (motive always an issue in misrepresentation cases). *Fox River Broadcasting*, 93 FCC 2d 127, 129 (1983) (a misrepresentation involves false statements of fact made with an intent to deceive the Commission).¹¹ Given this conclusion, we agree with the staff that it

⁸See File No. BAL-971202GK, granted on January 30, 1998. Multicultural notes that the coverage area of WPAT(AM) will completely encompass and extend substantially beyond that of WNWK. Thus, it notes, not only will all of WNWK's listening public continue to receive the same programming by tuning to WPAT(AM), but many more listeners will receive this programming for the first time.

⁹For example, WADO(AM), WZRC(AM), WBAI(FM) and WNYE(FM) broadcast multicultural or foreign language/ethnic programming. See *1999 Broadcasting and Cable Yearbook*, pp. 285-307.

¹⁰Antonoff claims that the unauthorized operation allowed Multicultural to reach an additional 260,000 people thereby providing a motive for misrepresentation. Antonoff has failed to provide any support for this assertion.

¹¹Antonoff asserts that representatives for Multicultural and/or WADO, Inc. violated the Commission's *ex parte* rules by contacting the staff to push for expedited resolution. See 47 C.F.R. § 1.1202(a). Multicultural responds that there was no *ex parte* contact and that its request for expedited treatment was fully set forth in the "Joint

would be inappropriate to designate this case for hearing. *See, e.g., Capital Cities/ABC Inc.*, 11 FCC Rcd 5841, 5862 (1996) (allegations failed to make *prima facie* case that character qualifications of applicant should be called into question, and no hearing was therefore warranted); *Radio New Jersey*, 44 FCC 2d 51 (Rev. Bd. 1973) (although applicant undeniably careless, there was no substantial showing of deliberate misrepresentation demonstrating applicant lacks requisite character qualifications to be a Commission licensee; thus, case was not designated for hearing). Based on the foregoing, we also deny Antonoff's request to deny WNWK's license renewal application for the Chanin facility, or designate the matter for hearing. In failing to provide evidence of acts of willful misrepresentation, Antonoff failed to make a *prima facie* case that Multicultural lacks the necessary character to hold a broadcast authorization.

14. There is no question, however, that Multicultural failed to exercise diligence in assuring that its operation was in compliance with its technical authorization. A broadcast station must be constructed substantially as set forth in its permit in order to avert air navigation hazards and avoid interference to other broadcast stations. *See* 47 U.S.C. § 319(c) and 47 C.F.R. § 73.1620 (which provides, in pertinent part, that program tests may be conducted by permittees, upon appropriate notice to the Commission, and that the facilities tested must have been built in accordance with the terms of the construction permit and the relevant technical rules). Otherwise, the station is subject to revocation of license or permit, or imposition of a forfeiture. *See* 47 U.S.C §§ 312(a)(2), 319(c); and 503(b)(1)(A) (forfeiture appropriate for willful or repeated failure to comply substantially with the terms and conditions of any permit or other authorization issued by the Commission). At the time Multicultural constructed the station, it was authorized to utilize an antenna height of 373 meters HAAT, 42 meters lower than that actually constructed. Therefore, it appears that Multicultural violated Section 503(b)(1)(A) of the Act by constructing and operating facilities that deviated from those described in the underlying permit, without first obtaining Commission authorization or consent for modification

15. In this case, we note that WNWK(FM)'s facilities, while utilizing an unauthorized power and antenna height, appear to have been otherwise consistent with the technical parameters set forth in its permit, and that no compounding factors -- such as the creation of air hazard or actual objectionable interference -- were present in either the construction or operation of the nonconforming facility.¹² We nevertheless find that the licensee's construction and operation of WNWK(FM) with unauthorized facilities was serious enough to warrant a sanction. We note that the duration of the violation, from March of 1997 until January 30, 1998 (when the Bureau granted WNWK's modification application reduced to an ERP of 610 watts), was not insubstantial.

16. In determining the appropriate forfeiture amount, we note that the Commission's *Forfeiture Policy Statement*¹³ provides for a forfeiture of \$5,000.00 as the current base amount for constructing or operating facilities that exceed the authorized antenna height. In the instant case, we believe that this amount reflects the full circumstance in which the violation arose, as discussed above, and is appropriate. In view of the foregoing, we believe that a Notice of Apparent Liability for a forfeiture of the base amount, \$5,000.00, is warranted.

Request for Expedited Action" filed on January 20, 1998.

¹² The height of the broadcast tower itself, the Empire State Building, is already known. It does not appear that the misstated antenna height, in this case, caused an air-safety hazard.

¹³ *In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

17. *Minor Modification.* WADO Corp. claims that in granting the 1998 permit to specify only 610 watts the staff failed to apply Section 73.213 in accordance with the *Report and Order* which was intended to increase the flexibility of grandfathered short-spaced stations such as WNWK to improve their facilities. However, WADO Corp. fails to acknowledge the Commission's concerns of increased interference. As stated in the *Grandfathered Short Spaced FM Stations, Report and Order*, 12 FCC Rcd 11840, 11843 (1997) ("*Report and Order*"), the new rule "allows maximum flexibility for grandfathered stations, while *maintaining or reducing interference....*" (*emphasis added*). Our independent engineering analysis indicates that WADO Corp.'s proposal would increase interference caused to co- and first adjacent channels in contravention of the rule.¹⁴

18. We also reject WADO Corp.'s assertion that the Commission should apply the prior version of Section 73.213(a) to the July 1998 modification application because the station commenced operations and filed its license application in March 1997, before the rule was modified in November 1997. We know of no legal authority, nor does WADO Corp. cite any, which would require us to apply a version of our rules that has been superseded simply because WADO Corp. filed an erroneous license application before the rules were changed. *See, e.g., ECI License Company, L.P.*, 11 FCC Rcd 3545 (1996), *aff'd* 106 F.3d 442 (D.C. Cir. 1996) (applicant prevented from filing due to freeze was not entitled to have its application reviewed under prior, more lenient rule, rather than more stringent version adopted during the freeze). *See also Washington Association for Television and Children v. FCC*, 665 F.2d 1264 (1981) (an agency cannot be required to apply a policy it has determined no longer serves the public interest). Prior to the rule changes, grandfathered short-spaced stations were permitted to modify facilities if their 1 mV/m contour did not extend toward the 1 mV/m contour of any other grandfathered short-spaced station. Since WADO Corp.'s 1 mV/m contour as authorized in 1992 and as it commenced operations in March 1997 were "equivalent," and since WADO Corp. therefore could have modified its authorization to "match" its actual operation had it filed a modification application at that time, the staff, as noted, rightly found that WADO Corp. had no motive to misrepresent its operation in its March 1997 license application. However, asking the Commission to grant the January 1998 "corrective modification application" or the July 1998 modification application under the old rules is another matter. Under the rules adopted in November 1997, whether a grandfathered short-spaced station's proposed 1 mV/m contour remains "equivalent" to its old 1 mV/m contour is no longer determinative in deciding whether a proposed modification is grantable. Rather, under the new rules, the modifying station cannot extend its interfering contour toward any other co-channel or first adjacent channel grandfathered short spaced station unless it can demonstrate, pursuant to the specific factors listed in 47 C.F.R. § 73.213(a)(2) that the proposed change is in the public interest. Here, as petitioners Cox Radio and Chancellor Media complain, WADO Corp.'s proposed modification in fact extends its interfering contour toward both stations and no valid public interest justification is provided. The staff therefore, properly, *sua sponte*, reduced the specified ERP to a level that brought the facilities proposed in the January 1998 "corrective modification application" into compliance with the current rules before granting it. For this reason we also deny the July 1998 modification application before us now.

19. Finally, we reject WADO Corp.'s claim that the Commission should waive Section 73.213 if necessary to grant the application, based on a staff error in issuing the construction permit. Although the staff listed the incorrect antenna in the shared antenna condition in its 1992 permit, the parameters specified in the technical portion of the authorization correspond to the facilities proposed in the application. The

¹⁴ These stations include: (1) the licensed (BLH-920323KA) co-channel Class B facility, WHCN(FM), Hartford, CT; (2) the licensed (BLH-940614KA) first-adjacent Class B facility, WBLI(FM), Patchogue, NY; and (3) the licensed (BMLH-850405KC) first-adjacent Class B facility WJJZ(FM), Philadelphia, PA. The licensees of WBLI(FM) and WJJZ have, as noted, objected to the minor modification application.

minor discrepancy in the authorization does not excuse the "miscommunication" between WNWK's engineers which resulted in the filing of a license application containing erroneous information. *See* para.12, *supra*. Nor does it excuse the fact that WNWK's facilities were not in compliance with its technical authorization. We have afforded WADO Corp.'s waiver request the "hard look" required under the WAIT doctrine, *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in WADO Corp.'s justification are insufficient to establish that grant of the requested waiver of Section 73.213 is in the public interest. Consequently, we dismiss the minor modification application. As a result, WADO Corp. is directed to amend its pending license application to specify an ERP of 610 watts as set forth in the 1998 permit.¹⁵

Conclusion/Orders

20. In sum, we find that the issues raised by Antonoff fail to present a substantial and material question of fact sufficient to indicate that grant of the subject assignment and renewal applications would be inconsistent with the public interest, convenience, and necessity. In accordance with 47 U.S.C. § 309, we therefor find no basis for a hearing in this proceeding and will deny Antonoff's requested relief. We will also, however, grant the informal objections of Antonoff, Chancellor, and Cox with respect to the modification application no. BMPH-980728IA and dismiss that application. Further, we find that the applicants are otherwise qualified and that grant of the assignment and renewal applications would serve the public interest, convenience, and necessity. Notwithstanding this conclusion, we find that the imposition of a forfeiture in the amount of \$5,000 is appropriate.

21. In view of the above, pursuant to 47 U.S.C. § 503(b), Multicultural Broadcasting, Inc. IS HEREBY ADVISED of its apparent liability for a forfeiture of Five Thousand Dollars (\$5,000.00) for its willful and repeated violation of 47 U.S.C. §503(B)(1)(A) on the dates specified above. In regard to this forfeiture, Multicultural is afforded a period of thirty (30) days from the date of this Notice "to show, in writing, why a forfeiture penalty should not be imposed or pay the forfeiture. Any showing as to why the forfeiture should not be imposed or reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Sec. 1.80(f)(3).

22. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed on February 2, 1998, by Emil Antonoff IS DENIED.

23. IT IS FURTHER ORDERED, That the Informal Objection filed on February 3, 1998, by Emil Antonoff is DENIED.

24. IT IS FURTHER ORDERED, That the Minor Modification Application, File No. BMPH-980728IC, filed by WADO-AM License Corporation on July 28, 1998 is DISMISSED.

25. IT IS FURTHER ORDERED, That the Application for Extension of Time to Construct, File No. BMPH-980728JB, filed by WADO-AM License Corporation on July 28, 1998, is DISMISSED as moot.

26. IT IS FURTHER ORDERED, That the Informal Objection filed by Emil Antonoff on August 18, 1998, IS GRANTED to the extent indicated herein.

¹⁵ WADO Corp.'s application (File No. BPH-980728JB) to extend its 1992 construction permit will be dismissed as moot.

27. IT IS FURTHER ORDERED, That the Informal Objection filed by Chancellor Media Pennsylvania Corp., on September 23, 1998, is GRANTED.

28. IT IS FURTHER ORDERED, That the Informal Objection filed by Cox Radio, Inc. on October 29, 1998, IS GRANTED.

29. IT IS FURTHER ORDERED, That the Application for Renewal of License of WNWK, File No. BRH-980202V3, is GRANTED.

30. IT IS FURTHER ORDERED, That WADO-AM License Corporation must, within 30 days of the date of this Order, amend its license application, File No. BLH-970327KA, to specify the parameters authorized in construction permit File No. BMPH-980120IG.

31. IT IS FURTHER ORDERED That, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80 of the Commission's rules,¹⁶ Multicultural Broadcasting, Inc., licensee, Station WNWK(FM), Newark, New Jersey, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Five Thousand Dollars (\$5,000.00) for willfully and repeatedly violating 47 U.S.C. Section 319(c) and Section 73.1620 of the Commission's rules.

32. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, Multicultural Broadcasting, Inc., SHALL PAY to the United States the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

33. Payment of the forfeiture may be made by credit card through the Commission's Credit and Debt Management Center at (202) 418-1995, or by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the file number of this proceeding.

34. The response, if any, must be mailed to the Commission's Audio Services Division, Mass Media Bureau, 445 Twelfth Street, S.W., Room 2-A320, Washington, D.C. 20554, and MUST INCLUDE the NAL/Account number referenced in the caption of this document (X18100001).

35. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

36. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 Twelfth Street, S.W., Washington, D.C.¹⁷

¹⁶ See 47 C.F.R. §§. 0.111, 0.311 and 1.80.

¹⁷ See 47 C.F.R. §. 1.1914.

37. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail -- Return Receipt Requested, to Multicultural Broadcasting, Inc., 449 Broadway, New York, New York 10013.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Román Salas
Secretary

Concurring Statement of Commissioner Harold W. Furchtgott-Roth*In re Application of Multicultural Radio Broadcasting, Inc. (Assignor) and WADO-FM License Corporation (Assignee) For Assignment of License of Station WNWK(FM), Newark, New Jersey*

I fully agree with the conclusion reached in this Order regarding the transfer of WNWK's license. I write separately to make the point that I would not depart, nor would I leave open the possibility that it ever would be appropriate for us to depart, from our policy of leaving format issues to the discretion of the licensee simply because foreign language or ethnic informational programming is at issue. *See* Order at para. 11. Although the Commission claims that it does not reach this question, it goes on to rely on the facts that the proposed assignee of the license states that it intends to continue its "multi-ethnic" programming format" and that many other stations in the area broadcast in that format. *Id.*

Such expressly content-based considerations are presumptively inconsistent with the First Amendment, as would be also a more express departure from our traditional policy regarding format. *Cf. Columbia Broadcasting System, Inc., DNC*, 412 U.S. 94, 104 (1973) ("We cannot allow any single person or group to place themselves in (a) position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material.") (quoting Testimony of Herbert Hoover, Hearings on H.R. 7357 before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess., 8 (1924)). Accordingly, I would not rely on them in any way in approving this license transfer.