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In Reply Refer to:

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Re: WTOK-FM, San Juan, PR
Facility ID No. 4936
File No. BALH-20090206ACE

Application for Assignment of License

Dear Counsel:

We have before us the above-captioned application (the "Application") for consent to the assignment of license for station WTOK-FM (formerly WIAC-FM), San Juan, Puerto Rico (the "Station" or "WTOK"), from MSG Radio, Inc. ("MSG") to WIAC-FM, Inc. ("WFI"). The Application includes a request by WFI for waiver of Section 73.3555(a) of the Commission's Rules (the "Rules"),¹ which sets forth the limits on the number of stations a party may own in a local radio market (the "Waiver Request"). We also have before us a Petition to Deny ("Petition"), filed March 18, 2009, by RAAD Broadcasting

¹ 47 C.F.R. § 73.3555(a).

Corporation² (“RAAD”).³ For the reasons stated below, we deny the Petition, waive Section 73.3555(a), and grant the Application.⁴

Background. Prior Station Transaction. On August 20, 2007, Luis A. Mejia (“Mejia”) filed an application seeking consent to assign the Station’s license to MSG (the “Mejia Application”).⁵ Pursuant to the Asset Purchase Agreement between Mejia and MSG (the “Mejia APA”), Mejia agreed to assign the Station license and other intangibles associated with the Station, to MSG for the sum of four million dollars (\$4,000,000.00). In September 2007, the Commission received two Petitions to Deny the Mejia Application, each alleging that Mejia and MSG lacked candor with the Commission by withholding documents germane to the transaction. Petitioners purported to provide copies of: (1) an Asset Purchase Agreement (the “Bestov APA”), dated August 10, 2007, between Bestov Broadcasting, Inc. of Puerto Rico (“Bestov”)⁶ and Madifide, Inc. (“Madifide”), pursuant to which Bestov proposed to sell Madifide tangible and intangible assets associated with the leases for the studio, office, and transmitter facilities needed to operate the Station for a total price of twelve million five hundred thousand dollars (\$12,500,000.00); and (2) an undated “Shared Services Agreement” (the “SSA”) between MSG and Madifide, under which Madifide would provide MSG with access to the station's studio and tower. The SSA excluded the sharing of other services including, but not limited to, MSG's employees, contractors, sales, accounting, programming, and related advertising decisions. Madifide and WFI, the current proposed assignee of WTOK, are commonly owned by members of the Soto family. The petitioners alleged that these documents reflected an unauthorized transfer of control of the Station to the Soto-controlled Madifide and that MSG was just an instrument in the transaction.

On May 2, 2008, the Media Bureau (the “Bureau”) sent a Letter of Inquiry to Mejia, MSG and Madifide, requesting more information to determine whether MSG “will exercise a meaningful degree of control over the Station’s programming.”⁷ The parties’ responses included copies of the Bestov APA, SSA, and a non-finalized, non-executed Option Agreement between MSG and Madifide, proposing that MSG extend to Madifide a two-year, irrevocable option to purchase the Station license when qualified to do so under FCC rules and policies.

Ultimately, the Bureau, *inter alia*, rejected arguments that the agreements reflected an unauthorized transfer of control. Specifically, the Bureau observed that the SSA “specifically excludes the sharing of responsibilities essential for MSG to maintain control over the Station” and the Option

² RAAD is the licensee of WXYX(FM), Bayamon, Puerto Rico, which is located in the same market as WTOK.

³ Also before us are the following pleadings: (1) Motion for Extension of Time, filed March 25, 2009, by MSG; (2) Motion for Extension of Time to File Opposition, filed March 30, 2009, by WFI; (3) Opposition to Petition to Deny, filed April 17, 2009, by MSG; (4) Opposition to Petition to Deny, filed April 20, 2009, by WFI; (5) Motion for Extension of Time to File Consolidated Reply, filed May 5, 2009, by RAAD; and (6) Consolidated Reply to Oppositions, filed May 5, 2009, by RAAD.

⁴ Arso Radio Corporation (“Arso”), an entity commonly-controlled by the principals of WFI, has raised the same arguments contained in the WFI Waiver Request, regarding the application of the Arbitron Metro standard to Puerto Rico, in other proceedings, and our action here does not prejudge the Commission’s disposition of Arso’s arguments in the appropriate context. Although we are granting the Station WTOK assignment application below, any future application by WFI to change or increase the Station’s facilities must be accompanied by a new showing of compliance with the Commission’s local radio ownership rules and, if necessary, a new request for waiver of the use of the Arbitron Puerto Rico Metro as the presumptive market in which the Station competes.

⁵ File No. BALH-20070820AGE.

⁶ Mejia is the 100 percent shareholder of Bestov.

⁷ See *Letter to Luis A. Mejia, et al.*, Reference 1800B3-TSN (MB May 2, 2008) at 2.

Agreement “does not appear to reflect any undue influence on MSG’s operation if MSG were to obtain the Station license.”⁸ Accordingly, on August 5, 2008, the Bureau granted the Mejia Application,⁹ and the parties consummated on January 8, 2009. On February 6, 2009, MSG filed the subject Application seeking the Commission’s consent to assign the Station’s license to WFI.

Waiver Request. WFI and/or its principals, the Soto family, currently have attributable interests in 14 radio stations (six AM and eight FM) on the island of Puerto Rico.¹⁰ Thirteen of the 14 stations were acquired through their demonstration of compliance with the Commission’s former methodology for defining radio markets, which relied on the overlapping principal community contours of the commercial radio stations that were proposed to be commonly owned.¹¹

In the *Ownership Order*,¹² however, the Commission adopted a new, geography-based definition of radio markets based on Arbitron’s Metro Survey Areas (“Metros”), as reported by BIA.¹³ This new market definition is used to determine compliance with the numerical limits under Section 73.3555(a) in Arbitron-rated markets, such as Puerto Rico. Under these new definitions, the island of Puerto Rico constitutes a single Arbitron Metro, which, according to BIA, contains 115 commercial and 12 noncommercial stations.¹⁴ In this size market, a party may have a cognizable interest in up to eight commercial stations, with no more than five in the same service (AM or FM).¹⁵ Thus, because the number of radio stations in Puerto Rico in which WFI and/or its principals currently have ownership

⁸ See *Luis A. Mejia*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 11902, 11905 (MB 2008) (“*Mejia*”).

⁹ *Id.* The *Mejia* Order also imposed a \$3,000 forfeiture on Mejia and MSG for failing to provide copies of drafts of the SSA and Bestov APA. No party sought reconsideration or review of the *Mejia* Application grant, and that action is final. The Bureau subsequently rejected MSG’s request for cancellation of the forfeiture. See *Luis A. Mejia*, Forfeiture Order, 23 FCC Rcd 15242 (MB 2008), *recon. denied*, 26 FCC Rcd 11444 (MB 2011), *application for review pending*.

¹⁰ Those stations are: WPRM-FM, San Juan, PR; WIVA-FM, Aguadilla, PR; WRIO(FM), Ponce, PR; WORA(AM), Mayaguez, PR; WPRP(AM), Ponce, PR; WFDT(FM), Aguada, PR; WUNO(AM), San Juan, PR; WMIO(FM), Cabo Rojo, PR; WFID(FM), Rio Piedras, PR; WLEO(AM), Ponce, PR; WZAR(FM), Ponce, PR; WCMN(AM), Arecibo, PR; WCMN-FM, Arecibo, PR; and WNEL(AM), Caguas, PR.

¹¹ The Soto family’s ownership of these 13 stations was subsequently grandfathered. See *Ownership Order*, *infra* note 12, 18 FCC Rcd at 13808. The fourteenth station, WMIO(FM), was acquired through a waiver of Section 73.3555(a) of the Rules. See *Luis A. Soto*, Letter, 22 FCC Rcd 2549 (MB 2007) (“*WMIO Waiver*”).

¹² 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) (“*Ownership Order*”), *aff’d in part and remanded in part*, *Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (2004) (“*Prometheus Remand Order*”), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 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). See also *Prometheus Radio Project v. FCC*, No. 08-3078 (3d Cir. Jul. 7, 2011) (affirming Commission’s 2008 local radio ownership rule).

¹³ See *Ownership Order*, 18 FCC Rcd 13724-13728. Although the Third Circuit Court of Appeals subsequently stayed the effective date of all the new rules set forth in the *Ownership Order* and continued that stay pending review of the Commission’s action on remand, see *Prometheus Remand Order*, 373 F.3d at 435, the court partially lifted the stay in response to the Commission’s Petition for Rehearing, such that the new local radio ownership rule took effect on September 3, 2004. *Prometheus Rehearing Order* at 2.

¹⁴ BIA database, April 19, 2012.

¹⁵ See 47 C.F.R. § 73.3555(a)(i).

interests exceeds the limits imposed for a local radio market of its size (six radio stations and three FM stations more than permitted), WFI cannot acquire Station WTOK absent a waiver.

On February 9, 2007, the Commission granted Arso, a corporation commonly controlled by the members of the Soto family, a waiver of Section 73.3555(a) of the Rules, and granted an application to assign the license for Station WMIO(FM), Cabo Rojo, Puerto Rico, from Bestov to Arso.¹⁶ The Commission found that the unique characteristics of the Puerto Rico Arbitron Metro presented a compelling case for departing from the Arbitron Metro as the presumptive definition of the local market when determining whether the transaction complied with the local radio ownership rule.¹⁷ Accordingly, the Commission reviewed the proposed acquisition using the interim contour-overlap methodology that applies in non-Arbitron rated markets. WFI claims that the same conclusions apply here and requests a waiver of the current rule, urging the Commission to review its proposed acquisition using the interim contour-overlap methodology that applies in non-Arbitron rated markets.¹⁸

The Petition. RAAD objects to the grant of the instant Application on two grounds. First, RAAD alleges that the Application is “part and parcel of an undisclosed scheme to permit unlawful assumption of control of [the Station] by the Soto family of Puerto Rico.”¹⁹ RAAD contends that the 2007 assignment of the Station to “Mr. Reed [MSG] was part of a plan to warehouse the station with Mr. Reed, while it was operated by the Sotos,” and that the current application is a “culmination of an ongoing effort by the Sotos to legitimize their de facto ownership, operation, and control of the station”²⁰ To support its allegations, RAAD primarily relies upon documents filed in conjunction with the 2007 Mejia Application. RAAD also bases its conclusions on (1) its belief that some “key” MSG employees were previously employees of the Sotos, and (2) the fact that MSG is using the Toca de To trademark used by companies owned by the Sotos.

Second, RAAD contends that the WFI Waiver Request is unjustifiable and should be denied. RAAD argues that the Commission’s prior decision to grant the WMIO(FM) waiver did not consider market realities and Puerto Rico’s competitive environment. According to RAAD, grant of the instant Application would result in the Soto family having an undue concentration of market power in the Puerto Rico Metro.

Discussion. In assessing the merits of a petition to deny under Sections 309(d) of the Communications Act of 1934, as amended (the “Act”), we first determine whether the petitioner makes specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest.²¹ If the Commission determines that the petitioner has satisfied

¹⁶ See *WMIO Waiver*, 22 FCC Rcd at 2553.

¹⁷ *Id.* at 2553.

¹⁸ As an attachment to its Waiver Request, WFI provides a Technical Statement which WFI claims demonstrates compliance pursuant to the interim contour-overlap methodology, as discussed in the *Ownership Order*, 18 FCC Rcd at 13729-30.

¹⁹ RAAD Petition at 1.

²⁰ *Id.* at 2, 9.

²¹ See *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge's consideration of a motion for directed verdict: “if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established.” *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (“*Gencom*”), cited in *Edwin L. Edwards*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236, 22248 (2001).

the threshold determination, it proceeds to determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, the petitioner has presented a “substantial and material question of fact” to warrant further inquiry.²² If no such question is raised and the Commission otherwise makes the required public interest determination, it will deny the petition and grant the application.

Unauthorized Transfer of Control. In determining whether there has been an unauthorized transfer of control, the Commission employs a tripartite, fact-based test for control within the meaning of Section 310(d) of the Act.²³ Specifically, we have traditionally looked beyond legal title to see whether a new entity or individual has obtained the right to determine basic operating policies of the station.²⁴ Although a licensee or permittee may delegate certain functions on a day-to-day basis, the ultimate responsibility for essential station operations, such as personnel, programming, and finances, is non-delegable.²⁵

RAAD’s allegation that the Soto family has obtained *de facto* control over the Station is premised primarily on documents submitted in connection with the 2007 Mejia Application. RAAD asserts that a “fresh look at the circumstances of that prior transaction” will show that the “Sotos are and have been in control of [the Station] without prior Commission approval.”²⁶ RAAD’s allegation is identical to the argument that two separate petitioners advanced in the 2007 Mejia Application and is mostly predicated on the same underlying factors. We previously considered and rejected the unauthorized transfer of control claim and we will not revisit that decision here.²⁷ Nevertheless, we have considered RAAD’s allegation, primarily in light of the new, albeit scant, information that RAAD has provided, *i.e.*, allegations regarding use of common employees and a common trade name.

RAAD asserts that the Soto family’s control over personnel is evidenced by the fact that “some of the MSG employees in key positions were previously employees of the Sotos.”²⁸ MSG’s abdication of programming control is, according to RAAD, reflected in the fact that MSG is currently using the “Toca de To” trademark, a tradename owned by a corporation controlled by the Soto family.²⁹

²² *Gencom*, 832 F.2d at 181.

²³ See 47 U.S.C. § 310(d) (prohibiting the transfer, assignment or disposal of any construction permit or station license “in any manner, voluntary or involuntary, directly or indirectly ... to any person except upon application to the Commission and upon finding that the public interest convenience, and necessity will be served thereby”). See also *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8142-46 (2005) (“*WGPR*”), *vacated on other grounds sub nom., Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998); *Choctaw Broadcasting Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8538-39 (1997).

²⁴ See *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856, 863 (1969), *aff’d sub nom., Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert denied*, 403 U.S. 923 (1971).

²⁵ See, e.g., *WGPR*, 10 FCC Rcd at 8145; *Southwest Texas Public Broadcasting Council*, Letter, 85 FCC 2d 713, 715 (1981).

²⁶ RAAD Petition at 4, 18.

²⁷ See, e.g., *ACME Television Licenses of Florida, LLC*, Letter, 22 FCC Rcd 1656, 1658 (a petitioner cannot ask the Commission to “look beyond the record based on concerns or allegations rejected by the Commission in prior applications and initiate a broad inquiry regarding the parties’ potential or intent to violate the Commission’s rules in the future.”).

²⁸ RAAD Petition at 17-18.

²⁹ RAAD also opines that because George Reed, the sole shareholder of MSG “has no other broadcast holdings and is, on information and belief, a media broker,” it is obvious that MSG is a “straw party.” RAAD Petition at 9. MSG
(continued....)

RAAD's allegation that the Soto family controls the Station's personnel and programming is based on inferences, conjecture, and erroneous information. It is clear from the terms of the agreements that MSG has ultimate control over personnel and all programming decisions and policies, and RAAD has provided no evidence that the agreements, in form or in practice, violate the Commission's Rules. The SSA is explicit with respect to employee control, maintaining that at "no time shall the MSG personnel be an employee of, or independent contractor with, WFI [the Soto family], or vice versa."³⁰ Moreover, George Reed, the sole shareholder of MSG, has confirmed, under penalty of perjury, that "neither WFI nor any other company (whether owned by members of the Soto family or otherwise) exercises any control over MSG employees and consultants when they are performing tasks for the Station,"³¹ and that "tasks involving programming are the sole province of me and the employees of MSG."³² The fact that some of the MSG employees previously worked for companies owned by the Soto family does not indicate an abdication of control, as RAAD speculates. Rather, Mr. Reed has confirmed that he hired the employees and is the only one who controls their activities.³³ Similarly, MSG verifies that the trademark agreement merely provides MSG with a license to use a trademark.³⁴ It does not confer any right on the Soto family to covertly control programming, as RAAD infers.³⁵ To the contrary, the fact that MSG has an explicit agreement to use the trademark indicates a legitimate, open business arrangement, not evidence of a stealth assumption of control.

The agreements are explicit that Mr. Reed and MSG maintain ultimate control over the Station.³⁶ RAAD has proffered no evidence that, in practice, the parties' conduct is not in compliance with the

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has refuted RAAD's allegation and illustrated that Mr. Reed has extensive experience at radio stations, working in the areas of sales and programming, and is an experienced broadcaster with current ownership interests in six radio stations. Moreover, regardless of Mr. Reed's prior broadcast experience, the agreements are explicit that Mr. Reed and MSG maintain ultimate control over the Station, and RAAD has failed to provide any evidence to show that this is not true in practice.

³⁰ See SSA at Section 2.2.1 – Personnel.

³¹ See Declaration of George R. Reed, attached as Exhibit to MSG Opposition.

³² See Declaration of George Reed at 2; SSA at Sections 2.1.6 and 2.2.2 (providing that "with the exception of the provision of Provided Programming [the programming WFI provides, which shall not comprise more than 15% of the programming on the Station during any week], neither WFI nor MSG will perform any duties with respect to selecting or procuring programming").

³³ Mr. Reed explains that he hired Marnie Ferrer as the full-time General Manager of the Station. Ms. Ferrer had previously been employed by a company owned by members of the Soto family. However, Mr. Reed states that Ms. Ferrer "does not take any direction from any member of the Soto family or any company owned by members of the Soto family in fulfilling her responsibilities as General Manager of the Station." Declaration of George Reed at 1.

³⁴ The tradename is owned by Caribbean Broadcasting Corporation, an affiliate of WFI. The programming slogan was previously used by WCMN-FM, Arecibo, Puerto Rico.

³⁵ See MSG Opposition at 16-17; Declaration of George Reed at 1-2 (declaring, under penalty of perjury, that the "agreement relates solely to the use of a trademark owned by Caribbean Broadcasting Corporation and does not involve in any way the selection or procurement of programming for the Station."). Moreover, to ensure there was no confusion regarding MSG's adoption of the new programming slogan, Mr. Reed met with advertising agencies in Puerto Rico to explain that MSG operates the Station. See WFI Opposition at 12.

³⁶ See, e.g., SSA at Section 3.3 – Control of Station (providing that "MSG shall maintain ultimate control over the operations of [the Station], including, but not limited to, management, programming, finances, editorial policies, personnel, facilities and compliance with the Act, FCC Rules . . .").

terms of the agreements. Accordingly, having reviewed the agreements and the entire record before us, we reject RAAD's first argument that MSG and the Soto family engaged in an unauthorized transfer of control.

Waiver. The Commission's rules may be waived only for good cause shown.³⁷ An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.³⁸ The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"³⁹ and must support its waiver request with a compelling showing.⁴⁰ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁴¹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁴² However, waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.⁴³ Applying these standards, we find that waiver of Section 73.3555(a) is appropriate in this instance.

WFI's Waiver Request is essentially identical to Arso's WMIO(FM) waiver request, which the staff granted in 2007.⁴⁴ Specifically, in support of its Waiver Request, WFI relies on the Commission's statement in the *Ownership Order* that Arbitron Metros "are based on Metropolitan Areas (MAs) established by the Office of Management and Budget (OMB),"⁴⁵ It notes that this reasoning is inapplicable here because OMB does not define, as an MA, the entire island of Puerto Rico.⁴⁶ According

³⁷ 47 C.F.R. § 1.3.

³⁸ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

³⁹ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*"), cited in *Ownership Order*, 18 FCC Rcd at 13647. See also *Thomas Radio V. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

⁴⁰ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

⁴¹ 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).

⁴² *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

⁴³ *NetworkIP, LLC v. FCC*, 548 F.2d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

⁴⁴ See *WMIO Waiver*, *supra* note 11.

⁴⁵ See *Ownership Order*, 18 FCC Rcd at 13725. The term MAs includes both Metropolitan Statistical Areas (MSAs) and Micropolitan Statistical Areas (Micro SAs). MSAs have at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties. Micro SAs have at least one urbanized area of at least 10,000 but less than 50,000 population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties. Combined Statistical Areas are combined adjacent MSAs and Micro SAs. See OMB Bulletin 10-02, at <http://www.whitehouse.gov/omb/bulletins/fy2010/b10-02.pdf>.

⁴⁶ WFI states that Puerto Rico has eight Metropolitan Statistical Areas and three Combined Statistical Areas. See List 5, Attachments to OMB Bulletin 03-04 (at <http://www.whitehouse.gov/omb/bulletins/b03-04.html>), which WFI (continued....)

to WFI, OMB considers the presence of population centers in defining both MAs and MSAs and has identified eight Metropolitan Statistical Areas (“MSAs”) in Puerto Rico.⁴⁷ Further, WFI asserts that the unique geography and topography of Puerto Rico make it impossible for stations across the island to compete with each other. Accordingly, WFI asserts that the entire island of Puerto Rico, by definition, cannot constitute a single Arbitron Metro.

The Commission previously found that the unique characteristics of the Puerto Rico Arbitron Metro, including the extreme topography and unusual economic circumstances, justified a waiver of the use of the Arbitron Puerto Rico Metro as the presumptive market in which Station WMIO(FM) competes. We find that the same factors support a grant of the instant WTOK Waiver Request. The island of Puerto Rico is approximately 125 miles long (east to west) and 35 miles wide (north to south), with a central mountain range that not only separates the island from east to west, but also divides it into three basic areas, San Juan, Ponce, and Aguadilla-Mayaguez. The Commission has previously acknowledged the severely limiting effect Puerto Rico's unique mountainous terrain has on signal propagation, which prevents stations in the more populous San Juan area from serving the two other main areas of the island.⁴⁸ In the *WMIO Waiver*, we found that the island's extreme topography was a prime factor justifying the waiver.⁴⁹ Similarly, WTOK is impacted by the island's unique topographical constraints, making it unlikely that the station can be heard, let alone compete, in areas on the western part of the island, some 120 kilometers away.

Further, Puerto Rico is unique in that the entire island, which is roughly the same size as Connecticut, is treated as one market by Arbitron.⁵⁰ Puerto Rico, however, consists of eight MSAs, five Micro Statistical Areas, and three Combined Statistical Areas.⁵¹ MSAs generally approximate the boundaries around centers of economic activity.⁵² Puerto Rico's eight MSAs suggest that the island may

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appends as Attachment 3 to its Waiver Request. The most current OMB MA list confirms that these numbers have not changed. See OMB Bulletin 10-02.

⁴⁷ Waiver Request at 3.

⁴⁸ The Commission has found that a combination of the island's topography and its geographic isolation places Puerto Rico in a highly unusual position, and accordingly, it has, on numerous occasions, authorized exceptions to the TV duopoly rule where satellite stations were at issue. See, e.g., *Canal 48, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 2193 (1993); *Paxson Communications of San Juan*, Memorandum Opinion and Order, 16 FCC Rcd 14139 (2001).

⁴⁹ See *WMIO Waiver*, 22 FCC Rcd at 2551, 2553.

⁵⁰ As we previously acknowledged in the *WMIO Waiver*, Arbitron itself, in “Puerto Rico Radio Today” states that Puerto Rico “can be compared to Connecticut. It is a little smaller, but with almost half a million more people.” However, in addition to the inclusion of southern Connecticut in the New York radio market, Connecticut has several Arbitron-rated radio markets. See Arbitron Inc., *Puerto Rico Radio Today* (2006 edition).

⁵¹ See OMB Bulletin 10-02, *supra* note 45; see also Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82228 (2000).

⁵² The Commission has previously used the U.S. Census Bureau's designation of MSAs to help define the applicable market for determining compliance with cross-ownership limits in Puerto Rico. See, e.g., *WLDI, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 12150 (1995) (recognizing that the San-Juan Bayamon PMSA may be equivalent to a radio market and the San Juan-Caguas-Arecibo CMSA may be equivalent to a television market)

have more centers of economic activity than the Arbitron Metro implies in this instance.⁵³ Moreover, since our grant of the *WMIO Waiver* in 2007, the Puerto Rico Metro has become a more competitive market with 115 commercial stations, 12 noncommercial stations, and 71 separate owners of radio stations.⁵⁴ As we previously acknowledged, while there are other Arbitron markets that comprise more than one MSA, Puerto Rico is the only such market that has the additional factors of geographic size, topography, and sheer numbers of radio stations and station owners.⁵⁵

Although RAAD concedes that the Commission may have “had some basis for allowing a waiver of the duopoly rules in the *WMIO* case,”⁵⁶ it contends that the *WTOK* Waiver Request is not justifiable and should be denied. RAAD asserts that the Commission must consider market realities and Puerto Rico’s competitive environment.⁵⁷ RAAD estimates that a grant of the Waiver Request would increase the Soto family’s market share to 26 percent of all radio revenues and “make an already alarmingly difficult competitive situation decidedly, substantially worse.”⁵⁸ According to RAAD, close to 60 percent of all radio revenues are controlled by the top three companies: the Soto family’s Uno Radio Group, SBS Spanish Broadcasting Systems, and Univision Radio. RAAD estimates that upon consummation of the subject transaction, the top three groups will control from 62 to 70 percent of all radio revenues, and over 90 percent of all national campaigns, and the Soto’s market share will increase from 22 to 26 percent of all radio revenues and over 30 percent of the national advertising campaigns.⁵⁹ RAAD boldly predicts that “if waivers like this are legitimized by the Commission, market dominance by the top firms will be complete.”⁶⁰

RAAD relies primarily on advertising revenue shares in asserting its competition concerns. The Commission, however, has concluded that ad revenue share is of “decreasing relevance . . . as a barometer of competition”⁶¹ and explicitly rejected arguments that it incorporate a market share analysis into the local ownership rule.⁶² Moreover, even were we to attempt to conduct such an analysis here, RAAD has failed to proffer sufficient economic data to substantiate its claim of competitive harm. For example, RAAD does not provide concrete data to explain how it derives its 26 percent revenue share estimate for the Soto family.

RAAD further premises its competition concerns on the fact that *WTOK* is a Class B station located in San Juan, the “major economic area of Puerto Rico.” RAAD asserts, without any support, that

⁵³ Arbitron acknowledges that when analyzing Puerto Rico, there are several regions – San Juan, West, South, East, North, and Northeast, and provides ratings data for Puerto Rico broken down by those regions. See *Puerto Rico Radio Today* (2012 edition) at 2.

⁵⁴ In 2007, there were 99 commercial stations, three noncommercial stations, as well as 53 separate owners of radio stations in Puerto Rico.

⁵⁵ We note that the Puerto Rico Radio Broadcasters Association filed comments in MB Docket 03-130, urging the Commission to utilize OMB’s statistical areas as the alternative basis for determining the size and number of local radio markets for the island of Puerto Rico.

⁵⁶ RAAD Petition at 12.

⁵⁷ *Id.*

⁵⁸ *Id.* at 13.

⁵⁹ *Id.* at 13.

⁶⁰ *Id.*

⁶¹ *Ownership Order*, 18 FCC Rcd at 13642.

⁶² *Id.* at 13736-37.

it is “a fact that the Sotos and the two other entities own in the aggregate a dominant number of the stations with optimum island coverage and power so that local or regional radio stations cannot compete with them.”⁶³ According to RAAD, grant of the Application will make it impossible for a healthy competitive environment to develop. We are unpersuaded by RAAD’s unsubstantiated allegations. Upon consummation of the Application, the Sotos will own one additional station, WTOK-FM, a Class B station licensed to San Juan. However, many other stations with comparable facilities will continue to compete against the Soto family.⁶⁴ Moreover, as the Commission recognized in the *Ownership Order*, technically weaker stations may, of course, be strong competitors in their markets, depending on a variety of factors such as format choice, population coverage, and quality of programming.”⁶⁵

Finally, we emphasize that our ultimate obligation is to consider the potential benefits and harms of the transactions on the listening public. As the Commission observed in the *Ownership Order*, “[p]reserving competition for listeners is of paramount concern” in our public interest analysis.⁶⁶ We need to ensure that a sufficient number of rivals are engaged in competition for listening audiences. RAAD, in fact, concedes that “there are a respectable number of licensees not under the control of the Sotos.”⁶⁷ Grant of the Application will not alter this fact. According to BIA data, 71 station owners currently compete in the Puerto Rico Metro, and 70 owners will remain in the Metro post-transaction.

Accordingly, we find RAAD’s speculative prediction of an anti-competitive environment unpersuasive and find that the instant Waiver Request is not, as RAAD asserts, “unjustifiable.” Rather, we find that the unique characteristics of the Puerto Rico present a compelling showing of special circumstances that warrant departing from the Arbitron Metro as the presumptive definition of the local market in determining whether the transaction complies with the local radio station ownership rule. On the facts presented here, we find that it is in the public interest to grant the Waiver Request and utilize the interim contour-overlap methodology that applies in non-Arbitron rated markets.

Multiple Ownership – Contour Overlap Methodology. We have evaluated the proposed transaction applying the Commission’s interim contour-overlap methodology.⁶⁸ Our analysis confirms that the proposed transaction forms five separate radio markets and complies with the local radio ownership limits in all five. In a local radio market with 30 to 44 radio stations, one owner may own up to seven commercial radio stations, no more than four of which are in the same service (AM or FM), in each market.⁶⁹ In Market One, WFI would own three FM stations and two AM stations in a 43-station market. In Market Two, WFI would own three FM stations and three AM stations in a 44-station market. In Market Three, WFI would own four FM stations and two AM stations in a 44-station market.⁷⁰

⁶³ RAAD Petition at 14.

⁶⁴ For example, Broadcasting and Programming Systems, Inc. owns a Class B station in San Juan; Clamor Broadcasting Network is the licensee of a Class B station in Culebra.

⁶⁵ *Ownership Order*, 18 FCC Rcd at 13732.

⁶⁶ *Id.* at 13716. *See also id.* at 13641.

⁶⁷ RAAD Petition at 14.

⁶⁸ Under the contour-overlap methodology, the relevant radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned. *See Ownership Order*, 18 FCC Rcd at 13729-13730.

⁶⁹ *See* 47 C.F.R. § 73.3555(a)(1)(ii).

⁷⁰ Market 1: WTOK-FM, WPRM-FM, WZAR(FM), WUNO(AM), and WPRP(AM).

Market 2: WTOK-FM, WFID(FM), WPRM-FM, WUNO(AM), WNEL(AM), and WCMN(AM).

(continued....)

In a local radio market with 45 or more radio stations, one owner may own up to eight commercial radio stations, not more than five of which are in the same service, in each market.⁷¹ In Market 4, WFI would own five FM stations and two AM stations in a 45-station market. Finally, in Market 5, WFI would have an interest in four FM stations and two AM stations in a 45 station market.⁷² Accordingly, evaluating the transaction using the interim contour-overlap methodology, WFI complies with the local radio ownership rule.

Conclusion/Actions. Based on the evidence presented in the record, we find that RAAD has not raised a substantial and material question of fact warranting further inquiry. We have examined the Application and find that it otherwise complies with all applicable statutory and regulatory requirements, and we find that grant of the Application would further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that Section 73.3555(a)(1)(iii) of the Commission's Rules⁷³ IS WAIVED with respect to all interests held by WIAC-FM, Inc. and its officers, directors and stockholders in the authorization for Station WTOK-FM, San Juan, Puerto Rico.⁷⁴

IT IS FURTHER ORDERED, that the March 18, 2009, Petition to Deny, filed by RAAD Broadcasting Corporation, IS DENIED.

IT IS FURTHER ORDERED, that the application (File No. BALH-20090206ACE) for consent to assign the license for Station WTOK-FM, San Juan, Puerto Rico, from MSG Radio, Inc. to WIAC-FM, Inc. IS GRANTED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

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Market 3: WTOK-FM, WFID(FM), WPRM-FM, WZAR(FM), WCMN(AM), WUNO(AM).

⁷¹ See 47 C.F.R. § 73.3555(a)(1)(i).

⁷² Market 4: WTOK-FM, WCMN-FM, WZAR(FM), WPRM-FM, WFID(FM), WCMN(AM), and WUNO(AM).

Market 5: WTOK-FM, WFID(FM), WPRM-FM, WZAR(FM), WCMN(AM), and WUNO(AM).

⁷³ 47 C.F.R. § 73.3555(a)(1)(iii).

⁷⁴ See note 4, *supra*.