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APR 24 2006

Federal Communications Commission  
Office of Secretary

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: Application for Review

Dear Ms. Dortch:

On behalf of Galaxy Syracuse Licensee LLC ("Galaxy"), the licensee of Station WTKV(FM), Oswego, New York (Facility ID No. 24131), transmitted herewith is an original plus four copies of Galaxy's Application for Review of the Audio Division's decision to deny Galaxy's request for waiver of the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, and dismiss Galaxy's FCC Form 301 modification application to implement the change in community of license for WTKV in FCC File No. BPH-20031209ABV.

Please date-stamp the enclosed "Return Copy" of this filing and return it to the courier delivering the package.

Should there be any questions concerning this matter, please contact the undersigned.

Respectfully yours,

John D. Poutasse

Enclosures

cc: Chairman Kevin J. Martin  
Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate

BEFORE THE  
**Federal Communications Commission**  
 WASHINGTON, D.C. 20554

2006 APR 25 A 11: 48

In the Matter of

Application for Minor Modification of  
 License  
 WTKV(FM), Oswego, NY  
 Facility ID No. 24131

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File No. BPH-20031209ABV

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APR 24 2006

To: Office of the Secretary  
 The Commission

Federal Communications Commission  
 Office of Secretary

**APPLICATION FOR REVIEW**

Galaxy Syracuse Licensee LLC (“*Galaxy*”), licensee of radio station WTKV(FM), Oswego, New York, Facility ID Number 24131 (the “*Station*”), by its attorneys and pursuant to Section 1.115 of the Commission’s Rules, hereby respectfully requests the Commission to review the denial of the waiver request (the “*Waiver Request*”) and dismissal of Galaxy’s above-captioned application for a minor change in the licensed facilities of the Station (the “*Modification Application*”).<sup>1</sup> Section 1.115 of the Commission’s rules provides “any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.”<sup>2</sup> The Bureau’s denial of the Waiver Request effectively forces Galaxy to abandon its minor change application to implement the reallocation of Channel 288A from

<sup>1</sup> Letter to Galaxy Communications, L.P. c/o Sally A. Buckman, Esq., DA 06-644, 1800B3-KV, (rel. Mar. 23, 2006) (the “*Dismissal Letter*”). This Petition is timely filed as it is being filed within 30 days of the issuance of the Dismissal Letter. See 47 C.F.R. §§ 1.4, 1.115.

<sup>2</sup> 47 CFR § 1.115(a)

Oswego to Granby, New York, or to forfeit the grandfathered status of its cluster of six FM and three AM stations in Syracuse, New York. Clearly, Galaxy is aggrieved by the Bureau's action dismissing the WTKV modification application. Galaxy is filing concurrently a Request for Waiver of the freeze on the acceptance and consideration of new Petitions for Rulemaking to amend the FM table of allotments and a Petition for Rulemaking to reallocate Channel 288A to Oswego and restore the status quo. However, in the event the Commission denies Galaxy's waiver request and does not issue a Notice of Proposed Rulemaking to reallocate Channel 288A to Oswego, Galaxy requests review of the Bureau's denial of the Waiver Request and dismissal of the Application. For the reasons set forth herein, Galaxy respectfully requests that the Application be reinstated and returned to pending status, or reinstated and granted.

## **I. Background**

The procedural history of this case begins over five and a half years ago, on August 1, 2000, when Galaxy submitted a Petition for Rule Making requesting the Allocations Branch to amend the FM Table of Allotments to reallocate channel 288A from Oswego to Granby, New York. In accordance with Section 1.420(i) of the Commission's Rules, Galaxy agreed to submit an application for modification of its license to specify Granby as the Station's community of license if its mutually exclusive proposal were adopted. On September 21, 2001, the Allocations Branch released a Report and Order adopting Galaxy's requested amendment to the table to specify Granby, New York, as the

community of license for Channel 288A.<sup>3</sup> The Granby Order was subsequently challenged by a third party and nearly two years later, the Media Bureau affirmed its decision.<sup>4</sup>

During the intervening two-year period, the Commission issued revised multiple ownership rules changing the definition of the presumptive radio market used to determine compliance with its local radio ownership rules.<sup>5</sup> The former version of the rules relied on a contour-overlap methodology in contrast to the new presumptive market definition which relies on Arbitron Metros.<sup>6</sup> The new rules were challenged by numerous parties before the Commission as well as appealed to the Third Circuit, which issued a stay of the new rules, delaying their implementation.

*Prior to the lifting of this stay*, Galaxy filed the Application to implement the change authorized by the Granby Order. Galaxy requested approval to modify WTKV's license to specify Granby instead of Oswego as its community of license and requested a change to its transmitting facility to provide service to the new community.<sup>7</sup> The

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<sup>3</sup> *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Oswego and Granby, New York)*, Report and Order, 16 FCC Rcd 16927 (MMB 2001) (the "*Granby Order*"), *affirmed on recon.*, Memorandum Opinion & Order, 18 FCC Rcd 17615 (2003).

<sup>4</sup> See 18 FCC Rcd 17615.

<sup>5</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*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003) ("*Multiple Ownership Order*").

<sup>6</sup> See *Multiple Ownership Order* at ¶ 274, *et seq.*

<sup>7</sup> See FCC File No. BPH-20031209ABV (the "*Modification Application*").

Application was pending when the stay of the local radio ownership rule was lifted by the Third Circuit on September 3, 2004.<sup>8</sup>

Upon implementation of the new rules, the Media Bureau required the filing of amendments to all pending radio broadcast applications, including Galaxy's Application, to require the demonstration of compliance with the new local radio ownership rule or to request a waiver.<sup>9</sup> Galaxy filed a waiver request of the new ownership rules due to its cognizable interest in nine stations in the Syracuse, New York Arbitron Metro, six of which are in the FM service. According to the BIA's Media Access Pro Radio Analyzer Database, there are currently 41 commercial and noncommercial radio stations licensed to communities, in, or designated as "home" to, the Syracuse, NY Arbitron Metro. Therefore, in a market this size, the Commission's rules permit one licensee to have a cognizable interest in up to seven commercial radio stations, no more than four of which may be in the same service (AM or FM). Pursuant to the Multiple Ownership Order, Galaxy's Syracuse cluster was grandfathered because it complied with the prior version of the rules using the contour-overlap methodology.<sup>10</sup>

The Modification Application requested a move from one community in the Syracuse Arbitron Metro (Oswego) to another (Granby) also in the Metro. Note 4 of the revised ownership rules provides, *inter alia*, that the new rules will apply to all applications "for minor changes to existing stations that implement an approved change in an FM

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<sup>8</sup> *Prometheus Radio Project, et al. v. FCC*, No. 03-3388 (3d Cir. Sept. 3, 2004).

<sup>9</sup> *Revised FCC Forms 301, 314, and 315 Approved and Available For Use; Media Bureau Announces End to Freeze on the Filing of Forms 301, 314, and 315 for Commercial Radio Stations*, Public Notice, DA 04-3204 (rel. Oct. 8, 2004).

<sup>10</sup> Multiple Ownership Report at ¶ 484.

station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties.”<sup>11</sup>. Although the Commission's Multiple Ownership Order provided absolutely no explanation as to why the grandfathered status of a non-compliant cluster would be implicated by a minor modification application to change a station's community of license from one community in an Arbitron metro to another, Galaxy requested a waiver of the new ownership rules so that the Modification Application could be processed without forcing Galaxy to forfeit its grandfathered status. On March 23, 2006, the Media Bureau issued the Dismissal Letter denying the Waiver Request and dismissing the Application. The Dismissal Letter is eligible for review because the denial of the waiver request and dismissal of the Modification Application contains an interpretation of Note 4 to the multiple ownership rules that has not been supported. Further, the precise issue raised by the Waiver Request is before the Commission in pending petitions for reconsideration of the Multiple Ownership Order but has not yet been addressed by the Commission.

## **II. Discussion**

### **A. The Issue Presented By the Waiver Request Involves A Question Which Is Presently Before, But Has Not Been Resolved By, The Commission.**

The Multiple Ownership Order expressly afforded grandfathered status to those licensees that acquired and operated stations pursuant to the former contour-overlap analysis because it recognized that forcing divestiture “would unfairly paralyze parties who

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<sup>11</sup> 47 C.F.R. § 73.3555, Note 4.

bought stations in good faith in accordance with the Commission's rules.”<sup>12</sup> The Commission also acknowledged that licensees of non-complaint combinations should be able to maintain the value of stations they acquired in reliance on Commission rules and orders.<sup>13</sup>

The main purpose of Note 4 to the Multiple Ownership Rules is to set forth those assignment and transfer and modification applications to which the revised multiple ownership rules will not be applied so as to require existing licensees with grandfathered clusters to divest stations. However, as explained above, Note 4 also sets forth certain application to which the new rules will be applied. These include “all applications for new stations, all other applications for assignment or transfer, all applications for major changes to existing stations, and applications for minor changes to existing stations that implement an approved change in an FM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties.”<sup>14</sup> The only explanation the Commission provides in the Multiple Ownership Order for placing any limitation on the ability of the licensee of a grandfathered cluster of stations to modify the facilities of its Stations is that “modification of the facilities of a station in grandfathered combination will be prohibited if the proposed modification would create a new violation of the ownership rules.”<sup>15</sup> As noted, the community change at issue here – from one community in the metro to another – creates no new violation of the ownership rules. Nonetheless, the Bureau has interpreted the rules

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<sup>12</sup> *Multiple Ownership Order* at § 484

<sup>13</sup> *Id.*

<sup>14</sup> 47 CFR § 73.3555 Note 4.

<sup>15</sup> *Multiple Ownership Order* at N. 1033.

to require the dismissal of Galaxy's Modification Application. In contrast, a licensee that is part of a grandfathered cluster that is seeking to make facilities improvements that do not involve a community of license change but could result in a large increase in service and a significantly improved competitive position would not be required to demonstrate compliance with the multiple ownership rules under Note 4. This disparity exemplifies precisely the arbitrariness of the Bureau's decision in the Dismissal Letter.

By making a determination *at this time* that Galaxy is not entitled to a waiver of Note 4 of the Commission's ownership rules to implement the WTKV community change, the Bureau has prejudged the outcome of certain Petitions for Reconsideration pending before the Commission in Docket Number 02-277 which raise the precise question raised in Galaxy's Waiver Request. In particular, both Entercom Communications Corp. and Great Scott Broadcasting, Inc. filed Petitions for Reconsideration requesting the Commission to clarify that Note 4 should not be applied to require applicants, such as Galaxy, whose minor change applications do not result in new violations of the multiple ownership rules to demonstrate compliance with the rules. Other parties have filed comments in support of these petitions. At a minimum, the Commission should reinstate the Modification Application pending its consideration of the petitions for reconsideration of the Multiple Ownership Order that request the Commission to clarify the language in Note 4.

**B. The Dismissal Letter Fails to Provide An Adequate Basis for the Denial of the Waiver Request and Dismissal of the Application.**

The Media Bureau gave the following justification for its decision in the Dismissal Letter:

“Potential ownership issues are not considered in reallocation rulemakings. Rather, ‘[i]t is established policy to consider such issues in conjunction with the applications to implement the reallocation. This unambiguous policy anticipates that, at the application stage, the issue of non-compliance with Section 73.3555 may arise, but also permits a licensee to divest other interests by the time the modification application is filed.’”<sup>16</sup>

However, the Bureau failed to recognize an important fact: at the time Galaxy filed its Modification Application to implement the authorized change of community, *divestiture would not have been required*. The new Arbitron-based local radio ownership rules were not in effect at the time of the filing of Galaxy’s Modification Application due to the Third Circuit’s stay. The outcome of the appeal was unknown. Further, Galaxy was aware that there were two Petitions for reconsideration and clarification of the multiple ownership rules pending that present compelling arguments as to why the language in Note 4 should be revised to make clear that the local radio ownership rule will not be applied to minor change applications such as the Modification Application which involve implementation of a move from one community in an Arbitron metro to another community in the metro and which do not create a new violation of the multiple ownership rules. Thus, at the time of its filing there were no definitive standards establishing that the Modification Application was not in compliance with the rules. The dismissal of the Modification Application was contrary to the longstanding principal of administrative law that “[E]lementary fairness

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<sup>16</sup> Dismissal Letter at 3 (citations omitted).

requires clarity of standards sufficient to apprise an applicant of what is expected.”<sup>17</sup>

Elementary fairness thus requires review of the dismissal of the Modification Application particularly in light of the pendency of two Petitions for Reconsideration involving the precise question at issue in the Bureau’s decision.

Also, despite the Bureau’s claim in the Dismissal Letter that potential ownership issues are not considered in reallocation rulemakings, the Bureau has previously recognized in such proceedings that ownership issues may be sufficient to constitute “unforeseen circumstances” allowing the consideration of counterproposals put forth by the original proponent.<sup>18</sup> In *Springfield*, the Bureau accepted a counterproposal in light of the fact that adoption of the original proposal would have resulted in the proponent’s violation of the new ownership rules. Not only did the Bureau permit consideration of the counterproposal, it agreed to reinstate the original proposal when the ownership rules were subsequently stayed by the Third Circuit, and proceeded to adopt the original proposal in that case.

Additionally, the Commission has acknowledged in at least one instance that the complications which arise as a result of the transition period when the new ownership rules

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<sup>17</sup> *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir. 1975). See also *Communications and Control v. FCC*, 374 F.3d 1329, 1336 (D.C. Cir. 2004) (finding that dismissal of an application without providing the applicant an opportunity to correct an error was a departure from regular Commission practice and rendered the agency’s rationale arbitrary and capricious). See generally *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1996). As the D.C. Circuit observed in *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985), “when the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration.”

<sup>18</sup> See *Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, 18 FCC Rcd 25628 (2003) (“*Springfield*”).

went into effect may necessitate grant of a waiver in certain circumstances.<sup>19</sup> In *White Park Broadcasting, Inc.*, the Commission stated that “grant of the waiver is based on the unique facts presented by this case, which arise from the Commission’s transition to the applicability of the new multiple ownership rules on September 3, 2004.”<sup>20</sup> Similar transition issues are present in this case.

Despite the Bureau’s claims in the Dismissal Letter, Galaxy is not asking for an amendment of the multiple ownership rules without notice and comment. On the contrary, Galaxy is requesting an acknowledgement of the special circumstances and public interest considerations that exist as a result of the complications posed by transitioning to the new ownership rules.

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### **III. Conclusion**

For all the reasons set forth above, Galaxy respectfully requests that at a minimum, Galaxy’s Modification Application be reinstated pending resolution of the pending petitions for reconsideration that request clarification of Note 4. Alternatively, Galaxy requests grant of the Waiver Request, and reinstatement and grant of the Modification Application.

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<sup>19</sup> *White Park Broadcasting, Inc., WVAA(AM), Burlington, Vermont, Facility ID No. 73613, BAL-20041029AHP, Application for Assignment*, DA 06-548 (rel. Mar. 9, 2006). (finding that the two year waiting period applied to changes in “home” market designations should be waived).

<sup>20</sup> *Id.* at n.24.

Respectfully submitted,

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