

EXHIBIT 28

Amendment to Request for Waiver of Section 73.213(a)(2)

As noted in response to Section I, Item 4, Exhibit 1, as a result of the destruction of the World Trade Center ("WTC") by terrorists on September 11, 2001, noncommercial broadcaster New York Public Radio ("NYPR", formerly WNYC Radio) lost the main transmitting facility for its station WNYC-FM, New York, New York. On November 20, 2001, NYPR filed an application for a construction permit to operate the station at 6kW from the ESB (the "6.0 kW Application"). Because the proposed facility slightly increased caused interference to CBS Radio Stations Inc. ("CBS") station WZMX(FM), Hartford, Connecticut, the 6.0kW Application contained a request for waiver of the short spacing rule found in Section 73.213(a)(2) of the FCC's Rules. In response, on December 20, 2001, CBS filed an Informal Objection to the 6.0kW Application. The 6.0kW application, as well as the Informal Objection and related pleadings, remain pending. In the interim, for nearly a decade now, WNYC-FM has been operating at 4kW from the Empire State Building ("ESB") pursuant to a series of special temporary authorizations.

Pursuant to a Settlement Agreement just reached between NYPR and CBS, NYPR now amends its 6.0kW Application to specify operation at 5.2kW. NYPR also agrees to reimburse CBS for its legitimate and prudent expenses incurred in preparing, filing and prosecuting the Informal Objection, up to

\$85,000. In exchange, CBS has agreed to withdraw its Informal Objection, and consented to an indirect modification of the WZMX(FM) license by grant of the instant application. Given the proposed reduction in operating power, coupled with CBS's withdrawal of its Informal Objection and consent to the WZMX(FM) license modification, NYPR urges the Commission to grant the requested waiver and underlying permit.

Commission decisions issued since filing of the 6.0kW Application support grant of the short spacing waiver. First, in February 2005, the FCC granted a modification of KBNH(FM), Homedale, Idaho which required a waiver of the Section 73.215(e) minimum separation requirements toward KCIX(FM), Garden City, Idaho, as well as a modification of the KCIX license—all over the objection of the KCIX licensee. In reaching its decision, the Commission determined that the KBNH(FM) licensee had justified grant of the waiver and the construction permit by showing: The unavailability of the station's present site; the unavailability of suitable non short spaces sites and that the proposed site was the least short spaced site available; and that grant of the requested waiver was otherwise in the public interest.¹

One month later, in March 2005, the agency granted the Trustees of Columbia University a waiver of the contour overlap rule and a construction permit to allow it to construct a facility on the ESB for WKCR-FM, New York, New York, which had lost its WTC site in the terrorist attacks. In granting waiver of the Section 73.509 contour overlap rule to allow increased interference by WKCR-

¹ See R&S Media, Memorandum, Opinion and Order (rel. Feb. 14, 2005).

FM to WSOU(FM), South Orange, New Jersey, the FCC relied on three primary factors: The “exceptional circumstance” of the terrorist attacks; the fact that operation from the ESB site would create the smallest increase in overlap to WSOU(FM) of all sites from which WKCR-FM could replicate its WTC coverage;² and the fact that the licensee of WSOU(FM) did not object to the waiver request or construction permit application.

As noted below, the circumstances present in the KBNH and WKCR-FM cases exist in this case, and similarly justify waiver of the short spacing rule and grant of the underlying application. Like WKCR-FM, non commercial station WNYC-FM lost its site in the terrorist attacks. Additionally, as detailed in the Technical Exhibit:

- As the tallest building in Manhattan, the ESB is the only location from which WNYC-FM can provide a signal comparable to that which it provided from its WTC facility.³ None of the other buildings are nearly as tall, nor can they accommodate broadcast facilities. Moreover, location elsewhere would likely increase the short spacings and would result in harmful intermodulation.⁴

Technical Exhibit at 2, 7-9.

² The overlap increase was 2.7% or 149,077. See Letter from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau to Joseph A. Godles (Mar. 4, 2005).

³ All but two of the Class B commercial stations located on the ESB broadcast at effective radiated power levels above 5.2kW.

⁴ Reclassification of the existing antenna as directional for WNYC-FM would provide no allocations advantage. To use the directional characteristics of the antenna, which are very minor, WNYC-FM would have to employ the peak antenna gain rather than the RMS non-directional antenna gain. This would result in a lower transmitter output power. In the end, the RMS effective radiated power would be only slightly higher than the 4kW at which the station is currently operating. See Technical Exhibit at 10.

- At 5.2 kW, the increase in predicted interference to WZMX(FM) is less than one percent of the population within the station's 54 dBu coverage contour, and no interference within the WZMX(FM) 60 dBu coverage contour is predicted. Furthermore, as stated in the affidavit of Jo Ann Haller, CBS's Senior Vice President and General Counsel, appended to the Joint Request for Approval of Settlement Agreement, CBS has agreed to a modification of the WZMX(FM) license to reflect the FCC's grant of the instant application. Technical Exhibit at 9. Note that at this power the WNYC-FM will reach 32,000 fewer people than it did from the WTC site, still a significant loss especially for a listener-supported non commercial station.
- Operation of WNYC-FM at 5.2 kW from the ESB will result in a net decrease in total caused and received interference from the WTC license site of 6,000 persons in an area of 355 square kilometers. Technical Exhibit at 10.

Finally, as in the WKCR-FM situation, there is no longer any objection to the waiver and construction permit proposed in this application. In fact, CBS has agreed to the license modification forced on the KCIX(FM) licensee over its objection in the KBNH case. Thus, although grant of the proposed construction permit will require a waiver of Section 73.213(a)(2), the balance of the equities, as discussed above, justify grant of the waiver, and Commission precedent supports such an outcome.