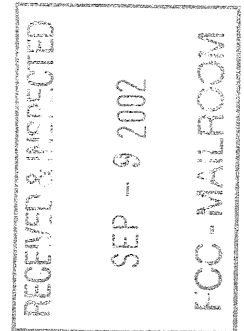


FEDERAL COMMUNICATIONS COMMISSION

**445 12th STREET, S.W.
WASHINGTON, DC 20554**

September 5, 2002

In Reply Refer to:
1800B3



Mark N. Lipp, Esq.
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Washington, D.C. 20554

In re: **WLVG(FM), Center Moriches, NY**
Facility ID No. 54519
Way Broadcasting, Inc.

Request for Waiver of 47 C.F.R.
§ 73.1125

Dear Mr. Lipp:

This letter refers to the February 6, 2001 request, filed on behalf of Way Broadcasting, Inc. ("WBI"), licensee of Station WLVG(FM), Center Moriches, New York, for waiver of the Commission's main studio location rule, 47 C.F.R. § 73.1125. WBI seeks authority to collocate the WLVG(FM) studio with that of co-owned station WNYG(AM) in Babylon, New York, 29 miles from the reference coordinates of the center of Center Moriches. For the reasons set forth below, we deny the waiver request.

Waiver request. In support of its waiver request, WBI indicates that it currently leases studio facilities for WLVG(FM). WBI also states that it is involved in a time brokerage agreement ("TBA") pursuant to which another entity provides programming for the station, although it retains two full-time employees to attend to the station's daily responsibilities. The programmer relocated its production facilities to another location in March of 2001, which left WLVG(FM)'s current studio with "a large area of unused space." WBI indicates that it could more efficiently use its employees to perform their responsibilities at WLVG by co-location with its existing Babylon station.

WBI claims that, in an attempt to comply with Section 73.1125 yet economize its WLVG(FM) staffing, it contacted numerous realtors to identify a new location within the principal community contour or within 25 miles of Center Moriches' reference coordinates. While its search uncovered numerous locations, none could be used for a studio location for reasons

including but not limited to, the owner did not want to lease the space for a radio station, the total square footage was too small for a main studio, the stairways and floor designs

of the locations were too small to store the station's equipment; inadequate (or no) parking, or the rent was prohibitively expensive.

Waiver request, at 1-2.¹

WBI therefore seeks a waiver of Section 73.1125 on the following grounds: (1) its extensive efforts to locate its main studio within 25 miles of Center Moriches have not been successful; (2) the deviation from the rule will be *de minimis*, as the Babylon studio location will be only 4 miles beyond the limitation set forth in Section 73.1125; (3) the Babylon studio location will be accessible to Center Moriches residents because there is a "main highway," Route 27, tying Center Moriches to several nearby communities, including Babylon; (4) the rule would provide economies of scale and administrative efficiency for the licensee, ameliorating the "administrative and financial burden" of operating two main studios in close geographic proximity;² and (5) waiver would be in the public interest because resources will not be wasted "on a large unneeded studio lease in an area where rents are high." Waiver request, at 4. WBI continues that it will "maintain an active presence" in Center Moriches because the WLVG(FM) antenna site will not change and the station's broadcast signal will continue to reach its community of license. Furthermore, claims WBI, it intends to continue to provide local programming and to sponsor community service events for Center Moriches, and it will establish toll-free telephone line from Center Moriches to the Babylon studio, as required by Section 73.1125(e).

Discussion. Pursuant to Section 73.1125, a broadcast station's main studio must be located either (1) within that station's principal community (70 dBμ) contour; (2) within the principal community contour of any other broadcast station licensed to its community; or (3) within 25 miles of the reference coordinates for its community of license.³ In relaxing the studio location requirement, the Commission proposed to strike a balance between reducing the burdens on licensees by expanding the area in which most licensees may locate their main studios while maintaining a "close connection" to their communities.⁴ The clear rules adopted in the 1998

¹ WBI attaches an affidavit from Jack McCloy, General Manager of WBI's Babylon station WNYG(AM) attesting to these efforts and listing the realtors and real estate agents used and the locations within 25 miles of Center Moriches identified as unavailable or unusable.

² WBI cites *Board of Visitors of James Madison University*, 8 FCC Rcd 1751 (Hearing Designation Order, Audio Services Division, Mass Media Bureau 1993) ("*James Madison University*") for the proposition that "administrative efficiency is justification to waive [the] main studio rule." It also cites the Commission's 1998 relaxation of the main studio rule, *Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Report and Order*, 13 FCC Rcd 15691 (1998) (1998 *Main Studio R&O*) in which it claims the Commission amended Section 73.1125 because the previous rule, restricting the area of location to a station's principal community contour, "may be disproportionately restrictive and burdensome for smaller stations." As a minority broadcaster, WBI states, it could greatly benefit from consolidation of its studios to one location. Waiver request, at 4.

³ See 1998 *Main Studio R&O*.

⁴ *Id.*, 13 FCC Rcd at 15694.

Main Studio R&O were designed to be easy to administer and maintain, and the Commission predicted that the revisions should reduce main studio waiver requests.⁵

WBI's waiver request clearly is predicated primarily on the benefits of economic efficiency, *i.e.*, consolidating operations at an existing studio and eliminating the expense of maintaining a separate studio for WLVG(FM) when the station is operated pursuant to the TBA and does not need significant production capability.⁶ The precedent WBI cites to support its proposal that economic efficiency constitutes sufficient ground for waiver of Section 73.1125, however, is inapposite. *James Madison University* involved a noncommercial educational applicant, not a commercial station such as WLVG(FM); it is well established, as evidenced by such cases as *James Madison University*, that the Commission will waive the main studio location requirement for noncommercial educational state and regional public radio networks proposing "satellite" operations⁷ based on the limited funding available for noncommercial educational stations. It has not accorded similar treatment to commercial stations,⁸ and in fact the Commission has specifically rejected an argument based on economic efficiency in the context of a waiver requested by a commercial station.⁹

Similarly, we find unpersuasive WBI's citation to the 1998 *Main Studio R&O* for the proposition that its relief should be granted because consolidation of studio facilities is consistent with prior Commission findings reducing the burden on smaller broadcasters. In that rule making proceeding, the Commission did seek to provide additional flexibility to smaller stations and those owning multiple stations, and it did so by relaxing the geographic limitation on studio location contained in Section 73.1125. The Commission in no way implied that it would look favorably upon requests for relief *beyond* that provided by the amended rule, and in fact stated that the rule relaxation should reduce the number of waiver requests.

Additionally, WBI cites no authority for waiving Section 73.1125 to permit WLVG(FM) to relocate its studio from Center Moriches (1990 population 5,947) to larger Babylon (1990 population 12,249) at a location more than 25 miles from Center Moriches. To the contrary, notwithstanding WBI's claim that it intends to continue airing "local programming," grant of the

⁵ *Id.*

⁶ WBI makes no claim that its present studio location will become unavailable or that it must vacate that facility for any reason. The additional space simply is not necessary given that the programming for WLVG(FM) is being created and provided by the time broker.

⁷ A "satellite" station meets all of the commission's technical rules. However, it originates no programming and instead rebroadcasts the programming of a "parent" station. See *Amendment of the Multiple Ownership Rules, Memorandum Opinion and Order*, 3 RR 2d 1554, 1562 (1964).

⁸ See 1998 *Main Studio R&O*, 13 FCC Rcd at 15,695 n. 18 ("noncommercial stations have been given distinct treatment from commercial stations.")

⁹ *Maines Broadcasting, Inc.*, 8 FCC Rcd 5501, 5502 (1993) ("Given the flexibility and efficiency accorded licensees under the studio rules revisions, coupled with the importance of the main studio in our broadcast licensing scheme, we find that Maines' economic argument is insufficient to justify a waiver.") See also *PZ Entertainment Partnership, L.P.*, 6 FCC Rcd 1240 (1991) (departure from licensing rules on economic grounds would be "inappropriate").

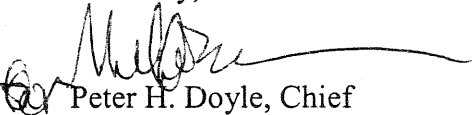
proposal would appear to contravene WBI's obligation under 47 U.S.C. § 307(b) to maintain the connection between WLVG(FM) and its community.¹⁰

Finally, we find that WBI's attempt to document its search for suitable studio locations within the geographic parameters specified in Section 73.1125 is insufficient. That submission, an affidavit by the General Manager of WNYG(AM), not someone ostensibly connected with WLVG(FM) or Center Moriches in any way, simply lists realtors/real estate agents and sites with (presumably) a contact person and telephone numbers. An applicant seeking waiver must plead with particularity the facts and circumstances that warrant such action.¹¹ The list provided by WBI here does not provide the detail or particularity necessary either to determine the adequacy of WBI's efforts or to accept WBI's conclusion.¹²

In sum, we find that the requested waiver will not enhance the public interest or benefit the residents of Center Moriches but is intended principally for WBI's private pecuniary benefit. Thus, there is no good cause for waiver.

Accordingly, the request of Way Broadcasting, Inc. for waiver of 47 C.F.R. § 73.1125 IS DENIED.

Sincerely,



Peter H. Doyle, Chief
Audio Division
Media Bureau

¹⁰ See, e.g., *Roberts Communications, Inc.*, 11 FCC Rcd 1138 (1996) (presumption that applicant will serve its designated community if, among other things, its studio location complies with Section 73.1125).

¹¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D. C. Cir. 1969); *Rio Grande Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968).

¹² WBI's submission does not, for example, contain a discussion of the criteria or parameters by which WBI sought and evaluated property for location of the WLVG(FM) studio, a statement from any of the listed realtors, a description of any of the listed properties, or a discussion of why each specific property was rejected. This is intended merely as an illustrative list of means available to WBI to support its contention that there is no property anywhere within 25 miles of the reference coordinates for Center Moriches that is suitable for an FM broadcast studio.