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ORIGINAL

April 24, 2006

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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
Attn: Chief, Media Bureau

Re: Request for Waiver of Filing Freeze and
Petition for Rulemaking to Amend the FM Table of Allotments

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 request for a waiver of the freeze on the acceptance and consideration of new Petitions for Rule Making to amend the FM Table of Allotments (the "Waiver Request"). Included at Attachment A to the Waiver Request is Galaxy's Petition for Rule Making seeking an amendment to the FM Table of Allotments to reallocate Channel 288A to Oswego, New York from Granby, New York. In the alternative, should this Waiver Request be denied, Galaxy has filed under separate cover an Application For Review requesting review of the Audio Division's decision to deny Galaxy's waiver request 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. A copy of the Application for Review is included with the Waiver Request at Attachment B.

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

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

RECEIVED

APR 24 2006

In the Matter of)	
)	Federal Communications Commission
Amendment of Section 73.202(b),)	Office of Secretary
Table of Allotments)	
FM Broadcast Stations)	MB Docket No. _____
(Granby and Oswego, New York))	RM - _____

To: Chief, Media Bureau

REQUEST FOR WAIVER

Galaxy Syracuse Licensee LLC, (“*Galaxy*”) licensee of broadcast station WTKV(FM), Oswego, New York (Facility ID No. 24131) (the “*Station*”), by its attorneys, and pursuant to Section 1.3 of the Commission’s Rules, 47 C.F.R. § 1.3, hereby submits this request for waiver (the “*Waiver Request*”) of the freeze on the acceptance and consideration of new Petitions for Rule Making to amend the FM Table of Allotments¹ for the reasons further described herein. Upon grant, Galaxy respectfully requests consideration of the Petition for Rule Making (the “*Petition for Rule Making*”), attached hereto at Exhibit A, to amend the FM Table of Allotments to identify Oswego, New York as the community of license for Channel 288A. In the alternative, should this Waiver Request be denied, Galaxy has filed the Application For Review

¹ The freeze was adopted in the Notice of Proposed Rule Making issued by the Commission on June 14, 2005 in its proceeding to consider changes for making amendments to the FM Table of Allotments and other modifications to broadcast facilities. *See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes Of Community of License in the Radio Broadcast Services*, Notice of Proposed Rule Making, 20 FCC Rcd 11142 (rel. Jun. 14, 2005) (“*NPRM*”).

attached hereto as Exhibit B, requesting review of the Audio Division's decision to deny Galaxy's waiver request of the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, and dismissing Galaxy's FCC Form 301 modification application to implement the change in community of license for WTKV.²

Background

On August 1, 2000, 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 (the "*Report and Order*").³ The Report and Order was subsequently challenged by a third party and nearly two years later, the Audio Division affirmed its decision.⁴

During the intervening two-year period, the Commission issued revised multiple ownership rules changing the definition of the presumptive radio market used to determine

² Letter to Galaxy Communications, L.P. c/o Sally A. Buckman, Esq., from Peter H. Doyle, Chief, Audio Division, Media Bureau, DA 06-644, Ref. No. 1800B3-KV (rel. Mar. 23, 2006) (the "*Dismissal Letter*").

³ *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 "*Report and Order*"), *affirmed on recon.*, Memorandum Opinion & Order, 18 FCC Rcd 17615 (2003).

⁴ See 18 FCC Rcd 17615.

compliance with its local radio ownership rules.⁵ 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.⁶

While the new multiple ownership rules remained pending on appeal to the Third Circuit, they were the subject of a stay. *Prior to the lifting of this stay*, Galaxy filed a modification application on FCC Form 301 to implement the change authorized by the Report and Order. In accordance with the Report and 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.⁷ Galaxy's Modification Application was pending when the stay of the local radio ownership rule was lifted by the Third Circuit on September 3, 2004.⁸

Upon implementation of the new rules, the Media Bureau required the filing of amendments to all pending radio broadcast applications, including Galaxy's Modification Application, to require the demonstration of compliance with the new local radio ownership rule or to request a waiver.⁹ Galaxy is the licensee of six FM stations in the Syracuse market. Galaxy's ownership of these stations, which complied with the previous contour-based multiple

⁵ 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*”).

⁶ Multiple Ownership Order at ¶ 274, *et seq.*

⁷ See FCC File No. BPH-20031209ABV (the “*Modification Application*”).

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

⁹ *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).

ownership rules, exceeds the applicable limits under the new rules and is therefore grandfathered.¹⁰ 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 generally sets out those applications which licensees may file without losing grandfathered status. However, the note also provides, inter alia, that the revised ownership rules will apply “to applications for minor changes to existing stations that implement an approved change in an FM station’s community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties.”¹¹ Although the Commission’s Multiple Ownership Order provided absolutely no explanation as to why the grandfathered status of a non-compliant station cluster would be implicated by a minor change application to implement a change in 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 lose its grandfathered status. By letter dated March 23, 2006, the Media Bureau denied the waiver request and dismissed the pending Modification Application.

¹⁰ According to the BIA’s Media Access Pro Radio Analyzer Database, there are 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).

¹¹ 47 C.F.R. § 73.3555 Note 4; Multiple Ownership Report at ¶ 484.

Grant of Galaxy's Waiver Request is Warranted
Due to the Unique Circumstances Presented and Will Serve the Public Interest.

As a result of the Bureau's dismissal of its Modification Application, Galaxy has been forced into an untenable situation. To implement the improvements in the facilities and service for Station WTKV Galaxy would have to divest at least two of its FM stations serving the Syracuse market. This "Hobson's Choice" exists despite the fact that the proposed modification of Station WTKV does not result in any increased concentration of ownership because both Oswego (the existing community of license) and Granby (the new community of license) are in the Syracuse Arbitron Metro. Galaxy clearly has no desire to divest two of its stations in order to implement the Report and Order. Therefore, it respectfully requests permission to file a new Petition for Rule Making to request a change in the FM Table of Allotments to reinstate the allotment of Channel 288A to Oswego, New York, to effectively abandon the Granby Report and Order and return to the *status quo ante* to prevent the loss of its grandfathered status. This Waiver Request is being submitted to request a waiver of the filing freeze implemented by the Commission in the NPRM.

The long procedural history associated with Galaxy's Modification Application and the intervening change in the Commission's multiple ownership rules provides ample justification for special treatment in this instance.¹² Despite the Bureau's claim in the Dismissal Letter that

¹² See, e.g., *White Park Broadcasting, Inc., WVAA(AM), Burlington, Vermont, Facility ID No. 73613, BAL-20041029AHP, Application for Assignment of License*, DA 06-548 (rel. Mar. 9, 2006) (granting a waiver of the two-year waiting period specified in the new multiple ownership rules for changes made to market definitions by BIA); *Hilo Broadcasting, L.L.C.*, 20 FCC Rcd 13582 (2005) (granting a waiver of the contour overlap requirements where such overlap occurs solely over water).

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.¹³ In *Springfield*, the Bureau accepted a counterproposal from the original proponent of a reallocation that was based on 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. Galaxy deserves the same treatment by the Bureau in this instance. The only way Galaxy can accomplish the same result, however, is through the submission of a new Petition for Rule Making to amend the FM Table of Allotments to request reinstatement of the original community of license for WTKV—Oswego, New York. A grant of this Waiver Request is necessary to permit timely consideration of this Petition.

The Bureau has previously permitted the abandonment of changes to the FM Table of Allotments when the proponent has requested such treatment.¹⁴ In *Taccoa*, the Bureau adopted an allotment order to amend the FM Table, but on reconsideration, the proponent requested review of a counterproposal and asked to withdraw its interest in any change to the FM Table if such counterproposal could not be granted. The Bureau determined that the counterproposal was technically deficient and agreed to set aside the original channel reallocation and license modification—effectively deleting the previously approved change to the FM Table.¹⁵ Galaxy is

¹³ See *Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, 18 FCC Rcd 25628 (2003) (“*Springfield*”).

¹⁴ *Taccoa, Sugar Hill, and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (2001) (“*Taccoa*”).

¹⁵ See *id.*

requesting the same treatment here—permission to have the Granby allotment set aside and reinstatement of Oswego as its community of license.

Due process considerations also support the grant of Galaxy’s waiver request. 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.’”¹⁶

However, the Media 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. Therefore, at the time of its filing, Galaxy had no reason to anticipate that implementation of the Modification Application would jeopardize the grandfathered status of Galaxy’s Syracuse cluster. “[E]lementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected.”¹⁷

Furthermore, grant of the Waiver Request will not frustrate the Commission’s goals described in the NPRM. To the contrary, Galaxy’s Modification Application illuminates the

¹⁶ Dismissal Letter at 3 (citations omitted).

¹⁷ *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.”

many problems identified by the Commission in the NPRM when applicants request amendments to the Table of Allotments using the current two-step process (first, a rulemaking proceeding; second, a modification application).¹⁸ Grant of the Waiver Request will permit the initiation of a proceeding to change the Table of Allotments solely to return the table to the status quo. The Station is currently licensed to Oswego. The move to Granby has not yet been implemented. No change may be made to the Station's license as a result of the decision in the Dismissal Letter. Therefore, a lifting of the freeze for the purpose of accepting Galaxy's Petition for Rule Making will permit Galaxy to continue operation at Oswego in compliance with Commission rules, maintain its service to its current listeners and retain its grandfathered status under the new multiple ownership rules.

For all of the foregoing reasons, Galaxy respectfully requests grant of its Waiver Request and consideration of the Petition for Rule Making attached hereto as Exhibit A. In the alternative, if the Waiver Request is denied, Galaxy requests consideration of the Application for Review of the Dismissal Letter attached hereto as Exhibit B.

¹⁸ As the Commission stated in the NPRM, “[i]t appears that a change in Commission procedures to permit the filing of city of license modifications as minor change applications could significantly compress the current lengthy and inefficient two-step licensing process.” NPRM at ¶ 24.

Respectfully submitted,

GALAXY SYRACUSE LICENSE LLC

By: Sally A. Buckman/JDP

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Katrina C. Gleber

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Dated: April 24, 2006

Its Attorneys

EXHIBIT A

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

In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. _____
Table of Allotments) RM - _____
FM Broadcast Stations)
(Granby and Oswego, New York))

To: Chief, Audio Division

PETITION FOR RULE MAKING

Galaxy Syracuse Licensee, LLC, (“*Galaxy*”) licensee of radio station WTKV(FM), Oswego, New York, by its attorneys and pursuant to Section 1.420(i) of the Commission’s rules, hereby submits a Petition for Rule Making seeking an amendment to the FM Table of Allotments to reallocate Channel 288A to Oswego, New York from Granby, New York. This amendment would simply be a procedural revision to the FM Table of Allotments to reflect the status quo. WTKV is currently licensed to Oswego and has been since the Station began operating in 1973. In 2000, Galaxy filed a Petition for Rule Making to change the allotment for WTKV from Oswego to Granby. The proposal was granted in 2001, and became final in 2003.¹ However, Galaxy’s application to implement the approved allotment change was dismissed upon denial of a waiver of the

¹ *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 Report and Order*”), affirmed on recon., Memorandum Opinion & Order, 18 FCC Rcd 17615 (2003) (“*Granby Order*”).

new multiple ownership rules now in effect.² Therefore, this Petition for Rule Making is being filed to request the initiation of a Notice of Proposed Rule Making proposing to modify the FM Table of Allotments to reallocate Channel 288A to Oswego.

DISCUSSION

As explained in the attached Request for Waiver, the community of license change proposed by Galaxy is warranted in this case for a number of reasons. Restoration of the status quo is necessary because Galaxy's application to modify the facilities of WTKV was dismissed based on the Bureau's finding that the application failed to comply with the Commission's revised multiple ownership rules. Oswego is an identifiable community that is larger in population than Granby, the new allotment is mutually exclusive with the old allotment, and such reallocation will reinstate the previous community of license assigned for this channel, and the community which the Station has served for over thirty years.

I. Oswego is an established community with a larger population than Granby, New York.

Under Section 307(b) of the Communications Act of 1934, as amended (the "*Act*"), the Commission may award licenses to those applicants who propose to serve a particular community. According to the 2000 Census, the City of Oswego has a population of 17,954 persons in 8,080 households, whereas Granby has a population of 7,009 persons in 2,869 households. Oswego has long been recognized as a valid community of license for WTKV as well as four other broadcast stations currently allotted to this community, two noncommercial educational stations (WNYO and

² Letter to Galaxy Communications, L.P. c/o Sally A. Buckman, Esq., from Peter H. Doyle, Chief, Audio Division, Media Bureau, DA 06-644, Ref. No. 1800B3-KV (rel. Mar. 23, 2006) (the "*Dismissal Letter*").

WRVO), and two commercial stations (WOLF-FM and WSGO). Such service by other stations should not preclude the Bureau from reinstating Oswego as the community allotted to Channel 288A as well, however.³ Thus, based on relevant precedent, the Commission should confirm that Oswego is a Section 307(b) community entitled to an additional local transmission service.

II. The New Allotment Is Mutually Exclusive With the Existing Allotment.

WTKV is currently licensed to operate on channel 288A (105.5 MHz) at Oswego. However, pursuant to the Granby Order, Channel 288A was allotted to Granby. No transmitter site changes will be necessary upon reallocation to Oswego. Such change would also have no effect on listeners in the community as WTKV is presently serving Oswego under its current license.

As the Engineering Statement of Cavell, Mertz and Davis, attached to this Petition as Exhibit A (“*Engineering Statement*”) demonstrates, Channel 288A can be allotted to Oswego in conformity with the minimum spacing requirements of Section 73.207(a) of the Commission’s rules. The minimum required spacing between co-channel Class A stations under the Commission’s rules is 115 kilometers (71 miles). 47 C.F.R. § 73.207(b). Because Oswego is located only 19.6 kilometers from Granby, the new allotment, while fully spaced, would be mutually exclusive with the existing allotment. See Engineering Statement at Table I. The reference coordinates for the Oswego allotment are 43-28-09 North/76-29-00 West. See Engineering Statement at 2. Galaxy

³ See, e.g., *Las Vegas, New Mexico*, 13 FCC Rcd 20182 (1998) (approving the addition of the fourth and fifth local services to Las Vegas, New Mexico); *Stillwater, Oklahoma*, 8 FCC Rcd 3046 (1993) (providing an additional local service to Stillwater, Oklahoma); *Amarillo, Texas*, 5 FCC Rcd 5416 (1990) (approving an additional local service allotment to Amarillo, Texas, as the community’s eighth local FM service).

recognizes that because the allotment at Oswego is short-spaced to the Canadian allotment for Channel 289 at Kingston, Ontario, Canada, concurrence from the Canadian government is required to permit the reallocation to Oswego. Engineering Statement at 2.

III. Public Interest Benefits Support the Reallocation to Oswego and Would Prevent a Loss of Service in the Syracuse Arbitron Metro.

While Galaxy's modification application to implement the Granby Order has been pending, WTKV has been operating pursuant to its current authorization which specifies Oswego as its community of license. Therefore, the requested allotment change is procedural in nature, and intended solely to unwind the allotment of Channel 288A to Granby to restore the status quo. The public interest would benefit from the administrative efficiency that would result in having the FM Table of Allotments accurately reflect the community of license for Channel 288A as Oswego. Further, because Galaxy has been unable to implement the Granby reallocation, the public is not deprived of any benefits that such reallocation would have generated. In other words, the public will continue to receive the same valuable service from WTKV that they have received since the Station began operating in 1973.

The Commission has previously permitted the abandonment of changes to the FM Table of Allotments when the proponent has requested such treatment.⁴ In *Taccoa*, the Bureau adopted an allotment order to amend the FM Table, but on reconsideration, the proponent requested review of a counterproposal and asked to withdraw its interest in any change to the FM Table if such counterproposal could not be granted. The Bureau

⁴ *Taccoa, Sugar Hill, and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (2001) ("*Taccoa*").

determined that the counterproposal was technically deficient and agreed to set aside the original channel reallocation and license modification—effectively deleting the previously approved change to the FM Table.⁵ Galaxy is requesting the same treatment here—permission to have the Granby allotment set aside and reinstatement of Oswego as its community of license. Procedurally, however, a new Petition for Rulemaking must be initiated in order to abandon the prior order.

For the reasons set forth above, it is respectfully requested that the Commission issue a Notice of Proposed Rule Making proposing to amend 47 C.F.R. § 73.202(b) by allotting Channel 288A to Oswego as set forth below:

	Channel Number	
Community	Present	Proposed
Oswego, New York	244A	244A, 288A
Granby, New York	288A	--

⁵ *See id.*

CONCLUSION

In light of the facts set forth above, the Commission is respectfully requested to issue a Notice of Proposed Rule Making proposing to reallocate Channel 288A from Granby to Oswego, New York.

Respectfully submitted,

GALAXY SYRACUSE LICENSE LLC

By: Sally A. Buckman / JDP
Sally A. Buckman
Katrina C. Gleber

Leventhal Senter & Lerman PLLC
2000 K Street, NW
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(202) 429-8970

Dated: April 24, 2006

Its Attorneys

Engineering Statement
PETITION FOR RULEMAKING TO AMEND §73.202(b)
TO CHANGE COMMUNITY OF LICENSE

prepared for
Galaxy Syracuse Licensee LLC
WTKV(FM) Ch. 288A Oswego, New York
Facility ID 24131

Introduction

Galaxy Syracuse Licensee LLC (“*Galaxy*”) is the licensee of WTKV(FM) (Ch.288A, Oswego, NY). With the instant Petition for Rulemaking, *Galaxy* seeks to abandon its proposed change of community of license for WTKV(FM) from Oswego, NY to Granby, NY.

Galaxy sought a change in community of license for WTKV(FM)(Ch. 288A) from Oswego, NY to Granby, NY by a Rule Making (MM Docket 00-169). Pursuant to the rulemaking Report and Order permitting *Galaxy* to proceed to change WTKV’s community of license from Oswego to Granby (RM-9953, MM Docket No. 00-169, released September 21, 2001 and September 5, 2003 on reconsideration), an application was filed to specify a new transmitter site approximately 17 km from the licensed site in order to encompass Granby with a principal community service contour. During the rulemaking and subsequent application process, the Commission’s policy and evaluation of multiple ownership issues changed from a contour overlap counting method to a geographic market counting method. By letter from the Commission of March 23, 2006 (DA-06-644, 1800B3-KV) *Galaxy’s* application to relocate WTKV was dismissed for failure to comply with the rules now governing ownership of multiple radio stations in the same market (Section 73.3555(a)).

Galaxy is stymied from implementing the change of the WTKV community of license from Oswego, NY to Granby, NY due to the change in rules governing ownership of multiple radio stations. The licensed WTKV site fails to provide principal community service to all of Granby.¹ *Galaxy* therefore seeks to modify the allotment table again to reflect Oswego, NY instead of

¹ Pursuant to §73.315 of the FCC Rules, a minimum field strength of 70 dBμ must be provided over the entire principal community to be served. In practice, coverage of 80% of the population or area is required. A 70 dBμ contour from the licensed WTKV(FM) facility, predicted pursuant to §73.313, encompasses 4,397 people and 67.1 square kilometers of the 7,009 people and 120.2 square kilometers in Granby, NY. This represents 62.7% of the population and 55.9% of the area of Granby.

Engineering Statement

(Page 2 of 3)

Granby, NY as the principal community for Ch. 288A and WTKV(FM). No change in WTKV's actual facility (BLH-19970819KC) is required to implement this remedy.

Allocation Considerations

The reference coordinates for the existing Ch. 288A Oswego, NY allotment are : North Latitude: 43° 28' 09" West Longitude: 76° 29' 00". As shown by the attached **Table I - Allocation Spacing Summary**, the existing Ch. 288A reference coordinates for Oswego meet all pertinent domestic minimum distance separation requirements. The use of Ch. 288A, either at Oswego, NY or Granby, NY is short-spaced to the Canadian allotment Ch. 289 for Kingston, ON. Unless some modification or site restriction is deemed to be warranted by the Commission, *Galaxy* respectfully requests that the existing Oswego, NY Ch. 288A allotment reference coordinates be used. Allotment coordination with Canada is also respectfully requested if necessary.

Request for Waiver of the Freeze on Changes of Communities of License

Galaxy recognizes that the Commission has placed a freeze on new petitions for rulemaking to amend the FM table of Allotments with the Notice of Proposed rulemaking in RM-10960 and MB Docket 05-210, released June 14, 2005. However, the circumstances surrounding the requested change in the table of allotments are peculiarly unique to WTKV's predicament, administrative in nature, and not subject to competing expressions of interest. WTKV is licensed to operate on Ch. 288A to serve Oswego, NY. Any competing proposal would be mutually exclusive with the existing WTKV facility. With the change in rules governing ownership of multiple radio stations, the Commission has essentially rescinded *Galaxy's* opportunity to change WTKV's community of license to Granby. *Galaxy* seeks only to restore the Table of Allotments in a timely manner to correctly reflect the licensed facility for WTKV(FM) as it serves Oswego, NY. *Galaxy* therefore respectfully requests a waiver of the freeze on new petitions for rulemaking to amend the FM table of allotments.

Engineering Statement

(Page 3 of 3)

Certification

I, Mark B. Peabody, hereby certify that the foregoing Engineering Statement was prepared by me or under my direction on behalf of *Galaxy Syracuse Licensee LLC* and that it is true and correct to the best of my knowledge and belief and that my qualifications are a matter of record with the Federal Communications Commission.



Mark B. Peabody April 21, 2006

Cavell, Mertz & Davis, Inc.
7839 Ashton Avenue
Manassas, VA 22030
703-392-9090

List of Attachments

Table I - Allocation Spacing Summary

Table I
ALLOCATION SPACING SUMMARY
 prepared for
Galaxy Syracuse Licensee LLC
 WTKV(FM) Ch. 288A Oswego, New York
 Facility ID 24131

Reference Site for Ch. 288A Oswego, NY:
 N 43° 28' 09" W 76° 29' 00"
 Database Date: 04-19-2006

Call	Status	Channel & Class	City, State	Azimuth	Distance (km)	FCC (km)	Margin (km)
WMHI	LIC	234A	Cape Vincent, NY	14.9	70.1	10.0	60.1
WKLL	LIC	235B	Frankfort, NY	108.4	112.1	15.0	97.1
WKUV	LIC	285A	Brockport, NY	252.6	110.8	31.0	79.8
Allotment		285B1	Brockville, ON	23.3	137.6	55.0	82.6
WWDG	LIC	286B	Deruyter, NY	145.5	92.4	69.0	23.4
WWDG	CP	286B	Deruyter, NY	145.5	92.4	69.0	23.4
CKQM-FM		286B	Peterborough, ON	302.1	176.1	78.0	98.1
WKPQ	LIC	287B	Hornell, NY	217.0	163.0	113.0	50.0
CKBY-FM		287C1	Ottawa, ON	12.3	231.5	168.0	63.5
WTKV(FM)	RSV	288A	Granby, NY	169.2	19.6	115.0	-95.4
WSKU	LIC	288A	Little Falls, NY	112.2	137.8	115.0	22.8
WLPW	CP	288C3	Lake Placid, NY	65.1	216.4	142.0	74.4
PRM		288B	Huntsville, ON	317.2	286.0	210.0	76.0
PRM		289B	Kingston, ON	0.6	76.2	137.0	-60.8
NEW		289C1	Kingston, ON	3.3	77.7	168.0	-90.3
PRM		289B	Kingston, ON	3.7	82.3	137.0	-54.7
PRM		289A	Kingston, ON	359.1	84.9	98.0	-13.1
PRM		289A	Kingston, ON	359.3	90.1	98.0	-7.9
WMRV-FM	LIC	289B	Endicott, NY	164.9	153.1	113.0	40.1
CHRE-FM		289B	St Catharines, ON	260.2	224.5	137.0	87.5
PRM		289B	St. Catharines, ON	260.6	229.3	137.0	92.3
WLTJ	LIC	290A	Syracuse, NY	150.6	52.4	31.0	21.4
WJZR	LIC	290A	Rochester, NY	249.2	95.3	31.0	64.3
WNKI	LIC	291B	Corning, NY	197.5	152.1	69.0	83.1

EXHIBIT B

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

In the Matter of)
)
Application for Minor Modification of) File No. BPH-20031209ABV
License)
WTKV(FM), Oswego, NY)
Facility ID No. 24131)
)
)
)

To: Office of the Secretary
The Commission

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*”).¹ 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.”² 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

¹ 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.

² 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.³ The Granby Order was subsequently challenged by a third party and nearly two years later, the Media Bureau affirmed its decision.⁴

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.⁵ 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.⁶ 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.⁷ The

³ *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).

⁴ See 18 FCC Rcd 17615.

⁵ 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*").

⁶ See *Multiple Ownership Order* at ¶ 274, *et seq.*.

⁷ 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, 2004.⁸

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.⁹ 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.¹⁰

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

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

⁹ *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).

¹⁰ 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.”¹¹. 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

¹¹ 47 C.F.R. § 73.3555, Note 4.

bought stations in good faith in accordance with the Commission's rules.”¹² 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.¹³

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.”¹⁴ 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.”¹⁵ 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

¹² *Multiple Ownership Order* at § 484

¹³ *Id.*

¹⁴ 47 CFR § 73.3555 Note 4.

¹⁵ *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.”¹⁶

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

¹⁶ Dismissal Letter at 3 (citations omitted).

requires clarity of standards sufficient to apprise an applicant of what is expected.”¹⁷

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.¹⁸ 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

¹⁷ *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.”

¹⁸ 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.¹⁹ 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.”²⁰ 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.

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.

¹⁹ *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).

²⁰ *Id.* at n.24.

Respectfully submitted,

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