



Federal Communications Commission
Washington, D.C. 20554

December 11, 2007

DA 07-4945

In Reply Refer to:

1800B3-LAS

Released: December 11, 2007

Ms. Valerie Klemmer Watts
Liberty Productions, a Limited Partnership
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C. Don Royston, Administrator
Estate of David T. Murray
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Willsyr Communications, Limited Partnership
c/o William and Marilyn Eaton
127 Belle Rive Drive
Ninety Six, SC 29666

Re: **Liberty Productions, a Limited Partnership**
WOXL-FM, Biltmore Forest, North Carolina
Facility ID No. 37242

Application for New FM Station
Construction Permit
File No. BPH-19870831MI

Application for License to Cover for Station
WOXL-FM
File No. BLH-20020220AAL

Application for Assignment of License for
Station WOXL-FM

File No. BALH-20040116ACT

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Glenville, Clyde and Weaverville, North Carolina and Tazewell, Tennessee)
MB Docket No. 02-352
RM-10602
RM-10776
RM-10777

Dear Ms. Watts, Mr. Bush, Mr. Collins, Mr. Royston, and Mr. and Mrs. Eaton:

We have before us a Joint Request for Approval of Settlement Agreement (“Joint Request” or “Omnibus Settlement Agreement”) filed on November 14, 2007, by Liberty Productions, a Limited Partnership (“Liberty”), Saga Communications of North Carolina, LLC (“Saga”), Ashville Radio Partners, LLC (“ARP”), and Willsyr Communications, Limited Partnership (“Willsyr”), pursuant to Section 73.3588 of the Commission’s Rules (“Rules”).¹ The Omnibus Settlement Agreement concerns various applications, orders, petitions and other filings regarding the licensing and sale of Station WOXL-FM, Biltmore Forest, North Carolina. As discussed below, we approve the Omnibus Settlement Agreement and dismiss all of the pleadings, comments, replies, and supplements filed by Willsyr in connection with the grant of the construction permit and license for Station WOXL-FM to Liberty and the assignment of license for Station WOXL-FM from Liberty to Saga. In conjunction with this proceeding, we also have before us a Withdrawal of Section 1.41 Request for Commission Action filed on August 27, 2007, by the Estate of David T. Murray. As further discussed below, we grant the withdrawal request and dismiss this pleading.

Background. Willsyr was among thirteen original applicants seeking an FM construction permit for Channel 243A at Biltmore Forest.² After comparative hearing, the Administrative Law Judge (“ALJ”) issued an Initial Decision disqualifying Liberty³ on site availability and site certification issues. The ALJ found that Orion Communications Limited (“Orion”) would offer the best service to the public.⁴ The Commission affirmed Liberty’s disqualification and also affirmed the ALJ’s determination that Orion was the comparative winner based on its superior integration proposal.⁵ Timely notices of appeal of the Commission’s decision were pending before the United States Court of Appeals for the District of

¹ 47 C.F.R. § 73.3588.

² See *Owen-Dumeyer Partnership*, Hearing Designation Order, 4 FCC Rcd 706 (1989).

³ File No. BPH-19870831MI. See *National Communications Industries*, Decision, 5 FCC Rcd 2862 (1990).

⁴ See *National Communications Industries*, Decision, 6 FCC Rcd 1978 (Rev. Bd. 1991).

⁵ See *National Communications Industries*, Memorandum Opinion and Order, 7 FCC Rcd 1703 (1992), *recon. denied*, *Liberty Productions*, Memorandum Opinion and Order, 7 FCC Rcd 7581 (1992), *recon. dismissed*, Memorandum Opinion and Order, 8 FCC Rcd 4264 (1993).

Columbia when that Court issued its decision in *Bechtel v. FCC*,⁶ invalidating the primary comparative criterion on which the Commission had relied in granting Orion's application. Thereafter, the Commission stayed all comparative broadcast proceedings⁷ and ultimately determined to resolve frozen hearing proceedings by competitive bidding procedures.⁸ On March 15, 1994, the Court remanded this case to the Commission for further consideration in light of *Bechtel* and, in a separate action, subsequently ordered the reinstatement of Orion as the interim operator, pending resolution of the proceeding to select the permanent licensee.⁹

Liberty was the high bidder for the Biltmore Forest FM construction permit during Closed Broadcast Auction 25. In the post-auction, May 25, 2001, *Liberty Order*,¹⁰ the Commission determined that Liberty was fully qualified and, subject to full payment of its final bid, granted Liberty's application, as amended, on November 10, 1999, and dismissed the competing applications.¹¹ On July 9, 2001, following payment of its final bid amount, the Commission issued the permit to Liberty for Channel 243C3 at Biltmore Forest.¹² The Commission's grant of the Biltmore Forest permit to Liberty was appealed and ultimately affirmed by the Court.¹³ The station is built, licensed,¹⁴ and on the air using call sign WOXL-FM.

⁶ *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

⁷ *FCC Freezes Comparative Proceedings*, Public Notice, 9 FCC Rcd 1055 (1994), *modified*, Public Notice, 9 FCC Rcd 6689 (1994), *further modified*, Public Notice, 10 FCC Rcd 12182 (1995).

⁸ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920 (1998) ("*Broadcast Auction First Report and Order*"), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *on further recon.*, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

⁹ *Biltmore Forest Broadcasting FM, Inc. v. FCC*, Order, No. 92-1645, 1994 WL 116196 (Mar. 15, 1994); *Orion Communications Ltd. v. FCC*, 131 F.3d 176 (D.C. Cir. 1997).

¹⁰ *Liberty Productions, L.P.*, Memorandum Opinion and Order, 16 FCC Rcd 12061 (2001) ("*Liberty Order*"). The Commission also reversed the ALJ's decision disqualifying Liberty for a false site certification, rejected arguments to disallow Liberty's site change amendment, rejected arguments that Liberty had misrepresented its ownership structure, found Liberty ineligible for a bidding credit, and denied a settlement agreement. Requests for stay of the *Liberty Order* pending judicial review were filed by unsuccessful bidders Orion and BFBFM, but were denied by the Commission in *Liberty Productions, L.P.*, Order, 16 FCC Rcd 18966 (2001).

¹¹ In a public notice released June 14, 2001, the Bureau announced that the balance of Liberty's winning bid payment was due by June 19, 2001, and that, upon timely payment of the final bid, the authorization would be granted. *FCC Announces It Is Prepared to Grant FM Broadcast Construction Permit for Biltmore Forest, North Carolina After Final Payment Is Made*, Public Notice, 16 FCC Rcd 11884 (MMB June 5, 2001). Liberty's final payment was timely received on June 19, 2001.

¹² On August 7, 2001, the Commission released a public notice of the grant of Liberty's construction permit: *Broadcast Actions*, Public Notice, Report No. 45043 (Aug. 7, 2001).

¹³ See *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155 (D.C. Cir. 2003), *cert denied*, 540 U.S. 981 (2003). The Court dismissed Willstyr's premature appeal. *Orion Communications Limited v. FCC*, 2002 WL 335537 (D.C. Cir. Jan. 7, 2002).

¹⁴ The February 20, 2002, application for license to cover the construction permit (File No. BLH-20020220AAL) was granted December 8, 2004.

Sorenson Southeast Radio, LLC (“Sorenson”), then-licensee of WNCC-FM, Franklin, North Carolina,¹⁵ and Sutton Radiocasting Corporation (“Sutton”), then-licensee of WBZT-FM, Mauldin, South Carolina,¹⁶ each sought reconsideration of the grant of the Class C3 permit to Liberty. A December 3, 2004, staff decision rejected petitioners’ arguments, dismissing the Sutton Petition for Reconsideration and/or Clarification, and denying the Sorenson Petition for Reconsideration.¹⁷ Willsyr sought reconsideration of the *Permit Decision*, filing the first in a series of petitions for reconsideration on December 30, 2004 (“*Willsyr Permit Reconsideration*”).¹⁸ On January 7, 2005, Sutton filed an Application for Review.

On January 16, 2004, Liberty and Saga filed an application to assign the WOXL-FM permit from Liberty to Saga.¹⁹ Both Sutton and Willsyr filed Petitions to Deny the assignment.²⁰ A July 7, 2005, staff decision found no substantial and material questions of fact warranting further inquiry, dismissed the Sutton and Willsyr Petitions to Deny, and granted the application for assignment.²¹ Willsyr sought reconsideration of the *Assignment Decision*, filing its second petition for reconsideration on July 19, 2005 (“*Willsyr Assignment Reconsideration*”).²² On August 8, 2005, Sutton filed a Petition for Reconsideration.

¹⁵ Sutton is the current licensee of WNCC-FM, Fac. ID 14551, pursuant to an assignment application that was granted on December 14, 2001, and consummated on December 31, 2001 (File No. BALH-20011019AAF).

¹⁶ Clear Channel Broadcasting Licenses, Inc. is the current licensee of WBZT-FM, Fac. ID 25240, pursuant to an assignment application that was granted on December 22, 2000, and consummated on August 15, 2001 (File No. BALH-20001103ABN).

¹⁷ *Letter to Timothy K. Brady, Esq. et al*, Ref. No. 1800B3-CNZ (MB Dec. 3, 2004) (“*Permit Decision*”). In addition, because the staff dismissed Sutton’s June 13, 2001, Petition for Reconsideration and/or Clarification, it also dismissed Willsyr’s July, 9, 2001, Motion to Dismiss the Sutton Petition for Reconsideration as moot.

¹⁸ Additional pleadings have been filed. Liberty filed an Opposition to *Willsyr Permit Reconsideration* on January 12, 2005. Willsyr filed a Reply on January 25, 2005. Willsyr filed a supplement to *Willsyr Permit Reconsideration* on November 28, 2005. Liberty filed an Opposition to *Willsyr Permit Supplement* on December 13, 2005. Willsyr filed a Reply to Opposition of Liberty to Supplement on December 22, 2005. Liberty filed a Response to Reply to Opposition of Liberty to Supplement on January 11, 2006. Willsyr filed a Motion to Strike Response of Liberty on January 25, 2006. Liberty filed an Opposition to Motion to Strike Response on February 7, 2006. In addition, the Commission is in receipt of a Letter from Betty Lee, on behalf of Orion, to the Honorable Kevin Martin, Chairman (Jan. 30, 2006) and a Letter from Stephen Yelverton, Esq., counsel to Willsyr, to the Honorable Kevin Martin, Chairman (Dec. 28, 2005).

¹⁹ ARP held an option to acquire WOXL-FM from Liberty, which it assigned to Saga. The application was filed as an assignment of a construction permit and given File No. BAPH-20040116ACT.

²⁰ Sutton filed its Petition to Deny on December 8, 2004. Willsyr filed a Petition to Deny and Revoke Permit on February 23, 2004.

²¹ *Letter to Timothy K. Brady, Esq. et al*, Ref. No. 1800B3-CNZ (MB July 7, 2005) (“*Assignment Decision*”).

²² Additional pleadings have been filed. Liberty and Saga filed a Joint Opposition to *Willsyr Assignment Reconsideration* on August 3, 2005. Willsyr filed a Reply on August 15, 2005. Willsyr filed a supplement to *Willsyr Assignment Reconsideration* on August 8, 2005. Liberty and Saga filed a Joint Opposition to *Willsyr Assignment Supplement* on August 23, 2005. Willsyr filed a Reply on September 2, 2005. Willsyr filed a Further Supplement on December 27, 2005. Liberty filed an Opposition to *Willsyr Assignment Further Supplement* on

On October 17, 2005, the staff granted a Joint Request for Approval of Settlement Agreement filed September 19, 2005, by Liberty, Saga, Sutton,²³ and ARP (collectively, “Settling Parties”), which provided for dismissal of both Sutton’s January 7, 2005, Application for Review and its August 8, 2005, Petition for Reconsideration upon reimbursement by Saga to Sutton of \$100,000, representing a portion of Sutton’s legitimate and prudent expenses incurred in connection with matters relating to the applications at issue (“Application Settlement”).²⁴ Settling Parties sought approval of their agreement pursuant to Section 73.3588 of the Rules, which governs the withdrawal and dismissal of petitions to deny and informal objections.²⁵ Willsyr sought reconsideration of the *Settlement Decision*, filing its third petition for reconsideration on October 24, 2005 (“*Willsyr Settlement Reconsideration*”).²⁶

In addition, a second, related settlement had been granted by the staff on October 12, 2005, with regard to an FM allotment proceeding involving the communities of Glenville, Clyde and Weaverville, North Carolina, and Tazewell, Tennessee (“Rulemaking Settlement”).²⁷ Therein, the staff granted the September 19, 2005, Joint Request for Approval of Universal Settlement filed by Glenville Radio Broadcasters, Stair Company, Inc. (“Stair”), Georgia-Carolina Radiocasting Company, LLC, and Frank McCoy (collectively, the “Joint Parties”), which requested the dismissal of the Glenville petition for rule making and the Clyde counterproposal, the grant of Stair’s Weaverville counterproposal, and the withdrawal of McCoy’s comments in MB Docket No. 05-191,²⁸ in order to allow expeditious resolution

January 11, 2006. Willsyr filed a Reply to Opposition of Liberty to Supplement on January 23, 2006. David T. Murray filed a Section 1.41 Request for Commission Action (“*Section 1.41 Request*”) on March 21, 2006. Liberty filed an Opposition on April 5, 2006. Saga and ARP filed Joint Comments On and Opposition to Section 1.41 Request for Commission Action on April 5, 2006. Willsyr filed Comments on Oppositions to Section 1.41 Request on May 8, 2006. Liberty filed a Supplement to its Opposition on May 11, 2006. David T. Murray filed a Reply on May 17, 2006. Willsyr filed Comments on Supplement of Liberty and Motion to Dismiss on May 23, 2006. Liberty filed a Reply on May 23, 2006. Saga and ARP filed a Joint Statement for the Record on May 23, 2006. Liberty filed a Reply to Comments on Supplement and Motion to Dismiss on June 7, 2006. Willsyr filed a Motion to Strike on June 22, 2006. ARP and Saga filed an Opposition to Motion to Strike on July 5, 2006. Liberty filed an Opposition to Motion to Strike on July 5, 2006. Willsyr filed a Consolidated Reply to Oppositions on July 12, 2006.

²³ Subsequent to the filing of its August 8, 2005, Petition for Reconsideration Sutton entered into the Joint Request in its current role as licensee of WNCC-FM, thereby effectively assuming the position previously occupied by Sorenson.

²⁴ *Letter to Timothy K. Brady, Esq. et al*, Ref. No. 1800B3-TSN (MB Oct. 17, 2005) (“*Settlement Decision*”).

²⁵ See *infra* note 32.

²⁶ Additional pleadings have been filed. Settling Parties filed a “Statement for the Record” on November 23, 2005. Willsyr filed “Comments on and Objections to the Statement for the Record” on December 5, 2005. Settling Parties filed an Opposition to *Willsyr Settlement Reconsideration* on November 30, 2005. Willsyr filed a Reply on December 12, 2005. ARP filed a “Reply to Comments on and Objections to Statement for the Record” on December 22, 2005.

²⁷ *Glenville, Clyde, and Weaverville, North Carolina and Tazewell, Tennessee*, Report and Order, 20 FCC Rcd 16269 (MB 2005) (“*Glenville Report and Order*”).

²⁸ The Rulemaking Settlement provided, *inter alia*, for a \$200,000 payment to Georgia-Carolina Radiocasting, LLC (“GCRC”), an affiliate of Sutton, in return for the dismissal of its counterproposal and objections in the rulemaking proceeding that involved multiple conflicting allotment proposals. Both Sutton and GCRC are owned by the same individual. Under the Rulemaking Settlement, Stair is to reimburse GCRC the \$200,000. As Settling Parties note, Stair and Saga share no common ownership, officers or directors. However, the two companies do have contractual

of a long-pending rulemaking proceeding. The Joint Parties settled the proceeding pursuant to the rulemaking settlement window, announced by the Media Bureau (“Bureau”), as directed by the Commission, and the Bureau appropriately waived the reimbursement limitation provisions of Section 1.420(j) of the Rules.²⁹ On October 24, 2005, Willsyr also filed a petition for reconsideration of the *Glenville Report and Order*, based upon the interrelated nature of the two settlements (“*Willsyr Glenville Report and Order Reconsideration*”).

On August 27, 2007, the Estate of David T. Murray (“Estate”) withdrew its *Section 1.41 Request*, which had been filed in connection with the Station WOXL-FM sales proceeding on March 21, 2006, by David T. Murray, deceased, prior to his death.³⁰ The Estate is the successor-in-interest to David T. Murray and the owner of the limited partnership interest in Liberty.³¹ As discussed further below, Willsyr filed pleadings concerning the *Section 1.41 Request*, which it has agreed to withdraw pursuant to the Omnibus Settlement Agreement.

On November 14, 2007, Liberty, Saga, ARP and Willsyr filed the instant Omnibus Settlement Agreement. Liberty, Saga, ARP and Willsyr seek approval of the Joint Request pursuant to Section 73.3588 of the Rules, which permits dismissal of petitions to deny or other objections filed against an application, upon certification that the dismissing party is not receiving any money or other consideration in excess of its legitimate and prudent expenses.³² Under the terms of the Omnibus Settlement Agreement, Saga is to pay Willsyr Two Hundred Thousand Dollars (\$200,000) and ARP is to pay Willsyr Two Hundred Thousand Dollars (\$200,000) for its legitimate and prudent expenses incurred, in exchange for the withdrawal and dismissal of the *Willsyr Permit Reconsideration*, the *Willsyr Assignment Reconsideration*, the *Willsyr Settlement Reconsideration*, the *Willsyr Glenville Report and Order Reconsideration*, and “any and all of the pleadings, comments, replies, and supplements filed by

relations and accordingly, “some of the funds to be paid by Stair to Sutton will come from Saga.” November 30, 2005, Opposition to *Willsyr Settlement Reconsideration* at 10. The record indicates that each of the two payments to Sutton or its affiliate GCRC - the \$100,000 in connection with the Application Settlement and the \$200,000 in connection with the Rulemaking Settlement - reflects legitimate consideration and the culmination of independently developed, arms-length negotiations. Despite the commonality of parties to both agreements, it is clear that the two transactions began at different times and progressed on different schedules. We find that the two separate agreements arose in discrete regulatory contexts, each involving consideration appropriate to that transaction.

²⁹ See *Window Announced for Universal Settlements of Pending Rulemaking Proceedings to Amend the FM Table of Allotments*, Public Notice, 20 FCC Rcd 10801 (MB 2005). The Commission directed the Bureau to accept universal settlements of certain pending rulemaking proceedings in *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Notice of Proposed Rulemaking, 20 FCC Rcd 11169, 11187-88 (2005).

³⁰ See *supra* note 22.

³¹ As described in a settlement agreement executed on July 31, 2007, between the Estate, its beneficiaries, and Liberty, the North Carolina litigation regarding the Estate’s ownership interest in Liberty is being settled, and the Estate’s limited partnership interest is being sold to Liberty. As part of the termination of the North Carolina litigation, the Estate agreed to withdraw its March 21, 2006, Section 1.41 Request for Commission Action.

³² The provisions of 47 C.F.R. § 73.3588 also apply to agreements to dismiss petitions for reconsideration and applications for review. See, e.g., *Sun Mountain Broadcasting, Inc.*, Memorandum Opinion and Order and Forfeiture Order, 11 FCC Rcd 1706 (1996) (petitions for reconsideration) and *Letter to Sunbelt Television, Inc.*, 20 FCC Rcd 13888 (MB 2005) (applications for review).

Willsyr”³³ (collectively, the “Adverse Pleadings”) during the course of the Station WOXL-FM licensing, sales, and rulemaking proceedings.

Discussion. *The Omnibus Settlement Agreement.* Parties to the Omnibus Settlement Agreement seek resolution of the long-pending Biltmore Forest application proceeding. After careful consideration of the Omnibus Settlement Agreement, and the attached declarations and affidavits, we find that approval of the Omnibus Settlement Agreement would serve the public interest and expedite the resolution of all matters relating to Station WOXL-FM. We have reviewed both the Joint Request and the Omnibus Settlement Agreement and we find no reason for further consideration of the matters raised in the Willsyr Adverse Pleadings.³⁴

We are guided by Section 73.3588 of the Rules, which is designed to curb process abuse whereby petitions are filed to extract monetary consideration at the expense of broadcast licensees.³⁵ Under the rule, no petitioner may receive a direct monetary payment or an indirect financial benefit in excess of its legitimate and prudent expenses.³⁶ Here, the Joint Request complies in all respects with the provisions of Section 73.3588 of the Rules, and the parties to the Omnibus Settlement Agreement have satisfactorily filed all required certifications and affidavits. Willsyr has certified that its legitimate and prudent expenses in pursuit of its various pleadings are in excess of \$400,000, and that it is receiving \$400,000 from Saga and ARP in exchange for the dismissal of the Adverse Pleadings. We further find that no consideration, other than as provided by the Omnibus Settlement Agreement, has been directly or indirectly paid or promised, in connection with the matters described in the Omnibus Settlement Agreement. We are thus satisfied that the requirements of Section 73.3588 of the Rules have been met.

Withdrawal of Section 1.41 Request by the Estate. The *Section 1.41 Request* sought rescission of the Commission’s July 7, 2005, consent to the assignment of the Station WOXL-FM license to Saga. Accordingly, the Estate contends, since denial of the assignment application was not requested, “the requirements of Section 73.3588 of the Commission’s rules appear to be inapplicable as the March 21, 2006 Section 1.41 Request for Commission Action was neither a petition to deny, nor an informal objection.”³⁷ Nonetheless, C. Don Royston, Administrator of the Estate, provides a declaration, attesting that neither the Estate nor its principals has received or will receive any money or consideration in exchange for the withdrawal of the *Section 1.41 Request*, other than payment for the value of the Liberty limited partnership interest. We have reviewed both the withdrawal request and the declarations attached thereto, and we find no reason for further consideration of matters raised in the *Section 1.41 Request*. To the extent applicable, the withdrawal request complies with the appropriate provisions of Section 73.3588 of the Rules.

Rulemaking Proceeding in MM Docket No. 02-352. Given the Willsyr request to dismiss all Adverse Pleadings, including the *Willsyr Glenville Report and Order Reconsideration*, and the action taken herein, the proceeding in MM Docket No. 02-352 will be terminated.

³³ Joint Request at 4; Omnibus Settlement Agreement at 2-3. *See also supra* notes 18, 22, 26.

³⁴ *See Stockholders of CBS, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 3733, 3739 (1995).

³⁵ *See Amendment of Sections 1.420 and 73.3584 of the Commission’s Rules Concerning Abuses of the Commission’s Processes*, Report and Order, 5 FCC Rcd 3911 (1990).

³⁶ *Id.* at 3913. *See* 47 C.F.R. § 73.3588.

³⁷ *Withdrawal of Section 1.41 Request for Commission Action* at 2.

Conclusion. Accordingly, for the above-stated reasons, IT IS ORDERED, that the November 14, 2007, Joint Request for Approval of Settlement Agreement IS GRANTED and the associated Omnibus Settlement Agreement IS APPROVED. IT IS FURTHER ORDERED, that all Adverse Pleadings filed by Willsyr Communications, Limited Partnership ARE HEREBY DISMISSED. IT IS FURTHER ORDERED, that the August 27, 2007, Withdrawal of Section 1.41 Request for Commission Action filed by the Estate of David T. Murray IS GRANTED and the Section 1.41 Request for Commission Action IS HEREBY DISMISSED. IT IS FURTHER ORDERED, that MM Docket No. 02-352 IS HEREBY TERMINATED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Timothy K. Brady, Esq., Counsel for Liberty Productions, a Limited Partnership
Gary S. Smithwick, Esq., Counsel for Saga Communications of North Carolina, LLC
Frank R. Jazzo, Esq., Counsel for Ashville Radio Partners, LLC
Stephen T. Yelverton, Esq., Counsel for Willsyr Communications, a Limited Partnership
John F. Garziglia, Esq., Counsel for the Estate of David T. Murray