

WIAC-FM
San Juan, PR
FCC Form 314

REQUEST FOR WAIVER OF §73.3555

WIAC-FM, Inc. (hereinafter “WIAC”), the proposed assignee in the instant application, hereby submits its request for waiver of the application of 47 C.F.R. §73.3555 (the “Rule”) relating to the total number of broadcast facilities which any one entity may hold an attributable interest in any particular “market” and in particular the definition of “market” under the current Commission rules in accordance with 47 C.F.R. §1.3.

WIAC’s principals have attributable interests in the licenses of 14 radio stations on the island of Puerto Rico¹. Prior to the Commission’s 2003 Rulemaking (FCC 03-127 Report and Order and Notice of Proposed Rulemaking, June 2, 2003) (the “*Report and Order*”), local radio markets were defined using a contour-overlap market definition. After applying the criteria to determine the relevant radio market, an analysis was undertaken to see if a licensee met the limitations on the total number of stations it could hold in that “market” based on a numerical formula dependent upon the total number of stations in the aforementioned “market”. WIAC’s principals meet all the multiple ownership rules using the contour-overlap market definition because of the geographic separation of its licenses on the island of Puerto Rico. Under the Commission’s prior rules, a single ownership entity could in theory hold up to 24 radio station licenses on the island of Puerto Rico because of the geographic separation and the contour-overlap rule

¹ A list of stations in which WIAC’s principals have attributable interests is attached to this Request as Attachment 1.

then in place. However, the *Report and Order* found that there were deficiencies in the “contour-overlap” methodology and adopted a “market” definition to be the same as the “market” as defined by Arbitron Metros. The Commission further ruled that for markets outside of Arbitron Metros, a modified contour-overlap definition should apply while a further rulemaking was undertaken to define “markets” in non-Arbitron Metros. Under the “new” definition set forth in the *Report and Order*, the “market” as defined by Arbitron Metro is now the entire island of Puerto Rico. WIAC’s principals’ attributable interests in the relevant “market” are now over the numerical limit, though their current holdings are grandfathered in accordance with Paragraph 484 of the *Report and Order*. By virtue of this change, the permissible maximum number of stations any one ownership group could own on the entire island dropped from 24 to 8. WIAC requests, for the reasons set forth hereinafter, that a waiver be granted of the numerical limitations and that consent be given to the assignment of the WIAC-FM licenses.

As noted above, the FCC adopted the Arbitron Metro Survey Area (“Arbitron Metro”) as the definition of radio market for the purpose of determining compliance with the local radio ownership rule.² In adopting the Arbitron Metro, the *Report and Order* reasoned that “*Where a commercially accepted and recognized definition of a radio market exists, it seems sensible to us to rely on that market definition for purposes of applying the local radio ownership rule. Arbitron, as the principal radio ratings service in the country, has defined radio markets for most of the more populated urban areas of the country. These radio markets – Arbitron Metros – are Arbitron’s primary survey area, which in turn are based on Metropolitan Areas (MAs) established by the Office of*

² *Report and Order* paragraph 273

Management and Budget (OMB) (emphasis added)”³ The *Report and Order*, in footnote 573, provided a further explanation of MAs and provided reference material concerning the methodology the OMB used in defining MAs and a link to information about the most recent MA listing, incorporating data from the 2000 census. The *Report and Order*, in reaching its conclusion to use the Arbitron Metro, argued that “people in the United States tend to be clustered around specific population centers”⁴ and adopted one commenter’s position that “Radio stations compete in Arbitron markets”⁵. As a result, the Report and Order concluded that the Arbitron Metro was the appropriate standard for the purpose of calculating compliance with the local ownership rule.

The Commission’s adoption of and reliance upon Arbitron’s Metro definition was predicated on the assumption (as noted above) that the Arbitron Metro was, in turn, based on the OMB’s Metropolitan Areas (MAs). Indeed, the *Report and Order* extensively footnoted (in footnote 573) how the OMB defined Metropolitan Areas and where to find the most updated information concerning the MAs. This assumption is likely correct in most of the United States but it is completely erroneous when applied to Puerto Rico. Arbitron’s Metro definition for Puerto Rico is the *ENTIRE* island of Puerto Rico.⁶ However, the OMB does *NOT* define the entire island of Puerto Rico as a Metropolitan Area. Indeed, according to the most recent OMB MA list, which incorporates information from the 2000 census, Puerto Rico has *EIGHT* (8) Metropolitan Statistical Areas and *THREE* (3) Combined Statistical Areas (which are larger population areas consisting of combinations of Metropolitan Statistical Areas and/or Micropolitan

³ *Report and Order* at 275

⁴ *Report and Order* at 273

⁵ *Report and Order* at 276

⁶ see Arbitron Metro Map: (http://www.arbitron.com/downloads/Arb_US_Metro_Map_08.pdf), a copy of which is attached to this Request as Attachment 2.

Statistical Areas).⁷ According to the OMB's Bulletin, Metropolitan Statistical Areas have "at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties"⁸. Arbitron, presumably because of the geographic isolation of Puerto Rico from the United States and as a matter of convenience, simply defined the entire island as one market. Arbitron's treatment of Puerto Rico varies significantly from the mainland. For example, Arbitron uses a significantly small population sample in Puerto Rico (only 2500 diaries) versus comparable markets which use at least 4000 diaries, which further dilutes the sample in the actual geographic markets as defined by the OMB. Notably, the Arbitron ratings for Puerto Rico are not accredited by the Media Rating Council ("MRC") because of the aforementioned sample size.

The assumptions made in the *Report and Order* (i.e. "Radio stations compete in Arbitron markets") do not hold true in Puerto Rico because of geography. For example, it is impossible for a station in Mayagüez or Ponce to compete with a station in San Juan because intervening terrain and geography (including Mt. Cerro de Punta, at 4,390 feet), precludes each station's signals from being heard in the other's community. Yet, because of the Arbitron Metro definition encompassing the entire island, a Mayagüez or Ponce station and a San Juan station are now presumed to be in the same radio market. The conclusion that stations in these cities would compete with each other for the same population ("*radio stations serve people, not land*"⁹) is entirely misplaced. The size (three times that of Rhode Island) and topography of the island makes such a conclusion

⁷ see List 5, (page 127) Attachments to OMB Bulletin 03-04 (http://www.whitehouse.gov/omb/assets/omb/bulletins/b03-04_attach.pdf) a copy of which is attached to this Request as Attachment 3.

⁸ *Id.*

⁹ *Report and Order* at 273

a physical impossibility. It is precisely because of the unique character and topography of Puerto Rico that the Commission has long-established precedent in treating radio stations in Puerto Rico differently than those on the mainland United States. For example, the Commission recognized in *St. Croix Wireless Co., Inc.*, 8 FCC Rcd 7329, 74 Rad. Reg.2d (Pike & Fisher) 202 (1993) that adoption of alternative standards for purposes of determining protected and interfering contours was prudent and necessary to accommodate the greater permissible HAAT that Puerto Rico and Virgin Island stations antennas are allowed (to overcome geographic obstacles). This was later adopted as rule revision in the Commission's Second Report and Order in MM Docket 98-93 (*In the Matter of 1998 Biennial Regulatory Review - Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules – FCC 00-368*), 15 FCC Rcd 2149 (2000), all as a result of the “unique topography” of the island (see Short-spaced FM Station Assignments by using Directional Antennas, *MM Docket 87-121, FCC 91-273, 6 FCC Rcd 5356* at 51); see also 47 C.F.R. §73.211(b)(3). Other examples include 47 C.F.R. §73.1210 (TV/FM Dual Language broadcasting in Puerto Rico) and 47 C.F.R. §73.807 (Minimum distance separation between LPFM stations). The geographic obstacles are further evident by the fact that there are a greater number of AM and FM stations licensed to the island of Puerto Rico than to a comparable geographic sized area in the mainland United States.¹⁰

Furthermore, an examination of the pending application utilizing the “contour-overlap” market definition (the current methodology in non-Arbitron Metro markets)

¹⁰ BIA reports there are 127 radio stations licensed to Puerto Rico. A check of the FCC's CDBS database shows 74 licensed AM stations and 54 licensed FM stations (not including translators, boosters, licensed but silent stations, experimental stations and construction permits). The island is a rectangular shape of land approximately 35 miles north to south and 100 miles east to west.

reveals that the proposed assignment would be compliant with the Commission's multiple-ownership rules. (*See* Attachment 4).

The Commission has previously granted a waiver under similar circumstances for WMIO (FM), Cabo Rojo, PR, which is one of the stations owned by principals of WIAC as a result of said waiver.¹¹ In the WMIO proceeding, the Media Bureau, after taking the "hard look" required under applicable standards, ultimately said: "We conclude that the unique combination of facts presented in this particular case justifies our use here of a radio market definition based upon that modified contour-overlap methodology, rather than the Arbitron-designated Metro."¹² The grant of the WMIO waiver further reasoned that:

"Arbitron itself, in "Puerto Rico Radio Today (2006 Edition)," states that Puerto Rico "can be compared to Connecticut. It is a little smaller, but with almost half a million more people." However, in addition to the inclusion of southern Connecticut in the New York radio market, Connecticut has several Arbitron-rated radio markets: (a) Hartford-New Britain-Middletown (the 50th largest market); (b) New Haven (the 109th largest market); (c) Bridgeport (the 121st largest market); (d) Stamford-Norwalk (the 145th-largest market); (e) New London (the 173rd largest market); and (f) Danbury (the 196th largest market). Moreover, Arbitron states: "When analyzing [Puerto Rico], there are several regions – San Juan, West, South, East, North and Northeast – that have important population centers with their own characteristics, such as Mayaguez, Ponce, Humacao, Fajardo, San Juan." In fact, Arbitron provides ratings data for Puerto Rico broken down by those regions. ***It is these characteristics of the Puerto Rico Arbitron Metro, in combination with the circumstances of this particular transaction, that present a compelling case for departing from the Arbitron Metro as the presumptive definition of the local market in determining whether the transaction complies with the local radio station ownership rule.***¹³ (emphasis added, footnotes omitted).

The same exact characteristics referenced above in the WMIO proceeding apply to the instant waiver request for WIAC-FM. It should also be noted that Arso Radio Corporation, the applicant in the WMIO proceeding and also owned by WIAC's

¹¹ *See* Letter from Peter Doyle, Chief, Audio Division, Media Bureau, FCC, to Luis A. Soto, President, ARSO Radio Corp., and Luis A. Mejia, President, Bestov Broadcasting, Inc., 22 FCC Rcd 2549, 2553 (Feb. 9, 2007).

¹² *Id.*

¹³ *Id.*

principals, has a long pending Petition for Reconsideration of the *Report and Order* requesting revision of the market definition for Puerto Rico from Arbitron market based to one of the alternatives set forth above. An order on same has been on circulation since 2/12/2007.¹⁴

WIAC suggests, (1) in light of the foregoing evidence that the Arbitron “Metro” definition for Puerto Rico is *not* based on the OMB’s Metropolitan Areas; and (2) for the same reasoning as set forth in the Commission’s WMIO waiver¹⁵; that it has met the “good cause” standard required by 47 C.F.R. §1.3 and that the application of 47 C.R.R. §73.3555 be waived in the instant case to permit it to acquire the licenses of WIAC-FM.

Respectfully Submitted

/S/

Anthony T. Lepore, Esq.
Counsel for WIAC-FM, Inc.
P.O. Box 823662
South Florida, FL 33082-3662
954.433.2126 (Tel)
anthony@radiotvlaw.net

¹⁴ See <http://www.fcc.gov/osec/weeklylist/circulate-weekly.pdf>

¹⁵ See footnote 11