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In Reply Refer to:

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In re: **WTOK-FM, San Juan, Puerto Rico**
Facility ID No. 4936
File No. BALH-20090206ACE

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (“Petition”) filed by RAAD Broadcasting Corporation (“RAAD”)¹ on July 18, 2012, seeking reconsideration of the grant of application for the assignment of W TOK-FM, San Juan, Puerto Rico (the “Station”), from MSG Radio, Inc. (“MSG”) to WIAC-FM, Inc. (“WFI”),² and related pleadings.³ For the reasons stated below, we deny the Petition.

I. Background

Prior station transaction. On August 20, 2007, Luis A. Mejia (“Mejia”) filed an application seeking consent to assign the Station’s license to MSG (the “Mejia Application”).⁴ The Mejia Application included a copy of an asset purchase agreement for the sale of the Station license, call sign, and other intangibles to MSG. In September 2007, the Commission received two petitions to deny the Mejia Application, alleging that Mejia and MSG had failed to file documents germane to the transaction. Specifically, the petitioners provided purported copies of: (1) an asset purchase agreement dated August

¹ RAAD is the licensee of station WXYX(FM), Bayamon, Puerto Rico, and the parent corporation of the licensees of stations WXLX(FM), Lajas, Puerto Rico, and WELX(FM), Isabela, Puerto Rico.

² *MSG Radio, Inc. c/o Lewis J. Paper, Esq. et al.*, Letter, 27 FCC Rcd 7066 (MB June 20, 2012) (“*Letter Decision*”). The parties consummated the transaction on September 21, 2012.

³ On August 17, 2012, MSG filed an Opposition to Petition for Reconsideration (“MSG Opposition”). On August 20, 2012, WFI filed an Opposition to Petition for Reconsideration (“WFI Opposition”). On August 31, 2012, RAAD filed a Reply to each of the Oppositions (“MSG Reply” and “WFI Reply,” respectively).

⁴ File No. BALH-20070820AGE.

10, 2007 (“Bestov APA”), under which Bestov Broadcasting, Inc. of Puerto Rico (“Bestov”)⁵ would sell the studio, office, and transmission facilities needed to operate the Station to Madifide, Inc., owned by members of the Soto family (“Madifide”); and (2) an undated “Shared Services Agreement” (“SSA”) between MSG and Madifide, allowing MSG access to the Station’s physical facilities but retaining MSG’s responsibility for, *inter alia*, the Station’s personnel, programming, and finances (collectively, the “Mejia Transactional Documents”). These documents, petitioners argued, reflected an unauthorized *de facto* transfer of control of the Station to Madifide.

On May 2, 2008, the Media Bureau (“Bureau”) sent a letter of inquiry (“LOI”) to Mejia, MSG, and Madifide, requesting additional information to ascertain whether MSG would exercise a meaningful degree of control over the Station.⁶ In response, the parties provided copies of the Bestov APA and SSA, as well as a draft option agreement under which Madifide would acquire a two-year, irrevocable option to purchase the Station license when qualified to do so under FCC rules and policies.⁷ On August 5, 2008, the Bureau granted the Mejia Application.⁸ In doing so, it rejected petitioners’ argument that there had been an unauthorized transfer of control of the Station; however, it imposed a forfeiture on the applicants for failure to provide all required documents relevant to the Mejia Application.⁹

Present transaction. On February 6, 2009, MSG filed the subject application (the “WFI Application”), seeking consent to the assignment of the Station’s license to WFI, a Soto-owned entity. Pursuant to the 2003 *Ownership Order*, a station located within an Arbitron Metro market must use that Arbitron Metro as the relevant market for determining compliance with the Commission’s local numerical ownership limits.¹⁰ In this case, station WTOK-FM is located within the Puerto Rico Arbitron Metro, which encompasses the entire island of Puerto Rico. Absent a waiver, WFI would impermissibly own a total of 15 stations in the Puerto Rico Arbitron Metro.¹¹ Therefore, the WFI Application included a request to waive the Arbitron Metro-based methodology and instead assess WFI’s compliance with the multiple ownership rule using the alternative contour-overlap methodology, which is normally permitted only when a station’s community of license is located in an unrated market, *i.e.*, outside any Arbitron Metro boundary.¹²

⁵ Mejia is the 100% shareholder of Bestov.

⁶ See *Luis A. Mejia, et al.*, Letter, Ref. No. 1800B3-TSN (MB May 2, 2008).

⁷ *Letter Decision* at 2.

⁸ *Luis A. Mejia*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 11902 (MB 2008) (“*Mejia Order*”). The parties consummated the transaction on January 8, 2009. No party sought reconsideration or review of the Mejia Application grant, which is now final. MSG filed a Request for Cancellation of Proposed Forfeiture on September 4, 2008, which the Bureau considered and rejected. *Luis A. Mejia*, Forfeiture Order, 23 FCC Rcd 15242 (MB 2008), *recon denied*, 26 FCC Rcd 11444 (MB 2011).

⁹ *Mejia Order* at 11905-6.

¹⁰ 47 C.F.R. § 73.3555(a); 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, 13724-6 (2003) (“*Ownership Order*”), *aff’d in part and remanded in part sub nom., Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004), *cert. denied*, 545 U.S. 1123 (2005).

¹¹ In a market with 45 or more stations, a party may have a cognizable interest in up to eight commercial stations, no more than five in the same service. 47 C.F.R. § 73.3555(a).

¹² See *Ownership Order*, 18 FCC Rcd at 13729.

On March 18, 2009, RAAD filed a Petition to Deny the WFI Application on two grounds.¹³ First, RAAD alleged that the WFI Application was the final step in a scheme by which the Soto family would warehouse the Station with MSG while retaining *de facto* control over its operations. RAAD's argument relied heavily on the Mejia Transactional Documents but added two new allegations, namely, that: (1) key MSG employees had been previously employed by the Soto family; and (2) MSG had licensed the "Toca de To" trademark from the Sotos. Second, RAAD argued that grant of WFI's request for waiver would lead to an undue concentration of market power in the hands of the Soto family, and that the Commission's prior decision to grant a similar waiver for station WMIO(FM), Cabo Rojo, Puerto Rico (the "WMIO Waiver"), was made in error because it did not consider market realities and Puerto Rico's competitive environment.¹⁴

In the *Letter Decision*, the Bureau observed that RAAD's *de facto* control argument was mainly predicated on facts that were considered and rejected in the context of the Mejia Application. Nonetheless, the Bureau re-examined RAAD's argument in light of the "new, albeit scant, information . . . *i.e.*, allegations regarding use of common employees and a common trade name."¹⁵ Accordingly, the Bureau again reviewed the terms of the Mejia Transactional Documents, concluding, as before, that "it is clear from the terms of the agreements that MSG has ultimate control over personnel and all programming decisions and policies . . ."¹⁶ The Bureau further found that the fact that "some of the MSG employees previously worked for companies owned by the Soto family . . . does not indicate an abdication of control."¹⁷ Lastly, the Bureau reasoned that the arms-length licensing agreement allowing WFI to use the "Toca de To" trademark reinforces, rather than undermines, MSG's claims of independence from the Soto family. For these reasons, the *Letter Decision* dismissed RAAD's *de facto* transfer of control argument as "based on inferences, conjecture, and erroneous information."¹⁸

As for WFI's waiver request, the Bureau concluded that the "unique characteristics of Puerto Rico present a compelling showing of special circumstances that warrant departing from the Arbitron Metro as the presumptive definition of the local market . . ."¹⁹ Specifically, the Bureau determined that Puerto Rico's extreme mountainous topography, large number of radio stations and station owners, and division into eight Metropolitan Statistical Areas ("MSAs") as defined by the Office of Management and Budget ("OMB") all demonstrate that Puerto Rico has more centers of economic activity than are accounted for by the single Puerto Rico Arbitron Metro. In this respect, the *Letter Decision* found that WFI's waiver request is "essentially identical" to the WMIO Waiver.²⁰ Contrary to RAAD's claims that it is impossible for stations to compete against the Sotos, the Bureau found that many stations and owners in Puerto Rico do compete with the Sotos and will continue to do so. Therefore, the *Letter Decision* granted WFI's request to review the proposed acquisition by defining, for multiple ownership purposes, the local radio market(s) in which the Station operates using the contour-overlap methodology.

Pleadings. In its Petition, RAAD argues that the Bureau erred by ignoring *prima facie* evidence that there was an unauthorized transfer of control of the Station in 2007 to an unspecified member of (or entity controlled by)

¹³ *Letter Decision* at 4.

¹⁴ *Id.*; See *Luis A. Soto*, Letter, 22 FCC Rcd 2549 (MB Feb. 9, 2007).

¹⁵ *Letter Decision* at 5.

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 10.

²⁰ *Id.* at 7.

the Soto family. According to RAAD, it is thus now “proper and timely”²¹ to revisit the facts surrounding the 2007 transfer because “the totality of the circumstances of this proposed assignment and the prior actions of the parties . . . demonstrate a covert and conspiratorial plan . . . to covertly vest actual control of WTOK-FM in the Sotos long before the grant of the [WFI] assignment application and the multiple ownership waiver.”²² RAAD also reiterates that the “commercially unusually favorable”²³ terms contained in the transactional documents, the shared employees, and the “Toca de To” trademark combine to make a *prima facie* case that an unauthorized transfer of control took place.²⁴

With respect to the WTOK-FM Waiver, RAAD’s objections fall into four main lines of argument, as follows:

1. *Factual basis for waiver.* RAAD argues that the WMIO and WTOK-FM Waivers ignore crucial facts regarding competition in the Puerto Rican radio market. Specifically, RAAD contends that, although there are 56 FM stations in Puerto Rico, 21 of these are noncommercial educational stations, and an additional three are “limited in power and/or geography.”²⁵ Of the remaining 32 stations, RAAD claims that the “top three groups” now own 22 stations, or 69 percent.²⁶ RAAD also contends that the *Letter Decision* draws the wrong conclusions from Puerto Rico’s topography, disregarding certain “demographic facts,” such as driving mobility, that show a lack of social and economic differentiation across the island.²⁷ In such a unified market, according to RAAD, smaller station groups cannot compete with large stations groups such as that owned by the Sotos, because they cannot offer the same island-wide advertising packages.²⁸ RAAD also alleges that, in contrast to the Bureau’s findings, station WTOK-FM can be listened to in “both Ponce and in Aguadilla and everywhere in between”—excluding only the southwest portion of the island.²⁹
2. *Delegated authority.* According to RAAD, the *Letter Decision* constitutes a “rulemaking by waiver” that exceeds the Bureau’s authority by prejudging the outcome of open docket proceedings that also address Puerto Rican market definitions.³⁰ In particular, RAAD refers to a 2003 petition for reconsideration of the *Ownership Order* filed by ARSO Radio Corporation (“ARSO”) requesting a permanent exemption for

²¹ MSG Reply at 4.

²² Petition at 15.

²³ *Id.* at 18.

²⁴ *Id.* at 15-20. RAAD also argues that the same facts show a lack of candor and a violation of the disclosure requirement of Section 1.65 of the Commission’s rules, 47 C.F.R. § 1.65. *Id.* at 20-21. RAAD does not develop the candor/disclosure arguments further, and it appears that they pertain primarily to the Mejia Application, which is now final. To the extent that these arguments apply to the WFI Application, they are resolved by our discussion herein, *supra* at 7-10. Because we do not find that a violation of the transfer of control or multiple ownership rules has occurred, we do not find a failure to disclose or lack of candor regarding the same.

²⁵ Petition at 11.

²⁶ *Id.* at 12. According to RAAD, these three groups are Uno Radio Group (controlled by the Sotos), SBS Spanish Broadcasting Systems, and Univision Radio (both major U.S. broadcasters). *Id.* at 13, n.18.

²⁷ *Id.* at 11-12.

²⁸ *Id.* at 4, n.3, 12-13.

²⁹ *Id.* at 11.

³⁰ *Id.* at 8-9.

Puerto Rico from the Arbitron Metro-based methodology. Because the issue is the subject of a pending rulemaking, RAAD argues, grant of the WTOK-FM Waiver is “premature.”³¹

3. *Waiver standard and precedent.* RAAD argues that WFI did not meet the waiver standard because it failed to show that “it would work an unusual or undue hardship on the Sotos’ if they were to be held to the same standard applicable to every other broadcaster in Puerto Rico.”³² RAAD further contends that there are no “special circumstances that differentiate the Sotos from any other broadcasters in Puerto Rico”³³ and that waiver was based purely on “the alleged uniqueness of Puerto Rico’s topography. . . .”³⁴ RAAD argues that the WMIO Waiver is inapposite precedent for the WTOK-FM Waiver, because station WTOK-FM is a Class B station serving a significantly greater population, including the largest economic center on the island (San Juan).³⁵ RAAD also contends that—unlike the WTOK-FM Waiver—the WMIO Waiver was “carefully conditioned upon the outcome of the multiple ownership rulemaking proceedings”³⁶ and that “the justification for the WMIO grant was specifically stated to be inapplicable to a duopoly waiver for stations located in San Juan.”³⁷ RAAD complains that WFI failed to show that waiver implements Commission policy better than compliance with the rules or that compliance with the rules would be inconsistent with the public interest.³⁸ Rather, RAAD argues, “all that [WFI] offered was an argument that the full Commission erred in adopting . . . the Arbitron market definition.”³⁹ Finally, RAAD contends that the Bureau failed to give the waiver the requisite “hard look,” instead “merely parrot[ing] its own rationale used in the uncontested WMIO waiver proceeding.”⁴⁰
4. *Rule violation.* RAAD argues that the WTOK-FM Waiver is “contrary to firmly established Commission precedent [the *Ownership Order*], upheld on judicial appeal, which on its face makes grant of the instant waiver unjustifiable.”⁴¹ According to RAAD, the WTOK-FM Waiver constitutes a “unilateral abandonment by the Audio Division of the Commission’s recently established market definition in Puerto Rico”⁴²

³¹ *Id.* at 10.

³² *Id.* at 21; *see also id.* at 7.

³³ *Id.* at 7.

³⁴ *Id.* at 21. In a related point, RAAD argues that the WTOK-FM Waiver makes it “effectively impossible to deny any future duopoly waivers for radio licenses in Puerto Rico . . . the Sotos will now have the unfettered ability to restrain competition throughout the Island.” *Id.* at 4.

³⁵ *Id.* at 5, 22. Station WTOK-FM is a Class B station with an ERP of 50 kW and 347 meters HAAT. Station WMIO(FM) is a Class A station with 3 kW and 238 meters HAAT.

³⁶ *Id.* at 8.

³⁷ *Id.* at 22. We interpret RAAD’s arguments that refer to the “duopoly rule” or a “duopoly waiver” as referring to the local radio ownership rule. The duopoly rule provides that one party may not own two *television* stations licensed in the same Designated Market Area (DMA) unless certain conditions are present. 47 C.F.R. § 73.3555(b). This rule does not apply to radio, which is governed by the local radio ownership rule, 47 C.F.R. § 73.3555(a).

³⁸ Petition at 7, 22.

³⁹ *Id.* at 22.

⁴⁰ *Id.* at 7-8.

⁴¹ *Id.* at 10.

⁴² *Id.* at 5.

For these reasons, RAAD concludes that the Bureau's grant of the WTOK-FM Waiver was an "arbitrary and capricious" action.⁴³

In its Opposition, MSG addresses only RAAD's unauthorized transfer of control argument. MSG contends that the Petition should be dismissed for failure to demonstrate that the *Letter Decision* contained a material error or omission. MSG argues that RAAD "does nothing more than invoke the same facts and reiterate the same arguments previously presented to the Bureau in its Petition to Deny" which in turn "relied almost entirely on facts and arguments that the Bureau had considered and rejected in 2008 [in the *Mejia Order*]." ⁴⁴ RAAD's allegations were fully considered and rejected in the *Letter Decision*, MSG concludes, and RAAD fails to show any material error or omission in the Bureau's analysis of the unauthorized transfer of control issue.⁴⁵

WFI's Opposition similarly argues RAAD fails to identify any material error or omission in the *Letter Decision* or to raise additional facts not known or existing until after RAAD's last opportunity to present such matters.⁴⁶ With respect to the waiver standard, WFI protests that it did demonstrate hardship "by clear and convincing evidence" because the Arbitron Metro market definition would foreclose "economic opportunities that other broadcasters in other, properly defined markets, were able to pursue."⁴⁷ WFI contends that the WTOK-FM and WMIO Waivers are based on the same factual predicates: namely, (1) the "extreme topography" of the island, which prevents stations on one side of the island from competing with stations on the other side; and (2) the incongruity of including within a single Arbitron Metro eight MSAs and three Combined Statistical Areas.⁴⁸ Lastly, WFI argues that the WTOK-FM Waiver, like the WMIO Waiver, is conditional, as it specifies that any future application to change or increase station WTOK-FM's technical facilities must be accompanied by a new showing of compliance with the local radio ownership rules, including, if necessary, a new request for waiver.

WFI also challenges RAAD's factual allegations, arguing that RAAD offers no support for its assertions regarding: (1) the number of competing radio stations in Puerto Rico; (2) the "national" nature of the Puerto Rican broadcast market; or (3) the inability of smaller broadcasters to compete with WFI.⁴⁹ WFI contends that WFI's alleged market share of 26 percent—even if verified—is not problematic, pointing to a 2001 decision approving an assignment that would result in an assignee having 48.8 percent share of a market's advertising revenue. Finally, WFI argues that RAAD includes other major Puerto Rico broadcasters in its competition analysis "for no readily ascertainable reason other than to imply some sort of broadcast 'cartel'..."⁵⁰

⁴³ *Id.* at 5, 11.

⁴⁴ *Id.* at 2, 4.

⁴⁵ *Id.* at 7-8.

⁴⁶ WFI Opposition at 1-2, 7.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 5, 8. WFI also contends that the WTOK-FM Waiver confirms previous holdings in similar contexts that Puerto Rico should be treated differently based on its "unique geographic issues." *Id.* at 9.

⁴⁹ *Id.* at 10-12. WFI argues that "[n]either BIA nor the Audio Division distinguish between commercial AM and commercial FM stations in computing the number of stations in a market because ALL of them compete with each other." *Id.* (emphasis in original).

⁵⁰ *Id.* at 13-14.

In its Reply to WFI, RAAD largely reiterates arguments made in the Petition, adding a discussion justifying Arbitron's designation of the Puerto Rico Metro as single market.⁵¹

II. Discussion

Reconsideration is warranted only if the petitioner shows an error of fact or law in the Commission's original order, or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.⁵² RAAD has not met this burden.

Unauthorized transfer of control. To determine whether there has been an unauthorized transfer of control of a broadcast station in violation of Section 310(d) of the Act,⁵³ the Commission looks to see whether a party that is not the licensee exercises control over the programming, personnel, and finances of the station.⁵⁴ A licensee is permitted to delegate the day-to-day operations relating to these three areas, so long as it continues to set the policies guiding those operations.⁵⁵

RAAD's primary argument on this point is that the Bureau failed to arrive at the correct conclusion based on the totality of the facts before it.⁵⁶ On reconsideration, RAAD does not adduce new facts in support of this position but merely contradicts the conclusions of the *Letter Decision*.⁵⁷ It is axiomatic that reconsideration will not be granted merely for the purpose of again debating matters on which the Commission has deliberated and spoken.⁵⁸ The *Letter Decision* thoroughly addressed RAAD's contentions regarding unauthorized control and we will not do so again here. While properly refraining from revisiting the 2008 Mejia transaction itself, now long final,⁵⁹ the Bureau re-examined the Mejia Transactional Documents as potentially relevant to current, or ongoing, unauthorized control of station WTOK-FM, concluding that "[i]t is clear from the terms of the agreements that MSG has ultimate control over personnel and all programming decisions and policies . . ."⁶⁰ The *Letter Decision* also separately evaluated each of RAAD's new allegations, finding that neither use of a Soto trademark nor employment

⁵¹ WFI Reply at 4-6.

⁵² See 47 C.F.R. § 1.106(c) and (d); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966) ("*WWIZ, Inc.*").

⁵³ 47 U.S.C. § 310(d).

⁵⁴ See, e.g., *Solar Broadcasting Company, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 5467, 5486 (2002); *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856, 863 (1969) (subsequent history omitted).

⁵⁵ See, e.g., *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8142 (1995), *vacated on other grounds sub nom. Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998).

⁵⁶ Petition at 15-16 ("The Division concluded that RAAD's argument was based on inferences, conjecture, and erroneous information. A review of the relevant facts, however, demonstrates otherwise.")

⁵⁷ 47 C.F.R. § 1.106(c) (stating that a petition for reconsideration may rely on facts or arguments not previously presented only if circumstances have changed, the facts were unknown to the petitioner and could not have been discovered through the exercise of ordinary diligence, or consideration of the facts or argument is in the public interest).

⁵⁸ *WWIZ, Inc.*, 37 FCC at 686.

⁵⁹ *Letter Decision* at 5.

⁶⁰ *Id.* at 6.

of former Soto employees evidences unauthorized control of the Station.⁶¹ Finally, the *Letter Decision* examined all of the facts collectively, concluding that the whole is not greater than the sum of its parts: “[H]aving reviewed the agreements and the entire record before us, we reject RAAD’s first argument that MSG and the Soto family engaged in an unauthorized transfer of control.”⁶² By merely reiterating facts and arguments that were before the Bureau at the time of the *Letter Decision* while urging a different result, RAAD manifestly fails to meet the reconsideration standard with respect to the alleged unauthorized transfer of control of station WTOK-FM.

Waiver. The Commission's rules may be waived only for good cause shown.⁶³ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”⁶⁴ and must support its waiver request with a compelling showing.⁶⁵ Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.⁶⁶ In this case, RAAD has not shown that the *Letter Decision* misapplies the waiver standard.

Factual basis for waiver. We disagree with RAAD’s contention that the Bureau arbitrarily or capriciously ignored facts or arguments before it regarding broadcast competition in Puerto Rico. “Market realities and Puerto Rico’s competitive environment” are thoroughly deliberated upon and decided in the *Letter Decision*, which devotes no fewer than six paragraphs to the subject.⁶⁷ The facts cited in the Petition in furtherance of RAAD’s waiver arguments were either before the Bureau at the time of the *Letter Decision* or could have been discovered through the exercise of ordinary diligence.⁶⁸ Accordingly, we do not revisit the factual basis for the *Letter Decision*’s conclusions regarding broadcast competition in Puerto Rico, nor do we entertain RAAD’s arguments on this point, upon which we have already deliberated and spoken.⁶⁹

Delegated authority. RAAD argues that the “fundamental error” of law in the *Letter Decision* is that the same issues raised by WFI’s waiver request are being addressed in “still-open” dockets.⁷⁰ The WTOK-FM Waiver, according to RAAD, thus constitutes an impermissible “rulemaking by waiver.”⁷¹ However, the ARSO petition for reconsideration of the 2002 *Biennial Ownership Order* was dismissed in the 2006 quadrennial broadcast ownership proceeding, and, to date, the Commission has not yet initiated

⁶¹ *Id.*

⁶² *Id.* at 7 (emphasis added).

⁶³ 47 C.F.R. § 1.3.

⁶⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“*WAIT Radio*”) (subsequent history omitted).

⁶⁵ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

⁶⁶ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

⁶⁷ *Id.* at 7-10.

⁶⁸ 47 C.F.R. § 1.106(c).

⁶⁹ *WWIZ, Inc.*, 37 FCC at 686.

⁷⁰ WFI Reply at 3.

⁷¹ Petition at 8.

a rulemaking proceeding specifically addressing the Puerto Rico market definition methodology.⁷² Therefore, there is no open Commission docket concerning market definition in Puerto Rico. More fundamentally, the *Letter Decision* is not an “agency statement . . . of future effect” such as would constitute a rule under the Administrative Procedure Act.⁷³ Therefore, the WTOK-FM Waiver in no way prejudices the Commission’s ultimate disposition of the issues raised in ARSO’s petition for reconsideration.⁷⁴ Rather, the *Letter Decision* merely takes the requisite “hard look” at the particular facts presented by WFI’s waiver request. Such a waiver, made on a case-specific basis, is well within the scope of the Bureau’s delegated authority.⁷⁵

Waiver standard and precedent. RAAD’s various arguments that the Bureau erred by misapplying the waiver standard in this case are unavailing. First, WFI was not required to show individualized hardship, as RAAD contends. When considering a waiver request, the Commission *may* take into account considerations of hardship, equity, *or* more effective implementation of overall policy.⁷⁶ In the *Letter Decision*, the Bureau found that Puerto Rico’s unique characteristics—mountainous topography, large numbers of radio stations and radio owners, and multiple MSAs—demonstrate that the island contains multiple local radio markets.⁷⁷ Because the purpose of the multiple ownership rules is to “preserve a healthy and robust competition” among broadcasters *in each local market*,⁷⁸ it is in the public interest to define that market as rationally as possible.⁷⁹ The Commission has stated that, in most cases, the Arbitron Metro-based methodology achieves that purpose.⁸⁰ In this particular case, however, because the Puerto Rico Arbitron Metro designation fails to adequately capture market realities, the policy goal of accurate market definition is better met by permitting use of the contour-overlap methodology. No separate showing of individual hardship was therefore necessary to justify grant of the waiver.

Second, while an applicant for waiver must show “special circumstances,” those circumstances need not be *unique* to the applicant, as RAAD contends.⁸¹ Other licensees may have similar special

⁷² 2006 *Quadrennial 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 Order on Reconsideration, 23 FCC Rcd 2010, n.427 (2008) (“We have granted ARSO’s waiver request to use the interim contour-overlap methodology pending the outcome of its Petition, which will be resolved in a separate proceeding. Therefore, we dismiss ARSO’s petition in this proceeding.”) (internal citations omitted).

⁷³ 5 U.S.C. § 551(4). The *Letter Decision* is an order adjudicating an individual licensing matter. *Id.* § 551(6)-(8).

⁷⁴ The *Letter Decision* also makes clear that any future application by WFI to change or increase station WTOK-FM’s technical facilities must be accompanied by a new showing of compliance with the local radio ownership rules and, if necessary, a new request for waiver of the use of the Arbitron Puerto Rico Metro as the presumptive market in which station WTOK-FM competes. *Letter Decision* at n. 4; *See also* 47 C.F.R. § 73.3555, n.4.

⁷⁵ 47 C.F.R. § 0.283.

⁷⁶ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

⁷⁷ *Letter Decision* at 8-9. Because the Bureau explicitly based its holding on these multiple facts, we disagree with RAAD’s contention that “all [WFI] offered was an argument that the full Commission erred in adopting . . . the Arbitron market definition.” *See* Petition at 22.

⁷⁸ *Ownership Order* at 13623.

⁷⁹ *See id.* at 13724-5.

⁸⁰ *Id.* at 13813.

⁸¹ Petition at 7 (arguing that WFI has failed to distinguish itself from “any other broadcasters in Puerto Rico”).

circumstances warranting waiver.⁸² In fact, it is common and appropriate practice for staff to analyze a waiver request in part by comparing it to similar cases, although each request is ultimately decided on its own merits. Conversely, because each waiver request is evaluated on a case-by-case basis, factual differences between stations WMIO(FM) and WTOK-FM do not militate against waiver for station WTOK-FM. We also disagree with RAAD's contention that the justification for the WMIO Waiver is expressly inapplicable to any San Juan station. Rather, the WMIO Waiver was based (in part) on station WMIO(FM)'s distance from San Juan, just as the WTOK-FM Waiver is based (in part) on station WTOK-FM's distance from the western portions of the island. The relevant factor in each case is that the station could not reach or compete in certain parts of the island, thus indicating the existence of multiple radio markets.

Rule violation. RAAD contends that the WTOK-FM Waiver is "contrary to firmly established Commission precedent,"⁸³ constituting an "abandonment. . . of the Commission's recently established market definition . . ."⁸⁴ RAAD's argument boils down to an observation that, in the absence of a waiver, the proposed transaction would inevitably violate the Commission's rules. We have long rejected such tautological objections to waiver requests and do so again here.⁸⁵

III. Conclusion/Actions.

We find that grant of the WFI Application was not in error and was consistent with the public interest, convenience, and necessity. Accordingly, IT IS ORDERED that RAAD's Petition for Reconsideration IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁸² On this point, we note that the *Letter Decision* requires WFI to satisfy the numerical limitations of Section 73.3555(a)(1)(iii); i.e., WFI may not have a cognizable interest in more than eight commercial stations, no more than five in the same service. Our waiver merely permits the pre-2003 market definition methodology—contour-overlap analysis—to be used instead of the Arbitron Metro-based methodology when determining such compliance. Thus WFI does not have an "unfettered ability to restrain competition," as alleged by RAAD, but is constrained by the numerical limits of our local radio ownership rule.

⁸³ Petition at 5.

⁸⁴ *Id.* at 10.

⁸⁵ *WAIT Radio*, 418 F.2d at 1158 ("The very essence of waiver is the assumed validity of the general rule, and also the applicant's violation unless waiver is granted.").