

FEDERAL COMMUNICATIONS COMMISSION  
445 12<sup>th</sup> STREET, S.W.  
WASHINGTON, DC 20554  
November 10, 2004

*In Reply Refer to:*  
1800B3-JS/JWR

Mark N. Lipp, Esquire  
Vinson & Elkins, LLP  
1455 Pennsylvania Ave. NW  
Washington, DC 20004

In re: **NEW(AM), Pace, FL**  
**Facility No. 135913**  
Brantley Broadcast Associates  
File Nos. BNP-20010706AAS  
Application for Construction Permit

Request for Waiver of Section 73.182,  
Engineering Standards of Allocation

Dear Mr. Lipp:

This letter refers to the above-referenced application filed on July 6, 2001 by Brantley Broadcast Associates ("Brantley"), as amended, for a construction permit to build a new AM broadcast station in Pace, Florida. Also before us is Brantley's request to waive section 73.182 of the Commission's rules, "Engineering Standards of Allocation." For the reasons set forth below, we deny the waiver request and dismiss Brantley's application.

*Background* On July 6, 2001, Brantley filed the subject application to construct a new AM station in Pace, Florida. By letter dated December 20, 2002, the staff advised Brantley, among other things, that its proposed nighttime operation would enter the 25% RSS limit of then NEW, Marathon, Florida ("Radio Marti"), and that the proposed nighttime contribution of 4.7 mV/m would increase the existing 25% RSS limit from 11.4 mV/m to 12 mV/m, in violation of section 73.182. On March 10, 2003, Brantley filed an amendment to the subject application which included a request to waive section 73.182.

*Waiver Request.* In support of its waiver request, Brantley states that Radio Marti is not a Commission licensee and is therefore not subject to the Commission's rules. In this regard, Brantley maintains that section 73.182 ensures that Commission licensees, *i.e.* domestic AM stations, are not subject to undue interference, thus 73.182 should not apply to non-licensee Radio Marti. Notwithstanding the argument that there is no requirement that Radio Marti receive protection from interference by domestic AM stations, Brantley submits that it has a "compelling case" for waiving 73.182. Specifically, Brantley states that its proposal will not cause interference to any AM station subject to FCC jurisdiction, and because Radio Marti "is not

licensed to Cuba” it is not entitled to protection under international agreements. Brantley also submits that: Radio Marti’s operation exceeds the limits imposed on domestic AM stations; that Radio Marti is already overwhelmed by existing interference in the Cuba service area; and that favorable action on the waiver request will result in a new AM service at Pace, Florida.

*Discussion/Action.* Radio Marti was created and authorized by Congress to broadcast information to Cuba in the Radio Broadcasting to Cuba Act.<sup>1</sup> Contrary to Brantley’s contention, there is precedent acknowledging that Radio Marti is to be protected from interference by domestic radio stations in the same fashion as are the domestic AM stations under the Commission’s jurisdiction.<sup>2</sup> We believe that authorizing the subject station would run contrary to the Commission’s statutory mandate to assist the United States Information Agency in fulfilling the purposes of the Act.

Further, while Brantley’s request indicates that it is aware of the “history and authorities” of Radio Marti, it does not contain a sufficient showing to justify a waiver of section 73.182. When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action. *Rio Grande Family Radio Fellowship, Inc. v. FCC*.<sup>3</sup> We have afforded Brantley’s waiver request the “hard look” called for under the *WAIT Doctrine*, *WAIT Radio v. FCC*,<sup>4</sup> but find that the facts and circumstances set forth in Brantley’s justification are insufficient to establish that grant of the requested waiver would be in the public interest. That Radio Marti exceeds the facilities limits imposed on domestic AM stations has no bearing on whether or not it should receive interference from domestic AM stations; Congress has authorized, and the Commission has recognized, that Radio Marti is a powerful station – its

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<sup>1</sup> Pub. L. 98-111, 97 Stat. 749 (1983) (the “Act”). The service was designed to “provide for the open communication of information and ideas through the use of radio broadcasting to Cuba. Radio broadcasting to Cuba shall serve as a consistently reliable and authoritative source of accurate, objective, and comprehensive news.” *Id.* at Section 3(a). The service was created because “there is a need for broadcasts to Cuba which provide news, commentary and other information about events in Cuba and elsewhere to promote the cause of freedom in Cuba.” *Id.* at Section 2. The Commission is mandated to promulgate such regulations and policies as necessary in order to assist the United States Information Agency in carrying out the purposes set forth in section 2 of the Act. *Id.* at Section 6. The service was originally part of the Voice of America, but All U.S. Government and government sponsored, non-military, international broadcasting has been consolidated under the Broadcasting Board of Governors (BBG). The station broadcasts seven days a week, 24 hours a day on AM and shortwave frequencies. For more information, see <http://www.bbg.gov>.

<sup>2</sup> See *Florida Educational Television, Inc., Hearing Designation Order*, MM Docket No. 86-42, Adopted: January 30, 1986; Released: February 7, 1986 (Because the proximity of the applicant’s proposed tower to Radio Marti could adversely affect Radio Marti’s radiation pattern, grant of the application would be subject to a condition intended to assure that Radio Marti’s radiation pattern was not distorted). See also *Request of United States Information Agency*, 10 FCC Rcd 4514 (1995) (Commission states applications for construction permits for new stations or modifications to existing stations or petitions for amendments to the Table of Allotments will not be accepted if they will interfere with TV Marti’s broadcasts to Cuba on those channels); and *Request of United States Information Agency*, 6 FCC Rcd 1714 (1991) (Commission added footnote to the Television Table of Allotments indicating that applications will not be accepted for the Channel 13 Key West allotment until the TV Marti operations on Channel 13 are permanently discontinued).

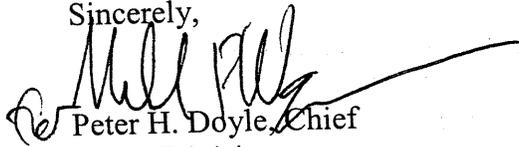
<sup>3</sup> 406 F.2d 644 (D.C. Cir.1968).

<sup>4</sup> 418 F.2d 1153 (D.C. Cir.1969).

target audience is, after all, in Cuba – and the Commission has cautioned applicants to consider that fact in designing the technical aspects of their proposed facilities.<sup>5</sup> Similarly, that Radio Marti may be receiving interference within the Cuba service area is irrelevant to whether its signal should be degraded by domestic stations. Finally, we reject Brantley's contention that favorable action on the waiver request will result in a new AM service at Pace, Florida. We generally will not waive the Commission's core technical rules for non-technical reasons,<sup>6</sup> and we are aware of no precedent in which the Commission waived one of its core technical rules simply to further an allotment priority.

Accordingly, Brantley's waiver request IS DENIED and its application, File Nos. BNP-20010706AAS, IS HEREBY DISMISSED.

Sincerely,



Peter H. Doyle, Chief  
Audio Division  
Media Bureau

cc: Brantley Broadcast Associates

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<sup>5</sup> *Florida Educational Television, Inc.*, *supra*, at n. 2.

<sup>6</sup> *ICBC Corporation v. FCC*, 716 F.2d 849 (D.C. Cir. 1983).