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John F. Garziglia, Esq.
Womble Carlyle Sandridge & Rice, LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036

Leonard Wheeler, President
Mel Wheeler, Inc.
3934 Electric Road
Roanoke, VA 24018

Gary E. Burns, CEO
3 Daughters Media Inc.
PO Box 348
Forest, VA 24551

In re: **WLNI(FM), Lynchburg, VA**
Facility ID No. 22663
File No. BALH-20130104ABX

Application for Assignment of License

Petition to Deny

Dear Counsel:

We have before us the referenced application (“Application”) seeking approval for the proposed assignment of the license of Station WLNI(FM), Lynchburg, Virginia (“Station”), from Centennial Licensing, LLC (“Centennial”), to Mel Wheeler, Inc. (“MWI”) (collectively, “Applicants”). We also have before us a Petition to Deny (“Petition”) filed by 3 Daughters Media Inc. (“3 Daughters”) on February 1, 2013.¹ For the reasons discussed below, we deny the Petition and grant the Application.

Background. The Applicants filed the Application on January 4, 2013. 3 Daughters timely filed its Petition to Deny, asserting that the proposed assignment violates the Commission’s local radio ownership rule, “will upset the competitive balance in the [Roanoke-Lynchburg Arbitron] market” and “discourage opportunities for females, minorities and small business to secure financing and to expand the marketplace.”² In response, Applicants argue that 3 Daughters lacks standing to file the Petition.³ Applicants also argue that 3 Daughters has failed to make a *prima facie* case that the proposed assignment

¹ Applicants filed a Joint Opposition (“Opposition”) on February 14, 2013. Petitioner filed a Reply to Joint Opposition to Petition to Deny (“Reply”) on March 4, 2013.

² Petition at 2.

³ Opposition at 2-3.

either violates the local radio ownership rule or otherwise is inconsistent with the public interest.⁴ In reply, 3 Daughters asserts that it has standing and that it did make a *prima facie* case.⁵

Discussion. Procedural Issue. Standing. Section 309(d)(1) of the Act provides that only a “party in interest” may file a petition to deny a proposed assignment.”⁶ The Commission accords party in interest status to a petitioner if grant of the application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature.⁷ It is well established that a competitor of an applicant qualifies as a party in interest.⁸ We note that contrary to Applicants’ assertions,⁹ where standing is derived from status as a competitor in the market, a petitioner “does not need to demonstrate that it will suffer a direct injury from grant” of an application.¹⁰ Nor, as a competitor, “must it demonstrate, or even allege . . . that it will be subjected to increased or materially different competition as a result of the proposed assignment.”¹¹ Accordingly, we find that 3 Daughters – which holds the licenses for three AM stations and one FM translator station located in the same market as the Station – has standing to file a petition to deny the Application.

Substantive Issues. Undue Concentration. 3 Daughters claims that, if allowed to acquire the station, MWI’s market revenue share will exceed 50 percent.¹² 3 Daughters also asserts that MWI would control all 5 of the top 5 rated stations in the Roanoke Metro and, thus, the proposed transaction would result in excessive market concentration. 3 Daughters, however, ignores the fact that, when the Commission adopted its bright-line, geography-based radio rule for rated markets, it concluded that “by applying the numerical limits of the local radio ownership rule to a more rational market definition, we believe that, *in virtually all cases*, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest.”¹³ While we are bound to give a “hard look” to petitions that allege that a particular transaction is not in the public interest, notwithstanding

⁴ *Id.* at 3-14.

⁵ Reply at 2-10.

⁶ 47 U.S.C. § 309(d)(1).

⁷ See, e.g., *Pinelands, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6058, 6063 (1992); *Telesis Corp.*, Memorandum Opinion and Order, 68 FCC2d 696 (1978).

⁸ *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-477 (1940); *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994 (1966).

⁹ See Opposition at 2, citing *KERM Inc. V. FCC*, 353 F.3d. 57, 60-61 (D.C. Cir. 2004) (“*KERM*”). We find Applicants’ reliance on *KERM* to be misplaced. That case addresses “[Article III] standing to seek *judicial* review of administrative action.” *KERM*, 353 F.3d. at 61 (emphasis added). While the Commission generally follows judicial standing principles, it does not require competitors to specifically allege injury in order to establish standing under Section 309(d) of the Act. See *CAPH v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985) (“The Article III restrictions under which this court operates do not, of course, apply to the FCC. The Commission may choose to allow persons without Article III ‘standing’ to participate in FCC proceedings, as it did in this case.”); *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 732 n.27 (D.C. Cir. 1970) (“Standing to sue depends on more restrictive criteria than standing to appear before administrative agencies . . .”).

¹⁰ See *Waterman Broadcasting Corporation of Florida*, Letter, 17 FCC Rcd 15742, 15744 n.2 (MB 2002), citing *American Mobilphone, Inc. and Ram Technologies, Inc.*, Order, 10 FCC Rcd 12297, 12298 (WTB 1995) (“*American Mobilphone*”).

¹¹ *American Mobilphone*, 10 FCC Rcd at 12298.

¹² Petition at 2 and 9.

¹³ See *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13813 ¶ 497 (2003) (“*Ownership Order*”) (emphasis added).

compliance with the new rule,¹⁴ the petitioner faces a high hurdle and must present specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest.”¹⁵ We find that 3 Daughters’ challenge ultimately fails under this standard and that departure from the rule is unwarranted in this case. 3 Daughters relies, in large part, on advertising revenue shares in asserting its competition concerns. The Commission, however, has concluded that ad revenue share is of “decreasing relevance . . . as a barometer of competition,”¹⁶ and explicitly rejected arguments that it incorporate a market share analysis into the local ownership rule.¹⁷ We are unpersuaded that application of the new radio ownership rule is inadequate to protect against competitive harm in this case. We therefore analyze these transactions by applying the numerical limits of Section 73.3555(a).

Radio Multiple Ownership Analysis. The Station is located in the Roanoke-Lynchburg, Virginia Arbitron Metro market (“Roanoke Metro”). BIA lists a total of 46 commercial and noncommercial full power stations as “home” to this market. Under the Commission’s local radio ownership rule, in a radio market with 45 or more full-power commercial and noncommercial radio stations, an entity may hold a cognizable interest in up to a total of eight commercial radio stations, not more than 5 of which are in the same service.¹⁸

Applicants state that the proposed transaction would result in MWI having cognizable interests in 5 FM and 2 AM stations in the Roanoke Metro and thus that the proposed transaction complies with both the applicable numerical limit and AM/FM subcap.¹⁹ 3 Daughters, on the other hand, asserts that the proposed transaction violates the local radio ownership rule. 3 Daughters argues that BIA incorrectly includes three stations – WWZW(FM), Buena Vista, Virginia, WODI(AM), Brookneal, Virginia, and WOWZ(AM), Appomattox, Virginia – in the station count for the Roanoke Metro. 3 Daughters states that, when these stations are excluded, the number of stations that are “home” to the Roanoke Metro drops to 43. 3 Daughters notes that the applicable numerical limit and AM/FM subcap decrease from eight to seven and five to four, respectively.²⁰ Thus, according to 3 Daughters, the local radio ownership rule would bar MWI’s acquisition of the Station. Applicants dispute 3 Daughters claims. In addition, Applicants urge us to include three additional counties – and at least nine additional radio stations – in the Roanoke Metro. As discussed in detail below, we agree with 3 Daughters that we should exclude WOWZ(AM) from our station count but find that WWZW(FM) and WODI(AM) should be included in that count.

¹⁴ *Ownership Order*, 18 FCC Rcd at 13647 ¶ 85 (explaining that although “we are confident that the modified rules will reduce the chances of precluding transactions that are in the public interest or, alternatively, permitting transactions that are not in the public interest . . . we are obligated to give a hard look both to waiver requests . . . as well as petitions to deny.”).

¹⁵ *Id.* at 13647, n. 131, *citing* 47 U.S.C. § 309(d) and case precedent (case citations omitted).

¹⁶ *Id.* at 13642 ¶ 68.

¹⁷ *Id.* at 13639 -43 ¶¶ 60-68.

¹⁸ 47 C.F.R. § 73.3555(a)(1).

¹⁹ Applicants acknowledge that MWI also holds a cognizable interest in WVBB(FM), Elliston-Lafayette, Virginia, but note that this station is not located within the geographic boundaries of the Roanoke Metro or otherwise or otherwise qualifies as “home” to that Metro. Applicants also note that the predicted community contours of the Station and WVBB(FM) do not overlap. Thus, Applicants assert that the proposed transaction complies with the local radio ownership rule. In contrast, Three Daughters argues that BIA incorrectly excludes WVBB(FM) from the Roanoke Metro. Given our findings below, we need not reach this issue.

²⁰ In radio markets with between 30 and 44 full-power commercial and noncommercial radio stations, an entity can own or hold a cognizable interest in a total of no more than 7 commercial radio stations, no more than 4 of which are in the same service. *See* 47 C.F.R. § 73.3555(a)(ii). MWI already holds cognizable interests in 4 FM and 2 AM stations in the Roanoke Metro.

WWZW(FM). 3 Daughters argues that we should exclude WWZW(FM) because “it does not cover a significant part of the market and has only registered in 2 of the last 18 reporting periods by BIA.”²¹ We do not find this sufficient to justify exclusion of the station.²² Moreover, we note that the two-year waiting period for inclusion of WWZW(FM) in the Roanoke Metro expired on August 1, 2013.²³ Accordingly, we will count WWZW(FM) as part of the Roanoke Metro for purposes of our analysis.

WODI(AM). 3 Daughters urges us to exclude WODI(AM) because, according to Three Daughters, the station has been dark since at least October 2012.²⁴ Three Daughters submits an email from the former owner of WODI(AM) confirming that the station is dark and has been since October 2012.²⁵ 3 Daughters also states that its CEO drives by the station’s transmitter site “at least 4 times each week and each time monitors the frequency.”²⁶ According to 3 Daughters, “WODI is and has been off the air for quite some time.” Applicants observe that, according to the BIA data included in the Petition and the Commission’s records, WODI(AM) is licensed and operating.²⁷ Given the conflicting information before us, we requested that JKC Ventures, LLC (“JKC”), the licensee of WODI(AM), clarify its operational status.²⁸ JKC indicates that, since it became licensee of the WODI(AM) in October 2010, the station “has not been silent for a period of 30 consecutive days or more.”²⁹ JKC also states that WODI(AM) currently is operational.³⁰ We find that WODI(AM) is not silent at this time and was not silent for the last six months. Accordingly, we will count it as part of the Roanoke Metro for purposes of our analysis.

WOWZ(AM). 3 Daughters last argues that we should exclude WOWZ(AM) because it “has been off more than it has been on in the last three years.”³¹ Since its license renewal in September 2011, WOWZ(AM) has operated less than 5 months and been silent for nearly 16 months.³² Its most recent

²¹ Petition at 7-8.

²² See *WKML License Limited Partnership*, Letter, 20 FCC Rcd 10877 (MB 2005) (“zero audience shares do not necessarily correspond to non-home status”).

²³ *Ownership Order*, 18 FCC Rcd at 13726 ¶ 278. The Commission “will not allow a party to receive the benefit of the inclusion of a radio station as ‘home’ to a Metro unless such station’s community of license is located within the Metro or such station has been considered home to that Metro for at least two years.” *Id.* This safeguard is intended to ensure that changes in “home market designations will be made to reflect actual market conditions and not to circumvent the local radio ownership rule.” *Id.* BIA designated WWZW(FM) part of the Roanoke Metro on August 1, 2011.

²⁴ Petition at 8.

²⁵ Reply at Attach. D.

²⁶ Reply at 7.

²⁷ Opposition at 8.

²⁸ Letter to Shelley Sadowsky, Esq., Counsel for JKC Ventures, LLC, from Peter H. Doyle, Chief, Audio Division, Media Bureau (dated May 28, 2013).

²⁹ Letter to Victoria McCauley, Esq., Audio Division, Media Bureau, from Shelley Sadowsky, Esq., Counsel for JKC Ventures, LLC (dated June 27, 2013).

³⁰ *Id.*

³¹ Petition at 7.

³² We renewed WOWZ(AM)’s license on September 27, 2011. See Broadcast Actions, Public Notice, Report No. 47583 (Sept. 30, 2011). While the station was operating at that time, it went dark on November 8, 2011. See File No. BLSTA-BLSTA-20111108AHF (requesting special temporary authority (“STA”) to remain silent and citing the need to relocate the station as the reason for its silence). It did not resume operations until October 31, 2012. See Notice of Resumption of Operations (Nov. 2, 2012). The station operated at reduced power from October 31, 2012 until January 28, 2013, at which time it went silent again. See File Nos. BSTA-20121102ADT (requesting STA to

period of silence commenced on January 28, 2013. At this time, WOWZ(AM) has been silent for more than 6 months. WOWZ(AM) is not a viable competitor.³³ For this reason, we will not count WOWZ(AM) as part of the Roanoke Metro for purposes of our analysis.³⁴

Excluding WWOZ(AM), 45 commercial and noncommercial full power stations are “home” to the Roanoke Metro. Under the Commission’s local radio ownership rule, in a radio market with 45 or more full-power commercial and noncommercial radio stations, an entity may hold a cognizable interest in up to a total of 8 commercial radio stations, not more than 5 of which are in the same service. MWI currently holds cognizable interests in 4 FM and 2 AM radio stations in the Roanoke Metro. Its proposed acquisition of WLNI(FM) would result in it owning 5 FM and 2 AM stations. This is permissible under the local radio ownership rule.³⁵

Other Public Interest Concerns. 3 Daughters asserts that approval of this assignment “will discourage opportunities for females, minorities and small business to secure financing and to expand in the marketplace.”³⁶ Three Daughters has provided no support for this generalized allegation. We consider this allegation no further.

Conclusion/Actions. Based on the evidence before us, we find no substantial and material questions of fact that warrant further inquiry. We conclude that the Applicants are fully qualified and that grant of the Assignment Applications will serve the public interest, convenience, and necessity. Accordingly, IT IS ORDERED that the Petition to Deny filed by 3 Daughters Media Inc. on February 1, 2013, IS DENIED. IT IS FURTHER ORDERED, that the application to assign the license for stations WLNI(FM), Lynchburg, Virginia (File No. BALH-20130104ABX), from Centennial Licensing, LLC to Mel Wheeler Inc. IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

operate at reduced power and from a different site) and BLSTA-20130207AAX (requesting STA to remain silent and citing financing as the reason for going silent). At that time, the station’s owner indicated it “hope[d] to be back up and operating within the next 90 days.” To date, the station has not resumed operations.

³³ *Revision of Radio Rules and Policies*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6387 ¶ 39 (1992). While the Commission decided to exclude stations that have been dark for more than 6 months when it defined local radio markets using the contour overlap methodology, the reasoning behind the decision – that a station that has been dark for more than 6 months is not a viable competitor – remains equally valid under the current rule.

³⁴ Given our finding, we need not reach 3 Daughters’ argument that we should exclude WOWZ(AM) because of its limited signal coverage. Petition at 7.

³⁵ Given this conclusion, we need not address Applicants’ argument that we should redefine the Roanoke Metro to include additional counties. Opposition at 11-12.

³⁶ Petition at 2, 9.