

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

2013 SEP 23 11 08 AM

In the Matter of Application of: )  
)  
**CENTENNIAL LICENSING, LLC** )  
**(Assignor)** )  
)  
and )  
)  
**MEL WHEELER, INC.** )  
**(Assignee)** )  
)  
For Assignment of License )  
**WLNI(FM), Lynchburg, VA** )

File No. BALH-20130104ABX  
Facility No. 22663

**ACCEPTED/FILED**

SEP 23 2013

Federal Communications Commission  
Office of the Secretary

To: Office of the Secretary  
Att: Chief, Audio Division, Media Bureau

**PETITION FOR RECONSIDERATION**

3 Daughters Media Inc. (“3 Daughters”), by its president, Gary E. Burns,<sup>1</sup> pursuant to Title 47 C.F.R. Section 1.106, hereby respectfully files this Petition for Reconsideration of the letter decision of the Chief, Audio Division, DA 13-1792, released August 22, 2013 (“Decision”), granting the captioned application for consent to assignment of license of WLNI(FM), Lynchburg, Virginia, from Centennial Licensing, LLC, to Mel Wheeler, Inc. (“MWI”).<sup>2</sup> The Decision denied a Petition to Deny filed by 3 Daughters and granted the application.

<sup>1</sup> This petition is supported by the verification of the licensee’s president.

<sup>2</sup> This petition is timely filed by September 23, 2013, as the 30<sup>th</sup> day following release of the Decision falls on a Commission “holiday.” See Section 1.4 and 1.106 of the Rules.

The Decision should be reversed because the acquisition of the license for WLNI by MWI would violate Section 73.3555 as MWI would hold attributable interests in more radio stations in the Roanoke-Lynchburg, VA, radio market than is permissible.

### **Background and Standing Issues**

The captioned application was filed on January 4, 2013, and 3 Daughters filed a timely Petition to Deny that showed that the proposed acquisition would violate the Commission's local radio ownership rule (Section 73.3555) and would result in harm to the marketplace. In its Decision, the Audio Division found, over the applicants' contrary argument, that 3 Daughters had standing to file a petition to deny the captioned application. With that core issue resolved, 3 Daughters herein focuses the Commission's attention on the substantive issues in this case.

### **The Acquisition of WLNI Violates Section 73.3555**

In support of its application, the applicants submitted as Exhibit 17 to Section III of FCC Form 314 a "Multiple Ownership" study that recites that there are 46 commercial and noncommercial educational full-power radio stations in the Roanoke-Lynchburg, Virginia, Arbitron Metro as reported by BIA as "home" to the Roanoke Metro. Based on this, the applicants argue that MWI can have a cognizable interest in five commercial full-power FM stations.<sup>3</sup>

3 Daughters previously argued that the BIA definition is incorrect as it includes three stations, WWZW(FM), Buena Vista, Virginia; WODI(AM), Brookneal, Virginia; and

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<sup>3</sup> MWI also has attributable interests in two AM stations, and, if it so desired, could have up to three AM stations.

WOWZ(AM), Appomattox, Virginia, in the station count for the Roanoke Metro. When those stations are excluded, the number of stations that are “home” to the Roanoke Metro drops to 43. In a market 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 Section 73.3555(a)(ii). Thus, if there are fewer than 45 full-power stations in the market, the acquisition of WLNI is barred.

The Commission agreed that WOWZ should be excluded from the station count, reducing the count to 45. However, the Commission refused to exclude WODI because it “is not silent at this time and was not silent for the last six months.” However, on August 30, 2013, WODI again went silent (See BLSTA-20130909ABT). That fact reduces the number of stations in the radio market to 44 and precludes the ownership of WLNI by MWI. However, should the Commission persist in ignoring the fact that WODI is off the air and should not be counted in the number of stations in the Roanoke Metro, the conclusion is inescapable that MWI’s acquisition of WLNI would result in MWI holding an attributable interest in 6 FM stations in the market, which violates Section 73.3555 of the Rules, as detailed herein.

**WVBB(FM) is “Home” to the Roanoke-Lynchburg Metro.**

The Audio Division erred when it failed to include WVBB(FM) as “home” to the Roanoke-Lynchburg Metro.<sup>4</sup> WVBB(FM), is owned by MWI and licensed to Elliston-Lafayette, Virginia. While Elliston-Lafayette is outside the Arbitron and BIA defined Roanoke-Lynchburg Metro, as can be seen from MWI Exhibit 17, attached to its above captioned application for assignment of license, WVBB(FM)’s antenna site is within the

Roanoke-Lynchburg Metro and the station puts a city grade signal over a large portion of the city of Roanoke. It is for all purposes a Roanoke City station.

MWI jointly owns, markets and simulcasts WVBB(FM), WVBB(AM) and WVBE(FM), Lynchburg as The Vibe – “Today’s best R&B and Classic Soul.”<sup>5</sup> MWI makes no secret that it considers WVBB(FM) a Roanoke station. The Vibes Facebook page clearly states, “ViBE 100.1 FM Lynchburg, 97.7 Fm **Roanoke** - Today's Best R&B and Classic Soul.”<sup>6</sup> (Emphasis added). A copy of the WVBB website home page is attached as Exhibit 1. The WVBB-WVBE(AM)-WVBE-FM trimulcast garnered a 9.3 share of 12+ population in the Adding WLNI to MWI’s portfolio in the Roanoke Metro would give MWI an attributable interest in 6 commercial FM stations.

WVBB(FM) is a Roanoke station; however, there is a critical flaw in the BIA data which keeps WVBB(FM) from being listed as “home” to the Roanoke-Lynchburg Metro. Arbitron reports ratings data for WVBE(FM), WVBE(AM) and WVBB under a policy known as Total Line Reporting. Total Line Reporting permits stations that simulcast their programming, such as WVBE (AM & FM) and WVBB, to be reported on a single line in the Arbitron Metro survey. Arbitron, also, permits the broadcaster to select the “primary” station from among the stations under whose call letters combined listening will be reported.<sup>7</sup> Further, individual estimates for radio stations that elect Total Line Reporting are not accessible through

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<sup>4</sup> 3 Daughters raised this issue in its Petition to Deny. The letter decision of the Chief, Audio Division acknowledged the issue in footnote 19, but concluded that “Given our finding below, we need not reach this issue.”

<sup>5</sup> <http://www.vibe100.com/>

<sup>6</sup> <https://www.facebook.com/Vibe100>

<sup>7</sup> [http://www.arbitron.com/downloads/tlr\\_quick\\_reference.pdf](http://www.arbitron.com/downloads/tlr_quick_reference.pdf)

any of Arbitron's syndicated reporting services. *Id.* Simply stated, there is no publicly available ratings information for WVBB(FM), because it is marketed as The Vibe and reported in Arbitron only under data reported for station WVBE (FM). If an Arbitron survey is returned and a listener writes in that they listen to WVBB, WVBE or The Vibe, the listenership is credited only to WVBE. Under Arbitron's Total Line Reporting System, no ratings for WVBB are possible, since its ratings are shared with its sister stations and reported under WVBE(FM).

BIA/Kelsey either did not pick up on the distinction between separately rated station and Total Line Reporting or the distinction was not relevant for BIA/Kelsey to perform its financial analysis of the Roanoke-Lynchburg Metro. In either case, BIA/Kelsey did not include WVBE as being home to the Roanoke-Lynchburg Metro. Yet the distinction between separately rated stations and Total Line Reporting is critical to understanding and properly applying the Commission's multiple ownership rules.

Moreover, examination of the BIA/Kelsey data submitted with 3 Daughters' Petition to Deny reveals that while the FCC refused 3 Daughters' request to exclude WWZW, Buena Vista, Virginia (which garnered only a 0.6 12+ audience share), the Media Bureau excluded the WVBB even though the trimulcast of the stations garnered an 8.0 share of the 12+ audience. WVBB was only excluded through manipulation and artifice engineered by MWI and Arbitron which only lists one station where multiple stations are broadcasting the same program material. However, for purposes of compliance with the multiple ownership rule, WVBB is a

separate radio station. It was arbitrary and capricious for the Media Bureau to include WWZW on the one hand and exclude WVBB on the other.<sup>8</sup>

Simple common sense dictates that if something looks like a duck, has webbed feet and quacks like a duck – it's a duck. Likewise, if WVBB, has a tower site in the Roanoke-Lynchburg Metro, puts a city grade signal over much of Roanoke, is marketed in the Roanoke-Lynchburg Metro as The Vibe, it must be a “home” station to the Roanoke-Lynchburg Metro. With WVBB(FM) squarely a part of the Roanoke-Lynchburg Metro, MWI already owns 5 FM stations in the market and under no circumstance can MWI acquire a sixth FM signal. For the Audio Division to find otherwise is arbitrary and capricious.

#### **The Use of Arbitron-BIA Defined Markets is Arbitrary and Capricious Conduct**

As this case illustrates, the Commission's consistently applied policy announced in *Review of the Commission's Broadcast Ownership Rules and Other Rules*, 18 FC Rcd 13620, 13813 ¶ 497 (2003) is arbitrary and capricious. The Decision cites this precedent and quotes the operative policy, i.e., “by applying the numerical limits of the local ownership rule to a more rational market definition, we believe that, *in virtually all cases*, the rules will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest.” 3 Daughters pointed out in its petition to deny that the advertising revenue shares garnered by MWI's stations would exceed 50%, having 5 of the top-rated stations in the Roanoke Metro. The Decision cavalierly bats this away by saying that the Commission “has concluded that ad revenue share is of ‘decreasing relevance...as a barometer of competition.’”

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<sup>8</sup> Latest audience reports show that the VIBE trimulcast has the second highest ratings 12+ in the Roanoke Metro. See <http://ratings.radio-online.com/cgi-bin/rol.exe/arb277>.

This is plainly wrong. There is no greater barometer of competition than the advertising revenue share enjoyed by a radio station. Audience translates to ratings, which translate, to dollars spent by advertisers on the particular radio station in question. To ignore this evidence of competitive harm is arbitrary and capricious.

Moreover, it was arbitrary and capricious conduct for the Commission to hand over to two commercial enterprises, Arbitron Ratings, and BIA/Kelsey, its responsibility for defining radio markets. Arbitron excludes radio stations that do not purchase its audience measurement services from the ratings it compiles in various markets. This data is then transferred to BIA/Kelsey which prepares its "FCC Market Definition" documents that it sells for \$400 each.

Under the standards of the Administrative Procedure Act ("APA"), Title 5 U.S.C. Section 551, *et seq.*, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 ("Under what we have called this 'narrow' standard of review, we insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action.'") The APA, which sets forth the full extent of judicial authority to review executive agency action for procedural correctness, see *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 545-549, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978), permits (insofar as relevant here) the setting aside of agency action that is "arbitrary" or "capricious," 5 U.S.C. Section 706(2)(A). See also *American Family Assn., Inc. v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004), *cert. denied* 543 U.S. 1004, at 1166, *quoting Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993). The

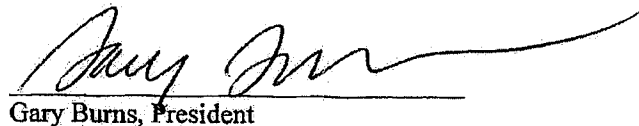
*American Family* Court explained that a party that seeks to establish that a policy is arbitrary and capricious in an "as applied" challenge must show that the policy does not "actually produce the benefits the Commission originally predicted they would." In this case, the blind application of the BIA/Kelsey FCC Market Definition to the Roanoke Metro, which excludes WVBB as a radio station in the market, is arbitrary and capricious because it does not produce the benefits the Commission predicted it would; namely, "in virtually all cases" the protection against "excessive concentration levels in local radio markets that might otherwise threaten the public interest."

In light of the above, 3 Daughters respectfully requests the Commission to reconsider its Decision and deny the captioned application.

Respectfully submitted,

**3 DAUGHTERS MEDIA, INC.**

Pursuant to 47 C.F.R. Section 1.52, I verify that the information contained in the preceding Petition for Reconsideration is true and correct to the best of my knowledge, information and belief.



Gary Burns, President

3 Daughters Media, Inc.  
P. O. Box 348  
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September 20, 2013





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**CERTIFICATE OF SERVICE**

I, Gary E. Burns, CEO of 3 Daughters Media, Inc., do hereby certify that a copy of the foregoing "Petition for Reconsideration" was mailed by First Class U.S. Mail, postage prepaid, this 23rd day of September, 2013, to the following:

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