



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

November 14, 2013

DA 13-2181

In Reply Refer to:

1800B3-HOD

Released: November 14, 2013

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

Petition for Reconsideration

Dear Sirs:

We have before us a Petition for Reconsideration filed by 3 Daughters Media Inc. (“3 Daughters”), which challenges our grant of the referenced application (“Application”) to assign the license of Station WLNI(FM), Lynchburg, Virginia (“Station”), from Centennial Licensing, LLC, to Mel Wheeler, Inc. (“MWI”) (collectively, “Applicants”).¹ For the reasons discussed below, we grant the Petition in part and deny it in part.

Background. Applicants filed the Application on January 4, 2013. 3 Daughters timely filed a Petition to Deny. 3 Daughters cited advertising revenue shares and argued the proposed transaction would result in excessive market concentration. In addition, 3 Daughters asserted that the proposed assignment violated the Commission’s local radio ownership rule. It put forth two alternative arguments in support of this claim. First, 3 Daughters argued that the Commission should exclude three stations – WWZW(FM), Buena Vista, Virginia, WODI(AM), Brookneal, Virginia, and WOWZ(AM), Appomattox, Virginia – from the station count for the Roanoke-Lynchburg, Virginia Arbitron Metro (“Roanoke Metro”). Second, 3 Daughters argued that the Commission should include WVBB(FM), Elliston-Lafayette, Virginia – a station owned by MWI but not currently listed by BIA as “home” to the Roanoke Metro – in the station count for the Roanoke Metro. Finally, 3 Daughters asserted that the proposed transaction would cause other public interest harms.

¹ Applicants filed a Joint Opposition to Petition for Reconsideration (“Opposition”) on October 18, 2013.

In a letter released August 22, 2013,² we noted that the Commission had concluded that advertising revenue share was of “decreasing relevance . . . as a barometer of competition” and had explicitly rejected arguments that it incorporate a market share analysis into the local radio ownership rule.³ In addition, we agreed with 3 Daughters that we should exclude WOWZ(AM) from our station count but found that WWZW(FM) and WODI(AM) properly were included in that count. We also found that we need not reach 3 Daughters’ argument for inclusion of WVBB(FM) in the count. Based on these findings, we determined that the proposed assignment of the Station to MWI would not violate the local radio ownership rule. After considering and rejecting the other arguments made by 3 Daughters, we denied its Petition to Deny and granted the Application.

3 Daughters filed the Petition on September 23, 2013. Therein, it notes that WODI(AM) went silent on August 30, 2013. 3 Daughters argues that, given WODI(AM)’s silence, we should exclude it from our station count for the Roanoke Metro. It asserts that, when WOWZ(AM) and WODI(AM) are excluded, the local radio ownership rule bars MWI’s acquisition of the Station. 3 Daughters also alleges that the Commission erred in failing to consider its argument that WVBB(FM) be included in the station count for the Roanoke Metro. Finally, 3 Daughters argues that it was arbitrary and capricious for us to “ignore” the evidence it offered regarding advertising revenue shares and that it was arbitrary and capricious for the Commission to define radio markets by reference to Arbitron Metro areas as reported by BIA.

Applicants opposed the Petition. Applicants argue that the Petition simply restates arguments that 3 Daughters made or could have made in its Petition to Deny. Accordingly, Applicants urge us to reject the Petition.

Discussion. As an initial matter, we note that it is settled Commission precedent that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.⁴ To the extent that the Petition raises arguments regarding undue concentration and advertising revenue shares, which were previously advanced and rejected, we dismiss them. We address 3 Daughters’ remaining arguments below.

WODI(AM). 3 Daughters urges us to exclude WODI(AM) because, according to Three Daughters, the station has been dark since August 30, 2013.⁵ However, as Applicants note, WODI(AM) “has been off the air for less than six months.”⁶ Accordingly, we will not exclude WODI(AM) from our station count at this time.⁷ In any event, we note that it is WODI(AM)’s operational status at the time we issued the *Letter Decision*, not its status on a subsequent date, that is relevant.

² *WLNI(FM), Lynchburg, VA*, Letter, DA 13-1792 (MB rel. Aug. 22, 2013) (*Letter Decision*).

³ *Letter Decision* at 3, citing *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, 13639-43 ¶¶ 60-68 (2003) (“*Ownership Order*”).

⁴ See *Dennis J. Kelly*, Letter, 25 FCC Rcd 14352, 14355 (MB 2010); *Regents of the University of California*, Order, 17 FCC Rcd 12891, 12892 (WTB 2002) (dismissing petition for reconsideration as repetitious) citing *Mandeville Broadcasting Corp. and Infinity Broadcasting of Los Angeles*, Order, 3 FCC Rcd 1667, 1667 (1988); *M&M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100, 5100 (1987) (dismissing petition for reconsideration as repetitious).

⁵ Petition at 3.

⁶ Reply at 3.

⁷ See *Letter Decision* at n.33 (citing *Revision of Radio Rules and Policies*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6387 ¶ 39 (1992), and finding the Commission’s prior conclusion that a station that has been dark for more than six months is not a viable competitor remains valid).

WVBB(FM). 3 Daughters argues that we should have reached its argument for inclusion of WVBB(FM) in our station count for the Roanoke Metro.⁸ We agree and grant its Petition in this respect. However, we find no merit to 3 Daughters' argument. BIA does not list WVBB(FM) as "home" to the Roanoke Metro nor do the contours of the Station and WVBB(FM) overlap. We find 3 Daughters' argument that BIA has made an error to be disingenuous since, as 3 Daughters freely acknowledges, it is due to 3 Daughters' efforts that WVBB(FM) today is excluded from the Roanoke Metro.⁹ Moreover, we note that 3 Daughters cannot pick and choose which stations are included in the market. Indeed, the Commission has expressly rejected such an *ad hoc* approach.¹⁰ Accordingly, we find WVBB(FM) was properly excluded from our station count for the Roanoke Metro.

Radio Market Definition. In 2003, the Commission revised the manner in which it defines local radio markets, moving from a definition based on contour overlaps to one based on geographic areas. Specifically, the Commission determined that it would define radio markets by reference to Arbitron Metro Survey Areas as reported by BIA.¹¹ 3 Daughters argues that the Commission turned over responsibility for defining radio markets to two commercial entities and that this was arbitrary and capricious.¹² This very argument was presented to and rejected by the U.S. Court of Appeals for the Third Circuit.¹³ The Third Circuit ruled that the changes the Commission made to its radio market definition were not arbitrary and capricious. It rejected the argument that the Commission improperly had delegated governmental power to a private entity, finding "[b]ecause the Commission remains the sole arbiter of whether a proposed radio station combination services the public interest, no improper delegation will occur."¹⁴ 3 Daughters has offered no evidence that the Commission has abdicated its responsibility to determine whether a transaction will serve the public interest. Accordingly, we find no merit to its argument that it was arbitrary and capricious for the Commission to define local radio markets by reference to Arbitron Metro Survey Areas as reported by BIA.

We also find unpersuasive 3 Daughters' argument that, as applied here, the market definition adopted by the Commission does not produce the benefit the Commission originally predicted it would.¹⁵ Specifically, 3 Daughters asserts that application of the market definition here fails to protect against excessive concentration levels in the Roanoke Metro because it excludes WVBB(FM) from the station count for the market. As noted above, we find it disingenuous for 3 Daughters to argue for WVBB(FM)'s inclusion in the Roanoke Metro when 3 Daughters itself previously – and successfully – argued for the station's exclusion from that market. Moreover, for the reasons discussed above, we find WVBB(FM) properly is excluded from the station count. Accordingly, we find no merit to 3 Daughters' "as applied" challenge to the local radio market definition.

⁸ Petition at 3.

⁹ Petition to Deny at 6 (explaining that WVBB(FM) initially was included in the Roanoke Metro but then the database "was corrected" to exclude the station from that market); Reply to Joint Opposition to Petition to Deny at 4-5 (noting that BIA corrected its database to exclude WVBB(FM) from the Roanoke Metro after a meeting with, among others, the CEO of 3 Daughters).

¹⁰ See *Eagle Broadcasting Co., Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 18440, 18445-46 ¶ 12 (2008), citing *Ownership Order*, 18 FCC Rcd at 13646-47. See also *6 Johnson Road Licenses, Inc.*, Letter, 28 FCC Rcd 20, 27 (MB 2013).

¹¹ *Ownership Order*, 18 FCC Rcd at 13724- 28 ¶¶ 273-281. For geographic areas not located in an Arbitron Metro, the Commission retained the contour-overlap market definition but made certain adjustments to that definition. *Id.* at 13729-30 ¶¶ 282-286.

¹² Petition at 7.

¹³ *Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372, 423-425 (3d Cir. 2004).

¹⁴ *Id.*

¹⁵ *Id.* at 7-8.

Conclusion/Actions. For the reasons set forth above, we GRANT IN PART AND DENY IN PART the Petition for Reconsideration filed by 3 Daughters Media Inc. on September 23, 2013.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau