

DEC 18 2013

FCC Mail Room



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

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

DA 13-2181
1800B3-HOD

To: Office of the Secretary

APPLICATION FOR REVIEW

3 Daughters Media, Inc. ("3 Daughters"), *pro se*, pursuant to Title 47 C.F.R. Section 1.115, hereby respectfully files this Application for Review.

The captioned application for assignment of licensee of WLNI(FM), Lynchburg, Virginia, from Centennial Licensing, LLC, to Mel Wheeler, Inc. ("MWI") was filed on January 4, 2013. 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. The Chief, Audio Division, by letter decision, DA 13-1792, released August 22, 2013 granted the application for consent to assignment of license. 3 Daughters timely filed a Petition for Reconsideration. The Chief, Audio Division, by letter decision DA 13-2181, released November 14, 2013 ("Decision"), denied 3 Daughters' Petition for Reconsideration.

Questions for Review

1. Did the Audio Division err when it concluded that WVBB(FM) licensed to MWI was not “home” to the Roanoke-Lynchburg Metro (“Roanoke Metro”)?
2. Did the Audio Division err when it concluded that WODI(AM) should not be excluded from the station count for the Roanoke Metro?

Factors that Warrant Commission Consideration

Pursuant to Section 1.115 of the Commission’s rules the following factors, as discussed herein, warrant Commission consideration.

1. The action taken pursuant to delegated authority is in conflict with Section 73.3555 of the rules and established Commission policy.
2. The action involves a question of law or policy which has not been previously resolved by the Commission.
3. The action involves an application of a precedent or policy which should be overturned or revised.

Background

MWI is the licensee of WSLQ(FM), WXLK(FM), WSLC-FM Roanoke, Virginia, WVBE-FM Lynchburg, Virginia and is approved to acquire WLNI(FM) Lynchburg. These five stations are within the Roanoke Metro. MWI is also the licensee of WVBB(FM), Elliston-Lafayette, Virginia, which community of license is not located within the geographic boundaries of the Roanoke Metro. However, WVBB(FM)’s tower is located within the metro and the station is rated within the Roanoke Metro, but the ratings are not reported under an Arbitron

policy known as Total Line Reporting.¹ MWI also owns two AM stations: WFIR(AM) and WVBE(AM) Roanoke, Virginia.

Section 73.3555(a)(i) provides that an entity can have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits.

In a radio market with 45 or more full-power, commercial radio stations, not more than 8 commercial radio station in total and not more than 5 commercial stations in the same service (AM or FM):

The issues raised in this Application for Review focus on whether MWI owns more than 5 commercial radio stations in the Roanoke Metro and whether there are 45 or more viable radio voices in the market.

The Audio Division erred when it concluded that WVBB(FM) was not “home” to the Roanoke Metro.

WVBB(FM), is owned by MWI. Its antenna site is within the Roanoke Metro and it provides a city grade signal over Roanoke. MWI Exhibit 17, to Section III of FCC Form 314, “Multiple Ownership” study attached to the WLNI application states: “While Assignee is also the licensee of WVBB(FM), that station’s community of license, Elliston-Lafayette, Virginia, is not located within the geographic boundaries of the Roanoke Metro and otherwise is not “home” to the Roanoke Metro. Therefore, WVBB(FM) is not considered under the Arbitron Metro Methodology.” (Emphasis added) What MWI fails to explain is the reason WVBB(FM) is not “home” to the Roanoke Metro. WVBB(FM) is not home to the Roanoke Metro because it is licensed outside the metro and it receives no published ratings. BIA reports stations licensed outside the metro as “home” to a metro if that station receives meaningful ratings; i.e., it is rated in the top half of the stations in the market. Because WVBB has no published ratings, it is not

¹ Nielsen Holdings recently purchase Arbitron. For the sake of clarity the company is referred to herein as Arbitron.

listed as “home” to the Roanoke Metro. The reason WVBB(FM) receives no ratings is that MWI has specifically requested that it be excluded under an Arbitron 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.² MWI jointly owns, markets and simulcasts WVBB(FM), WVBE(AM) and WVBE(FM), Lynchburg as The Vibe – “Today’s best R&B and Classic Soul.”³ MWI makes no secret that it considers WVBB(FM) a Roanoke station. The Vibe’s Facebook page clearly states, “ViBE 100.1 FM Lynchburg, 97.7 Fm **Roanoke** - Today's Best R&B and Classic Soul.”⁴ (Emphasis added)

Individual estimates for radio stations that elect Total Line Reporting are not accessible through any of Arbitron’s syndicated reporting services. *Id.* Simply stated, while ratings are gathered for WVBB within the Roanoke Metro, no public ratings information for WVBB(FM) is available because it is marketed as The Vibe and reported in Arbitron only under station WVBE (FM). If, for example, an Arbitron survey is returned and a Roanoke listener reports that she listens to WVBB, the listenership is credited to WVBE, not to WVBB. Under Arbitron’s Total Line Reporting, no ratings for WVBB are possible, since its ratings are shared with its sister stations and reported under WVBE(FM).

² http://www.arbitron.com/downloads/tlr_quick_reference.pdf

³ <http://www.vibe100.com/>

⁴ <https://www.facebook.com/Vibe100>

Ratings information released in September 2013 for WVBE shows the station with a commanding 9.3 share of the audience, 12+.5 This makes WVBE the second highest rated station in the market, though, of course, it is actually the ratings for three stations marketed as The Vibe. BIA is supposed to make an independent determination whether a particular station licensed to a community outside of a Metro should be listed as "home" to that Metro. *Review of the Commission's Broadcast Ownership Rules and Other Rules*, 18 FCC Rcd 13620, 13728, n.587 (2003). BIA/Kelsey either did not pick up on the distinction between a separately rated station and Total Line Reporting or the distinction was not relevant for BIA/Kelsey to perform its financial analysis of the Roanoke Metro. In either case, BIA/Kelsey did not include WVBB as being home to the Roanoke 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. WVBB has a tower site in the Roanoke Metro, puts a city grade signal over Roanoke, is marketed in the Roanoke Metro as The Vibe, and has ratings in the top fifty percent of the stations in the market. Therefore, consistent with FCC rules and policies, it is a "home" station to the Roanoke Metro. With WVBB(FM) squarely a part of the Roanoke 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.

In the Decision, the Audio Division did not address the Total Line Reporting issue. A search of the Commission's reported decisions shows that the neither the Commission, the Media Bureau, nor the Audio Division has yet to address how stations that utilize Total Line

⁵ <http://ratings.radio-online.com/cgi-bin/rol.exe/arb277>.

Reporting should be treated for the purpose of complying with the FCC's multiple ownership rules. Clearly, WVBB has significant, but unreported ratings in the Roanoke Metro.

As this case illustrates, the Commission's policy announced in *Review of the Commission's Broadcast Ownership Rules and Other Rules*, 18 FCC Rcd 13620, 13813 ¶ 497 (2003) is arbitrary and capricious. The order states, that "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." This may be true in many cases, but in this case, MWI used the flaws in the Arbitron/BIA reporting system to manipulate the data in such a way that one of the highest rated stations in the Roanoke Metro, with its tower located squarely within the metro and providing a city grade signal over Roanoke is not listed as being "home" to the market.

In the Decision, the Audio Division states that the Third Circuit rejected the argument that the Commission improperly had delegated governmental power to a private entity "[b]ecause the Commission remains the sole arbiter of whether a proposed radio station combination services the public interest, no improper delegation will occur."⁶ Yet to be the arbiter, the Commission must consider the arguments and act on the facts presented. In this case the Audio Division did neither. The Decision does not mention Total Line Reporting, nor does it address the issue of how stations relying on Total Line Reporting should be treated for the purposes of the Commission's multiple ownership rules. Nor does *Prometheus Radio* provide any guidance. *Prometheus Radio* was decided in 2004. However, Arbitron did not begin offering Total Line

⁶ *Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372, 423-425 (3d Cir. 2004) (herein, "*Prometheus Radio*."

Reporting until 2006. This is a case of first impression and there is need for clear guidance from the Commission on how Total Line Reporting should be treated for the purposes of the multiple ownership rules.

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 Metro, puts a city grade signal over Roanoke, is marketed in the Roanoke Metro as The Vibe, and is rated in the Metro, it must be a “home” station to the Roanoke Metro. MWI already owns five FM stations in the market and should not be permitted to acquire a sixth FM signal. For the Audio Division to find otherwise is arbitrary and capricious.

The Audio Division erred when it concluded that WODI(AM) should not be excluded from the Roanoke Metro.

In support of its application, the applicants submitted as Exhibit 17 a “Multiple Ownership” study that recites that there are 46 commercial and noncommercial educational full-power radio stations 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. MWI’s analysis of the market presupposes that the Commission will treat WVBB(FM) as being outside the Roanoke Metro.

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 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 by MWI is barred.

The Audio Division agreed that WOWZ should be excluded from the station count, reducing the count to 45. In its Petition to Deny, 3 Daughters stated that WODI was dark and had been dark since at least October 2012, though no STA was on file with the FCC. The Audio Division, without verifying the facts, 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.

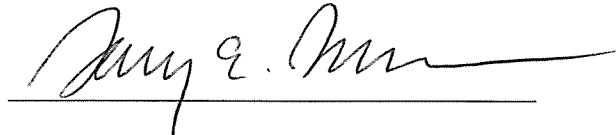
The Bureau erred when it included WODI as one of the stations comprising the Roanoke Metro. WODI is a failed station and should not have been included in the station count for the Roanoke Metro.

Conclusion

In light of the above, 3 Daughters respectfully requests the Commission to review the Media Bureau's Decision and deny the captioned application.

Respectfully submitted,

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



A handwritten signature in black ink, appearing to read "Amy E. Miller", is written over a horizontal line.

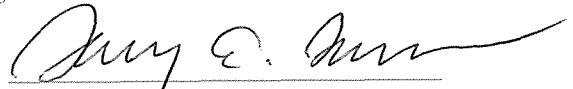
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December 12, 2013

Declaration of Gary E. Burns

I, Gary E. Burns, declare under penalty of perjury and verify that the following is true and correct: I am President of 3 Daughters Media, Inc, licensee of WVGM (AM), and translator W227BG, Lynchburg, VA, WBLT (AM), Bedford, VA, WGMN (AM), Roanoke, VA, and WMNA AM & FM, Gretna, VA. In that role, I have first-hand knowledge of the facts set forth in the foregoing Application for Review and the facts set forth therein are true and correct.

Executed this 12th day of December, 2013



Gary E. Burns


CERTIFICATE OF SERVICE

I, Gary E. Burns, CEO of 3 Daughters Media, Inc., do hereby certify that a copy of the foregoing "Application for Review" was mailed by First Class U.S. Mail, postage prepaid, this 12th day of December, 2013, to the following:

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