



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

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*In Reply Refer to:*  
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In re: **WCLG(AM), Morgantown, West Virginia**  
Bowers Broadcasting Corporation  
Facility ID No. 3  
File No. BAL-20130815ACK

**WCLG-FM, Morgantown, West Virginia**  
Bowers Broadcasting Corporation  
Facility ID No. 6553  
File No. BALH-20130815ACL

**Assignment of License**

**Petition for Reconsideration**

Dear Counsel:

The Media Bureau ("Bureau") has before it a March 6, 2015, Petition for Reconsideration of the Bureau staff's grant of the referenced applications for Commission consent to the assignment of the licenses for stations WCLG(AM) and WCLG-FM, Morgantown, West Virginia (collectively, the "Stations") from Bowers Broadcasting Corporation ("Bowers") to AJG Corporation ("AJG") (collectively, "Applications"). For the reasons set forth below, we deny the Petition.

**Background.** Brothers John R. Raese and David A. Raese each are 50 percent owners, officers, and directors of West Virginia Radio Corporation ("WVRC"), which owns three FM stations and one AM station in the Morgantown-Clarksburg-Fairmount Arbitron (now Nielsen) Metro ("Morgantown Metro"), the same radio market as the Stations.<sup>1</sup> AJG's stockholders are two trusts established by the Raese

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<sup>1</sup> WAJR(AM), Morgantown, West Virginia; WAJR-FM, Salem, West Virginia; WVAQ(FM), Morgantown, West Virginia; and WWLW(FM) Clarksburg, West Virginia.

brothers to benefit their descendants (the “Trusts”).<sup>2</sup> AJG owns two stations in the Morgantown Metro, WKKW(FM), Fairmount, West Virginia, and WFGM-FM, Barrackville, West Virginia. Ms. Lauren M. Kelly Driscoll is the trustee for the Trusts and AJG’s president and director, holding 100 percent of the votes. AJG disclosed in the Assignment Applications that it is a party to a “sales representation agreement” dated November 8, 2000, pursuant to which WVRC of Clarksburg, licensee of WWLW(FM), Clarksburg, West Virginia, sells the advertising time on AJG Morgantown Metro station WKKW(FM) (the “JSA”).<sup>3</sup>

In the *Letter Decision*, issued February 3, 2015,<sup>4</sup> the staff granted the assignment applications but, because the Raeses have beneficial interests in both AJG and WVRC, imposed certain operational and structural requirements in an attempt to ensure that the AJG stations are operated independently from the WVRC stations.<sup>5</sup> The staff relied, in part, on BIA/Kelsey (“BIA”) data, which showed that, as of July 29, 2014:

- WVRC and AJG share staff members and studio/office facilities. For example, BIA listed that:
  - Mr. Dale Miller is General Manager at AJG-owned station WFGM(FM) and at WVRC-owned station WVAQ(FM), and
  - Mr. Jack Murphy is Sales Manager at AJG-owned station WFGM(FM) and WVRC-owned station WAJR(AM).
- AJG-owned stations WFGM-FM and WKKW(FM) and WVRC-owned stations WAJR(AM) and WVAQ(FM) share the same mailing and physical address –1251 Earl L Core Road, Morgantown, West Virginia.
- the two currently owned AJG stations, WFGM-FM and WKKW(FM), have a local marketing agreement (“LMA”) with all four of the WVRC-owned stations: WAJR(AM), WAJR-FM, WVAQ(FM), and WWLW(FM).
  - all four of the WVRC-owned stations – WAJR(AM), WAJR-FM, WVAQ(FM), and WWLW(FM) – have an LMA with AJG-owned stations WKKW(FM) and WFGM(FM).<sup>6</sup>

Accordingly, the Bureau staff required that AJG Corporation submit to the Bureau, prior to

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<sup>2</sup> Each trust serves the descendants of one Raese brother, and each trust holds 50 percent of AJG assets. Created under a single trust document dated May 2, 2000, the “Descendants Trust, Lauren M. Kelley, Trustee,” acquired WKKW and WFGM-FM in November of 2000, *see* BALH-200007272AAM, granted September 13, 2000, and assigned those stations’ licenses in a *pro forma* transaction to AJG in November of 2007. *See* BALH-20070917ABI, granted October 30, 3007.

<sup>3</sup> *See* Assignment Applications, Exhibit 17. The percentage of WKKW(FM) time sold to WVRC of Clarksburg results in attribution of ownership interests in WKKW(FM) to both AJG and WVRC. *See* 47 C.F.R. §§ 73.3555 Note 2.k.1; 73.3613(d)(2) and File Nos. BOA-20050601AZO, Section II, Question 7; BRH-20110524AGW, Exhibit 16.

<sup>4</sup> *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to David D. Oxenford, Esq., Matthew H. McCormick, Esq., and Mr. Joe Potter* (dated Feb. 3, 2015) (“*Letter Decision*”).

<sup>5</sup> The staff also relied on *Corporate Ownership Reporting and Disclosure by Broadcast Licensees, Amendment of Sections 73.35, 73.240 and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Report and Order, 97 FCC 2d 997, 1023 (1984) (“1984 Attribution Order”).

<sup>6</sup> The staff noted in the *Letter Decision* that “BIA reports that WVRC’s ultimate owner, the Raeses, also becomes the ultimate owner of AJG-owned stations WFGM-FM and WKKW(FM).” *Letter Decision* at n. 37.

consummation, a sworn statement from Ms. Driscoll that:

- i. neither she nor any officer, director, employee or agent of AJG, shall have any communication whatsoever, direct or indirect, oral or written, with: (a) Messrs. John R. or David A. Raese; or (b) any officer, director, employee or agent of any Raese-owned company or any affiliate or subsidiary thereof regarding the management or operation of WCLG(AM) and WCLG-FM;
- ii. WVRC-owned stations in the Morgantown-Clarksburg-Fairmount Arbitron Metro have ceased sharing managerial staff with AJG-owned stations in that market;
- iii. AJG and WVRC have terminated the November 8, 2000, JSA and agree that they will enter into no further agreements with respect to either programming or advertising on any same-market AJG or WVRC station as described in Section 73.3555 Note 2, subsections j and k; and
- iv. AJG and WVRC have requested that BIA update its records to reflect terms (ii) and (iii).<sup>7</sup>

In the Petition, AJG requests partial reconsideration of the *Letter Decision* and modification of three of the four above-listed conditions. First, AJG claims the BIA data was incorrect and that the staff's reliance on that data was unwarranted. Specifically, AJG claims that: (1) Mr. Dale Miller is not employed by AJG but is employed by WVRC; he is not General Manager of AJG's station, WFGM-FM; (2) Mr. Jack Murphy is general manager of all AJG stations; he is not sales manager of WVRC's station, WAJR, and does not hold any employment with WVRC; (3) AJG's mailing address is not 1251 Earl Core Road, but has been for "several years," P.O. Box 542, Dellslow, West Virginia 26531 (although AJG does not claim any change in physical address); (4) the agreement between AJG and WKKW is not an LMA, and it is not between all AJG stations and a WVRC subsidiary but rather is a JSA between WKKW(FM) and a WVRC subsidiary, WVRC of Clarksburg; and (5) the Raese brothers are not the "ultimate owners" of WFGM-FM and WKKW by virtue of the LMA referenced in the *Letter Decision*; the ultimate owners of AJG are two trusts controlled by Ms. Driscoll, who is also the president of AJG.<sup>8</sup>

AJG acknowledges that BIA data is "the definitive source for determining, for multiple ownership purposes, the number of stations included in Arbitron (now Nielsen) rated Metro Markets,"<sup>9</sup> but it claims that the "Commission has not delegated any other data collection functions to BIA/Kelsey."<sup>10</sup> AJG states that BIA collects data for the benefit of its subscribers, much like a newspaper. Therefore, AJG argues, use of BIA data for these purposes is akin to information published in a newspaper, essentially "hearsay."<sup>11</sup>

Next, AJG argues that staff imposed an "excessively broad 'no communication' condition."<sup>12</sup> AJG alleges that the current restriction "would be unnecessarily burdensome," because it would prohibit

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<sup>7</sup> *Letter Decision* at 9.

<sup>8</sup> Petition, Declaration of Jack W. Murphy, Jr. AJG does not object to Condition (iv).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

ordinary functions such as pooling news coverage of a local event.<sup>13</sup> AJG proposes that Bureau staff amend Condition (i) in the *Letter Decision* to require a sworn statement from Ms. Driscoll only that: “(1) she will not communicate with Messrs. John R. or David A. Raese regarding the management or operation of WCLG(AM) and WCLG-FM; (2) AJG-owned stations in the Morgantown-Clarksburg-Fairmont Arbitron Metro will not share broadcast managerial staff with WVRC-owned stations.”<sup>14</sup>

Finally, AJG claims that the *Letter Decision* “provides no reason for requiring termination of [the JSA].”<sup>15</sup> AJG argues that because the BIA data incorrectly claimed both that WVRC’s stations are attributable to AJG and that AJG and WVRC are commonly controlled, there is “no basis in fact” to require the termination of this agreement. AJG claims that this termination “will disrupt without cause AJG’s well-established expectations with respect to WKKW.”<sup>16</sup> AJG proposes that Bureau staff amend Condition (iii) in the *Letter Decision* to read: “AJG will enter into no further agreements with WVRC with respect to either programming or advertising on any same-market AJG or WVRC station as described in Section 73.3555 Note 2, subsections j and k.”<sup>17</sup>

**Discussion.** Reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.<sup>18</sup> Here, AJG arguably has met these requirements with respect to our use of BIA data only.

*Use of BIA Data.* The Commission has authorized use of BIA data in this context. When it originally delegated information collection about market competition to BIA, it did so broadly, noting: “The Commission traditionally has relied on BIA’s Media Access Pro database *to obtain information about particular Arbitron Metros*. The BIA database relies on Arbitron’s market definitions and builds upon Arbitron’s data to provide greater detail about the competitive realities in Metro markets.”<sup>19</sup> Therefore, although the Commission has more commonly used BIA and Media Access Pro information to define local radio markets for purposes of the local radio ownership rule,<sup>20</sup> it has not been – and is not –

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<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.*, referencing *Letter Decision* at 8, first full paragraph: AJG and WVRC-owned stations in the same market “shall cease sharing managerial staff.” *Letter Decision* at 7.

<sup>15</sup> Petition at 6.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 7.

<sup>18</sup> 47 C.F.R. § 1.106(c). See *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

<sup>19</sup> 2002 Biennial Regulatory Review of the Commission’s Broadcast Ownership Rules, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13726 (2003), *aff’d in part and remanded in part sub nom. Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005) 13627 (emphasis added).

<sup>20</sup> *KIJN-FM, Farwell, Texas*, 24 FCC Rcd 7054, 7056 (MB 2009) (using BIA data to determine what station is “home” to an Arbitron metro area).

limited to that particular type of usage. For example, the Commission has relied on BIA and/or Media Access Pro data to make findings related to: (1) advertising revenue;<sup>21</sup> (2) number of viewers and listeners served;<sup>22</sup> and (3) competitive harms.<sup>23</sup>

We acknowledge that staff apparently relied on outdated and perhaps inaccurate BIA data in the *Letter Decision*. However, AJG does not allege a material error or omission due to the use of this data. Rather, AJG appears to argue that BIA overstated the extent to which it and WVRC continued to share personnel and office space, and it states that it is willing to accept Condition (ii) outside the JSA context.<sup>24</sup> In effect, AJG claims that it has already effectuated Condition (ii). Even if we were to grant reconsideration to the extent of re-evaluating Condition (ii) and revising it as AJG suggests, so doing would offer no material benefit to AJG. Thus, the staff's reliance on the outdated or inaccurate BIA data constitutes harmless error in this case.

*Scope of the "No Communications" Requirement.* AJG argues, without citing precedent, that staff exceeded the scope of the "no communications" requirement as set forth in the *1984 Attribution Order*.<sup>25</sup> AJG seeks to limit the scope of the prohibition only to direct communications between Ms. Driscoll and the Raeses, who own radio stations in the same market and who, by their prior ownership interest and creation of the Trusts, have an historic interest in the AJG-owned stations. Notwithstanding AJG's contrary argument, doing so would constitute an unwarranted departure from Commission precedent. As stated in *Twentieth Holdings*, the Commission's policy in this context is to minimize the degree of potential influence that might otherwise be exercised by a trustor.<sup>26</sup> Here, the staff used the same relevant "no communications" terms that the Commission consistently has used in precedent interpreting the *1984 Attribution Order*. For example, the Commission in *Twentieth Holdings* prohibited a variety of communications, direct, indirect, oral or written, and included in the "no communications" scope trustor's subsidiaries, affiliates, officers, directors, and employees: "there shall be no communications whatsoever, direct or indirect, oral or written, between: (a) the Trustees or the personnel of the trust assets; and (b) Twentieth, its affiliates, and their officers, directors and employees."<sup>27</sup> The *Letter Decision* is consistent with these restrictions. AJG thus has not shown that the staff erred in imposing this requirement, nor has it provided any reason to deviate from precedent in this case.

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<sup>21</sup> *Whitehall Enterprises, Inc., Assignor*, Hearing Designation Order, 17 FCC Rcd 17509, 17518-20 (2002) ("*Whitehall*") (using BIA data to determine a station's market share of advertising revenue); *Sinclair Television Group, Inc.*, Letter, 28 FCC Rcd 11746, 11747 (MB 2013) (same).

<sup>22</sup> *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation of Channel \*39, 620-626 MHz, Phoenix, Arizona, and to Add Noncommercial Reservation on Channel 11, 198-204 MHz, Holbrook, Arizona*, Memorandum Opinion and Order, 20 FCC Rcd 16854, 16860 (2005) (using BIA data to compare viewers reached by competing stations); *Whitehall*, 17 FCC Rcd at 17520 (using BIA data to evaluate the viewers served by other radio stations in the market).

<sup>23</sup> *Shareholders of Hispanic Broadcasting, Inc., Transferor*, Memorandum Opinion and Order, 18 FCC Rcd 18834, 18857 (2003) (using BIA data to determine whether merger would result in competitive harms).

<sup>24</sup> Petition at 5.

<sup>25</sup> The *1984 Attribution Order* states that "the trust instrument must clearly state that there will be no communications with the trustee regarding the management or operation of the subject facilities." *1984 Attribution Order*, 97 FCC 2d at 1024. The Commission has interpreted the requirement to prohibit communication between trustor (a.k.a. grantor) and trustee. See, e.g., *Twentieth Holdings Corp.*, Decision, 4 FCC Rcd 4052, 4054 (1989) ("*Twentieth Holdings*").

<sup>26</sup> *Twentieth Holdings*, 4 FCC Rcd at 4054.

<sup>27</sup> *Id.* at 4056.

*Termination of the JSA.* Without citing any rule or case precedent, AJG argues that requiring termination of the JSA as a condition of consummation of the transactions approved pursuant to the Applications is unwarranted and states that the *Letter Decision* provides “no reason” for requiring termination of this 14-year-old JSA, or for linking the JSA to AJG’s proposed acquisition of the Stations. On the contrary, the staff required termination of the JSA in the *Letter Decision* because, given the beneficial ownership of the Raeses in both AJG and WVRC stations, staff considered it appropriate to ensure that all AJG stations were operated independently from all WVRC stations.<sup>28</sup> The staff did not state in the *Letter Decision* that AJG cannot own WCLG(AM) and WCLG-FM, or that the parties cannot maintain the JSA. Rather, the staff merely stated that, if AJG acquires two more stations in the market, it can no longer engage in joint operation of any station with WVRC. Although not required to ensure compliance with the local radio ownership rules, the staff’s condition that the parties terminate the JSA as a condition of consummation was an appropriate measure to promote competition in the market under the facts of this case – particularly given the fact that the Raeses also control West Virginia Publishing Corporation, the publisher of the *Dominion-Post*, a daily newspaper in Morgantown – and comports with Commission precedent.<sup>29</sup>

Finally, with respect to AJG’s argument that termination of the JSA will disrupt “without cause” AJG’s “well-established expectations with respect to WKKW,”<sup>30</sup> we evaluate ownership interests in trust in accordance with the factors outlined in the *1984 Attribution Order*.<sup>31</sup> AJG made a business decision to combine sales operations with a subsidiary of WVRC. We have repeatedly held we do not make allowances for the negative effects of private business decisions.<sup>32</sup> With respect to AJG’s claim that our decision was without cause, as noted above, the Commission in *Twentieth Holdings* made a similar finding when it required that a network terminate its programming agreement with its affiliate in order to ensure trust insulation.<sup>33</sup>

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<sup>28</sup> See *KICG(FM)*, Letter, 28 FCC Rcd 10115, 10124 (MB 2013) (“[a]n entity or party with control over an applicant, whether *de facto* or *de jure*, would necessarily have an attributable interest”); see also *Infinity Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 5012, 5041 (1996) (although trusts may be effective in avoiding the influence that would trigger attribution, there could be an effect on competition in the relevant markets).

<sup>29</sup> The Commission, in *Twentieth Holdings*, required that a network terminate its programming agreement with its affiliate in order to ensure trust insulation, concluding that permitting “communications as to programming would be a substantial breach in the concept of insulation.” 4 FCC Rcd at 4054.

<sup>30</sup> Petition at 6.

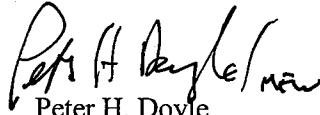
<sup>31</sup> *1984 Attribution Order*, 97 FCC 2d at 1024.

<sup>32</sup> See, e.g., *Silver Fish Broadcasting, Inc.*, Letter, 29 FCC Rcd 15054, 15055 (2014) (business decision to cease broadcasts does not toll broadcast construction period or provide grounds for Section 312(g) equity and fairness provision); *Marlene V. Borman*, Letter, 23 FCC Rcd 4786, 4789 (MB 2008), *rev. denied*, 28 FCC Rcd 1827 (2013) (business decision to choose less efficient route to amend construction permit application does not provide grounds for extension of time to construct broadcast facilities).

<sup>33</sup> *Twentieth Holdings*, n.29 *supra*. See also *Lorimar Telepictures Corp.*, Decision, 3 FCC Rcd 6250, 6255 (1988) (permitting written, ministerial communications relating to existing contracts, such as bills, payments or instructions as to the shipment of films or videotapes, would be permissible until termination date of those contracts). Here, the JSA involves more than ministerial communications between parties. For example, this JSA provides that: (1) station WKKW will make available to the sales agent its programming and operations staff and facilities; and (2) the agent will make available to WKKW its studio and production room space, telephone equipment and service, (...continued from previous page) “[b]usiness operations, sales management, and administrative services and personnel (exclusive of Station programming and format), including accounting, bookkeeping, traffic, local, regional and national sales, marketing and promotions.” JSA at 3.

**Conclusion/Actions.** Accordingly, for the reasons set forth above, IT IS ORDERED, that the March 6, 2015, Petition for Reconsideration filed by AJG Corporation IS DENIED.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter H. Doyle". The signature is stylized with a large initial "P" and a cursive "H".

Peter H. Doyle  
Chief, Audio Division  
Media Bureau