



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

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DA 05-2270
In Reply Refer to:
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Re: KKON(AM), Kealahou, HI
Facility ID No. 70382
File No. BAL-20031002AAZ

KPVS(FM), Hilo, HI
Facility ID No. 51240
File No. BALH-20031002AAY

KLUA(FM), Kailua Kona, HI
Facility ID No. 60504
File No. BALH-20031002ABA

KAPA(FM), Hilo, HI
Facility ID No. 5254
File No. BALH-20031002ABB

KAGB(FM), Waimea, HI
Facility ID No. 35507
File No. BALH-20031002ABC

Applications for Assignment of Licenses

Dear Counsel:

This letter refers to the above-captioned applications (the "Assignment Applications") to assign the licenses of stations KKON(AM), Kealahou, KPVS(FM), Hilo, KLUA(FM), Kailua Kona,

KAPA(FM), Hilo, and KAGB(FM), Waimea, all in Hawaii (the “Hawaii Stations”) from Big Island Radio (a Hawaii Limited Partnership) (“BIR”) to Pacific Radio Group, Inc. (“PRG”).¹ On November 6, 2003, Hilo Broadcasting, L.L.C. (“KHBC”), licensee of station KHBC(AM), Hilo, Hawaii, filed a Petition to Deny the assignment to PRG (“Petition”).² KHBC asserts that grant of the applications would result in violation of the Commission’s multiple ownership rule³ and in undue market concentration. Additionally, Petitioner argues that PRG has assumed unauthorized control of the subject stations.⁴ On November 4, 2004, PRG requested a waiver of Section 73.3555(a) of the Commission’s rules⁵ (the “Waiver Request”). For the reasons stated below, we deny KHBC’s Petition, grant the Waiver Request, and grant the Assignment Applications.⁶

BACKGROUND

The Hawaii Stations are not located within any Arbitron-rated market. By letter dated March 17, 2004 (“Deficiency Letter”), the staff informed the applicants that the Assignment Applications were deficient in that, *inter alia*, they did not contain an ownership exhibit for each of the markets created by the overlapping contours of certain of the captioned stations and stations commonly owned by PRG. As defined by our contour overlap rules,⁷ the mutual contour overlap in the omitted markets was limited to areas occurring solely over the Pacific Ocean. On March 26, 2004, PRG responded, asserting, *inter alia*,

¹ The subject assignment applications initially proposed to assign a sixth station, KIPA(AM), Naalehu, Hawaii, from BIR to PRG (File No. BAL-20031002AAX). This sixth application was dismissed at the applicants’ request on November 6, 2003. BIR subsequently filed an application to assign KIPA(AM) to Skynet Hawaii, LLC (“Skynet”) (File No. BAL-20031106AMG). This application was granted on March 11, 2004, and the transaction was consummated on May 3, 2004.

² BIR filed an Opposition on November 19, 2003 and PRG filed an Opposition on November 21, 2003. KHBC filed a Consolidated Reply on December 3, 2003.

³ 47 C.F.R. § 73.3555.

⁴ The Petition also references in its caption two proposed applications for assignment of station KKOAFM), Volcano, Hawaii. The first KKOAFM) application was dismissed at the applicants’ request on October 16, 2003 (File No. BALH-20030924AKE). The proposed assignee was Herb Radio. Because counsel for PRG is the sole owner of Herb Radio, KHBC alleges that this proposed assignment was an improper attempt to circumvent the multiple ownership rule. In light of the October 16, 2003 dismissal, and the lack of any allegation of impropriety concerning the subsequent assignment of KKOAFM) from PRG to Skynet, we find that no further inquiry concerning Herb Radio is warranted. The second referenced application, proposing assignment of KKOAFM) from PRG to Skynet (File No. BALH-20031016ACF), was granted on April 16, 2004, and consummated on May 3, 2004.

⁵ 47 C.F.R. § 73.3555(a).

⁶ KHBC had earlier filed a “Complaint,” dated October 8, 2003, that raised the same issues as its Petition. In addition to denying KHBC’s Petition, we also deny KHBC’s Complaint.

⁷ See 47 C.F.R. § 73.3555(a)(3) (2002), as modified by 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13729-30 (2003) (“Ownership Report and Order”) (subsequent history omitted).

that whenever contour overlap occurs solely over water, “no ‘waiver’ even should be required.”⁸ Alternately, PRG claimed that Commission precedent warranted waiver of the rules, excluding from consideration those markets in which the contour overlap occurs solely over water, and stated that it would be “willing to provide a waiver showing.”⁹ On October 21, 2004, the staff wrote to PRG stating that it had not yet submitted the requested information, and provided 15 days for PRG to submit the ownership-related materials to the Commission.¹⁰ PRG filed the requested information, including its Waiver Request, on November 4, 2004. In its Response to the Deficiency Letter, PRG also clarified that it has been brokering time on the Hawaii Stations pursuant to a Time Brokerage Agreement (“TBA”) with BIR.¹¹ PRG supplemented its Response to Deficiency Letter by a technical statement filed January 11, 2005.

DISCUSSION

Section 310(d) of the Communications Act of 1934, as amended (the “Act”),¹² requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of BIR’s radio broadcast licenses to PRG before the assignment may occur. The Commission will designate an application for hearing if: (1) the petition to deny contains specific allegations of fact that, taken as true, make out a *prima facie* case that grant of the applications would not serve the public interest; and (2) the allegations, together with opposing evidence, raise a substantial and material question of fact whether grant of the applications would serve the public interest.¹³ We find that the record fails to raise such a substantial and material question of fact. Moreover, we find that waiver of our rules is warranted and that grant of the Assignment Applications would serve the public interest.

Waiver Request. The Hawaii Stations are all licensed to communities on the island of Hawaii (the “Big Island”). PRG is currently the licensee of Big Island stations KLEO(FM), Kahaluu, as well as KKBG(FM) and KHLO(AM), both licensed to Hilo. PRG is also the licensee of stations KLHI-FM, KJMD(FM), KPOA(FM), KNUI-FM, KNUI(AM), and KMVI(AM), all of which are licensed to communities on the island of Maui. PRG is not seeking to acquire any additional stations on Maui in this transaction. None of the stations currently licensed to PRG, nor any of the Hawaii Stations, is in a market rated by Arbitron. The Commission has explained that, where transactions involve non-Arbitron markets,

⁸ March 26, 2004, Deficiency Letter Response at 6.

⁹ *Id.*

¹⁰ KHBC was provided ten additional days in which to file responsive comments. After requesting an extension of time, KHBC filed an Opposition to Waiver Request on December 8, 2004. PRG filed a Reply to Opposition to Waiver Request on December 10, 2004. We consider these submissions herein.

¹¹ Time brokerage is the sale by a licensee of discrete blocks of time to a broker that supplies the programming to fill that time and sells the commercial spot announcements in it. “Where two radio stations are both located in the same market . . . and a party with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a) and (c) of this section.” 47 C.F.R. § 73.3555, Note 2(j)(1).

¹² 47 U.S.C. § 310(d).

¹³ 47 U.S.C. § 309. See *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998). See also *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

it will continue to apply its contour-overlap methodology, with certain modifications, pending the outcome of the *Notice of Proposed Rulemaking* which seeks comment on alternative methodologies for defining non-rated markets.¹⁴ Thus, the relevant radio markets in this transaction are defined by the mutually overlapping principal community contours of the stations commonly owned by PRG.¹⁵

As shown in exhibits submitted with PRG's Waiver Request, as supplemented on January 11, 2005, the principal community contours of PRG's six Maui stations overlap the principal community contours of three of the Hawaii Stations PRG seeks to acquire: KKON(AM), KAGB(FM) and KLUA(FM). Seven separate radio markets are formed in which the principal community contour overlap between PRG's Big Island and Maui stations occurs entirely over the Pacific Ocean ("Over-water Markets").¹⁶ PRG states that there are at least 15 stations in each of these seven Over-water Markets.¹⁷ In a radio market with between 15 and 29 stations, a party may own up to six commercial stations, not more than four of which may be in the same service.¹⁸ In each of these seven Over-water Markets, PRG acknowledges that it would own either an impermissible total number of stations or an impermissible number of same-service stations, and is therefore not in compliance with the numerical limits of the local radio ownership rule. Accordingly, the Assignment Applications are grantable only if we waive application of Section 73.3555(a) for these seven Over-water Markets.

A waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.¹⁹ In support of its Waiver Request, PRG explains that the prohibited principal community contour overlap occurs entirely over the Pacific Ocean between the two islands, and is approximately 32 kilometers or more from each shore. The overlap areas encompass zero land area and zero population. According to PRG, the total size of each of the overlap areas is "extremely small," ranging from 15.8 square kilometers to 116.5 square kilometers. The prohibited overlap area in the Over-water Markets encompasses less than 1 percent of each station's service area. The shorelines of the Big Island and Maui are 47.9 kilometers apart at their closest points. Finally, PRG asserts, the stations located on Maui and the Big Island "serve two separate and distinct media advertising markets."²⁰

¹⁴ See *Ownership Report and Order*, 18 FCC Rcd at 13870-73.

¹⁵ Under the interim contour-overlap methodology, stations whose transmitters are located more than 92 kilometers from the perimeter of the common area of principal community contour overlap are not counted as being in the relevant radio market. *Ownership Report and Order*, 18 FCC Rcd at 13729-30.

¹⁶ As discussed *infra* p. 6, two other markets are formed over land.

¹⁷ Waiver Request, Technical Exhibit at 3.

¹⁸ 47 C.F.R. § 73.3555(a)(1)(iii).

¹⁹ See *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)). See also 47 C.F.R. § 1.3 (stating that rule provisions may be waived "for good cause shown") and 47 C.F.R. § 73.3566(a) (providing that requests for waiver "shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof"). The Commission declined to adopt any specific waiver criteria relating to radio station ownership in the *Ownership Report and Order*, but stated that "[p]arties who believe that the particular facts of their case warrant a waiver of the local radio ownership rule may seek a waiver under the general 'good cause' waiver standard in our rules." *Ownership Report and Order*, 18 FCC Rcd at 13746-47 (citing 47 C.F.R. § 1.3).

²⁰ Waiver Request at 2.

PRG also cites Commission precedent as supporting grant of the Waiver Request. PRG states that the issue was first considered in *American Colonial Broadcasting Corp.*,²¹ where the Commission concluded that only the overlap area within the land boundaries of Puerto Rico should be considered regarding two television stations. As noted by PRG, in *Tidewater Broadcasting Co., Inc.*,²² an otherwise prohibited contour overlap was allowed because this overlap would occur mainly over a large body of water and adjacent, uninhabited marshlands. The Waiver Request also cites a more recent unpublished decision granting waiver of the then-existing multiple ownership rule because the prohibited contour overlap occurred entirely over water, far from the shore of either island on which the subject radio stations were located, and no residential area was affected.²³ Additionally, PRG cites *Generation II Radio San Diego, Inc.*,²⁴ where waiver of the then-existing radio duopoly rule²⁵ was granted based chiefly on the fact that the prohibited overlap occurred over the Pacific Ocean.

In its Opposition, KHBC primarily argues that PRG is relying on outdated case law.²⁶ We find, however, that grant of the Waiver Request is consistent with the objectives and concerns expressed by the Commission in its recent omnibus ownership rulemaking proceeding. In adopting the *Ownership Report and Order*, the Commission noted that the primary public interest rationale for the local radio ownership rule is preserving competition in the relevant radio markets, thus “assuring that numerous rivals are contending for the attention of listeners.”²⁷ The Commission further observed that “radio stations serve people, not land.”²⁸

These considerations apply equally to the proposed transaction. The characteristics of the Over-water Markets at issue here, and the fact that there is currently, and always will be, a complete absence of daily listeners in or near the seven radio markets subject to the Waiver Request, constitute special circumstances warranting departure from the rule’s application. Deviation from the rule in this situation does not raise competitive concerns. Accordingly, we conclude that waiver of Section 73.3555(a) regarding the seven radio markets formed by contour overlaps occurring solely over the Pacific Ocean between Maui and the Big Island would serve the public interest. We do, however, admonish PRG for failure to obtain a waiver of Section 73.3555(a) for these markets as of October 1, 2003, the date on which it acquired attributable interests in the Hawaii Stations through the commencement of its TBA with

²¹ 6 R.R.2d 377 (1965) (finding that overlap areas which extend over the ocean beyond any land areas should not be considered sufficient to establish prohibited overlap).

²² 6 R.R.2d 730 (1966).

²³ *WVGN(FM), Charlotte Amalie, Virgin Islands* (Ref. 8920-GDG, MMB Sept. 5, 1991).

²⁴ 62 F.C.C.2d 691 (1976).

²⁵ 47 C.F.R. § 73.35(a) (1975) (proscribing overlap of the 1 mV/m contours of commonly-owned AM stations).

²⁶ Opposition to Waiver Request at 9.

²⁷ *Ownership Report and Order*, 18 FCC Rcd at 13716.

²⁸ *Id.* at 13724.

BIR.²⁹ These attributable interests caused PRG to exceed the numerical ownership limits and were thus prohibited absent a waiver.

Multiple Ownership. Applying the interim contour-overlap methodology, staff review confirms that the proposed transaction forms two separate radio markets where the contour overlap is over the Big Island. PRG complies with the local radio ownership rule in both markets. In the first of these markets (on the East side of the Big Island), PRG would own three FM stations -- KKBG(FM), KAPA(FM), and KPVS(FM) -- and one AM station -- KHLO(AM). Staff analysis establishes that there are at least 13 stations in this market. In the second market (on the West side of the Big Island), PRG would own three FM stations -- KLEO(FM), KAGB(FM), and KLUA(FM) -- and one AM station -- KKON(AM). Staff review of PRG's multiple ownership exhibit³⁰ establishes that there are at least eight radio stations in this market. In a local radio market with 14 or fewer stations, a single owner may own up to five commercial stations, no more than three of which are in the same service, except that a party may not own more than 50 percent of the stations in such market.³¹ The proposed transaction complies with these numerical limits.³²

Unauthorized Transfer of Control. In ascertaining whether an unauthorized transfer of control has occurred, we traditionally look to whether a party other than the licensee has the right to determine the station's basic operating policies,³³ with particular attention to three areas: programming, personnel, and finances.³⁴ Licensees are permitted under Section 310(d) of the Act to delegate day-to-day operations relating to those three areas, so long as they continue to set the policies guiding those operations and remain ultimately in control of them.³⁵ The Commission has consistently held that the existence of a local marketing agreement ("LMA") or TBA does not constitute a *per se* transfer of control.³⁶ A TBA broker is

²⁹ See 47 C.F.R. § 73.3555, Note 2(j)(1) (defining such brokered stations as attributable) and 2(j)(3) (requiring certification within the TBA by the brokering station that the agreement complies with the local ownership numerical limits). At Section 11(A) of the TBA, PRG stated, in error, that it "verifies that execution and performance of [the TBA] complies with the FCC's restrictions on local radio station ownership set out in Section 73.3555(a) of the FCC's rules."

³⁰ The multiple ownership exhibits that staff reviewed are the amended exhibits submitted with PRG's December 10, 2004, Reply to Opposition to Waiver Request and the Supplement to Technical Statement amendment submitted on January 11, 2005. The exhibit shows 11 stations for the West Big Island Market.

³¹ See 47 C.F.R. § 73.3555(a)(1)(iv).

³² KHBC asserts that grant of the application would result in PRG having unreasonable market dominance and states that it also plans to address this issue with the Federal Trade Commission and the Department of Justice. KHBC fails to support its general assertion with specific data or identification of a specific market. We find, therefore, that KHBC has failed to raise a substantial and material question of fact regarding this issue.

³³ See *WHDH, Inc.*, 17 F.C.C.2d 856 (1969), *aff'd sub nom., Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

³⁴ See, e.g., *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *recon. denied*, 50 R.R.2d 1346 (1982).

³⁵ See *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981); *The Alabama Educational Television Commission*, 33 F.C.C.2d 495, 508 (1972).

³⁶ See, e.g., *Solar Broadcasting Company, Inc.*, 17 FCC Rcd 5467, 5486 (2002); *Roy R. Russo, Esq.*, 5 FCC Rcd 7586 (1990).

entitled to employ its own personnel at the brokered station, as long as such employees are subject to the ultimate control of the station licensee and as long as the licensee fulfills its own personnel obligations.³⁷

The facts alleged by KHBC do not establish a *prima facie* case that PRG has engaged in an unauthorized transfer of control of the Hawaii Stations. As noted above, PRG acknowledged that it is brokering time on all five of the Hawaii Stations. KHBC alleges, based on affidavits from station employees, that the manner in which BIR and PRG implemented their September 29, 2003, TBA resulted in a premature assumption of control of the stations by PRG.³⁸ KHBC also argues that BIR failed to maintain control at the stations following the implementation of the TBA. We find, however, that the employee statements provided by KHBC are conclusory and fail to provide facts to support those conclusions. Accordingly, these statements do not raise a substantial and material question of fact as to whether PRG and BIR engaged in an unauthorized transfer of control. Moreover, the record includes explicit denials by both BIR and PRG regarding KHBC's allegations. BIR's Opposition expressly states that it exercises control over all of the Stations' operations, including programming, personnel and finances, and includes an affidavit of BIR's Chief Executive Officer, Glenn Yee, who attests that BIR has retained control.³⁹ PRG's Opposition provides the sworn declaration of its President, Richard Charles Bergson, stating that PRG acts subject to the limitations in the TBA, with BIR retaining ultimate control over programming, finances and personnel.⁴⁰

The subject TBA, which was properly filed with the Commission, comports with Commission policy.⁴¹ Section 8, for example, provides for complete licensee control of the Hawaii Stations. Additionally, Section 11B certifies that BIR will continue to maintain control over the Stations' finances, personnel and programming. Section 6 provides for meaningful licensee management and staff presence, and Attachment A provides for direct licensee payment of the Stations' expenses. We find that the record provides no evidence that PRG's conduct under the TBA constitutes anything other than appropriate broker involvement with the Stations. KHBC's assertion that PRG has illegally appropriated control of the Stations is thus without merit.

CONCLUSION

Based on our review of the record and for the reasons set forth above, we find that PRG is qualified as the assignee and that grant of the transaction is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that the Petition to Deny and the Complaint filed by Hilo Broadcasting, L.L.C. ARE DENIED. IT IS FURTHER ORDERED, that Pacific Radio

³⁷ See *WGPR, Inc.*, 10 FCC Rcd 8140, 8143 (1995) (recognizing necessity for time broker's staff to become involved with licensee's facilities); *Michael R. Birdsill*, 7 FCC Rcd 7891 (MMB 1992) (sharing of staff between brokered station and broker permitted). See also *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2761 n.30 (1992) (rules require licensee to maintain control over station regardless of any time brokerage agreements that may exist).

³⁸ See Petition to Deny, Exhibit B.

³⁹ BIR Opposition at 5 and attached Statement of Glenn Yee.

⁴⁰ PRG Opposition at Exhibit 1.

⁴¹ See, e.g., *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534 (1997).

Group's November 4, 2004 Waiver Request IS GRANTED, and that the applications for assignment of licenses of stations KKON(AM), Kealahou, Hawaii (File No. BAL-20031002AAZ), KPVS(FM), Hilo, Hawaii, (File No. BALH-20031002AAY), KLUA(FM), Kailua Kona, Hawaii (File No. BALH-20031002ABA), KAPA(FM), Hilo, Hawaii (File No. BALH-20031002ABB), and KAGB(FM), Waimea, Hawaii (File No. BALH-20031002ABC), from Big Island Radio to Pacific Radio Group, Inc. ARE GRANTED. Additionally, Pacific Radio Group, Inc. IS HEREBY ADMONISHED for failure to timely obtain a waiver of Section 73.3555(a) in connection with its time brokerage agreement with Big Island Radio.⁴²

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

⁴² See *supra* n. 28 and accompanying text.