



Federal Communications Commission
Washington, D.C. 20554

February 9, 2007

DA 07-640
In Reply Refer to:
1800B3-TH

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Mr. Luis A. Mejia
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In re: WMIO(FM), Cabo Rojo, PR
Facility ID No. 40052
File No. BALH-20050427ABB

Application for Assignment of License

Gentlemen:

We have before us the above-captioned application (the "Application") for consent to the assignment of the license for Station WMIO(FM), Cabo Rojo, Puerto Rico (the "Station"), from Bestov Broadcasting, Inc. to Arso Radio Corporation ("Arso"). The Application includes an unopposed request by Arso for waiver of Section 73.3555(a) of the Commission's Rules,¹ which sets forth the limits on the number of stations a party may own in a local radio market (the "Waiver Request"). For the reasons set forth below, we conditionally waive Section 73.3555(a) and grant the Application. This waiver is conditioned on the outcome of Arso's Petition for Reconsideration of the Commission's *Ownership Order*.²

¹ 47 C.F.R. § 73.3555(a).

² See 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, 18 FCC Rcd 13620, 13711-13747 (2003) ("Ownership Order"), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (2004) ("Prometheus Remand Order"), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004) ("Prometheus Rehearing Order"), *cert. denied*, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168 and 04-1177). Arso has raised the same arguments concerning the application of the Arbitron Metro standard to Puerto Rico contained in its Waiver Request in a Petition for Reconsideration of the Ownership Order, and in comments filed in the proceeding to determine an appropriate method of defining radio
(footnote continued on next page)

Background

Arso and/or its principals currently have attributable interests in 13 radio stations (6 AM and 7 FM) on the island of Puerto Rico.³ This combination of stations was acquired through their demonstration of compliance with the Commission's former methodology for defining radio markets, which relied on the overlapping principal community contours of the commercial radio stations that were proposed to be commonly owned.

In the *Ownership Order*, however, the Commission adopted a new, geography-based definition of radio markets based on Arbitron's Metro Survey Areas ("Metros"), as reported by BIA.⁴ This new market definition is used to determine compliance with the numerical limits under Section 73.3555(a) in Arbitron-rated markets, such as Puerto Rico.

The island of Puerto Rico constitutes a single Arbitron Metro, which, according to BIA, contains 99 commercial and three noncommercial stations.⁵ In this size market, a party may have a cognizable interest in up to eight commercial stations, with no more than five in the same service (AM or FM).⁶ Thus, because the number of radio stations in Puerto Rico in which Arso and/or its principals currently have ownership interests exceeds the limits imposed for a local radio market of its size (five radio stations and two FM stations more than permitted), Arso cannot acquire Station WMIO(FM), absent a waiver.⁷

Discussion

Waiver Request. In support of its Waiver Request, Arso relies on the Commission's statement in the *Ownership Order* that Arbitron Metros "are based on Metropolitan Areas (MAs) established by the Office of Management and Budget (OMB),"⁸ noting that OMB does not define, as an MA, the entire

markets in areas not covered by Arbitron Metros. *See Ownership Order*, 18 FCC Rcd at 13870 (initiating rulemaking proceeding in MB Docket 03-130). Arso's Petition, which remains pending, will be acted upon by the Commission in the context of the rulemaking proceedings, and our action here does not prejudice the Commission's disposition of Arso's arguments in that context. Although we are granting the Station WMIO(FM) assignment application below, any future application by Arso to change or increase the Station's facilities must be accompanied by a new showing of compliance with the Commission's local radio ownership rules and, if necessary, a new request for waiver of the use of the Arbitron Puerto Rico Metro as the presumptive market in which the Station competes.

³ Those stations are: WPRM-FM, San Juan, PR; WIVA-FM, Aguadilla, PR; WRIO(FM), Ponce, PR; WORA(AM), Mayaguez, PR; WPRP(AM), Ponce, PR; WFDT(FM), Aguada, PR; WUNO(AM), San Juan, PR; WFID(FM), Rio Piedras, PR; WLEO(AM), Ponce, PR; WZAR(FM), Ponce, PR; WCMN(AM), Arecibo, PR; WCMN-FM, Arecibo, PR; and WNEL(AM), Caguas, PR.

⁴ *See Ownership Order*, 18 FCC Rcd at 13724-28. Although the Third Circuit Court of Appeals subsequently stayed the effective date of all the new rules set forth in the *Ownership Order* and continued that stay pending review of the Commission's action on remand, *see Prometheus Remand Order*, 373 F.3d at 435, the court partially lifted the stay in response to the Commission's Petition for Rehearing, such that the new local radio ownership rule took effect on September 3, 2004. *Prometheus Rehearing Order* at 2.

⁵ BIA database, Jan. 25, 2007.

⁶ *See* 47 C.F.R. § 73.3555(a)(i).

⁷ Their current level of ownership, however, is grandfathered. *See Ownership Order*, 18 FCC Rcd at 13808.

⁸ *See Ownership Order*, 18 FCC Rcd at 13725. The term MAs includes both Metropolitan Statistical Areas (MSAs) and Micropolitan Statistical Areas (Micro SAs). MSAs have at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as
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island of Puerto Rico.⁹ According to Arso, OMB considers the presence of population centers in defining both MAs and MSAs and identifies eight Metropolitan Statistical Areas (“MSAs”) in Puerto Rico.¹⁰ Thus, it contends that the island, by definition, cannot constitute a single Arbitron Metro and suggests that the Commission review its proposed acquisition of Station WMIO(FM) using the interim contour-overlap methodology that applies in non-Arbitron rated markets.¹¹

An applicant for waiver “faces a high hurdle”¹² and must demonstrate that deviation from the general rule is warranted by special circumstances and will serve the public interest.¹³ We have given Arso’s Waiver Request the requisite “hard look”¹⁴ and, for the reasons set forth below, find that waiver of Section 73.3555(a) is appropriate based upon the unique facts presented in this case.

In the *Ownership Order*, the Commission designated Arbitron Metros as the “presumptive” means of defining the relevant geographic radio market for purposes of application of the ownership rules.¹⁵ With regard to those areas not located within a Metro, the Commission instituted a rulemaking proceeding to seek comment on how to define such markets. The Commission stated that, while that rulemaking was pending, if presented with applications proposing radio combinations in non-Metro areas, the Commission would apply a modified contour-overlap methodology to determine whether the transaction would comply with the radio ownership rule.¹⁶

We conclude that the unique combination of facts presented in this particular case justifies our use here of a radio market definition based upon that modified contour-overlap methodology, rather than the Arbitron-designated Metro.

measured by commuting ties. Micro SAs have at least one urbanized area of at least 10,000 but less than 50,000 population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties. Combined Statistical Areas are combined adjacent MSAs and Micro SAs. See OMB Bulletin 06-01, at <http://www.whitehouse.gov/omb/bulletins/fy2006/b06-01.pdf>.

⁹ Arso states that, according to the most recent OMB MA list, incorporating information from the 2000 Census, Puerto Rico has eight Metropolitan Statistical Areas and three Combined Statistical Areas. See List 5, Attachments to OMB Bulletin 03-04 (at <http://www.whitehouse.gov/omb/bulletins/b03-04.html>), which Arso appends as Attachment 2 to its Waiver Request.

¹⁰ Waiver Request at 3.

¹¹ As an attachment to its Waiver Request, Arso provides a Technical Statement which Arso claims demonstrates compliance pursuant to the interim contour-overlap methodology, as discussed in the *Ownership Order*, 18 FCC Rcd at 13729-30.

¹² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“*WAIT Radio*”), cited in *Ownership Order*, 18 FCC Rcd at 13647.

¹³ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio*). See also 47 C.F.R. § 1.3 (stating that rule provisions may be waived “for good cause shown”). The Commission declined to adopt any specific waiver criteria relating to radio station ownership in the *Ownership 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 Order*, 18 FCC Rcd at 13746-47 (citing 47 C.F.R. § 1.3).

¹⁴ *WAIT Radio*, 418 F.2d at 1157.

¹⁵ *Ownership Order*, 18 FCC Rcd at 13724 ¶ 274.

¹⁶ *Id.* at 13729-30 ¶¶ 282-286.

First, the Commission has long recognized both the unusual economic circumstances present in Puerto Rico, and the unique and extreme topography of that island as considerations in determining the relevant market for purposes of applying our multiple ownership rules. For instance, based upon these factors, the Commission has, on numerous occasions, authorized exceptions to the TV duopoly rule where satellite stations were at issue.¹⁷ In so acting, the Commission found that it was the combination of the island's topography and its geographic isolation that places Puerto Rico in a highly unusual position.¹⁸ The island is approximately 125 miles long (east to west) and 35 miles wide (north to south), which is about three times the size of Rhode Island. The island is bisected east to west by a central mountain range which effectively blocks signals originating in the eastern portion of Puerto Rico from reaching the western portion of the island, and vice versa. As we have recognized previously, the island's topography significantly obstructs local broadcast signals, and accordingly limits the ability of stations to provide service to other areas of the island.¹⁹

Further, the Commission has previously used the U.S. Census Bureau's designation of MSAs to help define the applicable market for determining compliance with cross-ownership limits in Puerto Rico.²⁰ As indicated by Arso, Puerto Rico consists of eight MSAs, five Micro Statistical Areas, and three Combined Statistical Areas.²¹ An MSA has at least one urbanized area of 50,000 or more population, as well as adjacent territory that has a high degree of social and economic integration with the core, as measured by commuting ties.²² MSAs generally approximate the boundaries around centers of economic activity. Puerto Rico's eight MSAs suggest that the island may have more centers of economic activity than the Arbitron Metro implies in this instance. Further, there are 99 commercial stations in Puerto Rico and three noncommercial stations, as well as 53 separate owners of radio stations. While there are other Arbitron markets that comprise more than one MSA, Puerto Rico is the only such market that has the additional factors of geographic size, topography, and sheer numbers of radio stations and station owners.

¹⁷ See *Seglares Iglesia Catolica, Inc.*, 2 FCC Rcd 7539 (1987); *Hector Nicolau*, 5 FCC Rcd 6370 (1990); *Canal 48, Inc.*, 8 FCC Rcd 2193 (1993); *Paxson Communications of San Juan*, 16 FCC Rcd 14139 (2001).

¹⁸ *Siete Grande Television, Inc.*, 7 FCC Rcd 5299 (1992); *Paxson*, 16 FCC Rcd at 14141-42 ¶¶ 9-10; *Ownership Order*, 18 FCC Rcd at 13693 ¶ 189 n.404. The Commission has determined that the island of Puerto Rico is a single television market. That decision, however, does not resolve the issue of the relevant radio markets for the island. First, television markets historically are much larger than radio markets. In addition, radio stations' signals do not propagate as far as those of television stations due to signal strength and HAAT differences. Moreover, these decisions acknowledge the fact that, but for the use of satellite stations, even a television signal most likely will cover only its Grade A service area. *JEM Communications, Inc.*, 9 FCC Rcd 4874, 4876 ¶¶ 16-17 (1994).

¹⁹ In *Paxson*, the Commission recognized that the island's topography significantly obstructs broadcast signals, and that stand-alone full-power television stations cannot provide service to the entire island. Therefore, the Commission has recognized that broadcasters must rely on "some type of ownership combination or alternative engineering solutions" such as satellite stations or boosters to transmit signals across the island. *Paxson*, 16 FCC Rcd at 14143 ¶ 14.

²⁰ See *WLDI, Inc.*, 10 FCC Rcd 12150 (1995) (Commission recognized that the San-Juan Bayamon PMSA may be equivalent to a radio market and the San Juan-Caguas-Arecibo CMSA may be equivalent to a television market); *WPRA, Inc.*, 12 FCC Rcd 2581 (1997) (Commission recognized that the Mayaguez-Aguadilla market can be used to determine the number of voices remaining post-transaction).

²¹ See OMB Bulletin 03-04, at <http://www.whitehouse.gov/omb/bulletins/b03-04.html>.

²² See generally Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82228 (2000).

Arbitron itself, in “Puerto Rico Radio Today (2006 Edition),” states that Puerto Rico “can be compared to Connecticut. It is a little smaller, but with almost half a million more people.”²³ However, in addition to the inclusion of southern Connecticut in the New York radio market, Connecticut has several Arbitron-rated radio markets: (a) Hartford-New Britain-Middletown (the 50th largest market); (b) New Haven (the 109th largest market); (c) Bridgeport (the 121st largest market); (d) Stamford-Norwalk (the 145th-largest market); (e) New London (the 173rd largest market); and (f) Danbury (the 196th largest market).²⁴ Moreover, Arbitron states: “When analyzing [Puerto Rico], there are several regions – San Juan, West, South, East, North and Northeast – that have important population centers with their own characteristics, such as Mayagüez, Ponce, Humacao, Fajardo, San Juan.”²⁵ In fact, Arbitron provides ratings data for Puerto Rico broken down by those regions.²⁶

It is these characteristics of the Puerto Rico Arbitron Metro, in combination with the circumstances of this particular transaction, that present a compelling case for departing from the Arbitron Metro as the presumptive definition of the local market in determining whether the transaction complies with the local radio station ownership rule. Station WMIO(FM) is a Class A facility operating with an effective radiated power of 3 kW located on the west coast of the island of Puerto Rico.²⁷ Its protected service (60 dBµ/1 mV/m) contour extends inland approximately 25 kilometers from the transmitter site. Accordingly, it is highly unlikely that Station WMIO(FM) can even be heard, let alone compete, in areas on the eastern part of the island, including the major economic area of San Juan, which is situated some 120 kilometers away.

Due to the presence of these unique factors, we will grant the Waiver Request to utilize, in this instance, the interim contour-overlap methodology that applies in non-Arbitron rated markets, pending the outcome of Arso’s Petition for Reconsideration of the *Ownership Order*.²⁸

Assignment Application. We have evaluated the proposed transaction applying the Commission’s interim contour-overlap methodology. Our analysis confirms that the proposed transaction forms three separate radio markets and complies with the local radio ownership limits in all three. Each of these markets contains 22 stations. Under the rules regarding application of the contour-overlap methodology, Arso may own six stations, no more than four of which are in the same service (AM or FM), in each market.²⁹ In Markets 1 and 2 under our analysis, Arso would own four FM stations and one AM station. In Market 3, Arso would own three FM stations and two AM stations.³⁰

We have also examined the Application and find that it otherwise complies with all applicable statutory and regulatory requirements, and we find that grant of the Application would further the public interest, convenience, and necessity.

²³ Arbitron Inc., “Puerto Rico Radio Today (2006 edition),” at <http://www.rab.com/secure/research/PuertoRicoRadioToday06.pdf>, (“Puerto Rico Radio Today”) at 2.

²⁴ Arbitron Inc., “Arbitron Radio Market Rankings: Fall 2006,” at <http://www.arbitron.com/home/mm001050.asp>.

²⁵ Puerto Rico Radio Today at 2.

²⁶ *Id.* at 16-18.

²⁷ See License No. BLH-19880128KA, granted on December 15, 1988.

²⁸ *Ownership Order*, 18 FCC Rcd at 13729-30 ¶ 285.

²⁹ See 47 C.F.R. § 73.3555(a)(1)(iii).

³⁰ Market 1: WMIO(FM), WIVA-FM, WCMN-FM, WFDT(FM), WORA(AM)
Market 2: WMIO(FM), WIVA-FM, WCMN-FM, WZAR(FM), WORA(AM)
Market 3: WMIO(FM), WIVA-FM, WZAR(FM), WORA(AM), WPRP(AM)

Accordingly, IT IS ORDERED, that Section 73.3555(a)(1)(iii) of the Commission's Rules³¹ IS WAIVED with respect to all interests held by Arso Radio Corporation and its officers, directors and stockholders in the authorization for Station WMIO(FM), Cabo Rojo, Puerto Rico, until the effective date of a decision by the Commission on the Petition for Reconsideration of the *Ownership Order* filed by Arso Radio Corporation.

IT IS FURTHER ORDERED, that the application (File No. BALH-20050427ABB) for consent to assign the license for Station WMIO(FM), Cabo Rojo, Puerto Rico, from Bestov Broadcasting, Inc. to Arso Radio Corporation IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Anthony T. Lepore, Esq.
Francisco R. Montero, Esq.

³¹ 47 C.F.R. § 73.3555(a)(1)(iii).