



Federal Communications Commission
Washington, D.C. 20554

October 8, 2008

DA 08-2251

In Reply Refer to:

1800B3-MJW

Released: October 8, 2008

Finger Lakes Alliance for Independent Media
c/o Barry D. Wood, Esq.
Wood, Maines and Nolan, Chtd.
1827 Jefferson Pl., NW
Washington, DC 20036

Citadel Broadcasting Co.
c/o Nancy Ory, Esq.
Leventhal, Senter & Lerman, PLLC
2000 K Street, NW, Suite 600
Washington, DC 20006

Saga Communications of New England, LLC
c/o Gary Smithwick, Esq.
Smithwick and Belendiuck, PC
5028 Wisconsin Ave., NW, Suite 301
Washington, DC 20016

In re. **Citadel Broadcasting Co.**
Saga Communications of New England, LLC

WKRT(AM), Cortland, New York
Facility ID No. 9428
File No. BAL-20061101ACS

WIII(FM) Cortland, New York
Facility ID No. 9427
File No. BALH-20061101ACT

Applications for Assignment of Licenses
Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (the "Petition"), filed by the Finger Lakes Alliance for Independent Media ("FLAIM"),¹ seeking rescission of the Commission's grant of the referenced applications (the "Applications"). For the reasons set out below, we dismiss the Petition.

Background. On December 27, 2006, the Commission conditionally² granted the Applications for assignment of the licenses of Stations WKRT(AM) and WIII(FM) (the "Cortland Stations") from

¹ The assignor, Citadel Broadcasting Co. ("Citadel"), filed an Opposition to Petition for Reconsideration (the "Citadel Opposition"), the assignee, Saga Communications of New England, LLC ("Saga") also filed an Opposition to Petition for Reconsideration (the "Saga Opposition"). FLAIM filed a Consolidated Reply to Oppositions to Reconsideration (the "Reply").

² Commission consent to the assignment was conditioned on Saga's divestiture of Station WKRT(AM). That divestiture was approved on December 21, 2006, and consummated on Sept. 12, 2007. The current call sign for the station is WYBY(AM). See BAL-20061106ABZ.

Citadel to Saga. The parties consummated the assignment on September 1, 2007. FLAIM requests the Commission to reconsider its grant of the Applications and rescind its consent to the assignments.³

FLAIM describes itself as an unincorporated association of individuals who reside and work in the Ithaca, New York, market.⁴ The essence of FLAIM's Petition is that – although Saga complies with the station limits in Section 73.3555(a)(1) of the Commission's Rules⁵ (the "Local Radio Ownership Rule") – Saga's operation of five stations in the Ithaca market would result in an undue concentration of ownership⁶ that will impede viewpoint diversity,⁷ particularly with respect to news coverage.⁸

FLAIM argues that the Commission's staff inappropriately evaluated the Applications by applying the "bright line" test for multiple ownership analysis established in the Commission's *Definition of Radio Markets* order.⁹ There, the Commission specified that Arbitron-defined "Metros" constitute the presumptive markets for multiple ownership analysis.¹⁰ FLAIM, however, claims that the presumption is overcome in the case of Ithaca because some stations attributed to the Arbitron Ithaca Metro Survey Area (the "Ithaca Metro") do not actually provide meaningful service there. For example, FLAIM contends that Arbitron unjustifiably included in the Ithaca Metro, stations that do not advertise in the local Yellow Pages, or compete for advertising revenue, or have measurable audience share in the market.¹¹ FLAIM also claims that Saga's existing stations have a "stranglehold" on local news coverage because few other stations in the Ithaca Metro cover local news.¹²

FLAIM made identical arguments in its earlier Petition to Deny filed against Saga's acquisition of its fourth station in the Ithaca market from Eagle Broadcasting Corp. The staff found those arguments

³ Petition at 2.

⁴ The Cortland Stations' community of license, Cortland, New York, is approximately 40 kilometers northeast of Ithaca, New York.

⁵ 47 C.F.R. § 73.3555.

⁶ See Petition at 1-2.

⁷ See *id.* at 3.

⁸ See *id.* at 3-4.

⁹ *2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets, Definition of Radio Markets for Areas not located in an Arbitron Survey Area*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13718 (2003), *aff'd in part and remanded in part sub nom. Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004), *cert. denied*, 545 U.S. 1123 (2005) ("*Definition of Radio Markets*").

¹⁰ In *Definition of Radio Markets*, the Commission explained that "[w]here a commercially accepted and recognized definition of a radio market exists, it seems sensible to us to rely on that market definition for purposes of applying the local radio ownership rule. Arbitron, as the principal radio rating service in the country, has defined radio markets for most of the more populated urban areas of the country. * * * The record shows that Arbitron's market definitions are an industry standard and represent a reasonable geographic market delineation within which radio stations compete. Indeed, the DOJ consistently has treated Arbitron Metros as the relevant geographic market for antitrust purposes. * * * Given the long-standing industry recognition of the value of Arbitron's service, we believe there is strong reason to adopt a local radio market definition that is based on this established industry standard." *Definition of Radio Markets* at 13724 (footnotes omitted).

¹¹ See Petition at 7. We note that FLAIM does not propose an alternative market definition.

¹² See *id.* at 8. FLAIM also claims that Saga stations have 70 percent of the local radio audience, and slightly less than 70 percent of the local radio advertising revenues. *Id.* at 9. Application of the Herfindahl-Hirschmann Index, FLAIM claims, discloses that the Ithaca market is currently "highly concentrated" and that approval of the instant transactions would only further increase concentration. *Id.*

meritless and denied the Petition to Deny.¹³ FLAIM then filed an Application for Review which – subsequent to the filing of FLAIM’s Petition – the Commission also denied,¹⁴ finding that FLAIM had failed to show that the staff’s use of the Ithaca Metro in its multiple ownership analysis was inconsistent with the public interest.¹⁵

Both Saga and Citadel oppose acceptance of the instant FLAIM Petition because it is untimely. They point out that FLAIM had the opportunity to file a Petition to Deny the Applications within thirty days after they appeared on public notice, but failed to do so. Instead, FLAIM waited more than three months after the Petition to Deny deadline – and after the Applications had been granted – to attempt to oppose the Applications by means of a Petition for Reconsideration.¹⁶

Citadel and Saga assert that the holding in *Moody Bible Institute of Chicago, Inc.* illustrates why FLAIM’s late-filed Petition should be dismissed.¹⁷ In *Moody*, the Commission did not credit the petitioner’s excuse that it failed to file a Petition to Deny because it thought the Commission was going to dismiss the underlying application. FLAIM, however, claims that *Moody* is inapposite and distinguishable on its facts. Here, FLAIM argues, it was not anticipating, as did the *Moody* petitioner, that the Commission would dismiss the Applications. Instead, FLAIM expected that the Commission would not process the Applications until it ruled on FLAIM’s Application for Review of the earlier transaction whereby Saga acquired a fourth station in the Ithaca Metro.¹⁸ FLAIM claims it was “shocked” when the Applications were granted with the Application for Review still pending.¹⁹ Moreover, FLAIM claims that it was unnecessary for it to timely challenge the Applications, *e.g.*, by a Petition to Deny, because the Commission should have deduced from FLAIM’s earlier arguments, about the addition of a fourth Saga station to the Ithaca Metro, that FLAIM also opposed a fifth Saga station there.²⁰ Finally, FLAIM claims that it should be excused from not earlier challenging grant of the Applications because it lacked the resources to do so.²¹

Discussion. We find *Moody* is relevant precedent here. The divergence of factual settings – the *Moody* petitioner’s assumption that an application would be dismissed *vs.* FLAIM’s assumption that the Applications would not be processed – is a distinction lacking any legally significant difference. We note

¹³ See *Eagle Broadcasting Corp.*, Letter, 20 FCC Rcd 8753 (MB 2075).

¹⁴ *Eagle Broadcasting Corp.*, Memorandum Opinion and Order, ___ FCC Rcd ___ (2008) (FCC 08-266, released Oct. ___ (2008) (“*Eagle Broadcasting MO&O*”).

¹⁵ *Id.* at ¶ 9. (“Although we agree that FLAIM is a party in interest, we find that it failed to establish a *prima facie* case that grant of the application would be inconsistent with the public interest or to raise a substantial and material question of fact warranting designation of the application for hearing.”)

¹⁶ See Citadel Opposition at 3; Saga Opposition at 3.

¹⁷ See *id.* (citing *Moody Bible Institute of Chicago, Inc.*, Memorandum Opinion and Order, 66 FCC 2d 629 (1977) (“*Moody*”).

¹⁸ Reply at 3 (“with respect to the instant proposed transaction, *no decision at all* would be forthcoming from the FCC unless and until it acted on the pending Application for Review”).

¹⁹ See Petition at 4-5.

²⁰ See Reply at 2.

²¹ See *id.* FLAIM also urges that, even if its Petition is found procedurally defective, the Commission should still “take note of the widespread local resistance among Ithaca’s civic leaders to Saga’s continued expansion of market power.” FLAIM submits that, even “in a worst case scenario,” *i.e.*, denial of FLAIM’s Application for Review, a timely Petition to Deny was unnecessary because FLAIM could oppose the grant of the Applications by filing an Informal Objection. *Id.* at 3. FLAIM also asks the Commission to exercise its discretion and rescind the grants of the Applications pending action on FLAIM’s Application for Review. *Id.* at 3. The Application for Review, however, has been denied, thus rendering FLAIM’s request for delay moot.

that the decision in *Moody* rested, in part, on *Colorado Radio Corp. v. FCC*,²² a case that addresses untimely filings more universally:

[We] cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

“Sitting back” is precisely what FLAIM has done here. In so doing, and not filing a timely Petition to Deny, it assumed the risk that – as eventually occurred – the Commission would grant the Applications in the normal course and deny FLAIM’s Application for Review of the earlier transaction.

FLAIM cannot use its untimely Petition to resurrect its foregone opportunity to protest the Applications by means of a Petition to Deny. Section 1.106(b)(1) of the Rules²³ precludes acceptance of Petitions for Reconsideration unless a non-party petitioner can “show good reason why it was not possible for [it] to participate in earlier stages of the proceeding.” It was possible for FLAIM to file a timely Petition to Deny the Applications. It elected, instead, to “sit back” while the Commission considered its Application for Review. That – as *Moody* and *Colorado Radio* establish – was not a “good reason” for FLAIM not “to participate in earlier stages of the proceeding.”

FLAIM’s claim that it lacked the resources to file a timely Petition to Deny is unsupported and, in any event, belied by its having the resources to file the instant Petition and an abundant number of other pleadings related to Saga’s acquisition of stations in the Ithaca Metro.²⁴ Moreover, there is no merit to FLAIM’s argument that it was relieved of filing a Petition to Deny because the Commission already was fully informed of FLAIM’s opposition to Saga’s acquiring additional stations in the Ithaca Metro.

Section 1.106(c)(2) of the Rules²⁵ affords us the discretion to accept untimely Petitions for Reconsideration if we “determine that consideration of the facts relied on is required in the public interest.” Exercise of that discretion is unwarranted here because FLAIM has adduced no relevant facts that bear on the public interest. Indeed, the only supported facts in the Petition appear in the declaration of Curt Dunnam who attests that an Ithaca television station is not broadcasting and apparently has no main studio or personnel.²⁶ The status of the television station has no nexus with the Local Radio Ownership Rule – radio and television are separate broadcast services.

FLAIM is mistaken that its Petition is acceptable – under what it calls a “worst case scenario” – because FLAIM could have filed a post-grant Informal Objection pursuant to Section 73.3587 of the Rules.²⁷ Informal Objections, however, are acceptable only “[b]efore FCC action on any application for an instrument of authorization.”²⁸ Thus, even were we to treat FLAIM’s Petition as the equivalent of an Informal Objection, we would dismiss it because it was filed after the Applications were granted. Indeed,

²² *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (“*Colorado Radio*”). *Moody* also relied on *Springfield Television Broadcasting Corporation v. FCC*, 328 F.2d 186 (D.C. Cir. 1964). (Expectation that Commission will dismiss an application deemed inadequate justification for failing to file a pre-grant Petition to Deny.)

²³ 47 C.F.R. § 1.106(b)(1).

²⁴ In connection with Saga’s acquisition of its fourth Ithaca Metro station, FLAIM filed, *inter alia*, a Petition to Deny, a Reply to Opposition, a Motion for Extension of Time, a Further Motion for Extension of Time; a Reply to Joint Opposition (to further extension of time), an Application for Review, a Supplement to Application for Review, an Opposition to Joint Motion to Strike (the supplement) and a Reply to Opposition to the Application for Review.

²⁵ 47 C.F.R. § 1.106(c)(2).

²⁶ Petition, Exhibit A.

²⁷ *See supra* n.21.

²⁸ 47 C.F.R. § 73.3587.

even were we to reach FLAIM's Petition on the merits, we would deny it for the same reason the Commission denied FLAIM's Application for Review: FLAIM fails to demonstrate, *prima facie*, the existence of a "a substantial and material question of fact warranting further inquiry" into whether grant of the Applications was in the public interest.²⁹

Decision/Action. Both Rule and precedent bar acceptance of FLAIM's Petition. We are not persuaded by FLAIM's arguments to the contrary. The Petition will be dismissed.

Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by the Finger Lakes Alliance for Independent Media, IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁹ See *Eagle Broadcasting MO&O*, __ FCC Red at __, ¶13.