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In re: **WCCL(FM), Central City, Pennsylvania**

Facility ID No. 49026

File No. BALH-20071031AAG

WLKH(FM), Somerset, Pennsylvania

Facility ID No. 56363

File No. BALH-20071031AAH

WBHV(AM), Somerset, Pennsylvania

Facility ID No. 49027

File No. BAL-20071031AAI

WNTJ(AM), Johnstown, Pennsylvania

Facility ID No. 15327

File No. BAL-20071031AAJ

**Application for Assignment of Licenses
Petition to Deny**

Dear Counsel:

We have before us the above-captioned application (the "Assignment Application") seeking approval for the proposed assignment of licenses for Stations WCCL(FM), Central City, Pennsylvania; WLKH(FM), Somerset, Pennsylvania; WBVH(AM), Somerset, Pennsylvania; and WNTJ(AM) (formerly WPRR(AM)), Johnstown, Pennsylvania (collectively, the "Stations"), from 2510 Licenses, LLC ("2510") to Forever Broadcasting, LLC ("Forever"). On December 5, 2007, Sherlock Broadcasting, Inc. ("Sherlock"), licensee of Station WBXQ(FM), Patton, Pennsylvania, and Sounds Good, Inc. ("Sounds Good"), licensee of Station

WBRX(FM), Cresson, Pennsylvania (together, “Barger”),¹ jointly filed a Petition to Deny the Assignment Application. On December 5, 2007, Vernal Enterprises, Inc. (“Vernal”), licensee of WRDD(AM), Ebensburg, Pennsylvania; WNCC(AM), Barnesboro, Pennsylvania; and WHPA(FM), Gallitzin, Pennsylvania, filed a separate Petition to Deny.² The two pleadings raise essentially the same issue and we will address the objecting parties jointly as the “Petitioners.” For the reasons stated below, we grant the Barger and Vernal Petitions to Deny to the extent indicated herein and dismiss the Assignment Application as inadvertently accepted for filing.

Background. On March 27, 2007, in the course of negotiating multi-year subscriptions to Arbitron, Forever’s parent company, Forever Communications, Inc., advised Arbitron via email that it had decided to continue to subscribe to Arbitron in the Jackson, Tennessee, market and in the Pittsburgh, Pennsylvania, Metro, but “at this time, a decision has not been made to renew” its subscription for Altoona, State College, and Johnstown.³ Vernal reports that “[O]n October 2, 2007, Arbitron announced in an ‘Advertiser/Agency Presurvey Bulletin’ (‘Arbitron Cancellation Announcement’) that the Johnstown Arbitron had been ‘cancelled.’”⁴ A copy of the Arbitron Cancellation Announcement submitted by Vernal indicates that the Johnstown Arbitron Metro “is cancelled, effective Fall 2007.”⁵

On October 31, 2007, the parties filed the Assignment Application, proposing to assign to Forever four stations that are licensed to communities within the recently-cancelled Johnstown Arbitron Metro.⁶ Forever states that “in the absence of any Metro reported by BIA for the above-referenced stations, the instant application was filed utilizing the contour-overlap methodology *required by Paragraph 4 of FCC Form 314 Worksheet 3, and the Ownership Order.*”⁷ Forever adds that it was required to demonstrate compliance with the local radio ownership rule utilizing the contour overlap methodology because the Johnstown Arbitron Metro ceased to exist “at some point after the date of the [Arbitron Cancellation Announcement] and prior to the filing of the [Assignment Application].”⁸

¹ David Barger is the President of both Sherlock and Sounds Good. *See* Barger Petition to Deny, Attachment 1.

² 2510 and Forever filed a Consolidated Opposition to Petitions to Deny (“Consolidated Opposition”) on December 19, 2007. Barger filed a Joint Request for Extension of Time on January 3, 2008, and a Reply to Consolidated Opposition on January 17, 2008. Vernal filed a separate Reply to Consolidated Opposition on January 17, 2008.

³ Consolidated Opposition at 3. Forever also states that “[P]rior to Fall 2007, BIA’s last ‘Competitive Overview’ reflected 18 radio stations” in the Johnstown Arbitron Metro. *Id.* at 2.

⁴ *See* Vernal Reply at 5; Vernal Petition to Deny, Exhibit D at 2.

⁵ Vernal Petition to Deny, Exhibit D at 2.

⁶ Pursuant to 47 C.F.R. § 73.3555(a)(1)(iii), in a radio market with between 15 and 29 stations, a single entity may not own more than six commercial stations in total, and not more than four commercial stations in the same service (AM or FM). Prior to its cancellation, the relevant radio market, as defined by the Johnstown Arbitron Metro, consisted of 23 stations. With the cancellation of the Johnstown Arbitron Metro, Forever used the contour overlap methodology to define the radio market. Because use of the contour overlap methodology results in the creation of four separate radio markets, Forever would be permitted to own nine stations, including six FM stations, whose communities of license are all located in either Somerset County or Cambria County, the two counties that had comprised the Johnstown Arbitron Metro prior to its elimination.

⁷ Consolidated Opposition at 3 (emphasis in original).

⁸ Consolidated Opposition at 3.

Discussion. Petitioners argue that Commission policy requires a waiting period before a party can rely on certain market definition changes. Specifically, Petitioners cite to the Commission’s policy that prevents a party from receiving the benefit of a change in Arbitron boundaries unless that change has been in place for at least two years.⁹ Vernal argues that the elimination of an entire Arbitron Metro should be treated as a market definition change within the scope of this policy. Vernal asserts that “Forever has effectuated the ultimate change in Metro boundaries; it has eliminated them.”¹⁰

When the Commission revised the local radio ownership rule to use Arbitron Metros, where available, to define a particular radio market, it concurrently adopted the two-year waiting period policy to safeguard the integrity of the new methodology. The Commission recognized that Arbitron Metro boundaries are subject to change, and noted that “[S]everal commenters have argued that Arbitron market definitions are not reliable enough for us to use as a radio market definition.”¹¹ While acknowledging that market definitional changes could be initiated at the behest of licensees seeking to circumvent the local radio ownership rule, the Commission nonetheless adopted the use of Arbitron Metros, but with the following *proviso*:

We believe, moreover, that we can establish safeguards to deter parties from attempting to manipulate Arbitron market definitions for purposes of circumventing the local radio ownership rule. Specifically, we will not allow a party to receive the benefit of a change in Arbitron boundaries unless that change has been in place for at least two years.¹²

The Commission stated that “these safeguards will ensure that changes in Arbitron Metro boundaries . . . will be made to reflect actual market conditions and not to circumvent the local radio ownership rule.”¹³ While the *Ownership Report and Order* does not define the scope of, nor qualify the reach of an Arbitron “change,” we find that the totality of circumstances surrounding Forever’s proposed acquisition supports application of this policy to the instant transaction.

Specifically, the record indicates that Forever’s March 27, 2007, communication to Arbitron that it would not renew the subscription for the Johnstown Arbitron Metro was followed by Arbitron’s announcement on October 2, 2007, that the Johnstown Arbitron Metro “is cancelled effective Fall

⁹ 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*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13726 (2003) (“*Ownership Report and Order*”), *aff’d in part and remanded in part*, *Prometheus Radio Project, et al. v. FCC*, 373 F. 3d 372 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005). See also *Prometheus Radio Project, et al. v. FCC*, No. 03-3388 (3d Cir. Sept. 3, 2004) (lifting stay with respect to new local radio ownership rule).

¹⁰ Vernal Petition to Deny at 8.

¹¹ *Ownership Report and Order*, 18 FCC Rcd at 13726.

¹² *Id.*

¹³ *Id.*

2007.”¹⁴ Thus, it appears that Forever’s business decision to cancel its subscription for the Johnstown Arbitron Metro precipitated Arbitron’s subsequent cancellation of the Johnstown Arbitron Metro.

Forever urges that we narrowly apply this policy to only those boundary changes that literally contract or expand an Arbitron Metro.¹⁵ This argument is based on the *Ownership Report and Order*’s illustrative statement that the safeguard “includes both enlarging the Metro (to make a market larger) and shrinking the Metro (to split a party’s non-compliant station holdings into separate markets).”¹⁶ We disagree with this narrow reading of this policy. The concerns, which the adoption of this two-year waiting period is intended to address, are equally present in a situation involving the cancellation of an entire Arbitron Metro. In particular, we find that a broader approach best comports with the Commission’s directive to consider whether “an Arbitron Metro boundary has been altered to circumvent the local radio ownership rule . . . in evaluating” compliance with the rule.¹⁷

In this regard, we note that taking into account the cancellation of the Johnstown Arbitron Metro would undeniably “benefit” Forever. Forever would be allowed to own nine stations, including six FM stations, where it had previously been limited to six stations, with a maximum of four FM stations. We concur with Vernal’s assessment that permitting Forever to benefit immediately from this market definition change would undermine the safeguards that the Commission specifically established to protect the reliability of an Arbitron Metro-based methodology.¹⁸

In light of the above finding, we must then determine when Forever may rely on the cancellation of the Johnstown Arbitron Metro to establish compliance with Section 73.3555(a) of the Commission’s Rules. Based on the totality of circumstances, we find that a two-year waiting period began on October 2, 2007 -- the date that Arbitron issued the Cancellation Notice. Thus, Forever may not rely on the Johnstown Arbitron Metro market cancellation at this time to demonstrate that its proposed acquisition of the Stations would comply with the local radio ownership restrictions.

Conclusion/Actions. Accordingly, because the proposed assignment of licenses does not comply with 47 C.F.R. Section 73.3555(a)(1)(iii), IT IS ORDERED, that the Barger and Vernal Petitions to Deny ARE GRANTED to the extent indicated herein. IT IS FURTHER ORDERED, that the application for

¹⁴ See *supra* page 3.

¹⁵ Consolidated Opposition at 5.

¹⁶ *Ownership Report and Order*, 18 FCC Rcd at 13726.

¹⁷ *Id.* at n. 584.

¹⁸ Recently, in the *2006 Quadrennial Review*, the Commission reaffirmed its previous finding that the relevant geographic market for purposes of the local radio ownership rule is the Arbitron Metro market. See *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (“2006 Quadrennial Review”)*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2069-82 (2007). Significant to this transaction, in the *2006 Quadrennial Review* the Commission also confirmed the relevance of the safeguard policy and denied reconsideration petitions that had argued that the two-year safeguard policy would not deter manipulation or abuse. *Id.* 23 FCC Rcd at 2080, n. 427.

approval to assign the licenses for Stations WCCL(FM), Central City, Pennsylvania (File No. BALH-20071031AAG); WLKH(FM), Somerset, Pennsylvania (File No. BALH-20071031AAH); WBVH(AM), Somerset, Pennsylvania (File No. BAL-20071031AAI); and WNTJ(AM), Johnstown, Pennsylvania (File No. BAL-20071031AAJ) from 2510 Licenses, LLC, to Forever Broadcasting, LLC, IS DISMISSED AS INADVERTENTLY ACCEPTED FOR FILING.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau