

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Guderian Broadcasting, Inc.)
)
KEGK(FM), Wahpeton, ND) Facility ID No. 25533
)
Motion to Show Cause and Petition for Revocation)
of Waiver)

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 2008

Released: March 19, 2008

By the Commission:

I. INTRODUCTION

1. We have before us a “Motion to Show Cause and Petition for Revocation of Waiver” (“Motion”) filed by Radio Fargo-Moorhead, Inc. (“RFM”) on April 5, 2007. The Motion, citing changed circumstances, requests that the Commission revoke its grant of a temporary waiver of Section 73.3555(a)(1)(iii) of the Commission’s Rules¹ (the “Rules”) permitting Triad Broadcasting Company, LLC and Monterey Licenses, LLC² (collectively, “Triad”) to continue a Joint Sales Agreement (“JSA”) involving KEGK(FM), Wahpeton, North Dakota, licensed to Guderian Broadcasting, Inc. (“Guderian”).³ We also have before us an opposition to the Motion filed by Triad and Guderian on April 18, 2007, and a reply filed by RFM on April 30, 2007. For the reasons set forth below, we hereby terminate the waiver granted in the *Waiver Decision*, effective ninety days after the release of this decision. We also decline RFM’s request to conduct an investigation to determine whether Triad’s JSA of WEGK(FM) was a *de facto* time brokerage agreement.⁴

¹ See 47 C.F.R. § 73.3555(a)(1)(iii) (in a market with between 15 and 29 full-power radio stations, no party may hold attributable interests in more than six commercial radio stations in total or more than four commercial radio stations in the same service (AM or FM)) and Notes 1 and 2(k) (a joint sales agreement is an attributable interest if it permits a party with an attributable interest in another radio station in the same market to sell more than 15 percent of the station’s advertising time per week). This standard was adopted by the Commission in 2003, temporarily stayed on appeal, and then released from the stay on September 3, 2004. 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, 13711-47 (2003) (“*2002 Biennial Review Order*”), *aff’d in part and remanded in part, Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (2004), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sep. 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).

² Monterey Licenses, LLC, which is 100% owned by Triad Broadcasting Company, LLC, is the licensee of one AM station and four FM stations in the Fargo, North Dakota – Moorhead, Minnesota radio market (the “Fargo Market”): KQWB(FM) and KVOX(FM), Moorhead, Minnesota, KLTA(FM), Breckenridge, Minnesota, KPFX(FM), Fargo, North Dakota, and KQWB(AM), West Fargo, North Dakota.

³ See *Letter to David D. Oxenford*, 21 FCC Rcd 9805 (MB 2006) (the “*Waiver Decision*”).

⁴ See RFM’s “Request for Special Investigation of Fraudulent Joint Sales Agreement” filed on October 30, 2007, which Triad and Guderian opposed on November 15, 2007, and RFM’s reply filed on November 28, 2007. Both in-market JSA’s and in-market time brokerage agreements are attributable non-ownership interests that are not subject to long-term grandfathering rights under the *2002 Biennial Review Order*, so there is no decisional distinction

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II. BACKGROUND

2. KEGK(FM) is one of 18 operating commercial radio stations in the Fargo Market.⁵ Since May 2002, Triad has purchased substantially all of the advertising time on the station for resale in combination with its five other stations in the Fargo Market. The *2002 Biennial Review Order* determined that such an in-market JSA is an attributable interest.⁶ In situations such as this one, where an attributable interest exceeded the revised ownership limits being adopted, parties were given two years from the effective date of the order to terminate the JSA or otherwise come into compliance with the revised limits.⁷ Pursuant to the *Prometheus Rehearing Order*, the revised rule became effective on September 3, 2004. Under the revised rule, Triad holds attributable interests in five FM stations in the Fargo Market. Accordingly, absent a waiver, Triad would have been required to terminate the JSA or divest an attributable interest in one of the FM stations to be within the allowed subcap of four FM stations for the market. In response to the *2002 Biennial Review Order*, Triad filed a petition for reconsideration regarding the attribution of radio JSAs and the termination requirement, and then filed a petition for waiver of the revised ownership rule. The *Waiver Decision* granted a temporary waiver, for a period ending six months after the Commission ruled on Triad's petition for reconsideration. The *Waiver Decision* noted that a waiver would maintain the competitive balance in the Fargo Market between Triad and Clear Channel Communications, Inc. ("Clear Channel"), which operated five FM stations and seven stations altogether in the Fargo Market. Clear Channel's stations in the Fargo Market were a grandfathered interest not subject to a divestiture requirement to come into compliance with the revised ownership rule.

3. RFM's Motion notes that, subsequent to the *Waiver Decision*, Clear Channel sold its radio stations in the Fargo Market to RFM. As a result of that transaction, the right to maintain a grandfathered combination exceeding the limits in the revised ownership rule terminated, and RFM was required to divest one of the FM stations. Thus, RFM, with attributable interests in four FM stations and two AM stations in the Fargo Market, complies with the revised ownership rule. Triad, on the other hand, with attributable interests in five FM stations in the market, has been allowed to exceed the limits of the local radio ownership rule due to the *Waiver Decision*. RFM argues that the termination of the grandfathered ownership interest relied upon by the *Waiver Decision* warrants the termination of Triad's waiver so that the two companies will compete with an equal number of FM stations in the Fargo Market. Triad argues that the waiver should remain in place until the Commission addresses Triad's petition for reconsideration. However, the Commission denied that petition in a decision released on February 4, 2008.⁸ Accordingly, the temporary waiver granted in the *Waiver Decision* is due to expire on August 4, 2008.

III. DISCUSSION

4. Our longstanding case law on waivers indicates that deviation from the general rule (in this case, the local radio ownership rule) is justified only where special circumstances exist and the public interest will be served.⁹ Accordingly, when the circumstances supporting a waiver have changed, it is appropriate to

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between the two situations. Even if there were such a distinction, our decision here will require that the arrangement be ended within ninety days, so we see no need to conduct an investigation.

⁵ The BIA database shows that the Fargo Market has 25 radio stations altogether. Seven stations are owned by public radio or religious entities.

⁶ *2002 Biennial Review Order*, 18 FCC Rcd at 13745 ¶ 321.

⁷ *Id.*, 18 FCC Rcd at 13746 ¶ 325. See also *Media Bureau Announces Requirement to File Certain Radio Joint Sales Agreements*, Public Notice, 20 FCC Rcd 1 n.8 (MB 2005).

⁸ See *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, FCC 07-216 (rel. Feb. 4, 2008), at 71 n. 427, 72 nn. 429 and 432, 80-81 (denying petition for reconsideration of Monterey Licenses, LLC).

⁹ See *Northeast Cellular Telephone Co. v FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio*, 418 F.2d at 1157-59).

determine whether the original justification for the waiver still exists and to terminate the waiver if that is not the case.¹⁰

5. Both Triad and RFM cite market data to bolster their arguments about whether RFM's group of stations is at a competitive disadvantage to Triad's group of stations. However, because market data is fluid in nature and can be interpreted differently by different parties based on any number of demographic distinctions, the Commission's ownership rules are based on the number of stations in which a party holds an attributable interest. There is no dispute that RFM's ownership interests in the Fargo Market now comply with the revised ownership rule, whereas the *Waiver Decision* allows Triad to continue the JSA with Guderian's station, KEGK(FM) that would otherwise violate the revised ownership rule. Clearly, the special circumstances that supported the outcome of the *Waiver Decision* no longer exist. Rather, the public interest in maintaining a competitive balance in the Fargo Market is best served by terminating the temporary waiver granted to Triad so that both Triad and RFM will comply with the ownership limit for the Fargo Market. We will make the termination of the waiver effective ninety days after the release of this decision so that Triad and Guderian can make appropriate arrangements to unwind the JSA.

6. Triad argues that the Commission erred in limiting the grandfathering of JSAs to two years after the effective date of the *2002 Biennial Review Order* while not limiting the grandfathering of ownership interests that do not comply with the revised ownership rule. However, that argument has been rejected in the *2006 Quadrennial Regulatory Review* decision. As indicated above, the release of that decision means the temporary waiver granted in the *Waiver Decision* is scheduled to expire in five months. However, in light of the change of circumstances discussed above, we believe it is appropriate to terminate the waiver in ninety days rather than allow the waiver to remain in effect for six months.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the waiver of 47 C.F.R. § 73.3555(a)(1)(iii) granted in the *Waiver Decision* IS TERMINATED, effective ninety days from the release date of this *Memorandum Opinion and Order*.

8. IT IS FURTHER ORDERED that the "Motion to Show Cause and Petition for Revocation of Waiver" filed by Radio Fargo-Moorhead, Inc. IS GRANTED to the extent indicated in the preceding paragraph and IS OTHERWISE DENIED.

9. IT IS FURTHER ORDERED that the "Request for Special Investigation of Fraudulent Joint Sales Agreement" filed by Radio Fargo-Moorhead, Inc. IS DISMISSED.

10. IT IS FURTHER ORDERED that a copy of this *Memorandum Opinion and Order* shall be sent to Monterey Licenses, LLC, 2511 Garden Road, Building A, Suite 104, Monterey, CA 93940, and to Guderian Broadcasting, Inc., 605 Dakota Avenue, Wahpeton, ND 58075, with copies to David D. Oxenford, Esq., Davis Wright Tremaine LLP, 1500 K Street, N.W., Suite 450, Washington, DC 20005-1272, Harry C. Martin, Esq., Fletcher, Heald & Hildreth, P.L.C., 1300 North 17th Street, 11th Floor, Arlington, VA 22209-3801, and Dawn M. Sciarrino, Esq., Sciarrino & Associates, PLLC, 5425 Tree Line Drive, Centreville, VA 20120.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁰ See *Promoting Efficient Use of Spectrum*, Memorandum Opinion and Order, 19 FCC Rcd 1542, 1544 (WTB 2004); *BOC Petition for Waiver to Allow DSMI to Account for Toll Free Database Services*, Order, 13 FCC Rcd 24125 (CCB 1998).