



Federal Communications Commission
Washington, D.C. 20554

March 9, 2006

DA 06-548
In Reply Refer to:
1800B3

White Park Broadcasting, Inc.
c/o Barry A. Friedman, Esquire
Thompson Hine LLP
1920 N Street, NW
Suite 800
Washington, D.C. 20036

Mr. Kenley D. Squire
Radio Vermont KDR, LLC
9 Stowe Street
Waterbury, Vermont 05676

In re: WVAA(AM), Burlington, Vermont
Facility I.D. No. 73613
BAL-20041029AHP
Application for Assignment of License

Dear Counsel and Mr. Squire:

We have before us the above-captioned application for approval of the proposed assignment of the license (the "Assignment Application") for station WVAA(AM), Burlington, Vermont, from Radio Vermont KDR, LLC ("Radio Vermont") to White Park Broadcasting, Inc. ("White Park"), a subsidiary of Northeast Broadcasting Company (collectively with White Park, "Northeast"). Initially, Northeast argued in the Assignment Application that its proposed transaction complies with the Commission's local radio ownership rule, Section 73.3555(a).¹ Northeast then amended the Assignment Application to request a waiver of Section 73.3555(a).² In its most recent amendment to the application, Northeast again asserts that the proposed transaction complies with the rule and that a waiver is not required.³ For the reasons set

¹ 47 C.F.R. § 73.3555(a). See Assignment Application, "Statement Concerning Compliance with Local Radio Multiple Ownership Rules" at 1-5; Assignment Application (as amended on Jan. 11, 2005), "Supplemental Statement" ("January Supplement") at 1.

² See Assignment Application (as amended on Feb. 2, 2005), "Request for Waiver of the Treatment of Certain Stations as Being 'Home' to the Burlington Metro" ("Waiver Request") at 1.

³ See Assignment Application (as amended on Feb. 18, 2005), "Supplemental Statement Concerning the Burlington Radio Market" ("February Supplement") at 1-2.

forth below, we conclude that the proposed assignment does not comply with the rule, but, for the reasons noted herein, we grant the Waiver Request and the Assignment Application.

BACKGROUND

When the Commission adopted its geography-based definition of radio markets based on Arbitron's Metro Survey Areas ("Metros"),⁴ it chose to rely on BIA, rather than Arbitron, data to determine which stations are "in" the relevant geographic market.⁵ The Commission "count[s] as being in an Arbitron Metro above-the-line radio stations (*i.e.*, stations that are listed as 'home' to that Metro), as determined by BIA."⁶ The Commission recognized that companies often successfully petition Arbitron to change Metro boundaries, create new Metros, and/or change a station's home designation (*i.e.*, companies may "opt in" or "opt out" of a Metro in certain circumstances). As "safeguards to deter parties from attempting to manipulate" the relevant data "for purposes of circumventing the local radio ownership rule," the Commission established a two-year waiting period for changes in Metro boundaries and home market designations.⁷ Based on the Commission's pronouncements, the revised radio application forms, including the FCC Form 314 at issue here, explain that applicants may not rely on changes in BIA's listing of home stations made after the effective date of the new rule -- September 3, 2004 -- unless the change has been in effect for at least two years.⁸

As of September 3, 2004, BIA reported 42 commercial and noncommercial educational ("NCE") radio stations above the line in the Burlington, VT – Plattsburgh, NY Metro (the "Burlington Metro"), including station WVAA(AM).⁹ Consequently, a party may have a cognizable interest in up to 7

⁴ 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, 13724-28 (2003) ("Ownership Order"), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2902, 2903, 2904 (2005). See also *Prometheus Radio Project, et al. v. F.C.C.*, No. 03-3388 (3d Cir. Sept. 3, 2003) (*per curiam*) (granting motion for stay of effective date of all the new ownership rules), *stay modified on reh'g*, No. 03-3388 (3d Cir. Sept. 3, 2004) (lifting the stay with respect to the new radio rule).

⁵ The Commission recognized that the BIA database does not always mirror Arbitron's, as BIA "builds upon Arbitron's data to provide greater detail about the competitive realities in Metro markets." *Ownership Order*, 18 FCC Rcd at 13727. "BIA may . . . determine on its own whether a particular station licensed to a community outside of a Metro should be listed as 'home' to that Metro." *Id.* n.587. See also *id.* at 13726, 13728 and n.593.

⁶ *Id.* at 13727. The Commission also counts as being in the market any station whose community of license is located within the Metro's geographic boundary regardless of the station's BIA listing. See, *e.g.*, *id.*

⁷ See 18 FCC Rcd at 13726.

⁸ See, *e.g.*, FCC Form 314 (September 2004), Worksheet No. 3 at 3 (stating, *inter alia*, that applicants "may not rely on the removal, after September 3, 2004, of their own stations from BIA's list of 'home' stations in a Metro" unless such exclusion has been in effect for at least two years . . .") (a second exception is not applicable here). Although July 2, 2003, was the Commission's original reference point for BIA station listings (see, *e.g.*, FCC Form 314 (July 2003), Worksheet No. 3 at 3), the Court's stay of the new rules meant that such BIA data were not being used generally to assess compliance with the numerical limits of Section 73.3555(a). Upon lifting of the stay, see *supra* note 4, September 3, 2004 became the new reference point for purposes of tracking changes.

⁹ Recent BIA data, made publicly available on January 3, 2006, show 38 stations above the line. The market tier is governed by 47 C.F.R. § 73.3555(a)(ii) using either set of data.

commercial stations, with not more than 4 in the same service (AM or FM), in this Metro.¹⁰ As Northeast acknowledges, the same BIA data show Northeast as having an attributable interest in the following nine commercial stations listed above the line in the Burlington Metro: WDOT(FM), Danville, VT; WRJT(FM), Royalton, VT; WNCS(FM), Montpelier, VT; WLKC(FM), Waterbury, VT;¹¹ WFAD(AM), Middlebury, VT; WLFE-FM, St. Albans, VT; WRSA(AM), St. Albans, VT; WTWK(AM), Plattsburgh, NY; and WXAL-FM, Addison, VT.¹² Northeast's nine-station cluster exceeds the limit for a local radio market of this size by two stations, but the existing combination is grandfathered.¹³ WVAA(AM), which Northeast proposes to acquire, is also listed as home to the Burlington Metro, according to both the September 3, 2004 and the current BIA data.¹⁴

However, as documented by two letters from Mr. Vin Ciavatta of Arbitron,¹⁵ Arbitron created two new Metros "as of August 2004 . . . effective with the Fall 2004 survey": (1) the Montpelier-Barre-Waterbury VT Metro (the "Montpelier Metro")¹⁶; and (2) the Lebanon-Rutland-White River Junction, NH-VT Metro (the "Lebanon Metro"). In the Assignment Application and its first two amendments, Northeast contends that Arbitron's creation of these new Metros resulted in removal of four Northeast stations – WDOT(FM), WJRT(FM), WLKC(FM), and WNCS(FM) (the "Four Stations") -- from the Burlington Metro, and, as a result, that Northeast controls only five (three AM and two FM) radio stations in the Burlington Metro.¹⁷ In its February Supplement, Northeast reports that Arbitron reports only three of the four stations as outside of the Burlington Metro: it continues to report WLKC(FM) as a station within that Metro. Northeast claims that, based upon this revised market data, because it holds interests in only six stations in the market, its proposed acquisition of WVAA(AM) complies with Section 73.3555(a). Reliance on the revised data reflecting the new Metros is appropriate, Northeast contends, because Arbitron made its changes prior to the September 3, 2004 effective date of the new ownership rules.

If, on the other hand, Northeast is deemed to control at least seven stations in the Metro, according to the September 3, 2004 BIA data, then its acquisition of WVAA(AM) would not comply with the rule. Northeast states that reliance on such data "is erroneous and that the Commission cannot

¹⁰ See 47 C.F.R. § 73.3555(a)(ii).

¹¹ The station has since changed its call sign to WWMP(FM), but herein we use the prior call sign of WLKC(FM).

¹² The station recently changed its call sign to WUSX(FM), but herein we use the prior call sign WXAL-FM.

¹³ See *Ownership Order*, 18 FCC Rcd at 13807-09.

¹⁴ Northeast has also been brokering time on WVAA(AM) pursuant to a Time Brokerage Agreement with Radio Vermont, an interest that will cease with the assignment of the station to it proposed in the Assignment Application.

¹⁵ See *Letter to Steven Silberberg* (Oct. 18, 2004), Assignment Application at Exh. C; *Letter to Steven Silberberg* (Oct. 18, 2004), Assignment Application at Exh. D.

¹⁶ Arbitron subsequently renamed this as the "Montpelier-Barre-St. Johnsbury, VT" Metro but did not change the Metro's boundary.

¹⁷ See, e.g., January Supplement at 1-5. In its most recent filing in this proceeding, the February Supplement, Northeast states that WLKC(FM) "continues to be described by Arbitron as being in the [Burlington Metro]" such that Northeast controls 6 stations in that Metro. See February Supplement at 1.

attribute the four stations that are now in different Metros as being part of the Burlington Metro”¹⁸ In its Waiver Request, Northeast presents ratings and technical coverage data for the Four Stations that, it maintains, establish that the facilities do not compete in the Burlington Metro. Thus, Northeast argues that a waiver of what it describes as “the Commission’s arbitrary application of BIA’s conclusions” will benefit the public interest because Northeast is a locally based owner that could acquire “a struggling AM radio station and, in turn, be able to compete effectively against major media groups already operating in the Burlington Metro”¹⁹

DISCUSSION

In accordance with the methodology established by the Commission in the *Ownership Order*, our analysis is based on BIA’s reports. As noted above, the September 3, 2004, BIA data reflects nine commercial radio stations controlled by Northeast in the Burlington Metro. In its application, as amended, Northeast erroneously relies on Arbitron’s reports, including audience ratings, as well as technical reports of station coverage, to establish compliance with the local radio ownership rule. However, in light of our determination that a waiver of the two-year waiting period required by section 73.3555 is warranted here, discussion of these arguments by Northeast is unnecessary.

An applicant for waiver faces a high hurdle and must demonstrate that deviation from the general rule is warranted by special circumstances and will serve the public interest.²⁰ As noted *supra*, in establishing the two-year waiting period before changes in market data may be relied upon, the Commission noted the potential for parties to manipulate Arbitron determinations for purposes of circumventing the local radio ownership rule. The Commission stated in the *Ownership Order* that reliance on such BIA home station designations in rated markets – a “more rational market definition” – is the mainstay of a rule that “in virtually all cases . . . will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest.”²¹ The Commission considered the potential problems noted by commenters in relying on such data and adopted the two-year “safeguard” to help ensure the new rule’s integrity.²²

In this case, BIA ultimately chose to remove all of the Four Stations from the Burlington Metro.²³ BIA’s ultimate action thus mirrors the removal of those stations from the Metro by Arbitron, which

¹⁸ January Supplement at 1.

¹⁹ Waiver Request at 2.

²⁰ 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”). 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).

²¹ *Ownership Order*, 18 FCC Rcd at 13813.

²² See *id.* at 13726, 13728 and n.593.

²³ We have not determined the precise date as of which the BIA data first show Northeast as controlling only 6 stations (3 FM and 3 AM) listed as home to the Burlington Metro; that date is not relevant to our decision in this proceeding. As late as January 2, 2005, however, BIA continued to list all but one of the Four Stations as home to

predated the effective date of the new rules. Because BIA's action confirms the reliability of that change, and we have previously concluded that reliance on BIA home station designations would protect against excessive concentration levels in virtually all cases, we conclude that imposition of the safeguard of requiring a two-year waiting period is not necessary in this case. Accordingly, we conclude that, in light of the unique facts here, waiver of the rule is consistent with the public interest.²⁴ Based upon the current BIA data, Northeast has attributable interests in only five stations in the Burlington Metro. Accordingly, its acquisition of station WVAA(AM) will comply with section 73.3555(a) of the rules.

Having found on the record before us that grant of a waiver of the two-year waiting period provision would serve the public interest, IT IS ORDERED, that the request for waiver filed by White Park Broadcasting, Inc. IS GRANTED. Accordingly, IT IS FURTHER ORDERED, that the application to assign the license for station WVAA(AM), Burlington, Vermont (File No. BAL-20041029AHP), IS HEREBY GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

the Burlington Metro (only WDOT(FM) is listed below the line), such that Northeast was shown as controlling 8 home stations in the Metro, rather than 9. BIA data available as of July 4, 2005 reflect the redesignation of WNCS(FM), reporting it and WDOT(FM) as home to the new Montpelier Metro and below the line in the Burlington Metro, and the redesignation of WRJT(FM), reporting it as home to the new Lebanon Metro and below the line in the Burlington Metro, reducing the number of in-Metro stations controlled by Northeast to 6 (3 FM and 3 AM). The July 4, 2005, BIA data still reported WLKC(FM) as home to the Burlington Metro. However, as of data available on August 30, 2005, BIA listed WLKC(FM) as a home station in the new Montpelier Metro, and below the line in the Burlington Metro.

²⁴ In so acting, we note that our grant of the waiver is based upon the unique facts presented by this case, which arise from the Commission's transition to the applicability of the new multiple ownership rules on September 3, 2004. We do not anticipate granting similar waivers of the two-year period in the future.