



**Federal Communications Commission
Washington, D.C. 20554**

February 27, 2007

DA 07- 50

In Reply Refer to: 1800B3-BSH

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In re: **WBKN(FM), Brookhaven, MS**
Facility ID No. 6318
File No. BALH-20060222AAT

WMJU(FM), Bude, MS
Facility ID No. 76262
File No. BALH-20060222AAU

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

Dear Counsel:

We have before us the above-captioned applications ("Assignment Application") proposing to assign the licenses of Stations WBKN(FM), Brookhaven, Mississippi, and WMJU(FM), Bude, Mississippi, from Ole Brook Broadcasting, Inc. to Brookhaven Broadcasting, Inc. ("BBI"). On April 3, 2006, Southwest Publishers, Inc. ("SPI"), the publisher of The Daily Leader, a local daily newspaper serving Brookhaven, filed a petition to deny the Assignment Application.¹ For the reasons stated below, we deny the petition to deny and grant the Assignment Application.

Background. SPI first argues that BBI failed to disclose all of its media interests in the Assignment Application. Specifically, SPI asserts that BBI omitted Station WTGG(FM), Amite, Louisiana, from its list of attributable media interests.² SPI also contends that BBI principal C. Wayne Dowdy ("Dowdy") failed to acknowledge having an attributable operating agreement with Station WMTI(FM) (formerly WKSJ(FM)), Picayune, Mississippi. Second, SPI states that grant of the Assignment Application would have an "overwhelmingly negative effect"³ on the marketplace, providing

¹ BBI filed an opposition on April 18, 2006, and SPI filed a Motion for Extension of Time and a reply on May 23, 2006.

² See Assignment Application, Exhibit 13.

³ Petition to Deny at 6.

Dowdy with an unfair advantage over his competitors. In this regard, SPI argues that the engineering analysis included in the Assignment Application, “while purporting compliance with the Commission’s rules, creates a legal fiction that includes two “markets” in an area that is ultimately one.”⁴

Discussion. In response, BBI acknowledges that it failed to include WTGG(FM) among its attributable media interests, but states that the exclusion was inadvertent error. Notwithstanding the omission, BBI states that the service provided by WTGG(FM) has no impact on the multiple ownership analysis included in the Assignment Application, because that station has no overlap with either Station WBKN(FM) or Station WMJU(FM). Moreover, BBI notes, it has listed WTGG(FM) in numerous other filings with the Commission, such as its most recent ownership report.⁵ While we find that BBI has demonstrated that its omission of WTGG(FM) was inadvertent, we remind BBI to use care to meet its obligation to report all attributable interests.

BBI states that SPI is mistaken in its claim that Dowdy has a current attributable interest in Station WMTI(FM). BBI explains that the station has been sold⁶ and that the operating agreement with the old licensee was cancelled by the new owner. Even assuming, *arguendo*, that Dowdy had retained an attributable interest based on this Station WMTI(FM) agreement, staff analysis demonstrates that Station WMTI(FM), like Station WTGG(FM), has no contour overlap with either Station WBKN(FM) or Station WMJU(FM). Accordingly, the exhibit demonstrating compliance with the Commission’s multiple ownership rule appropriately excluded Stations WMTI(FM) and WTGG(FM).

SPI also argues that grant of the Assignment Application would harm the public interest because it would diminish competition. We initially note that neither WBKN(FM) nor WMJU(FM) is located in a market that is rated by Arbitron. In its extensive review of the broadcast ownership rules⁷ the Commission determined that, where transactions involve non-Arbitron markets, it would continue to apply its contour-overlap methodology, with certain modifications, to determine compliance with the local radio ownership rule pending the outcome of an ongoing rulemaking proceeding, which seeks comment on methods to establish geographic boundaries for non-rated markets.⁸ While acknowledging that the methodology was problematic, the Commission concluded that “its temporary use during the pendency of the rulemaking proceeding cannot be avoided.”⁹ Alternatively, SPI recommends a case-by-case analysis to determine compliance with the multiple ownership rules. The Commission specifically

⁴ *Id.* at 5.

⁵ File No. BOA-20060201BHQ.

⁶ File No. BALH-20050512ACR, granted July 11, 2005.

⁷ 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, 18 FCC Rcd 13620 (2003) (“Ownership Report and 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, 2004) (lifting stay with respect to new local radio ownership rule).

⁸ See *Ownership Report and Order*, 18 FCC Rcd at 13729-30 and 13870-73.

⁹ *Id.* at 13729.

rejected such an approach, stating that “[c]onducting a case-by-case analysis would create significant regulatory uncertainty, and adopting an ill-considered ‘proxy’ geographic market could produce unforeseeable distortions.”¹⁰ Moreover, the Commission found that a case-by-case approach would “impose substantial burdens on small-market radio broadcasters.”¹¹

The Commission reasoned that the appropriate course is to develop market definitions for non-rated markets through the rulemaking process.¹² The rulemaking proceeding regarding non-rated markets is still ongoing. In light of the Commission’s concerns articulated in the *Ownership Report and Order* and discussed above, we determine compliance with Section 73.3555(a) in this case under the current rule, *i.e.*, by applying the interim contour-overlap methodology.

Staff review confirms that the proposed transaction forms two separate radio markets. In the first market, BBI would own three FM stations and one AM station in a 10-station market.¹³ In the second market, BBI would also own three FM stations and one AM station in a 10-station market.¹⁴ In a local radio market with 14 or fewer stations, a single owner may own up to five commercial stations, no more than three of which are in the same service. Moreover, no person or single entity (or entities under common control) may have a cognizable interest in more than 50 percent of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.¹⁵ Accordingly, the proposed transaction complies with the local radio ownership limits in both markets.

Conclusion/Actions. Based on the above, we find that the SPI has not raised a substantial and material question of fact warranting further inquiry. We further find that Brookhaven Broadcasting, Inc. is qualified as the assignee and that grant of the Assignment Application is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that the petition to deny filed by Southwest Publishers, Inc. IS DENIED, and that the application to assign the licenses of Stations WBKN(FM), Brookhaven, Mississippi (File No. BALH-20060222AAT) and WMJU(FM), Bude, Mississippi (File No. BALH-20060222AAU) from Ole Brook Broadcasting, Inc. to Brookhaven Broadcasting, Inc. IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Ole Brook Broadcasting, Inc.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ The stations that comprise that first market are WMJU(FM), WAZA(FM), WAKH(FM), and WAKK(AM).

¹⁴ The stations that comprise that second market are WBKN(FM), WMJU(FM), WAKH(FM), and WAKK(AM).

¹⁵ 47 C.F.R. § 73.3555(a)(1)(iv).