



Federal Communications Commission
Washington, D.C. 20554

March 31, 2008

DA 08-765

In Reply Refer to:

1800B3-MFW

Released: March 31, 2008

Capitol Broadcasting Corporation
Suite 411
70 Walnut Street
Wellesley, MA 02481

Concord Broadcasting, LLC
Suite 411
70 Walnut Street
Wellesley, MA 02481

Nassau Broadcasting I, LLC
619 Alexander Road, Third Floor
Princeton, NJ 08540

In re: WWHK(FM) (Formerly WOTX-FM),
Concord, NH
Facility ID No. 8683
Capitol Broadcasting Corporation, Inc.
File No. BTCH-20050105ACS

**Application for Consent to Transfer Control
Petition for Reconsideration**

Dear Licensee/Applicants:

This letter refers to Nassau Broadcasting I, LLC's ("Nassau") March 10, 2006 Petition for Reconsideration ("Petition") of the dismissal of the captioned application (the "Application") for approval to transfer control of Capitol Broadcasting Corporation, licensee of Station WWHK(FM), Concord, New Hampshire, from Concord Broadcasting, LLC ("Concord") to Nassau (Nassau and Concord collectively, the "Parties"). For the reasons set forth below, we deny the Petition.

BACKGROUND

When the Commission adopted its geography-based definition of radio markets derived from Arbitron's Metro Survey Areas ("Metros"),¹ it chose to rely on BIA, rather than Arbitron, data to

¹ 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 Further Notice of Proposed Rule Making, 18 FCC Rcd 13620, 13724-28 (2003) ("Ownership 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, 2903, 2904 (2005). See also *Prometheus Radio Project, et al. v. FCC*, 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).

determine which stations are “in” the relevant geographic market.² 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.”³ 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). In order “to deter parties from attempting to manipulate” the relevant data “for purposes of circumventing the local radio ownership rule,” the Commission stated: “[W]e will not allow a party to receive the benefit of a change in Arbitron Metro boundaries unless that change has been in place for at least two years.”⁴ Based on the Commission’s pronouncements, the revised radio application forms, including the FCC Form 315 transfer application 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.⁵

On January 5, 2005, Concord and Nassau filed the Application. It included an exhibit indicating that the station was located in the Manchester, New Hampshire Arbitron Metro (“Manchester Metro”), which is comprised of 18 stations.⁶ The exhibit observed that, under our ownership rules, in a market with between 15 and 29 stations, any one party may control up to six commercial stations in the market, including no more than four stations in the same service; thus, the Parties claimed, Nassau’s ownership of four stations in the Manchester Metro upon consummation of this transaction would comply with the revised ownership rules.⁷

The staff dismissed the Application on February 3, 2006, for failure to comply with the local radio ownership rules.⁸ In the staff’s analysis of the Application undertaken in March 2005, only one of the four indicated stations, WHOB(FM), was listed as being home to the Manchester Metro. The remaining three stations were listed as being home to and within the geographic boundaries of the newly created Concord, New Hampshire Metro (“Concord Metro”). BIA indicated that Nassau already owned

² 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.

³ *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. *Id.*

⁴ *See id.*, 18 FCC Rcd at 13726. The Commission imposed a similar safeguard with respect to any benefit from a change in the home market status of a party’s own station. *Id.* at n.583.

⁵ *See, e.g.*, FCC Form 315 (June 2005), 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 or the exclusion results from an FCC-approved change in the community of license of a station from within the Metro to outside the Metro).

⁶ Application, Exhibit 18.

⁷ *Id.* The parties submitted an Attachment containing a December 2, 2004, BIA study for the Manchester, New Hampshire Metro listing 18 stations, including WWKH(FM), in the “Home Market.” *Id.*, Attachment 18. Nassau would own Manchester Market Stations WJYY(FM), Concord, New Hampshire, WHOB(FM), Nashua, New Hampshire, and WNNH(GM), Henniker, New Hampshire, as well as WWKH(FM).

⁸ *See Broadcast Actions*, Public Notice, Report No. 46168 (Feb. 8, 2006) (“*Public Notice*”).

five stations in the 26-station Concord Metro. Thus, consummation of the proposed transaction would result in Nassau holding seven FM stations and one AM station, in violation of the six-station total market limit and four-station FM sub cap limit for the Concord Metro.⁹ The staff therefore dismissed the Application via the *Public Notice*.

DISCUSSION

In the Petition, Nassau argues that: (1) the staff's dismissal of the Application by the *Public Notice* does not provide an adequate discussion of the reasons for rejecting the application;¹⁰ and (2) the staff unreasonably applied the Commission's policy regarding Arbitron Metro changes. Specifically, Nassau argues that, as noted above, the Commission's Rules impose a two-year waiting period before applicants may take advantage of a change in an Arbitron Metro definition that would cure a multiple ownership problem. Nassau acknowledges that there is no corresponding waiting period for the imposition of an adverse Metro change, *i.e.*, where a change in an Arbitron Metro would otherwise bar a desired station acquisition in compliance with the local radio ownership rules. It is inequitable, contends Nassau, to subject pending applications to adverse Metro changes during this two-year period simply because a transaction has been "overtaken by events" and the Commission has not acted on an assignment or transfer application prior to the change in the Metro definition.

In September 2004, approximately four months prior to the Application's filing, Arbitron announced the creation of the Concord Metro.¹¹ Notwithstanding the creation of the Concord Metro, however, WWHK(FM) was listed as home to the Manchester Metro when the Application was filed. It was not until January 26, 2005 – before the staff had finished its evaluation of the transfer application and in fact before the statutory petition period for the application had run¹² – that BIA first reported WWHK(FM) as home to the Concord Metro.

It appears that the Parties anticipated this Metro change and attempted to secure Commission approval of Nassau's acquisition of WWHK(FM) prior to the implementation of the Concord Metro designation, which renders Nassau's current attributable interests in the market non-compliant with our rules¹³ and prevents Nassau from acquiring any additional attributable radio interest in that market. Although the Parties did file the Application prior to the listing of WWHK(FM) as home to the Concord Metro, we believe that Nassau's equity argument is meritless.

⁹ See 47 C.F.R. § 73.3555(a)(1)(iii).

¹⁰ Nassau argues that, because dismissal of the captioned application occurred by the *Public Notice*, it is unclear why the application does not comply with the multiple ownership rules. Petition at 7. Nassau's Petition, which addresses only the impact of the Arbitron market definition change, belies this claim. In any event, this letter decision moots Nassau's first objection.

¹¹ See *Arbitron Press Release*, "Arbitron Releases Fall 2004 Population Estimates Update; Six New Markets Added to Fall 2004 Survey Schedule; A Record 294 Markets to be Measured" (Sept. 22, 2004).

¹² The Application was accepted for filing on January 11, 2005. See *Broadcast Applications*, Report No. 25899 (Jan. 11, 2005) at 19. Petitions to deny the Application were due on February 10, 2005.

¹³ Those non-compliant holdings are grandfathered pursuant to the *Ownership Order*. See 18 FCC Rcd at 13808.

Generally, the Commission requires applicants to provide the most current relevant information available and relies on that information, so that our decisions are based on the most up-to-date data.¹⁴ The Commission created an exception to this policy in the *Ownership Order* in one specific circumstance: an applicant must wait two years before it can rely on Arbitron Metro changes to support its acquisition of additional stations. In order to ensure that the information that we consider is reliable, the Commission adopted this two-year rule as a safeguard to deter parties from attempting to manipulate Arbitron market definitions for purposes of circumventing the local radio ownership rule.¹⁵ However, the Commission did not impose such a waiting period, where, as here, changes in the Arbitron Metro work to the detriment of a licensee seeking to acquire additional radio stations. In such cases, the risk of our use of unreliable data is not present because an applicant will not manipulate the newly-changed Arbitron Metro definition in a manner that is adverse to its interests. In such circumstances, it is appropriate for the Commission to rely on the most current data, which, in this case, presumptively most accurately defines the radio market in the Concord area. We find no basis for relying on outdated, historic market data, as Nassau urges that we do here.

CONCLUSION

Accordingly, in light of the above discussion, the March 10, 2006, Petition for Reconsideration of Nassau Broadcasting I, LLC IS DENIED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: David G. O’Neil, Esq.
Stephen Diaz Gavin, Esq.

¹⁴ See, e.g., 47 C.F.R. § 1.65(a), requiring applicants to maintain the continuing accuracy and completeness of their applications and to report material changes “as promptly as possible and in any event within 30 days” See also *Henry Broadcasting Co.*, Memorandum Opinion and Order, 11 FCC Rcd 1175, 1178 (1995) (Commission relies upon “the most recent Arbitron survey available for that market”), and *WKML License Limited Partnership*, Letter, 20 FCC Rcd 10877, 10883 n. 11 (MB 2005) (because station “was not listed by BIA as being home to the Fayetteville [North Carolina] Metro as of September 3, 2004, and is not presently listed as home to any Metro,” proposal treated under the interim “contour overlap” methodology to determine compliance with the local radio ownership rules).

¹⁵ This safeguard includes market definition changes which either enlarge or split a Metro. *Ownership Order*, 18 FCC Rcd at 13726. Both the *Ownership Order* and the instructions to FCC Form 315 (see n.5 *supra*) specifically frame the two-year waiting period in terms of changes in market definitions that would allow the applicant to show *compliance* with the local radio ownership rule.