



Federal Communications Commission
Washington, D.C. 20554

October 24, 2012

DA 12-1713

In Reply Refer to:

1800B3-SS

Released: October 24, 2012

Christopher D. Imlay, Esq.
Booth, Freret, Imlay & Tepper, P.C.
14356 Cape May Road
Silver Spring, MD 20904-6011

William D. Silva, Esq.
Law Offices of William D. Silva
5335 Wisconsin Avenue, N.W., Suite 400
Washington, DC 20015-2003

Dan J. Alpert, Esq.
The Law Office of Dan J. Alpert
2120 N. 21st Road
Arlington, VA 22201

Re: KKON(AM), Kealahou, HI
Facility ID No. 70382
File No. BAL-20031002AAZ

KPVS(FM), Hilo, HI
Facility ID No. 51240
File No. BALH-20031002AAY

KLUA(FM), Kailua Kona, HI
Facility ID No. 60504
File No. BALH-20031002ABA

KAPA(FM), Hilo, HI
Facility ID No. 5254
File No. BALH-20031002ABB

KAGB(FM), Waimea, HI
Facility ID No. 35507
File No. BALH-20031002ABC

Applications for Assignment of License

Petition for Reconsideration

Dear Counsel:

This letter refers to the referenced applications (the “Applications”) to assign the licenses of stations KKON(AM), Kealahou, KPVS(FM), Hilo, KLUA(FM), Kailua Kona, KAPA(FM), Hilo, and KAGB(FM), Waimea, all in Hawaii (the “Big Island Stations”) from Big Island Radio (“BIR”) to Pacific Radio Group, Inc. (“PRG”). The staff granted the Applications on August 11, 2005.¹ On September 12, 2005, Hilo Broadcasting, LLC (“HBC”), licensee of station KHBC(AM), Hilo, Hawaii, filed a Petition for Reconsideration (the “Petition”).² For the reasons set forth below, we deny the Petition.

Background. The Big Island Stations are all licensed to communities on the island of Hawaii (the “Big Island”). PRG is the licensee of two FM and one AM Big Island stations,³ and four FM and two AM stations licensed to communities on the island of Maui.⁴ Neither the Big Island Stations nor any of the stations currently licensed to PRG is in an Arbitron-rated radio market.

BIR and PRG filed the Applications on October 2, 2003.⁵ On November 6, 2003, HBC filed a Petition to Deny. On November 4, 2004, in response to a staff inquiry letter,⁶ PRG submit an amended multiple ownership exhibit to reflect all of the markets created by the overlapping contours of certain of the Big Island stations and stations commonly owned by PRG; it included with that material a request for waiver (the “Waiver Request”) of Section 73.3555(a) of the Commission’s Rules (the “Rules”)⁷ and disclosed that it had been operating the Big Island Stations pursuant to a Time Brokerage Agreement (“TBA”) with BIR since September of 2003. PRG subsequently supplemented its response with a technical statement filed on January 11, 2005, indicating that the city-grade contours of PRG’s Maui stations and the city-grade contours of the Big Island Stations overlap only over the Pacific Ocean (“Over-water Markets”).⁸

Because none of the involved stations was in an Arbitron-rated market, the staff applied the interim contour-overlap methodology to assess compliance with local ownership limits.⁹ In reviewing

¹ See *Hilo Broadcasting, LLC, c/o Christopher D. Imlay, Esq., Big Island Radio, c/o William D. Silva, Esq., and Pacific Radio Group, Inc., c/o Dan J. Alpert, Esq.*, Letter, 20 FCC Rcd 13582 (MB 2005) (“*Staff Decision*”).

² PRG filed an Opposition to Petition for Reconsideration (the “Opposition”) on October 11, 2005. According to our records, BIR has not filed a Reply.

³ KLEO(FM), Kahaluu, as well as KKBG(FM) and KHLO(AM), both licensed to Hilo.

⁴ KLHI-FM, Kahului, KJMD(FM), Pukalani, KPOA(FM), Lahaina, KJKS(FM) (Formerly KNUI-FM), Kahului, KNUI(AM), Kahului, and KMVI(AM), Wailuku.

⁵ We note that BIR initially proposed to assign a sixth station, KIPA(AM), Naalehu, Hawaii, to PRG (File No. BAL-20031002AAX). This sixth application was dismissed at the applicants’ request on November 6, 2003. BIR subsequently filed an application to assign KIPA(AM) to Skynet Hawaii, LLC (“Skynet”) (File No. BAL-20031106AMG). This application was granted on March 11, 2004, and the transaction was consummated on May 3, 2004.

⁶ See *Hilo Broadcasting, LLC, c/o Christopher D. Imlay, Esq., Big Island Radio, c/o William D. Silva, Esq., and Pacific Radio Group, Inc., c/o Dan J. Alpert, Esq.*, Letter, Ref. 1800B3 (MB rel. Oct. 21, 2004).

⁷ 47 C.F.R. § 73.3555(a).

⁸ See January 11, 2005, Technical Statement at 4.

⁹ See 47 C.F.R. § 73.3555(a)(3) (2002), as modified by 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the (continued . . .)

PRG's amended ownership exhibits, the staff found that : (1) the proposed transactions formed two separate radio markets where the contour overlap was over the Big Island and that PRG's proposal complied with the local radio ownership rule in both markets;¹⁰ (2) the Applications were grantable only if a waiver of Section 73.3555(a) was granted with respect to seven Over-water Markets created by the proposed transaction;¹¹ and (3) the Over-water Markets had a complete absence of daily listeners. The staff therefore denied HBC's Petition to Deny; admonished PRG for its failure to timely obtain a waiver of Section 73.3555(a) of the Rules with regard to the operations of the Big Island Stations pursuant to the TBA; granted the Waiver Request; and granted the Applications. PRG consummated its acquisition of the Big Island Stations on September 15, 2005.

In its Petition, HBC argues that: (1) grant of the Applications has resulted in PRG having anticompetitive advantage and an undue concentration of control because PRG now garners nearly \$3 million of the Big Island's \$4 million total annual advertising market¹² and over \$3 million of the \$5 million spent on radio advertising in the Maui market as rated by the Eastlan Research market rating service ("Eastlan");¹³ (2) grant of the waiver request violates the revised, market-based local radio ownership rules; (3) the staff's grant of the Waiver Request ignores the fact that PRG has been violating the duopoly rules since September 2003 by exercising "control" over all of the BIR stations under local marketing agreements;¹⁴ (4) the staff failed to consider HBC's unauthorized transfer of control argument; and (5) the staff failed to address HBC's misrepresentation and lack of candor claims regarding the issues of divestiture and control.¹⁵ In its Opposition, PRG argues that HBC is attempting to re-litigate matters that were fully examined in the *Staff Decision*. PRG also argues that the staff correctly determined that there was no unauthorized transfer of control, that the grant of the Applications was not inconsistent with the Commission's multiple ownership rules and that PRG had not gained excessive market dominance from its acquisition of the Big Island Stations.¹⁶

(Continued from previous page)

Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13870-73 (2003) ("*Ownership Report and Order*") (subsequent history omitted).

¹⁰ Specifically, in the first of these markets (on the East side of the Big Island), PRG would own three FM stations -- KKBG(FM), KAPA(FM), and KPVS(FM) -- and one AM station -- KHLO(AM). Staff analysis established that there were at least 13 stations in this market. In the second market (on the West side of the Big Island), PRG would own three FM stations -- KLEO(FM), KAGB(FM), and KLUA(FM) -- and one AM station -- KKON(AM). Staff review of PRG's multiple ownership exhibit established that there were at least eight radio stations in this market. *Staff Decision*, 20 FCC Rcd at 13857. 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, except that a party may not own more than 50 percent of the stations in such market. See 47 C.F.R. § 73.3555(a)(1)(iv).

¹¹ There are 15 stations in each of the seven Over-water Markets; PRG acknowledged, and the staff confirmed that PRG would own more than the allowable six commercial stations, or more than four in the same service, in each of those markets. See *Staff Decision*, 20 FCC Rcd at 13855.

¹² Petition at 2, 10, 11.

¹³ *Id.* at 4.

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 8-10.

¹⁶ Opposition at 2, 4, 10, 16, 18.

Discussion. The Commission will grant reconsideration only when the petitioner shows either a material error in the original order or raises changed circumstances or unknown additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.¹⁷ A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied.¹⁸

Undue Concentration. HBC first reiterates the argument that grant of the Applications has resulted in PRG having an undue market dominance. The staff found in the *Staff Decision* that the transaction complied with the Commission's local radio ownership rules utilizing the contour-overlap methodology. Advertising revenue figures, such as those provided by HBC, are no longer part of the Commission's market competition analysis.¹⁹ The Commission has held that, because it established a rational system for defining radio markets and counting market participants, "numerical limits will be better able to protect against harmful concentration levels in local radio markets that might otherwise threaten the public interest . . . in our judgment, establishing a inflexible market share limit in our bright-line rule would add little, if any, benefit."²⁰ HBC has not shown that the staff erred in its analysis.

Local Radio Ownership Rules. Next, HBC argues that grant of the Waiver Request is inconsistent with the "new" multiple ownership rules. HBC acknowledges that Maui, Hilo, and Kona, Hawaii, are not in Arbitron-rated markets, and therefore, that compliance with local ownership limits generally would not be based on the geographic market definitions that apply in the 287 Arbitron Metro markets. However, it argues that the staff should have relied on the geographic market definitions used by Eastlan, an alternate market rating service to which a number of Hawaiian broadcasters subscribe.²¹ HBC argues that the overlapping signal contours of PRG stations actually occur in the Maui and Kona markets as rated by Eastlan, and that there is "substantial service provided to large portions of the Big Island" from PRG's Maui FM stations. Therefore, it argues, the Commission's use of a contour-overlap methodology in these circumstances is inappropriate and undermines the market definition-based ownership rules affirmed by the court in *Prometheus*.²² We disagree. The Commission has clearly explained that, where transactions involve non-Arbitron markets, it will continue to apply its contour-overlap methodology. The Rules currently do not specify using other rating services in lieu of Arbitron,²³ and HBC has not provided a persuasive justification for doing so in this case.

¹⁷ See 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964) ("WWIZ"), *aff'd sum nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); see also *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

¹⁸ *WWIZ*, 37 FCC at 686; see also *Alan Bishop and Saga Communications of New England*, Letter, 25 FCC Rcd 4691 (MB 2010) (denying a petition for reconsideration when the petitioner did not demonstrate a material error or omission in the staff's underlying decision).

¹⁹ See *Ownership Report and Order*, 18 FCC Rcd at 13620 ¶ 300 ("[w]e also reject arguments that we incorporate a market share analysis into the local radio ownership rule . . .").

²⁰ *Id.*

²¹ Petition at 4 and 19.

²² *Prometheus Radio Group v. FCC*, 373 F.3d 372, 424 (3d Cir. 2004) ("*Prometheus*").

²³ See *Ownership Report and Order*, 18 FCC Rcd at 13870-73.

We also affirm the findings in the *Staff Decision* that the local radio ownership rules do, in fact, apply to the Over-water Markets and that waiver of the Rules was warranted on the facts presented.²⁴ There is a complete absence of daily listeners in or near the Over-water Markets. Thus, special circumstances exist warranting departure from the rule's application.²⁵ As noted by the staff, in adopting the *Ownership Report and Order*, the Commission stated that the primary public interest rationale for the local radio ownership rule is preserving competition in local radio markets.²⁶ Deviation from the rule in this situation does not raise competitive concerns, as "radio stations serve people, not land."²⁷ We therefore affirm the decision below to waive the local radio ownership rule.

We also disagree with HBC's claim that the *Staff Decision* ignored the fact that PRG has been violating the duopoly rules since September 2003 by exercising "control" over the BIR stations under local marketing agreements. The staff admonished PRG for its failure to obtain a waiver of Section 73.3555(a) for these markets as of October 1, 2003, the date on which it acquired attributable interests in the Big Island Stations through the commencement of its TBA with BIR.²⁸ These attributable interests caused PRG to exceed the numerical ownership limits. We affirm the staff's finding that an admonishment, rather than a forfeiture, was appropriate in this case because although there was a violation of Section 73.3555, the signals of the commonly owned stations overlap occurred entirely over water and affected no populated areas.²⁹

Unauthorized Transfer of Control. HBC continues to allege, based on affidavits from station employees, that the manner in which BIR and PRG implemented their September 29, 2003, TBA resulted in a premature assumption of control of the stations by PRG.³⁰ Under the terms of the TBA, Section 8 provides that "Licensee [BIR] shall have ultimate authority and power over the [Big Island] Stations during the period of this Agreement." Additionally, Section 11B states that BIR will continue to maintain control over the Big Island Stations' finances, personnel and programming. Section 6 provides that "General Managers and other employees . . . shall . . . be accountable solely to Licensee . . . , [and] Programmer's personnel . . . shall be subject to the ultimate supervision and direction of Licensee's General Manager or other personnel"; Attachment A provides for direct licensee payment of the Big

²⁴ See, e.g., *Jerrold Miller, Esq., Miller and Nelly, P.C., Richard F. Swift, Esq., Irwin, Campbell and Tannenwald, P.C.*, Letter, 21 FCC Rcd 2200, 2203 n.17 (MB 2006) (applying and waiving local ownership rule where ownership limits were exceeded solely over water).

²⁵ See *Staff Decision*, 20 FCC Rcd at 13586. See also *See Network IP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir 2008) (waiver appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest).

²⁶ *Staff Decision*, 20 FCC Rcd at 13586, citing *Ownership Report and Order*, 18 FCC Rcd at 13716.

²⁷ *Staff Decision*, 20 FCC Rcd at 13586, citing *Ownership Report and Order*, 18 FCC Rcd at 13724

²⁸ See *Staff Decision*, 20 FCC Rcd at 13596-87, citing 47 C.F.R. § 73.3555, Note 2(j)(1) (defining such brokered stations as attributable) and 2(j)(3) (requiring certification within the TBA by the brokering station that the agreement complies with the local ownership numerical limits).

²⁹ See 47 C.F.R. § 1.80 note to paragraph (b)(5) (Commission may adjust forfeiture amount or choose to issue no forfeiture at all, based on the facts of each case).

³⁰ Petition at 6-7; see also "Statements Under Penalty of Perjury of Rachele Hennings and Andrea Hennings."

Island Stations' expenses.³¹ The terms of the TBA comport with Commission policy regarding licensee retention of control.³²

Nevertheless, HBC claims that BIR failed to maintain control at the stations following the implementation of the TBA because, following the signing of the TBA agreements in September 2003, PRG took control of the stations and fired all BIR employees.³³ Conversely, PRG argues that there was no unauthorized transfer of control and that BIR terminated its own employees.³⁴ PRG contends that its principals met with former BIR employees; interviewed them; and offered some of them new positions after "PRG made known that it would begin presenting programming and advertising on the stations beginning September 29, 2003."³⁵ PRG submits the statement made under penalty of perjury by BIR principal Glenn Yee who states that he "exercis[e] ultimate control over station operations and . . . [oversaw] all BIR employees . . ."³⁶ In fact, PRG claims that HBC's own declarants acknowledge that "Glenn Yee of BIR fired or released most of the BIR employees."³⁷

We agree with the *Staff Decision*'s finding that the employee statements provided by HBC stating that BIR had not been involved in station management for a "long time" and that PRG "t[ook] over" the BIR stations on September 28, 2003,³⁸ are conclusory and unsupported. PRG, on the other hand, provides the sworn declaration of Richard Charles Bergson, its President, stating that PRG acts subject to the limitations in the TBA, with BIR retaining ultimate control over programming, finances and personnel.³⁹ We find that the record provides no evidence that PRG's conduct under the TBA constitutes anything other than appropriate broker involvement with the Big Island Stations. Accordingly, the staff did not err in concluding that these statements do not raise a substantial and material question of fact as to whether PRG and BIR engaged in an unauthorized transfer of control.

Fraud allegation. Finally, HBC reiterates its allegations of fraud, lack of candor and misrepresentation regarding a 2003 application to assign the license of station KKOA(FM), Volcano, Hawaii, from PRG to PRG's counsel. HBC claims that PRG attempted to assign KKOA(FM) to its counsel in an attempt "to subvert the Commission's multiple ownership rules and did not represent an arm's length transaction."⁴⁰ Contrary to HBC's argument, the staff did not fail to address this allegation in the *Staff Decision*. Rather, it concluded that no further inquiry was warranted because this application

³¹ See Assignment Applications at Exhibit 15.

³² See, e.g., *Choctaw Broadcasting Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 8534 (1997).

³³ Petition at 5-6

³⁴ Opposition at 6 n.7.

³⁵ Opposition at 6.

³⁶ *Id.* at 5

³⁷ *Id.* at 6.

³⁸ See Petition at 5-6.

³⁹ Opposition at 5

⁴⁰ Petition at 9.

was voluntarily dismissed.⁴¹ The Commission historically has held that we need not consider allegations directed at an application that is not before us.⁴² We affirm the *Staff Decision*'s conclusion.

Conclusion/Actions. We find that HBC has failed to demonstrate a material error or omission in the *Staff Decision*, and thus, reconsideration is not warranted. Accordingly, IT IS ORDERED, that the September 12, 2005, Petition for Reconsideration filed by Hilo Broadcasting, LLC, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Hilo Broadcasting, LLC
Big Island Radio
Pacific Radio Group, Inc.

⁴¹ See *Staff Decision* at 2, n.4.

⁴² See *KAKE-TV & Radio, Inc.*, Memorandum Opinion and Order, 12 FCC 2d 227, 229 n.4 (1968) (“We do not here consider those allegations which are directed to KAKE-TV's Salina application . . . since that application is not before us in this proceeding, but the allegations will be considered in the context of the overall situation when that matter is before us.”).