



Federal Communications Commission
Washington, D.C. 20554

December 6, 2013

DA 13-2341

In Reply Refer To:

1800B3-CEG

Released: December 6, 2013

Allan G. Moskowitz, Esq.
10845 Tuckahoe Way
North Potomac MD 20878

In re: WFGE(FM), Tyrone, PA
Facility ID No. 1057
File No. BPH-20130325AJI

Dear Counsel:

We have before us the above-referenced application of Forever Broadcasting, LLC (“Forever”) for minor modification of the license of Station WFGE(FM), Tyrone, Pennsylvania (the “Station”), proposing to change the Station’s community of license from Tyrone to State College, Pennsylvania, without any change to its licensed facilities (the “Application”). In the Application, Forever seeks a waiver of Note 4 to Section 73.3555 of the Commission’s Rules (“Note 4”) to allow it to move the Station’s community of license without having to come into compliance with the Commission’s multiple ownership rules.¹ With the condition set forth below, we temporarily waive Note 4 and grant the Application.

Background. In 2006, Arbitron changed Station WFGE(FM)’s “home” designation from the Altoona Arbitron Metro (“Altoona Metro”) to the neighboring State College Arbitron Metro (“State College Metro”). In 2010, Arbitron eliminated the State College Metro and re-designated the Station as “home” to the Altoona Metro.² Throughout these changes, Station WFGE(FM)’s community of license was (and is) Tyrone, Pennsylvania, which is located within the boundaries of the Altoona Metro.³ BIA reports the Altoona Metro as having 16 stations; accordingly, under our local radio ownership rule, a licensee in the Altoona Metro may have an attributable interest in up to six commercial radio stations, with not more than four being in the same service (AM or FM).⁴ Forever currently has an attributable interest in seven broadcast stations in the Altoona Metro, two in the AM service and five in the FM

¹ 47 C.F.R. § 73.3555, Note 4.

² Forever’s proposed new community of license, State College, is not within the boundaries of any Arbitron Metro, therefore its compliance with the ownership limits with respect to State College is determined using a contour-defined radio market. *See* Application, Exhibit 5, “Amended WFGE Multiple Ownership Study.”

³ Forever mistakenly states that it never held a grandfathered combination in the Altoona market until Arbitron re-designated Station WFGE(FM) as “home” to the Altoona Metro in 2010. We have repeatedly held that any station whose community of license is located within an Arbitron Metro’s geographic boundary counts as being in that market, regardless of the station’s BIA listing. *See, e.g. Capitol Broadcasting Corporation*, Letter, 23 FCC Rcd 5478, 5479 n.3 (MB 2008); *White Park Broadcasting, Inc.*, Letter, 21 FCC Rcd 2317, 2318 n.6 (MB 2006) (citing *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, 13727 (2003) (subsequent history omitted)).

⁴ *See* 47 C.F.R. § 73.3555(a).

service. Thus, Forever currently holds one more FM station than is permitted under the rule. However, pursuant to Note 4, Forever is “grandfathered;” that is, it need not come into compliance with the rule unless and until one of certain specified events takes place, including—as in this case—a change in community of license.

As grounds for waiver, Forever argues that if and when its community of license is changed to State College, Station WFGE(FM) will no longer be reported by BIA as being “home” to the Altoona Metro. Thus, grant of the application would advance Note 4’s goal of “eliminat[ing] grandfathered combinations, and therefore, enhanc[ing] competition in the market.”⁵ With respect to competition, Forever claims that the Station “couldn’t possibly compete with other stations in the Altoona Metro because it only serves a small percentage of the Metro and doesn’t provide any 60 dB μ service to the city of Altoona itself.”⁶ Finally, Forever argues that the Station should not be licensed to Tyrone because it has never provided 70 dB μ coverage of the community and therefore is not truly “*allocated* to Tyrone in any way that would comply with the Commission’s rules or even the spirit of its rules . . .”⁷ Changing its community of license, Forever contends, also would bring Station WFGE(FM) into compliance with Section 73.315(a) of the Rules, which mandates that an FM station provide a 70 dB μ signal over its entire community of license.⁸

Discussion. The Commission's rules may be waived only for good cause shown.⁹ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”¹⁰ and must support its waiver request with a compelling showing.¹¹ Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.¹² In evaluating a request for waiver of the multiple ownership rules, the Commission weighs public interest concerns on a case-by-case basis to insure that the waiver does not unduly compromise the twin purposes of fostering diversity and economic competition that underlie the multiple ownership rules.¹³ In this case, special circumstances warrant a deviation from the rule that a licensee must demonstrate concurrent compliance with the multiple ownership rules when requesting a change in community of license.

Under Note 4, Forever’s requested change in community of license would eliminate Forever’s “grandfathered” status in the Altoona market, thus requiring prior or simultaneous compliance with the numerical ownership limits of Section 73.3555(a) of the Rules.¹⁴ In general, a licensee demonstrating

⁵ See Application, Exhibit 5, “Request for Waiver of Section 73.3555, Note 4” at 4 (emphasis removed).

⁶ *Id.* at 4.

⁷ *Id.* at 2.

⁸ 47 C.F.R. § 73.315(a).

⁹ 47 C.F.R. § 1.3.

¹⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted).

¹¹ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹² *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹³ See, e.g., *Multimedia, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 4883, 4884-4885 (1995).

¹⁴ 47 C.F.R. § 73.3555, Note 4; see also, e.g., *Stockholders of CBS Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 3733, 3755 (1995) (granting temporary waivers of the multiple ownership rules to facilitate a multi-station merger transaction).

such compliance may rely upon the removal of a station from BIA’s list of “home” stations in a Metro, without a two-year waiting period, when the exclusion results from an FCC-approved change in the community of license from within a Metro to outside the Metro.¹⁵ In this case, however, Forever is caught in a “catch 22”—it cannot change the Station’s community of license without triggering the need to come into immediate compliance with the ownership limits, and it cannot demonstrate compliance with the ownership limits until the community of license change is complete and the Station is no longer listed as “home” to the Altoona Metro. In light of the technical, administrative nature of this issue, we will temporarily waive the application of Note 4 to allow time for BIA to remove the Station from the Altoona Metro “home” station list. This waiver will not effect a material change in the competitive situation in the Altoona Metro, since the Station’s service coverage will remain the same. Moreover, once the Station is no longer designated as “home” to the Altoona Metro, Forever’s “grandfathered” station cluster will be eliminated. For these reasons, we find that waiver in these limited, special circumstances will not undermine the purpose of Note 4 or unduly compromise diversity and economic competition in the Altoona Metro.¹⁶

Grant of Forever’s waiver request is conditioned on the Station’s removal, within six months from the date of this letter, from BIA’s list of stations that are “home” to the Altoona Metro.¹⁷ In the event that the Station is still listed by BIA as “home” to the Altoona Metro at the end of this temporary waiver period, we will rescind grant of the Application and re-specify Tyrone as the Station’s community of license.¹⁸

Conclusion. With the condition stated above, IT IS ORDERED, That the application of Forever Broadcasting, LLC for minor modification of the license of Station WFGE(FM), Tyrone, PA, to change the Station’s community of license from Tyrone to State College, Pennsylvania, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁵ See FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, Instructions, Worksheet #3 at 3 (Oct. 2012).

¹⁶ Because we base our waiver solely on the administrative issue described above, we do not address Forever’s claim that the Station is not competitive in the Altoona Metro market or that waiver is justified by its historical failure to serve Tyrone.

¹⁷ This determination will be made using the BIA/Kelsey, MEDIA Access Pro Database.

¹⁸ See, e.g., *Enid Public Radio Association*, Letter, 28 FCC Rcd 2837 (MB 2013) (rescinding grant of a license renewal application due to licensee’s failure to comply with the terms of the renewal grant).