

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

In the Matter of)	
)	
CENTENNIAL LICENSING, LLC, Assignor)	File No. BALH-20130104ABX
)	Facility ID No. 22663
and)	
)	
MEL WHEELER, INC., Assignee)	
)	
Assignment of License)	
WLNI(FM), Lynchburg, Virginia)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2015

Released: September 17, 2015

By the Commission:

1. The Commission has before it an Application for Review (“AFR”) filed on December 18, 2013, by 3 Daughters Media, Inc. (“3 Daughters”). 3 Daughters challenges the Media Bureau’s (“Bureau”) grant of an application (“Application”) to assign the license of Station WLNI(FM), Lynchburg, Virginia (“Station”), from Centennial Licensing, LLC, to Mel Wheeler, Inc. (“MWI”) (collectively, “Applicants”).¹ 3 Daughters argues that the Bureau’s station count for the Roanoke-Lynchburg, Virginia Arbitron Metro (“Roanoke Metro”) erroneously included one station (WODI(AM), Lynchburg, Virginia) and excluded another (WVBB(FM), Elliston-Lafayette, Virginia). When WODI(AM) is excluded and WVBB(FM) is included, 3 Daughters asserts that the Commission’s local radio ownership rule bars the assignment of the Station’s license to MWI.²

2. 3 Daughters argues that the Bureau erred in including WODI(AM) in the station count for the Roanoke Metro because the station went silent on August 30, 2013, subsequent to the Bureau’s grant of the Application.³ 3 Daughters claims that, given WODI(AM)’s later silence, the Bureau should not have included it in the station count. We disagree. As the Bureau explained, it is a station’s operational status at the time the station count is performed – not at a later date – that is relevant.⁴ 3 Daughters does not dispute that WODI(AM) was operational at the time the Bureau performed its station count for the Roanoke Metro, as well as when it granted the Application.⁵

¹ 3 Daughters seeks review of a Bureau decision released on November 14, 2013. *WLNI(FM), Lynchburg, Virginia*, Letter, 28 FCC Rcd 15738 (MB 2013) (“*Letter Decision*”) (granting in part and denying in part 3 Daughters’ Petition for Reconsideration of a Bureau decision denying its Petition to Deny the Application and granting the Application). Applicants filed a Joint Opposition to Application for Review (“*Opposition*”) on December 23, 2013.

² To reach this conclusion, 3 Daughters also excludes from the station count another station, which the Bureau excluded from its count at 3 Daughters’ urging. *See WLNI(FM), Lynchburg, Virginia*, Letter, 28 FCC Rcd 12622 (MB rel. Aug. 22, 2013) (excluding WOWZ(AM) from station count).

³ AFR at 7-8.

⁴ *Letter Decision*, 28 FCC Rcd at 15739.

⁵ Indeed, 3 Daughters itself included WODI(AM) in a station count it submitted to the Commission in 2013. *See* File No. BALH-20130923AEV at Attach. 18. We reject 3 Daughters’ attempt to take one position in another proceeding before us, and then assume the contrary position here because to do so suits its interests.

3. 3 Daughters also argues that the Bureau erred in failing to consider an argument it made in support of including WVBB(FM) in the station count for the Roanoke Metro. 3 Daughters had argued that it is due to the Arbitron policy known as Total Line Reporting that BIA does not currently list WVBB(FM) as “home” to the market.⁶ Total Line Reporting is available where stations simulcast programming. If the owner(s) of such stations elect Total Line Reporting, the ratings for the stations are aggregated and reported as a total line. The total line rating is attributed to one station in the group that is designated in advance by the station owner(s). WVBB(FM) and two other MWI stations – WVBE-FM, Lynchburg, Virginia, and WVBE(AM), Roanoke, Virginia – simulcast programming. MWI has elected Total Line Reporting for these stations. As a result, any ratings attributable to WVBB(FM) (or WVBE(AM)) are credited to WVBE-FM. 3 Daughters maintains that, if WVBB(FM)’s ratings were credited to it instead of WVBE-FM, BIA would list WVBB(FM) as “home” to the Roanoke Metro.

4. As 3 Daughters acknowledges, WVBB(FM) is not listed by BIA as “home” to the Roanoke Metro, nor is it licensed to a community within the Roanoke Metro. Thus, pursuant to the counting methodology adopted by the Commission,⁷ the Bureau did not include WVBB(FM) in its station count when it evaluated whether assignment of the Station’s license to MWI would comply with the local radio ownership rule.⁸ The Bureau originally concluded that it “need not reach 3 Daughters’ argument for inclusion of WVBB(FM) in the count” but on reconsideration reversed itself.⁹ It then considered the argument but determined that it lacked merit. The Bureau noted that BIA does not list WVBB(FM) as “home” to the Roanoke Metro, nor do the contours of the Station and WVBB(FM) overlap.¹⁰ The Bureau dismissed 3 Daughters’ attempt to pick and choose which stations are included in a market for the purpose of analyzing different proposed station acquisitions and noted that the Commission had expressly rejected such an *ad hoc* approach.¹¹

5. After reviewing the record, we affirm the Bureau’s finding that 3 Daughters’ argument for inclusion of WVBB(FM) in the station count was meritless, but find that the Bureau erred in failing to address 3 Daughters’ Total Line Reporting argument. Accordingly, we grant the AFR in part and consider the argument herein.¹²

⁶ AFR at 5-6.

⁷ 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13727 ¶ 280 (2003) (“Ownership Order”) (including in a radio market stations that are listed by BIA as “home” to an Arbitron Metro or are licensed to a community of license located within the Metro’s geographic boundary).

⁸ Letter Decision, 28 FCC Rcd at 15740. BIA did list WVBB(FM) as “home” to the Roanoke Metro from January 6, 2009 until late 2011. The Commission has stated that “a party may not receive the benefit of changing the home status of its own station if such change occurred within the two years prior to the filing of an application.” Ownership Order, 18 FCC Rcd at 13726 ¶ 278. At the time that Applicants filed the Application, BIA had not excluded WVBB(FM) from its list of stations that are “home” to the Roanoke Metro for two years or more. Thus, it could be argued that the Bureau should not have allowed MWI to receive the benefit of the station’s changed “home” status. In fact, though, BIA has indicated that its listing of WVBB(FM) as “home” to the Roanoke Metro was an inadvertent error made while implementing the station’s change in community of license from Ronceverte, West Virginia, to Elliston-Lafayette, Virginia. BIA erroneously listed the station’s new community of license as located in a county within the geographic boundaries of the Roanoke Metro when the new community of license actually was – and is – located in a county outside the geographic boundaries of that Metro. BIA corrected this error in the fall of 2011. Given that BIA has indicated that WVBB(FM) never was “home” to the Roanoke Metro, we find irrelevant the fact that the Application was filed less than two years after BIA corrected its error.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Letter Decision, 28 FCC Rcd at 15740.

¹² We consider the evidence presented by 3 Daughters in its Petition to Deny in our analysis. We do not consider evidence presented by 3 Daughters for the first time in its Petition for Reconsideration. Therein, 3 Daughters

(continued....)

6. 3 Daughters asks us to override the Bureau's reliance on BIA's determination that WVBB(FM) is not "home" to the Roanoke Metro.¹³ We decline to do so. 3 Daughters' has not demonstrated that BIA varied from its own practices in excluding WVBB(FM) from the list of stations that are "home" to the Roanoke Metro. 3 Daughters itself states, BIA lists a station that is licensed to a community outside the geographic boundaries of a market as "home" to that market if the station receives meaningful ratings.¹⁴ According to 3 Daughters, a station has "meaningful ratings" if it is rated in the top half of the stations in the market.¹⁵ 3 Daughters seems to argue that WVBB(FM) has meaningful ratings in the Roanoke Metro, asserting that WVBB(FM) accounted for 22.9 percent of the diary entries attributed to WVBE-FM in the Fall 2012 ratings period¹⁶ and that WVBE-FM had a 7.7 share and a 9.3 share in the Fall 2012 and Fall 2013 ratings, respectively.¹⁷ 3 Daughters does not explain the connection between these two pieces of data, nor does it explain how it can conclude from this data that WVBB(FM) would be rated in the top half of the stations in the Roanoke Metro if rated separately from WVBE-FM. Further, it fails to substantiate its claim regarding the diary entries and WVBB(FM)'s Fall 2013 ratings.¹⁸

7. Even were we to credit 3 Daughters' claim, at most, it could be argued that 3 Daughters has demonstrated that simulcasting of the WVBE-FM signal on WVBB(FM) enhances the transmission facilities of WVBE-FM, and thus offers MWI a competitive advantage in the Roanoke Metro.¹⁹ That

(Continued from previous page)

alleged for the first time that WVBB(FM)'s antenna site is within the Roanoke Metro, WVBB(FM) puts a city grade signal over a large portion of the city of Roanoke, and WVBB(FM) is marketed to the Roanoke Metro. Petition for Reconsideration at 3-4. Under Section 1.106(c) of the Commission's rules, a petition for reconsideration that relies on new facts or arguments may be granted only if (1) the facts or arguments "relate to events that have occurred or circumstances that have changed since the last opportunity to present such matters," (2) "the petition relies on facts or arguments unknown to the petitioner until after its last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity," or (3) consideration of the new facts or arguments is in the public interest. 47 C.F.R. § 1.106(c). We find that none of those circumstances was present when 3 Daughters filed the Petition for Reconsideration or at any time thereafter. In any event, we note that consideration of this additional evidence would not have altered our decision herein. At most, it would support a finding that WVBB(FM) enhances the transmission facilities of WVBE-FM. For the sake of argument, we already assume this is the case. See, *infra*, para. 7.

¹³ In 2003, the Commission revised the manner in which it defines local radio markets, moving from a definition based on contour overlaps to one based on geographic areas. *Ownership Order*, 18 FCC Rcd at 13732 ¶ 291. Specifically, the Commission determined that it would define radio markets by reference to Arbitron Metro Survey Areas as reported by BIA. *Id.* at 13724- 28 ¶¶ 273-281. The Commission includes in its station count for a market stations that BIA lists as "home" to a market and any other licensed full power radio station whose community of license is located within the market's geographic boundary. As noted above, BIA has indicated that WVBB(FM) has never been "home" to the Roanoke Metro. See *supra* note 8. MWI's decision to elect Total Line Reporting for WVBB(FM) – which resulted in BIA reporting no ratings for WVBB(FM) and attributing that station's ratings to WVBE-FM – did not lead BIA to exclude it from the list of stations that are "home" to the Roanoke Metro.

¹⁴ AFR at 3.

¹⁵ *Id.*

¹⁶ Petition to Deny at 5; Reply to Opposition to Petition to Deny at 5.

¹⁷ Reply to Petition to Deny at 5; AFR at 5.

¹⁸ That claim is founded on information 3 Daughters' claims to have obtained from another station owner in the Roanoke market. Reply to Opposition to Petition to Deny at 5. According to 3 Daughters, an employee of that station owner "examined all Arbitron [diaries] for the Roanoke-Lynchburg Market." *Id.* While 3 Daughters did submit certain materials provided to it by this other station owner, 3 Daughters did not submit either copies of the diaries or a declaration from the employee of the other station owner regarding his review of the diaries.

¹⁹ This requires us to credit 3 Daughters' allegation that WVBB(FM) "accounted for 22.9% of all diary entries" for this group of MWI stations in the Fall 2012 rating period. As noted, though, this claim is not substantiated. See, *supra* note 18.

alone, though, would not justify our overriding BIA's determination that WVBB(FM) is not "home" to the Roanoke Metro. The Commission has specified that it will not distinguish between "technically weaker" and "technically stronger" stations in its station counts.²⁰ This is, in part, because "technically weaker stations may ... be strong competitors in their markets, depending on a variety of factors such as format choice, population coverage, and quality of programming."²¹ 3 Daughters has not persuaded us that we should deviate from the Commission policy of using BIA market data, especially here where our competitive concerns are lessened by WVBB(FM)'s simulcasting another station's signal and there is no evidence of abuse of Total Line Reporting.²²

8. Finally, we reject 3 Daughters' contention that, if WVBB(FM)'s ratings were attributed to it and not WVBE-FM, BIA would list WVBB(FM) as "home" to the Roanoke Metro and its related argument that the Commission's definition of radio markets and the stations considered "home" to those markets is "arbitrary and capricious."²³ In determining which stations to include in a market, the Commission does not look solely at a station's ratings. In fact, the Commission specifically rejected a proposal to count "below the line" stations – stations that historically have received a minimum listening share in a Metro – as part of a market for purposes of the local radio ownership rule.²⁴ Further, we note that BIA does not rely solely on ratings data in designating an out of market station "home" to a market.²⁵

9. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,²⁶ and Sections 1.115(c) and (g) of the Commission's Rules,²⁷ the Application for Review filed by 3 Daughters Media, Inc. on December 18, 2013, IS GRANTED IN PART, DISMISSED IN PART AND OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁰ *Ownership Order*, 18 FCC Rcd at 13732 n. 623 (explaining that "the local radio ownership rule takes into account differences in power and class of radio stations where appropriate").

²¹ *Id.* at 13732 ¶ 291.

²² The Commission has broad discretion to craft an appropriate remedy in a case where a party attempts to manipulate or misuse the Total Line Reporting process in a manner contrary to our rules. *See, e.g., Leflore Broadcasting Co. Inc. v. F.C.C.*, 636 F. 2d 454, 463 (D.C. Cir. 1980); *Lorain Journal Co. v. F.C.C.*, 351 F.2d 824, 831 (D.C. Cir. 1965). We do not find that the present case presents such a scenario and so we do not address such issues herein.

²³ AFR at 5-7.

²⁴ *Ownership Order*, 18 FCC Rcd at 13728 ¶ 281 (rejecting arguments that the Commission "should count below-the-line stations in determining the size of a Metro's radio market," noting that "[b]elow-the-line stations can be a considerable distance from the Metro, and in many cases serve different population centers, if not altogether different Metros, from radio stations located in the market," and stating that "counting every below-the-line radio station would produce a distorted picture of the station of competition in a particular Metro").

²⁵ *Id.* at 13728 n. 587.

²⁶ 47 U.S.C. § 155(c)(5).

²⁷ 47 C.F.R. §§ 1.115(c) & (g).