

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

In re Application of

EADS
BROADCASTING
CORPORATION
Assignor

File No. BAPH-921216GJ

and

C & C BROADCASTING, INC.
Assignee

For Assignment of License
of KGAL(FM)
Brownsville, Oregon

EADS
BROADCASTING
CORPORATION

File No. BPH-930222IG

For Modification of the
License and Construction
Permit of KGAL(FM)
Brownsville, Oregon

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1994;

Released: June 24, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned applications for consent to assign the license and construction permit of KGAL(FM), Brownsville, Oregon, from Eads Broadcasting Corporation ("Eads") to C & C Broadcasting, Inc. ("C & C") and to modify the facilities of KGAL(FM). Petitions to deny the assignment application were filed on January 26, 1993, by McCoy Broadcasting Company ("McCoy"), licensee of KPNW(AM)/KPNW-FM, Eugene, Oregon, and on January 28, 1993, by McKenzie River Broadcasting Company, Inc., licensee of KMGE(FM), KKKO(AM) and KEFD(AM), Eugene, Oregon ("McKenzie"). C & C filed a consolidated opposition to these petitions on February 12, 1993, to which McKenzie replied on February 25, 1993. The application to modify the station's facilities is unopposed.

2. C & C is presently the licensee of KUGN(AM)/KUGN-FM, an AM/FM combination in Eugene, Oregon. C & C proposes to acquire KGAL(FM), an authorized Class A FM station in Brownsville, Oregon. The principal community contours of KUGN(FM) and KGAL(FM) overlap; therefore, pursuant to 47 C.F.R. § 73.3555(a), C & C submitted an exhibit to demonstrate that its proposed co-ownership of the Eugene AM/FM combination and KGAL(FM) is permissible under the multiple ownership rules. Specifically, C & C submitted an exhibit

to demonstrate that the city-grade signals of 26 commercial radio stations overlap or intersect the area encompassed by the principal community contours of the mutually overlapping stations which C & C proposes to co-own. C & C also provided audience share data to demonstrate that its proposed acquisition of KGAL(FM) would not result in excessive concentration. In this regard, C & C asserted that the majority of the area of overlap between the stations in question is outside the Eugene Arbitron metro market, which includes only Lane County, Oregon. Accordingly, C & C submitted audience data derived from the 1992 Arbitron Radio County Coverage survey to demonstrate that the combined audience share for the proposed combination is 17.4 percent.

3. McKenzie, in its petition to deny, contends that the application cannot be granted without a hearing. Specifically, McKenzie points out that the proposed transaction is contingent on the grant of a pending application to upgrade KGAL(FM) to a Class C1 facility, to be co-located with KUGN(FM). Thus, McKenzie and McCoy both assert that the relevant market for purposes of the audience share analysis is the Eugene metro market, since the majority of the area of overlap between the stations in question will occur in the metro market when KGAL(FM)'s proposed Class C1 facilities are considered. In this regard, McKenzie and McCoy also argue that KUGN(AM)/KUGN-FM already dominate the Eugene metro market, based on a combined audience share of 25.8 percent in the Fall 1992 Arbitron survey. McCoy further asserts that KUGN(AM)/KUGN-FM already receive the largest share of the advertising revenue in the Eugene market. Moreover, McKenzie maintains that after KGAL(FM) receives a construction permit to upgrade its facilities, its zero share in the Eugene metro market will increase substantially, and thus the proposed combination will result in excessive concentration. McKenzie submits that these circumstances are sufficient to demonstrate that grant of the subject application is *prima facie* inconsistent with the public interest.

4. *Procedural Matters.* C & C asserts that McKenzie and McCoy lack standing to petition to deny this assignment because neither McKenzie nor McCoy has demonstrated its status as a party-in-interest and because neither petition is supported by the affidavit required by 47 U.S.C. § 309(d)(1). As discussed below, the Eugene market will be implicated in the multiple ownership analysis of the assignment at issue here, and thus McKenzie and McCoy as competitors of KUGN(AM)/KUGN-FM in Eugene are parties-in-interest pursuant to 47 U.S.C. § 309. *See FCC v. Sanders Brothers Radio Station*, 309 U.S. 257 (1940). However, we agree with C & C that McCoy's petition is not accompanied by an affidavit supporting the allegations made therein, as required by Section 309(d)(1). Therefore, McCoy's petition will be treated as an informal objection pursuant to 47 C.F.R. § 73.3587. McKenzie's petition includes the requisite affidavit; however C & C asserts that the affidavit was executed before the petition was signed, and therefore is ineffective support for the truth of the statements of fact contained in the petition. In its reply, McKenzie contends that although the affidavit was executed prior to the time that the petition was signed, the affiant had indeed read the petition in its final form before it was filed. Moreover, the reply contains a separate affidavit reaffirming the accuracy of the facts contained in the petition. Under these circumstances, we find that McKenzie's petition meets the procedural prerequisites of Section

309(d)(1). See *Finer Living, Inc.*, 5 FCC 2d 984, 987 (1966). See also *Malrite of New York, Inc.*, 71 FCC 2d 241, 243 (1979).¹

5. In MM Docket No. 91-140, the Commission relaxed the local radio ownership rules. See *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992) ("*Report and Order*"); *recon. granted in part, denied in part*, 7 FCC Rcd 6387 (1992) ("*Memorandum Opinion and Order*"). Like the prior rules, the revised rules apply only if there is overlap of commonly owned stations in the same service. In this case there is such overlap between stations KUGN(FM) and KGAL(FM). [This is true regardless of whether KGAL operates with its present facilities or with the upgraded facilities proposed in its pending modification application.] However, while the old rules flatly prohibited such overlap, the new rules allow ownership of stations with otherwise prohibited overlap if certain additional requirements are met. These requirements differ based on the number of stations in the market. In markets with 15 or more stations, common ownership of up to 2 AM and 2 FM stations is permissible, provided that the proposed combination will not result in excessive concentration, which is presumed when the combined audience share of the proposed co-owned stations exceeds 25 percent. See 47 C.F.R. § 73.3555(a)(1)(ii); *Memorandum Opinion and Order*, 7 FCC Rcd at 6393, 6396-6400. Audience share will be determined using the most recent published audience share survey data available at the time that the application is filed, and alternative data may be submitted to demonstrate that the transaction will not result in excessive concentration.² See *Franklin Communications Partners, L.P.*, 8 FCC Rcd 4909 (1993); *Report and Order*, 7 FCC Rcd at 2780; *Memorandum Opinion and Order*, 7 FCC Rcd at 6396-6400. For markets with fewer than 15 stations, the common ownership of up to three radio stations is permitted, provided that no more than two stations are in the same service and provided that the commonly owned stations represent less than 50 percent of the total number of stations in the market. See 47 C.F.R. § 73.3555(a)(1)(i).

6. The method of calculating both the number of stations in the market and the audience share relies on the principal community contours of the stations in question. However, the rules do not directly address how either a construction permit that has been granted or an authorized facility of a proposed co-owned station is affected by the rules when the principal community contour of the station will change as a result of the modification. Consequently, we will interpret our rules to require a two-step analysis. First, the number of stations in the market, and if applicable, the audience share limit, will be evaluated based on the facilities of the stations to be co-owned as they are presently licensed or authorized.

7. If the proposal set forth in the assignment or transfer application complies with the rules based on the presently authorized facilities of the proposed co-owned stations in step one, we will proceed to the second step of the analysis. The transaction will be evaluated again, substituting any relevant proposed or authorized modified facilities for the facilities which are presently licensed or authorized. In this regard, we note that it is Commission policy to grant construction permits only to qualified applicants who have a *bona fide* intention to construct the facilities they propose. See *Community Service Broadcasting, Inc.*, 7 FCC Rcd 5652, 5654 (1992). *recon. denied* 8 FCC Rcd 5044 (1993) *citing Calhoun County Broadcasting Co.*, 57 RR 2d 641, 646 (1985). We therefore believe that it is appropriate also to evaluate a proposal on the basis of any modifications to the facilities of the proposed co-owned stations, whether those modifications have been granted or are the subject of a pending application for a modification of the license or construction permit of the stations at issue.³ Consequently, before acting on an assignment or transfer application, we will need to evaluate any proposed or granted modification of the facilities of any station relevant to the transaction under the multiple ownership rules. In this regard, we will ask applicants for the following information if it is not in the application: two exhibits, to demonstrate that both the presently operating facilities, as well as the facilities with the proposed modifications, will comply with the local ownership rules. See 47 C.F.R. § 73.3555(a)(1); *Report and Order*, 7 FCC Rcd at 2779 n.102. Furthermore, applicants have the obligation, pursuant to 47 C.F.R. § 1.65, to update any pending application to report the filing of an application to modify the facilities of a proposed co-owned station and to provide any appropriate amendments to exhibits required under the multiple ownership rules or otherwise submitted prior to, or in response to, a staff request.

8. Thus, the second step will require a separate determination of the relevant market. The market will be defined by the area encompassed by the principal community contours of the stations to be co-owned, using the principal community contours associated with the modification of the facilities of any of the stations at issue. Further, if the relevant market has 15 or more stations, the geographic area to be used in the audience share analysis will be determined based on the modified facilities. If the majority of the area of overlap between the facilities at issue lies in a metro market, the relevant Arbitron data for that metro market will be considered. If the majority of this area of overlap is not within a metro market, audience share data for each county covered in whole or in part by the principal community contours of the stations at issue will be considered. See *Memorandum Opinion and Order*, 7 FCC Rcd at 6398-99, n.73. In order to be approved, the transaction must satisfy both parts of the two-step analysis. In this

¹ We conclude that C & C's cursory allegations concerning McKenzie's anti-competitive motive for challenging the subject assignment application fail to demonstrate that McKenzie's petition to deny is a strike pleading. See *Radio Carrollton*, 69 FCC 2d 1139, 1150-51 (1978), *clarified*, 69 FCC 2d 424 (1978), *recon. denied*, 72 FCC 2d 264 (1979), *aff'd sub nom Fau Inkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. Oct. 15, 1980), *cert. denied*, 450 U.S. 1041 (1981).

² The use of metro or county Arbitron data for calculating audience share in the first step of the analysis will continue to

be governed by whether a majority of the area of overlap of the principal community contours of the stations in question lies in the metro market. See 47 C.F.R. § 73.3555(a)(3)(ii).

³ C & C states that on the basis of a pre-filing submission which included disclosure of the required modification of KGAL(FM), the staff of the Mass Media Bureau advised C & C that the transaction would be evaluated based only on the existing facilities of the stations to be co-owned. However, an informal staff opinion is not binding on the Commission. See *Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991); *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990).

regard, we note that upon approval of the proposed transaction, the station subject to modification may continue to operate with its existing facilities while the modification of the facilities is completed. Moreover, for a variety of reasons, some proposed and approved modifications are never implemented. Consequently, it is appropriate that the transaction be reviewed for compliance with the rules considering both the existing facilities, as well as the modified facilities, of the proposed co-owned stations.

9. Applying the two-step analysis outlined above to the transaction proposed here, we find that grant of C & C's application is appropriate. KGAL(FM) is presently authorized as a Class A station. The area encompassed by the principal community contours of KUGN(AM)/KUGN-FM and KGAL(FM)'s Class A facilities, has more than 15 commercial radio stations. The area of overlap between the principal community contours of the present facilities of the stations at issue occurs only in Linn county, which is outside of the Eugene Arbitron metro market. The combined audience share of the stations to be co-owned in counties covered in whole or in part by the principal community contours of the stations at issue, weighted based upon the population of those counties, is 12.1 percent.⁴ The county data is derived from the Arbitron 1992 Edition Radio County Reports, the most recent published Arbitron data available at the time that the application was filed. The combined audience share of the present facilities proposed to be co-owned is not more than 25 percent. Thus, when those facilities are considered, the transaction will not raise a *prima facie* case of excessive concentration, and the transaction passes the first step of the analysis.

10. The second step of the analysis requires the evaluation of the proposed combination in light of the application for the modification of the facilities of KGAL(FM).⁵ There are more than 15 commercial stations in the area encompassed by the principal community contours of KUGN(AM)/KUGN-FM and the principal community contour for KGAL(FM)'s proposed Class C1 facilities. However, the majority of the area of overlap between the relevant principal community contours of the stations, including KGAL(FM), as modified, will occur in the Eugene

metro market.⁶ We reject McKenzie's argument that the Fall 1992 Arbitron ratings must be used to calculate the audience share for KUGN(AM)/KUGN-FM in the Eugene metro market. Audience share is calculated based on the most recent audience share data available at the time that the application is filed. See *Franklin Communications Partners, L.P.*, 8 FCC Rcd 4909 (1993). The Spring 1992 Arbitron ratings were the most recent audience share data available at the time that the application was filed since the Fall 1992 Arbitron survey was not then published. The combined audience share for KUGN(AM)/KUGN-FM and KGAL(FM) using the Spring 1992 data is 25 percent.⁷ Consistent with the approach set forth above, the audience share was calculated using record evidence of the Arbitron Spring 1992 ratings for KGAL(FM) in the Eugene metro market with its present Class A facilities.⁸ Thus, the second step of the two-step analysis also reveals that the transaction will not raise a *prima facie* case of excessive concentration. Because the transaction satisfies both parts of the two-step analysis, we need not consider the other evidence submitted by McKenzie and McCoy concerning concentration in the Eugene metro market. See *Memorandum Opinion and Order*, 7 FCC Rcd at 6397, 6399, n.77; *Patteson Brothers Inc.*, 8 FCC Rcd 7595, 7596 (1993) (consideration of alternative showings requires a demonstrated anomaly in the audience share data). The application to modify the facilities of KGAL(FM) otherwise complies with our rules. Because both the assignment application and the pending modification application are acceptable and the parties are otherwise qualified, we will grant both applications herein.

11. In view of the foregoing, IT IS ORDERED. That the application for consent to assign the license of KGAL(FM), Brownsville, Oregon, from Eads Broadcasting Corporation to C & C Broadcasting, Inc., File No. BAPH-921216GJ, IS HEREBY GRANTED. IT IS FURTHER ORDERED. That the petition to deny filed January 28, 1993 by McKenzie River Broadcasting Company, Inc. and the petition to deny filed January 26, 1993 by McCoy Broadcasting Company, when treated as an informal objection pursuant to 47 C.F.R. § 73.3587, ARE HEREBY DENIED. IT IS FURTHER ORDERED. That the application to modify the

⁴ The counties are Lane, Linn, Benton and Douglas. C & C obtained a 17.4 percent audience share because its calculation did not include data for Benton and Douglas counties.

⁵ We note that the contract supporting the subject assignment application is expressly contingent on the grant of a construction permit to modify KGAL(FM)'s presently authorized facilities by upgrading to a Class C1 and relocating the KGAL(FM) tower at the KUGN(FM) site. McKenzie asserts that the contingent nature of the sale transaction should have been disclosed when the application was filed because C & C and Eads had agreed to this contingency prior to filing. On January 12, 1993, after the decision granting the allotment for the upgrade of KGAL(FM)'s facilities became final, the parties amended the application to submit an executed agreement of sale supporting the transaction which states that the sale of KGAL(FM) is contingent upon grant of the application to modify the facilities of KGAL(FM), BPH-920222IG. Although McKenzie asserts that the contingency and the modification should have been disclosed when the assignment application was filed, under the circumstances presented here, McKenzie has not raised a substantial and material question of fact as to misrepresentation or lack of candor which would require further inquiry. See *Astroline Communications Company*, 857 F.2d 1556 (D.C. Cir. 1988); *Scout and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1099 (Rev. Bd. 1982).

⁶ In this regard, we note that a staff engineering study reveals that the relevant principal community contour for KGAL(FM)'s proposed Class C1 facilities is approximately the same as the principal community contour of KUGN-FM; therefore, we can ascertain that that there are more than 15 commercial stations in the relevant market and that the majority of the area of overlap is within the Eugene metro market from the exhibit provided by C & C.

The 25 percent audience share is calculated by adding the following shares for the individual stations: KUGN(AM) -- 7.8 percent, KUGN-FM -- 17.2 percent, KGAL-FM -- 0 percent.

⁸ Although McKenzie argues that it is unrealistic to evaluate audience share based on the rating received by KGAL(FM) as presently authorized in the Eugene metro market, we reject McKenzie's suggestion that KGAL(FM) should be assigned a rating comparable to the audience share of other Class C FM stations in the Eugene metro market which broadcast from locations near the proposed KGAL(FM) site, since to do so would require assumptions that are little more than pure speculation. This is particularly true given that it is audience share, not signal availability, that would be predicted by McKenzie's approach, and audience share is plainly sensitive to many factors beyond the physical facilities of the licensee.

facilities of KGAL(FM) to Class C1 and to relocate the transmitter for those facilities. File No. BPH-930222IG. IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary