
NOTICE

This document was converted from
WordPerfect to ASCII Text format.

Content from the original version of the document such as
headers, footers, footnotes, endnotes, graphics, and page numbers
will not show up in this text version.

All text attributes such as bold, italic, underlining, etc. from the
original document will not show up in this text version.

Features of the original document layout such as
columns, tables, line and letter spacing, pagination, and margins
will not be preserved in the text version.

If you need the complete document, download the
WordPerfect version or Adobe Acrobat version, if available.

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

In re Applications of)
)
HERITAGE MEDIA SERVICES, INC.)
(Transferor))
)
and) File No. BTCCT-970519ZF
)
WILLIAM G. EVANS, TRUSTEE)
(Transferee))
)
For Consent to the Transfer of Control of)
the License for Television Station)
WNNE-TV, Hartford, Vermont)
)
and)
)
WNNE-TV, INC.)
(Assignor))
)
and) File No. BALCT-970805KK
)
WNNE LICENSEE, INC.)
(Assignee))
)
For Consent to the Assignment of Television)
Station WNNE-TV, Hartford, Vermont)
)
and)
)
ROLLINS TELECASTING, INC.)
(Assignor))
)
and) File No. BALCT-970805KH
)
)
WPTZ LICENSEE, INC.)
(Assignee))
)
For Consent to the Assignment of Television)
Station WPTZ(TV), North Pole, New York)

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 1998
January 23, 1998

Released:

By the Commission:

1. The Commission has before it for consideration an application for review of the August 19, 1997 action by the Assistant Chief, Video Services Division, which denied, and

dismissed in part, the informal objection filed by Mt. Mansfield Television, Inc. (Mt. Mansfield) against the transfer of control of WNNE-TV, Hartford, Vermont (NBC, Channel 31) from Heritage Media Services, Inc. (Heritage Media), a wholly-owned subsidiary of Heritage Media Corporation (Heritage Corp.), to William G. Evans, Trustee (Trustee). See Letter to Heritage Media and Trustee from James J. Brown, Assistant Chief, Video Services Division (Aug. 19, 1997) (Division Letter). Pursuant to the transfer of control transactions, the Trustee controls WNNE-TV, Inc. and Rollins Telecasting, Inc. (Rollins Telecasting), the licensees of WNNE-TV and WPTZ(TV), North Pole, New York (NBC, Channel 5), respectively. An application to assign WNNE-TV to WNNE Licensee, Inc. has been filed, as has an application to assign WPTZ(TV) to WPTZ Licensee, Inc. Both of these assignees are indirect, wholly-owned subsidiaries of Sinclair Broadcast Group, Inc. (Sinclair). The WNNE-TV and WPTZ(TV) assignment applications, Mt. Mansfield's informal objection to the WNNE-TV assignment and the responsive pleadings filed with respect to the transfer of control and the assignment proceedings are also before the Commission. Because Mt. Mansfield presents virtually identical issues and arguments in each of its pleadings, we will consolidate the application for review and informal objection (collectively, the "Pleadings").

BACKGROUND

2. The predicted Grade B contour of WNNE-TV overlaps that of commonly-controlled WPTZ(TV) in contravention of the duopoly prohibition set forth in Section 73.3555 of the Commission's rules. 47 C.F.R. § 73.3555(b). Therefore, to effect the transfer to the Trustee, Heritage Media requested that WNNE-TV be allowed to continue to operate as a satellite of WPTZ(TV) in accordance with the satellite exception to the duopoly prohibition. Mt. Mansfield had opposed the request, arguing that: (1) the Trustee failed to meet its burden of satisfying the Commission's three-prong public-interest test for the presumption that a station may continue to operate as a satellite; (2) the Trustee should be required to demonstrate that, absent the basis for a presumption, compelling circumstances existed which warranted a waiver; and (3) any grant of a satellite waiver for WNNE-TV should be conditioned on the outcome of the Commission's review of its television broadcast ownership policies and regulations. In addition, Mt. Mansfield claimed that Heritage Media's time brokerage agreement with the

permittee of WFFF, Channel 44, Burlington, Vermont, would give it control of three out of the five commercial television stations in the "relatively small" Burlington, Vermont-Plattsburgh, New York market, and that Heritage Media should be required to demonstrate the extent to which the informational programming commitments made in its 1990 satellite request, "which formed a basis for the Commission's public interest finding, remain applicable today." Informal Objection (July 24, 1997) at 4.

3. In responding to Mt. Mansfield's informal objection to the transfer application, Heritage Media substituted for its satellite request a claim, inter alia, that the small degree of Grade B overlap between WNNE-TV and WPTZ(TV) qualified the stations for a de minimis waiver of the duopoly rule. According to Heritage Media, terrain features limit the Grade B contours of WNNE-TV and WPTZ(TV), and thus account for only a small overlap between the two stations. In support, Heritage Media submitted a Supplementary Engineering Statement containing population counts of the terrain-limited Grade B coverage of WNNE-TV and WPTZ(TV) as determined by using the Longley-Rice Irregular Terrain Model, Version 1.2.2 and 1990 U.S. Census data. Mt. Mansfield challenged Heritage Media's duopoly waiver request, contending that it failed because the Commission has neither found an overlap de minimis on the basis of population estimates alone, without considering the extent of the overlap area, nor relied on a terrain-limited analysis to conclude that an overlap is de minimis.

4. Upon review of the record and its own independent technical analysis, the staff confirmed Heritage Media's terrain-limited analysis that the overlap between WNNE-TV and WPTZ(TV) is de minimis. The staff granted a waiver of the duopoly rule on that basis, concluding that it would serve the public interest, convenience and necessity, and dismissed as moot Mt. Mansfield's informal objection as it related to the initial continued satellite request. In addition, the staff stated that Mt. Mansfield presented no evidence that the time brokerage agreement between WFFF's permittee and Heritage Media failed to comply with the Commission's rules and policies, or that WFFF's permittee had surrendered control of its station to Heritage Media. The staff further noted that time brokerage agreements are nonattributable interests for the purposes of the television multiple ownership rules. Lastly, after reciting the

improvements made to WNNE-TV's technical facilities and the overall increase in local news programming, the staff concluded that Heritage Media had made good faith efforts to carry out its earlier proposals regarding WNNE-TV's local news and public affairs programming.

5. In the Pleadings under consideration here, Mt. Mansfield reiterates the issues raised in the WNNE-TV transfer of control proceeding, see supra ¶¶2 and 3 and challenges the staff's grant of the de minimis duopoly waiver request as contrary to Commission precedent and policy. Specifically, Mt. Mansfield contends that in granting the original satellite waiver for WNNE-TV in 1990, the full Commission rejected Heritage Corp.'s terrain-based calculation showing de minimis overlap. Thus, Mt. Mansfield argues, the staff's decision "to bypass" the Commission's three-prong presumptive waiver test, and characterize the overlap between WNNE-TV and WPTZ(TV) as de minimis based on a terrain-limited analysis, is inconsistent with the 1990 ruling. Also inconsistent, Mt. Mansfield claims, are the results of Heritage Media's terrain limited analysis with those of the staff's analysis. Mt. Mansfield further criticizes the staff's decision as having been based entirely on the staff's own terrain analysis, and for failing to provide an explanation of the methods and data used in that terrain analysis. The staff's failure to give the parties an opportunity to review and comment on its analysis, Mt. Mansfield maintains, also raises due process concerns.

DISCUSSION

6. Having reviewed the staff's decision, we find that the staff thoroughly considered all relevant information and that its decision is adequately supported and consistent with Commission precedent and policy. As for the allegations relating to the programming commitments made by Heritage Media in 1990, and the potential of the Trustee or Sinclair to control or influence a third station in the market by means of a time brokerage agreement with WFFF, Mt. Mansfield has presented no new facts or arguments that would cause us to alter the staff's conclusions on these issues. We take this opportunity to emphasize that, contrary to Mt. Mansfield's assertion, our grant of the satellite request in 1990 was not based on the alleged programming commitments made by Heritage Media. Rather, we considered Heritage Media's programming proposals as factors reinforcing the appropriateness of that grant.

Taft, 5 FCC Rcd

at 6991. We believe, moreover, that Mt. Mansfield's concerns regarding the number of media interests held by a licensee in a smaller market are more appropriate for consideration in a rulemaking proceeding, such as those underway which deal with various relationships by broadcasters in the same market, including television time brokerage agreements. See Priscilla A. Schwier, et al., FCC 97-313 (released September 22, 1997); see also Further Notice of Proposed Rulemaking, MM Docket No. 94-150, et al., 11 FCC Rcd 19895 (1996); Second Further Notice of Proposed Rulemaking, MM Docket Nos. 91-222 and 87-7, FCC 96-438 (released November 7, 1996) (Television Ownership Second Further Notice). We note, here, our statement in the Television Ownership Second Further Notice, that we would "reserve the right . . . to invalidate an otherwise grandfathered LMA [local marketing agreement] in circumstances that raise particular competition and diversity concerns, such as those that might be presented in very small markets." Id. at 88.

7. In addition, we affirm the staff's decision granting a duopoly waiver based on a terrain-limited analysis which demonstrates that the overlap between WNNE-TV and WPTZ(TV) is de minimis, i.e., the overlap represents less than one percent of both the area and population of the Grade B contour of each station. See Hubbard Broadcasting, Inc., 2 FCC Rcd 7374 (1987). As a preliminary matter, we are not swayed by Mt. Mansfield's argument that the Division Letter is inconsistent with our 1990 decision granting the original satellite request for WNNE-TV. According to Mt. Mansfield, the inconsistency lies in the staff's reliance upon the terrain-limited analysis to grant the duopoly waiver request at issue here, when, in our 1990 decision, we "specifically rejected" such an analysis, and instead relied on the standard prediction method and "applied the full waiver analysis." We disagree. Mt. Mansfield's reliance upon language from our 1990 decision, which it characterizes as a specific rejection of the terrain-limited analysis, is misplaced. In that decision, we said:

While [sic] it appears that the terrain between WNNE(TV) and WPTZ(TV) is such that the actual overlap area may be less than that shown utilizing the standard prediction method of Section 73.684 of our Rules, we cannot state that the overlap area will be as small as that shown by the applicants' alternative method.

Taft Broadcasting, 5 FCC Rcd at 6992 n.9. This language merely expressed our deference to the standard prediction method in light of the particular terrain-limited analysis before us at that time. It had neither the intent, nor effect, of foreclosing our future consideration of alternative methodology, such as subsequent terrain-limited analyses, to evaluate the overlap area between WNNE-TV and WPTZ(TV), or any other two television stations. In this regard, the staff acted appropriately and in a manner consistent with our 1990 decision by reviewing a different terrain-limited analysis than the one which we considered in 1990. Here, Heritage Media presented the staff with a terrain-limited analysis which reflected updated population data, refinements in Longley-Rice terrain-sensitive methodology and improvements in computer technology, and, significantly, the Commission's own terrain-limited analysis confirmed the de minimis nature of the overlap area. For these reasons, we state now what we could not in 1990, that the overlap area between WNNE-TV and WPTZ(TV) is de minimis. Specifically, the WNNE-TV predicted Grade B contour encompasses an area of 26,280 square kilometers, and the WPTZ(TV) predicted Grade B contour encompasses an area of 43,180 square kilometers. The staff determined that the Grade B overlap between WNNE-TV and WPTZ(TV) comprises an area of 218 square kilometers, which is 0.83 percent of the area within the WNNE-TV predicted Grade B signal contour, and 0.50 percent of the area within the WPTZ(TV) predicted Grade B signal contour. In addition, based on 1990 U.S. Census data, the populations within the predicted Grade B contours of WNNE-TV and WPTZ(TV) are 639,921 and 568,402, respectively. The staff's analysis confirmed that the population in the overlap area is also de minimis, finding that the overlap area contains approximately 1,500 people which represents 0.23 percent of the population within WNNE-TV's predicted Grade B contour, and 0.26 percent of the population within WPTZ(TV)'s predicted Grade B contour.

8. We also find that, having confirmed the de minimis nature of the overlap area, the staff acted in accordance with Commission precedent and policy by granting a duopoly waiver on that basis. Section 73.684(f) of our rules permits the filing of terrain-limited analyses under certain circumstances, such as those presented in this case. In fact, "under Section 73.684(f), an applicant may make a supplemental terrain-limited contour showing to demonstrate that the

duopoly restriction of Section 73.3555 is inapplicable." Mad River Broadcasting Company, 4 FCC Rcd 6456, 6458 n.3 (1989); see also Kathleen Bailey d/b/a Capital Foothill Broadcasters, 4 FCC Rcd 1429, 1430 n.3 (1989). The Commission has previously used terrain-limited analyses to conclude that no actual overlap exists. See, e.g., John H. Phipps, Inc., 11 FCC Rcd 13053, 13054 n.1 (1996) (Commission's engineering analysis confirms that, due to intervening terrain, no actual overlap exists). We believe it would be counterintuitive to interpret Section 73.684(f) as permitting the submission of a terrain-limited analysis to show that the duopoly rule is inapplicable, i.e., that no actual overlap exists, but not to show that an overlap is de minimis.

9. Once a de minimis overlap has been demonstrated, a duopoly waiver may be granted on that ground. To this end, we see no reason to treat a de minimis duopoly waiver request based on a terrain-limited analysis differently from one based on the standard prediction method. Furthermore, Mt. Mansfield cites no evidence in support of its proposition that the Commission must conduct an additional public interest analysis in cases where a de minimis overlap has been demonstrated by means of a terrain-limited showing. We presume that, when the overlap area between two television stations is de minimis, the common ownership of the stations will not result in their serving common areas and populations to any significant degree and, therefore, that such common ownership will not undermine the concerns that form the basis of our duopoly policy. See, e.g., Hubbard Broadcasting, Inc., 2 FCC Rcd 7374. In addition, Mt. Mansfield fails to persuade us that previous cases in which a terrain-limited analysis showed a greater than de minimis overlap, and thus required additional analysis, control here, where a de minimis overlap has been demonstrated. See, e.g., Sunshine Television, Inc., 8 FCC Rcd 4428 (1993). Rather, those cases support the staff's position that the Commission has previously considered terrain-limited analyses to determine the overlap area in evaluating duopoly waiver requests. For these reasons, we conclude that the staff properly considered the terrain-limited analysis in granting the de minimis duopoly waiver request. Accordingly, the demonstration of a de minimis overlap between WNNE-TV and WPTZ(TV) mooted the applicants' initial continued satellite request for those stations. Likewise, it moots Sinclair's similar request, and, based upon

the the de minimis nature of the overlap area between the stations, we will grant a duopoly waiver to Sinclair.

10. With respect to the discrepancy between the numerical results of the staff's analysis and those reached in the analysis submitted by Heritage Media, we disagree with Mt. Mansfield's conclusion that this deems the analyses inconsistent. Both analyses yield a de minimis overlap, the preeminent consistency for our purposes in reviewing the staff's grant of a de minimis duopoly waiver. In addition, we are satisfied with the staff's judgment, as stated in the Division Letter, that Heritage Media provided sufficient engineering data for the Commission to conduct its own study of the overlap area. We therefore reject Mt. Mansfield's assertion that the staff gave no explanation of the data used in its analysis.

11. Mt. Mansfield likewise fails to persuade us that the Division Letter is flawed for not having explained the methods used in the staff's analysis when, as the expert agency in broadcast television regulation, the Commission employs sound engineering principles in conducting its analyses of all technical matters. As the staff correctly noted, moreover, the Commission has routinely conducted its own technical analyses, at times involving use of the Irregular Terrain Model (ITM), to evaluate de minimis duopoly waiver requests. Here, the staff's analysis confirmed the de minimis overlap. Mt. Mansfield's dissatisfaction with this result gives us neither pause nor reason to revise the staff's findings and reach a different conclusion. Furthermore, Mt. Mansfield's failure to submit its own technical analysis disputing the de minimis overlap strengthens our resolve on this matter.

12. Finally, our decision to affirm the Division Letter remains unchanged by Mt. Mansfield's contention that the staff's reliance on its independent terrain analysis, without providing an opportunity for adversarial review and comment, raises due process concerns. We recently rejected a similar challenge made by the petitioners in Radio Ingstad Minnesota, Inc., FCC 97-199 (released June 17, 1997) (Radio Ingstad) (Commission did not act arbitrarily by relying on its independent terrain analysis, corroborating existing record evidence, without incorporating it into the record and allowing for adversarial comment), and we see no basis for according Mt. Mansfield different treatment in this case. Like the petitioners in Radio Ingstad,

Mt. Mansfield cites "no authority for the proposition that the Commission cannot resort to its own expertise under the circumstances presented here without providing for comment" Id. at ¶8. However, in the interest of providing Mt. Mansfield with a more complete understanding of the basis for the staff's conclusions, we have appended to this Order an explanation of how the staff conducted its independent analysis.

13. Upon review of the staff's action, we find that the matters raised by Mt. Mansfield were fairly, fully and correctly treated. In addition, having determined WNNE-TV, Inc., Rollins Telecasting, Inc. and Tuscaloosa Broadcasting Licensee, Inc. qualified in all respects, we conclude that grant of the above-captioned assignment applications would serve the public interest.

14. Accordingly, IT IS ORDERED, That the application for review and informal objection filed by Mt. Mansfield Television, Inc. against File Nos. BTCCT-970519ZF and BALCT-970805KK, respectively, ARE DENIED.

15. IT IS FURTHER ORDERED, That a permanent waiver of the television duopoly rule, 47 C.F.R. Section 73.3555(b), to allow the common ownership by Sinclair Broadcast Group, Inc. of television stations WNNE-TV, Hartford, Vermont, and WPTZ(TV), North Pole, New York, IS GRANTED.

16. IT IS FURTHER ORDERED, That the application for consent to the assignment of license of station WNNE-TV from WNNE-TV, Inc. to WNNE Licensee, Inc., File No. BALCT-970805KK, and the application for consent to the assignment of license of WPTZ(TV) from Rollins Telecasting, Inc. to WPTZ Licensee, Inc., File No. BALCT-970805KH, ARE GRANTED.

FEDERAL

COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX

Determining Grade B Service Contour Overlap (WNNE-TV, Hartford, VT and WPTZ-TV, North Pole, NY)

The following analysis concerns an engineering exhibit in the supplemental showing submitted by HMI Broadcasting Corporation, licensee of WNNE-TV, Hartford, Vermont. The purpose is to determine the actual size of the area overlap by the Grade B service contours of WNNE-TV and co-owned WPTZ-TV.

WNNE-TV is located 148 kilometers southeast of WPTZ-TV in the 145 N azimuth. As determined by the standard prediction method, the area overlap by the Grade B contours of the TV stations is about 2,400 square kilometers.

We have examined the terrain profiles along seven evenly spaced radials (300 N to 360 N) from WNNE-TV to a distance of 100 km and eight evenly spaced radials (100 N to 170 N) from WPTZ-TV to a distance of 100 km using a 3-arc-second terrain database. From observations of the terrain profiles, there are large mountain ridges in the area between WNNE-TV and WPTZ-TV. Because a major obstacle is usually the limit of a contour, standard area prediction procedures are inaccurate and inappropriate where, as here, the terrain departs widely from average elevations (average terrain conditions).

From point-to-point field strength calculations based on the path clearance, the Grade B service contours in the area of interest are limited by the obstructing ridges. When both Grade B contours stop at the same mountain ridge, there is some minimal overlap area at the top of the ridge. It is reasonable to assume that very few TV viewers, if any, are located at rugged mountain peaks.

Conclusion

The WNNE-TV predicted Grade B contour encompasses an area of 26,280 square kilometers, and the WPTZ(TV) predicted Grade B contour encompasses an area of 43,180 square kilometers. Based on our calculations, the Grade B contours of WNNE-TV and WPTZ-TV are as indicated by the dashed line and dotted line on the attached map respectively. The area overlap by the predicted Grade B contours is about 218 square kilometers, which is 0.83 percent of the area within the WNNE-TV predicted Grade B signal contour, and 0.50 percent of the area within the WPTZ(TV) predicted Grade B signal contour.

According to 1990 U.S. Census data, the populations within the predicted Grade B contours of WNNE-TV and WPTZ(TV) are 639,921 and 568,402, respectively. We have determined that the overlap area consists of two population centers, Granville and Braintree, Vermont. Granville's population of 309 and Braintree's population of 1,174 yields a total of 1,483 people in the overlap area, which we have rounded to 1,500. The overlap area population of 1,500 represents 0.23 percent and 0.26 percent of the population within the predicted Grade B contours of WNNE-TV and WPTZ(TV), respectively.