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Washington, D.C. 20554

In reply refer to:
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In re: WZNY(FM), Augusta, GA
Assignment of License
BALH-970917EG

Dear Counsel:

This letter is in reference to the above-captioned application to assign the license of WZNY(FM), Augusta, Georgia, from Richard L. Rhoden, Executor to Cumulus Licensing Corp. ("Cumulus"). On October 27, 1997, GHB of Augusta, Inc. ("GHB") filed a petition to deny this application.¹ For the reasons stated below, we will grant the petition to deny, to the extent indicated herein, and dismiss the application as inadvertently accepted for filing.

Background

Cumulus is currently the licensee of four stations in the relevant market: WGUS(AM), North Augusta, Georgia; WEKL(FM), Augusta, Georgia; WRXR-FM, Aiken, South Carolina; and WUUS(FM), Martinez, Georgia. On February 2, 1998, the Commission granted an assignment of license of WBBQ(AM) and WBBQ-FM from Savannah Valley Broadcasting Company to Cumulus (File Nos. BAL-970917EE and

¹ Cumulus filed an opposition to the petition to deny on November 12, 1997 and GHB filed a reply on November 24, 1997.

BALH-970917EF).² Thus, grant of the above-captioned application would result in Cumulus having an attributable interest in seven radio broadcast stations, five in the same service (FM), in the market. In order to qualify for ownership of five same-service FM stations in the relevant market, the applicant must demonstrate that there are forty-five or more commercial stations in that market. See 47 C.F.R. Section 73.3555(a)(1)(i).

Assignee's Exhibit 3 to the above-referenced application indicates that there are forty-five stations in the relevant market. The petitioner argues that there are fewer than forty-five stations in the relevant market because Cumulus incorrectly counted silent stations WKRU(AM), Burnettsville, South Carolina, and WLOV(AM), Washington, Georgia, as well as WYFA(FM), Waynesboro, Georgia, which is licensed as a noncommercial educational station, to reach its claimed total of forty-five stations.³ Inclusion of silent and noncommercial educational stations, GHB contends, is in contravention of the Commission directive in *Order, Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368, 12370 (1996) (only operating commercial full-power stations, including daytimers and foreign stations, determine the number of stations in the market).

Cumulus does not challenge GHB's assertions in the opposition pleading. Rather, Cumulus argues that the Commission should accept an alternative means to demonstrate compliance with Section 73.3555. To this end, Cumulus has filed a supplemental technical exhibit which applies the "Longley-Rice" FM radio broadcast station signal propagation calculation methodology, published as Technical Note 101 ("Tech Note 101"). Based upon the Tech Note 101 calculations, Cumulus claims that an additional three stations - none of which were included in the engineering exhibit submitted with the original assignment application - intersect the principal community contour of WZNY(FM), and therefore must be counted in the relevant market. The three stations added in the supplemental exhibit are: WPEH(FM), Louisville, Georgia; WCOS(FM), Columbia, South Carolina; and WQZY(FM), Dublin, Georgia.

Cumulus notes that the only reported case involving the application of Tech Note 101 calculations in a multiple ownership context is *Letter to Lee W. Shubert*, 10 FCC Rcd 3159 (Chief, Audio Services Division, Mass Media Bureau, 1995) ("*Shubert*"). In that case, Commission staff rejected a petitioner's attempt to apply (Longley-Rice) Tech Note 101 calculations in order to disqualify an assignment application that had demonstrated compliance with 47 C.F.R. Section 73.3555 using standard calculation methods. Cumulus distinguishes *Shubert* by noting that, in the instant case, the applicant, rather than a petitioner, has employed Tech Note 101 calculations to defend an application after a petitioner has challenged the application. Cumulus concludes, therefore, that *Shubert* does not preclude an applicant

² The petition to deny was also filed against the application to assign the licenses of stations WBBQ(AM) and WBBQ-FM, Augusta, Georgia. Commission staff and petitioner concurred that, absent grant of the above-referenced WZNY(FM) application, the application to assign WBBQ(AM) and WBBQ-FM complied with 47 C.F.R. Section 73.3555(a)(1)(ii). Accordingly, on February 2, 1998, the petition to deny the assignment of WBBQ(AM) and WBBQ-FM was denied and that assignment application was granted. This transaction was consummated on April 1, 1998. The February 2, 1998 action was without prejudice to issues raised in the petition to deny regarding the assignment of station WZNY(FM)

³ Independent Commission staff investigation reveals that WYFA(FM) is licensed as a noncommercial educational station and that the WKRU(AM) license was cancelled on April 28, 1997. In response to a telephone inquiry, WLOV(AM) staff stated that the station was silent for a short period in October 1997 (the time period that petitioner determined WLOV(AM) to be silent), but that the station returned to the air and remains on the air. Thus, the multiple ownership exhibit in the subject application demonstrates forty-three stations in the relevant market.

from employing Tech Note 101 calculations. GHB counters that use of Tech Note 101 calculations in multiple ownership analyses are never appropriate, especially not in the instant case, in light of the holding in *Shubert*.

Discussion

The radio contour overlap rule provides that, for multiple ownership analyses, the principal community contour utilized for FM stations is the predicted 3.16 mV/m contour, computed in accordance with Section 73.313. 47 C.F.R. Section 73.3555(a)(4)(i). Section 73.313(e) provides that when anomalous terrain conditions exist near the antenna site, a Tech Note 101 showing may be submitted to supplement a conventional showing that conforms to the standard contour prediction methods prescribed in Section 73.313.

The Commission has not previously ruled on the acceptability of Tech Note 101 calculations in the context of showings submitted by applicants to demonstrate compliance with the multiple ownership rules for a proposed assignment or transfer. Putting aside this broad question, we note that Cumulus has submitted Tech Note 101 showings for only three stations in its effort to establish a forty-five station market. Cumulus has failed to address which other stations in the relevant market qualify for use of a supplemental analysis and to present Tech Note 101 calculations for those stations.⁴ We reject such selective application of Tech Note 101 in the multiple ownership context. Just as the Tech Note 101 showings may indicate that stations WPEH(FM), WCOS(FM) and WQZY(FM) in fact should be included in the relevant market, submission of similar showings for other stations might show that they should not be included. Thus, permitting selective use of Tech Note 101 showings in the multiple ownership context would invite protracted disputes where contradictory results could occur depending on which FM station contours opposing parties predicted with Tech Note 101 calculations.

In light of the above, we will not accept Cumulus' Tech Note 101 showing to supplement its multiple ownership exhibit. Therefore, the application to assign station WZNY(FM) fails to demonstrate compliance with Section 73.3555(a)(1)(i) of our rules, and will be dismissed as inadvertently accepted for filing.

Conclusion

Accordingly, the October 27, 1997 petition to deny the assignment of license of station WZNY(FM), Augusta, Georgia, IS GRANTED, TO THE EXTENT INDICATED HEREIN, and the application to

⁴ See 47 C.F.R. Section 73.313(e). Typically, a supplemental showing should include, *inter alia*., an explanation of why use of a supplemental showing is warranted (*e.g.* very flat, very rough, or anomalous terrain, and a showing of how the terrain departs widely from the average terrain assumed for the F(50,50) propagation curves in 47 C.F.R. Section 73.333); proof of at least a 10% difference between the supplemental and standard prediction methods in showing the distance to the 70 dBu contour; a list of assumptions and an explanation of the method used in generating the supplemental analysis; and sample calculations using the supplemental procedure. *Report and Order, Amendments of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, 12 FCC Rcd 12371, 12402-03 (1997)

assign WZNY(FM), Augusta, Georgia, from Richard L. Rhoden, Executor to Cumulus (File No. BALH-970917EG) IS HEREBY DISMISSED AS INADVERTENTLY ACCEPTED FOR FILING, pursuant to 47 C.F.R. Section 73.3566.

Sincerely,

Linda Blair, Chief
Audio Services Division
Mass Media Bureau