

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

In the Matter of)	
)	
Eagle Broadcasting Company, Inc.)	File Nos. BAL-20040603AAO
and)	BALH-20040603AAP
Eagle II Broadcasting Company, Inc.)	BAL-20040603AAK
Assignors)	BALH-20040603AAL
)	
And)	Facility ID Nos. 32391, 32390, 18048, and
)	18051
Saga Communications of New England, LLC)	
Assignee)	
)	
For Assignment of Licenses of)	
WHCU(AM), WYXL(FM), WNYW(AM), and)	
WQNY(FM), Ithaca, New York)	

MEMORANDUM OPINION AND ORDER

Adopted: September 24, 2008

Released: December 16, 2008

By the Commission: Commissioners Capps and Adelstein concurring and issuing a joint statement.

I. BACKGROUND

1. The Commission has before it an Application for Review filed by Finger Lakes Alliance for Independent Media (“FLAIM”).¹ FLAIM seeks review of a Staff Decision² which denied FLAIM’s Petition to Deny and granted the above-captioned applications (“Assignment Applications”) to assign four radio station licenses from Eagle Broadcasting Company, Inc. and Eagle II Broadcasting Company, Inc. (collectively “Eagle”) to Saga Communications of New England, LLC (“Saga”).³ For the reasons

¹ See Application for Review (June 3, 2005, as supplemented Mar. 7, 2007). FLAIM describes itself as an informal organization of individuals who reside and work in Ithaca, New York. Its original petition included supporting affidavits from local residents.

² See *Eagle Broadcasting Co., Inc.*, Letter, 20 FCC Rcd 8753 (MB 2005) (“Staff Decision”).

³ Eagle Broadcasting Company was the assignor of WNYW(AM) (formerly WTKO(AM)) and WQNY(FM). Eagle II Broadcasting Company was the assignor of WHCU(AM) and WYXL(FM). The two assignors are commonly owned. On June 20, 2005, Eagle and Saga filed a Joint Opposition to the Application for Review (“Joint Opposition”). Also before us are the following responsive pleadings: FLAIM’s July 15, 2005, Motion for Further Extension of Time; FLAIM’s July 15, 2005, Reply; Eagle and Saga’s July 28, 2005, Joint Opposition to Motion for Further Extension of Time; and FLAIM’s August 9, 2005, Reply to Joint Opposition. The final two pleadings in 2005 dispute whether the Commission should consider FLAIM’s Reply. Eagle and Saga had not opposed FLAIM’s request for an extension of the filing deadline to July 14, 2005, but oppose FLAIM’s weather-related motion for receipt of one additional day. In view of the circumstances and short amount of time requested, we will grant the motion and consider herein the Reply filed on July 15, 2005. FLAIM’s March 7, 2007, Supplement to the Application for Review (“Supplement”) prompted an additional round of pleadings including Eagle and Saga’s

(continued....)

stated below, we deny the Application for Review and affirm the Media Bureau's grant of the Assignment Applications.

2. The Staff Decision approved the acquisition of an existing combination of two AM and two FM radio stations by Saga, which had no other attributable interests in the Ithaca, New York radio market. The parties promptly consummated the transaction. The primary question on review is whether the Staff Decision was based on an incorrect market definition.

3. Common ownership of two AM and two FM stations is permissible under the Commission's multiple ownership rules, provided that the stations are located in a market comprised of at least eight commercial and/or noncommercial radio stations.⁴ The size of the Ithaca radio market is a matter of longstanding dispute. In 1996, when Eagle proposed to increase its attributable ownership interests in the Ithaca market from two stations to four, Commission rules specified a contour overlap methodology to determine market size and compliance with the numerical ownership limits. Under that methodology, the four Ithaca stations were within a 35-station market.⁵ Several commenters argued, however, that the market was actually smaller because terrain obstructions prevented certain radio signals from reaching Ithaca, and also raised various competition concerns. The staff rejected those arguments as unsubstantiated and approved Eagle's four-station combination.⁶

4. The Commission has since modified its radio market definition. Under the local radio ownership rule now in effect⁷ (and which was in effect as of the time the Staff Decision was issued), Arbitron's Ithaca Metro Survey Area ("Ithaca Metro") is the relevant geographic market for evaluating the Assignment Applications' compliance with the numerical limits set forth in the rules.⁸ The Ithaca Metro is "home" to ten commercial and noncommercial stations, which remains sufficient to permit common ownership of two AM and two FM stations (and indeed, under the Commission's rules, could

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March 20, 2007, Joint Motion to Strike Supplement; FLAIM's April 7, 2007, Opposition to Joint Motion to Strike, and Eagle and Saga's April 20, 2007, Joint Reply.

⁴ Specifically, in a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, a single entity can own up to five commercial radio stations of which three may be in one service (AM or FM), provided that the entity does not have an interest in more than fifty percent of the full-power radio stations in the market "unless the combination of stations comprises not more than one AM and one FM station." See 47 C.F.R. § 73.3555(a)(iv).

⁵ See 47 C.F.R. § 73.3555(a)(1996). Under that method, the Commission counted the number of stations with principal community contours that overlapped the principal community contours of the proposed combination.

⁶ See File Nos. BAL/H-19960306HH/HI (granted on June 6, 1996, and consummated on Aug. 2, 1996). Some commenters raised similar arguments in petitions to deny the stations' 1998 applications for license renewal. The Commission denied those petitions and granted the renewals. See File Nos. BR/H-19980202S5/L3 (granted Feb. 23, 2000).

⁷ 47 C.F.R. § 73.3555(a).

⁸ See 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, 13724-37 (2003) ("Ownership Order"), *aff'd in part and remanded in part, Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("Prometheus Remand Order"), *cert. denied*, 545 U.S. 1123 (2005). See also *Prometheus Radio Project, et al. v. FCC*, No. 03-3388 (3d Cir. Sept. 3, 2004) (lifting stay with respect to new local radio ownership rule).

support common ownership of one additional AM or FM station). The staff analyzed the Assignment Applications using the Ithaca Metro rather than an alternative market suggested by FLAIM in its Petition to Deny.

5. Although FLAIM acknowledges general merit to the Commission's use of Arbitron-defined local markets, it argues that the presumed validity of that market definition to a particular transaction is an assumption which can be rebutted. FLAIM contends, for example, that several Commission cases require multiple ownership analyses to reflect "the actual options available to listeners" and to exclude stations "that do not have an actual presence in a market" or do not "receive a minimal share of local advertising revenue."⁹ FLAIM claims that the information it submitted to the staff was sufficient to rebut the presumed use of the Ithaca Metro, and to require either a hearing or a divestiture of at least one station. Under FLAIM's analysis, the relevant market consists of seven stations which provide "listenable" service throughout Ithaca despite terrain obstructions or, alternatively, of five stations which are licensed to Ithaca and provide local news. In support, FLAIM states that only seven stations advertise in the Ithaca yellow pages, and that three stations in the Arbitron Metro lack either advertising revenue or significant audience in Ithaca.

6. FLAIM also argues that the staff, by relying on Arbitron market data, disregards its allegations that the four subject stations "provide nearly all of the local broadcast news coverage in Ithaca . . . [, account] for more than 68 percent of the local audience . . . [, and capture] 64 percent of advertising revenue," and that the market has a "highly concentrated" Herfindahl-Hirschman Index ("HHI").¹⁰ FLAIM contends that, under such circumstances, use of the Arbitron market definition would not serve the public interest and that it has shown good cause for deviation from the general rule.¹¹ It argues that the staff's approval of the present transaction cannot withstand judicial scrutiny because the staff "relies excessively on actions of Arbitron, a private entity, to pre-determine the results of the FCC's public interest deliberations," amounting to "an unlawful delegation of governmental power."¹² FLAIM

⁹ See Application for Review at 7-8 (citing *Sam Jones, Jr.*, Memorandum Opinion and Order, 10 FCC Rcd 5330 (1995); *Patteson Brothers, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 7595, 7596 (1993); *Mountain Broadcasting Co.*, Memorandum Opinion and Order, 43 RR 2d 558, n.6 (1978); *KACY, Inc.*, Memorandum Opinion and Order, 30 FCC 2d 648 (1971); and *Tri-County Radio Co., Inc.*, Memorandum Opinion and Order, 26 FCC 2d 147 (1970).

¹⁰ Application for Review at 3, 6. FLAIM also argues that the Staff Decision ignored its allegation that concentration has been harmful because the stations "suppressed important local news" *i.e.*, they did not cover local opposition to the stations' assignment applications in 1996. See Application for Review at 11. Eagle denies that any news was suppressed and argues that the allegation is unsupported. See Joint Opposition at 11. We agree that the allegation is not adequately supported; it is not based on a sworn affidavit of someone with personal knowledge of the facts alleged. FLAIM supports the allegations primarily with an unsworn letter from a former station employee based on what the former employee was told by another employee. See Petition to Deny, Ex. 5. Although FLAIM also submits sworn statements from two local residents, those residents base their statements upon the same hearsay allegations of the former employee. Their personal knowledge is limited to having not heard any news coverage about local opposition to the assignment while listening to the station. *Id.* Accordingly, the Staff Decision's statement that "Petitioners have not raised a substantial and material question of fact warranting further inquiry" was sufficient. See Staff Decision, 20 FCC Rcd at 8755.

¹¹ See Application for Review at 8 (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

¹² Application for Review at 6.

argues that a court's rejection of a similar unlawful delegation argument was based solely on the court's erroneous prediction that the Commission would remain "the sole arbiter of whether a proposed radio station combination serves the public interest..."¹³

7. Eagle and Saga respond that the staff's use of the Arbitron Metro was proper because there is nothing novel about this case or the Ithaca market. They emphasize that the Commission and U.S. Department of Justice rejected similar competition arguments when Eagle acquired the stations, and that Eagle's sale of the stations to Saga neither creates a new combination nor changes the competitive makeup of the market. They argue that the staff's approval of the transaction is fully consistent with precedent which provides that transfers of existing station combinations do not increase ownership concentration and will generally be approved unless otherwise contrary to the public interest.¹⁴ With respect to the number of signals heard in Ithaca, Eagle and Saga state that at least 13 stations have an audience share of 1.0 or more and that there will be at least one additional commercial Ithaca station in the future.¹⁵ Eagle and Saga further contend that FLAIM's arguments for an alternative multiple ownership analysis rely on outdated case law.¹⁶

8. On December 27, 2006, the staff conditionally granted Saga's uncontested applications to acquire two more stations in the Ithaca Metro -- WKRT(AM) and WIII(FM), both Cortland, New York -- from Citadel Broadcasting Company. Because that acquisition would result in Saga's ownership of six stations in a market where it could own no more than five, the staff conditioned its approval upon Saga's divestiture of one station.¹⁷ The staff separately approved Saga's application to assign the license of newly acquired WKRT(AM) to Bible Broadcasting Network, which modified the station's license to specify noncommercial educational operations.¹⁸ FLAIM filed its March 7, 2007, Supplement in

¹³ *Id.* (quoting *Prometheus Remand Order*, 373 F.3d at 425).

¹⁴ See Application for Review at 12 (citing *Solar Broadcasting Co.*, Memorandum Opinion and Order, 17 FCC Rcd 5467 (2002) and *Shareholders of Jacor Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 6867 (MMB 1999)). In reply, FLAIM argues that the case law provides a public interest exception to the transferability of existing station combinations and that the current transaction is contrary to the public interest. See Reply at 9.

¹⁵ See Application for Review at 10 (citing *Romar Communications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 23128 (2004), which directed that two mutually exclusive applications to construct AM stations in Ithaca be set for auction). The Commission also recently granted an application to construct a new noncommercial FM station at Ithaca. See File No. BPED-19970411MC (granted May 30, 2007).

¹⁶ Saga and Eagle argue that *Mountain Broadcasting* and *Tri-County Radio*, *supra* note 9, are distinguishable because those cases concern the ability of a market to support a new radio service, a matter not at issue in the present proceeding. They claim that *KACY, Inc.* concerns the long-abolished doctrine of service to suburban communities. See Joint Opposition at 9 (citing *Suburban Community Policy*, 93 FCC 2d 436 (1983)). They further contend that other cited cases by FLAIM interpret multiple ownership rules which have been superseded. We agree with these distinctions but also accept FLAIM's explanation that it does not claim that any of these cases are dispositive but rather indicative of a continuing policy favoring competition and viewpoint diversity in local markets. See Reply at 7.

¹⁷ See *Broadcast Actions*, Public Notice, Report No. 46394 (Jan. 3, 2007). Saga consummated the transaction on September 1, 2007.

¹⁸ See File No. BAL-20061106ABZ (granted Dec. 21, 2006); File No. BML-20070105AEY (granted Oct. 19, 2007).

response to these events. FLAIM argues that Saga's acquisition of WIII(FM) will result in increased market power as well as decreased diversity and competition in Ithaca unless the Commission compels Saga to divest one of the four stations subject to the instant Application for Review.¹⁹

II. DISCUSSION

9. When the Commission adopted its bright-line, geography-based radio rule for Arbitron-rated markets, it concluded that “[b]y applying the numerical limits of the local radio ownership rule to a more rational market definition, we believe that, *in virtually all cases*, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest.”²⁰ The Commission acknowledged that it must give a hard look to petitions that allege that a particular transaction is not in the public interest notwithstanding compliance with the new rule.²¹ Such petitions “must contain specific allegations of fact sufficient to show that (1) the petitioner is a party in interest, (2) a grant of the application would be *prima facie* inconsistent with the public interest, and (3) a substantial and material question is presented to be determined by the Commission.”²² The Commission similarly acknowledged that the rule can be waived based on public interest considerations.²³ The Commission alone is responsible for making these public interest determinations, not Arbitron or any other private entity. Although we agree that FLAIM is a party in interest, we find that it failed to establish a *prima facie* case that grant of the application would be inconsistent with the public interest or to raise a substantial and material question of fact warranting designation of the application for hearing.

10. FLAIM's claim that the staff erroneously included up to four stations in the market is based on purely subjective factors such as the stations' "listenability" and the sufficiency of local news coverage. Even accepting *arguendo* FLAIM's allegation that four of the stations in the Ithaca Metro do not cover Ithaca in its entirety, such factors would not dictate an alternate market definition. When the Commission adopted the Arbitron Metro as its geographic market for multiple ownership purposes, it recognized that not every station in a market will fully cover the market's geographic area.²⁴ City-grade coverage of the community for which the market is named is not a particularly meaningful factor in itself, because the relevant factor is how many stations operate in the market, rather than in a specific community. In this case, as in most cases, some of the radio stations operating in the market are not licensed to the community for which the market is named (Ithaca). Accordingly, those stations are not

¹⁹ See Supplement at 2.

²⁰ *Ownership Order*, 18 FCC Rcd at 13813 (emphasis added).

²¹ See *id.* at 13647.

²² *Id.* at 13647, n.134 (citing 47 U.S.C. § 309(d); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940); *Maumee Valley Broadcasting, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3487, 3488-89 (1997), modified by, *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041 (1999); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394-95 (D.C. Cir. 1985); *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir. 1996)).

²³ *Id.* at 13647.

²⁴ *Id.* at 13724 (“We understand that geographic areas are less accurate than contours in measuring the signal reach of individual stations.”).

required to provide a particular level of service to Ithaca.²⁵

11. Nor would the number of stations airing or lacking local news coverage be *prima facie* evidence of the relevant geographic market. The Commission shares FLAIM's view that diversity of viewpoints is desirable. The number of disparate viewpoints expressed in public affairs programming and news (local and national) is one of several ways to measure viewpoint diversity.²⁶ The quantity and quality of a market's local news is also one way to measure localism.²⁷ Nevertheless, programs that are not local in focus also contribute to diversity of viewpoints, as do programs other than traditional newscasts.²⁸ Consistent with First Amendment principles, the Commission affords licensees broad discretion over content decisions. Some of the many types of issue-responsive programs that a station can use to meet its local public service obligations include: news, public affairs, public service announcements, editorials, community bulletin boards, and religious programming.²⁹ A particular licensee's choice to meet its obligations through programming other than local news will not, contrary to FLAIM's contention, remove that station from a geographic market for purposes of the multiple ownership rules nor raise public interest concerns sufficient to depart from the rule's market definition.

12. In essence, FLAIM is advocating the use of a case-by-case approach to the present transaction. The Commission has expressly rejected such an approach due to "the harm caused by a lack of regulatory certainty" and because "the adoption of bright line rules" is preferable in implementing the Commission's competition and other goals.³⁰ FLAIM has failed to proffer sufficient economic and demographic data to support a departure from the Arbitron Metro definition in this case. In particular, we note that the Commission has concluded that advertising revenue share is of "decreasing relevance . . . as a barometer of competition."³¹ HHI data, which concerns market changes resulting from mergers, is not relevant in the case at hand, which involves the sale of an existing combination with no

²⁵ We also note that in this case, as in most cases, some of the stations in the market are noncommercial educational FM stations, which are subject to less stringent requirements to provide a predicted 60 dBu signal to at least 50% of the area or population of the city of license. See 47 C.F.R. § 73.515. In the present case, the staff determined that the two stations that FLAIM seeks to exclude based on signal coverage, provide predicted city-grade coverage (FM 70 dBu and AM 5 mV/m) to most, though not the entirety, of Ithaca

²⁶ See generally *Ownership Order*, 18 FCC Rcd at 13630, 13713 ("broadcast ownership limits are necessary to preserve and promote viewpoint diversity" because "media outlets have the ability to affect public discourse . . . through their coverage of news and public affairs;" and "localism and diversity are fostered when there are multiple, independently owned radio stations competing in the same market."). See also *id.* at 13644 (program selection is a measure of localism).

²⁷ *Id.* at 13644.

²⁸ *Id.* at 13627. ("Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives.").

²⁹ See *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 982-83 (1981), *on recon.* Memorandum Opinion and Order, 87 FCC 2d 797 (1981), *remanded on other grounds sub nom. Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

³⁰ *Ownership Order*, 18 FCC Rcd at 13646-47.

³¹ *Id.* at 13642.

consolidation of ownership.³² Further, our examination of signal coverage in the market including the FM 70 dBu and AM 5 mV/m contours of the stations in the Arbitron Metro supports the use of the Ithaca Metro as the relevant geographic market in this case because the stations provide service to the city of Ithaca as well as to surrounding population centers.

13. In light of the above, we are unpersuaded that the revised radio ownership rule now in effect is inadequate to protect against competitive harm in this transaction. The staff properly analyzed this transaction by applying the numerical limits of Section 73.3555(a), using the Ithaca Metro as the relevant geographic market. We find that FLAIM has not raised a substantial and material question of fact warranting further inquiry. We further find no error in the staff's conclusion that the assignment of this existing radio station combination is consistent with the public interest, convenience, and necessity.³³

14. Saga's acquisition of a fifth station in the Ithaca Metro does not change our analysis of the current four-station transaction.³⁴ Any consideration of FLAIM's argument with respect to the fifth station will be undertaken in connection with its Petition for Reconsideration of that transaction.³⁵

III. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, That the Application for Review filed on June 3, 2005, and supplemented on March 7, 2007 by Finger Lakes Alliance for Independent Media IS DENIED.

16. IT IS FURTHER ORDERED, That the Joint Motion to Strike Supplement to Application for Review filed on March 20, 2007 by Eagle Broadcasting Company, Inc., Eagle II Broadcasting Company, Inc., and Saga Communications of New England, LLC IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³² See *Shareholders of AMFM, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 16062, 16069 n.18 (2000).

³³ See *Solar Broadcasting Co.*, 17 FCC Rcd at 5475.

³⁴ See *supra* ¶ 8.

³⁵ See File No. BAL-20061101ACS and associated Petition for Reconsideration (Feb. 2, 2007).

**JOINT CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
AND
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *Applications of Eagle Broadcasting Company, Inc. and Eagle II Broadcasting Company, Inc., Assignors, and Saga Communications of New England, LLC, Assignee, for Assignment of Licenses of WHCU(AM), WYXL(FM), WNYN(AM), and WQNY(FM), Ithaca, New York.*

The petitioners in this case allege that these license transfers are not in the public interest because they will perpetuate excessive concentration in the Ithaca radio market. The majority acknowledges that we must give a “hard look” to such allegations—even if the transfers comply with our general local radio ownership caps.

Unfortunately, the majority fails to apply its own “hard look” standard, giving short shrift to many of petitioner’s allegations. For instance, with respect to the allegation that a single entity will control 64 percent of advertising revenues in the Ithaca market, the majority simply asserts that the petitioners failed to justify a departure from our general rule and—most troubling—relies on the FCC’s discredited media ownership decision that was overturned and remanded by the courts for the proposition that advertising revenues are of “decreasing relevance” as a barometer of competition.

In the end, we are left with a record that makes it difficult to assess the true impact of this transaction on competition, localism, and diversity in the Ithaca market. Based on the limited information before us, we reluctantly concur in the majority’s decision.