

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

In the Matter of)) Peconic Bay Broadcasting Corporation) (Assignor)) and)) AAA Entertainment Licensing LLC) (Assignee))) For Assignment of Construction Permit of) Station WEHM(FM) (formerly WCSO(FM)),) Southampton, New York)	File No. BAPH-20011207AAK Facility ID No. 52059
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MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2008

Released: March 14, 2008

By the Commission: Commissioner Copps concurring and issuing a statement.

I. INTRODUCTION

1. The Commission has before it an Application for Review and a Motion for Stay filed by Main Street Broadcasting Company, Inc. (“Main Street”); an Application for Review filed by Jarad Broadcasting Company of Westhampton, Inc. (“Jarad”); and related pleadings regarding Station WEHM(FM) (formerly WCSO(FM)), Southampton¹, New York.² Main Street and Jarad (collectively, the “Petitioners”) request review of a February 26, 2003, Media Bureau Decision (“Staff Decision”)³ that granted the captioned application for the assignment of the WEHM(FM) construction permit from Peconic Bay Broadcasting Corporation to AAA Entertainment Licensing LLC (“AAA”). For the reasons discussed below, we deny the Applications for Review and dismiss the Motion for Stay as moot.

II. BACKGROUND

2. The multiple ownership exhibit submitted with the assignment application specified that the transaction would create a single radio market formed by the mutually overlapping principal community

¹ On October 2, 2007, the Commission granted a construction permit to modify WEHM(FM)’s community of license to Manorville, New York (File No. BPH-20070119AAC).

² The Motion for Stay was filed on March 7, 2003. Both Applications for Review were filed March 28, 2003. AAA Entertainment Licensing LLC filed an Opposition to Motion for Stay, as well as an *Erratum* to Opposition to Motion to Stay, on March 10, 2003, and Oppositions to Applications for Review on April 16, 2003. Main Street filed a Reply to the Oppositions to Applications for Review on April 28, 2003, and Jarad filed a Reply to the same Oppositions on April 29, 2003.

³ *Letter to Lewis J. Paper, Esq., et al.*, Ref. No. 1800B3-BSH/LAS (MB Feb. 26, 2003).

contours of New York stations WEHM(FM); WBAZ(FM), Bridgehampton; WBEA(FM), Southold; and WHBE(FM) (formerly WEHM(FM)), East Hampton. AAA's exhibit showed that 20 stations were in this market, using the Commission's contour-overlap methodology.⁴ AAA could therefore own up to six stations, four of which could be in the same service. In this defined radio market, AAA already owned three FM stations and no AM stations; post-transaction it would own the one additional FM station.

3. Petitioners filed Petitions to Deny the Assignment Application,⁵ arguing that: (1) AAA inappropriately identified 20 stations in the radio market, whereas 8 of the 20 should be excluded, thus reducing the number of stations in the market to 12 and precluding grant of the application;⁶ (2) inclusion of AAA-owned WMOS(FM), Montauk, New York, presents a shifting market definition problem, as addressed by the Commission in *Pine Bluff Radio, Inc.*, warranting deferral of action on the assignment application;⁷ and (3) a grant would result in excessive market concentration in violation of Commission policy. Specifically concerning the stations to be excluded from the market, Petitioners contended the following: (a) AAA's inclusion of WMKI(AM), Boston, Massachusetts, was based on inaccurate Commission data used in determining the WMKI(AM) transmitter site;⁸ (b) six AM stations licensed to communities in Connecticut and Rhode Island are "distant," separated from Southampton, New York, by Long Island Sound, with contours that overlap with the AAA station contours forming the defined radio market only as a result of the unique conductivity characteristics and long transmission path over salt water;⁹ and (c) WXXP(FM), Calverton-Roanoke, New York, was granted a construction permit to relocate its transmitter, and the modified facility contour will not overlap any AAA station contour forming the radio market.¹⁰

4. The staff excluded three stations in calculating the number of stations in the market.¹¹ The staff thus found that AAA would own four FM stations and no AM stations in a 17-station market post-

⁴ See *Definition of Radio Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd 25077, 25078 (2000) ("*Radio Markets Definition NPRM*"); 47 C.F.R. § 73.3555(a)(3).

⁵ Main Street and Jarad filed separate Petitions to Deny on January 28, 2002. A third party, Crystal Coast Communications, Inc., filed a pleading styled as a Petition to Deny on January 28, 2002, but did not seek Commission review of the Staff Decision.

⁶ See 47 C.F.R. § 73.3555(a).

⁷ 14 FCC Rcd 6594 (1999) ("*Pine Bluff*"). See Jarad Petition at 13-14.

⁸ Jarad Petition at 5-6; Main Street Petition at 3, n. 6.

⁹ The six stations are: WADS(AM), Ansonia, CT; WDJZ(AM), Bridgeport, CT; WFIF(AM), Milford, CT; WLIS(AM), Old Saybrook, CT; WSUB(AM), Groton, CT; and WXNI(AM), Westerly, RI. Petitioners argued that the long salt water path artificially extends the signal strength of these allegedly "distant" stations and results in excessive coverage predictions. Jarad Petition at 6, 9; Main Street Petition at 6-8.

¹⁰ Jarad Petition at 6. See File No. BPH-20011012AAW. A license to cover this construction permit was granted on July 15, 2002 (File No. BLH-20020520AAF).

¹¹ The Staff Decision excluded stations WMKI(AM), Boston, MA, and WXXP(FM), Calverton-Roanoke, NY, for the reasons articulated by Petitioners (see *supra* ¶ 3), and WMOS(FM). Although WMOS(FM) was licensed to AAA when the Assignment Application was filed, its principal community contour does not overlap the contours of the four AAA stations forming the subject market. See 47 C.F.R. § 73.3555(a)(3)(ii). (An application requesting assignment of the license of WMOS(FM) from AAA to Citadel Broadcasting Company was granted on April 3, 2003 (File No. BALH-20030124AGB). The assignment was consummated on April 29, 2003.)

transaction, and would thus still comply with the local radio ownership rule.¹² The Staff Decision: (1) found no basis to depart in this case from Section 73.3555(a) to determine the number of stations in the market, and therefore counted all stations whose principal community contours overlap the market's defining contours; (2) concluded there was no *Pine Bluff* problem warranting deferral; and (3) affirmed that the relevant geographic market for purposes of assessing the competitive effects of the transaction is the Arbitron Nassau-Suffolk, New York, metropolitan area (the "Nassau-Suffolk Metro"). The staff found that Petitioners had failed to establish an alternative geographic market for the competition assessment and rejected Petitioners' allegations of undue concentration. Petitioners contest all these determinations set forth in the Staff Decision, as explained below.

III. DISCUSSION

5. **Multiple Ownership Analysis.** The local radio ownership rule in effect at the time the Assignment Application was granted specifically provided that the radio market was to be defined in all cases by the mutually overlapping contours of the commonly owned stations.¹³ The methodology entails counting the number of mutually-overlapping stations proposed to be owned -- constituting the "numerator" of the numerical limits fraction, and then counting "all stations whose principal community contours overlap the principal community contour of any one or more of the stations that define the market"¹⁴ -- *i.e.*, the "denominator" of the fraction. The Commission did not identify any exceptions.¹⁵ Although in mid-2003 the Commission adopted a geography-based methodology for radio stations in an Arbitron-rated metropolitan area ("Metro") and made changes to the contour-based methodology for stations in unrated markets,¹⁶ it did not do so until after the Staff Decision was issued and the subject transaction was consummated.¹⁷

6. On review, Jarad contends that, notwithstanding facial compliance with Section 73.3555(a)(3)(iii), the Commission has the discretion to decline to grant an assignment application where, as here, certain stations that are included in the market, *i.e.*, included in the "denominator," do not compete for advertisers or listeners, are "distant," and are not actual participants in that market. Jarad does not provide a specific standard for denying such transactions, nor a definition of "distant." Instead, Jarad argues that the Commission must assess, on a case-by-case basis, audience and advertising revenue

¹² See 47 C.F.R. § 73.3555(a)(1)(iii).

¹³ See 47 C.F.R. § 73.3555(a) (2001). The methodology entails counting the number of mutually-overlapping stations proposed to be owned -- constituting the "numerator" of the numerical limits fraction, and then counting all stations whose principal community contours overlap the principal community contour of any one or more of the stations that define the market -- *i.e.*, the "denominator" of the fraction.

¹⁴ *Radio Markets Definition NPRM*, Notice of Proposed Rulemaking, 15 FCC Rcd 25079 (emphasis omitted).

¹⁵ *Id.*

¹⁶ See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003) ("*Ownership Report and Order*"), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (3d Cir. 2004), *stay modified*, No. 03-3388 (Sept. 3, 2004) (lifting stay regarding local radio ownership rules, thus making such rules effective as of September 3, 2004). This omnibus ownership proceeding incorporated two radio-specific rulemaking proceedings that addressed radio ownership and radio market definitions: the *Radio Markets Definition NPRM* issued in December 2000 (*see supra* note 4); and the Notice of Proposed Rulemaking in *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets ("Local Radio Ownership NPRM")*, 16 FCC Rcd 19861 (2001), issued in November 2001.

¹⁷ The parties consummated the transaction on April 30, 2003.

shares, distances from the stations at issue, whether the stations' signal propagations result from anomalies, or whether the contour overlaps are *de minimis*.

7. Petitioners in effect urge the Commission to adopt an amorphous, *ad hoc* approach to defining which stations are in a market. We expressly rejected a case-by-case approach in the *Ownership Report and Order*.¹⁸ The Commission's consistent application of the multiple ownership rules has enabled the staff to process efficiently the more than one thousand sales applications that are filed in any given year. The Commission explicitly chose consolidation of related rulemaking proceedings as the appropriate manner to address perceived shortcomings in the contour-based methodology.¹⁹ Neither the methodology in effect when the subject transaction was pending, nor the modified "interim" contour methodology adopted in June 2003 for unrated markets, provides for the exclusion of certain signal contours from our analysis in determining the size of the market, even, for example, where the contour overlap results from unique AM signal propagation characteristics.²⁰ While we could consider departing from this methodology where extraordinary circumstances justified it, Petitioners have failed to show that such departure is warranted in this case. The pre-1992 multiple ownership cases cited by Petitioner²¹ are also not persuasive. These cases involved instances where the Commission granted applicants' requests for waiver of then-existing rules, based on a convincing showing that applying the rules in the circumstances of those cases would not be in the public interest. Here, Petitioner has not met its burden of providing a sound basis to overcome the presumptive correctness of the rule upon which AAA relies.

8. Petitioner Jarad cites various cases²² for the proposition that contour overlaps occurring entirely over sea water are disregarded in making interference determinations and reasons that a similar outcome should follow here, where contour overlaps used in determining multiple ownership compliance occur entirely over sea water. Specifically, Petitioner points to WXNI(AM), Westerly, Rhode Island, whose overlap with the relevant market stations occurs only over Long Island Sound, and contends that it should not be counted as a market station. As a general matter, we find those interference cases inapposite. In contrast to the assignment application at issue here, the applications in those cases facially violated a Commission rule. Critically, however, that rule, Section 73.37, Note 2 (1), states that it "will not apply" when otherwise prohibited overlap occurs entirely over sea water because such interference does not adversely affect listeners.²³ As noted above, Section 73.3555 contains no parallel instruction. In any event, AAA volunteered to omit WXNI(AM) from the station count and doing so would not alter the outcome in this case. Even without WXNI(AM), there will be 16 stations in the market and AAA's acquisition of WEHM(FM) would still comply with our rules. As to the three Connecticut stations, Petitioner's argument is simply misplaced because, as noted in our Staff Decision, these stations' overlaps

¹⁸ *Ownership Report and Order*, 18 FCC Rcd at 13645-47.

¹⁹ *See supra* note 14.

²⁰ *See* 47 C.F.R. § 73.3555(a); *Ownership Report and Order*, 18 FCC Rcd at 13729-30.

²¹ *See* Jarad Application for Review at 11-12 (citing, e.g., *Generation II Radio San Diego, Inc.*, By Direction of the Commission Letter, 62 FCC 2d 691 (1976) and *Tidewater Broadcasting Co.*, Memorandum Opinion and Order, 2 FCC 2d 364 (1966)).

²² *See* Jarad Application for Review at 11-12, citing *Collier Broadcasting Co.*, Memorandum Opinion and Order, 25 FCC 2d 867 (1970); *Larson-Irwin Enterprises (KOAG)*, Memorandum Opinion and Order, 6 FCC 2d 613 (1976); and *State University of New York*, Memorandum Opinion and Order, 56 FCC 2d 433 (1975).

²³ 47 C.F.R. § 73.37, Note 2(1); *See also Amendment of Part 73 of the Commission's Rules Regarding AM Station Assignment Standards and the Relationship Between the AM and FM Broadcast Services*, Memorandum Opinion and Order, 4 RR 2d 1567, 1572 (1965).

occur partially over land, since “portions of the overlap between . . . each of the principal community contours of the five Connecticut AM stations, and . . . the radio market” in this case “occur over Long Island land area.”²⁴

9. We also find unpersuasive Petitioner’s argument that we should exclude certain stations from the market because they are “distant” signals whose contours overlap the market stations only because of anomalous propagation over salt water. As stated in the Staff Decision, it is impossible to conclude, as Jarad suggests, that the AM contour overlaps at issue occur solely as a result of the salt water transmission path. The degree to which the overlaps are a function of salt water propagation is undeterminable. Indeed, although Petitioners contend that this particular salt water path is “long” and the Connecticut and Rhode Island stations are “distant,” staff analysis indicates that the actual salt water paths between Long Island and the Rhode Island and Connecticut shorelines range only from 10 to 34 miles.

10. Main Street argues that the Commission’s 1995 decision in *Sam Jones, Jr.* (“*Jones*”)²⁵ supports exclusion of stations with *de minimis* overlap when determining numerical compliance with Section 73.3555(a). We disagree. Under the local radio ownership rule then in effect, grant of any application which resulted in a combined Arbitron audience share in excess of 25 percent was considered *prima facie* inconsistent with the public interest.²⁶ In *Jones*, the proposed acquisition of stations KVGB(AM) and KVGB-FM, Great Bend, Kansas, complied with the numerical ownership limits, but the combined audience share for the proposed co-owned stations in two of the markets would exceed the rule’s 25 percent benchmark.²⁷ While the Commission concluded that the contour overlap of KVGB(AM) with the contours of stations commonly owned by the proposed assignee²⁸ was *de minimis*, the finding was not made for purposes of applying the numerical ownership limits. Rather, it was made for purposes of applying the audience share component of the rule,²⁹ a component that was eliminated in 1996.³⁰ We thus do not find *Jones* persuasive in our analysis of the subject transaction.

11. Similarly, the three radio competition-based cases that Jarad cites -- *Gowdy FM 95, Inc.*,³¹ *Great Scott Broadcasting*,³² and *Letter to Harry C. Martin, Esq., et al.* (“*KBMW(AM)*”)³³ --do not support

²⁴ See *Letter to Lewis J. Paper, Esq. et al.*, *supra* note 3, at pp. 6-7.

²⁵ 10 FCC Rcd 5330 (1995).

²⁶ 47 C.F.R. § 73.3555(a)(1)(ii) (1992).

²⁷ *Jones*, 10 FCC Rcd at 5333.

²⁸ The stations commonly owned by proposed assignee Eagle Communications, Inc. were KAYS(AM) and KHAZ(FM), Hays, Kansas.

²⁹ This finding was but one factor prompting Commission grant of the applicant’s requested waiver of Section 73.3555. The assignee also pledged to divest itself of KVGB-FM within one year of acquisition. The Commission emphasized that the stations’ poor financial status, and the buyer’s pledge to actively recruit minority and female controlled companies to prospectively acquire KVGB-FM, were also factors warranting grant of the temporary, one year waiver of the rule. *Jones*, 10 FCC Rcd at 5333.

³⁰ See *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³¹ 17 FCC Rcd 5449 (2002).

³² 17 FCC Rcd 5397 (2002).

³³ 18 FCC Rcd 1498 (2003).

excluding allegedly “distant” stations when determining the number of stations in the market to establish AAA’s numerical compliance with Section 73.3555(a). The Commission addressed station exclusion in all three cases in the context of establishing the appropriate geographic market for the competition analysis, not to determine compliance with the local radio ownership rule. The two analyses are distinct and serve different purposes. To determine numerical compliance in the three cases cited, we used the then-in-effect contour methodology, as prescribed by the applicable rule, Section 73.3555(a). As prescribed by the then-in-effect Interim Policy, we then analyzed the potential competitive effects of the transaction using a geography-based (*i.e.*, Arbitron markets) analysis. Accordingly, Jarad’s reliance on these cases is misplaced.

12. **“Pine Bluff” Issue.** In the *Radio Markets Definition NPRM*, the Commission expressed concern that the contour overlap methodology could produce inconsistent results because of the “shifting market definition” or so-called “*Pine Bluff*” problem.³⁴ Despite this concern, the Commission decided that it would “process applications under existing standards, unless and until they are changed in this proceeding.”³⁵ The Commission concluded, however, that “[i]n cases raising concerns about how we count the number of stations a party owns in a market, . . . we will defer decision pending resolution of that issue.”³⁶ The Staff Decision stated that the deferment policy did not apply to the instant transaction. Unlike the scenario in *Pine Bluff*, the staff concluded, AAA’s compliance with the relevant local radio ownership rule did not depend on counting WMOS(FM), which AAA then owned,³⁷ as being in the market.³⁸ AAA voluntarily proposed the exclusion of station WMOS(FM) for purposes of calculating the number of stations in the market, *i.e.*, in the denominator.³⁹ The staff therefore omitted WMOS(FM) from the denominator in determining that the transaction complies with the Section 73.3555(a).

13. Main Street argues on review that WMOS(FM) should be retained in the denominator and added to the numerator, thus attributing to AAA an impermissible five FM stations in the market.⁴⁰ There is, however, no basis to do so: the WMOS(FM) principal community contour does not overlap the contours of all four of the other stations proposed to be commonly owned.⁴¹ Because the application

³⁴ See *Radio Markets Definition NPRM*, 15 FCC Rcd at 25082. At issue in the *Pine Bluff* case was whether the shifting market definition in our local radio station counting methodology was defensible and appropriate. *Pine Bluff*, 14 FCC Rcd at 6599. Under this methodology, it was possible to comply with our local radio ownership rule by counting a station as being “in the market” for purposes of determining the total number of in-market stations, *i.e.*, the denominator, but not “in the market” for purposes of determining the number of stations attributable to the proposed assignee, post-transaction, *i.e.*, the numerator. See, e.g., *1998 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, 15 FCC Rcd 11058, 11094 ¶ 67 (2000) (“*1998 Biennial Review Report*”). This anomaly was eliminated with the adoption of the revised local radio ownership rules. See *supra* note 14.

³⁵ *Radio Markets Definition NPRM*, 15 FCC Rcd at 25082.

³⁶ *Id.*

³⁷ See *supra* note 11.

³⁸ Specifically, removing WMOS(FM) from the applicant’s station count, reduces the stations in the market to 17, of which AAA would own four FM stations. As discussed above, see *supra* ¶ 8, with the exclusion of station WXNI(AM) from the station count, the total station count for the market is 16 stations. These results comply with the numerical limits in the local radio ownership rules. See 47 C.F.R. § 73.3555(a)(1)(iii).

³⁹ AAA Opposition to Petition to Deny at 4.

⁴⁰ Main Street Application for Review at 22.

⁴¹ See *supra* note 11 and accompanying text.

complies with the numerical limits in our local radio ownership rules without counting WMOS(FM) -- there are more than 14 stations in the market, of which AAA would own four stations post-transaction -- there is no reason to defer processing of the application pursuant to *Pine Bluff*. We affirm that the transaction complies with the local radio ownership rule in effect at the time of the Staff Decision. We also find that Petitioners' argument does not present a novel issue, and the staff properly exercised delegated authority in rejecting Petitioners' contentions.

14. **Competition Analysis.** Main Street argues that grant of the application would increase concentration and result in a market where two participants control over 70 percent of advertising revenue.⁴² We disagree. Although the subject transaction was not flagged pursuant to the Interim Policy then in effect,⁴³ staff analysis of Main Street's competition-based allegations was nonetheless guided by the Interim Policy.⁴⁴ Accordingly, the staff presumed that the relevant geographic market in which to assess the competitive effects of the proposed sale was the Arbitron "Metro."⁴⁵ WEHM(FM) was licensed to Southampton, which was located in the Nassau-Suffolk Metro, defined by Nassau and Suffolk Counties in New York. Post-transaction, BIA data indicated that AAA would have a 2.1 percent advertising revenue share in the Nassau-Suffolk Metro. The largest in-metro group owner, Cox Radio, Inc., owned three stations, garnering a 29.5 percent advertising revenue share, according to BIA.⁴⁶ Together, the AAA and Cox stations accounted for a 31.6 percent advertising revenue share, which is well below the "50/70" screen for flagging radio transactions.⁴⁷

15. Main Street had asserted that a smaller segment of the Metro was the relevant geographic market for purposes of this transaction and disagrees with the staff's determination that Main Street failed to meet its procedural burden in establishing an alternative market. The Staff Decision found Main Street's proposal for an "Eastern Long Island" market to be speculative. The showing failed to identify specific geographic boundaries, market participants, or any methodologies by which a unique geographic market or group of market participants could be determined in this case. Main Street counters that its Petition to Deny provided sworn affidavits from four officers of station WLNG(FM), Sag Harbor, New York, who have extensive experience working in radio on Eastern Long Island.⁴⁸ As noted in the Staff Decision, we are not bound by our Interim Policy presumptions and could determine the relevant

⁴² Main Street Application for Review at 15.

⁴³ Commission policy was to issue a Public Notice flagging proposed radio transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market, or two entities controlling 70 percent or more of the advertising revenues in that Arbitron market. *See AMFM, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 16062, 16066 n. 10 (2000); *Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97.

⁴⁴ *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97.

⁴⁵ A "Metro" is a metropolitan area defined by the Arbitron rating service, which is used by radio stations and radio advertisers in negotiating and determining advertising rates.

⁴⁶ These statistics are based on BIA's Year 2001, data made available to the public as of December 2002, and relied on in the Staff Decision. BIA is a communications and information technology, investment banking, consulting, and research firm. BIA provides funding, consulting and financial services to the communications, Internet and media industries, and makes available to the public revenue data for stations assigned to Arbitron metro markets.

⁴⁷ *See supra* note 45.

⁴⁸ *See* Main Street Application for Review at 16; Main Street Petition to Deny, Exhibits A-D.

geographic market on a case-by-case basis in light of the particular facts of the transaction.⁴⁹ The affidavits from the Main Street principals are, however, merely anecdotal declarations that reference an ambiguous “Eastern Long Island” market. None of the affidavits defines the parameters of such a market. Nor do the submissions provide a methodology for us to delineate such an alternative market ourselves.

16. Main Street argues that its Petition to Deny described the “Eastern Long Island” market “to include the region ‘east of Hampton Bays,’”⁵⁰ a village approximately nine miles west of Southampton. This reference fails to specify if areas west of Hampton Bays might also be included in this so-called Eastern Long Island market, and thus fails to set a specific geographic boundary to define the market. Main Street further asserts that it identified a list of stations in the market.⁵¹ However, two of the eleven stations that Main Street lists as being in the Eastern Long Island market, WRIV(AM) and WFTU(AM), are licensed to Riverhead,⁵² which is approximately seven miles west of Hampton Bays. While Main Street’s Application for Review argues that Main Street’s Petition to Deny proposed a methodology to determine if a station is in the relevant market, *i.e.*, “an independent assessment” to determine if there are a “significant amount of actual listeners,”⁵³ Main Street’s Petition to Deny provided no methodology for determining the geographic boundary of the alternative market. Accordingly, we find that Main Street failed to meet its procedural burden to justify a departure from our presumptions regarding the relevant geographic market. On the facts before us, we conclude that the Nassau-Suffolk Metro comprised the market and that the stations listed by BIA as “home” to the Metro were the market participants. Having evaluated the evidence before us regarding the Nassau-Suffolk Metro, we find that the proposed assignment did not harm competition within that Metro.

IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED**, that the Application for Review filed by Main Street on March 28, 2003, **IS DENIED**, and that the Application for Review filed by Jarad on March 28, 2003, **IS DENIED. IT IS FURTHER ORDERED**, that the Motion for Stay filed by Main Street on March 7, 2003, **IS DISMISSED AS MOOT**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁹ See *Local Radio Ownership NPRM*, 16 FCC Rcd at 19896.

⁵⁰ Main Street Application for Review at 16-17. The reference in the Petition to Deny to which Main Street refers states that the relevant market “approximates that portion of Long Island east of Hampton Bays.” Main Street Petition to Deny at 2.

⁵¹ See Main Street Application for Review at 17; Main Street Petition to Deny, Exhibit E.

⁵² Main Street Petition to Deny, Exhibit E.

⁵³ Main Street Application for Review at 18-19.

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *In re Application of Peconic Bay Broadcasting Corporation and AAA Entertainment Licensing LLC for Assignment of Construction Permit of Station WEHM(FM) (formerly WCSO(FM)), Southampton, New York – File No. BAPH-20011207AAK*

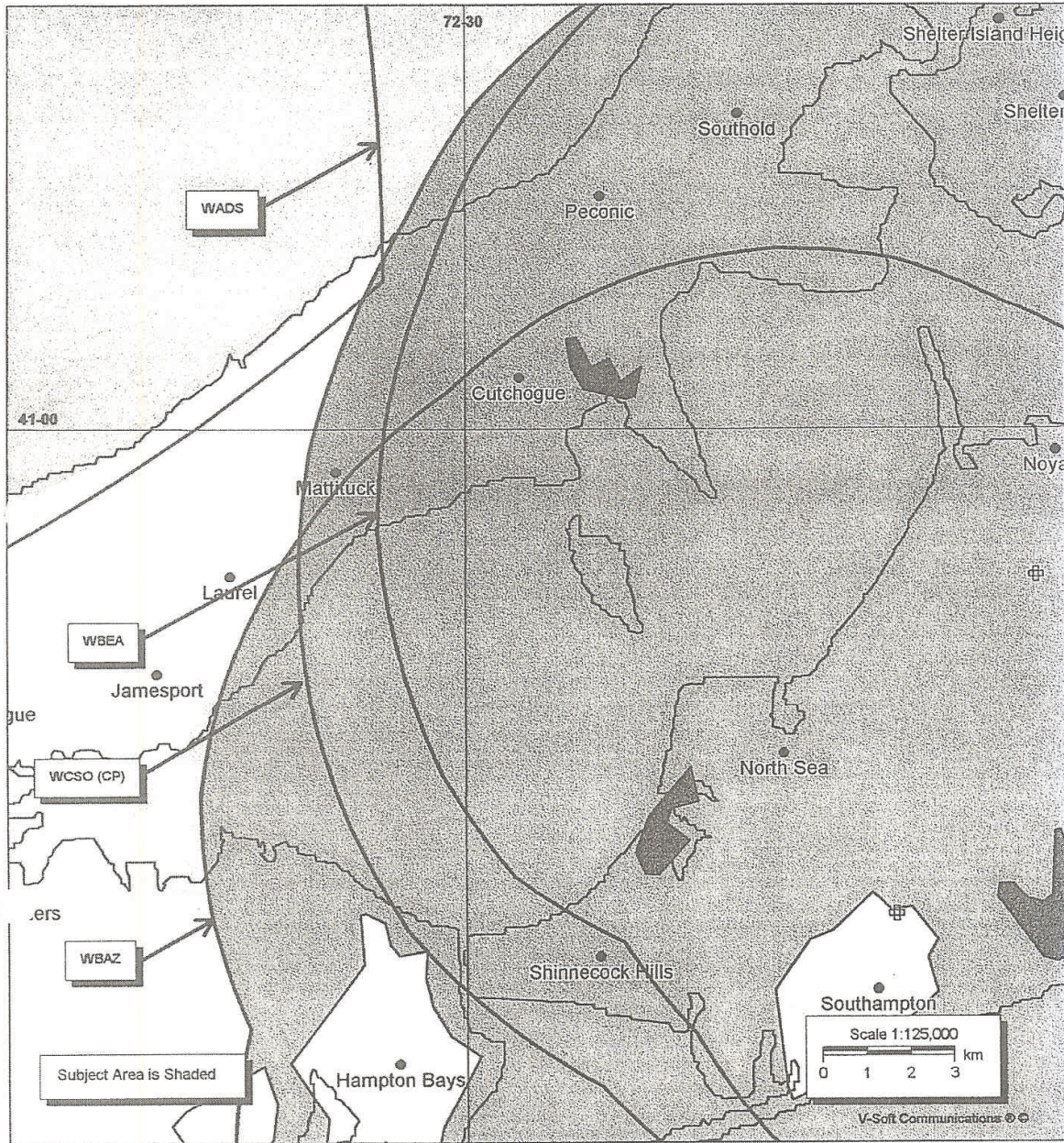
This case is about defining local radio markets for purposes of our multiple ownership rules. While I concur in the result, it demonstrates just how irrational the Commission's old "contour-overlap" methodology could be and why moving to Arbitron markets was such an improvement.

In this case, AAA Entertainment sought FCC approval to own four FM stations on Eastern Long Island. The only way it could own that many FM stations under our rules, however, is by counting three Connecticut AM radio stations as being "in" the Eastern Long Island market—notwithstanding the fact that the Connecticut stations are separated from Long Island by Long Island Sound. Not surprisingly, there is no evidence in the record that these Connecticut stations focus on the needs of Eastern Long Island or that any economist would consider them part of the same local economic market. Indeed, the Commission's competition analysis tacitly acknowledges that they are in different markets by ignoring the Connecticut stations in assessing the competitive consequences of the proposed transaction.

A closer look at one of the Connecticut stations demonstrates the illogic of applying the contour-overlap methodology in this case. WADS-AM is licensed to serve the community of Ansonia, Connecticut, approximately 140-160 driving miles (via New York City) from the relevant area of Eastern Long Island. Given the distance, there is little chance that businesses on Eastern Long Island would advertise on WADS, or that residents on Eastern Long Island would commute to or shop in Ansonia, Connecticut. Given those facts, how does today's Order count WADS as being "in" the Eastern Long Island market? As the petitioner argues, it is at least partially due to the unique propagation characteristics of salt water. In Connecticut, WADS's signal forms a roughly circular pattern with a radius of about fifteen miles. But once the signal hits the Long Island Sound, it takes off and travels approximately another thirty miles before dying quickly when it hits the Long Island coastline. WADS's signal contour thus resembles something like an ice cream cone jutting across Long Island Sound. At the very tip of the cone, WADS's signal contour barely overlaps with the predicted contour of WCSO, one of the stations in AAA's proposed combination. I have attached to this statement the contour map showing WADS's overlapping "service" to Long Island. I will leave it to those with better eyes than mine to determine the precise overlap area, but to me it looks like about a quarter mile right near the shoreline.

The petitioner raises many of these concerns but the Order rejects them, finding that: (1) the degree to which salt water propagation allows the signals of WADS and the other Connecticut stations to cross Long Island Sound is "undeterminable;" and (2) the overlap areas between the Connecticut stations and the proposed combination on Long Island "occur partially over land" and not solely over open water. Those assertions may both be technically true, but they also blink at reality. We may not know precisely the effect of salt water propagation, but one look at the Connecticut stations' oddly-shaped signal contours indicates that its impact is significant. And while WADS does indeed overlap with WCSO "over land," an overlap of a few hundred yards on a beach can hardly be deemed meaningful "service" to Eastern Long Island.

In the end, I concur in today's Order because it comports with the Commission's rules in effect when the transaction was consummated. It is a good reminder, however, of why the contour-overlap methodology was rightly scrapped in Arbitron-defined markets.



**EXHIBIT #3A
WADS SERVICE TO SUBJECT AREA**

**MULTIPLE OWNERSHIP
COMPLIANCE STUDY
All New York**

Bromo Communications, Inc.
Atlanta, Georgia
February 2002