

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

In re Applications of: )  
)  
ACT III COMMUNICATIONS )  
HOLDINGS, L.P. )  
(Transferor) )  
)  
and )  
)  
A-3 ACQUISITION, INC. )  
(Transferee) )  
)  
For the Transfer of Control of )  
)  
WUTV(TV), Buffalo, New York )  
WUHF(TV), Rochester, New York )  
WXLV-TV, Winston-Salem, )  
North Carolina )  
WRGT-TV, Dayton, Ohio )  
WZTV(TV), Nashville, Tennessee )  
WRLH-TV, Richmond, Virginia )  
WVAH-TV, Charleston, West Virginia )  
WTAT-TV, Charleston, South Carolina )

File Nos. BTCCT-950621KJ  
BTCCT-950621KK  
  
BTCCT-950621KL  
BTCCT-950621KM  
BTCCT-950621KN  
BTCCT-950621KO  
BTCCT-950621KP  
BTCCT-950621KQ

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 1995

Released: January 16, 1996

By the Commission: Commissioner Barrett dissenting and issuing a separate statement.

1. The Commission has before it for consideration the applications of Act III Communications Holdings, L.P. to transfer control of Act III Broadcasting License Corporation ("Act III"), licensee of the above-captioned television stations, to A-3 Acquisition, Inc. ("A-3"). Because television stations WUTV(TV), Buffalo, New York (Channel 29, Fox) and WUHF(TV), Rochester, New York (Channel 31, Fox) have overlapping Grade B contours, A-3 requests a waiver of the Commission's duopoly rule, 47 CFR § 73.3555(b), which proscribes common ownership of television stations with overlapping contours. Action on these applications was deferred while the license renewal

application for WXLV-TV Winston-Salem, North Carolina (formerly WNRW-TV) remained pending before the Commission. On November 6, 1995, the Commission released a Memorandum Opinion and Order granting the license renewal. *Memorandum Opinion and Order and Notice of Apparent Liability*, FCC 95-448. On November 9, 1995, A-3 amended its transfer applications to include the instant request for duopoly waiver. A-3 filed supplemental amendments to its waiver request on November 20, 1995 and November 30, 1995. On December 1, 1995, public notice of the waiver request was given. The applications and waiver request are unopposed.<sup>1</sup>

2. In support of its request for a waiver, A-3 principally argues that there has been no essential change in the factors cited by the Commission in its approval of the current waiver permitting common ownership of WUTV(TV) and WUHF(TV) by Act III. *Citadel Communications Company, Ltd.*, 5 FCC Rcd 3842 (1990) (granting a 12-month waiver) and *Citadel Communications Company, Ltd.*, 8 FCC Rcd 855 (1993) (granting a permanent waiver). A-3 urges that a waiver is warranted because it would merely reaffirm the existing ownership pattern.

3. A-3 states that the overlap area is a rural area consisting of small towns, the largest of which are Batavia (population of 16,310) and Albion (population of 5,863). A-3 has submitted an engineering study demonstrating that the Grade B contour overlap between WUTV(TV) and WUHF(TV) encompasses an area of 319 square miles (826 square kilometers) and an overall population of 45,927. The study indicates that the overlap contains 10.9% of the service area and 4.5% of the population of WUHF(TV) and represents 11.5% of the service area and 3.5% of the population within WUTV(TV)'s contour. A-3 contends that these population and service area percentages are consistent with past grants of duopoly waivers.

4. A-3 further represents that the overlap area is served by several off-the-air stations. A-3 states that the predicted Grade B contours of ten other television stations (six network affiliates, one independent and three non-commercial stations) reach the WUHF(TV)-WUTV(TV) overlap area. A-3 similarly states that portions of the overlap area are served by two cable systems. The Batavia system, A-3 indicates, has a total of 57 channels, 15 of which are devoted to television broadcast stations. The Albion system has 53 channels, of which 14 are dedicated to television broadcast stations. According to A-3, several of the cable channels also carry local programming and sell local advertising.

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<sup>1</sup>On August 7, 1995, a petition to deny the transfer application for WZTV(TV), Nashville, Tennessee was filed by WNAB - Channel 58 Nashville, Inc. ("WNAB"). WNAB subsequently requested withdrawal of the petition. After review of the matters contained in the petition, we find that they raise no substantial and material questions of fact requiring further inquiry. *Booth American Company*, 58 FCC 2d 553, 554 (1976).

5. A-3 additionally notes that the stations at issue are independently operated. A-3 contends that each station currently has its own general manager, neither of whom reports or answers to the other, and that this management style will be continued upon acquisition of the stations. A-3 also promises to continue the current licensee's commitment to employing separate national sales representation firms for each station and to refrain from participation in either combination sales or in the joint acquisition of syndicated programming.

6. A-3 further contends that WUHF(TV) and WUTV(TV) serve separate and distinct markets. WUTV(TV) is located in the nation's 36th largest market, Buffalo, New York and WUHF(TV) is licensed to the nation's 71st largest market, Rochester, New York.<sup>2</sup> A-3 also reports that the demographic characteristics of each market are distinct. A-3 claims that the Buffalo market has a smaller minority presence than does Rochester (Black: 8.3% versus 10.1%; Asian: 0.9% versus 1.7% and Spanish Speaking: 2.2% versus 3.5%).<sup>3</sup> Buffalo, A-3 states, has a higher unemployment rate than Rochester (6.3% versus 5.4%) but a lower percentage of college-educated residents (18.8% versus 22.9%) and "management/professional" persons (25.9% versus 28.6%).<sup>4</sup>

7. A-3 argues that neither station dominates its market in that each remains fourth in its respective market shares and suffers the increased operational and signal propagation costs associated with UHF television stations. A-3 argues that this persistent signal and audience share disadvantage diminishes the stations' ability to achieve an undue concentration of economic power. While acknowledging both stations' affiliation with the same network, A-3 asserts that the duplicative network programming is unrelated to the stations' ownership.

8. When Act III sought a permanent waiver in 1993, it expressed its intent to create a local, nightly news program on WUHF(TV). Act III pledged to initiate this late evening newscast for Rochester, dependent on Fox's development of network news services. Subsequently, in December 1993, Act III advised the Commission that, as the Fox national news plans did not materialize, the station did not have the resources to produce this program alone. However, Act III stated that it was starting a weekly half-hour public affairs program, *Fox 31-Forum*, which featured local and regional civic leaders discussing issues of importance to the viewers in its community. The program addressed issues of importance as ascertained by the station's personnel and, it believed, would meet viewer needs not currently being covered by other area stations. In addition, the following March, A-3 states that Act III began broadcasting a locally-produced weekly half-hour children's program, *The Adventures of Gary the Happy Pirate*. This program won the New York State Broadcast Award in 1994 and a Bronze National Telly Award in 1995 as the best series designed for children. A-3 indicates that the host of the program is a well-known local children's entertainer and, though the show

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<sup>2</sup> A-3 cites to the *1995 Broadcasting and Cable Yearbook*.

<sup>3</sup> A-3 cites to BIA's *1995 Investing in Television Market Report*.

<sup>4</sup> A-3 cites to *Duncan's Radio Market Guide* (1995 edition).

is targeted for children ages two to six, it has educational benefits for all children. As justification for its waiver, A-3 states that it will maintain the broadcast of these two locally-produced programs. A-3 further promises to begin producing and broadcasting a second public affairs program, tentatively named *Rochester Talks Back*, for WUHF(TV). *Rochester Talks Back* will be a half-hour weekly program broadcast on Saturday evenings and then repeated on Sundays. A-3 notes that the show will be hosted by a Rochester native who has served as an anchor and reporter for another Rochester television station. The program, A-3 states, will provide an in-depth view of local issues in a documentary format. Its topics will be determined as a result of WUHF's on-going efforts to ascertain the Rochester area's problems, needs and interests.

## DISCUSSION

9. The ultimate objective of the duopoly rule, as well as of the other multiple ownership rules, is to promote maximum diversification of program and service viewpoints and to prevent an undue concentration of economic power contrary to the public interest. *Multiple Ownership Rules*, 22 FCC 2d 306, 307 (1970), *recon. granted in part*, 28 FCC 2d 662 (1971). However, the Commission has allowed common ownership of stations with overlapping Grade B contours in two circumstances: where the signal overlap is *de minimis*, or where the public interest benefits to be gained from waiving the rule outweigh any detrimental effects resulting from the overlap. *H & C Communications*, 9 FCC Rcd 144, 145 (1993). The Commission evaluates requests for duopoly waiver based on several factors including: (1) the size of the overlap area and the population within the geographic area; (2) the separateness of the markets within which the two stations are located; (3) the diversity of voices available to the population residing within the area of overlap; (4) the independence of the stations' operations; (5) the resulting concentration of economic power; and (6) any public interest benefits attained from the proposed combination. *Iowa State University Broadcasting Corp.*, 9 FCC Rcd 481, 487-88 (1993), *aff'd sub nom, Iowans for WOI-TV, Inc. v. FCC*, 50 F.3d 1096 (D.C. Cir. 1995). As a public interest consideration, the Commission has considered the opportunity for programming enhancement. *H & C Communications*, 9 FCC Rcd at 146.

10. Our past waiver cases have characterized *de minimis* as an overlap area representing less than 1% of both the area and population of the Grade B contour of each station. *Hubbard Broadcasting*, 2 FCC Rcd 7374 (1987). The extent of overlap in the instant case falls short of this strict standard. Yet, while the degree of overlap is not *de minimis*, we have previously found that it is not so large as to require a finding that WUTV(TV) "serves substantially the same area" as station WUHF(TV). *Citadel*, 8 FCC Rcd at 858, *citing, Capital Cities Communications, Inc.*, 59 RR 2d 451, 465 (1985). We have also previously found the overlap in this case<sup>5</sup> to be within the range of cases in which we have granted

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<sup>5</sup> We note that these overlap percentages are slightly higher than those submitted in Act III's prior waiver requests. See *Citadel*, 5 FCC Rcd at 3842 and *Citadel*, 8 FCC Rcd at

waivers.<sup>6</sup>

11. Regarding the distinctiveness of the markets, we reaffirm our prior conclusion that the markets are separate and distinct. Buffalo is the nation's 36th largest television market while Rochester is the nation's 71st largest. Buffalo and Rochester are also located 70 miles from one another. *Citadel*, 8 FCC Rcd at 856. The applicant has further shown that the markets differ in several demographic qualities. A-3's pledge to continue the separate management of the stations and to maintain their independent operation by the use of different national sales firms and abstention from cooperation in the stations' programming and operational strategies additionally minimize any adverse effect on competition in the overlap area.

12. We further note the diversity of voices in the overlap area. It appears that it receives ten off-the-air television signals in addition to WUHF(TV) and WUTV(TV). The numerous signals in the overlap area assure a diversity of voices to viewers within the area and make it unlikely that permitting the overlap will result in the exercise of inordinate influence by A-3 on public opinion. As to concentration of economic power, we observe that both WUTV(TV) and WUHF(TV) are UHF stations, ranked only fourth in terms of audience share in their markets. Their non-dominant positions in the marketplace reduce concerns about their impact on competition in the overlap area. Further, this station combination has existed for several years without undue adverse effects on media diversity or competition.

13. Finally, A-3's commitment to continue broadcast of *Fox 31-Forum* and *The Adventures of Gary the Happy Pirate* and its commitment to develop and broadcast *Rochester Talks Back* weigh in favor of granting this request. *Fox 31-Forum* is broadcast on a weekly basis, features local and regional topics and is locally produced. *The Adventures of Gary the Happy Pirate* has received both state and national acclaim as a children's program and features a prominent local children's entertainer. Moreover, *Rochester Talks Back* will feature a local anchorperson, address locally relevant issues and be broadcast twice each week. The Commission previously has taken these public interest factors into account when evaluating waiver requests,<sup>7</sup> and we find that A-3's promise to continue this programming provides additional support for grant in this case.

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855 (area overlap of 11.3% and 10.7% and population overlap of 3.1% and 4.3%).

<sup>6</sup>See *Pegasus Broadcasting, Inc.*, 7 FCC Rcd 8625 (1992) (area overlap of 7.7% and 6.9% and population overlap of 7.6% and 3.9%).

<sup>7</sup>See, *H & C Communications*, 9 FCC Rcd at 145 (expanded news and weather programming and enhanced children's programming) and *Capital Cities*, 59 RR 2d at 465 (expanded broadcast service to New Jersey and Delaware).

14. Upon consideration of the arguments presented and the representations made, we conclude that any detriment realized by creation of the contour overlap would be outweighed by the public interest benefits generated by common ownership of WUTV(TV) and WUHF(TV). We find, for the reasons discussed above, that grant of this duopoly waiver would serve the public interest, convenience and necessity. We further conclude that A-3 is qualified to be a licensee in all other respects and we find that grant of the instant applications will inure to the public interest.

15. Accordingly, IT IS ORDERED, That the request for permanent waiver of the Commission's duopoly rule, 47 CFR § 73.3555(b), is GRANTED. IT IS FURTHER ORDERED That the applications of Act III Communications Holdings, L.P. to transfer control of Act III Broadcasting License Corporation, licensee of WUTV(TV), Buffalo, New York; WUHF-TV, Rochester, New York; WXLV-TV, Winston-Salem, North Carolina; WRGT-TV, Dayton, Ohio; WZTV(TV), Nashville, Tennessee; WRLH-TV, Richmond, Virginia; WVAH-TV, Charleston, West Virginia and WTAT-TV, Charleston, South Carolina (File Nos. BTCCT-950621KJ-KO), to A-3 Acquisition, Inc. are hereby GRANTED and is effective upon adoption.

**FEDERAL COMMUNICATIONS COMMISSION**

**William F. Caton**  
Acting Secretary

DISSENTING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

**RE: Act III Communications Holdings, L.P., Applications for Transfer of Control.**

Today, the Commission grants the applications of Act III Communications Holdings, L.P., to transfer control of Act III Broadcasting License Corporation ("Act III") to A-3 Acquisition, Inc. ("A-3"). In granting the subject applications, the Commission also grants A-3 a waiver of the Commission's duopoly rule as a result of the Grade B contour overlap between television station WUTV(TV), Buffalo, New York and WUHF(TV), Rochester, New York.

The Commission granted Act III a temporary twelve-month waiver in 1990<sup>1</sup> and made that waiver permanent in 1993.<sup>2</sup> In support of its instant duopoly waiver request, A-3 principally argues that there has been no essential change in the factors cited by the Commission in its 1993 approval of the current waiver permitting the common ownership of WUTV(TV) and WUHF(TV) by Act III. I dissented in Citadel Communications because I did not find that the facts of the case nor the stated public interest justifications for grant of a permanent duopoly waiver to Act III outweighed the Commission's concerns with the promotion of diversity and competition.

Thus, because the circumstances herein remain the same as those in the 1993 Citadel decision, I am compelled to dissent to the instant decision. In addition, the Commission has acknowledged in the instant case that the overlap percentages are slightly higher than those submitted in Act III's prior waiver requests. Consequently, based on my prior position with regard to Citadel Communications, as well as my concerns in cases in which the Commission now relies to grant the instant duopoly waiver request,<sup>3</sup> I cannot support this Commission action.

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<sup>1</sup> See Citadel Communications Company, Ltd., 5 FCC Rcd 3842 (1990).

<sup>2</sup> See Citadel Communications Company, Ltd., 8 FCC Rcd 855 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett) ("Citadel Communications").

<sup>3</sup> See eg., Pegasus Broadcasting, Inc., 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett).