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Harry C. Martin, Esq.
Harry F. Cole, Esq.
Alison J. Shapiro, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street
11th Floor
Arlington VA 22209

John P. James, Esq.
Lommen, Nelson, Cole & Stageberg, PA
1800 IDS Center
80 South Eighth Street
Minneapolis MN 55042

Lee W. Shubert, Esq.
Katten Muchin Zavis Rosenman
1025 Thomas Jefferson Street, N.W.
East Lobby, Suite 700
Washington, D.C. 20007-5201

Re: KBMW(AM), Breckenridge, Minnesota
Facility ID No. 70500
File No. BAL-20020513AAO
Application for Consent to Assignment of License

Dear Counsel:

We have before us the above-captioned application (“Application”) of W-B Broadcasting, Inc. (“W-B”), and Monterey Licenses, LLC (“Monterey”), a wholly owned subsidiary of Triad Broadcasting Company, LLC (“Triad”).¹ The Application seeks our consent to the assignment from W-B to Triad of the license of broadcast station KBMW(AM), Breckenridge, Minnesota. On June 24, 2002, Randy K. Holland Investments, LLC (“Holland”), the licensee of KGBZ(FM), Harwood, North Dakota, timely filed a Petition to Dismiss or Deny (the “Petition”). Triad filed an Opposition to Petition to Dismiss or Deny on July 1, 2002 (the “Opposition”), and on July 31, 2002,

¹ Throughout this decision, we generally refer to Monterey as Triad.

Holland filed its Reply to Opposition to Petition to Dismiss or Deny (the “Reply”).² Based on the record before us, and for the reasons set forth herein, we find that grant of the Application is consistent with the public interest.

Background. KBMW(AM)’s community of license, Breckenridge, is in Wilkin County, Minnesota. The Arbitron “metro”³ nearest to Breckenridge is the Fargo, ND-Moorhead, MN, metro (“Fargo metro”) defined by Cass County, North Dakota, and Clay County, Minnesota. The Petition cites to BIA⁴ data listing five Triad-owned stations “home” to the Fargo metro.⁵ BIA also lists Holland’s station KGBZ(FM), Harwood, North Dakota, as home to the Fargo metro. KBMW(AM), however, is neither assigned by Arbitron to any metro nor listed by BIA as an out-of-market (“below the line”) station -- *i.e.*, one that has historically received revenue or audience share -- in the Fargo metro.

In proposed sales of radio stations that, like this one, are not assigned to an Arbitron metro, we do not ordinarily subject the transaction to a competition analysis.⁶ In this case, however, as discussed in detail below, Holland claims that the proposed transaction will have adverse effects on competition, particularly with respect to Holland’s KGBZ(FM). We must therefore evaluate Holland’s claim prior to determining whether or not grant of the Application is in the public interest. In so doing, we are guided by the Commission’s interim policy governing so-called “flagged” sales transactions.⁷ Holland raises no issues other than competition.⁸

² On July 3, 2002, Holland filed a Motion for Extension of Time (“Motion”) to file its Reply to the Opposition. Counsel for Triad and W-B raised no objection and we hereby grant the Motion. On September 30, 2002, Holland filed a Petition to Convert the Status of the Proceeding (“Petition to Convert”), asking (a) that a letter to Commission Chairman Michael Powell from U.S. Representative Jim Ramstad (“Ramstad Letter”) be deemed an *ex parte* presentation in violation of the Commission’s rules, and (b) that this proceeding be converted from “restricted” to “permit-but-disclose” under the Commission’s *ex parte* rules. *See* 47 C.F.R. § 1.1200(a) *et seq.* On October 1, 2002, counsel for Triad filed a letter opposing the Petition to Convert. By letter dated November 7, 2002, the Chief, Audio Division, Media Bureau, denied the Petition to Convert, finding that the Ramstad Letter had been served on Holland and was not an *ex parte* presentation, and also that the public interest would not be served by changing the status of this proceeding.

³ 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.

⁴ BIA is a communications and information technology, investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries. Unless otherwise specified, references throughout this document to BIA data refer to the BIA data cited by Holland.

⁵ These stations are KQWB(FM), KVOX(FM), KLTA(FM), KPFX(FM), and KQWB(AM).

⁶ *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets (“Local Radio Ownership NPRM”),* 16 FCC Rcd 19861, 19895 ¶¶ 85-86 n.137.

⁷ *Local Radio Ownership NPRM,* 16 FCC Rcd at 19894-97 ¶¶ 84-89.

⁸ In the “Conclusion” sections of its Petition and its Reply, Holland also asks that we “defer consideration of the Application pending the outcome of the FCC’s omnibus proceeding respecting the multiple

Holland’s claim regarding adverse competitive effects is premised on assertions that lack precision regarding the relevant geographic market and market participants. The resulting ambiguity makes our task more difficult, as it is not clear whether Holland is arguing that the Fargo metro is appropriately used for our analysis of this transaction, or whether some other unique market should be used. Holland rarely uses the term “metro,” a term the Commission has used in its numerous decisions to describe the Arbitron-defined geographic market typically evaluated in flagged cases. Throughout its pleadings, Holland uses a variety of terms other than “metro,” such as, for example, “the Fargo-Moorhead radio market,”⁹ “the Arbitron radio market,”¹⁰ “the region,”¹¹ “Fargo/Moorhead”¹² and several others.¹³ Holland never explains whether it intends the same meaning by these various terms or whether the inconsistent use of terminology is purposeful to convey different geographic boundaries.

One might infer nonetheless from certain of Holland’s statements that it assumes that the Fargo metro is the relevant geographic market in this case. For example, in its Petition, Holland references the presumption under our interim policy that “the Arbitron metro market is the relevant geographic market.”¹⁴ Holland also cites to Arbitron’s “Fargo-Moorhead (North Dakota/Minnesota) radio market” as ranked 215th in the nation, which corresponds to Arbitron’s metro ranking system and therefore, presumably, the Arbitron-defined Fargo metro.¹⁵ Under the heading “Market Participants,” Holland discusses and includes as an exhibit the BIA data for the Fargo metro.¹⁶ Holland repeatedly cites these BIA data and does not provide data for a larger or otherwise

ownership rules” Petition at 15; Reply at 11-12. Holland does not suggest a basis for doing so, however, and does not otherwise elaborate on this point. In any event, we find no grounds for deferral based on the evidence of record in this case.

⁹ See, e.g., Petition at i, 3; Reply at i, 5.

¹⁰ See, e.g., Reply at 4.

¹¹ See, e.g., Petition at i, 4; Reply at ii.

¹² See, e.g., Reply at 8.

¹³ The other terms used by Holland are “the Fargo, North Dakota, area” (e.g., Petition at 2), “the market” (e.g., Petition at 4-5), “the Arbitron metro market” (e.g., Petition at 8), “the Arbitron market for Fargo/Moorhead” (e.g., Reply at 5), “the Fargo-Moorhead market” (e.g., Petition at i, 4; Reply at i), and “the radio market” (e.g., Petition at i, 4; Reply at ii).

¹⁴ Petition at 8 (citing the *Local Radio Ownership NPRM*).

¹⁵ *Id.* at 1 n.1. See also *id.* at 8 n.17 (referencing other Arbitron-ranked metros as being distant “from Fargo”).

¹⁶ *Id.* at 9-10 & Exhibit 4.

different geographic area or set of market participants.¹⁷ Holland states, for example, that the revenue share for Triad's five stations is "nearly forty percent . . . of the radio revenues in the Fargo-Moorhead radio market,"¹⁸ presumably meaning the Fargo *metro*, as Holland cites in that instance to the BIA metro data, listing the five in-metro stations Triad currently owns. Holland likewise cites to the BIA metro data in stating that, when Triad's share is combined with that of Clear Channel Communications, Inc. ("Clear Channel"), which owns six in-metro stations, the total revenue share is more than 91%.¹⁹ Holland alleges that the addition of KBMW(AM) to "Triad's stable . . . only can exacerbate the revenue and audience disparity attributable to Triad/Monterey and Clear Channel by adding more bulk to the Triad/Monterey broadcast station cluster,"²⁰ presumably referring to the Triad/Clear Channel cluster in the metro.

At the same time, Holland makes other statements from which it would be reasonable to conclude that Holland intends the use of some other, perhaps larger, relevant geographic market for our analysis. Holland notes in its Reply that the Commission determines relevant geographic market on a case-by-case basis "without a presumption" when dealing with a station not assigned to any Arbitron metro.²¹ The definition of "market" for competition analyses, Holland states, "plainly is not locked only to BIA or Arbitron data."²²

Holland's assertions regarding market participants are intertwined with those concerning geographic market and are similarly imprecise. In the initial Petition, Holland does not assert that KBMW(AM) or its current owner participates in the Fargo metro. In rebuttal to Triad's Opposition, Holland argues that the "fact that [KBMW(AM)] is not rated . . . does not mean that [it] is not included in the Arbitron market for Fargo/Moorhead."²³ Holland further asserts that KBMW(AM)'s 0.5 mV/m contour "reaches far beyond" the cities of Fargo and Moorhead and that the station "has carried advertising for at least a half-dozen business enterprises that have their principal business locations in Fargo/Moorhead."²⁴ Holland thus claims that KBMW(AM) derives

¹⁷ Petition at i, 4, 5 (citing also various BIA data for the Fargo metro to estimate the listening shares of Triad's and Clear Channel's stations), 9-10, 11-12 (Herfindahl-Hirschman data for stations in the Fargo metro); Reply at i-ii, 8.

¹⁸ Petition at 5. *See also id.* at 10 (providing a chart of licensees and their respective revenue and audience shares as reported by BIA for the Fargo metro).

¹⁹ Petition at i, 10; Reply at ii.

²⁰ Petition at 10.

²¹ Reply at 3 (citing *Local Radio Ownership NPRM*, 16 FCC Rcd at 19896 n.138).

²² *Id.* at 3 (emphasis omitted) (citing *Gowdy FM 95, Inc.*, 17 FCC Rcd 5449, 5451 (2002) ¶ 7).

²³ *Id.* at 5.

²⁴ *Id.* at 6-7.

advertising revenue from the “Fargo-Moorhead radio market”²⁵ and functions “as an element of” that market.²⁶ According to Holland, these facts support the argument that the proposed transaction will have a measurable competitive impact on the “Fargo-Moorhead radio market.”²⁷

Holland also states that KBMW(AM) “is included within the Arbitron radio market, because Wilkin County, Minnesota, is included within the Arbitron [Fargo-Moorhead, ND-MN Total Service Area (“TSA”)].”²⁸ Holland explains that the Arbitron-defined TSA encompasses the “Metro Survey Area and all adjacent counties in which Metro licensed stations achieve the level of listening required to meet Arbitron’s TSA qualification criteria.”²⁹ Triad’s station KLTA(FM), also licensed to Breckenridge in Wilkin County, “appears in BIA and Arbitron data as a rated station in the Fargo/Moorhead market.”³⁰ According to Holland, “KLTA, therefore, meets Arbitron’s TSA qualification criteria, and thereby qualifies Wilkin County, Minnesota, as an element of the Arbitron radio market.”³¹ That factor in turn, Holland asserts, “subsumes KBMW, by default, in the Fargo/Moorhead radio market.”³²

From these statements, it is reasonable to infer Holland’s belief that because one station located in Wilkin County, KLTA(FM), is listed by BIA as in the Fargo metro, all stations located in Wilkin County, including KBMW(AM), are participants in the Fargo metro. Holland’s statements about the Fargo-Moorhead TSA also suggest Holland’s belief that all stations located in the TSA should be deemed participants in the metro. The only data that Holland produces for calculating market revenue shares, however, are for the stations reported by BIA in the Fargo metro, as discussed above.

Triad argues that KBMW(AM) is not in the “Fargo-Moorhead metro market” and that, therefore, its acquisition of that station cannot harm competition there.³³ Triad points out that none of the revenue, audience or other market data cited by Holland pertains to KBMW(AM) or its owner, W-B. According to Triad, Holland does not provide any support for its “notion that KBMW has any measurable audience or revenue

²⁵ *Id.* at i.

²⁶ *Id.* at 6.

²⁷ *Id.* at 8.

²⁸ *Id.* at 5.

²⁹ *Id.* at 4 (emphasis omitted) (citing Arbitron Radio’s “May 2001 Update,” which is included as Attachment 1 to the Reply, explaining how Arbitron has changed its TSA qualification criteria).

³⁰ *Id.* at 4.

³¹ *Id.*

³² *Id.* at 5.

³³ Opposition at 2-4.

share in the Fargo-Moorhead market.”³⁴ Regarding signal contours, Triad notes that KBMW(AM)’s predicted 5 mV/m contour does not reach “the Fargo metro market” and that, although its predicted 2 mV/m contour reaches slightly into that area, it still falls about ten miles short of both Fargo and Moorhead.³⁵ Triad’s engineering expert states that “KBMW fails to place a competitive signal over any meaningful portion of [the Fargo] metro area”³⁶ Triad also notes that the trade press article cited by Holland indicates “[i]t’s a stretch to say that KBMW-AM is in the Fargo market”³⁷

With respect to KGWB(FM), Wahpeton, North Dakota (in Richland County), currently licensed to Guderian Broadcasting, Inc. (“GBI”), Holland alleges that Triad is attempting to add further to its economic power in the “Fargo-Moorhead radio market” through its involvement with this station.³⁸ Like KBMW(AM), KGWB(FM) is not assigned by Arbitron to any metro and is not listed by BIA as having historically received a revenue or listener share in the Fargo metro. Holland notes that Triad (through a subsidiary) sells advertising time on this station pursuant to a joint sales agreement (“JSA”).³⁹ Triad also has an option to buy KGWB(FM), but is currently prohibited from owning an additional station in the market pursuant to our local radio ownership rules, 47 C.F.R. § 73.3555(a).⁴⁰

While Holland concedes that the JSA is consistent with Commission rules, Holland alleges that because KGWB(FM) “also serves the Fargo-Moorhead radio market,” the JSA has adverse implications for Triad’s revenue concentration in the market.⁴¹ According to Holland, this is particularly so in light of GBI’s plans to move the station’s transmitter closer to Fargo, change its frequency from 107.1 to 106.9 MHz, and upgrade it from a Class A facility to a Class C2 facility.⁴² Holland alleges that as a result, KGWB(FM) “economically will be in lockstep with all the Triad/Monterey stations in the

³⁴ *Id.* at 4 (emphasis omitted).

³⁵ *Id.* at 3 n.6 and Exhibit C (Engineering Statement in Support of Opposition to Petition to Dismiss or Deny, by Carl E. Smith Consulting Engineers) (“Engineering Statement”), Figure 1.0.

³⁶ Engineering Statement at 1.

³⁷ Opposition at 3 n.6 (citing Petition, Exhibit 2, referencing article by Jack Messmer, *Triad Expands Fargo Cluster*, RADIO BUSINESS REPORT (May 20, 2002)).

³⁸ Petition at 3 n.5; Reply at 8-9.

³⁹ Petition at 3, 7 n.13.

⁴⁰ *See id.* at 7 n.13. Triad voluntarily submitted a copy of the JSA and the Option agreement with the Application.

⁴¹ Petition at 3-5; Reply at 8-9.

⁴² Petition at 3 n.5. The Commission granted a construction permit for these minor modifications on July 8, 2002. *See* Public Notice, *Broadcast Actions*, Report No. 45274, released July 11, 2002. Holland did not contest the minor modification application.

Fargo-Moorhead radio market, thereby amplifying Triad's audience, marketing, business, and colossal economic clout."⁴³ Holland asks that we set aside the JSA or "investigate the implications of the JSA."⁴⁴

Triad emphasizes that it does not own KGWB(FM) and that therefore the licensee's relocation of the transmitter "should not be a factor in the Commission's deliberations" on the Application.⁴⁵ Moreover, Triad asserts, KGWB(FM) does not participate in the Fargo metro, as demonstrated by the BIA and Arbitron materials relied upon by Holland.⁴⁶ Therefore, Triad argues, the JSA with KGWB "will have no cognizable effect on economic concentration in the Fargo-Moorhead metro market."⁴⁷

Discussion. We reiterate that Holland's treatment of the relevant geographic market and market participants lacks precision and clarity. Assuming that Holland is arguing that the relevant geographic market for evaluating the impact of this proposed transaction is the Fargo metro and that KBMW(AM) participates in that metro, Holland has not adequately supported such an argument. Holland has not challenged the Arbitron data as reported by BIA, which do not include KBMW(AM) or W-B in the Fargo metro. Nor has Holland provided alternative data or other information sufficient to support its claim that KBMW(AM) competes with KGBZ(FM) or other stations in the metro. The evidence regarding signal contours establishes that KBMW(AM) reaches some listeners in the Fargo metro. While certain enterprises in the Fargo metro might purchase advertising time on KBMW(AM), this does not necessarily establish that Fargo advertisers are relying on such advertising to reach Fargo metro listeners. Rather, it is reasonable to presume that such advertising is targeted to Breckenridge listeners. Notably, the advertisers Holland lists as advertising on KBMW(AM) are entities that draw clientele from a large regional area, not just from Fargo and Moorhead and communities within the metro.⁴⁸ Holland offers no evidence that KBMW(AM) derives a sizable percentage of its advertising revenues from these Fargo metro entities or has sales people devoted to the Fargo metro.

We also reject Holland's contention that KBMW(AM) is properly analogized to KLTA(FM). KLTA(FM) operates at 100 kW, has a reportable revenue and audience

⁴³ Petition at 12. *See also id.* at 3 n.5, 7 n.13; Reply at 9 n.18.

⁴⁴ Petition at 4. *See also id.* at 16; Reply at 12.

⁴⁵ Opposition at 5.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ The businesses that Holland lists are a home siding company, motels, an entertainment arena, a large hospital and health care facility, a speedway, and a medical testing facility. *See* Reply at 6. The hospital/health care facility, for example, has offices in more than 30 locations throughout Minnesota and North Dakota. *See* MeritCare, Locations, <http://www.meritcare.com/guidebook/directories/locationlist.asp> (visited Nov. 20, 2002).

share in the Fargo metro according to BIA data, as cited by Holland,⁴⁹ and broadcasts from a tower five miles from the Fargo metro. KBMW(AM), however, operates at only 1 kW, broadcasts from a tower 25-30 miles from the Fargo metro and, as Holland concedes, “does not, or has not, achieved sufficient survey diary responses to be rated” by BIA as being in the Fargo metro.⁵⁰

We further find without merit the notion that, because KLTA(FM) is in Wilkin County, which is in Arbitron’s Fargo TSA, KBMW(AM) should be deemed a participant in the Arbitron metro. By this logic, all stations in the TSA should be considered participants in the metro. Holland cannot cite to any radio assignment case in which we have found it reasonable to deem all the stations located in a TSA as participants in a metro, and Holland does not cite to factors that provide a basis for doing so here.⁵¹ Moreover, Holland has not provided revenue data for -- or even identified -- all the other stations in Wilkin County, let alone the other counties in the TSA, that would be included in our competition analysis, even were we to adopt such an approach for this transaction.

Assuming, arguendo, that Holland is, instead, asserting that a unique “Fargo-Moorhead radio market” other than the Arbitron-defined Fargo metro is the relevant geographic market for our analysis, Holland has not provided the requisite support for such an assertion. Holland is correct in stating that, in radio transactions involving non-Arbitron rated stations, we are not bound by our interim policy presumptions and may determine the relevant geographic market based on the particular facts of the transaction. The burden, however, is on the requesting party -- in this case, Holland -- to provide adequate information to define a unique geographic market. Holland has provided no such information. Holland also fails to provide any alternative revenue or audience share data to assess a specific group of stations that might be competing in a market different from the Fargo metro.

Likewise with respect to KGWB(FM), Holland has not demonstrated that this station is properly considered a participant in the Fargo metro. Hence, even if we were to evaluate for competition purposes Triad’s revenues earned through the JSA (which revenues Holland has, in any event, not provided to us), such revenues are not appropriately considered with the revenues of any in-metro stations, including Triad’s. To the extent that Holland may be arguing that we use a different geographic market other than the metro to evaluate the impact of the JSA, Holland has failed to provide data to establish a unique, clearly defined geographic market in which both KBMW(AM) and KWGB(FM) compete.

⁴⁹ Petition, Exhibit 3.

⁵⁰ Reply at 5.

⁵¹ If Holland’s intent is to assert that the relevant geographic market is the Fargo-Moorhead, ND-MN TSA, we note that, to date, the Commission has not accepted a TSA as the relevant geographic market in a radio station merger. *See, e.g., Golden Triangle Radio, Inc.*, 17 FCC Rcd 5373, 5380 (2002) ¶ 22.

In sum, Holland has not provided any evidence to persuade us that, contrary to the BIA data, KBMW(AM) participates in the Fargo metro. Consequently, we conclude that the proposed assignment is not likely to harm competition either within the metro generally or, specifically, with respect to KGBZ(FM). Moreover, Holland has not established any other relevant geographic market for evaluating the competitive effects of the proposed sale of KBMW(AM). We are thus unable to conclude that the proposed sale is likely to harm competition in any particular market.

Conclusion. Based on our review of the record, we find no substantial and material question of fact to warrant further inquiry or designate the Application for hearing. We find that Monterey Licenses, LLC is qualified as the assignee and that grant of the Application is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED that the application to assign the license for station KBMW(AM), Breckenridge, Minnesota, from W-B Broadcasting, Inc., to Monterey Licenses, LLC (File No. BAL-20020513AAO) IS GRANTED. IT IS FURTHER ORDERED that the Petition to Dismiss or Deny the Application, filed by Randy K. Holland Investments, LLC, IS DENIED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau