

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

In Re Application of)	
)	
KCWE-TV, INC)	
(Assignor))	File No. BALCT-20050810ABL
)	Facility ID No. 64444
and)	
)	
KCWE LMA, INC.)	
(Assignee))	
)	
For Consent to the Assignment of)	
KCWE(TV), Kansas City, Missouri)	

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 2006

Released: August 15, 2006

By the Chief, Media Bureau

1. The Chief, Media Bureau, acting pursuant to delegated authority, herein considers the above-captioned application to assign the license of KCWE(TV), Channel 29 (UPN), Kansas City, Missouri, from KCWE-TV, Inc. (“Assignor”) to KCWE LMA, Inc (“Assignee”), a subsidiary of the Hearst Corporation (“Hearst”). This application is unopposed.

2. Hearst currently programs KCWE(TV) pursuant to a grandfathered time brokerage agreement (“TBA”) dated August 24, 1995. Hearst is also the ultimate parent company of KMBC Hearst-Argyle Television, Inc., licensee of KMBC-TV, Kansas City, Missouri. KMBC-TV is in the same Kansas City DMA as, and has overlapping Grade B signal contours with, KCWE(TV).¹ While KCWE(TV) is not ranked among the top four stations in the DMA, common ownership of both stations would violate the Commission’s duopoly rule since there would not be eight independently owned and operating commercial and noncommercial educational television stations post-merger. Accordingly, Hearst requests a waiver of Section 73.3555(b)(2) of the Commission’s rules to permit it to acquire KCWE(TV) on the basis that it is an “unbuilt station.” Although KCWE(TV) is now operational, Hearst bases its waiver request on circumstances as they existed just prior to its 1995 time brokerage agreement (“TBA”), when KCWE(TV) was unbuilt.

¹ Because this would be Hearst’s second station in the Kansas City DMA, its proposed acquisition of KCWE(TV) is governed by Section 73.3555(b)(2) of the Commission’s rules. That rule provides that an entity may own, operate or control two television stations licensed in the same Designated Market Area (“DMA”) (as determined by Nielson Media Research) if: (1) the Grade B contours of the stations do not overlap; or (2) if at least one of the stations is not ranked among the top four stations in the DMA in terms of audience share and eight or more independently owned and operating commercial and noncommercial educational television stations would remain in the market post-merger.

3. **Duopoly Waiver.** The Commission's *Local Ownership Order*² established the criteria for a waiver of the television duopoly rule for an "unbuilt station." These criteria are: (1) the combination will result in the construction of an authorized, but as yet unbuilt station; (2) the permittee has made reasonable efforts to construct, but has been unable to do so; and (3) the in-market buyer is the only reasonably available candidate willing and able to acquire the construction permit and build the station, and selling the station to an out-of market buyer would result in an artificially depressed price. Ordinarily, an applicant for an unbuilt station duopoly waiver must set forth the efforts to sell the station to an out-of market buyer. However, this showing is not required of a waiver applicant that seeks to acquire a station with which it entered into a TBA arrangement prior to the adoption of the *Local Ownership Order* on August 5, 1999.³ Such is the case here, where the TBA arrangement for KCWE(TV) has existed since August, 1995. Thus, the assignor need only demonstrate compliance with the first two prongs of the unbuilt station waiver standard. Moreover, parties to grandfathered TBAs in existence prior to November 5, 1996, such as the assignor, may base waiver requests on circumstances as they existed at the time just prior to the parties entering into the TBA.⁴ Thus, KCWE(TV)'s present operational status is not a bar to Hearst seeking a waiver based on its status as an unbuilt station.

4. The Commission granted KCWE(TV)'s initial construction permit to the assignor (then T.V. 32, Inc.)⁵ on July 3, 1993. Ultimately, through October 19, 1998, it filed for and the Commission granted six requests for extensions of time to construct the station. The assignor avers that the station was constructed and the Commission granted KCWE(TV)'s license on August 19, 1999. The assignor declares that when it entered into the TBA with Hearst on August 24, 1995, KCWE(TV) was an unbuilt station authorized pursuant to a valid construction permit. As part of the consideration under the TBA, the assignor avers that Hearst provided the funds, equipment, and programming necessary for the construction and operation of the station. Prior to Hearst entering into the TBA, states the assignor, KCWE(TV)'s construction permit had been outstanding for over two years. The assignor declares that the station was constructed only after Hearst agreed to enter into the TBA, to lease space on its tower, and to provide the financing necessary to complete the project.

5. The assignor contends that prior to entering into the TBA with Hearst, it made reasonable efforts to construct KCWE(TV), but was unable to do so. In this regard, the assignor explains that it was originally granted a construction permit to operate on Channel 32, at Kansas City, Missouri, after a lengthy comparative hearing. At this time, the assignor states that it was controlled by Robert Liepold, a telephone company executive with no prior broadcast experience. In addition to Mr. Liepold, the assignor states that T.V. 32, Inc. had one other voting shareholder, Tom Jones, who owned a minority interest and had extensive broadcast experience. According to the assignor, T.V. 32, Inc. also had a complicated debt structure involving three other parties.

² 47 C.F.R. § 73.3555, Note 7. See also *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12941 (1999) ("*Local Ownership Order*"), recon. granted in part, 16 FCC Rcd 1067 (2001) ("*Local Ownership Reconsideration Order*"). See also *Kentuckiana Broadcasting, Inc.*, 16 FCC Rcd 6974 (2001).

³ 16 FCC Rcd at 1077.

⁴ 14 FCC Rcd at 12964.

⁵ T.V. 32, Inc. later changed its name to KCWB-TV, Inc. and, later, to KCWE-TV, Inc.

6. The assignor declares that T.V. 32, Inc. unsuccessfully attempted for some two years to secure financing and programming to construct and operate the new station. After securing the permit, the assignor avers that T.V. 32, Inc.'s stockholders and debt holders had different goals. The assignor further states that neither of the shareholders could afford to fund the construction of the station, and neither was willing to cause the company to incur further debt, which would have required personal guarantees and would have been next to impossible, given the company's existing debt structure at that time. Furthermore, the assignor explains that Tom Jones' wife became seriously ill, and due to these changed circumstances, Jones was simply unable to commit further to T.V. 32, Inc. Also, the assignor declares that the company's debt holders were not willing to loan any more funds and wanted to get out of the deal.

7. The assignor maintains that despite the different goals and commitments of T.V. 32, Inc.'s stockholders and debt holders, Liepold still desired to construct and put the station on the air. The assignor avers that as it became apparent to Liepold that it would be necessary to find an entrepreneur investor to fund the station's construction, he hired a broker and considered approximately fifty (50) different investors. According to the assignor, most of the investors considered had no prior broadcast experience and were not interested given the complexities involved in constructing a station and securing competitive programming. The assignor avers that with only a year left in which to construct the station, in late 1995, Jones and T.V. 32, Inc.'s debt holders sold their interests in T.V. 32, Inc. to Sonia and David Salzman.⁶ The assignor declares that the Salzmans then arranged with Hearst to finance the station, lease equipment, and supply KCWE(TV) with programming through the TBA.

8. According to the assignor, the Salzmans' arrangement with Hearst was unique in that T.V. 32, Inc. believed that Hearst's experience and presence in the market would help launch the station with a network affiliation and a strong competitive schedule of syndicated and local programming. The assignor states that the TBA allowed the station to achieve those objectives. Specifically, the assignor declares that the station was originally launched as a WB affiliate, and is now a UPN affiliate. The assignor notes that through its relationship with Hearst, the station was also able to obtain the rights to broadcast Kansas City Royals baseball games. In short, the assignor avers that Hearst's financial resources and broadcast expertise allowed KCWE(TV), which went on the air in 1996,⁷ to commence broadcast operations and secure competitive programming.

9. The assignor states that Hearst's involvement with the construction of KCWE(TV) was invaluable as construction of the station involved considerable and unanticipated expenses. As noted above, KCWE(TV)'s original construction permit was for Channel 32. However, the assignor points out that serious zoning problems developed with the station's initial site that ultimately prohibited construction of the station on Channel 32. The assignor declares that with Hearst's assistance, KCWE(TV) was able to co-locate its transmission facility on Hearst's tower with KMBC-TV, which required KCWE(TV)'s construction permit to be modified to specify Channel 29. The assignor claims that Hearst was required to make substantial modifications to its tower in order to accommodate KCWE(TV), and it is doubtful that KCWE(TV) would have been able to locate on Hearst's tower absent the TBA between the parties. The assignor further declares that this

⁶ The Salzmans initially acquired a minority voting interest in T.V. 32, Inc. Control of the company was later transferred from Liepold to the Salzmans in 1999 pursuant to the authority in FCC File No. BTCCT-19990825IA.

⁷ The assignor was originally granted Special Temporary Authority ("STA") to operate on channel 29 in lieu of channel 32 on June 21, 1996. The assignor filed multiple requests for extension of its STA, which were granted through 1999.

arrangement has enabled KCWE(TV) to operate with broadcast facilities substantially comparable or even superior to other stations in the market. The assignor notes that KCWE(TV) continues to operate from Hearst's tower site today.

10. The assignor submits that a duopoly waiver is in the public interest because Hearst's TBA with KCWE(TV) has enhanced both programming diversity and competition in the Kansas City DMA. The assignor asserts that KMBC-TV and KCWE(TV) provide distinct programming, as KMBC-TV is an ABC network affiliate and KCWE-TV is now a UPN network affiliate.⁸ The assignor asserts that absent Hearst's role in constructing KCWE(TV), a full power television station outlet may not have been available for UPN programming in the Kansas City DMA. Moreover, the assignor states that KCWE(TV) is ranked fifth in the market in audience share, while KMBC is ranked second in the market. The assignor contends that with such distinct audience shares and programming, the stations pose no threat to competition. The assignor notes that, as recognized by the Commission, "construction of a [previously unbuilt] station, even by the owner of another television station in the market . . . increases program choice for viewers, may increase outlet diversity, and increases the amount of advertising time available for sale in the market."⁹

11. **Discussion.** Based on the above representations, we believe that the assignor has satisfied the applicable criteria for obtaining a duopoly waiver based on KCWE(TV)'s status as an unbuilt station. With regard to the first prong of the our unbuilt station waiver standard, the parties have sufficiently demonstrated that the TBA arrangement with Hearst resulted in the construction of KCWE(TV), Kansas City, Missouri, which at that time was an authorized but as yet unbuilt station. In particular, through the TBA with Hearst, the permittee was able to secure financing, as well as equipment and programming, thereby successfully completing the construction of KCWE(TV). This is the type of public interest benefit of TBA's cited by the Commission in the *Local Ownership Order* as warranting a waiver of the local ownership rule.

12. As to the second prong, the assignor has explained its extensive efforts in attempting to construct KCWE(TV). It appears that these efforts were reasonable as demonstrated by the facts set forth in the many extension requests approved by the staff. Moreover, the attempts by the permittee's controlling stockholders to secure financing through the consideration of approximately fifty (50) entrepreneur investors demonstrate that the assignor made reasonable efforts, but was unable to construct the station without Hearst.

13. **Conclusion.** We, therefore, conclude that common ownership of KCWE(TV), Kansas City, Missouri, and KBMC-TV, Kansas City, Missouri, is justified under the unbuilt station waiver standard. Having determined that the applicants are qualified in all respects, we find that grant of the application will serve the public interest, convenience and necessity.

14. Accordingly, IT IS ORDERED, That the request for an unbuilt station waiver pursuant to Note 7 of the Commission's local television ownership rule, 47 C.F.R. § 73.3555(b), to permit common ownership of KCWE(TV), Kansas City, Missouri and KBMC-TV, Kansas City, Missouri, IS GRANTED.

⁸ We note that KCWE(TV) will become a CW affiliate in September 2006 and that KMBC-TV and KCWE(TV) will continue to provide distinct programming.

⁹ See *Local Ownership Order*, 14 FCC at 12941 (1999).

15. IT IS FURTHER ORDERED, That the application of KCWE-TV, Inc. and KCWE LMA, Inc. for consent to assign the license of KCWE(TV), Kansas City, Missouri (File No. BALCT-20050810ABL) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau