



Federal Communications Commission
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Re: Assignment of License for
WCWN(TV), Schenectady, NY
Facility ID No. 73264
File No. BALCT-20060725ADJ

Dear Counsel:

This is in reference to the application for consent to assign the license for WCWN(TV), Channel 45, Schenectady, New York (WB, to become CW), from WCWN LLC, a subsidiary of Tribune Broadcasting Company ("Tribune") to Freedom Broadcasting of New York Licensee, L.L.C. ("Freedom"). The application requests a waiver of Section 73.3555(b)(2) of the Commission's rules, the television duopoly rule, to permit Freedom, licensee of WRGB(TV), Channel 6, Schenectady, New York (CBS), to acquire WCWN. Both WCWN and WRGB are in the same Nielsen Designated Market Area ("DMA") and their Grade B contours overlap.

Under Section 73.3555(b)(2) of the Commission's rules in effect,¹ two television stations licensed in the same DMA that have Grade B overlap may be commonly owned if: (i) at least one of the stations is not ranked among the top four stations in the DMA; and (ii) at least eight independently owned and operating, full-power commercial and non-commercial educational television stations would remain in the DMA after the merger. The Albany-Schenectady-Troy, New York DMA would have fewer than eight independently owned and operated full-power television stations post-merger. Thus, the proposed common ownership of WCWN and WRGB would violate Section 73.3555(b)(2). However, the applicants requested a waiver on the basis that WCWN is a "failing station."²

Comments. On August 30, 2006, Hubbard Broadcasting, Inc. ("Hubbard"), licensee of WNYT-TV, Albany, New York, filed comments regarding the above-captioned application.³ Hubbard states that it does not seek denial of the application. Rather, Hubbard asks that the Commission carefully consider the legal arguments and factual information submitted by the parties in support of the waiver request, including information sought to be withheld from public inspection. Furthermore, Hubbard urges the Commission to base its decision solely on standards currently in effect, "without prejudgment of standards" which may be adopted in future rulemaking proceedings.

Duopoly Waiver Request. The Commission's *Local Ownership Order* established the criteria for a waiver of the television duopoly rule for a "failing station" – one which has been struggling for "an extended period of time both in terms of its audience share and financial performance." These criteria are:

- (a) One of the merging stations has had a low all-day audience share (*i.e.*, 4 percent or lower);
- (b) The financial condition of one of the merging stations is poor. "A waiver is more likely to be granted where one ...of the stations has had a negative cash flow for the previous three years;"
- (c) The merger will produce public interest benefits. "A waiver will be granted where the applicant demonstrates that the tangible and verifiable public interest benefits of the merger outweigh any harm to competition and diversity;" and

¹ 47 C.F.R. § 73.3555(b)(2). On June 2, 2003, the Commission adopted revised media ownership rules. *In re 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*, 18 FCC Rcd 13620, 13691-92 (2003) ("2002 Biennial Regulatory Review"). The effective date of those rule changes, however, was subsequently stayed by order of the 3rd Circuit Court of Appeals on September 3, 2003. *Prometheus Radio Project v. FCC*, No. 03-3388 (3rd Cir. Sept. 3, 2003) (per curiam) ("*Prometheus*"). With respect to Section 73.3555(b)(2), the court continued the stay in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004) ("*Prometheus Stay Order*"). On June 13, 2005, the Supreme Court of the United States denied a petition for writ of certiorari. 125 S.Ct. 2904.

² See 47 C.F.R. § 73.3555, Note 7. See also *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12935-40 (1999) ("*Local Ownership Order*"), recon. granted in part, 16 FCC Rcd 1067 (2001).

³ The applicants responded by letter filed September 14, 2006.

(d) The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; selling the station to an out-of-market buyer would result in an artificially depressed price.⁴

If the applicant satisfies each criterion, a waiver of the rule will be presumed to be in the public interest.

As part of its waiver request, the applicants state that WCWN's all-day audience share for May 2006, as reported by Nielsen, was 1.9 percent, well below the 4 percent the Commission considers a low audience share. Freedom and WCWN further state that, since the February 2003 ratings period, WCWN has never managed to garner more than a 2.8 percent share, and has reached that number only once.

With respect to WCWN's financial condition, the applicants submitted WCWN income statements and balance sheets for fiscal years 2003, 2004, and 2005, and for the first half of 2006, with a request for confidential treatment.⁵ Tribune and Freedom maintain that these financial data demonstrate that the station has not achieved positive cash flow for the three full years preceding the filing of the application. They indicate that, over that three-year period, operating losses have worsened more than 13-fold, from a negative \$60,000 to a negative \$821,000, and that the station's net cash flow has also been negative for each of those three years. Moreover, they state that, for the first half of 2006, WCWN continued to have operating losses (of \$264,000) and negative cash flow (of \$64,000).

The applicants state that consolidated operations of the two stations will result in tangible and verifiable public interest benefits that would outweigh any harm to competition and diversity. Specifically, Freedom pledges that it will maintain WCWN as a separate network affiliate with locally employed station staff. Moreover, within the first six months after acquiring the station Freedom intends to start broadcasting at least thirty minutes per day of local news and weather programming. Aside from a weekly thirty-minute public affairs program, WCWN currently provides no locally originated programming. In addition, upon acquiring WCWN Freedom will provide the station with access to WRGB's extensive and high quality news and weather facilities. Furthermore, WCWN will benefit from Freedom's history of community broadcast service and WRGB's community affairs programming resources. Freedom intends to simulcast or re-broadcast community affairs programs aired on WRGB.

In addressing the fourth criterion, the applicants indicate that no buyer outside the market is willing and able to operate the station. They attach the declaration of Brian Byrnes, President of Paramount Media Advisors, Inc. ("Paramount"), a firm which was retained by Tribune to identify potential bidders for WCWN. Paramount identified and contacted 18 prospective buyers, but no potential buyer from outside the market expressed any real interest.

Discussion. We will grant the request for a waiver of the television duopoly rule and we will grant the above-captioned application. Based upon the showings submitted under the waiver criteria established by the Commission in the *Local Ownership Order*, we are persuaded that grant of a waiver is warranted on

⁴ 14 FCC Red at 12939.

⁵ In response to a staff inquiry letter, the parties provided additional financial data on October 4, 2006, also with a request for confidential treatment.

grounds that WCWN is a failing station. *See, e.g., Counterpoint Communications, Inc.*, 16 FCC Rcd 15044 (2001).

First, the applicants have demonstrated that WCWN has a low audience share -- i.e., below 4 percent for the last three years. Second, the financial documentation submitted shows that WCWN's financial condition is poor, including at least three years of negative cash flow.

Third, numerous public interest benefits will accrue from the combined operation of WCWN and WRGB. Among these is Freedom's pledge to begin broadcasting at least thirty minutes of daily local news and weather on WCWN. Currently, aside from a weekly one-half hour public affairs program, WCWN provides no locally-originated programming and provides no local news at all. Finally, the applicants have made an active and serious effort to sell the station, and no reasonable offer from an entity outside the market has been received.

Consistent with the *Local Ownership Order*, we find that the combined operation of WCWN and WRGB will pose minimal harm to our diversity and competition goals because WCWN's financial situation hampers its ability to be a viable voice in its market. Under these circumstances, allowing WCWN to be operated by a stronger station in the market will result in a clear improvement in facilities and programming, an outcome which clearly benefits the public interest.⁶

As urged by Hubbard in its comments, and as required under Commission policy and rules, we have carefully considered the legal arguments and factual information submitted by the applicants and we conclude that grant of the above-captioned application is in the public interest.

Accordingly, IT IS ORDERED, That the request for a "failing station" waiver of the television duopoly rule, Section 73.3555(b)(2), to permit Freedom to own and operate both WCWN(TV) and WRGB(TV), IS GRANTED. IT IS FURTHER ORDERED, That the application (File No. BALCT-20060725ADJ) for consent to the assignment of the license for WCWN(TV), Schenectady, New York, from WCWN LLC to Freedom Broadcasting of New York Licensee, L.L.C., IS GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc: David A. Jones, Esq., counsel for Hubbard Broadcasting, Inc.

⁶ 14 FCC Rcd at 12939.