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Re: Application for Transfer of Control of
BlueStone License Holdings, Inc.
Licensee of

WCYB-TV, Bristol, VA
BTCCT-20061127AJN, Fac. ID 2455

KTXS-TV, Sweetwater, TX
BTCCT-20061127AJO, Fac. ID 308

KRCR-TV, Redding, CA
BTCCT-20061127AJR, Fac. ID 8291

KAEF(TV), Arcata, CA
BTCCT-20061127AKI, Fac. ID 8263

KECI-TV, Missoula, MT
BTCCT-20061127AKO, Fac. ID 18084

KCFW-TV, Kalispell, MT
BTCCT-20061127AKS, Fac. ID 18079

KTVM(TV), Butte, MT
BTCCT-20061127AKU, Fac. ID 18066

et al.

to Bonten Media Group LLC

Dear Counsel:

This is in reference to the above-captioned application for transfer of control of BlueStone License Holdings, Inc. ("BlueStone") from BlueStone Television LLC to Bonten Media Group LLC ("Bonten"). On January 3, 2007, Marshall R. Noecker ("Noecker") filed a petition to deny the application concerning KCFW.[1]

Among the stations licensed to BlueStone are KCFW-TV, Kalispell, Montana, and KECI-TV, Missoula, Montana. The proposed transferee, Bonten, requests authorization to continue operating KCFW as a satellite of KECI pursuant to Note 5 of Section 73.3555 of the Commission's Rules.[2] Bonten points out that KCFW has been operating as a satellite of KECI under Commission authority most recently granted in 2004.[3]

Waiver Request. Pursuant to *Television Satellite Stations,* the Commission presumes that a proposed satellite operation will serve the public interest if: 1) no City Grade overlap exists between the parent and the satellite; 2) the proposed satellite would provide service to an underserved area; and 3) no alternative operator is ready and able to purchase or operate the satellite as a full-service station.[4] Bonten concedes that KECI and KCFW have a small overlap of their City Grade contours but argues that, under an *ad hoc* analysis, other compelling circumstances warrant the continued authorization of KCFW to operate as a satellite of KECI.[5] Specifically, Bonten indicates that the overlap encompasses 647 square kilometers and a population of 9,570, representing 4.9% of the area and 7.1% of the population within the KECI city-grade contour and 7.4% of the area and 10.6% of the population within the KCFW city-grade contour.

Bonten states that KCFW continues to serve an underserved area. KCFW remains the only commercial full-power television station licensed to Kalispell, Montana. Moreover, 100% of the area within KCFW's Grade B contour (but outside KECI's Grade B contour) receives four or

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[1] On January 18, 2007, and January 30, 2007, respectively, the applicants filed a Joint Opposition and Noecker filed a Reply.

[2] 47 C.F.R. §73.3555, Note 5.

[3] *See Letter to Eagle Communications, Inc. from Barbara A. Kreisman, Chief, Video Division, Media Bureau,* April 29, 2004 (*"Eagle"*). Authority to operate KCFW-TV as a satellite of KECI-TV was also given in 1998. *See Precht Communications, Inc.,* 13 FCC Rcd 8659 (MMB 1998) ("*Precht")*.

[4] 6 FCC Rcd 4212, 4213-4214 (1991) (subsequent history omitted).

[5] The Commission noted a similar degree of Grade B overlap in both *Eagle* and *Precht*, considering it minimal. Both decisions went on to analyze the waiver requests under an *ad hoc* analysis, rather than relying on the presumptive criteria of *Television Satellite Stations*

fewer television services, not including KCFW. Bonten points out that 93% of Kalispell's Grade B contour (containing 97.5% of the population) receives no full-power television service at all, other than from KCFW.

According to Bonten, KCFW has operated as a satellite of KECI since the Kalispell station first began operating in 1968. Bonten posits that, while small in population and in terms of television advertising revenues, the Missoula Designated Market Area ("DMA") is geographically dispersed over an extensive area which includes seven large, mostly rural, sparsely-settled counties. Due to distance and mountainous terrain, the four stations licensed to Missoula (the economic center of the DMA) require satellites (full or low power facilities) to provide over-the-air service to the northwest Montana area bordering Canada which includes the distant community of Kalispell.

Bonten attaches an Economic Viability Study of Dr. Mark Fratrik, Vice President of BIA Financial Network ("2006 BIA Study"). According to Bonten, the 2006 BIA Study demonstrates that KCFW's coverage area does not realistically provide the basis to support full-service, stand-alone operations. The Kalispell station is licensed to a community more than 90 miles distant from the most populous community of Missoula, the economic center of the market, where each of the four other full-power stations are licensed. As the only full-power station licensed to a community in the northern portion of the market, the KCFW Grade B contour does not even reach the key Missoula area.

Bonten states that, in addition to KCFW's disadvantaged market coverage, the 2006 BIA Study examines in detail various other reasons that the sole Kalispell station could not support a viable, stand-alone operation. They include the level of competition in and sparse advertising revenues of the small market, the unavailability of a major network affiliation or an alternative one that could support full-service operations from the distant Kalispell area, and the major costs of converting the station to stand-alone operations, including the significant costs of digital conversion.

Petition to Deny. *Standing.* Noecker claims standing to file the petition to deny because he is ready and able to purchase KCFW and operate it as a full-power station. He will have no opportunity to do so if the Commission grants the continuing satellite waiver requested by Bonten, and he posits that this will cause him direct harm.

While acknowledging that the Commission has found the City Grade overlap between KECI and KCFW to be minimal, he insists that the overlap is not *de minimis* and should therefore be weighed against the applicants. Moreover, Noecker claims that the public interest rationale which previously supported KCFW's authority to operate as a satellite is no longer valid. Furthermore, he maintains that such authority cannot be granted where an alternative operator, namely himself, is ready and able to purchase and operate the station as a full-service station. Noecker states that he has made multiple offers to purchase KCFW for operation as a full-service station.

He appends a report by Robin V. Flynn, Senior Vice President of Kagan Media Appraisals ("Kagan Report") which he claims shows that KCFW can succeed as a full- service station. Although Noecker agrees that KCFW operates in an underserved area, he argues that the Kagan Report points to the fact that KCFW's is the only full-power television signal in the rapidly developing northern portion of the Missoula DMA as one reason it can succeed as a full-service station. According to Noecker, the Kagan Report contends that such operation would succeed because of the economic and demographic development in KCFW's viewing area. The Kagan report finds that KCFW would have adequate advertising revenues, given the level of economic

activity in its primary coverage area. Based upon the economic profile of the Kalispell area, the geography of the market, and the size of the unduplicated service area, the Kagan Report opines that KCFW would be able to secure syndicated programming and possibly a network affiliation. It maintains that the concept of having two stations in a geographically dispersed market with the same affiliation serving two separate population centers is not new, and it cites a number of examples.

The Kagan Report states that, although KCFW would not have the same reach as the other Missoula market stations, those stations reach similar areas and compete with each other for advertising revenues across similar coverage areas. According to the Kagan Report, KCFW, as a local Kalispell station, would not face the same level of competition for local advertisers. Moreover, the Kagan Report posits that, because Flathead County accounts for approximately 33% of the retail sales in the Missoula DMA, with Lake County contributing another 7%, the potential revenue base for a full-service station serving these counties as its primary coverage area is significant, when compared to the other stations in the DMA, which are oriented toward the Missoula area. The Kagan Report maintains that other similarly-sized areas in small markets have supported television stations for years. Finally, the Kagan Report states that its opinion regarding KCFW's viability as a stand-alone station assumes that the station would have adequate financing during the initial phases of operation.

In a Joint Opposition filed by Bonten and BlueStone, the applicants argue that Noecker lacks standing because he is not a *bona fide* purchaser of KCFW. An attached declaration of Sandy DiPasquale, President and CEO of BlueStone, states that Noecker's offers for the station were unacceptable as to price and contained problematic conditions. According to DiPasquale, these conditions included Noecker's ability to acquire a network affiliation for KCFW as a stand-alone station and BlueStone's agreement not to compete with KCFW in Kalispell. In any event, the applicants point out that, if the Commission's presumptive criteria are not met, the Commission is still able, under a long-standing *ad hoc* analysis approach, to determine whether overall circumstances justify satellite status.

The Joint Opposition maintains that, if KCFW is converted to stand-alone operation, it would operate under a very serious competitive disadvantage in market coverage. The applicants append a letter from the author of the 2006 BIA Study, Mark Fratrik, reasserting his view that KCFW could not sustain itself as a full-service stand-alone station. Fratrik states that KCFW's coverage area is so much smaller than that of the centrally located Missoula television stations in the market that KCFW would be unable to compete with those stations. He disagrees with the Kagan Report's comparison of KCFW with other stations in small markets with similarly-sized areas, stating that those small-market stations have limited, if any, competition. In nine markets, the stations are the only commercial full-power stations in the market, in seven there is only one other competitor, in another seven there are two competitors and in three there are three competitors. By contrast, KCFW would be the fifth stand-alone station in the market. Moreover, Fratrik points out that the other stations in the market have Class A or low power television satellites so that they reach, in total, more than double the population reached by KCFW, and, because they have facilities in the Kalispell area, their reach encompasses the entire market.

Fratrik opines that the revenues for the Missoula market are so limited that a new commercial station trying to share in that revenue would find it extremely difficult. According to Fratrik, the smallest market with five viable full-power competitors is the Odessa-Midland, Texas market, whose estimated 2005 total market revenues are 45.5% larger than the estimated revenues in the Missoula television market.

The Joint Opposition maintains that KCFW's stand-alone audience would be so small that it would not be able to bid competitively for quality syndicated programming, most of which is under contract to Missoula's other stations. Moreover, it considers it unlikely that a major network would choose to undercut an established affiliate in the market by agreeing to affiliate with a second station. With respect to the Kagan Report's examples of two same-market stations sharing affiliations, the Joint Opposition claims that two are historical anomalies resulting from market modifications, and two are unique common ownership situations.

Finally, the Joint Opposition alludes to the costs of purchasing KCFW, of converting it to stand-alone operations, of making necessary digital expenditures, of financing acquisition of programming, of creating a full-service news department, and of funding on-going operations.

In his Reply, Noecker restates most of the arguments in his Petition. He insists that his offers to purchase KCFW were *bona fide*, being not out of line for an initial negotiating offer. He maintains that only a small fraction of his net liquid assets are sufficient to provide the millions of dollars required to acquire the station, expand facilities, complete the digital transition, and underwrite potential operating losses.

Discussion. In assessing the merits of a petition to deny, we follow a two-step analysis. First, we determine whether the petition makes specific allegations of fact which, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. If so, we then proceed to examine and weigh all of the material before us, including the applicant's submissions, to determine whether there is a substantial and material question of fact requiring resolution in a hearing.[6] If the facts are not disputed, but disposition turns on inferences and legal conclusions to be drawn from facts already known, a hearing is unnecessary.[7]

Petitioners have failed to raise a substantial and material question of fact that grant of the subject applications would be inconsistent with the public interest. Accordingly, Noecker's petition will be denied.

Standing. The applicants argue that Noecker lacks standing to file the petition to deny. We need not reach this issue, however, because we believe it is in the public interest to evaluate the merits of all of the submissions in determining whether a continuation of KCFW's satellite waiver is warranted in this case.

We conclude that a satellite waiver continues to be warranted here. Bonten concedes that it does not meet the presumptive criteria for a satellite waiver because the City Grade contours of KECI and KCFW overlap. Noecker argues that Bonten does not meet the third presumptive criterion because it cannot show that no alternative operator is ready and able to purchase or operate the satellite as a full-service station. Indeed, Noecker claims that he himself is willing to purchase and operate the KCFW as a stand-alone station.

We agree that Bonten has not met the presumptive criteria. However, this is not fatal to Bonten's waiver request because where, as here, the satellite operation fails to meet all of the three

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[6] *See* 47 U.S.C. Sections 309(d)(1) and (2), as explained in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988).

[7] *Stone v. FCC*, 466 F.2d 316, 323 (D.C.Cir. 1972).

presumptive criteria, we will nevertheless evaluate the proposal on an *ad hoc* basis to determine whether other compelling circumstances exist that warrant satellite authority.[8]

In 1998, in *Precht*, and then again in 2004, in *Eagle*, we found that continuation of the satellite relationship of KECI and KCFW was consistent with the policies set forth in *Television Satellite Stations*. We conclude that the same is true now. Indeed, we are persuaded that the factors upon which we based our previous satellite authorization have not changed to such an extent that we should alter the determination we made then. We conclude, therefore, that continued operation of KCFW-TV as a satellite of KECI-TV would serve the public interest.

The current degree of City Grade contour overlap between KECI-TV and KCFW-TV is very similar to what existed when *Eagle* and *Precht* were adopted, and we find here, as we did there, that it is not substantial enough, taking the other factors shown into account, to warrant denial of Eagle's request. The area is just as underserved now as it was in *Eagle* and *Precht.* Additionally, the DMA is small in population and geographically dispersed over an extensive, mostly rural area, and KCFW is licensed to a community which is relatively distant from the DMA's population center. Indeed, KCFW's Grade B contour does not reach those key population centers.

We have considered Noecker's arguments that the portion of the DMA where KCFW is located is rapidly growing and that the fact that the station is the only station in the area would position it to compete favorably for local advertising. Nevertheless, even the Kagan report submitted by Noecker concedes that only 40% of the retail sales in the Missoula DMA are generated in counties near KCFW.

At the same time, given KCFW's much smaller coverage area, we are not persuaded that KCFW has been shown to be able to successfully compete with the other, centrally-located stations in the Missoula DMA. For the same reason, it does not appear that it would be likely to be able to compete for quality syndicated programming. We find Noecker's argument that KCFW would be able to secure a network affiliation speculative, particularly when such an affiliation would tend to undercut an established, existing affiliate in the same market.

With respect to Noecker's comparison of KCFW with stand-alone stations in small markets in similar areas, we agree with the applicants that such comparisons are not instructive because those other stations face limited, if any, competition. In contrast, KCFW would be the fifth stand-alone station in the market. We note that, according to the applicants' expert, the smallest market with five viable full-service stations has total market revenues exceeding Missoula's by more than half. Even KCFW's competitors have Class A or low power television satellites. This illustrates not only the need for such satellite combinations in the dispersed DMA but the fact that KCFW would be competing with stations whose reach, in total, is more than double that of KCFW.

The Kagan report submitted by Noecker in support of KCFW's viability as a stand-alone station assumes that the station would have adequate financing. The applicants correctly allude to the costs of purchasing KCFW, converting it to stand-alone operations, including digital conversion, and funding on-going operations, including programming. Noecker responds that he has more than enough assets to cover these expenses and to underwrite potential operating losses. However, whether Noecker has the necessary finances is irrelevant because his application is not before us. What concerns the Commission is whether KCFW would succeed as a stand-alone

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[8] *Television Satellite Stations,* 6 FCC Rcd at 4214.

station because an unsuccessful station cannot easily serve the market in a way that the public interest warrants.

On balance, given the history of this market and the fact that we have granted this station satellite status twice before, we find that the satellite waiver should be continued. In *Precht* and again in *Eagle* we questioned the viability of KCFW as a stand-alone station because of the level of competition in the DMA, the station's likely high operating expenses, its coverage, and its low revenue potential. We believe that the factors that persuaded us in *Eagle* and *Precht* continue to argue in favor of a satellite waiver.

Accordingly, Bonten's request for continued television satellite authorization, pursuant to Note 5 of Section 73.3555 of the Commission's Rules, to enable KCFW-TV to operate as a satellite of KECI-TV, IS GRANTED. Furthermore, the petition to deny filed by Marshall R. Noecker, IS DENIED.

Having determined that the applicants are qualified in all other respects, the above-captioned applications to transfer control of BlueStone (File Nos. BTCCT-20061127AJN, BTCCT-20061127AJO, BTCCT-20061127AJR, BTCCT-20061127AKI, BTCCT-20061127AKO, BTCCT-20061127AKS, and BTCCT-20061127AKU) ARE GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau