



Federal Communications Commission  
Washington, D.C. 20554

**DA 07-2946**

**Released: July 9, 2007**

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Re: Assignment of License for  
KSCW(TV), Wichita, KS  
Facility ID No. 72348  
File No. BALCT-20070330ATL

Dear Counsel:

This is in reference to the application for consent to assign the license for KSCW(TV), Channel 33 (CW), Wichita, Kansas, from WLBB Broadcasting, LLC (WLBB) to Sunflower Broadcasting, Inc. (Sunflower). The application is unopposed. The application requests a waiver of Section 73.3555(b)(2) of the Commission's rules, the television duopoly rule, to permit Sunflower, licensee of KWCH-TV, Channel 12 (CBS), Hutchinson, Kansas, to acquire KSCW. Both KSCW and KWCH-TV 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 currently in effect,<sup>1</sup> 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 Wichita-Hutchinson, Kansas DMA would not have eight

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<sup>1</sup> 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.

independently owned and operated television stations post-merger.<sup>2</sup> Thus, the proposed common ownership of KSCW and KWCH-TV would violate Section 73.3555(b)(2). Sunflower requested a waiver on the basis that KSCW is a “failing station.”<sup>3</sup>

**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
- (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.<sup>4</sup>

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, Sunflower attaches a chart showing Nielsen reported audience shares for the all-day share. The chart shows that, over the period from November 2004 to February 2006, KSCW’s average all-day share was a 2.27 share. The highest share the station experienced was 2.7 in November 2006, and the lowest was 2.1 on four different occasions.

With respect to KSCW’s financial condition, Sunflower appends cash flow data intended to show negative cash flow for the three years preceding the filing of the instant application.<sup>5</sup> In addition, in a Declaration, Lyle Banks, President and Chairman of Banks Broadcasting, Inc., parent of KSCW’s licensee, states that the station has “suffered operating losses each year since it was acquired in 2000 shortly after the station

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<sup>2</sup> Only seven independently-owned and operated full power television stations would remain in the DMA. In September 2006, the Commission issued a construction permit for a new DTV-only full power television station on Channel 46 at Derby, Kansas to Entravision Holdings, LLC. That station is not yet operational.

<sup>3</sup> 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).

<sup>4</sup> *Local Ownership Order*, 14 FCC Rcd at 12939.

<sup>5</sup> Sunflower requested confidential treatment for this material pursuant to Sections 0.457 and 0.459(a) of the Commission’s rules.

went on the air.” Mr. Banks affirms that in each of the last three years the station has had six-figure negative cash flow. Mr. Banks’ estimates for 2007 are “similarly poor.” Mr. Banks explains that the station’s historically poor financial condition is rooted in the fact that it is an independent station. Although the station was an affiliate of the WB Network and last year became an affiliate of the CW network, Mr. Banks maintains that the station is at a disadvantage in the Wichita-Hutchinson DMA. Mr. Banks states that each of the other network affiliates in the market has satellite or translator stations to extend their coverage across the market. KSCW has no such facilities and, according to Mr. Banks, has operated at a “competitive disadvantage than emerging network affiliates in other, more geographically compact, markets.” Mr. Banks argues that the Commission should conclude that the station’s financial condition is poor.

Sunflower maintains that the assignment of KSCW will benefit the public interest. Sunflower argues that allowing a failing station like KSCW to join with a stronger station in the market will greatly improve its ability to upgrade its facilities and programming operations, thus benefiting the public interest.<sup>6</sup> In a Declaration, Sunflower’s President Joan Barrett states that KSCW’s paired digital television (DTV) facility currently does not distribute programs in high definition format. Ms. Barrett represents that, following the consummation of the assignment, Sunflower will upgrade KSCW-DT to enable broadcast of programs from the CW network in high definition format.<sup>7</sup>

Further, Ms. Barrett states that, due to financial constraints, KSCW does not offer local weather programming or have the capability of monitoring weather events. Ms. Barrett states that KWCH-TV has radar capability and five staff meteorologists. If the assignment is approved and Sunflower is permitted to operate KSCW and KWCH-TV, weather and emergency information from KWCH-TV will be broadcast on KSCW. Ms. Barrett notes that this is of particular importance in KSCW’s service area, which is part of “Tornado Alley.”<sup>8</sup> Ms. Barrett also states that, due to financial constraints, KSCW does not now broadcast local news. After consummation of the transaction, Ms. Barrett represents that KSCW will re-broadcast KWCH-TV’s 10 p.m. late news program at 1:30 am. This will increase the sources of local news and information to area residents who do not now have access to a local television news program.<sup>9</sup> Ms. Barrett also states that Sunflower will explore adding a daily weekday morning news program to the KSCW schedule and a weekly local public affairs program.

Ms. Barrett also maintains that Sunflower and KWCH-TV devote substantial staff and other resources to public service in the Wichita-Hutchinson area. Because of the greater resources that this transaction will

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<sup>6</sup> See *Local Ownership Order*, 14 FCC Rcd at 12939.

<sup>7</sup> See *Hispanic Keys Broadcasting, Inc.*, 19 FCC Rcd 4603, 4606 (MB 2004)(where the Media Bureau relied on a similar commitment as part of the public interest benefits supporting a failing station waiver).

<sup>8</sup> See *WCWN LLC*, 21 FCC Rcd 13522, 13524 (MB 2006); *KSMO Licensee, Inc.*, 20 FCC Rcd 15254, 15257, 15258 (MB 2005).

<sup>9</sup> See *KSMO Licensee*, 20 FCC Rcd at 15256 (where the Media Bureau found that the proposed licensee would repurpose appropriate local programming and program content on the failing station).

make available to KSCW, Ms. Barrett argues that these other public service activities will be extended to KSCW, expanding the range of public service activities in the market.<sup>10</sup> Finally, Ms. Barrett states that Sunflower is committed to maintaining the separate network affiliations for KWCH-TV (CBS) and KSCW (CW).<sup>11</sup>

In addressing the fourth criterion, Sunflower submits the Declaration of Kelly Callan, a station broker with Kalil and Company (Kalil). Mr. Callan states that Banks Broadcasting, KSCW's parent company, retained Kalil to find an out-of-market purchaser for the station. According to Mr. Callan, Kalil approached 16 out-of-market prospective purchasers, and only one made an offer for the station which Mr. Callan describes as "well below its appraised value." Given the absence of an out-of-market buyer, Mr. Callan states that Kalil approached others stations in the market, securing an agreement with Sunflower. Mr. Callan states that it is Kalil's judgment that, "despite extensive marketing process, including independent valuation and significant outreach to prospective out-of-market buyers, the only potential *bona fide* purchaser of KSCW is an in-market buyer."

**Discussion.** We will grant the parties' request for a waiver of the television duopoly rule, and we will grant the assignment application. On balance, 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 grounds that KSCW is a failing station.

Specifically, the parties have demonstrated that KSCW has a low audience share. Significantly, the station's audience share has been well below 4 percent since at least 2004 averaging a 2.27 share during that time.

Furthermore, the financial documentation submitted by the parties shows that KSCW's financial condition is poor. In reviewing the financial information submitted by the parties, we are persuaded that KSCW is failing to such an extent that its ability to be a viable voice in the Wichita-Hutchinson market is severely hampered. Specifically, the parties have shown that the station's prior independent status and its lack of companion satellite or translator facilities have placed it at a competitive disadvantage.

Given these operational circumstances, it is not surprising that little news, public affairs or other public interest programming is currently being provided by the station.<sup>12</sup> The proposed merger would address these shortcomings, and we find important public interest benefits will accrue from the combined operation of KSCW and KWCH-TV. For example, Sunflower has pledged to upgrade KSCW's digital operation, as well as to air additional weather and news programming on KSCW. Finally, the parties have established that Sunflower is the only reasonably available buyer for station KSCW.

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<sup>10</sup> See *WCWN, LLC*, 21 FCC Rcd at 13524.

<sup>11</sup> *Id.*

<sup>12</sup> As the *Local Ownership Order* indicated, failing stations "rarely have the resources to provide local news programming, and often struggle to provide significant local programming at all." 14 FCC Rcd at 12939.

Consistent with the *Local Ownership Order*, we find that the combined operation of KSCW and KWCH-TV will pose minimal harm to our diversity and competition goals because KSCW's financial situation hampers its ability to be a viable voice in its market. Under these circumstances, allowing KSCW to be operated by a stronger station in the market will result in a definite improvement in facilities and programming, an outcome which clearly benefits the public interest.<sup>13</sup>

Having found the applicants qualified to be Commission licensees, we find that grant of the KSCW assignment application would serve 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 Sunflower to own and operate both KSCW and KWCH-TV, IS GRANTED. IT IS FURTHER ORDERED, That the application (File No. BALCT-20070330ATL) for consent to the assignment of the license for KSCW(TV), Wichita, Kansas, from WLBB Broadcasting, LLC to Sunflower Broadcasting, Inc., IS GRANTED.

Sincerely,

Monica Shah Desai  
Chief, Media Bureau

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<sup>13</sup> 14 FCC Rcd at 12939.