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Re: Assignment of License for
KNIN-TV, Caldwell, ID
Facility ID No. 59363
File No. BALCT-20080701AEB

Dear Counsel:

This is in reference to the application for consent to assign the license for KNIN-TV, Channel 9 (CW), Caldwell, Idaho, from Banks-Boise, Inc. (Banks-Boise) to Journal Broadcast Corporation (Journal). The application is unopposed. The application requests a waiver of Section 73.3555(b)(2) of the Commission's rules,[1] the television duopoly rule, to permit Journal, licensee of KIVI(TV), Channel 6 (ABC), Nampa, Idaho, to acquire KNIN.[2] Both KNIN and KIVI are in the same 113th-ranked Boise Nielsen Designated Market Area (DMA), and their Grade B signal contours overlap.

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[1] 47 C.F.R. §73.3555(b)(2).

[2] In addition, the Grade A signal contours of KNIN and KIVI encompass the communities of license of six radio stations licensed to Journal that are in the Boise Arbitron Metro, triggering the radio-TV cross-ownership rule, Section 73.3555(c) of the Commission's rules. The parties note that under the radio-TV cross-ownership rule, a party authorized to own two television stations in the same market under the local TV ownership rule may own up to six commercial radio stations (if permissible under the local radio ownership rule) where at least 20 independently-owned media voices will remain in the market post-acquisition. The parties have demonstrated that at least 20 independently-owned media voices will remain in the market following the closing of the proposed transaction. Therefore, if permitted to acquire KNIN, Journal is also permitted to hold the resulting two TV/six radio combination.

Under Section 73.3555(b)(2) of the Commission's rules currently in effect,[3] 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 Boise DMA would not have eight independently owned and operated television stations post-merger. Thus, the proposed common ownership of KNIN and KIVI would violate Section 73.3555(b)(2). The applicants request a waiver on the basis that KNIN is a "failing station." [4]

Duopoly Waiver Request. The Commission's *Local Ownership Order* established the criteria for a waiver of the television duopoly rule for a "failing station," defined as 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);
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> (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;"
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> (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. [5]

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

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[3] *2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 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; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets, Ways to Further Section 257 Mandate and To Build on Earlier Studies; and Public Interest Obligations of TV Broadcast Licensees, Report and Order on Reconsideration,* 23 F.C.C.R. 2010 (2008)("*2007 Ownership Order*").

[4] *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).

[5] *Local Ownership Order*, 14 FCC Rcd at 12939.

As part of its waiver request, the applicants attach information showing Nielsen reported audience shares for the all-day share. It shows that, over the period between February 2005 and November 2007, KNIN's all-day average household audience shares of 3.60, 3.675 and 3.65 percent based on a Neilsen four-book average, and during the most recent February and May 2008 sweep periods, KNIN achieved household audience shares of only 3.6 and 3.8 respectively. Accordingly, the applicants claim that the proposed transaction satisfies the audience share prong of the "failing station" waiver standard.

To satisfy the second criterion with respect to KNIN's financial condition, the applicants submit financial data intended to show negative cash flow and operating losses for the three years preceding the filing of the instant application.[6] Specifically, they have provided information purporting to show that KNIN experienced a negative cash flow for the years 2004-2006 and, therefore, meet the grounds for the requested waiver. However, Note 7 to Section 73.3555 of the Commission's Rules explicitly states that applicants for a "failing station" waiver must demonstrate that "the station has had a negative cash flow for three consecutive years *immediately prior to the application* . . . ."[7] Because the instant application was filed on July 1, 2008, the relevant three-year period to evaluate KNIN's financial posture are 2005-2007.

Section 73.3555 of the Commission's Rules and Note 7 thereto do not specifically define "cash flow." KNIN has submitted financial information based on a "free cash flow" accounting method as an indicator of viability. KNIN has shown a negative free cash flow all three years, $90,038 in 2007, $124,945 in 2006, and $109,684 in 2005. Free cash flow, however, includes all of a station's income and expenditures, even those which are discretionary and/or not directly related to station operations. In this case, this includes capital expenditures of $160,572 in 2007, $124,129 in 2006, and $50,000 in 2005. For this reason, in past "failing station" waiver cases, we have consistently used "operating cash flow" as the preferable and only reliable measure of a station's viability. Our evaluation of the materials submitted, based on "operating cash flow" and excluding the discretionary or non-operating expenditures, shows that KNIN has demonstrated a declining negative operating cash flow for the years 2005 ($61,891) and 2006 ($9,527), but not for 2007, when the station showed a positive operating cash flow of $61,552.[8] Accordingly, we find that the applicants have not met this prong of the failing station waiver standard, and we will therefore deny the waiver request. As such, we need not address the remaining criteria of the waiver standard.

Accordingly, IT IS ORDERED, That the request for a "failing station" waiver of the television duopoly rule, Section 73.3555(b)(2), to permit Journal to own and operate both KNIN and KIVI, IS DENIED.

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[6] The applicants' requested confidential treatment for this material pursuant to Sections 0.457 and 0.459(a) of the Commission's Rules.

[7] 47 C.F.R. §73.3555, Note 7(2).

[8] Our evaluation of the materials submitted by the applicants in this case included interest expense in the operating cash flow, although it is not technically an "operating" expense because it is not directly related to the operation of a television station. Nevertheless, in recognition of certain economic realities that it is unlikely for a business to operate successfully without incurring interest expense, and to place the applicants' showing in the best light in this case, we factored in such expenses in the calculation of operating cash flow.

IT IS FURTHER ORDERED, That the application for assignment of license (File No. BALCT-20080701AEB) of Station KNIN-TV, Caldwell, Idaho, IS DISMISSED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau