

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

In the Matter of )
Davis Television Clarksburg, LLC )
(Assignor) ) File No. BALCT-20070622ABZ
And ) Fac. ID No. 10976
Withers Broadcasting Company, LLC )
(Assignee) )
For Assignment of License of Station )
WVFX(TV), Clarksburg, West Virginia )

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 2008

Released: March 31, 2008

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. The Commission, by the Chief, Video Division, pursuant to delegated authority, has before it an application for consent to assign the license for Station WVFX(TV), Clarksburg, West Virginia, from Davis Television Clarksburg, LLC ("Davis") to Withers Broadcasting Company of Clarksburg, LLC ("Withers"). In connection with the application, Withers has requested a "failing station" waiver of Section 73.3555(b) of the Commission's rules ("local television ownership rule"), to permit common ownership of Station WDTV(TV), Weston, West Virginia and Station WVFX(TV).1 On July 30, 2007, West Virginia Media Holdings, LLC ("WVMH" or "Petitioner") filed a Petition to Deny. Davis and Withers filed a joint opposition on August 24, 2007. For the reasons set forth below, we deny the petition to deny, grant the requested waiver, and grant the above-referenced assignment application.

II. BACKGROUND

2. Under the local television ownership rule, a party may own, operate or control two television stations within the same Nielsen Designated Market Area ("DMA") if the Grade B contours of the stations do not overlap, or if eight or more independently owned and operating commercial and noncommercial television stations will be licensed to the DMA and at least one of the stations is not ranked within the top four stations in the DMA in terms of audience share.2 The Clarksburg-Weston,

1 47 C.F.R. §73.3555(b).

2 47 C.F.R. §73.3555(b) (2002). On July 2, 2003, the Commission issued its 2002 Biennial Review Order, in which it modified the local television ownership rule by permitting attributable interests in two stations in those DMA's containing 17 or fewer full-power commercial and noncommercial television stations, and by permitting attributable interests in three stations in those DMA's with 18 or greater full-power commercial and noncommercial television stations. See 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunication Act of 2002, 18 FCC Rcd 13620 (2003)

West Virginia DMA would have three independently owned and operating full power television broadcast stations following consummation. Thus, the proposed common ownership of WVFX(TV) and WDTV(TV) would violate the local television ownership rule. However, the applicants requested a waiver of the local television ownership rule under the “failing station” waiver standard.

3. The “failing station” waiver standard is set forth in Note 7(2) of Section 73.3555 of the Commission’s Rules, and is meant to permit combinations in which one of the stations has been struggling for “an extended period of time both in terms of its audience share and financial performance.”<sup>3</sup> In order to qualify for a waiver under this standard, an applicant must demonstrate that:

- (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.

4. With respect to audience share, the applicants maintain that Station WVFX(TV)'s all-day audience share for the previous three years, as reported by Nielsen, averaged between .5 percent and 1 percent, well below the 4 percent the Commission considers a low audience share. Davis and Withers further state that the station's all-day audience shares have regularly fallen below the four-percent benchmark.

5. With respect to Station WVFX(TV)'s financial condition, the applicants submitted financial statements for 2004, 2005, and 2006, with a request for confidential treatment. Davis and Withers maintain that these financial data demonstrate that the station has had a negative cash flow as well as net operating losses in each of the three full years preceding the filing of the application.

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(“2002 Biennial Review Order”), *aff’d in part and remanded in part, Prometheus Radio Project et al. v. Federal Communications Commission*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus Remand Order*”), stay modified on rehearing, (3d Cir. Sept. 3, 2004) (“*Prometheus Rehearing Order*”). On September 3, 2003, the U.S. Court of Appeals for the Third Circuit stayed the effective date of the rule changes contained in the 2002 Biennial Review Order, stating that the “prior ownership rules [will] remain in effect pending resolution of these proceedings.” *Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam).

<sup>3</sup> See 47 C.F.R. § 73.3555, Note 7. See also *Review of the Commission’s Regulations Governing Television Broadcasting*, Memorandum Opinion and Order, 14 FCC Rcd 12903, 12935-40 (1999) (“*Local Ownership Order*”), *recon. granted in part*, 16 FCC Rcd 1067 (2001).

<sup>4</sup> 14 FCC Rcd at 12939.

6. 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, Davis and Withers maintain that, according to the Television Bureau of Advertising, as of May 2006, nearly 95 percent of all television households in the DMA received their television via cable and/or alternative delivery systems. Thus, the applicants argue, Station WVFX(TV) is effectively competing with at least 100 television channels available on cable or satellite. For this reason, the applicants claim that the proposed combined operations would have a negligible adverse effect on either competition or diversity of program choices.

7. Withers further pledges that it will institute local newscasts on Station WVFX(TV), which has no local news at present. Specifically, Withers would air a local newscast in the 10 p.m. time slot. According to Withers, Station WDTV(TV) currently provides a significant local weather service, which will be made available to Station WVFX(TV). Finally, the applicants maintain that joint ownership of Station WVFX(TV) and Station WDTV(TV) will allow for significant economies of scale.

8. In addressing the fourth criterion, Withers states that it is the only reasonably available purchaser willing and able to operate Station WVFX(TV). According to Withers, Davis retained the services of Kalil and Company ("Kalil"), a nationally recognized independent broker, in July 2003 to market Station WVFX(TV). According to the declaration of Kalil Vice President Kelly Callan, appended to the application, Kalil contacted approximately fifteen parties to solicit interest for the purchase of the station. Not one, according to Kelly Callan, submitted an offer.

9. WVMH argues that the applicants have failed to meet any of the presumptive criteria for grant of a "failing station" waiver. With respect to low all-day audience share, WVMH states that, although the applicants claim an all-day audience share below 4 percent, they have not submitted data for the appropriate time period, 9:00 a.m. to midnight. Instead, according to WVMH, the applicants purport to submit Nielsen Station Index data covering the time period 7:00 a.m. to 1:00 a.m. for the years 2004 and 2005, and Nielsen quarterly ratings data covering the time period 7:00 a.m. to 11:30 p.m., Monday through Friday, for 2006. WVMH provides copies of the Nielsen all-day (9:00 a.m. to midnight) audience share reports for February 2007 and May 2007. WVMH argues that these show a 12 percent in-market share for February 2007 and a 13 percent in-market share for May 2007.

10. WVMH claims that the applicants have provided no documentation in support of their claims about Station WVFX(TV)'s financial condition, relying instead on the Commission's recent grant to the station of a waiver of the DTV build-out deadline. With respect to the third criterion, regarding the public interest benefits of the waiver, WVMH argues that the applicants' generic promises do not outweigh the substantial harms to diversity and competition that will result from the proposed combination of two television stations in a market containing only three television stations. Finally, WVMH faults the applicants' reliance on a Kalil and Company media broker, and no other brokers, in support of their claim that no out-of-market buyer is available.

11. WVMH insists that the waiver request is not consistent with the public interest. It maintains that Withers' ownership of Station WDCI(FM), Bridgeport, West Virginia, adds to the adverse competitive impact of the proposed television duopoly. Petitioner further argues that the assignment application may not be granted while WVFX's renewal application is pending.<sup>5</sup>

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<sup>5</sup> We note that Station WVFX(TV)'s renewal application was granted on August 22, 2007. See File No. BRCT-20040601BOM. WVMH posits that the record is incomplete because certain schedules to the Asset Purchase Agreement, the Advertising Representation Agreement, and the Shared Services Agreement have not been submitted. We find, however, that the application is complete as the applicant has certified that the schedules at issue are not germane to the Commission's evaluation of the application. See *LUJ, Inc.*, 17 FCC Rcd 16980, 16983 (2002).

12. In their Joint Opposition, Davis and Withers maintain that they have satisfied all four elements of the "failing station" waiver presumptive test. They concede that their showing with respect to audience share uses a "slightly more comprehensive 'all day' time period"<sup>6</sup>, but they insist that it is probative of low audience share nonetheless. The applicants maintain that Station WVFX(TV) viewership is more realistic when measured against the total number of people watching television in the DMA, even when some people are watching via cable, rather than when limited, as WVMH suggests, to over-the-air viewership. This is particularly so, according to the applicants' Joint Opposition, given the fact that cable and alternate delivery systems' penetration in the DMA is 94 percent. The Joint Opposition provides Nielsen Station Index quarterly share percentages for various time periods from July 2004 to May 2007. These percentages reflect total television household viewing, including cable household viewing. The Joint Opposition averages these percentages to conclude that shares for the 9 a.m. to midnight period averaged 2.92. For May 2007, the share is shown as 5 percent.

13. The Joint Opposition denies the Petitioner's allegation that the applicants rely on a previous DTV financial showing. The applicants point out that they have submitted to the Commission financial data for the last three years with a request for confidential treatment.

14. The applicants also object to WVMH's criticism of its public interest showing. They maintain that their pledge of a 30-minute newscast at 10:00 p.m. is significant because news programming is a core benefit of a combination such as they propose. With respect to their showing of attempts to sell Station WVFX(TV), the applicants argue that the broker declaration submitted is consistent with showings found adequate in other cases. The applicants disagree with the significance the Petitioner attaches to Withers' ownership of a radio station in the market. They state that such ownership is consistent with the multiple ownership rules.

15. In reply, WVMH argues that there is no precedent for grant of a duopoly waiver where there are only three full power television stations in the DMA. WVMH goes on to repeat that the applicants fail that part of the presumptive criteria for a "failing station" waiver that requires one of the merging stations to have a low all-day audience share (*i.e.*, 4 percent or lower). WVMH argues that the applicants have not used the proper time period for an all-day audience share (according to WVMH, 9:00 am to midnight), and that they have improperly counted inside-DMA viewing of stations outside the DMA.

### III. DISCUSSION

16. 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 applicants' submissions, to determine whether there is a substantial and material question of fact requiring resolution in a hearing.<sup>7</sup> 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.<sup>8</sup> Given the specific circumstances before us, we find that Withers has demonstrated that grant of the waiver would comply with the "failing station" waiver standard and is, therefore, presumed to be in the public interest. We do not find that the information presented by WVMH is enough to overcome this presumption and, therefore, we conclude that grant of the waiver in this

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<sup>6</sup> Joint Opposition at p.6.

<sup>7</sup> 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).

<sup>8</sup> *Stone v. FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972).

instance would be in the public interest.

17. We find, at the outset, that Withers has provided evidence sufficient to demonstrate compliance with criteria (b), (c), and (d) of the “failing station” waiver standard. With respect to (a), the audience share criterion, Withers was required to show that one of the merging stations has had a low all-day audience share, which the Commission defines as 4 percent or lower. To meet this criterion, the applicants rely on the audience share for Station WVFX(TV), the station to be acquired, and the one they allege is failing. The applicants’ initial showing used share data for the 7:00 a.m. to 1:00 a.m. time period for 2004 and 2005 and the 7:00 a.m. to 11:30 p.m. time period for 2006. However, Section 73.3555(b)(2)(i) of the Commission’s rules defines the “all-day” period, at least with respect to determining compliance with the local television ownership rule, as being between 9:00 a.m. and midnight.<sup>9</sup> Moreover, that same rule provision makes clear that the relevant audience share data is that most recent to the filing of the application.<sup>10</sup>

18. Use of the inappropriate daypart by the applicant in the initial showing resulted in an inaccurate calculation of audience share. Despite the disagreement as to the actual audience share due to the different methodologies relied upon by the applicant and petitioner, the applicant concedes that as of May 2007 Station WVFX(TV)’s audience share would have been at least 5 percent, above the 4 percent threshold set forth in our rules. As such, the waiver standard would not have been met and the applications should not have been accepted.

19. On February 21, 2008, the staff issued a letter providing the applicants “an opportunity to amend their application with updated data relevant to our review of the waiver showing.”<sup>11</sup> On February 28, 2008, Davis amended the application, which WVMH opposed via a filing dated March 6, 2008. Davis has provided updated data, including the Nielsen Station Index “Viewers in Profile” for the quarters ending in July 2007 and November 2007, demonstrating an all-day “total market” audience share for Station WVFX(TV) of 2 and 3, respectively. WVMH argues that the only audience share relevant to the analysis is an audience share that excludes from its calculation cable channels and out-of-DMA broadcast stations viewed within the market. We, however, agree with the applicants that “total market” audience share is the appropriate measure of overall performance, and better indicates whether a station is in financial trouble. While we continue to believe that applicants’ showings should be evaluated using the data available at the time of filing, under the specific circumstances of this case, we will evaluate this “failing station” waiver request using the most recent audience share data available, which was 3 percent in November 2007. We also note that were we to now find that the initial showing failed to comply with the audience share criterion, the applicants could withdraw their initial application and re-file using the most recent data. Given that fact and the applicants’ confusion regarding the correct methodology to apply in determining audience share, we find that Withers’ showing, as revised, complies with the audience share prong of the “failing station” waiver standard.<sup>12</sup>

20. We recognize that the Clarksburg-Weston market is relatively small, as indicated by WVMH. We note, however, contrary to WVMH’s assertion, this market contains four full service stations, as Station WNPB(TV), Morgantown, is assigned to the Clarksburg-Weston DMA.<sup>13</sup> Given the

<sup>9</sup> 47 C.F.R. §73.3555(b)(2)(i).

<sup>10</sup> See, also, *2002 Biennial Review Order*, 18 FCC Rcd at 13692 (referencing “the most recent all-day audience share” at the time an application is filed in determining whether an applicant complies the audience share prong of the local television ownership rule).

<sup>11</sup> Letter from Barbara A. Kreisman, Chief, Video Division, to Dennis J. Kelly, Esq., *et al*, dated February 21, 2008.

<sup>12</sup> The failing station waiver standard set forth in 47 C.F.R. Section 73.3555(b)(2)(i), Note 7, does not specify that the 4% audience share prong must be complied with at the time an application is filed.

<sup>13</sup> *Nielsen Media Research*.

financial condition of Station WVFX(TV), and the programming benefits that would accrue to common ownership of Station WVFX(TV) and WDTV(TV) as described in the application and opposition, we find that grant of the waiver would serve the public interest. It would manifestly disserve the public interest were the Clarksburg-Weston market to lose the services of Station WVFX(TV).

#### IV. ORDERING CLAUSES

21. **ACCORDINGLY, IT IS ORDERED**, That the request for a “failing station” waiver of the television duopoly rule, Section 73.3555(b), to permit Withers Broadcasting Company of Clarksburg, LLC, to own and operate both WVFX(TV) and WDTV(TV), **IS GRANTED**.

22. **IT IS FURTHER ORDERED**, That the petition to deny filed by West Virginia Media Holdings, LLC, **IS DENIED** to the extent set forth herein.

23. **IT IS FURTHER ORDERED**, having found the applicants qualified and that grant of the application would serve the public interest, convenience and necessity, That the application (File No. BALCT-20070622ABZ) for consent to the assignment of the license for Station WVFX(TV), Clarksburg, West Virginia , from Davis Television Clarksburg, LLC, to Withers Broadcasting Company of Clarksburg, LLC, **IS GRANTED**.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau