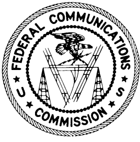

Federal Communications Commission
Washington, D.C. 20554

DA 10-209
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Borger Broadcasting, Inc., Debtor in Possession
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Midessa Broadcasting, L.P.
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Lerman Senter PLLC
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Re: KEYU(TV), Borger, Texas, ID No. 83715
Application for Assignment of License
File No. BALCDT - 20091015ACU

Dear Licensees:

This is in reference to the application for consent to assign the license of KEYU(TV), Borger, Texas, channel 31 (Univisión), from Borger Broadcasting, Inc., Debtor in Possession ("Borger") to Midessa Broadcasting, L.P. ("Midessa"), which shares common ownership with Panhandle Telecasting LP, ("Panhandle") the licensee of television station KFDA-TV, Amarillo, Texas. The application is unopposed. The applicants have requested a waiver of Section 73.3555(b)(2)[1] of the Commission's Rules, the local television multiple ownership rule or duopoly rule. Stations KEYU(TV) and KFDA-TV are both assigned to the Amarillo, Texas Designated Market Area ("DMA") and the stations have noise limited contour overlap. For the reasons stated below, we grant the requested waiver and grant the application.

Background. Under Section 73.3555(b)(2) of the Commission's Rules currently in effect,[2] two full-power television stations licensed in the same DMA that have Grade B[3] overlap may be

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[1] 47 C.F.R. § 73.3555(b)(2).

[2] *Id*.

[3] Post digital transition, the equivalent of the analog Grade B service contour is the noise limited service contour. *Report To Congress: The Satellite Home Viewer Extension And Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures*, ET Docket No. 05-182, 20 FCC Rcd 19504, 19507, ¶3 ("For digital television stations, the counterpart to the Grade B signal intensity standards for analog television stations are the values set forth in Section 73.622(e) of the Commission's Rules describing the DTV noise-limited service contour.").

commonly owned if: (1) at least one of the two stations is not ranked among the top four stations in the DMA; and (2) at least eight independently owned and operating, full-power commercial and noncommercial television stations would remain in the DMA after the merger. The Amarillo, Texas DMA will not have eight independently owned and operating full-power television stations after the proposed merger. Therefore, the applicants have requested a waiver of the rule under Note 7(2) to Section 73.3555, the "failing station" standard.[4]

The Commission's *Local Ownership Order*,[5] states 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."[6] These criteria are:

1. One of the merging stations has a low all-day audience share (*i.e.*, 4% or lower);

2. The financial condition of one of the merging stations is poor (for example, one of the stations has had a negative cash flow for the previous three years);

3. The merger will produce public interest benefits; and

4. 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.

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

With respect to audience share, the applicants maintain that station KEYU(TV)'s all-day audience share has been below 4% for each of the previous three years. The applicants state, as reported by Nielsen Media Research, that KEYU(TV) "garnered average household audience shares of 0.0[%] in 2006, 1.0[%] in 2007[,] and 1.5[%] in 2008." Furthermore, the applicants explain that the highest audience share that KEYU(TV) has captured during the last three years is 2.2%, which occurred in November 2007 and May 2008.

With respect to its financial condition, the applicants have submitted KEYU(TV)'s financial data to demonstrate negative cash flow and operating losses for the three years preceding the filing of the application.[7] The information submitted shows that over the past three years, KEYU(TV)

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[4] 47 C.F.R. § 73.3555 Note 7.

[5] *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999) ("*Local Ownership Order*"), *recon. granted in part*, 16 FCC Rcd 1067 (2001).

[6] *Id.* at 1076.

[7] In late 2008, Equity Media Holdings Corporation, Debtor in Possession ("Equity"), and its subsidiary Borger, filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. Sections 101-1532, as amended, with the United States Bankruptcy Court for the Eastern District of Arkansas. The applicants claim that

has had a consistently negative financial position and has suffered annual net losses ranging from nearly $300,000 to $450,000.

In regard to the third criterion, the applicants state that consolidation of the operations of KEYU(TV) and KFDA-TV will result in tangible and verifiable public interest benefits that will outweigh any harm to competition and diversity. Specifically, the applicants assert that joint ownership will enable KEYU(TV) to improve both its service coverage area and public service to the community.

The applicants state that joint ownership of KEYU(TV) and KFDA-TV will provide KEYU(TV) with the financial resources and manpower needed to restore and upgrade KEYU(TV)'s technical facilities and to return the station to full power.[8] The applicants explain that returning the station to full power "will increase service to the Amarillo community," and the upgraded facilities will "provide KEYU[(TV)] with a better, more consistent on-air broadcast picture and signal."

The applicants further assert that this transaction will improve KEYU(TV)'s public service to the community, as Midessa pledges to allow KEYU(TV) complete use of KFDA-TV's local production facilities. As a result, the applicants state that "for the first time in the history of KEYU(TV), the station w[ill] be able to produce and broadcast local programs." Furthermore, the applicants explain that due to financial conditions, KEYU(TV) "does not currently offer local news and weather programming or have the capability to monitor weather events." Midessa, therefore, pledges to provide KEYU(TV) with the resources "to provide viewers with important news and weather alerts." Finally, the applicants state that KEYU(TV) "currently maintains a minimal staff presence – enough to maintain *status quo*." Thus, Midessa pledges to "staff KEYU[(TV)] with sufficient employees to improve programming and responsiveness to the local community."[9]

As to the final criterion for the requested waiver, the applicants have included the Declaration of Gregory Guy, Managing Partner of Patrick Communications, LLC ("Patrick Communications"). In February 2008, Equity Holdings Corporation ("Equity") and its subsidiary, Borger, retained Patrick Communications, a media and brokerage consulting firm, to market and sell KEYU(TV) to an out-of-market buyer. According to Guy, Patrick Communications originally located Luken Communications, LLC ("Luken") as a buyer, and the Commission subsequently approved the

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there is no hope that Equity will re-emerge from bankruptcy as a reorganized entity. As such, Equity and its subsidiaries have already liquidated the majority of their assets, and KEYU(TV) is among the last stations that Equity, through Borger, still operates.

[8] Due to equipment failures, KEYU(TV) is currently operating at 5% of its authorized power, and Borger does not have the financial means to make the repairs. File No. BLDSTA-20090921ABX.

[9] As an "additional improvement in public service that would result from Midessa's ownership of KEYU[(TV)]," the applicants state that "Midessa and Panhandle commit to maintain separate network affiliations for KFDA-TV and KEYU[(TV)]."

transaction.[10] Guy states, Luken, however, ultimately refused to close the transaction. Next, Guy explains that Patrick Communications "included KEYU(TV) in the sale auction that it conducted for all of Equity's television stations on April 16, 2009." Guy asserts that "despite extensive marketing of the auction, no bidders or potential bidders expressed an interest in KEYU[(TV)]." Guy explains that his marketing techniques for the auction included print media advertisements in *Television Week* and *Broadcasting & Cable*, electronic media advertisements in *Television Business Reports* and *TVNewsday*, and "direct mail solicitations to hundreds of existing television station owners and other potential purchasers." After the sale of KEYU(TV) to Luken and the auction both failed, Guy states that Patrick Communications conducted a review of its regional and national television station marketplace contacts and followed up with 20 parties as potential buyers. Of these 20 parties, Guy explains that only three groups requested additional information, and only one group made an offer, which was for $100,000. According to Guy, the offer for $100,000 was "significantly less than the independently appraised fair market value for the station." As a result, Guy states that "given the lack of bona fide interest in KEYU[(TV)] at the national and regional levels," Patrick Communications had no choice but to pursue potential buyers in the Amarillo market. Finally, Guy states that of the nine in-market prospective buyers, Midessa is the only party which made an offer.

Based on the foregoing, the applicants contend that extensive efforts have been made to market the station and only an in-market buyer is available. They state that Midessa is willing and able to purchase KEYU(TV) at a reasonable price. Moreover, the applicants assert that Midessa will make the investments needed for KEYU(TV) to better serve the public interest with improved service area coverage and with local programming, including news and weather. Therefore, they request a waiver of the local multiple ownership rule under the "failing station" waiver standard.

Discussion. Upon review of the record, we will grant the parties' request for a waiver of the local television duopoly rule, and we will grant the assignment application. The applicants have submitted detailed information regarding KEYU(TV)'s bleak financial situation. Both Borger and its parent company, Equity, have filed for bankruptcy pursuant to chapter 11 of the United States Bankruptcy Code. Furthermore, KEYU(TV)'s negative cash flow and operating losses for the past three years are consistent with the criterion the Commission has set for determining that a station is "failing." In addition, KEYU(TV) has averaged between a 0% and 1.5% audience share during the last three years. The attempts to sell KEYU(TV) to an out-of-market buyer were extensive, albeit unsuccessful. Only Midessa of the potential in-market buyers sought to purchase the station. We believe that the proposed merger of the two stations will not only help KEYU(TV) overcome its existing shortcomings, but that it will also provide a tangible benefit to the community by returning the station to full power; upgrading the station's facilities; and broadcasting local programming, including news and weather, for the first time.

Consistent with the *Local Ownership Order*, we find that the combined operation of KEYU(TV) and KFDA-TV will pose minimal harm to our diversity and competition goals because KEYU(TV)'s dire financial situation hampers its ability to be a viable voice in its market. Under these circumstances, allowing KEYU(TV) to be operated by a stronger station in the market will

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[10] File No. BALCT-20080819AAX.

improve KEYU(TV)'s facilities and local programming, an outcome which clearly benefits the public interest. In light of the above discussion, we find that the applicants are fully qualified and conclude that the grant of the assignment application will serve the public interest.

ACCORDINGLY, IT IS ORDERED That, the request for a waiver of Section 73.3555 of the Commission's Rules pursuant to Note 7(2), the "failing station" standard, to permit the co-ownership of KEYU(TV), Borger, Texas and KFDA-TV, Amarillo, Texas, IS GRANTED.

IT IS FURTHER ORDERED That the application for the assignment of license of KEYU(TV), Borger, Texas, from Borger Broadcasting, Inc., Debtor in Possession to Midessa Broadcasting, L.P., File No. BALCDT-20091015ACU, IS GRANTED.

Sincerely,

William T. Lake
Chief, Media Bureau