



Federal Communications Commission
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Re: WNYA-TV, Pittsfield, MA, ID No. 136751
File No. BALCDT-20130307ABT

Dear Counsel:

This letter is in reference to the unopposed, above-captioned application (Application) to assign the license of television station WNYA-TV, Pittsfield, Massachusetts, from Venture Technologies Group, LLC (VTG) to WNYT-TV, LLC (WNYT) (collectively, the Applicants). WNYT is the current licensee of WNYT(TV), Albany, New York, an affiliate of the NBC Television Network. Nielsen Media Research (Nielsen) assigns both stations to the Albany-Schenectady-Troy, New York Designated Market Area (DMA).

Section 73.3555(b)(2) of the Commission's rules¹ permits common ownership of two full-power television stations licensed in the same DMA, the Grade B contours of which overlap,² provided that, at the time the application to acquire the station(s) is filed: (1) at least one of the two stations is not ranked among the top four stations in the DMA, based on the most recent all-day audience share; and (2) at least eight independently owned and operating, full-power commercial and noncommercial television stations would remain in the DMA after the merger. While WNYA-TV is not ranked among the top four stations

¹ 47 C.F.R. § 73.3555(b)(2).

² Although the rule refers to Grade B contours, we note that, following the digital transition, the Commission has developed the digital noise-limited contour to approximate the same probability of service as the analog Grade B contour and that it has stated that the two are roughly equivalent. See 47 C.F.R. § 73.622(e); *2010 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*, Notice of Inquiry, 25 FCC Rcd 6086, 6117 (2010). In this instance, both the historic analog Grade B contours and the digital noise-limited contours of the stations overlap.

in the market, there are fewer than eight independent voices in the Albany DMA. WNYT and VTG therefore request a waiver of the rule, pursuant to the “failing station” standard.³

Waiver Request. The Commission has defined a “failing station” as one that has been struggling “for an extended period of time both in terms of its audience share and financial performance.”⁴ The criteria for a “failing station” waiver of the television duopoly rule are:⁵

1. One of the merging stations has an all-day audience share of no more than four per cent;
2. The station has had a negative cash flow for the previous three years;
3. The merger would produce tangible and verifiable 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
4. The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station, and selling the station to an out-of-market buyer would result in an artificially depressed price.

A waiver will be presumed to be in the public interest if the applicant satisfies each criterion.

We find that the Application meets all four prongs of this test. First, the Applicants submit Nielsen ratings showing that during the last three years, WNYA-TV’s all-day audience share peaked at 1.4% in July 2010, and has continued to decline without exceeding 0.9% in more than a year.

With regard to the second criterion of financial condition, the applicants have submitted financial data to demonstrate negative cash flow and operating losses at the station for the three years preceding the filing of the application. Staff analysis of the financial data in the record indicates that the station had a negative cash flow for 2010, 2011, and 2012.

Third, the Applicants state that WNYT will expand WNYA-TV’s local news programming, and anticipates producing new local programming. Specifically, the Applicants state that WNYT(TV) currently is the top-rated local and nation television news program in the DMA, and that WNYT(TV) routinely schedules 9.5 hours of news each weekday, of which 4.5 are locally produced by WNYT(TV), whereas WNYA-TV offers no regularly scheduled news programming. After acquiring WNYA-TV, WNYT intends to begin locally producing a half-hour weekday newscast for broadcast by WNYA-TV, with expectations to increase such local production and at non-traditional times. WNYT further intends to offer a focus on local news coverage for Berkshire, County, Massachusetts where there is no local, full-power television station with such a focus, and to initiate a “town meeting” program for broadcast by WNYA-TV for local issues of public importance.

The Applicants state that WNYA-TV has provided little in the way of public service outreach, but that WNYT will initially strengthen WNYA-TV’s public service offerings in two ways. First, WNYA-TV will replicate a successful local public service issues and causes program called FORUM,

³ 47 C.F.R. § 73.3555, Note 7. *See also Review of the Commission’s Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903 (1999) (*Local Ownership Order*).

⁴ *Local Ownership Order*, 14 FCC Rcd at 12939.

⁵ 47 C.F.R. § 73.3555, Note 7; *Local Ownership Order*, 14 FCC Rcd at 12939.

which WNYT has produced for years. Shortly after acquisition, WNYT would start to produce and air on WNYA-TV a similar program that spotlights WNYA-TV's local public service issues and causes. Second, WNYT would associate WNYA-TV with some of WNYT's public service efforts, including an annual Earth Day electronics recycling project.

With regard to the fourth criterion, the Applicants submit that VTG began to seek an out-of-market buyer for WNYA-TV beginning in 2009, and has made "active and serious efforts" to market the station. VTG met with at least ten potential buyers, but due to WNYA-TV's lack of network affiliation and worsening financial condition, none were willing to extend an offer. The Applicants explain that in 2012 VTG retained Kalil & Co., Inc., a television brokerage company, to market the station to out-of-market buyers. They submit an affidavit from the broker stating that it launched an aggressive out-of-market campaign for WNYA-TV and discussed selling with several dozen prospective buyers. Only one requested additional information about the station and no offers were made.⁶ The Applicants state that only after several years of unsuccessfully searching for an out-of-market buyer did VTG approach WNYT, which then extended the only offer to purchase WNYA-TV.

Based on the showings submitted under the "failing" station waiver criteria established in the *Local Ownership Order*, we are persuaded that grant of a waiver is warranted on the grounds that WNYA-TV is a "failing" station. Specifically, the Applicants demonstrate that WNYA-TV has a low audience share that has not even approached 4% during the relevant period. In addition, the financial documents submitted by the Applicants show that the station has consistently had a poor financial condition and continues to do so, based on financial data confirming the station's persistent financial difficulties, including a large negative cash flow for each of the previous three years.

Consistent with the *Local Ownership Order*, we believe that the combined operation of the stations will pose minimal harm to diversity and competition and that allowing WNYA-TV to operate in tandem with a stronger station will help it to become a viable local voice in the market, through a definite improvement in locally produced news and locally produced issue-responsive and public affairs programming. With regard to the fourth criterion, the Applicants document unsuccessful, active efforts to sell WNYA-TV to an out-of-market buyer. Consistent with our previous decisions, we find that WNYT is the only reasonably available candidate willing and able to acquire and operate WNYA-TV, and selling the station to an out-of-market buyer would result in an artificially depressed price.

In light of the above discussion, we find that the applicants are fully qualified and conclude that the grant of the assignment application would serve the public interest.

⁶ Application, Failing Station Waiver Request, Att. C, Statement of Louis McDermitt, Vice President, Kalil & Co., Inc., "Declaration of Station Marketability."

ACCORDINGLY, IT IS ORDERED That the request for a “failing station” waiver of Section 73.3555(b)(2) of the Commission’s rules to permit the common ownership of WNYT(TV), Albany, New York, and WNYA-TV, Pittsfield, Massachusetts, IS GRANTED. IT IS FURTHER ORDERED That the application for assignment of the license of WNYA-TV, Pittsfield, Massachusetts, from Venture Technologies Group, LLC to WNYT-TV, LLC (File No. BALCDT-20130307ABT) IS GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau