

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

In re Application of

KYLES
BROADCASTING,
LTD.
(Assignor)

File No. BAPCT-891107KK

and

FLINN
BROADCASTING
CORPORATION
(Assignee)

For Assignment of Construction Permit
for Channel 50, Memphis, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: August 27, 1990; Released: October 11, 1990

By the Commission:

1. The Commission has before it for consideration: (1) the above-captioned application for consent to the assignment of the construction permit for Channel 50, Memphis, Tennessee,¹ from Kyles Broadcasting, Ltd. (Kyles) to Flinn Broadcasting Corporation (Flinn); (2) petitions to deny the assignment application filed by West Tennessee Broadcasting Corporation (West Tennessee), licensee of station WLMT(TV), channel 30 (IND/FOX), Memphis, Tennessee, and Channel 24 Licensee Corp. (Channel 24), licensee of station WPTY-TV, channel 24 (IND), Memphis, Tennessee; and (3) related pleadings. Flinn is the licensee of station WHBQ(AM), Memphis, Tennessee. In view of the proposed common ownership of radio and television stations in Memphis, which is generally prohibited by Section 73.3555(b)(1) of the Commission's Rules, Flinn has requested a waiver of the one-to-a-market rule.

PROCEDURAL MATTERS

2. The pleadings raise two procedural questions: namely, whether Channel 24's petition was timely filed and whether Kyles has a construction permit to assign. In regard to the first question, the applicants claim that Channel 24's petition should be returned without consideration because it was not timely filed in accordance with Section 73.3584 of the Commission's Rules; that is, within thirty (30) days of acceptance of the application. Channel 24, on the other hand, argues that its petition, which was filed nearly four months after the application's acceptance, is timely because the assignment application was not complete when filed. It asserts that the applicants even conceded that the deficiencies in their original submission must be taken into account in determining the due dates for pleadings by opposing parties. We find

Channel 24's arguments unavailing. The application was substantially complete when filed, and was accepted for filing on November 22, 1989. Petitions to deny were due, in accord with Rule 73.3584, on or before December 26, 1989. West Tennessee filed its petition timely; Channel 24 did not. The fact that the assignment application contained certain deficiencies, which rendered the application initially ungrantable, but which were cured subsequently by minor amendments, does not afford Channel 24 good cause for filing its petition to deny untimely. See *John F. Runner*, 36 RR2d 773 (1976); and *Midwestern Broadcasting Co., Inc.*, 15 FCC2d 720 (1968). Further, no support for Channel 24's late filing is provided by the applicants' recognition of this failure to set forth initially all necessary information and documentation and their willingness to interpose no objection to West Tennessee's subsequent response to any curative amendment. Accordingly, Channel 24's late-filed petition to deny will be dismissed. Nevertheless, in our discretion, we have treated the petition as an informal objection in accordance with Section 73.3587 of the Commission's Rules.

3. The second question concerns the status of Kyles' construction permit. We note that the construction permit for Channel 50 was granted by the Review Board on November 23, 1987, pursuant to an approved settlement among the competing applicants for that permit. It became effective on January 4, 1988. The construction permit was issued on April 30, 1990 and, by its terms, will not expire until April 30, 1992.² The issuance of the construction permit, which we view as a ministerial act, was delayed because the engineering staff of the Television Branch had to review certain technical amendments that had been filed during the course of the Channel 50 proceeding, to assure compliance with our Rules. Thus, at the time the assignment application was filed, Kyles had already been granted a construction permit. The validity of the construction permit is not affected by the fact that the mere ministerial act of actually issuing the permit had not occurred. Accordingly, we reject Channel 24's contention that the assignment was filed prematurely.

SUBSTANTIVE MATTERS

4. *Assignability of permit.* Channel 24 essentially contends that by filing the assignment application in advance of the actual receipt of the construction permit, Kyles has shown that it had no intent to construct the station. Citing *Calhoun County Broadcasting Co.*, 57 RR2d 641, 646 (1985); and *Scott & Davis Enterprises, Inc.*, 54 RR2d 868 (1983), Channel 24 urges the denial of the application. Additionally, Channel 24 argues that because Kyles has allegedly admitted that it is bereft of financial resources, it is in violation of the Commission's Rules by failing to inform the Commission of this fact prior to the filing of the assignment application.³

5. *Disposition.* Initially, we note that in challenging the assignment application, pursuant to Section 309(d) of the Communications Act of 1934, as amended, a petitioner must, as a threshold matter, submit specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. See *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Once the pleading standard is satisfied, the Commission must determine whether the record as a whole (*i.e.*, the application, the pleadings, and other mat-

ters which may be officially noted) presents a substantial and material question of fact requiring a hearing. See Section 309(d)(2).

6. Since Kyles' construction permit has only recently been issued, there is no proscription to the assignment of the construction permit. A construction permit may generally be assigned at any time prior to the 12th month of the construction period, without any explanation by the permittee. See Section 73.3598 of the Rules. The cases cited by Channel 24 in support of the proposition that a construction permit will not be issued to a permittee who has agreed to sell it, are inapposite. In both of the cited cases, agreements to assign the construction permits were executed prior to grant of the permits. In this case, the permittee made its decision to sell after grant of the construction permit. Finally, we find that Kyles is not in violation of Section 1.65 of the Commission's Rules. While changes did occur in the primary source of financing (the 80% limited partner, who was to provide 80% of the funding for construction of the station, withdrew from the partnership), the applicant's statement that such changes took place after the Review Board's decision granting the application has not been challenged. Since Section 1.65 of the Commission's Rules applies only to "pending" applications, such change was not reportable. Moreover, changes in an applicant's sources of funds to be relied upon occur frequently and such intervening events do not detract from the initial determination of the applicant's ability to construct the proposed station. See *KRPL, Inc.*, FCC 90-116, released May 2, 1990. Accordingly, we find that Channel 24 has failed to allege any matters that warrant further action.

WAIVER

7. *Waiver of the One-to-a-Market Rule.* We now turn to the question of whether a sufficient showing has been made to warrant a waiver of the multiple ownership rules so as to permit common ownership of the new station on Channel 50, and WHBQ(AM), both Memphis, Tennessee. On February 23, 1989, the Commission released its *Second Report and Order* in MM Docket No. 87-7 (*Second Report and Order*), 4 FCC Rcd 1741, *recon. denied in part and granted in part*, 4 FCC Rcd 6489 (1989), in which it retained the one-to-a-market rule, but adopted a revised waiver standard for cases satisfying certain criteria. Specifically, the Commission indicated that it would "look favorably upon waiver applications involving radio and television station combinations in the top 25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees or 'voices' after the proposed merger." *Id.* at 1741. The Commission also stated that it would look with similar favor on waiver requests involving "failed" broadcast stations; e.g., a station that has not been operating for a substantial period of time or is involved in bankruptcy proceedings. Beyond these two circumstances, the *Second Report and Order* asserted that waiver applications would be considered on a case-by-case basis and evaluated using five public interest criteria: (1) the potential benefits of joint operation of the facilities; (2) the types of facilities involved (e.g., VHF or UHF, AM or FM); (3) the number of media outlets already owned by the applicant in the relevant market; (4) any financial difficulties experienced by the stations involved; and (5) the nature of the market -- that is, the level of competition and diversity, based on both broad-

cast and other media voices, after the requested joint operation is implemented. These factors would be weighed to determine whether, in a given case, the potential benefits of combined facilities can be obtained without undermining the public interest in diversity and economic competition in communications markets. Because Memphis, Tennessee is the 41st ranked television ADI, and because neither WHBQ(AM) nor unbuilt Channel 50 qualifies as a failed station, Flinn's waiver request is subject to review under the case-by-case standard, pursuant to the five public interest criteria.

8. The applicants maintain that their showing meets these criteria and is consistent with Commission precedent, citing *Tulsa 23*, 5 FCC Rcd 727 (1990); *P-N-P Broadcasting, Inc.*, 4 FCC Rcd 5596 (1989); and *Great American Television and Radio Co., Inc.*, 4 FCC Rcd 6347 (1989). With regard to the first factor, public service benefits, Flinn states that the proposed common ownership of WHBQ(AM) and Channel 50 will result in significant economies of scale, operating efficiencies, and public interest benefits. Flinn points out that it plans to seek authority to relocate the Channel 50 transmitter site to the current WHBQ(AM) site. This, Flinn notes, will enable it to eliminate the costs it would incur in acquiring or leasing a separate site for Channel 50, and will also reduce site development costs. Additionally, it maintains, common ownership of WHBQ(AM) and Channel 50 will allow it to construct joint studio facilities which will result in significant future savings in operational costs.⁴ Flinn estimates that it will save approximately \$200,000 in construction costs for the joint studios, and more than \$35,000 annually in studio rent. Additionally, Flinn maintains, the joint operation of the stations will allow it to achieve significant economies of scale with respect to administrative, promotion, program and production costs, and the sharing of personnel (including the general manager, and sales, accounting, traffic and engineering employees). It believes that these savings will exceed \$240,000 annually.

9. Flinn contends that these savings are significant when viewed in terms of the anticipated potential revenue for Channel 50. When constructed, Flinn states, Channel 50 will be the third or fourth independent television station in the Memphis market and that the station's competitive position will be weak.⁵ Flinn notes that of the two independent stations in the market, one averaged a 6.5 percent share of the Memphis ADI television audience from 9:00 a.m. to 12 midnight in 1988, and the other station averaged a 4 percent audience share. Because of the anticipated reluctance of many Memphis cable systems to carry the new station, Flinn states, it believes that Channel 50's audience shares will be below the other independent stations when it commences broadcast operations. The estimated 1989 net television revenues for the Memphis market, it asserts, was \$69,300,000. Thus, Flinn maintains, if Channel 50 could achieve a 4 percent audience share, and a corresponding share of the market's advertising revenue, its net revenues would approximate \$2,770,000. However, Flinn maintains that it does not expect the station to generate revenues of this magnitude initially. Flinn has estimated that the annual operating expenses for Channel 50 and WHBQ(AM), operating separately, would total \$793,000, and that the estimated operating expenses for combined operation of the stations would total \$551,500. Savings from joint operation of the stations, Flinn avers, would represent almost 10 percent of

the estimated revenues for Channel 50. These savings, it states, would be used to hire additional employees and to expand the stations' news, public affairs, and other nonentertainment programming. Further, Flinn claims, common ownership of the stations would enable a struggling radio station to continue to provide service to the public, and would activate an unused commercial allocation, thereby providing a new television broadcast service to the public. See *Second Report and Order*, 4 FCC Rcd at 1749.

10. With respect to the second criterion, the nature of the stations involved, Flinn notes, WHBQ(AM) is a directional, Class III regional AM station operating on 560 kHz with reduced power at night (5 kW-D, 1kW-N, DA-2). According to the Fall 1988 Arbitron ratings, it notes, WHBQ(AM) was the 13th ranked radio station in the Memphis market with a 1.4 share. Arbitron ratings for Spring 1989, Flinn asserts, showed that WHBQ(AM)'s share had declined to less than 1.2, and that it was no longer among the top 14 radio stations in the Memphis market. Therefore, it argues, WHBQ(AM) is not a dominant station in the Memphis radio market. Flinn avers that Channel 50 will be an independent UHF station, and that the construction permit authorizes operation from an antenna radiation center 800 feet above average terrain at 5,000 kW ERP visual. Therefore, Flinn states, the proposed joint operation of the two facilities poses no risk of creating any adverse effect on diversity or competition given the substantial number of competing stations in the Memphis market.

11. The third factor deals with the number of media outlets owned by the applicant in the particular market. Flinn now owns only WHBQ(AM).

12. Flinn asserts that the fourth criterion, concerning the financial difficulties of the station or stations in question, may not apply to its acquisition of Channel 50 since it is an unbuilt station. However, it contends, relevant facts demonstrate that both WHBQ(AM) and Kyles (the Channel 50 permittee) have experienced significant financial difficulties. In this regard, Flinn claims, since it acquired WHBQ(AM) and separated the station operation from WHBQ-TV, it has lost \$768,000 on a cash basis, struggling to maintain the station's operations while also trying to provide service to the public. During this same period, it avers, WHBQ(AM)'s ratings and competitive position in the Memphis market have also declined. Flinn asserts that the joint operation of the two stations will allow it to provide an improved program service to Memphis, compared to the level of service that would result if the stations were to be operated as stand-alone stations (assuming that Channel 50 could be built as a stand-alone station). Additionally, Flinn states, Kyles has experienced financial difficulty in attempting to place Channel 50 on the air. In this regard, Kyles notes, shortly after it was granted the construction permit for Channel 50, its limited partner, who was the 80-percent owner, suffered severe financial losses and was unable to provide his share (80 percent) of funding for the station's construction and initial operation. Tri-State Bank of Memphis was to provide a loan for the remaining 20 percent of the construction costs, Kyles maintains, but the bank refused to lend the funds absent the equity financing from the limited partner. Kyles claims that it sought funds from other banking sources, but the banks were not interested; therefore, it sought new investors for the station through personal contacts, its communications counsel, and a media

broker. After one year of seeking and contacting numerous potential investors, Kyles avers, it received only negative responses. These responses, Kyles states, reflect the broadcasting industry belief that operating Channel 50 as a third or fourth stand-alone independent station in Memphis is not economically viable. Kyles asserts that it has always been its goal and intent to construct the station and to provide the first minority-owned broadcast television service to the Memphis community. However, because of its inability to bring new investors into the partnership and other changed circumstances, Kyles states, it sought to assign the Channel 50 permit to a third party. Flinn, Kyles notes, was the only party that engaged in serious negotiations, and one of only two that expressed any interest in acquiring it. Thus, Kyles asserts, Flinn's acquisition of Channel 50 is the only means of activating the channel and providing a new television service to Memphis. Kyles notes that Flinn has incurred significant financial losses in operating WHBQ(AM) as a stand-alone AM station, and that it has encountered difficulties over a two-year period, while seeking to attract investors and/or third parties interested in acquiring the construction permit. Kyles contends that these factors are analogous to those financial difficulties which the Commission has found to justify one-to-a-market waivers, citing, *Holston Valley Broadcasting Corp.*, 5 FCC Rcd 507 (1990).

13. The fifth and final factor in our case-by-case review is concerned with the nature of the relevant market in light of our traditional diversity and competition concerns. This includes the number of broadcast outlets and separate "voices" that would exist if the merger were approved, the degree of cable penetration and the availability of other nonbroadcast media. As to television stations, we stated that we would consider the relevant ADI TV market and, as to radio, the relevant TV metro market. In this regard, Flinn points out the Memphis ADI TV market (ranked 41st with 586,500 households) is served by seven television stations having seven separate owners. They are: WHBQ-TV (ABC), channel 13; WMC-TV (NBC), channel 5; WREG-TV (CBS), channel 3; WPTY-TV (IND), channel 24; WLMT(TV) (IND/FOX), channel 30; WKNO-TV (PBS), channel 10; all Memphis, Tennessee and WMAV-TV (PBS), channel 18, Oxford, Mississippi. Of these stations, one (WMC-TV) is co-owned with radio stations WMC(AM) and WMC-FM. Additionally, it states, that the Memphis metropolitan area is served by 30 radio stations, including WHBQ(AM), and that 14 of these stations are co-owned AM/FM combinations resulting in 23 separate owners or voices. Thus, Flinn argues, if it is authorized to acquire Channel 50, there will be 37 total AM, FM and television stations in the Memphis market (not including channels 50 and 40), with 29 separately owned broadcast voices. It notes that this is only one voice short of the Commission's 30-voice standard. Moreover, Flinn points out that the Memphis market is also served by 3 daily newspapers, 7 weekly newspapers and a 50-percent cable penetration (294,600 television households).

14. *Channel 24's contentions.* In opposing the waiver, Channel 24 asserts that Flinn has failed to justify a one-to-a-market exception. In this regard, it maintains that Flinn cites no Commission precedent where the Commission has granted a waiver of Section 73.3555 of the Rules to permit the co-ownership of a new broadcast station of doubtful viability and an existing station in extreme financial difficulty. It maintains, such waivers typically are

awarded where the financial strength of one station will undergird the usually unprofitable operations of the other. Here, it states, Flinn documents the financial nonviability of both stations, raising substantial and material questions concerning the appropriateness of waiver relief in this case. Channel 24 maintains that the cases cited by Flinn are inapposite. In *Tulsa 23*, it states, the Commission granted the request for waiver on the basis of the applicant's statement that finances from the successful operation of its radio stations, its broadcast experience, and its substantial asset base would contribute to returning the failing UHF TV station to a viable operation. In *Holston Valley Broadcasting Corp.*, it claims, the Commission granted a waiver to allow a failing AM station to be operated under common ownership with a grandfathered AM-FM-TV combination, and that while there was some evidence that operation of the television station had been unprofitable, the Commission relied heavily upon the benefits to be derived from the combination with the other AM radio station to justify the waiver. Moreover, Channel 24 claims, Flinn's representations concerning the economies of scale to be realized from the proposed combination are speculative. While Flinn suggests that the resulting cost savings may enable it to expand the news and public affairs programming on the stations, Channel 24 asserts, the applicant makes no firm commitment to provide such programming.

15. *Disposition*. In amending the one-to-a-market rule, the Commission emphasized that the new waiver policy was not an abandonment of its continuing concerns for encouraging diversity of voices and economic competition. *Second Report and Order*, 4 FCC Rcd at 1752. Thus, in evaluating requests for waiver of the one-to-a-market rule, "our goal in all situations is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market area involved." *Amendment of Section 73.3555* (partial reconsideration), 4 FCC Rcd at 6491. In acting upon requests where the stations are not in the top-25 television markets with 30 or more independent broadcast voices or where no claim of a "failed station" is availing, we have indicated that applicants must specifically demonstrate the public interest benefits of common ownership of stations ordinarily required by the one-to-a-market rule to be separately owned.

16. We find that the requested waiver by the applicant meets the public interest case-by-case criteria and will result in significant public service benefits without a substantial adverse impact on the level of diversity and competition in the Memphis market. Flinn has shown that the joint operation of the stations would result in significant cost savings and economic efficiencies that are critical to the continued operation of WHBQ(AM) and the activation of Channel 50. As noted by the applicant, WHBQ(AM) has been losing money since the separation of its operation from that of WHBQ-TV. Additionally, since the acquisition of WHBQ(AM) by Flinn, the station's ratings and competitive position have also declined. Moreover, Kyles submitted detailed information concerning the difficulties it encountered over a two-year period in its efforts to find new investors in Channel 50, or third parties to purchase the construction permit. These efforts included the services of a media consultant, media broker, and its communications counsel and contacts with the

former competing applicants for Channel 50. In view of the financial losses incurred by WHBQ(AM), the reluctance of the banking community to finance the construction of Channel 50, the lack of interested investors, and the difficulty of finding a third party to whom to assign the construction permit, we believe that a grant of this application would serve the public interest. Indeed, it may offer the only opportunity for the activation of Channel 50 and the provision of a new television service to the public. A grant of this request would also assure the continuation of WHBQ(AM)'s operations without drastic cuts in programming and personnel. Flinn represents that cost savings from joint operation of the stations will be used to hire additional staff and to expand the local news and public affairs programming broadcast on both stations. More importantly, a grant of the waiver request will likely save a marginal AM radio station and bring about the activation of a television station in the Memphis market.⁶

17. WHBQ(AM) and the proposed television station are modest operations in comparison to the facilities of other stations in the market. Because the Memphis market is served by numerous media services, we do not find that the proposed common ownership would create any undue concentration of control of the media. As noted above, the Memphis market is served by a number of radio and television stations (37 AM, FM and television stations with 29 separately owned broadcast voices), 3 daily newspapers and 7 weekly newspapers and has a 50% of cable penetration. Under these circumstances, we do not find that common ownership of WHBQ(AM) and the proposed station on Channel 50 would have a substantial adverse impact on diversity of the media or competition in Memphis and its surrounding area. Accordingly, grant of the requested waiver would be in the public interest.

CONCLUSION

18. In view of the foregoing, we find that Channel 24 and West Tennessee have failed to either make a *prima facie* showing or present a substantial and material question of fact that grant of the instant assignment application is inconsistent with the public interest. Having determined that the applicants are fully qualified, we conclude that grant of the requested waiver and the proposed assignment of the Channel 50 permit would serve the public interest, convenience and necessity.

19. Accordingly, IT IS ORDERED. That the petition to deny filed by West Tennessee Broadcasting Corporation IS DENIED.

20. IT IS FURTHER ORDERED. That the petition to deny filed by Channel 24 Licensee Corp. IS DISMISSED and, when considered as an informal objection, IS DENIED.

21. IT IS FURTHER ORDERED. That the request for waiver of the Commission's one-to-a-market rule, Section 73.3555(b), IS GRANTED, and that the above-captioned application (BAPCT-891107KK) for consent to assignment of the construction permit for Channel 50, Memphis, Tennessee, from Kyles Broadcasting, Ltd. to Flinn Broadcasting Corporation, IS GRANTED.

22. IT IS FURTHER ORDERED. That copies of this Memorandum Opinion and Order shall be sent Certified Mail-Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ Because no call letters have been assigned, we will refer to the station as Channel 50.

² Section 73.3598(a) of the Rules provides that a permittee will have 24 months from *the date of issuance* of the original permit within which to complete construction and apply for a license. See letter to *Lee J. Peltzman, Esquire* (MMB, dated August 7, 1984).

³ Channel 24 and West Tennessee (petitioners) also raise questions regarding the completeness of the assignment application. They allege that the application as filed did not contain the showing required by Section 73.3597 of the Rules, verifying the legitimate and prudent expenses expended in connection with the filing and prosecution of the construction permit application. Additionally, the petitioners contend that the assignment application did not contain the showing required by Section 73.3535(a) with respect to assignment applications filed after the 12th month of the construction period. The applicants subsequently amended the application to supply the required documentation, which amended showing has not been challenged by Channel 24 or West Tennessee. Additionally, in view of our ruling regarding the status of the construction permit, we need not address further Channel 24's arguments concerning the construction permit. The application is now complete in all respects and petitioners do not challenge this fact.

⁴ Flinn acquired WHBQ(AM) from RKO General, Inc. (RKO) on October 1, 1988. Prior to Flinn's acquisition of WHBQ(AM), the station was commonly owned and operated jointly with WHBQ-TV. The current WHBQ(AM) studios are co-located with WHBQ-TV and leased from RKO. Because the WHBQ(AM) studio lease will expire in October 1990, and the Commission has approved the acquisition of WHBQ-TV by Adams TV of Memphis, Inc., Flinn anticipates that it will be required to relocate the WHBQ(AM) studios.

⁵ The Commission has issued a construction permit for WBUY(TV), channel 40, Holly Springs, Mississippi, which is in the Memphis market, but the station has not commenced broadcast operations. Sonlight Broadcasting Systems, Inc., a nonprofit corporation specializing in religious programming, recently acquired the construction permit for WBUY(TV).

⁶ The fact that both WHBQ(AM) and Channel 50 have financial difficulties does not undercut our rationale for a waiver. The cost savings will make it easier for both stations to serve better the public interest.