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

In re Applications of	)	
UNITED BROADCASTING COMPANY, INC. (Assignor)	)	
and	)	File No. BALH-971023EF
WABASH VALLEY BROADCASTING CORP. (Assignee)	)	
For Assignment of License of WWVR(FM), West Terre Haute, Indiana	)	
WABASH VALLEY BROADCASTING CORP. (Assignor)	)	
and	)	File No. BALCT-980403IH
EMMIS TELEVISION LICENSE CORPORATION OF CAPE CORAL (Assignee)	)	
For Assignment of License of WFTX(TV), Cape Coral, Florida	)	
WABASH VALLEY BROADCASTING CORP. (Assignor)	)	
and	)	File No. BALCT-980403II
EMMIS TELEVISION LICENSE CORPORATION OF TERRE HAUTE (Assignee)	)	
For Assignment of License of WTHI-TV, Terre Haute, Indiana	)	
WABASH VALLEY BROADCASTING CORP. (Assignor)	)	

and	)	File No. BAL-980403IJ
EMMIS 1480 AM RADIO LICENSE CORPORATION OF TERRE HAUTE (Assignee)	)	
For Assignment of License of WTHI(AM), Terre Haute, Indiana	)	
WABASH VALLEY BROADCASTING CORP. (Assignor)	)	
and	)	File No. BALH-980403IK
EMMIS 99.9 FM RADIO LICENSE CORPORATION OF TERRE HAUTE (Assignee)	)	
For Assignment of License of WTHI-FM, Terre Haute, Indiana	)	
WABASH VALLEY BROADCASTING CORP. (Assignor)	)	
and	)	File No. BALH-980403IL
EMMIS 105.5 FM RADIO LICENSE CORPORATION OF TERRE HAUTE (Assignee)	)	
For Assignment of License of WWVR(FM), West Terre Haute, Indiana	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 1998 **Released: October 6, 1998**

By the Commission: Chairman Kennard concurring and issuing a statement; Commissioner Ness issuing a statement; and Commissioner Tristani dissenting and issuing a statement.

1. The Commission has under consideration the above-captioned unopposed assignment applications. Wabash Valley Broadcasting Corp. ("Wabash Valley"), which currently holds the licenses of WTHI(AM), WTHI-FM and WTHI-TV, Channel 10 (CBS), Terre Haute, Indiana, as a grandfathered AM-FM-TV

combination,[1] seeks to acquire another FM station in the market, WWVR(FM), West Terre Haute, Indiana, from United Broadcasting Company, Inc. (the "United application"), and concurrently to sell all four stations (the grandfathered AM-FM-TV combination and WWVR(FM)) to wholly-owned subsidiaries of Emmis Broadcasting Corporation.[2] In connection with the assignment of the Terre Haute television and radio stations, we consider requests by Wabash and by Emmis for permanent waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(c), which generally proscribes common ownership of television and radio stations in the same market.[3] Also under consideration is the application for assignment of license of WFTX(TV), Channel 36 (FOX), Cape Coral, Florida, from Wabash Valley to Emmis.

One-To-A-Market Waivers

2. With respect to the United application, we note that the community of license of WWVR(FM), the station to be acquired by Wabash Valley, falls entirely within the Grade A signal contour of WTHI-TV. Accordingly, Wabash Valley submitted a request for a permanent waiver of the one-to-a-market rule to permit common ownership of this new television-radio combination. However, Wabash Valley subsequently filed the above-captioned applications to assign the licenses of the grandfathered AM-FM-TV combination and the license of WWVR(FM) to Emmis. Wabash Valley states that the sale of WWVR(FM) to Emmis is contingent on the grant and consummation of the United application, and further represents that Wabash Valley will consummate its acquisition of WWVR(FM) simultaneously with the consummation of the assignment of WWVR(FM) from Wabash Valley to Emmis. Wabash Valley asserts that it does not intend to operate or control WWVR(FM), but rather seeks to acquire the station for the sole purpose of assigning the license to Emmis. Accordingly, our action on the United application will be conditioned on the concurrent consummation of the sale of WWVR(FM) from Wabash Valley to Emmis, thereby obviating the need to act on Wabash Valley's one-to-a-market waiver request.

3. Grant of the subject transactions would allow Emmis to control one TV, one AM, and two FM stations in the Terre Haute Designated Market Area (DMA), the nation's 138th largest DMA. Since the Grade A contour of WTHI-TV completely encompasses the communities of license of the radio stations, Emmis requests a permanent waiver of the Commission's one-to-a-market rule to permit common ownership of WTHI-TV, WTHI(AM), WTHI-FM and WWVR(FM).[4]

4. Emmis bases its one-to-a-market waiver request on the standards adopted in the *Second Report and Order* in MM Docket 87-7, 4 FCC Rcd 1741 (1989) (*"Second Report and Order"), recon. granted in part and denied in part,* 4 FCC Rcd 6489 (1989) (*"Second Report and Order Recon."*). In accordance with these standards, the Commission presumptively favors waiver requests involving: (a) stations serving

[1] This existing AM-FM-TV combination is "grandfathered" because it predates the adoption of the Commission's one-to-a-market rule in 1970. *See Multiple Ownership of Standard, FM and TV Broadcast Stations,* 22 FCC 2d 306 (1970), *recon. in part,* 28 FCC 2d 662 (1971).

[2] Wholly-owned subsidiaries of Emmis Broadcasting Corporation are referred to herein as "Emmis."

[3] Section 73.3555(c) of the Commission's rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompass the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

[4] The grandfathered status of the existing AM-FM-TV combination in Terre Haute does not survive an assignment, and a waiver of the one-to-a-market rule with respect to those stations is therefore required.

the top 25 markets where at least 30 separately owned, operated and controlled stations will remain following the proposed combination ("top 25 market/30 voice standard"); or (b) "failed" stations, *i.e.*, stations which have not been operating for a substantial period of time (four months or more) or are involved in bankruptcy proceedings. Otherwise, waiver requests must be evaluated under the more rigorous case-by-case standard. *See* 47 C.F.R. § 73.3555(c), Note 7. Emmis submits its waiver request pursuant to the case-by-case standard since neither WTHI-TV nor any of the subject radio stations are failed stations, and the Terre Haute DMA is not among the top 25 markets.

5. Under the case-by-case approach, the Commission makes a public interest determination by weighing five factors: (1) the potential public benefits of joint operation of the facilities, such as economies of scale, cost savings, and programming and service benefits; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented. *See Second Report and Order,* 4 FCC Rcd at 1753-54. In enunciating the five factors to be considered under the case-by-case standard, the Commission noted that not all five factors must be satisfied in each case, but rather the overall consideration of these factors must weigh in favor of granting the waiver request. *Second Report and Order Recon.*, 4 FCC Rcd at 6491. Emmis has submitted a showing that addresses each of the criteria.

Waiver Showing

6. **Public Service Benefits of Joint Operation.** Emmis reports that by consolidating the operations of WTHI(AM), WTHI-FM and WTHI-TV, Wabash Valley has achieved significant economies of scale and cost efficiencies which translate into substantial public interest benefits for the residents of Terre Haute. Emmis states that it intends to continue the consolidation of the three stations' operations in order to maintain these efficiencies and resulting public interest benefits.

7. According to Emmis, by sharing a physical plant, the WTHI(AM)/FM/TV combination results in considerable annual savings in rent and utilities. In addition, Emmis states that it plans to follow Wabash Valley's current practice of combining postage, telephone and data processing expenses ($55,000 savings). The stations also employ the same legal counsel and accountants and maintain joint insurance ($9,000 savings). And Emmis asserts that consolidation of the three stations' administrative functions, including business offices, equipment and accounting staffs, creates cost savings of nearly $83,000. Emmis proposes to save an additional $32,000 on technical expenses by using TV engineers and technicians at the radio stations. Cross-promotions are another source of cost savings, as the radio stations save approximately $200,000 by advertising on WTHI-TV. Additionally, Emmis states that it expects to achieve roughly $20,000 in savings through group discounts on promotional items and outdoor advertising. In addition, by Emmis' estimate, Wabash Valley currently saves a minimum of $100,000 annually in news costs because the AM and FM stations have access to the news gathering resources of the television station. Emmis contends that if the news functions of the stations were separated, at least four additional full-time news employees would be required to maintain the current level of news coverage. In all, Emmis estimates that it would cost an additional $544,000 annually to operate the three stations separately at the same level of service to the community.

8. Emmis asserts that the efficiencies arising from common ownership and operation of the WTHI(AM)/FM/TV combination will allow Emmis to maintain enhanced service to the Terre Haute community, "primarily [through] . . . substantially increased news and public affairs programming." The AM and FM stations will be able to draw on the considerable news resources of the television station, which has a news budget of over $1 million. Specifically, Emmis maintains that the radio stations --

which have a news staff of one full-time and two part-time employees -- will be able to take advantage of WTHI-TV's 32-person news, weather and sports department as well as the television station's five-person public service and community promotions staff. WTHI(AM), which currently airs public local affairs programming from 10 a.m. to noon each day, also simulcasts WTHI-TV's nightly 6 o'clock newscast. Additionally, says Emmis, the AM station provides comprehensive coverage of local high school, college and professional sports, while the FM station, which has a country format, also broadcasts local programming using local talent.

9. Emmis notes that the three stations jointly sponsor more than 30 different public service organizations and specific community events each year. For example, the radio stations work closely with the television station to promote public service programs to combat drug and alcohol abuse and crime. Emmis reports that through combined efforts, the stations have raised hundreds of thousands of dollars for a local hospital, the March of Dimes, the Children's Miracle Network and the United Way of the Wabash Valley. According to Emmis, the continued joint ownership of the three stations will benefit women and minorities. In this regard, Emmis notes that the stations have established internship programs and regularly hire students from local colleges as part-time employees. Emmis pledges to continue this "aggressive recruitment and support of women and minorities."

10. The subject transactions propose to add another FM station to the existing AM-FM-TV combination. Emmis contends that common ownership of WWVR(FM), in addition to WTHI(AM)/FM/TV, will create further efficiencies of approximately $300,000 per year. Specifically, Emmis states that the stations would consolidate personnel responsible for management, administration, data processing, news, public affairs, and engineering for an estimated annual savings of $60,000. The elimination of duplicate equipment and parts and the consolidation of technical maintenance resources for the three radio stations is expected to yield annual savings of about $10,000. According to Emmis, studio consolidation would result in annual savings of approximately $30,000 for utilities, office maintenance and equipment. The stations would share expenses for professional services including accountants, attorneys, and insurance services for an annual savings of $5,000. Emmis also states that group advertising and audience research discounts would result in annual savings of $195,000.

11. Emmis proposes to use these savings to improve service to the community. Emmis anticipates adding a news operation to WWVR(FM), which it states would cost $100,000 if WWVR(FM) were a stand-alone station, but will be less expensive because WWVR(FM) would share resources with the television station's established news department. Emmis states that it will use the television station's news and information resources to air newscasts and weather updates on WWVR(FM) on a daily basis. Further, Emmis represents that its acquisition of WWVR(FM) would permit the TV and radio stations to engage in cross-promotions. Such cross-promotions, says Emmis, are particularly important for WWVR(FM) as it launches a new format and targets a different demographic, and will also allow WTHI-TV to more widely promote its children's educational and informational programming. According to Emmis, all of the stations would share in public service programming efforts and join in community public service programming targeted to a younger audience. Lastly, Emmis proposes a capital investment of approximately $90,000 in WWVR(FM)'s facilities which will allow the station to operate more efficiently and provide a stronger signal in the Terre Haute radio market.

12. **Types of Facilities**. With respect to the technical facilities of the subject radio stations, Emmis reports that WWVR(FM) is a Class A station that operates at 3.3 kW; WTHI(AM) is a Class B station that operates on 1480 kHz and at 5 kW; and WTHI-FM is a Class B station that operates at 50 kW. As to the television station, Emmis states that WTHI-TV is a VHF television station affiliated with the CBS network that operates on Channel 10 at 316 kW authorized power and 961 meters height above average terrain ("HAAT").

13. **Other Media Outlets.** Following consummation of the proposed transaction, Emmis would own and operate 1 TV, 1 AM and 2 FM stations in the Terre Haute market. Emmis does not own other broadcast or media interests in this market.

14. **Economic Status.** Emmis reports that none of the broadcast stations at issue faces financial distress. However, Emmis maintains that WWVR(FM) and WTHI(AM) hold a weak position in the Terre Haute radio market. According to Emmis, WWVR(FM) garners little market share, does not provide a competitive signal, has minimal night coverage and monaural sound, and has a marginal operating budget, all of which Emmis maintains are indicative of the station's deficient financial situation and ability to compete independently in the market. Emmis also describes WTHI(AM) as a "barely break-even operation" that is subsidized by WTHI-FM and WTHI-TV.

15. **Competition and Diversity in the Market.** Emmis asserts that two commercial television stations (excluding WTHI-TV) and two noncommercial educational television stations are licensed to communities in the Terre Haute DMA (ranked 138th), and that these four TV stations have four separate owners. Further, Emmis states that WTHI(AM) competes with four other AM stations, and WTHI-FM and WWVR(FM) compete with five other commercial FM and six noncommercial FM stations. Following the proposed transactions, says Emmis, the Terre Haute market will be served by 18 broadcast radio stations owned by 12 separate entities, not including the stations under Emmis' ownership. Emmis maintains that in a market the size of Terre Haute, this level of diversity warrants grant of the requested waiver.

16. Emmis points out that a wide variety of non-broadcast media are also available. It states that approximately 45 communities in the Terre Haute DMA receive cable service from 22 cable systems operated by 10 separate owners, for a cable penetration of 61%. Additionally, states Emmis, four daily newspapers, one weekly newspaper, two independently operated Multipoint Distribution Services, and three independently operated Multichannel Multipoint Distribution Services serve the Terre Haute DMA. Emmis also asserts that direct mail and outdoor advertising compete with radio and television stations in the local Terre Haute advertising market.

Discussion

17. **One-to-a-Market Waiver Standard.** In evaluating a request for a permanent waiver of the one-to-a-market rule, the Commission's goal "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 areas involved." *Second Report and Order Recon.*, 4 FCC Rcd at 6491. We conclude that Emmis' showing in support of a waiver of the one-to-a-market rule meets our case-by-case criteria, and that a permanent waiver in this instance is consistent with the public interest and is not likely to unduly diminish diversity and competition in the Terre Haute market.

18. Emmis demonstrates that common ownership and operation of WTHI(AM)/FM/TV creates efficiencies and cost savings which inure to the public benefit. Emmis represents that the stations' operations have been consolidated for more than 25 years, and that operating them separately at the current level of service would cost an additional $544,000 annually. Moreover, we are persuaded that common ownership and operation of the stations allows for more and better coverage of local news, in that WTHI-TV makes its extensive news gathering resources -- including a 32-person news, weather and sports department -- available to the AM and FM stations. Under joint ownership, the radio stations provide significant local news and public affairs programming to the Terre Haute community, including a simulcast

of WTHI-TV's 6 p.m. newscast, a daily two-hour time slot devoted to local community issues, and coverage of local sports teams. Emmis states that it intends to continue to operate the stations so as to maintain these efficiencies and resulting public service benefits. Likewise, with respect to the acquisition of WWVR(FM), Emmis has shown that the addition of this FM station to the existing AM-FM-TV combination will create efficiencies of approximately $300,000 annually which will be used to enhance the station's technical facilities and programming. Like the radio stations involved in the original AM-FM-TV combination, WWVR(FM) will be better able to serve the Terre Haute community by utilizing the television station's news and information resources. We also note with approval Emmis' commitment to continue to recruit women and minorities through television and radio internships and outreach to local colleges.

19. Our independent analysis verifies the existence of competing facilities in the market which are generally technically comparable or superior to the proposed combination. The Commission's "concern with the types of facilities merging under the authority of a one-to-a-market waiver reflects our interest in assessing the potential impact of a proposed combination of stations in a given market in order that we might predict and avoid any significant adverse effect on diversity or competition from too powerful a combination." *Great American Television and Radio Co., Inc.*, 4 FCC Rcd 6347, 6349-50 (1989). According to our review, WTHI-FM -- a Class B station with 50 kW authorized power and 149 meters HAAT -- faces competition from at least one other comparable FM stations in the Terre Haute TV Metro Market.[5] We also find that WWVR(FM) -- a Class A FM station operating at 3.3 kW at 90 meters HAAT -- competes with at least three Class B stations and two Class A FM stations in the TV Metro Market which are technically superior.[6] WTHI(AM), which operates at 5 kW daytime/1kW nighttime, is one of four Class B AM stations in the TV Metro Market.[7] Additionally, there is one Class C AM station in the TV Metro Market, with 1 kW authorized power. Our independent analysis also shows that in addition to WTHI-TV, a VHF station affiliated with CBS, there is one other VHF station, an NBC affiliate, licensed to the Terre Haute DMA. The market is also served by one commercial UHF station affiliated with FOX, and two noncommercial UHF stations affiliated with PBS. Given the existence of these competing television and radio facilities in the market, the proposed combination does not present issues of market dominance inconsistent with the public interest.

20. As to the financial condition of the stations, there is no showing that the subject television and radio stations are financially compromised. However, the Commission has held that "not all of the [five] factors mentioned will be relevant in every case" (*Second Report and Order*, 4 FCC Rcd at 6491), and has granted one-to-a-market waivers in the absence of a showing of financial distress. *See, e.g., S.E. Licensee G.P.*, 11 FCC Rcd 16728, 16734 (1996); *Stockholders of Infinity Broadcasting*, 12 FCC Rcd 5012, 5052 (1996).

21. Finally, we have carefully considered whether the proposed combination would create undue

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5 There is one other Class B station operating at 50 kW, at 152 meters HAAT. The remaining two Class B stations have authorized power of 28 kW and 27.5 kW, with 201 and 204 meters HAAT, respectively.

6 One of these FM stations operates at 4.1 kW, 121 meters HAAT; the other operates at 6 kW, 91 meters HAAT.

7 As to the other three Class B AM stations in the TV Metro Market, one operates at .5 kW day/.075 kW night, one at .25 kW full-time, and one at .5 kW (day only).

concentration of ownership or control in the Terre Haute market.[8] Following consummation of the proposed transaction, Emmis will hold the licenses of one television station, one AM station and two FM stations in the Terre Haute market, and will not have any other media interests in the market. We have independently verified that, following consummation of the subject transactions, there will be five commercial AM stations, seven commercial FM stations, and six noncommercial educational radio stations in the TV Metro Market, licensed to 12 individual owners (including Emmis). Following consummation there will also be three UHF and two VHF television stations (including WTHI-TV), each of which is separately owned, in the Terre Haute DMA. Taking into account the grandfathered WTHI(AM)/FM/TV combination, there are currently 23 stations with 17 owners in the market. After the proposed transactions, these 23 stations would be operated by 16 separate broadcast owners.[9] A wide variety of other media outlets are available in the market as well, including two Multipoint Distribution Services, three Multichannel Multipoint Distribution Services, four daily newspapers, and cable television reaching 62% of the households in the market.[10] This level of diversity is consistent with the level we have approved in previous waiver requests. *See e.g., Twenty First Century Broadcasting, Inc.*, 12 FCC Rcd 6974 (1997) (12 voices in the 140th DMA with 73% cable penetration rate and nine local newspapers); *Pennino Broadcasting Corp.*, 12 FCC Rcd 10752 (1997) (12 voices in the 164th ranked market with 90% cable penetration rate and three daily newspapers).

22. Regarding economic concentration and competition, our independent analysis indicates that the WTHI(AM)/FM/TV combination -- which has existed for more than 25 years -- garners a combined television and radio advertising share of 48.0%. This figure, while significant, is mainly due to the fact that the television station is the leader in television advertising revenues for the market, receiving an advertising revenue share of 52.2%. We have previously approved one case in which the level of economic concentration in the television market was at least this high. *See Pennino Broadcasting Corp.*, 12 FCC Rcd 10752 (1997) (television station garnered 55.3% of television advertising revenue). It is also notable that the acquisition of WWVR(FM) would result in only a 0.4% gain in total radio and TV advertising revenues, and would bring the combined television and radio advertising share to 48.4%.[11]

23. Overall, Emmis has demonstrated that continuation of the WTHI(AM)/FM/TV combination and the addition of WWVR(FM) to the combination will result in economic efficiencies and cost savings which will be used to maintain and enhance public interest programming. Furthermore, we find that the number of independent broadcast voices and the existence of competing facilities in the market ensure continued competition. While the proposed combination garners a combined television and radio advertising share of 48.4% -- a figure higher than those in previously approved one-to-a-market waiver requests -- we do not believe that the acquisition of WWVR(FM) will have have an additional significant

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[8] As to the market definition within which to count the number of broadcast stations in the context of a one-to-a-market waiver, the Commission considers "the relevant TV metro market for radio stations and the relevant ADI [Arbitron Area of Dominant Influence] TV market for TV stations." *Second Report and Order*, 4 FCC Rcd at 1760 n. 101. However, since Arbitron no longer compiles ADI data, we now accept showings using the Nielsen DMA. See *Media/Communications Partners L.P.*, 10 FCC Rcd 8116 n. 3 (1995). *See also Further Notice of Proposed Rulemaking*, 10 FCC Rcd 3524, 3529 n. 59 (1995).

[9] We are not aware of any Local Marketing Agreements (LMAs) in the relevant market.

[10] *See* Television & Cable Factbook, Cable Vol. No. 66, F-11 (1998).

[11] Advertising revenue data is based on 1997 revenue figures and is obtained from BIA Publications, Inc.'s Radio Master Access and Television Master Access databases.

impact on economic concentration in the market. WTHI(AM)/FM and WTHI-TV have been commonly owned for many years, and the addition of WWVR(FM) garners less than half of one percent of the market's advertising dollars. Based on the totality of the circumstances, we conclude that grant of a permanent one-to-a-market waiver[12] would serve the public interest without undue effect on competition or diversity in the Terre Haute market.

Ordering Clauses

24. Having determined that the applicants are qualified in all respects, we find that grant of the above-captioned applications will serve the public interest, convenience and necessity.

25. Accordingly, IT IS ORDERED, That the applications to assign the license of station WWVR(FM), West Terre Haute, Indiana, from United Broadcasting Company, Inc. to Wabash Valley Broadcasting Corp. (File No. BALH-971023EF), IS GRANTED, subject to the condition that concurrently with consummation of the subject transaction, the assignment of the license of stations WTHI-TV, WTHI(AM) and WTHI-FM, Terre Haute, Indiana, and WWVR(FM), West Terre Haute, Indiana (File Nos. BAL/BALH/BALCT-980403II-IL), is also consummated.

26. IT IS FURTHER ORDERED, That the request for permanent waiver of the one-to-a-market rule, 47 C.F.R. § 73.3555(c), to permit common ownership of stations WWVR(FM), West Terre Haute, Indiana; WTHI(AM) and WTHI-FM, Terre Haute, Indiana, and WTHI-TV, Terre Haute, Indiana, IS GRANTED.

27. IT IS FURTHER ORDERED, That the applications to assign the license of stations WTHI-TV, WTHI(AM) and WTHI-FM, Terre Haute, Indiana, and WWVR(FM), West Terre Haute, Indiana, from Wabash Valley Broadcasting Corporation to wholly-owned subsidiaries of Emmis Broadcasting Corporation (File Nos. BAL/BALH/BALCT-980403II-IL), ARE GRANTED.

28. IT IS FURTHER ORDERED, That the application to assign the license of station WFTX(TV), Cape Coral, Florida, from Wabash Valley Broadcasting Corporation to Emmis Television License Corporation of Cape Coral a wholly-owned subsidiaries of Emmis Broadcasting Corporation (File No. BALCT-980403IH), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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[12] We note that the pending television ownership proceeding, in which the Commission is considering eliminating or modifying the one-to-a-market rule, does not preclude our grant of a permanent waiver. *Second Further Notice of Proposed Rulemaking,* 11 FCC Rcd 21655, 21689 and n. 130 (1996). In that *Second Further Notice,* the Commission contemplated approval of permanent, unconditional waivers to allow television-radio combinations that do not propose common ownership of stations exceeding those permitted prior to the adoption of the Telecommunications Act of 1996 (i.e., one TV, two AM and two FM stations), as long as the requested waivers are clearly consistent with Commission precedent. *Id.* Emmis' proposed combination of one television station, one AM station and two FM stations is consistent with that standard. *See, e.g., Alabama Universal Corporation,* 12 FCC Rcd 7556 (1997).

Concurring Statement of Chairman William E. Kennard

Although I support the Commission's decision to grant a permanent one-to-a-market waiver in this matter, I do so with reluctance. The decision to grant this waiver is a very close case in my view because, as pointed out by my colleagues Commissioners Ness and Tristani, this case involves a high degree of concentration in a relatively small market. The stations are located in the Terre Haute Designated Market Area (DMA), ranked 138th in the nation. Aside from the television and radio stations being assigned, the Terre Haute DMA is served by two commercial and two noncommercial educational television stations, four AM stations and five commercial and six noncommercial FM stations. In all, these stations are licensed to just fifteen separate broadcast owners. In addition, the proposed television and radio combination garners an advertising share of 48.4% based on 1997 revenue figures, with WTHI-TV being the market leader in television advertising revenues with a 52.2% share.

More fundamentally, I believe that the one-to-a-market waiver process that the Commission adopted in 1989 has become fundamentally flawed. The history of application of the one-to-a-market waiver process has made it clear that the waiver standards, as applied, are so discretionary that grant of waivers has become a foregone conclusion. The Commission has not applied these waiver standards with the necessary rigor. Commissioner Tristani notes in her dissent that in recent years the Commission has denied only two one-to-a-market waiver requests. *NewCity Communications of Massachusetts, Inc.*, 10 FCC Rcd 4985 (1995), *aff'd* 85 F.3d 695 (DC Cir. 1996); *Kargo Broadcasting, Inc.* 5 FCC Rcd 3442 (1990). These and other problems with the one-to-a-market waiver process are eloquently described in more detail by my colleague Commissioner Tristani in her dissenting statement and I will not repeat them here.

Nonetheless, I am voting to approve the grant of this one-to-a-market waiver because I believe that it would be inappropriate to deny it given the body of Commission precedent supporting the waiver. *See e.g. Twenty First Century Broadcasting, Inc.*, 12 FCC Rcd 6974 (1997) (12 voices in the 164th ranked DMA market); *Glendive Broadcasting Corporation*, 10 FCC Rcd 2708 (1994) (12 voices in the 152nd ADI market). As I have said previously, it is important that licensees have a sense of certainty in structuring their business transactions and any licensee filing this waiver application reasonably would have had a high degree of certainty that the waiver would be granted.

In the final analysis, I am committed this year to restructuring the Commission's administration of our waiver standards from what is now a rule by waiver to a bright line test that will bring certainty and well-considered standards to our decisions in this area. *See Review of the Commission's Regulations Governing Television Broadcasting*, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 21655 (1996).

Separate Statement
of
Commissioner Ness

In Re: WTHI(AM)/FM/TV, Terre Haute, IN; WWVR(FM), West Terre Haute, IN; WFTX (TV), Cape Coral, FL: Assignments of License - One to a Market Waiver

Although I support the decision to grant a permanent one-to-a-market waiver, for me it is a closer case than is acknowledged in our order. I am troubled that this decision approves television and radio concentration significantly beyond any combination previously approved.

We are approving the combination of the dominant television station and the dominant radio station in Terre Haute, the 138th market. It is notable that WTHI-TV's high percentage of local television advertising is in some part due to the absence of local stations affiliated with ABC, UPN, or the WB networks. Perhaps this helps alleviate some of the competitive concern, since the market for local television revenue is split, therefore, between three commercial stations rather than the more usual four, five or six. On the other hand, the absence of affiliates for the other networks raises a concern that diversity of television choices is limited in Terre Haute, a two-VHF market with only four commercial television stations. There are also no translators providing over-the-air service from outside the market. In these circumstances, the impact of this combination on the number of separately owned, local, media outlets is heightened. On balance, however, I believe the factors enumerated in the order weigh in favor of the grant, largely because of promised improvements in technical facilities, news and public affairs programming, as well as other benefits that will accrue to the viewers and listeners in Terre Haute.

I also note with approval some of the points made by Commissioner Tristani in her dissent. The fact that the WTHI(AM)/FM/TV combination has existed for more than 25 years does not mean anything except that it was formed before our one-to-a-market rule was adopted. Our rules require us to look at the transaction without regard to its grandfathered status.

Finally, I would agree with Commissioner Tristani that as a general matter, we should do more to follow up on the representations made by applicants to insure that the benefits alleged from the consolidation are, in fact, delivered to the public. I do not doubt that the assignee in this case will fulfill its commitment, but I take this opportunity to note that in our Further Notice of Proposed Rulemaking on Broadcast Ownership Rules (MM Docket No. 91-221, 87-7), we sought comment on proposals to increase the effectiveness of the five factors used to weigh one-to-a-market waiver requests. A means of verifying the fulfillment of pledges may very well be in order. I urge the Commission to complete that rulemaking in the very near future.

DISSENTING STATEMENT OF COMMISSIONER GLORIA TRISTANI

In re Applications of United Broadcasting, et al., File Nos. BALH-971023EF, BALCT-980403IH, BALCT-980403II, BAL-980403IJ, BALH-980403IK and BALH-980403IL

I agree with the majority that Emmis's one-to-a-market waiver request must be analyzed under the "rigorous" five-part test for determining whether a waiver is in the public interest, since the request does not meet the circumstances under which a waiver is presumptively favored. Where I believe the majority falters is not in its enunciation of the applicable waiver standard, but in its willingness to enforce it.

Although this is the first time I have been called upon to rule on a one-to-a-market waiver request, the Commission has decided well over a hundred such cases in recent years. Incredibly, the Commission appears to have granted a waiver *in all but two cases*. That record is no coincidence. As described below, the majority seems determined to find a way to grant Emmis's waiver request, glossing over or ignoring facts that do not advance its goal.

1. Public interest benefits of joint operation.

The Commission finds that Emmis will save a significant amount of money if it is allowed to jointly operate the four Terre Haute stations. No doubt that is true (indeed, it is true in almost any consolidation). But whether the *public* will realize any benefits from those cost savings is a different question. In my view, several things are missing that are necessary for us to make a rational determination in this regard.

First, the public benefits of the proposed combination have not been set forth "with great specificity," as the Commission requires.[1] In general, the majority states its belief that the combination will lead to more and better coverage of local news because WTHI-TV will make its 32-person news staff available to the three radio stations. The only specifics offered, however, is that WTHI(AM) currently provides, and will continue to provide, a simulcast of WTHI-TV's 6 p.m. newscast and two hours a day of coverage of local community issues. Regarding WWVR(FM), the only benefit cited is that the cost savings will be used to "enhance the station's technical facilities and programming." And the majority cites no specific public benefits at all from the two stations in the proposed combination with real market clout -- WTHI(FM), which has a radio market share of 30% (compared to WTHI(AM)'s 4.8% and WWVR(FM)'s 1.7%) and WHTI-TV, which has a television market share of 52%.

Second, the majority's analysis treats the claimed public interest benefits as if they existed in a vacuum. These are not failing stations. We must assume that someone will

[1]*See Second Report and Order*, 4 FCC Rcd 1741, 1753 (1989).

operate them if Emmis does not. The issue, therefore, is not whether the proposed combination will provide more public interest benefits than if the stations ceased operations, but whether it will provide more public benefits than if the stations were operated independently. As the Commission has stated: "[A]pplicants will face a heavy burden in relying on these benefits, because we will evaluate any potential benefits in the context of our other public interest criteria, particularly as to whether the combination would threaten our traditional diversity and competition concerns in the market."[2]

Third, there is no accountability. The Commission will have no way of knowing whether any of Emmis's promises are ultimately kept. Some type of follow-up is crucial, especially if we are going to grant requests based on the type of vague promises offered here. Nor do I believe that some type of reporting requirement would be unfair to Emmis. Those who ask for and receive special treatment by the government (which Emmis itself values at $844,000 a year) ought to be accountable for the representations they make in obtaining that special treatment.

2. Types of facilities involved.

The Commission has stated that combinations involving a UHF TV, a small AM or a class A FM station may be more likely to provide the public with the benefits of consolidation and impose relatively fewer costs.[3] That is not the case here. Although WWVR is a class A FM station, this case involves the combination of one of only two VHF TV stations in the Terre Haute market, the most powerful AM station (WHTI) in the market, and one of only four class B FM radio stations in a market with no class C FM radio stations.[4]

3. Number of media outlets owned in market.

Emmis will own four media outlets in the Terre Haute market if the waiver is granted. As described below, however, it is not so much the number of media outlets as the market dominance of those outlets in the Terre Haute market that raises concern.

4. Financial difficulties of the stations involved.

As the majority notes, there is no evidence that any of these stations are in financial distress. The majority attempts to dismiss the significance of this fact by pointing out that not all five factors must be present in every case. What the majority ignores, however, is that

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[2] *Id.*

[3] *Id.*

[4] Although Terre Haute has one class C AM station, that station operates at less power than the class B AM stations.

demonstrated financial difficulties is a factor "of particular importance" in smaller markets, where competition is usually more limited.[5]

5. Effect on competition and diversity.

Competition -- The proposed combination would control almost half (48.4%) of the television and radio ad revenues in the Terre Haute market. The majority acknowledges that this figure "is higher than those in previously approved one-to-a-market waiver requests," but finds comfort in the fact that three of the stations have been commonly owned for over 25 years and that the fourth station does not add much to the overall figure.

This argument is improper bootstrapping. As the majority notes, the stations' grandfathering does not survive an assignment; thus, Emmis must meet the waiver standard as if these stations had never been jointly owned. This makes sense: these stations were grandfathered not because their combination was found to be pro-competitive but simply because their common ownership pre-dated the adoption of the one-to-a-market rule in 1970. This is our first chance to assess whether that level of concentration is in the public interest. Since the grandfathered status of these stations must be disregarded in assessing whether the public interest would be served by a waiver, it is inappropriate to rely on the existing state of the market in arguing that the proposed combination will have no anti-competitive effects.

Diversity -- One would never know it by reading the decision, but this case proposes to combine the dominant television station and the dominant radio station in the Terre Haute market, both of which generate market shares larger than their next two competitors combined.[6]

The Commission's diversity analysis is limited to: (1) counting the number of separately-owned "voices" in the market (which again improperly takes as its baseline the grandfathered level of diversity in arguing that the transaction will have little impact); (2) finding that there are two MDS and three MMDS operators in the market (with no discussion of their service areas or penetration levels); (3) stating that there are four daily newspapers in the market (without describing the type of newspapers or circulation levels); and (4) a cable television penetration rate of 62% (which is lower than the national average; if the point is simply that Terre Haute residents have access to cable, they share that trait with 97% of the country).

[5]*See Second Report and Order and Order Recon.*, 4 FCC Rcd at 6491.

[6]WHTI-TV has a market share of 52%; its nearest competitors, WTWO-TV and WBAK-TV, have market shares of 37% and 11%, respectively. Similarly, WHTI(FM) has a market share of 30%; its nearest competitors have market shares of 13.4% (WMGI-FM) and 12% (WZZQ-FM).

In the end, regardless of what one thinks of the one-to-a-market rule, this is no way for the Commission to operate. If we are going to repeal the rule, we should do so directly and not through the pretense of a waiver process that is, in practice, a rubber stamp. Our willingness to churn out waiver after waiver based on the type of showing made here simply invites cynicism and disrepect for the Commission and its processes.