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Washington, D.C. 20554

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Re: Assignment of License for
KNIN-TV, Caldwell, ID
Facility ID No. 59363
File No. BALCT-20080701AEB

Dear Counsel:

This is in reference to the "Joint Petition for Clarification of the Record and Reconsideration" of the November 10, 2008 dismissal of the above-captioned application for consent to assign the license for KNIN-TV, Channel 9 (CW), Caldwell, Idaho, from Banks-Boise, Inc. (Banks-Boise) to Journal Broadcast Corporation (Journal).[1] The application requested a waiver of Section 73.3555(b)(2) of the Commission's rules,[2] the television duopoly rule, to permit Journal, licensee of KIVI(TV), Channel 6 (ABC), Nampa, Idaho, to acquire KNIN.[3]

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[1] See *Letter to Banks-Boise, Inc. and Journal Broadcast Corporation*, DA 08-2741, released November 10, 2008.

[2] 47 C.F.R. §73.3555(b)(2).

[3] Both KNIN and KIVI are in the same 113th-ranked Boise Nielsen Designated Market Area (DMA), and their Grade B signal contours overlap. In addition, the Grade A signal contours of KNIN and KIVI encompass the communities of license of six radio stations licensed to Journal that are in the Boise Arbitron Metro, triggering the radio-TV cross-ownership rule, Section 73.3555(c) of the Commission's rules. The parties note that under the radio-TV cross-ownership rule, a party authorized to own two television stations in the same market under the local TV ownership rule may own up to six commercial radio stations (if permissible under the local radio ownership rule) where at least 20 independently-owned media voices will remain in the market post-acquisition. The parties have demonstrated that at least 20 independently-owned media voices will remain in the market following the closing of the proposed transaction. Therefore, if permitted to acquire KNIN, Journal is also permitted to hold the resulting two TV/six radio combination.

Background

Under Section 73.3555(b)(2) of the Commission's rules currently in effect,[4] two television stations licensed in the same DMA that have Grade B overlap may be commonly owned if: (i) at least one of the stations is not ranked among the top four stations in the DMA; and (ii) at least eight independently owned and operating, full-power commercial and non-commercial educational television stations would remain in the DMA after the merger. The Boise DMA would not have eight independently owned and operated television stations post-merger. Thus, the proposed common ownership of KNIN and KIVI would violate Section 73.3555(b)(2). The applicants requested a waiver on the basis that KNIN is a "failing station."[5]

In the November 10, 2008 decision, we explained that the Commission's *Local Ownership Order* established 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." These criteria are:

> (a) One of the merging stations has had a low all-day audience share (*i.e.,* 4 percent or lower);
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> (b) The financial condition of one of the merging stations is poor. "A waiver is more likely to be granted where one …of the stations has had a negative cash flow for the previous three years;"
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> (c) The merger will produce public interest benefits. "A waiver will be granted where the applicant demonstrates that the tangible and verifiable public interest benefits of the merger outweigh any harm to competition and diversity;" and
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> (d) The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; selling the station to an out-of-market buyer would result in an artificially depressed price.[6]

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

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[4] *2006 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; 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets, Ways to Further Section 257 Mandate and To Build on Earlier Studies; and Public Interest Obligations of TV Broadcast Licensees, Report and Order on Reconsideration,* 23 FCC Rcd 2010 (2008)("*2007 Ownership Order"*).

[5] *See* 47 C.F.R. § 73.3555, Note 7. *See also Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12935-40 (1999) (*"Local Ownership Order"*), *recon. granted in part,* 16 FCC Rcd 1067 (2001).

[6] *Local Ownership Order*, 14 FCC Rcd at 12939.

As part of its waiver request, the applicants attached information showing Nielsen reported audience shares for the all-day share. It showed that, over the period between February 2005 and November 2007, KNIN's all-day average household audience shares of 3.60, 3.675 and 3.65 percent based on a Neilsen four-book average, and during the most recent February and May 2008 sweep periods, KNIN achieved household audience shares of only 3.6 and 3.8 respectively. Accordingly, the applicants claimed that the proposed transaction satisfies the audience share prong of the "failing station" waiver standard.

To satisfy the second criterion with respect to KNIN's financial condition, the applicants submitted financial data intended to show negative cash flow and operating losses for the three years preceding the filing of the instant application.[7] Specifically, they provided information purporting to show that KNIN experienced a negative cash flow for the years 2004-2006 and, therefore, that they meet the grounds for the requested waiver. However, Note 7 to Section 73.3555 of the Commission's Rules explicitly states that applicants for a "failing station" waiver must demonstrate that "the station has had a negative cash flow for three consecutive years *immediately prior to the application* . . . ."[8] Because the subject application was filed on July 1, 2008, we determined that the relevant three-year period for evaluation of KNIN's financial posture is 2005-2007.

In the November 10, 2008, decision, we stated that Section 73.3555 of the Commission's Rules and Note 7 thereto do not specifically define "cash flow." KNIN submitted financial information based on a "free cash flow" accounting method as an indicator of viability. KNIN listed a negative free cash flow all three years, $90,038 in 2007, $124,945 in 2006, and $109,684 in 2005. We noted, however, that free cash flow includes all of a station's income and expenditures, even those which are discretionary and/or not directly related to station operations. In this case, we determined that the applicants' financial showing included capital expenditures of $160,572 in 2007, $124,129 in 2006, and $50,000 in 2005. Further, we observed that in past "failing station" waiver cases, the Commission has consistently used "operating cash flow" as the preferable and only reliable measure of a station's viability. Our evaluation of the materials submitted, based on "operating cash flow" and excluding the discretionary or non-operating expenditures, showed that KNIN demonstrated a declining negative operating cash flow for the years 2005 ($61,891) and 2006 ($9,527), but not for 2007, when the station showed a positive operating cash flow of $61,552.[9] Accordingly, we found that the applicants had not met this prong of the failing station waiver standard, and we therefore denied the waiver request without addressing the remaining criteria of the failing station standard and dismissed the subject application.

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[7] The applicants' requested confidential treatment for this material pursuant to Sections 0.457 and 0.459(a) of the Commission's Rules.

[8] 47 C.F.R. §73.3555, Note 7(2).

[9] Our evaluation of the materials submitted by the applicants in this case included interest expense in the operating cash flow, although it is not technically an "operating" expense because it is not directly related to the operation of a television station. Nevertheless, in recognition of certain economic realities that it is unlikely for a business to operate successfully without incurring interest expense, and to place the applicants' showing in the best light in this case, we factored in such expenses in the calculation of operating cash flow.

Clarification and Reconsideration Petition

In the instant petition, the applicants state that because financial analysis submitted in the underlying application did not specify the precise nature of the equipment comprising the station's capital expenditures, the staff considered these costs as "discretionary or non-operating expenditures" not directly related to the operation of the station. Excluding such expenditures, they maintain, led to the finding that while KNIN experienced negative cash flow in 2005 and 2006, it did not do so in 2007. However, because the free cash flow analysis contained within its financial materials was not specific with respect to these expenditures, the petitioners submit clarifying information detailing the expenses associated with the digital conversion and other equipment that were essential to lawful operation of the station and should have been factored into the Commission's evaluation.

The petitioners further assert that the bulk of the station's non-digital-related expenses were essential to the continued operation of KNIN and are appropriately factored into the station's financial condition. They state that almost $22,000 of the station's almost $24,000 of its "non-digital" but necessary expenditures in 2007 was spent on analog transmitter tubes needed to maintain KNIN's bare-bones operation. In this regard, they also assert that the record reflects that the station "has neither the financial reserves nor the operational latitude to indulge in any capital expenses other than those essential to operate in conformity with its license requirements." In his declaration, Mr. Banks states that the lack of financial resources has created the need for the station to defer crucial capital improvements and repairs of aging and used equipment of up to $3.1 million. The station's financial posture has also prevented it from investing in equipment necessary to expand distribution of the station's signal and to hire the staff and acquire the resources to offer local news, placing it at a substantial competitive disadvantage to its major network competitors. Because KNIN's current liabilities have consistently and significantly exceeded current assets, Banks-Boise non-voting preferred shareholders have been forced to make additional funds available to the station, which have been made without charging standard interest.[10] The petitioners note that the financial statements submitted to the Commission do not include this customarily included expense, but the fact that these loans have been crucial to the continued operation of the station is indicative of its bleak financial picture.

While the petitioners acknowledge the Commission's concern that its financial analyses in these cases should exclude from consideration cost items that are truly discretionary or not directly related to the operation of a television station, the clarified non-discretionary expenses directly relate to KNIN's continued operations and should be taken into account in the 2007 cash flow analysis. Beyond the evidence presented with respect to cash flow, the petitioners contend that their supplemental showing demonstrates that KNIN has struggled for an extended period just to remain operational and that it can not continue to operate as a going business concern. The petitioners argue that the station's operating losses

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[10] See Declaration of William Cunningham, Vice President and Controller of LIN TV Corp. Mr. Cunningham estimates that, based on a conservative interest rate of 8 percent to reflect the cost of capital, interest on these loans would total $177,038 for 2007 alone – an amount nearly triple the level of positive operating cash flow determined by the staff after excluding equipment expenditures. He also states that LIN also provides financial accounting services for the station that are not reflected in the financial information previously submitted to the Commission. Finally, he notes that none of the investors in the assignee have ever received a return on their investments, and that consummation of the proposed sale to Journal will result in substantial losses to the investors.

between 2005 and 2007 indicate that its losses are mounting without any realistic prospect for improvement, a condition that has continued to the present.

In addition to the station's previously recognized persistently low ratings, the petitioners maintain that they have demonstrated that KNIN is a failing station, that Journal has demonstrated its commitment and ability to improve the station's operations and service to the public, and that no out-of-market buyer willing and able to acquire and operate KNIN is available. Specifically, to satisfy the third criterion of the failing station waiver standard, the applicants reiterate that the proposed assignment of KNIN will produce tangible and verifiable public interest benefits that far outweigh any potential harm to competition and diversity. In this regard, Journal has attested to its ability to provide the financial, personnel and other resources necessary to increase the station's local public service, and its commitment to make KNIN into a viable local competitor and increase the diversity of programming available to viewers in the Boise market. Journal commits to maintaining separate network affiliations for KIVI (ABC) and KNIN (CW). By taking advantage of economies of scale and resources, Journal intends to consolidate KNIN's facilities with those of KIVI, giving the station the ability to produce and broadcast live and local programming and its viewers a consistent, high-quality broadcast signal. Journal also states that approval of the proposed transaction will allow it to initiate a 30-minute daily (Monday-Friday) local newscast on KNIN utilizing the significant news operations of KIVI, and to provide local viewers important alerts regarding weather events, traffic and other emergencies.

The petitioners state that Journal will also significantly increase KNIN's community outreach efforts. Journal and KIVI already devote significant staff and other resources to public service events such as the Susan G. Komen "Race For The Cure," the annual U.S. Marine Corps' "Toys For Tots," and local efforts to provide clothes and essential items to families in need. Journal states that it will include KNIN in these types of events and outreach campaigns , including the "Children's Miracle Network Telethon," the "Safe/Smart" bicycle helmet project, sponsorship of Boise's Fourth of July fireworks celebration, and participation in the "Idaho Green Living" environmental awareness campaign. Journal also plans to redesign KNIN's online website to increase the station's outreach and enhance its interactive capabilities.

As to the final criterion for the requested waiver, Banks-Boise retained the brokerage firm of Kalil & Company (Kalil) to market the sale of KNIN. Kelly Callan, Vice President of Kalil, states in a Declaration that the firm made vigorous efforts to solicit offers from out-of-market entities and approached 28 prospective buyers, but found no interest in the station. Only one out-of-market entity offered to purchase KNIN, but for a price 56 percent less than the independently appraised market value for the station. After concluding that it would be unable to obtain any reasonable offer from an out-of-market buyer, Kalil contacted six prospective in-market buyers, for which it received two offers. In light of those developments, Callan has concluded that an in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station, and that selling the station to an out-of-market buyer would result in an artificially depressed price.

Accordingly, the petitioners request that, in light of its clarified showing with respect to the failing station waiver standard, the November 10, 2008 decision be reconsidered and the subject assignment application be granted.

Discussion

Upon reconsideration of the record of this proceeding, as clarified by the extensive and detailed materials with respect to the station's increasingly desperate financial condition, we will grant the parties' request for a waiver of the television duopoly rule, and we will grant the assignment application. On reconsideration, the petitioners have submitted detailed identification and explanation regarding the nature of the expenses, costs and other factors underlying the station's bleak financial picture. Although we stated below that a financial analysis based on "operating cash flow" is the best indicator of a station's financial posture, we note that it is not the sole method upon which to make such an evaluation. In any event, applicants must adequately support the financial showing made in such cases so that an accurate evaluation can be made consistent with the requirements for establishing "failed" stations.[11] With the additional clarifications as to KNIN's financial posture, we can now determine that, on balance, and based upon the complete showing submitted under the waiver criteria established by the Commission in the *Local Ownership Order*, we are persuaded that grant of a waiver is warranted on grounds that KNIN is a "failing station."

Specifically, we previously found that the parties have demonstrated that KNIN has a sufficiently low audience share for the last three years. Furthermore, the financial documentation submitted and as clarified by the parties shows that KNIN's financial condition is poor. In reviewing the financial information submitted by the parties, we are persuaded that KNIN is failing to such an extent that its ability to be a viable voice in the Boise market is severely hampered, placing it at a competitive disadvantage.

Given these operational circumstances, it is not surprising that little news, public affairs, or other public interest programming is currently being provided by the station.[12] The proposed merger would address these shortcomings, and we find important public interest benefits will accrue from the combined operation of KIVI and KNIN. For example, Journal has pledged to improve KNIN's news, weather and emergency announcement capabilities, as well as its community outreach capabilities. Finally, the parties have established that Journal is the only reasonably available buyer for station KNIN.

Consistent with the *Local Ownership Order*, we find that the combined operation of KIVI and KNIN will pose minimal harm to our diversity and competition goals because KNIN's dire financial situation hampers its ability to be a viable voice in its market. Under these circumstances, allowing KNIN to be operated by a stronger station in the market will result in a definite improvement in facilities and programming, an outcome which clearly benefits the public interest.[13]

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[11] We caution, however, that in preparing such materials, applicants must ensure that they sufficiently identify the bases for their submissions so that proper identification and evaluation of relevant line-item expenses can be made.

[12] As the *Local Ownership Order* indicated, failing stations "rarely have the resources to provide local news programming, and often struggle to provide significant local programming at all." *Local Ownership* Order, 14 FCC Rcd at 12939.

[13] *Local Ownership* Order, 14 FCC Rcd at 12939; s*ee also WCNW LLC*, 21 FCC Rcd 13522 (MB 2006); *KSMO Licensee, Inc.*, 20 FCC Rcd 15254 (MB 2005).

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

Accordingly, IT IS ORDERED, That the parties request for reconsideration of our November 10, 2008 decision, IS GRANTED to the extent indicated herein.

IT IS FURTHER ORDERED, That the request for a "failing station" waiver of the television duopoly rule, Section 73.3555(b)(2), to permit Journal to own and operate both KIVI and KNIN, IS GRANTED.

IT IS FURTHER ORDERED, That the application for assignment of license (File No. BALCT-20080701AEB) of Station KNIN-TV, Caldwell, Idaho, from Banks-Boise, Inc. Journal Broadcast Corporation IS GRANTED.

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Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau