

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Application of
K-W TV, INC.
(Assignor)
and
WTNH BROADCASTING, INC.
(Assignee)
For Consent to the Assignment of
WCTX(TV), New Haven, Connecticut
File No. BALCT-20010917AAD
Facility ID No. 33081

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 2002

Released: January 15, 2002

By the Chief, Mass Media Bureau:

1. The Chief, Mass Media Bureau, acting pursuant to delegated authority, herein considers the above-captioned application to assign the license of WCTX(TV), Channel 59 (UPN), New Haven, Connecticut, from K-W TV, Inc. ("K-W") to WTNH Broadcasting, Inc. ("WTNH"), a subsidiary of LIN Television Corporation. This application is unopposed.

2. WTNH currently programs WCTX pursuant to a local marketing agreement dated December 9, 1994. The LMA arrangement also included an option to acquire the station, which WTNH has exercised, resulting in this application. WTNH is also the licensee of WTNH-TV, Channel 8 (ABC), New Haven, Connecticut, which is in the same Hartford-New Haven DMA as, and has overlapping Grade B signal contours with, WCTX. Because this would be the second station in the DMA licensed to WTNH, its proposed acquisition of WCTX is governed by Section 73.3555(b)(2) of the Commission's Rules, 47 C.F.R. §73.3555(b)(2). That rule provides, in pertinent part, that the same entity may own or control two television stations in the same market so long as: (i) at the time the application is filed, at least one of the stations is not ranked among the top four stations in audience rankings in the DMA; and (ii) at least 8 independently owned and operating full-power commercial and noncommercial educational television stations would remain in the market after the proposed acquisition.

3. WCTX is not ranked among the top four stations in the DMA. However, there would not be 8 remaining independently owned and operated television stations in the

Hartford-New Haven DMA following the proposed transaction. Accordingly, WTNH requests a waiver of Section 73.3555(b)(2) of the Commission's Rules to permit it to acquire WCTX on the basis that it is an "unbuilt station." Although WCTX is now operational, WTNH bases its waiver request on circumstances as they existed prior to its 1994 LMA agreement, when WCTX was unbuilt.

4. **Duopoly Waiver.** The Commission's *Local Ownership Order* established the criteria for a waiver of the television duopoly rule for an "unbuilt station." These criteria are:

(a) The combination will result in the construction of an authorized, but as yet unbuilt station;

(b) The permittee has made reasonable efforts to construct, but has been unable to do so; and

(c) The in-market buyer is the only reasonably available candidate willing and able to acquire the construction permit and build the station, and selling the station to an out-of-market buyer would result in an artificially depressed price.¹

If the applicant satisfies each criterion, a waiver of the rule will be presumed to be in the public interest. Moreover, in the case of grandfathered LMAs in existence prior to November 5, 1996, applicants may base waiver requests on circumstances as they existed at the time just prior to the parties entering into the LMA. 14 FCC Rcd at 12964. WTNH bases its waiver showing on circumstances as they existed prior to December 9, 1994, when the parties entered into its LMA. Thus, WCTX's present operational status is not a bar to WTNH seeking an unbuilt station waiver.²

5. WTNH claims that prior to 1994, a usable fully spaced transmitter site for this station was not available. It states that the various permittees of WCTX expended considerable and reasonable efforts to construct the station, and the authorization was extended many times. However, WTNH asserts that after entering into the LMA and option with the assignor in 1994, WTNH made its tower available, a minor modification was filed, the station was constructed and broadcast operations began in February 1995. WTNH maintains that the numerous construction extensions received through the years demonstrate that the Commission concluded that the extensions served the public interest

¹ 47 C.F.R. § 73.3555, Note 7. *See also Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12941 (1999) ("*Local Ownership Order*"), *recon. granted in part*, 16 FCC Rcd 1067 (2001) ("*Local Ownership Reconsideration Order*"). Ordinarily, the applicant for a failing or unbuilt station duopoly waiver must set forth the efforts to sell the station to an out-of-market buyer. However, this showing is not required of a waiver applicant that seeks to acquire a station with which it formed an LMA arrangement prior to the adoption of the *Local Ownership Order* in August 1999. *See Local Ownership Reconsideration Order*, 16 FCC Rcd at 1077. Such is the case here, where the LMA arrangement for WCTX has existed since December 1994.

² *See Kentuckiana Broadcasting, Inc.*, 16 FCC Rcd 6974 (2001).

and that the permittees had undertaken reasonable and diligent efforts to construct the station.

6. Since it began operating, WTNH states that the station has provided additional programming as New Haven's second commercial television outlet, providing additional programming choice in the market, first as a WB affiliate, and then (when that affiliation was lost) as a UPN affiliate. In April 2000, the station, using the combined resources of assignee's WTNH, launched a daily half-hour prime-time newscast. The station also airs regularly scheduled children's programming, locally produced public affairs and sports programming, various local professional and local collegiate sporting events, and telethons for local charities.

7. Despite these efforts, WTNH represents that even after six years of operation, the station's audience share in the market hovers around 2 percent in a highly competitive market (and adjacent to the New York City DMA).³ It contends that the station's financial condition is precarious, having produced "cumulative broadcast cash flow losses" of nearly \$5 million in its six years of operation, and that such losses will continue. Without the LMA, it estimates that a capital investment of nearly \$28 million would have been required for the first six years of operation, and would have resulted in nearly \$11 million in broadcast cash flow losses over that time. WTNH expects the approximately \$2.2 million cost associated with DTV conversion to further tax the station's financial picture.

8. **Discussion.** Based on the above representations and showings, we conclude that WTNH has sufficiently demonstrated that the LMA/purchase option arrangement resulted in the construction of WCTX, which at the time was an authorized but as yet unbuilt station. At the time the parties entered into the LMA/purchase option arrangement, K-W as well as the various past permittees were unable to complete construction of this station, as evidenced by the facts set forth in the many extension requests. Moreover, that these efforts were reasonable is demonstrated by the very grant of those extension requests. But for the assistance of WTNH, this station would not have been constructed and commenced broadcast service. The LMA/purchase option arrangement thus helped the permittee of WCTX complete construction of its facilities, which is the type of public interest benefit cited by the Commission in the *Local Ownership Order* as warranting a waiver of the duopoly rule. We find, therefore, that common ownership of WCTX(TV) and WTNH-TV is justified under the unbuilt station waiver standard, as clarified with respect to LMAs by the *Local Ownership Reconsideration Order*.

9. **Conclusion.** We have reviewed the assignment application, and find that the applicants are fully qualified, and that the grant of that application, as described herein, will serve the public interest, convenience and necessity.

³ It references the Commission's recent decision to permit the Tribune Company to acquire a second television station in the subject Hartford-New Haven DMA based, in part, on the highly competitive nature of the market. See *Counterpoint Communications, Inc.*, 16 FCC Rcd 15044 (2001).

10. Accordingly, IT IS ORDERED, That the request for an unbuilt station waiver pursuant to Note 7 of the Commission's local television ownership rule, 47 C.F.R. § 73.3555(b), to permit common ownership of WCTX(TV), New Haven, and WTNH-TV, Hartford, Connecticut, IS GRANTED.

11. IT IS FURTHER ORDERED, That the application (BALCT-20010917AAD) for consent to the assignment of license of WCTX(TV), New Haven, Connecticut, from K-W TV, Inc. to WTNH Broadcasting, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau