Federal Communications Commission
Washington, D.C. 20554

May 1, 2020

Independence Television Company
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1299 Pennsylvania Ave, NW
Suite 700
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Re: WDRB(DT), Louisville, KY
WBKI(DT), Salem, Indiana
Fac. ID Nos. 28476 and 34167
Application File Nos. BTCCDT-20200221AAG and AAH

Counsel:

By this letter we grant the above-captioned uncontested applications seeking consent to transfer control of Independence Television Company (ITC), a subsidiary of Block Communications, Inc. (Block).[1] We find the transfer to be in the public interest. In connection with the applications, we also grant the request for a waiver of Section 73.3555(b), the Local Television Ownership Rule, to approve ITC's common ownership of WBKI, Salem, Indiana, and WDRB, Louisville, Kentucky, based on the failing station waiver standard.[2]

Background. The Local Television Ownership Rule allows an entity to own two television stations licensed in the same Nielsen Designated Market Area ("DMA" or "market") that have digital noise limited service contour overlap if: (1) at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day audience share; and (2) at least eight independently owned and operating, full-power commercial and noncommercial television stations would remain in the DMA after the transaction.[3] Ownership of both WBKI and WDRB would violate the Local Television

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[1] Application of Independence Television Company for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, File BTCCDT-2020221AAG (filed Feb. 24, 2020) (Application). Block is a closely held corporation owned and controlled by the descendants of Paul Block.

[2] 47 CFR § 73.3555, Note 7.

[3] *See Review of the Commission's Regulations Governing Television Broadcasting,* Report and Order, 14 FCC Rcd 12903, 12938, para. 79 (1999), *recon. granted in part*, 16 FCC Rcd 1067 (2001) (*1999 Ownership Order*); *see also 2014 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 et al.,* MB Docket No. 14-50, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802 (2017) *vacated and remanded, Prometheus*

Ownership Rule because fewer than eight independently owned and operating stations would remain in the market post transaction. ITC acquired WBKI in 2001 pursuant to "an unbuilt station waiver" of the Local Television Ownership Rule.[4] Since that time, WBKI was constructed and commenced operations, requiring ITC to now seek a "failing station" waiver for common ownership to continue.

Discussion. We find that the Applicants satisfy all four criteria of the failing station test. The Commission has defined a "failing station" as one that has been struggling for "an extended period of time both in terms of its audience share and financial performance."[5] The criteria for a "failing station" waiver of the Local Television Ownership Rule are: (1) one of the merging stations has had a low all-day audience share (i.e., 4 percent or lower); (2) the station has had negative cash flow for the previous three years; (3) the merger will produce tangible and verifiable public interest benefits; and (4) the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station, and selling the station to an out-of-market buyer would result in an artificially depressed price.[6] If the applicant satisfies each criterion, a waiver will be presumed to be in the public interest.

First, Applicants show that WBKI's combined audience ratings did not exceed three percent during any sweeps period in 2019.[7] With respect to the second criterion, Applicants state that WBKI relies on joint ownership with WDRB to continue operating.[8] Because WBKI relies on these joint operations, Applicants state there are no separate financial records.[9] Instead, Applicants present a carve-out operating statement that shows WBKI would have generated negative cash flow in the years 2017, 2018, and 2019, had it operated independently.[10] Applicants assert that the costs to begin independent operations would be prohibitive.[11] We find that this showing adequately demonstrates that the common ownership of WBKI and WDRB meets the first and second criteria of the "failing station waiver" standard.

With respect to the third criterion, public interest benefits, Applicants note that WBKI would likely have never been built without ITC's assistance[12] and that WBKI provides essential local programming for the Louisville market,[13] including local news when WDRB programming is preempted

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Radio Project, 939 F.3d 567 (3rd Cir. 2019), *petition for rehearing en banc denied*, *petition for cert. filed, Apr. 17, 2020*.

[4] *See Kentuckiana Broadcasting, Inc. and Independence Television Company*, Memorandum Opinion and Order, 16 FCC Rcd 6974 (MB 2001).

[5] *1999 Ownership Order*, 14 FCC Rcd at 12938, para. 79.

[6] *Id.* at 12939-40, para. 81; 47 CFR § 73.3555, note 7.

[7] Application Attach. 20, Failing Station Waiver Request at 3 (Failing Station Waiver Request).

[8] *Id.*

[9] *Id.*

[10] *Id.* at 3, Exhibit B. Specific financial information relating to the stations' current operations has been submitted to the Commission with requests for confidential treatment.

[11] Failing Station Waiver Request at 3.

[12] *Id.* at 4.

[13] *Id.*

by network obligations and local sports programming.[14] Applicants state that producing this original programming would be prohibitively expensive as a standalone station, and WBKI relies on access to WDRB's production facilities.[15]

With respect to the fourth criterion, Applicants maintain that the difficulty in operating WBKI as a standalone station makes it unlikely there is a rational out-of-market buyer that would purchase the station.[16] Applicants include a letter from W. Lawrence Patrick of Patrick Communications,[17] which states that any buyer would need to make considerable investments into WBKI's facilities and staff to replace what it currently gains from joint operations with WDRB.[18] In addition, because ITC controls the CW and MyNetworkTV affiliations, ITC would likely shift affiliations rather than transfer the affiliations to a new owner, depriving any potential buyer of valuable network programming.[19] According to Mr. Patrick, this makes it highly unlikely an independent WBKI could achieve the revenue stream sufficient to fund standalone operations or justify investment from new ownership.[20]

The request for a "failing station" waiver is uncontested. Based on our analysis of the facts presented, we find that waiver of the Local Television Ownership Rule to permit common ownership of WBKI and WDRB is warranted on the grounds that WBKI is a "failing station." With respect to the fourth criterion in particular, although we do not generally accept predictive judgments by brokers or analysts, we do recognize the evidentiary value of fact-based broker due diligence.[21] We find that Mr. Patrick's letter is not merely predictive, but instead is sufficiently based on an examination of actual in-market data. Mr. Patrick's evaluation is representative of the due diligence in which a licensee customarily engages when it is actively determining the feasibility of selling a station.[22] We find that in the context of this application it would be contrary to the public interest to require a licensee needlessly to go through the process of putting its "failing station" up for sale when, as part of the due diligence process, an independent broker has concluded based on comparable market data that selling to an out-of-market buyer would be difficult, if not impossible.[23]

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[14] *Id.*

[15] *Id. See, e.g., Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc. from Shareholders of Media General, Inc. to Nexstar Media Group, Inc.*, MB Docket No. 16-57, Memorandum Opinion and Order, 32 FCC Rcd 183, 202, para. 49 (MB and WTB 2017) (*Nexstar/Media General*) (accepting adjusted financial statements to show performance of each station as a standalone operation as sufficient to demonstrate compliance with third prong of "failing station waiver" standard).

[16] Failing Station Waiver Request at 5.

[17] *Id.* at 5, Exhibit C.

[18] *Id.* at 5.

[19] *Id.*

[20] *Id.*

[21] *See, e.g., Nexstar/Media General*, 32 FCC Rcd at 203, para. 54 (accepting a similar predictive judgement from Mr. Patrick regarding the fourth criterion).

[22] *Shareholders of Media General, Inc. and LIN Media, LLC,* Memorandum Opinion and Order, 29 FCC Rcd 14798, 14812, para 32 (MB 2014).

[23] This approach is consistent with our practice in other, similar transactions. *See, e.g., Nexstar/Media General*, 32 FCC Rcd at 203-204, para. 55; *Shurz Communications, Inc.*, Letter Order, 31 FCC Rcd 1113, 1118 (MB 2016).

Conclusion. Having reviewed the application and facts before us, we conclude that grant of the applications as requested will comply with the Commission's rules and section 310(d) of the Act. We conclude that grant of the applications will serve the public interest, convenience and necessity.

ACCORDINGLY, IT IS ORDERED, That the request for a "failing station" waiver of section 73.3555(b)(2) of the Commission's rules to permit the continued common ownership of WBKI(DT), Salem, Indiana and WDRB(DT), Louisville, Kentucky, IS GRANTED.

IT IS FURTHER ORDERED, That the above-referenced applications, BTCCDT-20200221AAG and AAH, ARE GRANTED.

These actions are taken pursuant to sections 0.61 and 0.283 of the Commission's rules, 47 C.F.R. §§ 0.61, 0.283, and sections 4(i) and (j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309, 310(d).

Sincerely,

/s/

Barbara A. Kreisman
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Media Bureau