



Federal Communications Commission
Washington, D.C. 20554

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Re: KWWT(DT), Odessa, Texas
Fac. ID No. 84410
File No. BALCDT-20200724AAB

Counsel:

This letter grants the above-captioned unopposed application (Application) for consent to assign the license of television station KWWT(DT), Odessa, Texas (KWWT), from Winstar Odessa, Inc. (Winstar), to Gray Television Licensee, LLC (Gray) (collectively, the Applicants). In connection therewith, we also grant a waiver of section 73.3555(b) of the Commission's rules (Local Television Ownership Rule),¹ to permit common ownership of KWWT and KOSA(TV), Odessa, Texas (KOSA), based on KWWT's status as a "failing" station.²

Background. Under the Local Television Ownership Rule, an entity may own, operate, or control two television stations within the same Nielsen Designated Market Area (DMA)³ if: (1) the digital noise

¹ 47 CFR § 73.3555(b).

² See 47 CFR § 73.3555, note 7.

³ Within the Odessa-Midland DMA, Gray is also the licensee of satellite station KCWO(TV), Big Spring, Texas (KCWO), and low-power station KTLE(LD), Odessa, Texas (KTLE). Furthermore, the Asset Purchase Agreement (APA) between purchaser Gray, and sellers Winstar and Martin Weiss, contemplates the sale of both KWWT and low-power television station KMDF(LD), Midland, Texas (KMDF), to Gray. As an authorized satellite station of KOSA, KCWO does not count towards the television station ownership limits delineated in 47 CFR § 73.3555(b). See 47 CFR § 73.3555, note 5. Similarly, the two low-power television stations, KTLE and KMDF, are not counted

limited service contours (NLSC) of the stations do not overlap; or (2) 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 at least eight independent full-power television stations would remain in the DMA after the transaction.⁴

The proposed common ownership of KWWT and KOSA would violate the Local Television Ownership Rule. First, the NLSC contours of KWWT and KOSA overlap.⁵ Second, while KWWT is not a top-four station in the Odessa-Midland DMA, fewer than eight independent full-power television stations would remain after the transaction.⁶ Thus, the Applicants have requested a “failing” station waiver of the Local Television Ownership Rule pursuant to note 7 of section 73.3555 of the Commission’s rules.⁷

A “failing” station is defined as one that “has been struggling for an extended period of time both in terms of its audience share and in its financial performance.”⁸ “Failing” station waivers are granted on a “case-by-case basis,”⁹ and “may be of particular assistance to struggling stations in smaller markets that are not covered by the eight voice/top-four ranked station test.”¹⁰ The criteria for a “failing” station waiver are: (1) one of the merging stations has had a low all-day audience share (i.e. 4% or lower); (2) the station has had a negative cash flow for the previous three years; (3) the merger will produce tangible and verifiable public interest benefits that outweigh any harm to competition and diversity; 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.¹¹ A waiver will be presumed to be in the public interest if an applicant satisfies each of these criteria.¹²

Discussion. We find that the Applicants satisfy all four prongs of the above test and qualify for a “failing” station waiver. First, the Applicants provided ratings data showing that KWWT has averaged an

for the purposes of 47 CFR § 73.3555. *See* 47 CFR § 74.732(b). Applicants have filed a separate application for the transfer of KMDF to Gray. *See* KMDF Application for Assignment of License of Low Power Television Station, File No. BALTT-20200724AAC (filed July 24, 2020).

⁴ 47 CFR § 73.3555(b). *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 *et al.*, Order, 34 FCC Rcd 12360 (MB 2019) (reinstating the Local Television Ownership Rule as it existed in the 2014 Quadrennial Review Order - 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 *et al.*, Second Report and Order, 31 FCC Rcd 9864 (2016)).

⁵ KWWT Application for Consent to Assignment of Broadcast Station Construction Permit or License, Attachment 18 - Further Amended Request for Failing Station Waiver, File No. BALCDT-20200724AAB, at 1 (filed July 27, 2020) (KWWT Waiver Request).

⁶ *Id.*

⁷ 47 CFR § 73.3555, note 7. *See also* Review of the Commission’s Regulations Governing Television Broadcasting, Report and Order, 14 FCC Rcd 12903, 12939, para. 81 (1999) (*Local Ownership Order*), *recon. granted in part*, 16 FCC Rcd 1067 (2001).

⁸ *Local Ownership Order*, 14 FCC Rcd at 12938, para. 79.

⁹ *See* 47 CFR § 73.3555, note 7.

¹⁰ *Local Ownership Order*, 14 FCC Rcd at 12939, para. 79.

¹¹ *See* 47 CFR § 73.3555, note 7; *Local Ownership Order*, 14 FCC Rcd at 12939, para. 81.

¹² *See Local Ownership Order*, 14 FCC Rcd at 12939, para. 81.

all-day audience share below 2% for the last 18 months.¹³ These ratings are well below the waiver standard's 4% threshold. Accordingly, we find that the first prong of the "failing" station waiver test is satisfied.

Second, the Applicants submitted KWWT's financial statements for the years 2017, 2018, and 2019.¹⁴ Staff analysis of these financial statements reveals that KWWT has operated with a negative cash flow in each of the previous three years. Accordingly, we find that the Applicants have satisfied the second prong of the "failing" station waiver test.

Third, the Applicants maintain that common ownership of the two stations will provide tangible public interest benefits in the form of additional local programming and operational improvements.¹⁵ As to local programming, they note that KWWT's status as a struggling station within a small market¹⁶ has impacted its ability to invest in quality local programming and that because of this, KWWT does not air any local news coverage.¹⁷ We find that Gray's intention to leverage its news resources to enable KWWT to air additional locally-focused programming is a tangible public interest benefit of the transaction.¹⁸

As to operational improvements, the Applicants note that KWWT currently broadcasts using outdated equipment and facilities.¹⁹ Gray plans to operate KWWT from KOSA's more modern studio facilities, providing access to upgraded workstations, equipment, and software. Gray also pledges to provide KWWT with the resources necessary to upgrade from standard to high definition transmissions.²⁰ Lastly, KWWT currently has a single full-time employee responsible for sales, traffic, billing, accounting, programming, and operations.²¹ Gray plans to increase KWWT's staffing levels and contends that this will make KWWT a more viable advertising platform for local businesses to reach local consumers.²² Based on the above, we find that the combined operation of the stations will result in tangible and verifiable public interest benefits in the form of new local news programming and improved operations. We also believe these proposed public interest benefits outweigh any potential risk of harm to competition and diversity, because they will allow KWWT to become a more viable local voice in the

¹³ KWWT Waiver Request at 1, 6. Certain ratings and financial information has been submitted to the Commission with a request for confidential treatment under 47 CFR § 0.457(d). A redacted version of the filing is available in the public file.

¹⁴ *Id.* at 2, 8-9.

¹⁵ *See id.* at 2-3.

¹⁶ The Odessa-Midland DMA is the 145th ranked television market in the United States. *Id.* at 2.

¹⁷ *See* KWWT Waiver Request at 2-3.

¹⁸ *See id.* at 2 (noting that Gray will "integrate KWWT(DT) into KOSA-TV's growing local news presence[,] . . . provide KWWT(DT) viewers with important updates from the community . . . [and] explore opportunities to add local news to KWWT(DT) as it integrates the station into its news operations").

¹⁹ *Id.* at 3.

²⁰ *See id.*

²¹ *See id.* at 2-3.

²² For example, Gray notes that many local businesses do not currently advertise on KWWT and may not even know it exists as an advertising outlet. Gray maintains that their experienced sales staff will more effectively market advertising opportunities to these local businesses. *See id.* at 3.

Odessa-Midland DMA.²³ Consequently, the third prong of the “failing” station waiver test is satisfied.

Fourth, to satisfy the last prong of the waiver standard the Applicants submit two declarations. The first declaration, prepared by the President of Winstar, James L. Primm, attests that he began marketing KWWT in 2018, and that he has contacted approximately 30 potential buyers using industry connections and by attending trade shows.²⁴ Mr. Primm notes that included among the 30 potential buyers were multiple out-of-market operators with substantial television broadcasting experience and resources. He also presented the station to four owners who operate within the Odessa-Midland DMA: Gray, TEGNA, Nexstar, and Entravision.²⁵ His efforts yielded only two potential buyers: one was Gray, and the other was an out-of-market buyer that offered approximately 50% of the station’s fair market value.²⁶

The second declaration was prepared by Frank J. Higney, Vice President of Kalil & Co., Inc. (Kalil).²⁷ Kalil is a media brokerage firm with over 40 years of experience, and Mr. Higney has been involved in hundreds of broadcast property transactions. In Mr. Higney’s professional opinion, the odds of finding an out-of-market buyer are low, and in the unlikely event one was found, it would be at a severely depressed price. For background, he notes that as a MeTV affiliate KWWT has earned just over 1% of the total annual advertising share in the relatively small Odessa-Midland DMA. Mr. Higney contends that due to low revenues KWWT would struggle to continue operations as a standalone full-power station, and that the ability to share resources with Gray’s in-market stations would greatly improve its long-term prospects. We find that Gray is the only reasonably available candidate willing and able to acquire and operate KWWT, and that selling the station to an out-of-market buyer would result in an artificially depressed price.²⁸ Therefore, the fourth prong of the “failing” station waiver test is satisfied.

Conclusion. Because the Applicants have satisfied all four prongs of the “failing” station waiver test, we are persuaded that a grant of a “failing” station waiver permitting common ownership of KWWT and KOSA is warranted.²⁹ We note that our findings are limited to the specific facts and circumstances of this case. Furthermore, in light of the above discussion, we find that Gray is fully qualified and conclude

²³ See, e.g., *Withers Broadcasting Company, and Gray Television Licensee, LLC*, Letter Order, 32 FCC Rcd 3179, 3181 (MB 2017) (finding the third prong satisfied where, *inter alia*, combined ownership allowed a station access to an “experienced engineering team . . . industry-leading resources, technology” and improved staffing); *William H. Fitz, Esq., and Jack N. Goodman, Esq.*, Letter Order, 22 FCC Rcd 11845, 11847 (MB 2007) (finding the third prong was satisfied where a transaction will lead to high definition transmissions and additional local programming).

²⁴ See KWWT Waiver Request at 10-11.

²⁵ See *id.*

²⁶ See *id.* (noting that the lone out-of-market offer was only approximately 50% of fair market value and that an in-market operator, such as Gray, is the only rational purchaser of KWWT with the “economies of scale necessary” to operate the station competitively).

²⁷ See *id.* at 13-14.

²⁸ See, e.g., *Fireweed Communications LLC, and Gray Television Licensee, LLC*, Letter Order, 31 FCC Rcd 6997, 6999-7000 (MB 2016) (finding the fourth prong satisfied where applicants submitted a declaration by the licensee describing failed efforts to market the station, in combination with a separate broker letter stating that in the broker’s professional opinion an “effort to find a qualified out-of-market buyer would either be fruitless or at a very depressed price” because operating the station on a standalone basis was not viable); *Pappas Arizona License, LLC, and Blackhawk Broadcasting LLC*, Letter Order, 28 FCC Rcd 17048, 17050 (MB 2013) (finding the fourth prong satisfied where 40 out-of-market prospective buyers were contacted).

²⁹ See 47 CFR § 73.3555, note 7.

that the grant of the unopposed Application would serve the public interest.³⁰

ACCORDINGLY, IT IS ORDERED that the request for a “failing” station waiver of the Local Television Ownership Rule, section 73.3555(b), to permit Gray Television Licensee, LLC, to own and operate both KWWT(DT), Odessa, Texas, and KOSA(TV), Odessa, Texas, **IS GRANTED. IT IS FURTHER ORDERED** that the application to assign the license of KWWT(DT), Odessa, Texas, from Winstar Odessa, Inc., to Gray Television Licensee, LLC (File No. BALCDT-20200724AAB), **IS GRANTED.**

Sincerely,

/s/

Barbara A. Kreisman
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Media Bureau

³⁰ See 47 U.S.C. § 310(d).