

**WTNH Broadcasting, Inc.
WCTX, New Haven, CT**

**EXHIBIT NO. 14
FCC Form 314
Section III, Paragraph 6**

Assignee WTNH Broadcasting, Inc. ("WTNH Broadcasting"), a subsidiary of LIN Television Corporation ("LIN TV"), is the licensee of station WTNH-TV, Ch. 8 (ABC), New Haven, Connecticut, which is located in the Hartford-New Haven, Connecticut, Nielsen Designated Market Area (the 27th ranked DMA) (the "Hartford-New Haven DMA"). (When used herein, "Assignee" refers to WTNH Broadcasting and LIN TV collectively.) By this application, WTNH Broadcasting seeks to acquire from K-W TV, Inc. ("K-W"), the license for New Haven station WCTX (formerly WBNE, and prior to that, WTVU, referred to herein as the "Station" or "WCTX"), Channel 59 (UPN). The Assignee has provided advertising and programming services to the Channel 59 Station under a local marketing agreement since December 9, 1994.¹

¹ On December 9, 1994, the parties also entered into a lease agreement and option agreement (the LMA, lease, and option agreements are sometimes collectively referred to as "Agreements"). As a pre-November 5, 1996, agreement, the LMA is "grandfathered" under the FCC's multiple ownership policies. See *Review of FCC's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12963 (1999) ("Television Ownership Order"), recon. granted in part, Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067 (2001) ("Reconsideration Order").

The television duopoly rule permits co-ownership of two stations within the same DMA where at least eight independently-owned and operating full-power commercial and noncommercial TV stations will remain in the DMA in which the communities of license of the TV stations at issue are located and where at least one of the two co-owned stations is not among the top-four ranked TV stations in the DMA based on audience share. Until recently, there were nine separately licensed television facilities in the DMA. But as noted in Annex A, the FCC has now authorized Tribune, licensee of WTIC-TV (Ch. 61, Fox, Hartford), to acquire WTXX (Ch. 20, WB, Waterbury) pursuant to the "failing station" duopoly waiver standard.² Because WTNH-TV and the Station also are counted as one voice, seven independently-owned and operating full-power TV stations will remain in the DMA after consummation of the instant transaction.

In markets with fewer than eight independent TV voices, the FCC presumes that the public interest is served by a grant of a television duopoly waiver where, *inter alia*, co-ownership will enable the construction

² See Application of Counterpoint Communications, Inc. and Tribune Television Co. for Consent to the Transfer of Control of Tiberius Broadcasting, Inc., Licensee of WTXX(TV), Waterbury, CT, File No. BTCCT-19991116AJW, FCC 01-220 (rel. Aug. 3, 2001) ("*Tribune Waiver Grant*"). Prior to the grant of this transfer application, Tribune operated WTXX pursuant to a post-November 5, 1996 "non-grandfathered" LMA.

of an authorized but unbuilt station. To qualify for such a waiver, an applicant must demonstrate that the permittee made “reasonable” efforts to construct the station but was unable to do so.³ Assignee seeks, in the instant application, to acquire WCTX pursuant to the FCC’s “unbuilt station” duopoly waiver standard — on the grounds that the unprecedented 41-year struggle of the owner of WCTX (and its predecessors) prior to the December 9, 1994 LMA constitute more than “reasonable” efforts to construct the Station.

I. CONVERSION OF WCTX TO ASSIGNEE’S OWNERSHIP SATISFIES THE FCC’S UNBUILT STATION DUOPOLY WAIVER STANDARD.

In situations, as here, involving conversion of a grandfathered LMA arrangement to duopoly ownership, the FCC assumes that waiver of its duopoly rule serves the public interest where the application shows that the transaction has resulted in the construction of an authorized but as yet unbuilt station and that the permittee has made “reasonable efforts to construct but has been unable to do so.”⁴ The FCC has further ruled that in

³ See 47 C.F.R. § 73.3555, Note 7, ¶ 3.

⁴ See *id.* In the non-LMA context, the FCC requires that an applicant also show that an in-market buyer is the only reasonably available candidate willing and able to acquire the construction permit and build the station and that selling the permit to an out-of-market buyer would result in an artificially depressed price. 47 C.F.R. § 73.3555, Note 7; see also *Television Ownership Order* at 12941. In its *Reconsideration Order*, the FCC determined that “a duopoly waiver applicant that (continued...) ”

such a situation, the waiver showing may be based "on the circumstances existing just prior to the parties entering into an LMA."⁵

Here, the construction permit for the Station was first issued in 1953. Incredibly, it remained unbuilt when, more than 41 years later, the current licensee, K-W, finally entered into the Agreements with Assignee on December 9, 1994. The story of the efforts of K-W and its predecessors is laid out in the Commission's files in the form of numerous requests to extend the construction period deadline as well as in other FCC applications and pleadings. That history is reviewed briefly below, but suffice it to say that the record presents a compelling showing of the reasonable efforts to construct the Station prior to entering the LMA. Moreover, as shown in Part II, the benefits that have inured to the public from inauguration and operation of WCTX and the Station's existing precarious financial condition (even before

is a party to a several-year-old LMA may not, as a practical matter, now be able to show that at the time it entered into the LMA, it was the only buyer willing or able to operate or construct the . . . unbuilt station, and that sale of the station to an out-of-market buyer would result in an artificially depressed price." *Reconsideration Order* at ¶ 28. Thus, the FCC ruled that a duopoly waiver applicant that seeks to acquire a station with which it has formed an LMA in the past need only show that the transaction will result in the construction of an authorized but as yet unbuilt station and that the permittee has made reasonable efforts to construct but has been unable to do so. *See id. Accord Kentuckiana Broadcasting, Inc.*, File No. BALCT-19991116AAK, DA 01-744, ¶ 3 (rel. Mar. 23, 2001) ("*Kentuckiana Decision*").

⁵ *See Television Ownership Order* at 12965. The FCC reaffirmed this policy in its *Reconsideration Order* (¶ 28), and it applied the new policy in the *Kentuckiana Decision* (¶ 5).

making expenditures for DTV facilities) buttress the presumption under the FCC's unbuilt station duopoly waiver standard that the public interest would be well served by permitting co-ownership of WCTX with WTNH-TV.

A. The Station Was Unbuilt For 41 Years When the Parties Entered Into the LMA.

When the parties entered into the LMA in December 1994, the Station's construction permit had remained outstanding but unbuilt for over 40 years. The FCC initially issued a construction permit for the Station on June 24, 1953, to the Connecticut Radio Foundation, Inc.⁶ After years of difficulty, the permit was assigned to Impart Systems, Inc., in 1967.⁷ As a result of nonbroadcast character issues involving its controlling owner, however, Impact Systems assigned the permit to New Haven Associates Co. in 1982.⁸ K-W, one of the investors in New Haven Associates, acquired the

⁶ See BPCT-456.

⁷ See Connecticut Radio Foundation, Inc. and Connecticut Television, Inc. for Assignment of the Construction Permit of Television Station WTVU(TV), Channel 59, New Haven, Connecticut, 8 RR 2d 780 (Sept. 28, 1966) (granting request for substitution of Impart Systems as assignee).

⁸ The serious questions concerning the qualifications of Impart Systems' controlling stockholder led to deferral of an application to relocate to another tower site as well as to a required divestiture of the Station's construction permit. See *Victor Muscat*, 44 FCC 2d 832 (1974). The 1974 assignment application was not granted until November 1981, and New Haven Associates closed on the transaction in 1982. See Application for Extension of Construction Permit, BMPCT-830301KH, filed March 1, 1983, Ex. 1.

construction permit in 1983.⁹ As had its predecessors, K-W faced extraordinary difficulties in locating and obtaining a tower site to build the Channel 59 facility. Only after entering into the Agreements with Assignee was K-W finally able, on December 30, 1994, to file a minor modification application to specify a usable fully-spaced site — the tower of Assignee's New Haven station WTNH-TV.¹⁰ The FCC granted the 1994 Modification Application on February 15, 1995 (extending the construction permit through August 15, 1995). In April 1995, K-W filed its Form 302 license application (BLCT-19950406KE), beginning program operations pursuant to program test authority.

B. The Permittee Made Reasonable Efforts to Construct the Station but Was Unable to Do So Prior to Entering Into the Agreements.

When it granted the long-pending assignment application in 1981, the FCC also granted a modification application, filed by Impact Systems years earlier in 1969, for a North Branford (Connecticut) tower site.¹¹

⁹ See Application for Extension of Construction Permit, BMPCT-840830KE, filed August 30, 1984, Ex. 1.

¹⁰ See Application for Modification of Construction Permit, BMPCT-941230KE, filed December 30, 1994 ("1994 Modification Application"). By November 1994, the FCC had approved Assignee's application (BALCT-940629LB) to acquire WTNH-TV from Cook Inlet Communications, Inc. ("Cook Inlet").

¹¹ See BMPCT-6611. The Station's originally proposed tower site at West Rock Ridge previously had become unavailable. See, e.g., Petition For Order To Show Cause, filed September 20, 1985, at 2 ("Show Cause Petition").

After the passage of years, however, the site owner (the New Haven Water Company) declined to make the property available to New Haven Associates.¹² Thereafter, in the decade-plus span leading up to the Agreements with Assignee, the Permittee expended extensive efforts and resources, especially in locating a feasible fully-spaced site that was available to the Permittee to construct the Channel 59 station.

Obtaining a tower site for Channel 59 was made extraordinarily difficult by a combination of special circumstances, including the unusual topography of the East Central Connecticut region (featuring rugged ridges and deep valleys), the area's rigid local zoning and environmental restrictions, FAA airspace constraints due to the presence of several airports and associated airways in the New Haven vicinity, the FCC's minimum distant spacing requirements, and the well-know frequency congestion of the area.¹³ The FCC's records reflect that in the early 1980's alone the

¹² See, e.g., Application for Extension of Construction Permit, BMPCT-840830KE, filed August 30, 1984, Ex. 1.

¹³ See, e.g., Application for Modification of Construction Permit, BMPCT-881202KM, filed December 2, 1988, Request For Waiver ("1988 Modification Application"). Frequency congestion remains a significant problem in this region in general and for the Station in particular. The congestion led to very tight packing of DTV channels in the northeast corridor, including the Hartford-New Haven market. In creating the DTV Table, the FCC endeavored to avoid use of Channel 6 to the extent possible, citing potential interference concerns related to noncommercial educational ("NCE") FM stations. Nevertheless, it assigned (continued...)

Permittee investigated no less than 17 potential tower sites.¹⁴ Thereafter, it continued to pursue other sites and tried again to overcome obstacles confronted in connection with sites that it had investigated earlier.¹⁵

Some examples illustrate the breadth of the Permittee's extensive efforts. The Permittee retained local counsel to prosecute a zoning variance for a site at Hamden (Connecticut) as well as a later appeal which

Channel 6 to the Station — the only station in the country initially to obtain a Channel 6 DTV allotment/ assignment and one which suffers from unusually low replication and significant interference problems resulting from short-spacing to nearby stations. Moreover, because the Station operates on out-of-core analog Channel 59, it does not have the flexibility to elect to keep Channel 59 at the end of the DTV transition. See Comments of K-W TV, Inc., in MM Docket No. 99-325 (Digital Audio Broadcasting Systems and Their Impact On the Terrestrial Radio Broadcast Service), filed January 24, 2000.

¹⁴ See 1988 Modification Application, Request for Waiver at 6.

¹⁵ See, e.g., Application for Extension of Construction Permit, BMPCT-19921112KH, filed November 12, 1992, Ex. 1; Application for Extension of Construction Permit, BMPCT-19931210KI, filed December 10, 1993, Ex. 1; Application for Extension of Construction Permit, BMPCT-19940715KE, filed July 15, 1994. While resolution of the host of difficulties in obtaining a usable site proved pivotal to other construction activities, the Permittee undertook significant efforts on other fronts as well. The FCC's records reflect, for example, that the Permittee interviewed prospective key personnel (including general managers and program directors), tried unsuccessfully to negotiate a network affiliation relationship with NBC (the nascent WB, UPN and PAX networks being unavailable at the time), met with program syndicators to try to line up programming, and conferred with equipment suppliers, sales representative organizations, and advertising agencies. See, e.g., Application for Extension of Construction Permit, BMPCT-840830KE, filed August 30, 1984. As early as 1988 (years before the Station was constructed), K-W already had expended nearly \$1,000,000 in its efforts to build the Station. See 1988 Modification Application, Request for Waiver at 1.

eventually proved unsuccessful.¹⁶ Contemporaneously, the Permittee prosecuted a lawsuit against one of the competing applicants for a new Channel 61 television station in Hartford (Connecticut) — which entity, according to the complaint, sought to impede by unlawful means Permittee's efforts to obtain the Hamden site for Channel 59.¹⁷ K-W later sought another zoning variance, this time for a site in the Town of Bethany (Connecticut) — which hearing and appeal eventually resulted in a denial of the requested variance.¹⁸

In addition to local counsel, K-W retained other consultants, including the engineering firm of Hammett & Edison, to help locate and obtain tower sites.¹⁹ Being thwarted as it investigated each successive alternative, K-W eventually decided, with the assistance of Hammett & Edison, to prepare and file an application (BMPCT-881202KM), with waiver showing, for a Meridan Mountain site that was short-spaced to Channel 61

¹⁶ See Application for Extension of Construction Permit, BMPCT-830301KH, filed March 1, 1983, Ex.1; 1988 Modification Application, Request for Waiver at 6.

¹⁷ See Application for Extension of Construction Permit, BMPCT-830301KH, filed March 1, 1983, Ex. 1 and Attachment.

¹⁸ See Application for Extension of Construction Permit, BMPCT-840830KE, filed August 30, 1984, Ex. 1.

¹⁹ See, e.g., Application for Extension of Construction Permit, BMPCT-840830KE, filed August 30, 1984, Ex. 1; 1988 Modification Application, Request for Waiver at 6; *id.* App. A.

at New Britain (Connecticut).²⁰ That application was denied by the FCC but was pursued on appeal in the courts by K-W until July 1993, when it requested the Court of Appeals for the D.C. Circuit to dismiss its appeal (Case No. 92-1293).²¹ K-W also pursued the option of a UHF/UHF channel exchange with a noncommercial educational licensee operating a NCE station on Channel 49 at Bridgeport (Connecticut).²² The proposal initially faced difficulties resulting from the risk of competing applications. Later, after adoption of an FCC rule change to eliminate that risk from Intra-band Channel swaps, the NCE licensee nevertheless decided against the proposed channel swap for other reasons.²³

For years, K-W pressed hard to negotiate a tower lease with the licensee of New Haven's one other commercial television outlet (WTNH-TV Channel 8), including extending an offer to pay for construction of a new tower if necessary to accommodate both stations.²⁴ By late 1985, faced

²⁰ See 1988 Modification Application, Request for Waiver.

²¹ See, e.g., Application for Extension of Construction Permit, BMPCT-19921112KH, filed November 12, 1992, Ex. 1; Application for Extension of Construction Permit, BMPCT-19931210KI, filed December 10, 1993, Ex. 1.

²² See, e.g., 1988 Modification, Request for Waiver at 7; Show Cause Petition, Declaration of Jerry Weiss.

²³ See, e.g., 1988 Modification, Request for Waiver at 8.

²⁴ See Application for Extension of Construction Permit, BMPCT-840830KE, filed August 30, 1984, Ex. 1.

with a negotiation impasse, K-W submitted a rare request under Section 73.635 of the rules for the FCC to require the then-licensee of Channel 8 (Capital Cities Communications, Inc., and later Cook Inlet) to negotiate in good faith for collocation at the site.²⁵ The preparation and filing of this Show Cause Petition — while it eventually was denied in 1993²⁶ — illustrates K-W's diligent and resourceful efforts to pursue the broadest array of options in an attempt to construct the Station's facilities.

As options narrowed still further, the Permittee sought (unsuccessfully) to negotiate access to a site at Totoket Mountain; studied but rejected a site in Seymour (Connecticut) due to non-compliance with FCC spacing requirements; studied but rejected a site in Guilford (Connecticut) due to significant FAA constraints; and re-contacted site owners, including the Water Authority (which controlled several potential sites), to determine if circumstances had changed to permit negotiations to go forward — which efforts again proved unsuccessful.²⁷

Over these years, the FCC repeatedly concluded that the activities undertaken by Permittee, as outlined in its various extension

²⁵ See Show Cause Petition.

²⁶ See 1994 Modification Application.

requests and other applications, showed that the public interest was served by extending the construction permit deadline for the Station.²⁸ The extent and duration of its various efforts provide a solid basis for finding, pursuant to the unbuilt station duopoly waiver standard, that the Permittee made reasonable efforts to construct the Station but was unable to do so before entering the December 1994 Agreements with Assignee. As noted, the prior actions granting the extension requests (and 1994 Modification Application) reflect the FCC's judgment that the Permittee had undertaken diligent and reasonable efforts to construct the Station.

In summary, the record fully demonstrates that the Station was unbuilt as of December 9, 1994 (the date of the LMA) and that the Permittee made reasonable efforts to construct but was unsuccessful doing so prior to entering into the Agreements with Assignee. Thus, grant of the instant application fully satisfies the FCC's unbuilt station waiver standard.²⁹

²⁷ See, e.g., Application for Extension of Construction Permit, BMPCT-1992112KH, filed November 12, 1992, Ex. 1; 1994 Modification Application.

²⁸ In addition to granting the extension requests, the FCC also found that Permittee's efforts justified waiver of Section 73.3535(d) of the rules to permit the filing of a modification application after expiration of the initial construction deadline. See, e.g., 1994 Modification Application.

²⁹ See 47 C.F.R. § 73.3555, Note 7, ¶ 3. *Accord Kentuckiana Decision*, where the FCC, in granting an unbuilt station duopoly waiver, considered, *inter alia*, the applicant's difficulties in securing tower space, inadequacy of the original tower site, and filing of applications for extension of the construction period. In that case, (continued...)

II. GRANT OF THE ASSIGNMENT APPLICATION OTHERWISE ADVANCES THE PUBLIC INTEREST.

In finding that adoption of an unbuilt station duopoly waiver standard would serve the public interest, the FCC reasoned:

A station that has gone unbuilt . . . cannot contribute to diversity or competition. On the other hand, activation of a construction permit and construction of a station, even by the owner of another television station in the market . . . , increases program choice for viewers, may increase outlet diversity, and increases the amount of advertising available for sale in a market. We believe that the benefits to the public of construction and operation of such a station, even if through joint ownership, rather than allowing the channel to remain unused, outweigh any costs to diversity and competition.³⁰

As explained in Part I, the proposed acquisition satisfies the FCC's unbuilt station duopoly waiver standard and therefore presumptively advances the public interest. As also noted previously, because the instant situation involves a grandfathered LMA, the analysis of the efforts to construct the Station focuses on the pre-operational period prior to the December 1994 LMA. While unnecessary under the FCC's unbuilt station waiver standard, Assignee notes that the Station's subsequent history — both the programming and advertising opportunities the Station has provided

the permittee entered into a 1993 LMA only three years after issuance of the construction permit. Here, of course, the Permittee expended far greater efforts over a much longer period before entering into the Agreements with Assignee.

³⁰ See *Television Ownership Order* at 12941.

and the Station's existing poor financial condition — buttress the presumption that the public interest is served by authorizing co-ownership of WCTX and WTNH-TV.

First, activation of New Haven's second local commercial outlet has increased program choices for members of the public, increased opportunities for advertisers to reach their target audience, and increased competition among broadcast stations in the Hartford-New Haven market.³¹ Initially, the Station was able to offer the fledgling WB network an outlet in the Hartford-New Haven market when no other was available. More recently, faced with loss of the WB affiliation to WTXN, a facility then-operated as a non-grandfathered LMA by WB co-owner Tribune, the Station was able to obtain an affiliation to broadcast UPN programming and serve as the Hartford-New Haven outlet for this developing competing program source.

In April 2000, the Station, using the facilities and the assistance of WTNH-TV personnel, launched a local newscast to serve the New Haven area, airing from 10 to 10:30 p.m. Monday through Sunday (a daily newscast that continues today). The Station has provided other significant outlets for

³¹ For example, there is little or no duplication in programming between WTNH-TV and WCTX, and each station operates with a separate sales staff.

local expression as well. From time to time, it has aired locally-produced 30-minute public affairs series such as "The Highlight Zone" (weekly programs focusing on high school football), "Dialogue With Laurel Vlock" (an interview show dealing with a variety of issues affecting Connecticut that aired six times a year), and "What's Goin On!" (a monthly program focusing on the African-American community and multicultural issues).³²

The Station broadcasts a wide array of sporting events of interest locally including, currently, the New York Yankees and Boston Red Sox baseball games. Starting this fall, WCTX will air one Quinnipiac University men's hockey game and five men's basketball games. In the past, it has broadcast New York Mets baseball games, Big East NCAA basketball, America East NCAA basketball, Hartford Whalers hockey (before the team shifted to another state), Hartford Wolfpack (minor league) hockey, and New Haven Ravens (minor league) baseball. For two years, the Station broadcast Telethons supporting adoption in conjunction with the Connecticut Department of Children & Families. The Station adds to the diversity of children's educational and informational programming available

³² In 1996, the Station offered free airtime to federal congressional candidates in a series of eight 30-minute programs, an offer accepted by more than half of the 22 eligible candidates. For several years, the Station produced "Reflection of You," (continued...)

in the market by, for example, airing six days a week (this fall from 7-8 a.m. weekdays and 9:30-10 a.m. Sundays) "Disney's Recess," a program designed to inform and educate children about important lessons of life, and airing on Sundays (8-9 a.m.) programs designed to help inform and educate children six to 12 years old about animals, wildlife and nature.

Second, despite all these efforts and accomplishments and, even after six years of operations, the Station's financial condition is precarious. In view of the very competitive nature of the Hartford-New Haven market,³³ the Station's sign-on-to-sign off viewing shares have hovered only around 2%.³⁴ This share of viewing falls substantially below the 4% benchmark used as one key indicia for determining whether a station is "failing" under the failing station duopoly waiver standard.³⁵

a series of two-minute vignettes, aired daily, featuring discussion of social policy issues.

³³ For example, as Tribune pointed out in its request to acquire WTXH as a "failing" station (see footnote 2, *supra*), many residents in the southern portion of the Hartford-New Haven DMA are drawn to New York City stations and many residents throughout the DMA are drawn to popular cable networks due to the unusually high cable penetration rate in the DMA (now 88%, the nation's second highest).

³⁴ For example, the Station's share has not exceed 2% for the July 2000, October 2000, November 2000, February 2001, May 2001 and July 2001 audience sweeps rating periods.

³⁵ See *Television Ownership Order* at 12939.

Because of the continuing low audience viewing numbers and because of the comparatively high expenses of operating a Channel 59 UHF facility in a northeastern market adjacent to the New York City DMA, the Station's finances have been bleak, even considered in the context of the economies associated with an in-market LMA arrangement. In nearly six years of operations, the revenues generated by the Station in relation to the costs of the time broker alone (and even allocating a disproportionate share of the fixed costs to jointly operated WTNH-TV) has produced a cumulative broadcast cash flow loss of nearly \$5 million, and such losses are likely to continue. Were the Station a stand-alone facility, its financial situation would be especially dire. Assignee estimates that if operated as a stand-alone station, WCTX's broadcast cash flow losses over the nearly six-year period would have totaled nearly \$11 million, without a single profitable year, and the pro forma capital investment would have been nearly \$28 million. Though certainly significant, these losses do not even tell the entire story for the Station is now faced with the additional burden of DTV conversion (approximately \$2.2M for antenna, transmitter and related equipment alone, plus additional operating costs). Given the Station's continuing relatively low audience share, there would be little doubt but that, had it been operated on a stand-alone basis, WCTX would today presumptively

qualify as a failing station under the FCC's failing station duopoly waiver standard.³⁶

The proposed continued joint operation and further integration of WCTX and WTNH-TV will create significant cost savings -- economies essential to preserving WCTX's existing service, including especially its local news programming. Also, as part of an established group owner, Assignee is in the position to provide the critical financial and other resources necessary to construct the Station's digital facilities and provide programming to be carried in the new digital environment.

* * *

Thus, the record fully warrants grant of the instant assignment application pursuant to the FCC's unbuilt station duopoly waiver standard.

³⁶ Cf. *Tribune Waiver Grant*, ¶¶ 4–6 (granting a failing station duopoly waiver to allow Tribune to acquire a second station in the Hartford-New Haven DMA, finding that the station was failing when operated on a stand-alone basis prior to entering into an LMA with Tribune).