

### Request for Failing Station Waiver

Gray Television Licensee, LLC (“Gray”) seeks consent from the Commission to the assignment of the license of KWWT(DT), Odessa, Texas (Facility Identification Number 84410), which is located in the Odessa-Midland Designated Market Area (“DMA”). Gray is the licensee of KOSA-TV, Odessa, Texas (Facility Identification Number 6865) and its authorized television satellite station KCWO-TV, Big Spring, Texas (Facility Identification Number 42008), which also are located in the Odessa-Midland DMA.<sup>1</sup> With the exception of the local television ownership rule, the proposed transaction complies in all respects with the Commission’s Rules.

#### Failing Station Waiver

The Commission’s local television ownership rule, Section 73.3555(b), generally bars common ownership of television stations in the same television market with overlapping digital noise limited contours unless at least one of the stations in the proposed combination is not ranked among the top four stations in the market and there would be at least eight independently owned and operated full-power stations in the market after an acquisition is consummated. As discussed above, Gray is the licensee of KOSA-TV in the Odessa-Midland DMA. KOSA-TV’s digital noise limited contour overlaps that of KWWT(DT). While KWWT(DT) is not a top-four ranked station in the market, the Odessa-Midland Designated Market Area (“DMA”) would not have eight independent voices after the transaction. Each of the other top-four stations in the market are full-power stations not owned or operated by Gray.

Gray, therefore, requests a waiver of the local television ownership rule because KWWT(DT) is a “failing” station. The Commission will presume a “failing” station waiver request to be in the public interest if (1) the “failing” station has a low all-day audience share (*i.e.*, no more than four percent), (2) the station has had negative cash flow for three consecutive years prior to the application, (3) the parties demonstrate public interest benefits that will flow from the proposed transaction, and (4) there is no out-of-market buyer willing and able to acquire the station at other than an artificially depressed price.<sup>2</sup> The proposed transaction undoubtedly meets all four of these standards.

#### KWWT(DT) Consistently Has a Low All-Day Audience Share

For the past eighteen months, KWWT(DT) has failed to achieve an all-day audience share in excess of four percent.<sup>3</sup> Last year, KWWT(DT) averaged an all-day audience share of 1.3 percent. And even with the recent surge in broadcast viewership in 2020, KWWT(DT)’s highest all-day audience share this year has been 1.631 percent. With a consistent failure to achieve an

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<sup>1</sup> Gray is also the licensee of KTLE-LD, Odessa, TX (Facility ID 64993), which is the Telemundo affiliate in the market, and Gray is the permittee of the unbuilt low power K08PL-D (Facility ID 183689). Finally, Gray is the licensee of one TV Translator in the DMA: K31KJ-D, Big Spring, TX (Facility ID 168200).

<sup>2</sup> *Id.* at Note 7.

<sup>3</sup> *See* Attachment 1.

all-day audience share that even approaches two percent, KWWT(DT) satisfies the first criterion of the failing station exception.

### Poor Financial Condition

This prong of the waiver showing focuses on the three years immediately preceding the filing of the application. As the attached financial statements from Winstar Odessa, Inc. demonstrate, KWWT(DT) has operated with negative cash flow in each of the three years.<sup>4</sup> Accordingly, this prong of the waiver showing has been met, because the station simply does not operate with positive cash flow and has not for at least three years.

### Public Interest Benefits

The Commission recognized when it adopted its “failing station” waiver policy in 1999 that “[a]llowing a ‘failing’ station to join with a stronger station in the market can greatly improve its ability to improve its facilities and programming operations, thus benefiting the public interest.”<sup>5</sup> It understood that these waivers might be “of particular assistance to struggling stations in smaller markets that are not covered by the eight voice/top four ranked station test.”<sup>6</sup>

KWWT(DT) is without a doubt a failing station within a small market. The Odessa-Midland DMA is the 145<sup>th</sup> ranked television market with just 141,600 television households. As described above, the station has had negative cashflow for several years and that streak of poor financial performances has prevented the licensee from investing in the station’s programming. Indeed, KWWT(DT) does not have any local news coverage. The station, therefore, has no mechanism to share important breaking updates with its community. This means that over the past four months, KWWT(DT) has offered little coverage of the COVID-19 pandemic with little local information about the pandemic’s effect on the market.

By operating KWWT(DT) with KOSA-TV, KWWT(DT) will have access to all of the news resources from KOSA-TV, which is the leading news station in the market. Since Gray acquired KOSA-TV in 2015, Gray has increased the average number of hours per week of local news on KOSA-TV by 30%. With KWWT(DT) that investment in the local community will continue. Gray’s experienced news team in Odessa will integrate KWWT(DT) into KOSA-TV’s growing local news presence in the Odessa-Midland DMA, and when events warrant, Gray will provide KWWT(DT) viewers with important updates from the community that will only help to support local viewers, organization, and events. Finally, Gray will explore opportunities to add local news to KWWT(DT) as it integrates the station into its news operations.

As Gray integrates KWWT(DT) into its operations, Gray will immediately be able to staff the station in a way that it has never before been staffed. Currently, KWWT(DT) has one full-time

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<sup>4</sup> See Attachment 2.

<sup>5</sup> Review of the Commission’s Regulations Governing Television Broadcasting, *Report and Order*, 14 FCC Rcd 12903, 12939 (1999).

<sup>6</sup> *Id.*

employee responsible for sales, traffic, billing, accounting, programming and operations. Not surprisingly, most local businesses do not advertise on the station, and most may not know the station exists as an option.

When combined with KOSA-TV, KWWT(DT) will become a new resource for local businesses to publicize their offerings to local residents. From a local advertiser's perspective, KWWT(DT)'s new advertising availabilities for local businesses will come at a critical time as local businesses continue to struggle not only with the challenges that have arisen as a result of the COVID-19 pandemic, but also the historic shutdown of the West Texas energy industry. Moreover, these local businesses will quickly learn about these availabilities, because Gray's deeply experienced sales staff will immediately begin to spread word of the new advertising opportunities that are available through KWWT(DT).

In addition, Gray anticipates making substantial operational improvements that would provide tangible public interest benefits:

- KWWT(DT) currently broadcasts in standard definition and operates using outdated equipment and physical plant. After the transaction, KWWT(DT) will have access to the full support of and resources from Gray to upgrade the station's transmissions to high definition.
- Gray intends to operate KWWT(DT) from KOSA-TV's studio facilities. The move will instantly upgrade the physical plant for the station with the latest workstations, equipment, and software necessary to compete in today's television environment.
- Operated together with KOSA-TV, KWWT(DT) will have access to sufficient financial resources to compete for sought after syndicated programming and other programming.
- Gray has a proven track record of running strong local stations. Indeed, Gray has the number-one or number-two ranked television station operations in nearly all of its 93 television markets, including in the Odessa-Midland DMA.

#### No Rational Out-of-Market Buyer

Buyers are not willing and able to acquire and operate a failing station such as KWWT(DT) without the ability to operate it in conjunction with a stronger, in-market station (such as KOSA-TV). Only by taking advantage of the synergies from combining with an in-market station can a failing station like KWWT(DT) become profitable and pay for the public interest benefits like those described above. Attachment 3 hereto is the declaration of Frank J. Higney of Kalil & Co., Inc. No broker was used to facilitate this transaction so the applicants requested Mr. Higney's professional opinion on the likelihood that he would be able to find an out-of-market buyer that would agree to purchase the station for a fair market price. Because the station has limited assets beyond the FCC license, a new owner would need to make significant investments into the station. Moreover, because there are no major networks that appear to need new broadcast partners in the market, there is little the station can do to improve its programming. Indeed, Mr.

Higney concluded that an out-of-market buyer would only agree to purchase the station for a severely depressed price.

With increasing competition from digital companies, including Google and Facebook, and broadcast ratings in decline due to viewer fragmentation from streaming services such as Netflix and Amazon, no rational out-of-market buyer would be interested in purchasing a standalone MeTV affiliate in a small market and continuing to operate it on a standalone basis. This is especially true for KWWT(DT), which operates with facilities that are inferior to other stations in the market. Any prospective buyer would need to invest significant amounts of capital to improve the station's performance – without any guarantee that a standalone MeTV station could generate the revenues needed to pay for the upgrades. To add to the difficulty, any out-of-market buyer would need to take into account the effect the COVID-19 pandemic has had on broadcasters, particularly small broadcasters in small markets. As Mr. Kalil stated, the “odds of finding an out-of-market buyer of KWWT are essentially zero.”

Gray respectfully submits that the public interest would be served by granting a failing station waiver in order to allow common ownership of KOSA-TV and KWWT(DT). In adopting the failing station exception to the Duopoly Rule, the Commission stated that allowing failing stations to combine with a stronger station would “pose minimal harm to our diversity and competition goals, since their financial situation typically hampers their ability to be a viable ‘voice’ in the market.”<sup>7</sup> That is the case here, where a waiver will allow KWWT(DT) to strengthen its “voice” in the market. A combination that includes KWWT(DT) also would make available new financial, operational, and programming resources that would provide improved service to viewers throughout the Odessa-Midland DMA. Accordingly, Gray respectfully requests that the Commission grant the instant failing station waiver request.

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<sup>7</sup> Review of the Commission's Regulations Governing Television Broadcasting, *Report and Order*, 14 FCC Rcd 12903, 12938-39 (1999).

Attachment 1

Audience Shares

**Comscore StationView Essentials ®  
Report Builder**

Filtered by: All Day, All Week, Include Exceptions, Stations in Odessa-Midland: KWWT Odessa, Texas (MeTV)

| Net/Station | Jan 2020 |    | Feb 2020 |    | Mar 2020 |    | Apr 2020 |    | May 2020 |    | Jun 2020 |    |
|-------------|----------|----|----------|----|----------|----|----------|----|----------|----|----------|----|
|             | HH Live  |    | HH Live  |    | HH Live  |    | HH Live  |    | HH Live  |    | HH Live  |    |
|             | Rtg      | Sh |
| KWWT        |          |    |          |    |          |    |          |    |          |    |          |    |

**2019 Comscore Data**

| Market Name    | Station | Rtg | Sh |
|----------------|---------|-----|----|
| Odessa-Midland | KWWT    |     |    |

Attachment 2

Financial Data

**REDACTED - FOR PUBLIC INSPECTION**

KWWT-DT Odessa, TX

**Operating Statement**

**For the Fiscal Years Ended December 31, 2017-2019**

**Revenue:**

Local, net

National, net

Political, net

**Total Net Time Sales Revenue**

Retransmission

Barter Programming Revenue

Internet Revenue

Other Broadcast Revenue

**Total Net Broadcast Revenue**

**Cost of Revenue**

**Engineering/Technical**

Salaries and Wages

Telephone and Internet

Equipment Maintenance & Repairs

Transmitter/Microwave Maintenance

Utilities

Other Technical/Engineering Expense

**Total Engineering/Technical**

**Creative Services**

Salaries and Wages

Advertising

Outside Talent/Special Events

Other Creative Services Expense

**Total Creative Services**

**Production**

Salaries and Wages

Auto Expense

Outside Talent & Production

Other Production Expense

**Total Production**

**Programming/Traffic**

Salaries and Wages

Program Licenses/Fees/Rent

Network Affiliation Fee

Other Programming Expense

**Total Programming/Traffic**

2019 2018 2017

**Sales/Digital**

Salaries/Wages/Commissions

Dues & Subscriptions

Travel & Entertainment

Auto Expense

Sales Promotions

Research

Website Sales Projects

Other Sales/Digital Expense

**Total Sales/Digital**

**General & Administrative**

Salaries and Wages

Payroll Taxes

Employee Insurance

Interest on Loans

Insurance General

Dues & Subscriptions

Travel & Entertainment

Auto Expense

Telephone/Internet

Freight/Shipping/Postage

Building Maintenance

Utilities

Rent Office/Tower

Professional Fees

Taxes & Licenses

Office Supplies

Bank Charges

Other G&A Expense

**Total General & Administrative**

**Misc. Operating Expenses**

Depreciation

Other Operating Expenses

**Total Other Operating Expenses**

**Total Operating Expenses**

**Operating Income (Loss)**

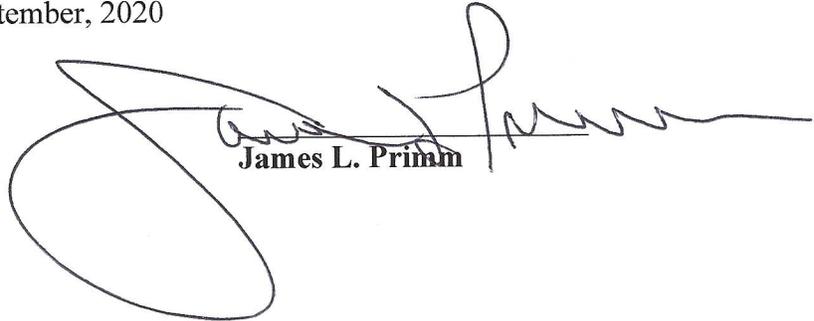
AMENDED DECLARATION

I, **James L. Primm**, do hereby declare under penalty of perjury and to the best of my knowledge, information, and belief that:

1. I am President of Winstar Odessa, Inc. (“Winstar”).
2. Winstar is the FCC licensee of full power television KWWT(DT), Odessa, TX (FCC Facility ID No. 84410), located in the Odessa-Midland Designated Market Area.
3. Winstar operates KMDF-LD, Midland, TX, (Facility ID No. 127009), licensed to Martin Weiss, pursuant to a Local Marketing Agreement. Mr. Weiss is the sole shareholder of W&K Pharmacy, Inc. which is a shareholder of Winstar.
4. For a few years, operation of KWWT and KMDF-LD (together, the “Stations”) was a somewhat profitable business in a relatively sleepy television market. However, especially over the last five years, market and economic forces have combined to make operation of these independent television stations unprofitable.
5. Despite my efforts, KWWT was never able to acquire a major network affiliation, which has hampered Winstar’s ability to command higher advertising rates and negotiate retransmission consent rates.
6. Further pressure on the profitability of the Stations has been the West Texas oil industry boom, which, until the last few months, had driven wages in the market to an untenable level. Winstar was simply unable to retain or hire sales or production staff because the oil industry and related businesses were able to pay far more.
7. Over the past few years, the Stations have operated at a loss, causing many material obligations, including seven years of FCC regulatory fees, to go unpaid.
8. The financial information for 2017, 2018, and 2019 (as revised) provided in support of the failing station waiver is limited to the operation of KWWT/Winstar and is true and correct, to the best of my knowledge.
9. I began marketing the Stations in earnest in 2018. I contacted approximately thirty (30) potential buyers directly using industry contacts I have developed as an owner and communication lawyer over many years, as well as by attending trade shows such as the NAB Show.
10. These efforts, which included presentation of the Stations to in-market owners Gray Television, TEGNA, Nexstar and Entravision, as well as to many more out-of-market entities, yielded only two potential buyers. The first potential buyer (an out-of-market entity) made an offer at approximately 50% fair market value. Gray Television was the only other interested bona fide buyer.

11. I believe that an in-market operator is the only rational buyer that would consider buying KWWT (with or without KMDF-LD) because of the economies of scale necessary to be competitive in the television market today.
12. My analysis appears to be proven by the fact that multiple other operators, each with substantial television broadcasting experience and resources but not another in-market station, declined to purchase the station or offer greater than 50% of the station's fair market value.

Executed on this 15<sup>th</sup> day of September, 2020



James L. Primm

Attachment 3

Declaration of Frank J. Higney

July 7, 2020

Mr. Robert J. Folliard, III  
Gray Television, Inc.  
4370 Peachtree Road, NE  
Atlanta, GA 30319

Re: KWWT(TV), Odessa, TX

Dear Mr. Folliard:

Gray Television has asked Kalil & Co., Inc. ("Kalil") to evaluate the prospects for a sale of television broadcast station KWWT(TV), Odessa, Texas ("KWWT"). Specifically, I am providing my professional opinion about whether the station should be considered a failing station by the FCC, because no out-of-market buyer would acquire the station at other than a severely depressed price. KWWT is the MeTV affiliate for the Odessa-Midland, Texas market. As described below, I believe that any effort to sell KWWT likely would not identify any out-of-market buyers.

**Qualifications of Kalil:** Kalil & Co., Inc. has been in the media brokerage business for over forty-four years. Located in Tucson, Arizona, Kalil is comprised of ten brokers whose combined experience totals well over 100 years. Kalil conducts business throughout the United States and is widely recognized as one of the top brokerage organizations in the country. Over the last 10 years, Kalil has brokered well over \$2.5 billion worth of transactions.

As a Vice President at Kalil, I have extensive knowledge of the television industry in general, having worked as a media broker for almost three decades. I have been engaged by the owners of television stations for both acquisitions and divestitures. I have been involved personally in the acquisition or sale of hundreds of broadcast properties, including stations in small, medium, and large markets.

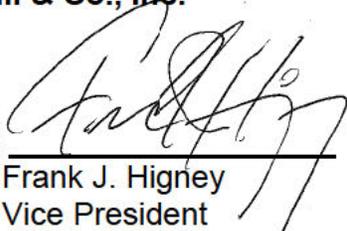
**Analysis:** The Odessa-Midland, Texas designated market area is market 145 with an estimated 141,600 TV homes. Historically, KWWT has had limited success in the market. According to BIA, the station has earned just over one percent of the total advertising share in the market over the past five years and has consistently come in as the sixth ranked station in this very small market. KWWT has been a MeTV affiliate for many years and it has never achieved a competitive position in the market capable of generating the requisite revenue base. Moreover, even with several programming streams in addition to MeTV, KWWT's programming has failed to find a meaningful television audience.

Given the overall minimal level of market television revenues, I believe KWWT will be unable to continue to operate as a viable standalone full power station. Operated alone, KWWT has limited facilities, a minimal staff, and no local news programming. The current owner has limited revenues and little chance to significantly increase revenues so it can invest in the station's programming to better compete with the stronger stations in the market. Currently, all other major networks have broadcasting partners in the market so there are no other viable primary networks or programming suppliers that could change the status quo. Stated differently, any buyer would acquire limited assets, would seek to retain a limited staff to operate the station, and face the same fierce competition from other in-market stations. It is clear that KWWT would benefit significantly if it were operated jointly with Gray's in-market stations. KWWT would be able to share expenses and facilities, as well as benefit from Gray's expert sales and technical staff.

As a broker, if I were asked to market KWWT solely to out-of-market entities, I believe it would be difficult to identify any potential viable buyers. Under normal circumstances, given the low odds of finding a buyer other than an in-market buyer, I am not certain I would even accept that project as a broker. The efforts needed to identify an out-of-market buyer would need to be extensive, widespread, and time consuming, and the costs associated with those efforts likely would outweigh the benefits to my firm. In addition, given the current economic situation as broadcasters struggle to outlast the COVID-19 pandemic, I am confident that the odds of finding an out-of-market buyer of KWWT are essentially zero. Broadcasters have suffered significant declines in revenue during the pandemic and the effects of the pandemic are hurting small stations in small markets most of all. Accordingly, it is my opinion that even if an out-of-market buyer was found after an exhaustive marketing effort that it would only be at a severely depressed price.

Sincerely,

**Kalil & Co., Inc.**

By: 

Frank J. Higney  
Vice President