

## WAIVER REQUEST

Pappas Digital Television of Des Moines-Ames, LLC (“Pappas Digital”), respectfully requests a waiver of the Local Television Ownership Rule, 47 C.F.R. § 73.3555(b)(2) (2002), to permit the common ownership of the digital broadcast television facility authorized by the construction permit referenced in this application (the “Des Moines Digital CP Facility”) and analog t-television station KPWB-TV (Ch. 23), (“Analog Station KPWB”) licensed to Ames, Iowa (Facility. Id. 51502), which does not have an assigned paired digital channel. Both the Des Moines Digital CP Facility and Analog Station KPWB would serve the Des Moines DMA. As discussed in more detail below, waiver is justified in the instant circumstances because it facilitates the transition to digital. Because Analog Station KPWB has no paired digital station, KPWB would not otherwise be able to migrate its viewers to a digital station and thereby build a digital audience during the transition. Instead, it would have to flash-cut to digital on a certain date, losing digital viewers before the flash-cut to digital, and stranding analog viewers prematurely. Waiver in this case would ensure the simultaneous delivery of an analog and a digital signal for viewers of KPWB in the Des Moines, Iowa DMA throughout the transition to digital.

### **I. STATEMENT OF FACTS**

Pappas Digital Television of Des Moines-Ames, LLC, the proposed assignee, ownership is comprised of Pappas Telecasting Companies, 4%; Harry J. Pappas, 86.5%; Dennis J. Davis, 2%; LeBon G. Abercrombie 2%, Deb Corson, 1.5%; Peter Chrisanthopoulos, 1.5%; Howard Shrier 1.5%; Peter Pappas 1.0%. Similarly, Harry J. Pappas and Pappas Telecasting Companies own 55.2% of the membership interests in Pappas Telecasting of Iowa, LLC, the licensee of KPWB-TV. Since both entities are owned and controlled by Pappas Telecasting Companies and Harry J. Pappas, and since both the Des Moines CP Facility and KPWB are within the Des

Moines, Iowa DMA, a waiver of the Commissions Local Television Ownership Rule is required for the grant of the instant application.

KPWB is authorized to operate on NTSC Channel 23. Since the initial construction permit for KPWB had not been issued at the time of the adoption of the DTV Table of Allotments, the Commission did not provide KPWB with a “paired” digital television channel. In addition, for parties with pending applications for new television facilities for which NTSC construction permits had not yet been issued as of April 3, 1997, the Commission determined that it would grant only digital construction permits. Thus, those applicants were required to find an acceptable digital channel, petition for the allocation of such channel and, if the Commission approved the rulemaking and underlying construction permit application, commence operation as a DTV only stand-alone television service. Caroline K. Powley, the holder of the construction permit in the instant application, took each of these steps, and was granted a digital-only construction permit for Channel 56 at Des Moines, Iowa, on August 28, 2003 (BNPCDT-19960117KE) (the “Permit”).

In light of the lack of a paired digital channel for Station KPWB, and the lack of a paired NTSC channel for the Permit, a grant of the proposed assignment must be seen as allowing the two facilities to operate in a complementary fashion so that the Des Moines DMA will receive seamless television service during the transition to a digital television platform.

## **II. DISCUSSION**

The Commission’s rules currently restrict the ownership of two television stations in the same DMA unless certain conditions are met. Specifically, Section 73.3555(b)(2) of the Commission’s rules permits the common ownership of two television stations in the same DMA

in those markets where there will be at least eight independently-owned stations, and the proposed merger would not include two of the top-four rated stations.<sup>1</sup>

Under the current local television ownership rules, the common ownership of Station KPWB and the Permit would not be permitted without waiver, since there are, and there would remain, only seven independently owned and operating television stations in the Des Moines DMA if the Des Moines Digital CP Facility were assigned to the proposed assignee.<sup>2</sup> However, the Commission's rules do provide for the submission of waiver requests for consideration on a case-by-case basis. As established below, the grant of waiver in the instant case would serve the public interest for the following reasons.

Under the Commission's ownership rules, analog television licensees who had either an existing construction permit or licensed facilities as of April 3, 1997, were automatically entitled to a digital paired channel for their facility, which would be held by such licensees under a single, paired license. As stated above, the initial KPWB(TV) construction permit was not issued until after the April 3, 1997 cut-off date and thus KPWB(TV) was not issued a paired DTV channel in the DTV Table of Allotments. Effectively, a grant of the instant application would result in Pappas holding authorizations for an analog and a digital facility in the Des Moines DMA. In other words, a grant would place Pappas on equal footing with those licensees who were automatically entitled to a digital paired channel for their analog facility. Although

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<sup>1</sup> Revisions to this rule were adopted in June 2003 would permit the common ownership of two television stations in a market with between 5 and 17 independently owned stations. *2002 Biennial Regulatory Review -- Review Of The Commission's Broadcast Ownership Rules And Other Rules Adopted Pursuant To Section 202 Of The Telecommunications Act 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003) ("2003 Order"). However, the implementation of these new rules was stayed by the Court of Appeals for the Third Circuit. *Prometheus Radio Project v. FCC*, No. 03-3388 (3rd Cir. Sept. 3, 2003). As such, until such time that the stay is lifted, and/or the June 2003 rules are affirmed, the Commission's former local television ownership rule is still in effect.

<sup>2</sup> In addition to Pappas, there are six other licensees of seven operating television stations in the Des Moines DMA: Hearst-Argyle Television, Inc. (Station KCCI), Sinclair Broadcasting Group, Inc. (Station KDSM-TV), Paxson Communications Corp. (Station KFPX), The New York Times Co. (Station WHO-TV), Capital Communications Co., Inc. (Station WOI-TV), and Iowa Public Broadcasting Board (Stations KDIN-TV and KTIN).

technically a second station, the Des Moines Digital CP Facility will be simulcasting KPWB's programming during the transition, and should therefore not be regarded as an entirely separate station.

Moreover, while there are currently only seven licensees operating eight television stations in the Des Moines, DMA, the FCC recently granted a construction permit for a new television station to operate on Channel 34 at Ames, Iowa, to an eighth independent licensee, Family Educational Broadcasting, Inc. (File No. BPET-19960712KL, granted 9/02/2003). This new Ch. 34 facility must be constructed by September 2, 2006, while the Des Moines Digital CP Permit for DTV Channel 56 has an expiration date of August 28, 2006.

Section 73.3555(b) of the Commission's rules looks at the number of independently owned and operating stations that would exist *after* a proposed transaction. There are currently eight operating television stations in the Des Moines DMA, licensed to seven independent licensees. Since the authorization sought to be assigned hereunder is an unbuilt construction permit, there would be no immediate impact on the Des Moines DMA from the grant of the instant application since neither the DTV Channel 56 Permit, nor the new Ch 34 permit, have been constructed or are operating. After a grant of the proposed assignment, there will still be eight operating television stations in the Des Moines DMA, licensed to seven independent licensees. Effectively, however, with two new television stations to be added to the Des Moines DMA by no later than September 2006, upon activation of the Ch. 34 facility, there will be an eighth independent voice in the DMA. In light of this influx of two new television stations, including a new independent voice, in a market with eight existing stations, the overall impact of the common ownership of KPWB and the Permit will be insubstantial. However, even if the Permit's authorized facilities were constructed prior to those for Channel 34, the overall impact on the Des Moines DMA would not substantially harm the public interest as the number of independent voices remains static.

In adopting the June 2003 Ownership rules, the Commission abandoned the eight-independent-voice test currently in place in light of the *Sinclair* decision which remanded to the Commission consideration of the local TV ownership rule.<sup>3</sup> The *Sinclair* court determined that the Commission had not properly explained its decision to exclude non-television voices in determining the relevant local market.<sup>4</sup>

In response to this decision, the Commission expanded its understanding of the local television market, and determined that the ownership of two television stations in a market with 5 to 17 television stations would not adversely affect the Commission's goals of promoting diversity, competition, and localism.<sup>5</sup>

The grant of the instant waiver would not undermine these conclusions. Including KPWB, there are already eight operating stations in the market. Although two of those stations are commonly owned by the Iowa Public Broadcasting Board, the Commission concluded in the *2003 Order* that it would permit the inclusion of commonly-owned noncommercial television stations as separate television stations in the determination of the number of stations in the local television market.<sup>6</sup> Thus, there are more than enough stations currently operating, even without the activation of the new Ch. 34 facility, for the grant of this application to acceptable be under the stayed "new" rules.

The common ownership of KPWB and the Permit will not undermine the Commission's goals of promoting diversity, competition, and localism in the Des Moines DMA. Pappas is a seasoned owner of 20 television stations across the United States, and will be in a unique position to deliver a new digital service to the Des Moines DMA. In addition, Pappas intends to simulcast the WB Network programming of KPWB during the transition in Enhanced Definition

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<sup>3</sup> *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (2002) ("*Sinclair*").

<sup>4</sup> *Id.* at 162.

<sup>5</sup> *2003 Order*, ¶ 186.

<sup>6</sup> *Id.*, nt. 398.

or High Definition. Eventually, Pappas may introduce Hispanic programming<sup>7</sup> and, possibly, UPN Network programming. In light of the fact that the Hispanic population is the largest growing minority in the United States, this is yet another public interest benefit that will result from the grant of the requested waiver and assignment.

Moreover, the proposed transaction likely will lead to the more-rapid introduction of a new DTV television service to the market, which will further the Commission's strong interest in moving the television industry into a digital world. Since Station KPWB is an analog-only facility, the acquisition of the DTV Channel 56 Permit would also permit the seamless transition of television service from analog to digital operations in the Des Moines DMA.

Finally, it is interesting to note that, while the Commission requires the instant showing for the acquisition of a non-operating construction permit, it does not include such non-operating construction permits in the calculation of the number of independently owned stations. As a result, even though the Commission does not recognize the independent permittee of an authorized but as yet unbuilt facility as a "voice" in the market for purposes of the local television ownership rule, the acquisition of such permit is governed by the very same rule. This unequal treatment of television voices is analogous to the conditions that resulted in the issuance of the *Sinclair* decision.

### **III. CONCLUSION**

In light of the foregoing, Pappas Digital Television of Des Moines-Ames, LLC, respectfully requests the Commission to find that a waiver of the current local television ownership rule to permit the common ownership of Analog Station KPWB-TV, Ames, Iowa, and Digital Channel 56 at Des Moines, Iowa is in the public interest.

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<sup>7</sup> There currently are not television stations in the Des Moines DMA providing Spanish language programming.