WCWN(TV), Schenectady, New York
FCC Form 314
November 2011

REQUEST FOR WAIVER UNDER SECTION 73.3555(b)

I. INTRODUCTION AND SUMMARY

This application is one of a series of applications pursuant to which consent is sought to the assignment of the licenses of television stations licensed to various entities controlled by the Freedom Communications Broadcast Trust (the "Trust") to entities affiliated with Sinclair Broadcast Group, Inc. ("SBGI"). The instant application seeks consent to the assignment of license of commercial broadcast television station WCWN(TV), Facility ID 73264 ("WCWN"), Schenectady, New York, from Freedom Broadcasting of New York Licensee, L.L.C. ("Freedom NY"), to WCWN Licensee, LLC. A contemporaneously filed application seeks consent to the assignment of WRGB(TV), Facility ID 73942 ("WRGB"), Schenectady, New York, from Freedom NY to WRGB Licensee, LLC.

Both WCWN and WRGB are located in the Albany-Schenectady-Troy, New York Nielsen Designated Market Area (the "DMA"), and their predicted Grade B contours overlap with one another. Freedom NY, and related predecessor entities, have been the licensees of WRGB since 1986.[1] Freedom NY sought consent to acquire WCWN in 2006. *See* FCC File No. BALCT - 20060725ADJ. Because that assignment resulted in there being only seven independently owned and operated full power television stations in the DMA, a waiver of the Commission's multiple ownership limitations was required. A copy of the letter order granting a "failing station" waiver

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[1] *See* FCC File No. BALCT -19851114KH (consummated March 4, 1986).

and approving the combination of WCWN with WRGB (the "*WCWN Waiver*") is attached hereto as Schedule A.

There are presently nine full power television stations in the DMA, of which seven are independently owned and operated. While the proposed assignment would not change the number of independently owned and operated television stations in the market and will maintain the status quo regarding the number of owners in the market, there will remain less than eight independently owned and operated television stations in the DMA following the assignment of the WCWN authorization to SBGI's subsidiary WCWN Licensee, LLC.[2] Therefore, even though WCWN and WRGB are already commonly owned, a re-evaluated waiver of the TV duopoly rule is required in order to effectuate the proposed assignment.[3] For the reasons set forth herein, the Trust and SBGI respectfully request that the Commission grant a "failing station waiver" of its television duopoly rule to permit the assignment of the Commission authorization for WCWN to WCWN Licensee, LLC, as the FCC granted a "failing station waiver" under similar circumstances to the Trust's predecessor when it acquired WCWN initially.

The Commission has established four criteria that must be satisfied for a failing station waiver, as follows:

(1) One of the merging stations has had low all-day audience share (*i.e.*, 4% or lower).

(2) The financial condition of one of the merging stations is poor.

(3) The merger will produce public interest benefits. A waiver will be granted

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2 Although WRGB is one of the top four rated stations in the DMA, WCWN is not. Thus, the "top-4" limitation is not implicated by this application.

3 47 C.F.R. § 73.3555(b). As discussed herein, WCWN is currently operating in combination with WRGB pursuant to a "failing station" waiver. *See WCWN, LLC,* 21 FCC Rcd 13522 (2006). Like all ownership waivers, that waiver must be re-evaluated in the context of a long-form transfer of control application. *See K. Rupert Murdoch*, 21 FCC Rcd 11499, 11500 (2006); *Shareholders of Tribune Co. and Sam Zell*, 22 FCC Rcd 21266 (2007), at fn. 76.

where the applicant demonstrates that the tangible and verifiable public interest benefits of the merger outweigh any harm to competition and diversity.

(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.[4]

The Commission found in the *WCWN Waiver* that each of these four criteria had been met and that combined ownership of WCWN and WRGB would serve the public interest. That conclusion remains appropriate for the instant case.

As more fully explained below, each of the criteria specified in the *TV Local Ownership Order* and cited in the *WCWN Waiver* as justifying waiver of the multiple ownership rules to permit WCWN and WRGB to be commonly owned is just as applicable today as it was when the previous waiver was granted. WCWN continues to have a very low audience share and has not in the last three years had an all-day audience share equal to or greater than 4%. The station would be unable to sustain itself without the benefits of combining operations with another station in the market. As demonstrated below, on a pro forma basis, WCWN has endured consistent negative cash flow for the last three years. There is no realistic likelihood of selling WCWN independently to an out-of-market licensee and SBGI is the only reasonably available purchaser willing and able to operate the station. Finally, WCWN does not have the resources to provide consistent local public service programming if it is operated on a "stand-alone" basis, and the station requires continued association with another in-market station in order to provide the public service benefits of local news, weather and public affairs

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4 *See Review of Commission 's Regulations Governing Television Broadcasting; Television Broadcasting Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903, 12938-39 (1999) ("*TV Local Ownership Order*") at ¶ 81. *See also, Review of the Commission's Regulations Governing Television Broadcasting*; *Television Satellite Stations Review of Policy and Rules*, *Memorandum Opinion and Second Order on Reconsideration*, 16 FCC Rcd 1067, at ¶¶ 25-33 (rel. Jan. 19, 2001) ("We reaffirm the elements of our presumptive waiver standards.").

programming. Indeed, WCWN has been precisely the type of station that the Commission contemplated when it adopted the failing station waiver standard.[5] There is no doubt that it would continue to serve the public interest to waive the provisions of Section 73.3555(b) so as to permit the continued common ownership of WCWN and WRGB.

II. THE PROPOSED CONTINUED COMMON OWNERSHIP OF WCWN AND WRGB MEETS EACH OF THE COMMISSION'S CRITERIA FOR GRANT OF A FAILING STATION WAIVER

As noted, the Commission has established a test consisting of four criteria to determine whether the grant of a failing station waiver of the television duopoly rule would be in the public interest.[6] The proposed assignment of WCWN to WCWN Licensee, LLC falls squarely within each of those four criteria.

A. Failing Station Must Have All Day Audience Share of No More Than 4%

The first criterion for the failing station waiver is that the failing station have all-day audience share of no more than 4%.[7] While the Commission did not establish a specific calendar period over which the failing station's audience share would be reviewed when it adopted the failing station waiver standard, the Commission has in the

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5 *See TV Local Ownership Order* at ¶ 79. In adopting the "failing station" waiver standard, the Commission had explained its reasoning as follows:

> Permitting such [failing] stations to merge should 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. These stations rarely have the resources to provide local news programming, and often struggle to provide local programming at all. Allowing 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. This waiver standard may be of particular assistance to struggling stations in smaller markets that are not covered by the eight voice/top four ranked station test.

6 *Id.* at ¶ 81. *See also*, 47 C.F.R. § 73.3555, note 7.

7 *Id.*

past reviewed audience share data for the three years prior to filing of the application.[8] WCWN has clearly satisfied this first criterion of the failing station waiver test.

WCWN has had far less than a 4% share for the three most recent years. As is demonstrated by the audience share information set forth in Schedule B hereto, for the most recent ratings period available, July, 2011, WCWN had a 1.3% all-day share.[9] Since the February 2008 ratings period, WCWN has never had more than a 2.0% share (February 2008), and has managed to reach that number only once. It has had as low as a 1.1% share in July of 2010. As these figures show, WCWN's all-day audience share has remained below 4% for at least three years and has actually declined at times over that period.

In an advertiser-supported industry such as broadcasting, a station which cannot achieve meaningful audience share will not be able to generate sufficient revenues to cover its expenses. The Commission recognized that fact when it set the 4% share standard as indicative of a struggling station.[10] WCWN therefore meets the first prong of the failing station test.

B. Failing Station Must Have Had Negative Cash Flow for the Three Consecutive Years Immediately Prior to Filing of the Application

The second criterion is that the failing station must have had negative cash flow from its operations for the three consecutive years immediately prior to filing of the application requesting consent to the proposed assignment.[11] As is demonstrated by the financial information attached as Schedule C hereto, on a pro forma basis, the station has

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8 *See, e.g., KSMO Licensee, Inc.*, 20 FCC Rcd 15254, 15258 (MB 2005).

9 The data on Exhibit A to Schedule B consist of all day (Monday-Sunday 9:00a.m.-12 a.m.) audience share numbers for WCWN

10 *See TV Local Ownership Order* at ¶ 84.

11 *Id.*

had a negative cash flow for calendar year 2008 through the present.[12]

The financial data provided with this waiver request show that WCWN has struggled financially and has sustained cumulative operating losses during at least the last three years. It is clear that the station has been unable to operate profitably for the last three full years, and has continued to be unprofitable in the first seven months of 2011, the most recent figures available. The Commission has consistently recognized that such an inability to generate positive cash flow and operating income is determinative of a poor financial condition for purposes of granting a failing station waiver.[13]

The Commission should also recognize that if the ownership of WCWN were to be separated from that of WRGB, the new owner of WCWN would have to make substantial capital expenditures as a result of separating the stations' facilities. Capital expenditures would be required to establish new studios and for equipment which is currently shared by WCWN and WRGB. The considerable expenditures that would need to be incurred by a buyer of WCWN who could not use the WRGB studio, news gathering, production and other equipment would obviously not be discretionary, and would in fact be essential to the operations of the station. Without a doubt, the FCC should allow such capital expenditures to be included in computing WCWN's projected financial performance consistent with the FCC's prevailing caselaw.[14]

In summary, WCWN indeed has been "struggling for an extended period of time

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12 Since the acquisition of WCWN by Freedom NY in 2006, WRGB and WCWN, have been operated as a combined entity with shared studios, staff, promotional expenditures and the like. For this reason, Freedom NY has prepared pro forma financial analyses which assume operation of WCWN as a stand-alone entity for the purposes of this analysis. *See* Schedule C.

13 *See, e.g., Hispanic Keys Broadcasting Inc.*, 19 FCC Rcd 4603, 4605 (MB 2004).

14 *See Banks-Boise, Inc.,* 23 FCC Rcd 16508 (MB 2008). The parties estimate that up-front capital expenditures of several million dollars would be needed to permit WCWN to replicate its current capabilities if operated as a stand-alone station.

in terms of its . . . financial performance," and its financial situation has continually more than "hamper[ed]" its "ability to be a viable 'voice' in the market."[15]

C. Proposed Buyer Must be the Only Entity Ready, Willing and Able to Operate the Station, and Sale to an Out-of-Market Buyer Would Result in an Artificially Depressed Price

The third requirement is that the proposed assignee of the license for the failing station be the only entity ready, willing and able to operate the failing station, other than an out-of-market buyer, a sale to whom would result in an artificially depressed purchase price.[16] Attached as Schedule D hereto is the Declaration of Moelis & Company, which has represented Freedom NY in attempts to sell the Freedom stations, including WCWN. The Declaration makes clear that, despite a broad and aggressive marketing of the Freedom stations, no buyer for WCWN as a stand alone station was available, and that, given the current market for the sale of television stations, and the financial situation of WCWN, there is no realistic possibility that an out-of-market buyer would be willing to acquire WCWN for anything other than an artificially depressed price.

The Commission has stated that "an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received" will satisfy this prong of the failing station waiver test.[17] The attached Declaration clearly satisfies that requirement. It is submitted that this showing, which demonstrates that Freedom NY attempted to sell WCWN for over a year, more than satisfies the requirement under the

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15 *TV Local Ownership Order* at ¶ 79.

16 *Id.* at ¶ 81.

17 *See TV Local Ownership Order* at ¶ 86.

failing station test that "active and serious efforts" be made to sell a station and that "no reasonable offer from an entity outside the market has been received."[18]

Moreover, the Commission should also take note of the fact that the prior owner of the station, WCWN, LLC, undertook extensive efforts to sell WCWN as a stand-alone station to an out-of-market owner before it was sold to Freedom NY.[19] The Commission previously relied on these efforts in the *WCWN Waiver.* Those efforts were headed by Mr. Brian Byrnes of Paramount Media Advisor. Mr. Byrnes current Declaration, attached hereto as Schedule E, underscores the fact that WCWN remains an non-viable candidate for sale to a broadcaster which does not have a companion station in the DMA.

D. Consolidation of the Stations Would Result in Tangible and Verifiable Public Interest Benefits that Outweigh any Harm to Competition and Diversity

The final criterion is that the proposed assignment would produce "tangible and verifiable public interest benefits" that would outweigh any harm to competition and diversity.[20] 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 benefitting the public interest."[21] 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."[22]

Allowing the continued combination of WCWN with WRGB will result in precisely the type of benefits to the public interest that the Commission contemplated.

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18 *Id.*

19 *See generally, WCWN Waiver.*

20 *See TV Local Ownership Order* at ¶ 76.

21 *Id.* at ¶ 79.

22 *Id.*

The consolidated operations of the two stations has and will continue to result in tangible and verifiable public interest benefits that far outweigh any conceivable harm to competition and diversity. Due to its current financial situation, WCWN, a CW affiliate, would not be able to operate as a stand-alone station were it not co-run with CBS affiliate WRGB. As a direct result of the joint combination, the stations have and will continue to be able to maintain separate network affiliations for the two stations.

As the new owner, SBGI would continue to maintain separate network affiliations for WCWN and WRGB and SBGI is committed to continue to provide separate non-network programming on WCWN. Consequently, SBGI would continue to preserve WCWN's unique identity, catering to local interests and needs. SBGI would also strive for economic efficiencies to the greatest extent possible. Any additional cost savings inherent in joint ownership could enhance SBGI's ability to improve programming geared towards local needs and interests, particularly those of the DMA's residents.

In addition, Sinclair intends to continue to broadcast daily news and weather programming on WCWN. The station currently covers issues and activities of importance to the local community, and alerts viewers in the DMA to weather alerts and breaking news events. Prior to the Commission's grant of the *WCWN Waiver*, WCWN provided no local news or weather at all. The Commission should thus allow for the continued combined operation of WRCB and WCWN as requested in order to ensure that viewers in the DMA continue to receive the high quality news coverage they otherwise would not receive if WCWN were required to operate as a stand-alone station.

Through more cost-efficient operations going forward, SBGI plans to transform WCWN from a station that is operating at the financial margins into an economically viable competitor offering programming targeted toward a distinct segment of the DMA's population. The cost savings are directly linked to the economies of scale that can only arise from duopolies or in-market service arrangements. In addition to shared maintenance staff, the two stations would continue to share other personnel which will yield significant cost savings in terms of salaries, benefits, and related personnel expenses. SBGI intends to further merge the programming, production, promotion, traffic, sales and sales support, accounting, and technical operations of WCWN and WRGB, so as to increase efficiency and upgrade staff capabilities. Ultimately, SBGI's long-term experience operating television stations will enhance its ability to achieve in-market economic efficiencies that will serve to *increase* programming competition and diversity in the DMA.

As described above, substantial public interest benefits will flow from the continued same-market operations when an otherwise failing station is joined in operations with those of an in-market broadcaster committed to excellent local programming and first-rate public service. SBGI submits that, in these circumstances, it would be unreasonable for the Commission to deny the failing station waiver and thus deny to the viewing public in the DMA with SBGI's commitments to improve the service of WCWN. The proposed combination of WCWN and WRGB fully satisfies the failing station waiver criterion requiring a showing of "tangible and verifiable public interest benefits [that] outweigh any harm to competition and diversity."[23]

III. THE EVIDENCE ALSO SUPPORTS A GENERAL WAIVER TO PERMIT COMMON OWNERSHIP OF WCWN AND WRGB

If, notwithstanding the overwhelming evidence presented in the foregoing

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23 *Id.*

sections, the Commission is not inclined to grant the requested failing station waiver, then it should nevertheless grant a general waiver of the "8 TV voices" test of the duopoly rule and permit the proposed WCWN/WRGB ownership combination. In adopting the "failing station" waiver standard, the Commission has concluded that there are circumstances where the public interest benefits are greater than those flowing from strict application of the "8 TV voices" standard.

The Commission has "acknowledged the need for 'flexibility' in [the duopoly rule's] application," and has "note[d] that waivers should be granted where rigid conformance to the rule would be 'inappropriate.'"[24] The D.C. Circuit has upheld this approach, concluding that waivers of "general rule[s] should be granted where an applicant makes a proposal "that will not undermine the policy served by the [general] rule" and that is otherwise in the public interest.[25] The court also noted that the existence of a general rule does not relieve the Commission of "an obligation to seek out the 'public interest' in individualized cases."[26]

To evaluate a proposed waiver, the Commission considers whether "the [public interest] benefits outweigh any detriment which may occur from grant of the waiver."[27] Rigid application of the "8 TV voices" test in the case of WCWN would be inappropriate

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24 *See, e.g., Betti D. Lidsky,* 13 FCC Rcd 10343, 10345 (1998) (quoting *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 FCC 2d 1476 n.12, *recon. granted in part*, 3 RR 2d 1554 ("*Multiple Ownership Order*") (1964)); *Sainte Limited,* 13 FCC Rcd 9216 (1997) (also noting the different television service needs of the two stations' respective audiences and the fact that the two stations are not direct competitors with respect to advertising sales); *Weigel Broadcasting Company*, 11 FCC Rcd 17202, 17204 (1996) (also quoting the *Multiple Ownership Order*, fn.12).

25 *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied,* 409 U.S. 1027 (1972).

26 *Id.*

27 *See NWCG Holdings Corp.,* 11 FCC Rcd 16318, 16322 (1966) ("the Commission considers whether the public interest benefits to be gained from waiving the duopoly rule would be greater than any detrimental effects . . . "); *Office of Communication of United Church of Christ v. FCC*, 911 F.2d 803, 812 (D.C. Cir. 1990).

because the requested waiver to permit a duopoly of WCWN and WRGB would greatly serve – not undermine – the Commission's policy goals of competition and diversity. In short, the public will benefit if the FCC allows the WCWN and WRGB duopoly to remain in place.

Even with a WCWN/WRGB combination, the data regarding the DMA demonstrate robust media competition with which SBGI must contend. As noted above, SBGI's acquisition of WCWN would leave seven independently owned and operated full power television voices in the DMA, and thus would fall only one station short of being permissible without a waiver. In addition to those seven full power television voices, numerous other media voices exist in the market. The market has at least 25 full power AM and FM radio stations in the market, with six additional multicast radio station channels, owned by at least 10 different entities.[28] There are also eleven television multicast channels in addition to the nine full power stations in the DMA (that will remain after the proposed transaction), and four Class A and low power television stations owned by different entities airing different programming who do not own full power television stations in the market.[29] Additionally, nearly all households in the market are passed by at least one cable television system, and the Time-Warner cable system, by far the largest in the DMA, provides a 24-hour local news channel, thus supplying yet another source of local news programming on a 24-hour basis. DirecTV and DISH Network both provide television and audio programming to subscribers through satellite service in the market, and Sirius Radio provides satellite audio radio service to the DMA. Importantly, the DMA is also served by no fewer than four daily

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28 *See* BIA/Kelsey Investing in Radio Market Report 2011.

29 *See* BIA/Kelsey Investing in Television Market Report 2011.

newspapers: the Albany Times Union (owned by the Hearst Corporation, one of the nation's largest diversified media companies), the Daily Gazette (formerly the Schenectady Daily Gazette), the Glen Falls Post Star (serving the counties of Warren, Washington, and Saratoga, New York), and the Troy Record (which has been published regularly since 1896 and covers all of the State of New York's Capitol Region, including the DMA).[30] All of these media "voices" should be taken into account in evaluating the instant request for a general waiver of the duopoly rule because they demonstrate the significant amount of market diversity which will not be reduced as a result of continued common ownership of WCWN and WRGB.

If the voice test of the duopoly rule is not waived, thereby depriving SBGI of its opportunity to acquire WCWN, the public will lose the benefits that would result from the "efficiencies inherent in joint ownership and operation of television stations in the same market,"[31] undermining important Commission goals. As this is surely not a desired outcome of the Commission's attempt to bring its multiple ownership rules in line with the current age of unprecedented diverse multi-media competition, a waiver of the rule in this case is warranted.

IV. CONCLUSION

As shown above, SBGI's acquisition of WCWN squarely meets the "failing station" waiver standard. Approval of SBGI's application to permit the proposed WCWN/WRGB duopoly thus presumptively serves the public interest. The facts demonstrate that only SBGI is available to invest the substantial capital necessary to WCWN's continued transformation, long-term survival and financial viability. SBGI's

30 *See* http://en.wikipedia.org/wiki/The_Record_(Troy) (visited Nov. 6, 2011).

31 *TV Local Ownership Order* at ¶ 34.

common ownership of the failing WCWN along with WRGB will not harm competition and diversity, but instead will greatly advance these goals. The Commission has provided for failing station waivers precisely so that it can implement its competition and diversity goals in a tailored fashion for television stations that cannot compete effectively and that, by being combined with a stronger station, can improve their facilities and provide local news, weather and other valuable program offerings to benefit the public interest.

Accordingly, SBGI urges the Commission to promptly grant this request for a failing station waiver of the duopoly rule. In the alternative, SBGI requests a general waiver of the duopoly rule with respect to WCWN and WRGB under the Commission's general waiver provisions. For the reasons set forth above, the public interest benefits of the enhanced competition and diversity stemming from the proposed continued common ownership of WCWN and WRGB far outweigh any perceived detriment in a effort to vastly improve the ability of WCWN to continue to originate and otherwise provide locally-oriented programming responsive to the needs and concerns of the residents of the DMA. Granting the proposed request will greatly enhance the ability of WCWN to provide much better service to the community in numerous ways, and will result in significant cost savings through efficiencies realized by the joint operation of the two stations.

SCHEDULE A

Federal Communications Commission
Washington, D.C. 20554

DA 06-2338
Released: November 22, 2006

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Re: Assignment of License for
WCWN(TV), Schenectady, NY
Facility ID No. 73264
File No. BALCT-20060725ADJ

Dear Counsel:

This is in reference to the application for consent to assign the license for WCWN(TV), Channel 45, Schenectady, New York (WB, to become CW), from WCWN LLC , a subsidiary of Tribune Broadcasting Company ("Tribune") to Freedom Broadcasting of New York Licensee, L.L.C. ("Freedom"). The application requests a waiver of Section 73.3555(b)(2) of the Commission's rules, the television duopoly rule, to permit Freedom, licensee of WRGB(TV), Channel 6, Schenectady, New York (CBS), to acquire WCWN. Both WCWN and WRGB are in the same Nielsen Designated Market Area ("DMA") and their Grade B contours overlap.

Under Section 73.3555(b)(2) of the Commission's rules in effect,[1] two television stations licensed in the same DMA that have Grade B overlap may be commonly owned if: (i) at least one of the stations is not ranked among the top four stations in the DMA; and (ii) at least eight independently owned and operating, full-power commercial and non-commercial educational television stations would remain in the DMA after the merger. The Albany-Schenectady-Troy, New York DMA would have fewer than eight independently owned and operated full-power television stations post-merger. Thus, the proposed common ownership of WCWN and WRGB would violate Section 73.3555(b)(2). However, the applicants requested a waiver on the basis that WCWN is a "failing station."[2]

Comments. On August 30, 2006, Hubbard Broadcasting, Inc. ("Hubbard"), licensee of WNYT-TV, Albany, New York, filed comments regarding the above-captioned application.[3] Hubbard states that it does not seek denial of the application. Rather, Hubbard asks that the Commission carefully consider the legal arguments and factual information submitted by the parties in support of the waiver request, including information sought to be withheld from public inspection. Furthermore, Hubbard urges the Commission to base its decision solely on standards currently in effect, "without prejudgment of standards" which may be adopted in future rulemaking proceedings.

Duopoly Waiver Request. The Commission's *Local Ownership Order* established the criteria for a waiver of the television duopoly rule for a "failing station" – one which has been struggling for "an extended period of time both in terms of its audience share and financial performance." These criteria are:

(a) One of the merging stations has had a low all-day audience share (*i.e.,* 4 percent or lower);

(b) The financial condition of one of the merging stations is poor. "A waiver is more likely to be granted where one ...of the stations has had a negative cash flow for the previous three years;"

(c) The merger will produce public interest benefits. "A waiver will be granted where the applicant demonstrates that the tangible and verifiable public interest benefits of the merger outweigh any harm to competition and diversity;" and

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[1] 47 C.F.R. § 73.3555(b)(2). On June 2, 2003, the Commission adopted revised media ownership rules. *In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13691-92 (2003) (*"2002 Biennial Regulatory Review"*). The effective date of those rule changes, however, was subsequently stayed by order of the 3rd Circuit Court of Appeals on September 3, 2003. *Prometheus Radio Project v. FCC,* No. 03-3388 (3rd Cir. Sept. 3, 2003) (per curiam) (*"Prometheus"*). With respect to Section 73.3555(b)(2), the court continued the stay in *Prometheus Radio Project v. FCC,* 373 F.3d 372 (3rd Cir. 2004) (*"Prometheus Stay Order"*). On June 13, 2005, the Supreme Court of the United States denied a petition for writ of certiorari. 125 S.Ct. 2904.

[2] *See* 47 C.F.R. § 73.3555, Note 7. *See also Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12935-40 (1999) (*"Local Ownership Order"*), *recon. granted in part,* 16 FCC Rcd 1067 (2001).

[3] The applicants responded by letter filed September 14, 2006.

(d) The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; selling the station to an out-of-market buyer would result in an artificially depressed price. [4]

If the applicant satisfies each criterion, a waiver of the rule will be presumed to be in the public interest.

As part of its waiver request, the applicants state that WCWN's all-day audience share for May 2006, as reported by Nielsen, was 1.9 percent, well below the 4 percent the Commission considers a low audience share. Freedom and WCWN further state that, since the February 2003 ratings period, WCWN has never managed to garner more than a 2.8 percent share, and has reached that number only once.

With respect to WCWN's financial condition, the applicants submitted WCWN income statements and balance sheets for fiscal years 2003, 2004, and 2005, and for the first half of 2006, with a request for confidential treatment.[5] Tribune and Freedom maintain that these financial data demonstrate that the station has not achieved positive cash flow for the three full years preceding the filing of the application. They indicate that, over that three-year period, operating losses have worsened more than 13-fold, from a negative $60,000 to a negative $821,000, and that the station's net cash flow has also been negative for each of those three years. Moreover, they state that, for the first half of 2006, WCWN continued to have operating losses (of $264,000) and negative cash flow (of $64,000).

The applicants state that consolidated operations of the two stations will result in tangible and verifiable public interest benefits that would outweigh any harm to competition and diversity. Specifically, Freedom pledges that it will maintain WCWN as a separate network affiliate with locally employed station staff. Moreover, within the first six months after acquiring the station Freedom intends to start broadcasting at least thirty minutes per day of local news and weather programming. Aside from a weekly thirty-minute public affairs program, WCWN currently provides no locally originated programming. In addition, upon acquiring WCWN Freedom will provide the station with access to WRGB's extensive and high quality news and weather facilities. Furthermore, WCWN will benefit from Freedom's history of community broadcast service and WRGB's community affairs programming resources. Freedom intends to simulcast or re-broadcast community affairs programs aired on WRGB.

In addressing the fourth criterion, the applicants indicate that no buyer outside the market is willing and able to operate the station. They attach the declaration of Brian Byrnes, President of Paramount Media Advisors, Inc. ("Paramount"), a firm which was retained by Tribune to identify potential bidders for WCWN. Paramount identified and contacted 18 prospective buyers, but no potential buyer from outside the market expressed any real interest.

Discussion. We will grant the request for a waiver of the television duopoly rule and we will grant the above-captioned application. Based upon the showings submitted under the waiver criteria established by the Commission in the *Local Ownership Order*, we are persuaded that grant of a waiver is warranted on

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[4] 14 FCC Rcd at 12939.

[5] In response to a staff inquiry letter, the parties provided additional financial data on October 4, 2006, also with a request for confidential treatment.

grounds that WCWN is a failing station. *See, e.g., Counterpoint Communications, Inc.*, 16 FCC Rcd 15044 (2001).

First, the applicants have demonstrated that WCWN has a low audience share -- i.e., below 4 percent for the last three years. Second, the financial documentation submitted shows that WCWN's financial condition is poor, including at least three years of negative cash flow.

Third, numerous public interest benefits will accrue from the combined operation of WCWN and WRGB. Among these is Freedom's pledge to begin broadcasting at least thirty minutes of daily local news and weather on WCWN. Currently, aside from a weekly one-half hour public affairs program, WCWN provides no locally-originated programming and provides no local news at all. Finally, the applicants have made an active and serious effort to sell the station, and no reasonable offer from an entity outside the market has been received.

Consistent with the *Local Ownership Order*, we find that the combined operation of WCWN and WRGB will pose minimal harm to our diversity and competition goals because WCWN's financial situation hampers its ability to be a viable voice in its market. Under these circumstances, allowing WCWN to be operated by a stronger station in the market will result in a clear improvement in facilities and programming, an outcome which clearly benefits the public interest.[6]

As urged by Hubbard in its comments, and as required under Commission policy and rules, we have carefully considered the legal arguments and factual information submitted by the applicants and we conclude that grant of the above-captioned application is in the public interest.

Accordingly, IT IS ORDERED, That the request for a "failing station" waiver of the television duopoly rule, Section 73.3555(b)(2), to permit Freedom to own and operate both WCWN(TV) and WRGB(TV), IS GRANTED. IT IS FURTHER ORDERED, That the application (File No. BALCT-20060725ADJ) for consent to the assignment of the license for WCWN(TV), Schenectady, New York, from WCWN LLC to Freedom Broadcasting of New York Licensee, L.L.C., IS GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc: David A. Jones, Esq., counsel for Hubbard Broadcasting, Inc.

[6] 14 FCC Rcd at 12939.

SCHEDULE B

WCWN - CW

Albany - Schenectady - Troy DMA

Household Shares [1]

	2008	2009	2010	2011
Calendar Year 2008:				
Feb/2008LP	2.0			
May/2008LP	1.7			
Jul/2008LP	1.6			
Nov/2008LP	1.5			
2008 Avg	**1.7**			
Mar/2009LP [2]		1.4		
May/2009LP		1.6		
Jul/2009LP		1.2		
Nov/2009LP		1.6		
2009 Avg		**1.5**		
Feb/2010LP			1.4	
May/2010LP			1.6	
Jul/2010LP			1.1	
Nov/2010LP			1.7	
2010 Avg			**1.5**	
Feb/2011LP				1.9
May/2011LP				1.3
Jul/2011LP				1.3
2011 Avg to date				**1.5**

Notes:

(1) Data source is Nielsen Media local audience surveys, total household shares, 5am to 5am, Mon - Sun.accessed via One Domain "Trender" report.

(2) In 2009 Nielsen moved its February survey period to March, in anticipation of possible audience disruption related to the digital transition underway at that time.

SCHEDULE C

(Financial Information)

Filed separately with the Commission under Request for Confidential Treatment.

SCHEDULE D

1999 AVENUE OF THE STARS
SUITE 1900
LOS ANGELES, CALIFORNIA 90067

MOELIS & COMPANY

T 310.443.2300
F 310.443.8700

I, John Momtazee, do hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

1. I am a Managing Director of Moelis & Company, LLC ("Moelis"), a global investment bank that provides financial advisory, capital raising and asset management services to a broad client base including companies in the television and media industries. Prior to joining Moelis, I was the Head of Broadcasting Investment Banking at UBS AG and I have over 14 years of experience in the broadcasting sector. During this time, I have been involved in over $24.5 billion of broadcasting industry transactions.

2. In July 2010, Freedom Communications, Inc. ("Freedom" or the "Company") retained Moelis to advise them on strategic alternatives for their television broadcasting, newspaper and digital media businesses and to conduct a broad sale process (the "Process"). Beginning in October 2010, Moelis approached 58 buyers regarding a purchase of the Freedom in whole or in part, including 25 buyers for Freedom's television broadcasting stations, 23 of which had no existing television stations in the Albany, NY market. Moelis received four initial indications of interest for the entire broadcasting division in December 2010.

3. The Process was broadly publicized and Moelis received over 38 unsolicited inquiries regarding the purchase of individual newspaper or television properties, including 11 inquiries about Freedom's television stations. No buyers expressed interest in Freedom's WCWN station specifically. In June 2011, the Wall Street Journal reported that Freedom was in discussions with MediaNews regarding a purchase of the entire Company, and that talks had since broken down. In August 2011, the Wall Street Journal reported that MediaNews was pursuing a separate transaction for the newspaper business only, which was later terminated due to upheaval in the financing markets. Despite this publicity surrounding the Process, during this time, no buyers approached Moelis regarding the purchase of WCWN.

4. Freedom management estimates that WCWN, operating on a standalone basis, would have generated negative EBITDA in the fiscal years ended December 31, 2008, 2009 and 2010 and for the fiscal year ending December 31, 2011. In addition, management estimates that an out-of-market buyer would require significant upfront capital expenditures in order to operate WCWN on a standalone basis.

5. Based on the foregoing history, WCWN's standalone financial performance, the significant capital expenditures required to operate WCWN on a standalone basis, my experience, and today's economic and competitive environment, it is my opinion that it is unlikely that WCWN on a standalone basis could be sold to an out-of-market buyer.

John Momtazee

Moelis & Company LLC

SCHEDULE E

DECLARATION OF BRIAN BYRNES

I, Brian Byrnes, do hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

1. I am President of Paramount Media Advisors, Inc., a media and brokerage consulting firm in Chicago, Illinois. I have been with Paramount Media Advisors, Inc. and its predecessor affiliate company for twenty-four years and have ten years of experience in media brokerage.

2. As the principal of Paramount Media Advisors, I have extensive knowledge of the television industry in general, having owned and operated television properties over a period of thirty years. I have owned and operated television and radio broadcast properties for both my own benefit and for the benefit of public shareholders, such as the Merrill-Lynch Media Partners partnership. I have both consulted for and appraised television stations for a variety of purposes, including acquisitions, divestitures, mergers, financing, and restructuring of debt. In some instances the valuations have formed the basis for testimony in court cases involving bankruptcy, for both petitioners and estates. I have has been personally involved in the acquisition or sale of more than 75 television broadcast properties, including many stations in the top 50 television markets.

3. I am providing this Statement in support of the efforts of Freedom Broadcasting, Inc. ("Freedom") to sell its television station, WCWN-TV ("WCWN"), which serves the Albany-Schenectady-Troy, NY television market. The station currently

is an affiliate of The CW Television Network ("CW") for the Albany-Schenectady-Troy, NY market.

4. In 2006, Paramount Media Advisors was retained by Tribune Broadcasting Company, at that time the owner of WCWN, to market WCWN to the broadest possible number of prospective buyers. As is detailed in my declaration dated July 17, 2006 and filed with the FCC with the application for assignment of the WCWN license to Freedom, no out-of-market buyer was available to acquire WCWN at that time.

5. Since 2006, in our opinion as discussed in greater detail below, the environment for the sale of televisions stations generally has deteriorated, and it is highly unlikely that a similar marketing process would result in the emergence of a buyer for WCWN, except as part of a duopoly.

6. As a firm, we have been active in marketing television stations over a period of the last several years and we are particularly aware of the current lack of acquisition activity in other than unique situations, such as those where a buyer has an established brand and following in a given marketplace and may expand on that brand and following by acquiring an additional outlet in the market.

7. Over the last several months we have been in contact with a significant number of group operators regarding their interest in a potential acquisition and have noted a complete lack of appetite for stations of any affiliation, unless there is a unique opportunity in connection with the acquisition, such as an in-market situation.

8. In July 2008, we were retained by Minden Television Company, LLC to sell its television station KPXJ-TV, a CW affiliated station serving the Shreveport, Louisiana television market. Paramount Media Advisors developed a list of 32 prospective buyers for KPXJ. Following the preparation of an Offering Memorandum and an extensive marketing campaign to the prospective buyers, it became apparent that KPXJ did not represent an attractive opportunity to almost all of the broadcast companies that were contacted. Specifically, only one prospect requested and received a non-disclosure agreement (NDA) and executed the NDA. This out-of-market prospect contacted by Paramount Media Advisors executed the NDA, and this potential buyer subsequently failed to express any further interest in KPXJ at any time during the marketing process. KPXJ was ultimately sold to the owner of KTBS-TV, the ABC affiliate in the Shreveport market, pursuant to a failing station waiver.

9. In recent weeks, we have been marketing a dominant CBS affiliate in a small market with excellent ratings, strong revenue growth, and significant cash flow, and have been unable to promote interest of any kind, from a significant number of current television station operators.

10. In light of these facts, it is the judgment of Paramount Media Advisors that, despite what might be an extensive marketing process, including significant outreach to national and regional broadcasters for a creditable buyer for WCWN, the only potential purchaser of the station is an in-market buyer.

Executed on this 7th day of November 2011 at Chicago Illinois

Brian Byrnes