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Re: WCWF(DT), Suring, WI, ID No. 73042,
File No. BALCDT-20100917AAF.

Dear Counsel:

This is in regard to the application to assign the license of digital television station WCWF(DT),¹ Suring, Wisconsin, from ACME Television, Inc. (“ACME”) to LIN Television of Wisconsin, LLC (“LIN”). WCWF(DT) is assigned to the Green Bay-Appleton, Wisconsin Designated Market Area (“DMA”) and LIN is the licensee of WLUK-TV, the FOX affiliate in Green Bay. The applicants have requested a waiver of Section 73.3555(b)(2)² of the Commission’s Rules, the local television multiple ownership rule or duopoly rule under the “failing station” waiver standard. A petition to deny the assignment was filed by Time Warner Cable Inc. (“TWC”) and oppositions were filed by LIN and ACME, with a reply filed by TWC.³ For the reasons stated below, we deny the petition, grant the waiver, and grant the application.

Background. TWC has raised two issues in its petition to deny. First, it contends that grant of the assignment application and the requested waiver would permit a single entity, LIN, to negotiate retransmission consent for two stations in the same market. TWC argues that this would be improper and

¹ At the time the application was filed the station’s call letters were WIWB(TV).

² 47 C.F.R. § 73.3555(b)(2).

³ A response to the reply was filed by ACME outside of the pleading cycle. Because it addresses arguments raised for the first time in the reply, we will consider it here.

not in the public interest. Second, TWC argues that LIN has failed to meet the standard for a failing station waiver.

With respect to the first argument, TWC states that WLUK-TV obtains carriage through the retransmission consent process and that WCWF(DT) has previously relied on its must-carry rights for carriage. In its petition, TWC states that LIN, acting as the agent for ACME, has informed TWC that both WLUK-TV and WCWF(DT) are now seeking compensation as part of a master retransmission consent agreement. TWC argues that this is evidence of a broken and increasingly unworkable retransmission consent process that permits broadcasters to raise the prices for carriage of their signals and/or cause service interruptions, which can ultimately harm consumers. TWC contends that broadcasters are able to engage in brinkmanship tactics vis-à-vis MVPDs⁴ because of their bargaining leverage and that this leverage is facilitated by the Commission's various rules, including the network non-duplication rule⁵ and the syndicated exclusivity rule.⁶ According to TWC, when more than one station is allowed to negotiate together, it permits a "weaker" station, like CW-affiliated WCWF(DT), to extract higher retransmission consent fees than those to which it might otherwise be entitled, because the stations could threaten to pull the signal of both the CW affiliate and the "stronger" station like Fox-affiliated WLUK-TV from the MVPD's system.⁷ Even the threat of such signal loss could cause consumers to either switch providers or forego MVPD service altogether according to TWC, imposing burdens on both consumers and MVPDs. TWC argues that granting the proposed assignment would legitimize this potential conduct.⁸

TWC further argues that, if the Commission grants the application, it should impose conditions on the grant. Specifically, TWC would have the Commission forbid the stations from withholding their signals from an MVPD during the pendency of a retransmission consent dispute upon the expiration of an existing agreement and, in the absence of a future retransmission consent agreement, would require the stations to submit to a Commission-supervised dispute resolution process.

TWC challenges LIN's failing station waiver showing, and maintains that LIN has failed to demonstrate that grant of such a waiver would be consistent with the standard set forth in the Commission's rules.

⁴ Multichannel video program distributors ("MVPDs").

⁵ See 47 C.F.R. § 76.92(a).

⁶ See 47 C.F.R. § 76.101.

⁷ In support of its position, TWC cites to two studies filed in the current proceeding commenced in regard to its own *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Petition for Rulemaking, MB Docket No. 10-71 (filed Mar. 9, 2010) ("*Retransmission Consent Petition*"). Those studies are William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees*, at 12, filed by the American Cable Association May 18, 2010, and Steven C. Salop, *et al.*, *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, at 54, filed by TWC June 3, 2010.

⁸ In its petition, TWC states that "an agreement to set retransmission consent prices on behalf of independently owned stations in a single DMA would likely violate Section 1 of the Sherman Act." (emphasis added) Such a statement is speculative on its face.

TWC argues, moreover, that a waiver of the local television ownership rule in this case violates the public interest as it would result in additional market concentration, and, in particular, TWC opposes waivers that would result in a shift in the balance of power in the retransmission consent process.⁹

In their oppositions, both LIN and ACME contend that TWC is rehashing arguments that it has raised in our current retransmission consent proceeding and that these arguments have no place in an adjudicatory proceeding.¹⁰ LIN argues that TWC has mischaracterized the facts of the retransmission consent negotiation process and that its predictions about future negotiations and future competitive harm are speculative. LIN also argues that WCWF(DT) has a statutory right to elect retransmission consent during the election cycle. Both LIN and ACME contend that there is no legal basis to impose the conditions that TWC seeks, arguing that these conditions have no foundation in our rules. LIN further notes that TWC does not propose any corresponding conditions that would be imposed on MVPDs.

Discussion. The Commission applies a two-step analysis to a petition to deny under the public interest standard. The Commission must first determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.¹¹ The first step “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established.”¹² If the petition meets this first step, the Commission must determine whether “on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” the petitioner has raised a substantial and material question of fact as to whether the application would serve the public interest.¹³

With respect to TWC’s requested conditions regarding the retransmission consent process, TWC has not argued that any supposedly increased bargaining position that it contends would be gained by the combined stations violates our rules. As discussed above, TWC filed a petition for rulemaking in which it raised these same arguments and we have recently issued our *Retransmission Consent NPRM*.¹⁴ To the extent that TWC argues that we should never grant any waivers that would permit the combination of two

⁹As part of a Transition Plan submitted with the application, LIN and ACME have entered into a Joint Sales Agreement (“JSA”), Local Marketing Agreement (“LMA”), and Shared Services Agreement (“SSA”). The Transition Plan also permits LIN to act as ACME’s agent for retransmission consent purposes. TWC argues that permitting stations to jointly negotiate retransmission consent agreements, while at the same time being parties to such cooperative agreements as JSAs, LMAs, or SSAs, violates the public interest. The cooperative agreements contained in the Transition Plan will terminate upon consummation. Therefore, we do not need to address here the appropriateness of combining such agreements with joint negotiation rights for retransmission consent in this proceeding.

¹⁰ On March 3, 2011, the Commission released *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent, Notice of Proposed Rulemaking*, MB Docket 10-71, FCC 11-31 (March 3, 2011) (“*Retransmission Consent NPRM*”). TWC’s *Retransmission Consent Petition* was an earlier filing in that proceeding.

¹¹ 47 U.S.C. § 309(d)(1); *Astroline Communications Co., Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (“*Astroline*”).

¹² *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (“*Gencom*”).

¹³ *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

¹⁴ See fn. 10.

stations in the same market because of a concomitant increase in market power, the Commission has commenced its *2010 Quadrennial Ownership Review* and such issues are properly raised in that proceeding.¹⁵ Issues of broad applicability, such as the complaints raised by TWC regarding the retransmission consent process, are more suited to a rulemaking than to adjudication, and the Commission has long refused to develop broad new rules in an adjudicatory context.¹⁶ By denying TWC's request to impose transaction-specific conditions, we take no position with respect to whether the Commission should alter its policies with regards to the retransmission consent process.

Under Section 73.3555(b)(2) of the Commission's Rules,¹⁷ two full-power television stations licensed in the same DMA whose Grade B contours overlap¹⁸ may be commonly owned if: (1) at least one of the two stations is not ranked among the top four stations in the DMA; and (2) at least eight independently owned and operating, full-power commercial and noncommercial television stations would remain in the DMA after the merger. Although WCWF(DT) is not among the top-four ranked stations in the market, the Green Bay-Appleton DMA would not have eight independently owned-and-operating full power television stations after the proposed merger. Therefore, the applicants have requested a waiver of the rule under Note 7(2) to Section 73.3555, the "failing station" standard.¹⁹

The Commission's *Local Ownership Order*,²⁰ set forth the criteria for a waiver of the television duopoly rule for a "failing station," defined as one which has been struggling for an "extended period of time both in terms of its audience share and financial performance."²¹ These criteria are:

1. One of the merging stations has a low all-day audience share, (*i.e.* 4 percent or lower);
2. The financial condition of one of the merging stations is poor. For example, that the station has had a negative cash flow for the previous three years;²²

¹⁵ *In the Matter of the 2010 Quadrennial Review – Review of the Commission's Media Ownership Rule and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 25 FCC Rcd 6086 (2010) ("2010 Quadrennial Ownership Review")..

¹⁶ *See, e.g., Pine Bluff Radio, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 6594, 6599 (1999); *Application of Great Empire Broadcasting, Inc. and Journal Broadcasting Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11145, 11148 (1999). *See also Community Television of Southern California v. Gottfried*, 459 U.S. 499, 511 (1983) ("[A] rulemaking is generally a better, fairer, and more effective method of implementing a new industry wide policy than uneven application of conditions in isolated [adjudicatory] proceedings.")

¹⁷ 47 C.F.R. § 73.3555(b)(2).

¹⁸ Although the rule refers to Grade B contours, DTV stations do not have Grade B contours and the Commission treats noise-limited contours as their functional equivalent. *See, e.g. Estes Broadcasting, Inc.*, Letter, 25 FCC Rcd 7596 (2010).

¹⁹ 47 C.F.R. § 73.3555 Note 7.

²⁰ 14 FCC Rcd 12903.

²¹ *Id.* at 12939.

²² *Id.*

3. The merger will produce public interest benefits; and
4. The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; and selling the station to an out-of-market buyer would result in an artificially depressed price.²³

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

As part of their waiver request, the applicants have attached a chart demonstrating that WCWF(DT)'s all day audience share has been below four percent since 2007 and has not exceeded 2% since the third quarter of 2007.

With respect to its financial condition, the applicants have submitted financial data to demonstrate negative cash flow and operating losses at the station for the three years preceding the filing of the application. In its pleadings, TWC argues that certain costs appear artificially high and should not have been included in operating cash flows as a matter of common corporate accounting practice.²⁴ TWC also argues that these costs should be deducted from the waiver analysis because they were allocated to ACME as part of intra-company liability. TWC argues that another class of costs is irrelevant to the station's financial condition and has no impact on its solvency or liquidity.²⁵ In response, ACME argues that all of the charges relied on in its showing are consistent with GAAP and with Commission precedent.²⁶ ACME argues that both of the charges at issue impact the station's financial condition. ACME also argues that even if both of the charges at issue were removed, the station would still have had negative cash flow for the three years prior to the filing of the application and, thereby, satisfies the second prong of the waiver standard. Staff analysis of the financial data in the record and of the particular charges at issue, considering all of the charges as they are treated according to GAAP, indicates that the station had a negative cash flow for the past three years and that the second prong of the test is satisfied.

In its filings, LIN has made representations that, following the acquisition, WCWF(DT) would broadcast a significant amount of locally produced issues-responsive programming including a weekly first-run, locally produced public affairs series and quarterly hour-long Town Hall meetings to be aired in prime time. LIN has also committed to providing locally-produced weather reports and news updates, coverage of local live events, high school sports and to a year-long effort to focus on an important topic of community concern. TWC argues that that these enhancements to the station's programming could be accomplished in other ways without the grant of the waiver and that LIN has failed to make a commitment to produce unique programming for WCWF(DT). TWC's vague claim that the station's programming could be enhanced in other unspecified ways without the waiver is unconvincing. The issue before us is whether the requested waiver will serve the public interest, not whether some vague, hypothetical "other" solution might serve better.²⁷ TWC's second argument is also meritless. LIN has

²³ *Id.*

²⁴ These costs were included in a showing of financial information that was submitted by the applicants with a request for confidential treatment. TWC was permitted access to the confidential information pursuant to an agreement between the parties.

²⁵ These costs were also included the materials that were submitted with the request for confidential treatment.

²⁶ *Citing Banks-Boise, Inc.*, 24 FCC Rcd 401 (MB 2009).

²⁷ *See, e.g.*, 47 U.S.C. § 310(d).

made a commitment to be a strong “local voice” at WCWF(DT) and we would expect that commitment to include some increased news and public affair coverage of the station’s community of license, which would be in the public interest.

In regard to the fourth prong of the waiver standard, the parties have submitted the sworn declaration of Brian E. Cobb, an experienced broadcast station media broker with the firm of CobbCorp LLC. (“CobbCorp”). The application states that between June 2007 and May 2010, CobbCorp sought a buyer for the station. The application goes on to state that CobbCorp developed a list of 28 potential buyers, nine of which entered into a non-disclosure agreement and received a copy of the prospectus materials developed by CobbCorp. Of those nine, only two buyers, both in-market, expressed an interest in acquiring the station and only LIN offered what the seller believed was a reasonable purchase price. According to the applicants, it was Mr. Cobb’s view, based on his experience in brokering broadcast stations and his knowledge of the prevailing economic conditions and competitive climate, selling the station to an out-of-market entity would result in an artificially depressed price. This showing is consistent with what we have found acceptable in previous decisions.²⁸

Upon review of the record, we find TWC’s objections to the requested waiver to be without merit. We will grant the parties’ request for a waiver of the local television duopoly rule, and we will grant the assignment application. The applicants have submitted detailed information regarding the station’s bleak financial situation. The station’s negative cash flow and operating losses for the past three years are consistent with the criterion the Commission has set for determining that a station is “failing.” In addition, WCWF(DT) has rarely exceeded even a two percent audience share for the last three years. In these circumstances, it is unsurprising that an out-of-market buyer cannot be found. We believe that the proposed merger of the two stations will not only help WCWF(DT) overcome its existing shortcomings, but that it will provide a tangible benefit to the community through the expansion of local news and public affairs programming on the station.

Consistent with the *Local Ownership Order*, we find that the combined operation of WLUK-TV and WCWF(DT) will pose minimal harm to our diversity and competition goals because WCWF(DT)’s dire financial situation hampers its ability to be a viable voice in its market. Under these circumstances, allowing WCWF(DT) to be operated by a stronger station in the market will result in a definite improvement in facilities and programming, an outcome which clearly benefits the public interest.

In light of the above discussion, we find that the applicants are fully qualified, and conclude that the grant of the assignment application would serve the public interest.

ACCORDINGLY, IT IS ORDERED That the petition to deny filed by Time Warner Cable Inc. is DENIED. IT IS FURTHER ORDERED That the request for a waiver of Section 73.3555 of the Commission’s Rules pursuant to Note 7(2), the “failing station” standard, to permit the co-ownership of

²⁸ See, e.g., *Minden Television Company*, Letter, 24 FCC Rcd 10151 (Med. Bur. 2009).

WCWF(DT), Suring, Wisconsin and WLUK-TV, Green Bay, Wisconsin IS GRANTED. IT IS FURTHER ORDERED That the application for the assignment of license of WCWF(DT), Suring, Wisconsin, File No. BALCDT-20100917AAF IS GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau