



Federal Communications Commission  
Washington, D.C. 20554

DA 17-387

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Withers Broadcasting Company  
c/o Dawn M. Sciarrino, Esq.  
Sciarrino & Shubert, PLLC  
4601 N. Fairfax Drive  
Suite 1200  
Arlington, VA 22203

Gray Television, LLC  
c/o Henry Wendel, Esq.  
Cooley LLP  
1299 Pennsylvania Ave., NW  
Suite 700  
Washington, DC 20004

Re: Application for Consent to Assignment of Licenses  
WDTV(TV), Weston, WV, Facility ID No. 70592,  
File No. BALCDT-20160518ABL,  
WVFX(TV), Clarksburg, WV, Facility ID No. 10976,  
File No. BALCDT-20160518ABO

Dear Counsel:

By this letter we grant the above-captioned uncontested license assignment applications (the "Applications") for the licenses of television broadcast stations WDTV(TV), Weston, West Virginia, and WVFX(TV), Clarksburg, West Virginia (the "Stations") from subsidiaries of Withers Broadcasting Company ("Withers") to subsidiaries of Gray Television, LLC ("Gray"). In connection with the sale, we also grant the Applicants' request for a waiver of Section 73.3555(b), the local television multiple ownership rule, to permit Gray's common ownership of the Stations based on WVFX(TV)'s status as a "failing station."<sup>1</sup>

**Background.** WDTV(TV), a CBS affiliate, and WVFX(TV), a Fox affiliate, are both located in the Clarksburg-Weston, West Virginia Nielsen Designated Market Area ("DMA"). The Stations are licensed to subsidiaries of Withers -- Withers Broadcasting Company of West Virginia is the current licensee of WDTV(TV), and Withers Broadcasting Company of Clarksburg, LLC is the current licensee

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<sup>1</sup> 47 C.F.R. § 73.3555, Note 7. The Applicants have included their request for a continuation of the "failing station" waiver as part of the identical Comprehensive Exhibit that they filed with both of the Applications. *See, e.g.*, File No. BALCDT-20160518ABO, Application, Exh. 14, "Comprehensive Exhibit" ("Comp. Exh.").

of WVFX(TV). Withers has owned and operated WVFX(TV) since 2008 pursuant to a “failing station” waiver.<sup>2</sup> The proposed assignee for both stations is Gray Television Licensee, LLC, a subsidiary of Gray.

Discussion. The Local Television Ownership Rule allows an entity to own two television stations licensed in the same Nielsen Designated Market Area (“DMA” or “market”) that have digital noise limited service contour overlap if: (1) at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day audience share; and (2) at least eight independently owned and operating, full-power commercial and noncommercial television stations would remain in the DMA after the transaction.<sup>3</sup> Ownership of both WDTV(TV) and WVFX(TV) would violate the local television ownership rule because there would remain less than eight independently owned and operating stations in the market post-merger. The Applicants have requested a “failing station” waiver pursuant to Note 7 of Section 73.3555 of the Commission’s rules<sup>4</sup> to allow continued ownership of the Stations in the Clarksburg-Weston, West Virginia DMA.

The Commission has defined a “failing station” as one that has been struggling for “an extended period of time both in terms of its audience share and financial performance.”<sup>5</sup> The criteria for a “failing station” waiver of the Local Television Ownership Rule are: (1) one of the merging stations has had a low all-day audience share (*i.e.* 4 percent or lower); (2) the station has had negative cash flow for the previous three years; (3) the merger will produce tangible and verifiable 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.<sup>6</sup> If the applicant satisfies each criterion, a waiver will be presumed to be in the public interest.

We find that the Applications satisfy all four prongs of this test. First, the Applicants submit that for the four Nielsen “sweeps” periods preceding the filing of the Applications, WVFX(TV) has consistently failed to receive even a two percent share.<sup>7</sup>

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<sup>2</sup> *Davis Television Clarksburg, LLC (Assignor) and Withers Broadcasting Company, LLC (Assignee) for Assignment of License of Station WVFX(TV), Clarksburg, West Virginia*, Memorandum Opinion and Order, 23 FCC Rcd 5472 (Vid. Div. MB 2008).

<sup>3</sup> 47 C.F.R. § 73.3555(b). *See also 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Report and Order, 31 FCC Rcd 9864, 9885, 9895, paras. 52, 78 (2016) (“*2016 Quadrennial Second Report and Order*”) (finding that the Local Television Ownership Rule, with slight modifications, continues to be necessary to serve the public interest as a result of competition and replacing the analog Grade B contour with the digital noise limited contour). The revised standard went into effect on December 1, 2016. *See id.* at 10024, para. 381; 81 Fed. Reg. 76220 (rel. Nov. 1, 2016) (announcing December 1, 2016 effective date).

<sup>4</sup> 47 C.F.R. § 73.3555(b); *see K. Rupert Murdoch*, Memorandum Opinion and Order, 21 FCC Rcd 11499, 11500, para. 5 (2006) (“failing station” waivers must be reevaluated, *de novo*, in the context of a long-form change of control application).

<sup>5</sup> *Review of the Commission’s Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12938, para. 79 (1999) (“*Local Ownership Order*”), *recon. granted in part*, 16 FCC Rcd 1067 (2001) (“*Local Ownership Order on Reconsideration*”).

<sup>6</sup> *Id.* at 12939-40, para. 81; 47 C.F.R. § 73.3555, note 7.

<sup>7</sup> Comprehensive Exhibit at 9. *See, e.g., Colins Broadcasting Corporation*, Letter Order, 28 FCC Rcd 1282, 1283 (Vid. Div. MB 2013) (relying on Nielsen ratings demonstrating that KSNB-TV had no reportable audience share during previous sweeps).

With regard to the second criterion, Gray has submitted financial data to demonstrate negative cash flow at WVFX(TV) for the three years preceding the filing of the Applications.<sup>8</sup> The financial statements for WVFX(TV) for calendar years 2013, 2014, and 2015 as a stand-alone operation show that its independent operation would have resulted in substantial annual losses. Staff has reviewed the financial statements, and finds that they adequately demonstrate the requisite negative cash flow.<sup>9</sup>

As to the third criterion, the Applicants assert that substantial programming and operations improvement would result from Gray's common ownership of WVFX(TV) and WDTV(TV) and provide tangible, transaction-specific public interest benefits.<sup>10</sup> They point out that prior to its combination with WDTV(TV), WVFX(TV) provided no local news, and that Gray will continue to air the 10 p.m. local newscast that WVFX(TV) currently airs. They state that, absent utilization of WDTV(TV)'s resources, it would be impossible for WVFX(TV) to provide any local newscasts.<sup>11</sup> In addition, according to the Applicants, Gray's current ownership of top-ranked stations in the Charleston-Huntington, West Virginia and the Parkersburg, West Virginia DMAs will enable Gray to provide viewers in the Clarksburg-Weston DMA with comprehensive coverage of the important issues facing all West Virginians. They state that WVFX(TV) will continue to have access to the full support of and resources from WDTV(TV)'s experienced engineering team, and will obtain industry-leading resources, technology, and assistance from Gray's staff. Consistent with the *Local Ownership Order*, we believe that the combined operation of the stations will pose minimal harm to diversity and competition, and that allowing WDTV(TV) to continue to operate in tandem with a stronger station will help it to become a more viable local voice in the market, through a definite improvement in programming.<sup>12</sup>

To demonstrate compliance with the fourth criterion, the Applicants have submitted a letter from W. Lawrence Patrick of Patrick Communications.<sup>13</sup> Mr. Patrick states that he is very familiar with the Clarksburg-Weston, West Virginia DMA and that he has helped to sell WVFX(TV) twice over the past 20 years. He submits that this is a very small DMA with limited television market revenues that are barely sufficient to support the five television networks in the market that are aired by three stand-alone stations. He explains that WBOY-TV – which is owned by Nexstar – leads the DMA with a 46.4 percent share of the local television ad revenue in the market for its NBC/ABC combination, and that WVFX(TV) only has 9.8 percent share of that market. Even on a combined basis, WVFX(TV) and WDTV(TV) account for only 44.2 percent of the revenues. Mr. Patrick concludes that “[g]iven the dominance of WBOY-TV and the overall minimal level of market television revenues, WVFX-TV is unable to operate as a viable standalone full power station.”<sup>14</sup>

He reports that he has spoken with several dozen owners about a potential purchase of WVFX(TV) as a stand-alone station, and received no interest. He states that as a broker, if asked to

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<sup>8</sup> Comprehensive Exhibit at 10. Specific financial information relating to WVFX' current operations have been submitted to the Commission with a request for confidential treatment. Letter from Jason Rademacher, Counsel for Gray Television Licensee, Inc., to Marlene H. Dortch, FCC, File No. BALCDT-20160518ABO, Att. 1, “Stand-Alone Financial Statements” (filed May 25, 2016).

<sup>9</sup> *Freedom Broadcasting of New York Licensee, L.L.C.*, Letter Order, 27 FCC Rcd 2498 (Vid. Div. 2012).

<sup>10</sup> Comprehensive Exhibit at 10-11.

<sup>11</sup> *Id.*

<sup>12</sup> *Local Ownership Order*, 14 FCC Rcd at 12939, para. 80.

<sup>13</sup> Comprehensive Exhibit at 11-12; *id.* at Att. 1 (letter dated May 11, 2016).

<sup>14</sup> *Id.* at 3.

market the station solely to out-of-market entities, he would be hard-pressed to identify any potential buyers. He further concludes that “WVFX-TV is not marketable as a standalone station . . . . 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.”<sup>15</sup>

The requests for a “failing station” waiver is uncontested. Based on the totality of the circumstances,<sup>16</sup> we find that continuation of the grant of a waiver of the Local Television Ownership Rule to permit common ownership of WVFX(TV) and WDTV(TV) is warranted on the grounds that WVFX(TV) remains a “failing station.” With respect to the fourth criterion in particular, although we do not generally accept predictive judgments by brokers or analysts, we do recognize the evidentiary value of fact-based broker due diligence.<sup>17</sup> We find that Mr. Patrick’s letter is not merely predictive but instead sufficiently based on an examination of actual in-market data. Mr. Patrick’s evaluation is representative of the due diligence that a licensee customarily engages in when it is actively determining the feasibility of selling a station.<sup>18</sup> We find that in the context of this transaction it would be contrary to the public interest to require a licensee to needlessly go through the process of putting its “failing station” up for sale when, as part of the due diligence process and based on comparable market data, an independent broker has concluded that an in-market buyer is the only reasonable candidate to buy the station and that selling to an out-of-market buyer would result in an artificially depressed price.<sup>19</sup>

The continued combined operations of WVFX(TV) and WDTV(TV) will pose minimal harm to our diversity and competition goals because the financial situation of WVFX(TV) hampers its ability to be a viable voice in the market absent a “failing station” waiver. Based on the facts and circumstances, including news coverage that would not otherwise be possible, we find that combined operation will benefit the public interest.

Conclusion. Having reviewed the Applications and other facts before us, we conclude that grant of the Applications as requested will comply with the Commission’s rules and section 310(d) of the Act. We conclude that Gray is fully qualified and that grant will serve the public interest, convenience, and necessity.

ACCORDINGLY, IT IS ORDERED, That the request for a “failing station” waiver of Section 73.3555(b)(2) of the Commission’s rules to permit the continued common ownership of WDTV(TV), Weston, West Virginia, and WVFX(TV), Clarksburg, IS GRANTED.

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<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Tribune Bankruptcy Order*, Memorandum Opinion and Order, 27 FCC Rcd 14239, 14261 (MB 2012).

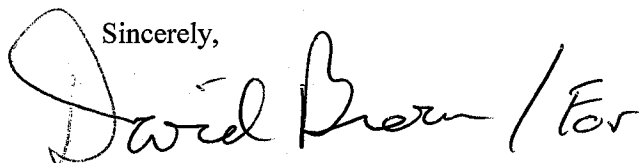
<sup>17</sup> See, e.g., *Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc. from Shareholders of Media General, Inc. to Nexstar Media Group, Inc.*, Memorandum Opinion and Order, DA 17-23 (MB Jan. 11, 2017) (“*Nexstar/Media General*”) at 21, para. 54.

<sup>18</sup> See *id.* Note 7 of section 73.5555 of the Commission’s rules identify that one way to demonstrate compliance with the fourth criterion is an “affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit and that no reasonable offer from an entity outside the market has been received,” 47 C.F.R. § 73.3555, Note 7. However, in *Media General/LIN*, the Bureau emphasized that “[t]he Commission’s rules do not identify this as the only” means of demonstrating compliance with the four criterion. *Shareholders of Media General, Inc. and Shareholders of LIN Media, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 14798, 14812, para. 32 (MB 2014) (“*Media General/LIN*”).

<sup>19</sup> This approach is consistent with our practice in other, similar transactions. See, e.g., *Nexstar/Media General* at 22, para. 55; *Schurz Communications, Inc.*, Order, 31 FCC Rcd 1113, 1118 (Vid. Div. 2016).

IT IS FURTHER ORDERED, That the above-referenced applications for consent to assign the license of WDTV(TV), Weston, West Virginia, File No. BALCDT-20160518ABL, and the license WVFX(TV), Clarksburg, West Virginia, No. BALCDT-20160518ABO to Gray Television Licensee, LLC, ARE GRANTED.

Sincerely,

A handwritten signature in black ink that reads "David Brown / For". The signature is written in a cursive style with a large initial "D" and a slash followed by "For".

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau