

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of
HISPANIC KEYS BROADCASTING, INC.
(Assignor)
and
SONIA BROADCASTING COMPANY, LLC
(Assignee)
For Consent to the Assignment of License
WVIB(TV), Key West, Florida
File No. BALCT-20030515AAL
Facility ID No. 27387

MEMORANDUM OPINION AND ORDER

Adopted: March 10, 2004

Released: March 11, 2004

By the Chief, Media Bureau:

1. We herein consider, pursuant to delegated authority, the above-captioned application to assign the license of WVIB (TV), Channel 8 (Ind.), Key West, Florida, from Hispanic Keys Broadcasting, Inc. ("Hispanic Keys") to Sonia Broadcasting Company, LLC ("Sonia"). This application is unopposed.

BACKGROUND

2. Sonia's affiliate, WDLP Broadcasting Company, LLC, is the licensee of WDLP-TV (formerly WGEN-TV), Channel 22 (Ind.), Key West, Florida. Because this would be the second television station in the Miami-Ft. Lauderdale designated market area ("Miami DMA") owned and operated by Sonia, its proposed acquisition of WVIB is governed by Section 73.3555(b)(2) of the Commission's rules. This rule provides, in pertinent part, that the same entity may own or control in the same market two television stations with overlapping Grade B contours so long as: (i) at the time the application is filed, at least one of the stations is not ranked among the top four stations in audience rankings in the DMA; and (ii) at least 8 independently owned and operating full-power commercial and non-commercial educational television stations would remain in the market after the proposed acquisition. WVIB is not ranked among the top four stations in the DMA, but there would not be 8 remaining independently owned and operating television stations in the Miami DMA. Accordingly, Sonia requests a waiver of Section 73.3555(b)(2) on the basis that WVIB is a "failing station."

1 47 C.F.R. § 73.3555(b)(2).

2 47 C.F.R. § 73.3555(b)(2)(ii).

3. Alternatively, Sonia argues that its application should be granted because the “8 remaining TV voices” provision was invalidated by the court reviewing the Commission’s 1999 decision modifying the local television ownership rule in *Sinclair Broadcast Group, Inc. v. FCC*,<sup>3</sup> and because it would be in compliance with the modified local television ownership rule adopted by the Commission in the *2002 Biennial Review Order*.<sup>4</sup> The effective date of the rule changes contained in the *2002 Biennial Review Order*, however, was subsequently stayed by order of the 3<sup>rd</sup> Circuit Court of Appeals on September 3, 2003.<sup>5</sup>

### DISCUSSION

4. The Commission will entertain applications to waive the local television multiple ownership rule on a case-by-case basis where the station to be acquired is a failing station, a failed station, or an unbuilt station.<sup>6</sup> 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
- (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.<sup>7</sup>

If the applicant satisfies each criterion, a waiver of the rule will be presumed to be in the public interest.<sup>8</sup> For the reasons discussed below, we find that Sonia has satisfied each of the above criteria such that we can presume that waiver of the duopoly rule, as requested in this case, is in the public interest. We need not address, therefore, Sonia’s alternative ground for relief.

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

<sup>4</sup> See *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 (2003).

<sup>5</sup> *Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam).

<sup>6</sup> 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).

<sup>7</sup> 14 FCC Rcd at 12939.

<sup>8</sup> *Id.*

5. *Audience Share.* Sonia has submitted Nielsen ratings information for the Miami – Ft. Lauderdale market that demonstrates that during the last three years, between 2001-03, WVIB had an all-day audience share of less than 4 percent. Specifically, WVIB’s viewership was so small that it failed to meet Nielsen’s minimum reporting standards. According to the general manager of WDLP-TV, the station presently owned by Sonia in the market, WVIB has “never achieved even an all-day audience share of ‘1’.” The BIA database also shows that WVIB has not received a reportable share in the Miami DMA over the past 16 quarters.<sup>9</sup> Further, based on the location of the station and its signal contour, it is unlikely to be received over-the-air by most Miami viewers.<sup>10</sup>

6. *Financial Condition.* Sonia has submitted financial information (income statements, balance sheets, and tax information)<sup>11</sup> supporting a finding that the station meets the “poor financial condition” prong of the failing station test.<sup>12</sup> In this regard, Sonia asseverates that WVIB has sustained a “large” cumulative operating loss for the three years ending December 31, 2002. According to Sonia, WVIB has been “struggling since it commenced operations in 1996” and has been “on the brink of ceasing broadcast operations for several years.”<sup>13</sup> Sonia asserts that the station has been unable to maintain its transmission equipment due to insufficient funds and has been on and off the air for much of 2003. Sonia further asserts that WVIB’s DTV equipment would not be ready for shipment if it had not advanced funds to Hispanic Keys for its purchase pursuant to the parties’ agreement for the sale of the station.

7. *In-Market Buyer Only Reasonably Available Candidate.* Sonia, an in-market buyer that has agreed to purchase WVIB for \$2,750,000 asserts that it is the only reasonably available candidate willing and able to operate the station.<sup>14</sup> Previously, Hispanic Keys had retained Bruce Fox, an independent media broker with over 10 years experience in TV ownership/consulting and station brokerage, to sell WVIB and its Miami Class A television station WVEB-CA for \$12 million. According to Mr. Fox, the only “serious offer” he received after a “thorough and extensive search” was for

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<sup>9</sup> BIA is a communications and information technology, investment banking, consulting, and research firm. BIA provides strategic funding, consulting, and financial services to the telecommunications, Internet, and media/entertainment industries. Unless otherwise specified, references throughout this document to BIA data refer to the Year 2002 data made available to the public on October 21, 2003.

<sup>10</sup> According to Joseph Lassiter, the chief operator of WDLP-TV, WVIB’s Grade B service area contains fewer than 40,000 viewers.

<sup>11</sup> The parties have requested confidential treatment of this material pursuant to Sections 0.457 and 0.459 of the Commission’s rules. 47 C.F.R. §§ 0.457 & 0.459.

<sup>12</sup> Sonia also submitted an economic analysis by Alan Pearce, Ph.D., and Richard Carlson, MBA, of Information Age Economics, Inc., that concludes that WVIB is a financially failing station and that the proposed duopoly will have minimal market power in the DMA.

<sup>13</sup> In support, Sonia refers to Hispanic Keys’ statements that it has been in default on a Textron loan and in arrears on license fee payments to BMI, professional fees, and site lease payments. Sonia argues that the Commission itself has recognized WVIB’s poor financial condition when the Video Division granted extension requests for the station’s DTV permit based on financial hardship and when the FCC’s Chief Financial Officer made findings of financial hardship and waived WVIB’s regulatory fees for the years 2000 and 2001 (citing a February 25, 2002, letter to C. Michael Curry, Vice President, Hispanic Keys Broadcasting). Hispanic Keys states that it requested another regulatory fee waiver in September 2003.

<sup>14</sup> According to the parties, the station’s sale agreement resulted from a request by Hispanic Keys to Sonia for \$250,000 to fund a court settlement.

approximately \$9.5 million for both stations from Pappas Communications – a transaction that was approved by the Commission in 2001, but not consummated.<sup>15</sup> Mr. Fox states that subsequent attempts on his part to find another potential in-market or out-of-market buyer for WVIB have been unsuccessful.<sup>16</sup>

8. *Public Interest.* As to the public interest benefits in this case, Sonia notes that it has already made, and will continue to make, a financial commitment to expedite the station's conversion to digital operations. Currently, WVIB does not employ any full-time sales employees and its principal source of income comes from infomercial programming. Post-transaction, Sonia states that it will replace the existing infomercial programming on WVIB with "four hours of local, live prime-time Spanish-language programming to serve Key West, Miami, and the entire DMA." Although Sonia intends to broadcast primarily in Spanish, it has indicated that WVIB may broadcast regularly scheduled programming "directed to the needs and interests of other minority populations in the DMA, especially immigrants in Key West and south Florida from Brazil, Haiti and other Latin American/Caribbean countries." Specifically, Sonia pledges to implement the following programming commitments during the first year of its operations of WVIB: (a) local weather information concentrating on the needs of Key West viewers and the thousands of viewers through the 100-mile-long Florida Keys and the ability to go "live" in the case of any hurricane emergency as well as live "relief" telethons if the Key West-Miami area suffers another serious storm; (b) live weekly public affairs programming targeted to serve the needs and interests of Key West viewers; (c) tripling the number of weekly public service announcements devoted to the needs and interests of Key West viewers; (d) special weekly programming aimed at the health and medical needs of Key West and all of the DMA, particularly aimed at immigrants and HIV victims in Key West and throughout the DMA; and (e) internships for minority and economically disadvantaged youth at WVIB similar to those offered by WDLP-TV.

9. Sonia also claims that grant of the proposed duopoly is the only viable chance for either WVIB or WDLP-TV to compete successfully as minority and independently-owned Spanish-language stations against the larger Spanish-language stations in the Miami DMA. Sonia maintains that it is "essential" that the joint operation of these two stations be permitted so that the costs to provide competitive local programming are sustainable. Sonia asserts that the efficiencies of the combined operations of WVIB and WDLP-TV will result in two viable local outlets of diverse expression capable of competing against Univision/Telefutura/HBC and Telemundo/NBC in the Miami DMA.<sup>17</sup> Sonia contends that it is "well-positioned to successfully 'turnaround' WVIB from a 'failing' station into a vibrant independent media 'voice'" because it is "assembling a unique, highly inventive group of

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<sup>15</sup> Mr. Fox states that WVIB was in poor financial condition at the time of the Pappas transaction as well, but was not required to request a waiver of the television duopoly rule. According to Mr. Fox, WVIB was failing because its over-the-air signal coverage was limited to viewers in Key West and it was unable to secure cable carriage in the larger Miami DMA.

<sup>16</sup> Mr. Fox states that he used the same methods and wide outreach that had resulted in the Pappas transaction, including soliciting both traditional in-market and out-of-market buyers and non-traditional candidates, such as religious groups, Spanish-language programmers, shopping stations, and radio broadcasters in Miami, but received no "serious interest" from any potential buyer.

<sup>17</sup> Sonia indicates that it plans to merge the operations of the two stations (eventually having common studios, some common technical employees, etc.), but will keep two independent programming voices. In this regard, Sonia indicates that it does not plan on simulcasting the programming of one station on the other and further pledges that WVIB will have its own full-time program director.

professionals who want to see Spanish-language programming serve Key West and South Florida in ways that the network-owned stations in the Miami DMA are not.”<sup>18</sup>

10. Based on our foregoing analysis of the record in this case, we find that Sonia has demonstrated that the grant of a “failing station” waiver of the multiple ownership rules is warranted. We further find that Sonia is qualified to be the licensee of WVIB(TV) and grant of this transaction is consistent with the public interest, convenience, and necessity.

11. Accordingly, IT IS ORDERED, THAT the request for a “failing station” waiver of the television duopoly rule, Section 73.3555(b)(2), to permit Sonia to own and operate both WVIB(TV) and WDLP-TV, IS GRANTED.

12. IT IS FURTHER ORDERED, THAT the application (BALCT-20030515AAL) for consent to the assignment of license of WVIB(TV), Key West, Florida, from Hispanic Keys Broadcasting, Inc. to Sonia Broadcasting Company, LLC, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree  
Chief, Media Bureau

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<sup>18</sup> In support, Sonia states that following its acquisition of WDLP-TV, it hired the “most talented professionals available in the Spanish-language TV business” and provided “them with an absolutely state-of-the-art facility.” Consequently, WDLP-TV has been offering live, local Spanish-language programming since its re-launch on September 29, 2003.