

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

In re Application of )  
) )  
**KX ACQUISITION LIMITED** )  
**PARTNERSHIP** )  
(Assignor) )  
) )  
and ) File No. BALCT-971001IB  
) )  
**SHOCKLEY COMMUNICATIONS** )  
**CORPORATION** )  
(Assignee) )  
) )  
For Consent to the Assignment of License )  
of Station KXLT-TV, Rochester, Minnesota )

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 26, 1997**

**Released: November 28, 1997**

**By the Chief, Mass Media Bureau:**

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration the above-captioned unopposed application to assign the license of television station KXLT-TV (IND), Channel 47, Rochester, Minnesota ("KXLT"), from KX Acquisition Limited Partnership to Shockley Communications Corporation ("Shockley"). Shockley is the licensee of WXOW-TV(ABC), Channel 19, La Crosse, Wisconsin ("WXOW"). Because the Grade B contour of KXLT overlaps the Grade B contour of WXOW, Shockley requests a permanent waiver of the Commission's television duopoly rule (47 CFR § 73.3555(b)) to allow common ownership of KXLT and WXOW. Shockley maintains that a permanent waiver is warranted because the proposed acquisition complies with existing Commission policy and case precedent.

2. *Duopoly Waiver Request.* In support of its waiver request, Shockley has submitted an engineering exhibit which shows that there is no Grade A contour overlap between KXLT and WXOW.<sup>1</sup> According to Shockley, the Grade B overlap area of KXLT and WXOW encompasses 9,321 individuals and 228 square miles, comprising approximately 3.17% of the population and

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<sup>1</sup> Shockley has pending an application to modify the licensed facilities of WXOW (BPCT-960610KF). Our independent engineering analysis reveals that the future grant of this modification application would not create Grade A contour overlap with the authorized facilities of KXLT.

3.88% of the land area within WXOW's Grade B contour and 6.13% of the population and 11.48% of the land area within KXLT's Grade B contour. Shockley contends that the extent of the overlap created by the proposed assignment is well within the range that the Commission has permitted in previously approved waivers, citing, *inter alia*, *Media General Broadcasting, Inc.*, 12 FCC Rcd 10434 (1997) (granting waiver where Grade B population overlap was 10.8% and 12.8%, and area overlap was 21.9% and 18%); and *Sainte Limited*, DA 97-484 (MMB, released March 6, 1997) (granting waiver where Grade B population overlap was 9.0% and 3.9%, and area overlap was 11.5% and 18.1%).

3. Shockley contends that the overlap area will remain well-served by numerous media voices. According to the engineering report submitted by Shockley, seven other television stations serve the overlap area, including KAAL-TV (ABC/FOX), Austin, Minnesota; KIMT-TV (CBS), Mason City, Iowa; KTTC-TV (NBC), Rochester, Minnesota; WEAU-TV (NBC), Eau Claire, Wisconsin; WHLA-TV (PBS), La Crosse, Wisconsin; WKBT-TV (CBS), La Crosse, Wisconsin; and WLAX-TV (FOX), La Crosse, Wisconsin. The report further indicates that the area is served by at least four AM radio stations providing at least a 0.5 mV/m signal and nine FM radio stations providing at least a 1 mV/m signal over the entire overlap area. Additionally, the engineering exhibit reflects that the overlap area is served by three cable television systems and five daily and two weekly newspapers. Shockley also asserts that the proposed assignment will not diminish media diversity because the stations serve separate and distinct markets. Not only are the stations licensed in different states, they are also located in different Designated Market Areas ("DMAs"), states Shockley. KXLT is located in the Rochester (MN)-Mason City (IA)-Austin (MN) DMA, ranked 148th, while WXOW is located in the LaCrosse-Eau Claire DMA, ranked 130th. Additionally, according to the engineering exhibit, the communities of license of KXLT and WXOW are approximately 53 miles apart.

4. Next, Shockley states that KXLT and WXOW will be operated independently, with the stations targeting their marketing efforts in different directions: KXLT southwest toward Austin, Minnesota and Mason City, Iowa, and WXOW north toward Eau Claire, Wisconsin. Each station will also maintain separate staffs (including separate engineering staffs) overseen by different general managers and sales managers.<sup>2</sup> In light of the separate and distinct nature of the markets served by KXLT and WXOW, Shockley maintains that it is "highly unlikely" that common ownership of the stations will have even a minimal impact on economic competition within the overlap area.

5. *Discussion.* In adopting the duopoly rule's fixed standard of prohibiting overlap of Grade B service contours, the Commission also acknowledged the need for "flexibility" in that rule's application, noting that waivers should be granted where rigid conformance to the rule would be "inappropriate." *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 FCC 2d 1476, 1479 n.12, *recon. granted in part*, 3 RR 2d 1554 (1964). To that end, the Commission

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<sup>2</sup> According to Shockley, the stations will make independent programming decisions and will air public affairs programs and public service announcements which reflect the interests of their respective markets.

has developed a set of factors to be considered when evaluating an applicant's request for waiver of the duopoly rule, including the extent of the overlap, the number of media voices available in the overlap area, the distinctness of the respective markets, the independence of the stations' operations, and the concentration of economic power resulting from the combination. *See Iowa State University Broadcasting Corporation*, 9 FCC Rcd 481, 487-88 (1993), *aff'd sub nom. Iowans for WOI-TV, Inc. v. FCC*, 50 F.3d 1096 (D.C. Cir. 1995); *H&C Communications, Inc.*, 9 FCC Rcd 144, 146 (1993). After weighing the factors, the Commission considers any public interest benefits proposed by the applicant to determine whether, in light of the overlap, the benefits outweigh any detriment which may occur from grant of the waiver. *See, e.g., Iowa State University*, 9 FCC Rcd at 487-88. As with any waiver, it will only be granted if the Commission concludes that the waiver is in the public interest.

6. Currently, the Commission is reexamining its broadcast television ownership policies, including the duopoly rule. In January 1995, the Commission proposed a new analytical framework within which to evaluate its broadcast television ownership rules. *See Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making*, 10 FCC Rcd 3524 (1995) ("*Television Ownership Further Notice*"). Subsequent to the release of the *Television Ownership Further Notice*, Congress directed the Commission to conduct a rulemaking proceeding to determine whether to retain, modify or eliminate existing limitations on the number of television stations that an entity may control within the same television market. *See* Section 202(c) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) ("*Telecomm Act*"). In response to this Congressional directive in the Telecomm Act and to update the record, the Commission released the *Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making*, FCC 96-438 (released Nov. 7, 1996) ("*Television Ownership Second Further Notice*"). In that *Second Further Notice*, the Commission tentatively concluded to authorize common ownership of television stations that are in separate DMAs and whose Grade A contours do not overlap. *Television Ownership Second Further Notice* at ¶ 57.

7. The Commission stated in the *Television Ownership Second Further Notice* that it will be inclined, during the pendency of the television ownership proceeding, to grant temporary duopoly waivers involving stations in different DMAs with no overlapping Grade A contours, conditioned on coming into compliance with the outcome of the proceeding within six months of its conclusion. It also noted there its tentative conclusion that the record in that proceeding "supports relaxation of the geographic scope of the duopoly rule from its current Grade B overlap standard to a standard based on DMAs supplemented with a Grade A overlap criterion." *Id.* at ¶ 57. The Commission further stated that "we do not believe granting waivers satisfying the proposed standard, and conditioning them on the outcome of this proceeding, will adversely affect our competition and diversity goals in the interim." *Id.* Additionally, the Commission gave the staff delegated authority to act on applications seeking waivers consistent with this interim policy. *Id.*

8. Given the clearly articulated policy in the *Television Ownership Second Further Notice*,

we do not believe that an unconditional grant of Shockley's duopoly waiver is appropriate. See *WHOA-TV, Inc.*, 11 FCC Rcd at 20046-47, 20051. However, we believe that grant of a conditional waiver of the duopoly rule, subject to the outcome of the pending ownership proceeding, is justified. The temporary common ownership of KXLT and WXOW would be consistent with the interim policy set forth in the *Television Ownership Second Further Notice*, as the stations are in separate DMAs and there is no Grade A overlap between KXLT and WXOW. Moreover, our examination of the record presented here reveals nothing suggesting that we should not follow the established interim policy in this case. Accordingly, we conclude that grant of a temporary waiver, conditioned on the resolution of the pending broadcast television ownership rulemaking, will serve the public interest, convenience and necessity. Any requests to extend this conditional waiver should be filed at least 45 days prior to the end of the six-month period and would be closely scrutinized. Additionally, having found the applicants to be qualified in all respects, we conclude that grant of the application for assignment of license would also serve the public interest.

9. Accordingly, IT IS ORDERED, That the request for permanent waiver of the television duopoly rule, Section 73.3555(b) of the Commission's Rules, to permit the common ownership of television stations KXLT-TV and WXOW-TV, IS DENIED; however, a conditional waiver of Section 73.3555(b) IS GRANTED to permit the common ownership of stations KXLT-TV and WXOW-TV subject to the outcome of the Commission's pending broadcast ownership rulemaking in MM Docket Nos. 91-221 and 87-8. Should divestiture be required as a result of that proceeding, Shockley Communications Corporation is directed to file, within six months from the release of the final order in MM Docket Nos. 91-221 and 87-8, an application for Commission consent to dispose of such station as would be necessary for it to come into compliance with the rules as provided in the final order.

10. IT IS FURTHER ORDERED, That the application for assignment of license of KXLT-TV, Rochester, Minnesota, from KX Acquisition Limited Partnership to Shockley Communications Corporation (BALCT-971001IB) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart  
Chief, Mass Media Bureau