

**Before the
Federal Communications Commission
Washington, DC 20554**

FCC 95-408

In re Applications of)	
)	
TAK COMMUNICATIONS, INC.,)	
<i>Debtor-in-Possession</i>)	
)	
For Renewal of Licenses of)	
Station WKOW-TV, Madison, WI	)	File Nos. BRCT-927031LB
Station WXOW-TV, LaCrosse, WI	)	BRCT-927031KP
Station WQOW-TV, Eau Claire, WI	)	BRCT-927031LA
Station WAOW-TV, Wausau, WI	)	BRCT-927031KY
)	
and)	
)	
SHOCKLEY COMMUNICATIONS)	
CORPORATION)	
)	
For Construction Permits for New)	
Commercial Television Stations)	
on Channel 27 at Madison, WI	)	File Nos. BPCT-921103KG
on Channel 19 at LaCrosse, WI	)	BPCT-921103KH
on Channel 18 at Eau Claire, WI	)	BPCT-921103KE
on Channel 9 at Wausau, WI	)	BPCT-921103KF
)	
and)	
)	
TAK COMMUNICATIONS, INC.,)	
<i>Debtor-in-Possession</i>)	
)	
and)	
)	
SHOCKLEY COMMUNICATIONS)	
CORPORATION)	
)	
For Assignment of the Licenses of)	
Station WKOW-TV, Madison, WI	)	File Nos. BALCT-950119LJ
Station WXOW-TV, LaCrosse, WI	)	BALCT-950119LH
Station WQOW-TV, Eau Claire, WI	)	BALCT-950119LI
Station WAOW-TV, Wausau, WI	)	BALCT-950119LK

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 1995 Released: September 28, 1995

By the Commission: Commissioner Barrett dissenting and issuing a statement.

1. The Commission has before it for consideration: (i) the above-captioned license renewal applications of Tak Communications, Inc., Debtor-in-Possession ("Tak-Com") of the named television stations (all ABC affiliates); (ii) the above-captioned mutually exclusive applications for new construction permits filed by Shockley Communications Corporation ("SCC"); (iii) a Joint Request for Approval of Settlement Agreement filed by Tak-Com and SCC and requests by Tak-Com and SCC to withdraw their petitions to deny filed against each other's applications; (iv) the above-captioned applications for assignment of Tak-Com's stations to SCC and SCC's accompanying requests for temporary waiver of the one-to-a-market rule and for a satellite waiver; and (v) a Joint Request for Approval of Settlement Agreement filed by SCC and Mid-West Management, Inc. ("Mid-West"), and request to dismiss Mid-West's petition to deny the assignment of WKOW-TV.

TAK-SCC SETTLEMENT AGREEMENT

2. On January 3, 1991, Tak-Com filed a voluntary petition for reorganization under Chapter 11 of the U.S. Bankruptcy Code. The Commission consented to the transfer of control of the company's licenses to Tak-Com, as a debtor-in-possession, on January 17, 1991. Tak-Com has operated its Wisconsin stations, along with its other broadcast stations under the jurisdiction of the Bankruptcy Court since that time. On July 31, 1992, Tak-Com timely filed applications with the Commission to renew the licenses of the Wisconsin stations. SCC, who had previously attempted to purchase the stations, challenged Tak-Com's request by applying for mutually exclusive construction permits for four new television stations. Thereafter, the parties filed petitions to deny against each other's applications, which extended the already protracted nature of Tak-Com's proceedings both before the Commission and before the Bankruptcy Court. On January 17, 1995, Tak-Com and SCC, entered into two agreements to resolve these pending matters: (i) an asset purchase agreement providing for the sale of the Wisconsin stations to SCC; and (ii) a settlement agreement which contemplates withdrawal of SCC's competing applications and each party's petitions to deny as well as Tak-Com's reimbursement of SCC's expenses generated by the prosecution of its applications ("Tak-SCC Agreement"). The parties represent that on March 25, 1995, the Bankruptcy Court approved both the asset purchase agreement and the Tak-SCC Agreement without objection from Tak-Com's creditors.

3. Section 73.3523 of the Commission's rules, as modified by Public Notice, FCC Waives Limitations on Payments To Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy (FCC-95-591, released September 15, 1995) ("Public Notice"), governs the approval of settlement agreements in cases involving mutually exclusive proposals for new broadcast facilities and comparative renewal

proceedings. We have reviewed the terms of the Tak-SCC Agreement and find that it is consistent with Commission policies as announced in the Public Notice. In this regard, SCC has shown that the proposed reimbursement of \$441,916.29 represents its legitimate and prudent out-of-pocket expenses in prosecuting its competing applications. The expenses are documented by a description of the charges incurred and by accompanying certifications. We further find that the parties have submitted affidavits certifying that, apart from the settlement payments, no other consideration or payment was exchanged for the requests for dismissal of SCC's applications for construction permits or for dismissal of the parties' respective petitions to deny. SCC has also attested to the fact that it did not file its competing applications for the purpose of encouraging a subsequent agreement. Additionally, we have reviewed Tak-Com's petitions to deny and SCC's pleadings against Tak-Com. We conclude that these pleadings do not raise a substantial or material question of fact which requires further inquiry. See Booth American Company, 58 FCC 2d 553, 554 (1976). In sum we find that the Tak-SCC Agreement is consistent with Commission rules and policies and will serve the public interest.

TEMPORARY WAIVER OF THE ONE-TO-A-MARKET RULE

4. Currently, SCC is the licensee of station WLOX-FM, Baraboo, Wisconsin, and it owns 25% of ODON Madison Station Limited Liability Company ("ODON"), licensee of station WMXF(FM), Sauk City, Wisconsin. SCC also has a five-year option to acquire the remaining equity in ODON. Because both Baraboo and Sauk City are within the predicted Grade A contour of station WKOW-TV, the proposed acquisition would violate Section 73.3555(c)(2) of the Commission's Rules, which prohibits the common ownership of a radio station and a television station if the radio station's community of license is located within the television station's predicted Grade A contour. 47 C.F.R. Section 73.3555(c)(2) (1994). Accordingly, SCC requests a temporary twelve-month waiver of the one-to-a-market rule.

5. Within that twelve-month waiver period, SCC proposes to divest itself of its interests in radio stations WOLX(FM), Baraboo, and WMXF(FM), Sauk City, Wisconsin. In support of its request, SCC asserts that a twelve-month period is necessary because it will permit SCC's acquisition of WKOW-TV to proceed more expeditiously than would otherwise be the case, which will facilitate the resolution of Tak-Com's bankruptcy proceeding and attendant payments to creditors.¹ SCC also asserts that SCC's disposition of the radio stations will be undertaken in a more orderly fashion than would otherwise be the case if a forced sale were required because forcing an immediate sale would artificially limit the range of potential buyers to those with immediate access to the necessary capital. SCC contends that a forced sale could work an economic hardship on SCC without significant offsetting public benefits.

¹SCC modified its original request for a permanent waiver to a request for a temporary waiver pursuant to a May 1, 1995 settlement agreement with Mid-West Management, Inc., which is discussed infra. See ¶ 15.

6. SCC also asserts that the sale will not reduce media competition and diversity in the Madison, Wisconsin area. SCC states that after its acquisition of WKOW-TV, the Madison market will continue to have 9 separately-owned television stations and voices and 21 radio stations with 12 separate radio voices for a total of 21 separate television and radio voices. In addition, SCC states, Madison has a 36-channel cable television service, a 22-channel wireless cable service, and a substantial number of daily, weekly, monthly and quarterly print media. SCC concludes that the Madison, Wisconsin market is sufficiently large, when all media voices are taken into account, to warrant a grant of its temporary waiver request.

7. Based on the representations provided above, we believe that a temporary twelve-month waiver of Section 73.3555(c)(2) is consistent with Commission precedent and will serve the public interest. See, e.g., Knoxville Channel 8 Limited Partnership, 4 FCC Rcd 4760 (1989). As we have stated in the past, the primary goals of our multiple ownership rules are to promote diversity of ownership and viewpoint, as well as to prevent any undue concentration of economic power contrary to the public interest. We find that a temporary waiver of our multiple ownership rules will not appreciably hinder diversity or competition in the Madison market. SCC has shown that if the assignment is granted, the Madison market will still have 9 separate television voices and 12 separate radio voices for a total of 21 voices. Further, we do not believe that requiring an immediate sale of the radio stations would be in the public interest. We concur in SCC's contention that such a forced sale would artificially limit the range of potential buyers to those with immediate access to the necessary capital, and could work an economic hardship on SCC without significant offsetting public benefits. See Citadel Communications Company, Ltd., 5 FCC Rcd 3842 (1990). Instead, we believe that a twelve-month waiver period would provide the opportunity for a broader range of potential buyers, thus serving our policies of diversity and economic competition. Finally, approval of the temporary waiver serves the public interest because it will permit SCC's acquisition of WKOW-TV and the resolution of Tak-Com's bankruptcy proceeding and attendant payments to creditors to proceed more expeditiously than would otherwise be the case, thus effectuating our broad interest in accommodating bankruptcy proceedings. In any event, under our "failed station" standard, applications seeking permanent waiver of the one-to-a-market rule filed by broadcast stations that are involved in bankruptcy proceedings are looked upon favorably by the Commission. 47 CFR § 73.3555, Note 7. Since WKOW-TV is involved in Chapter 11 bankruptcy proceedings, it would qualify for this "failed station" exception to the one-to-a-market rule.

SATELLITE WAIVER

8. Station WQOW-TV, Eau Claire, Wisconsin, is authorized to operate as a satellite of WXOW-TV, LaCrosse, Wisconsin. SCC proposes to continue satellite operation of the station, and it requests grant of the application pursuant to the exception to the duopoly prohibition for satellite operations as set forth in Note 5 of Section 73.3555 of the Commission's Rules.

9. Under our satellite policy, see Television Satellite Stations, 6 FCC Rcd 4212 (1991), (petitions for partial stay and reconsideration pending),² an applicant for satellite status is entitled to a presumption that the proposed operation is in the public interest if it meets the following three criteria: (1) there is no City Grade contour overlap between the parent and satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. 6 FCC Rcd at 4213-14. Applicants meeting this criteria, when unrebutted, will be viewed favorably by the Commission. Id. at 4214. For the reasons set forth below, we find that the continued operation of WQOW-TV as a satellite of WXOW-TV is consistent with our satellite policy.

10. With respect to the first criterion, a review of the authorized facilities of the stations demonstrates that the City Grade contours of WQOW-TV and WXOW-TV do not overlap. With respect to the second criterion, an applicant can use two different tests to demonstrate that an area is underserved. Under the "transmission test," a proposed satellite community of license is considered underserved if there are two or fewer full-service stations already licensed to it. Television Satellite Stations, 6 FCC Rcd at 4215. Our records show that WEAU-TV is the only station licensed to Eau Claire, Wisconsin. Therefore, the area is underserved.

11. As to the third criterion, to qualify for the presumption, an applicant must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. Sharad Tak, President of Tak-Com, states that in the last four years, there have been four possible buyers for the stations, none of whom had any interest in operating WQOW-TV as a stand-alone station. Richard L. Beesemyer, Vice President of Kalil and Co., Inc., a media brokerage firm, also submitted a letter to the Commission regarding WQOW-TV. Mr. Beesemyer states that in his expert opinion, the demographics of the LaCrosse-Eau Claire market, the existing competition from network affiliates operating on powerful VHF frequencies, and the inability of WQOW-TV operating on UHF Channel 19 to reach more than one-third of the audience reached by its VHF competitors, combine to make WQOW-TV wholly undesirable to any reasonable buyer as a stand-alone station.

12. Based on the above, we believe that the applicant has adequately demonstrated the unlikelihood of finding an alternative operator willing and able to operate WQOW-TV as a full-service stand-alone facility. See Stauffer Communications, Inc., 10 FCC Rcd 5165

²We note that there is an outstanding proceeding concerning television satellite stations, which invites comment on whether television satellites should be exempted from the 12-station limit set out in the multiple ownership rules. Second Further Notice of Proposed Rulemaking in MM Docket No. 87-8, 6 FCC Rcd 5010 (1991). See also Further Notice of Proposed Rulemaking in MM Docket Nos. 91-221 and 87-8, FCC 94-322, released January 17, 1995. Grant of the ampliation before us would not in any event implicate the 12-station rule.

(1995). Thus, we conclude that a sufficient basis has been established for finding that continued operation of WQOW-TV as a satellite of WXOW-TV would be in the public interest. Having determined that the applicants are qualified in all other respects, we find that grant of the assignment applications will serve the public interest, convenience and necessity.

MID-WEST SETTLEMENT AGREEMENT

13. Finally, Mid-West, licensee of WTDY(AM) and WMGN(FM), Madison, Wisconsin, filed a petition to deny the assignment application for station WKOW-TV. Mid-West opposed SCC's initial request for a permanent waiver of the Commission's one-to-a-market rule. SCC and Mid-West, however, later reached an agreement, ("Mid-West Agreement") regarding this issue and on May 2, 1995, submitted a Joint Request for Approval of Settlement Agreement. The Mid-West Agreement provides for: (1) the dismissal of Mid-West's petition to deny; (2) the amendment of SCC's assignment application substituting a request for a twelve-month waiver of the multiple ownership rules; and (3) SCC's partial reimbursement of Mid-West's expenses for prosecution of its petition to deny.

14. The Mid-West Agreement complies with the requirements for Commission approval of agreements to dismiss petitions to deny. 47 CFR § 73.3588. The parties have submitted affidavits certifying that no consideration or payment in excess of legitimate and prudent expenses was exchanged for the request for dismissal of Midwest's petition. Mid-West has also submitted an accounting of expenses to show that its reimbursement of \$9,000 does not exceed its legitimate and prudent expenses.³ Further, we have reviewed the matters raised by Mid-West and they do not raise any substantial and material questions of fact. See Booth American Company, 58 FCC 2d 553. For these reasons, we find that approval of the Mid-West Agreement will serve the public interest.

15. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Expedited Approval of Settlement Agreement filed by Tak Communications, Inc., Debtor-in-Possession and Shockley Communications Corporation IS GRANTED, the applications for construction permits for new television broadcast facilities (BPCT-921103KE, BPCT-921103KF, BPCT-921103KG and BPCT-921103KH) filed by Shockley Communications Corporation ARE DISMISSED conditioned upon notification to the Commission that the Settlement Agreement has been consummated, the reimbursement to the applicant in an amount not to exceed, \$441,916.29 IS APPROVED, the Consolidated Petition to Dismiss or Deny SCC's Applications filed by Tak Communications, Inc., Debtor-in-Possession IS DISMISSED and the Consolidated Petition to Dismiss, the Consolidated Petition to Deny and all pleadings directed against Tak Communications, Inc., Debtor-in-Possession filed by Shockley Communications Corporation ARE DISMISSED WITH PREJUDICE.

³ Counsel have certified to the billing of \$13,000 in legal fees and expenses in connection with the preparation, filing and prosecution of Mid-West's petition to deny.

16. IT IS FURTHER ORDERED, That the Joint Request for Approval of Settlement Agreement, filed jointly by Shockley Communications Corporation and Mid-West Management, Inc. IS GRANTED; and that the Petition to Deny the license assignment application for WKOW-TV (BALCT-950119LJ), filed by Mid-West Management, Inc. IS DISMISSED and reimbursement to petitioner in an amount not to exceed \$9,000 IS APPROVED.

17. IT IS FURTHER ORDERED, That the license renewal applications for WKOW-TV, WXOW-TV, WQOW-TV and WAOW-TV (BRCT-927031LB, BRCT-927031KP, BRCT-927031LA, and BRCT-927031KY, respectively), filed by Tak Communications, Inc., Debtor-in-Possession, ARE GRANTED; that the request for temporary waiver of Section 73.3555(c) IS GRANTED, subject to the condition that Shockley Communications Corporation divest itself of its interests in WOLX(FM), Baraboo, and WMXF(FM), Sauk City, Wisconsin no later than twelve months from the consummation of the instant assignment transaction; that the request for operation of station WQOW-TV, Eau Claire, Wisconsin, pursuant to the satellite exception to Section 73.3555 of the Commission's Rules, IS GRANTED; and that the applications to assign the licenses of WKOW-TV, WXOW-TV, WQOW-TV and WAOW-TV (BALCT-950119LJ, BALCT-950119LH, BALCT-950119LI and BALCT-950119LK, respectively) from Tak Communications, Inc., Debtor-in-Possession, to Shockley Communications Corporation ARE GRANTED.

18. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the parties herein by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

DISSENTING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Applications of Tak Communications, Inc. (Debtor in Possession) for the Renewal and Assignment of Licenses of WKOW-TV, Madison, Wisconsin, WXOW-TV, Lacrosse, Wisconsin, WQOW-TV, Eau Claire, Wisconsin and WAOW-TV, Wassau, Wisconsin and Applications of Shockley Communications Corporation for Construction Permits for New Commercial Television Stations on Channel 27 at Madison, Wisconsin, Channel 19 at Lacrosse, Wisconsin, Channel 18 at Eau Claire, Wisconsin, and Channel 9 at Wassau, Wisconsin.

By this action today, the Commission, among other things, grants the Joint Request for Expedited Approval of Settlement Agreement filed by Tak Communications, Inc., Debtor in Possession ("Tak") and Shockley Communications Corporation ("SCC"). In taking this action, the Commission finds that the Tak-SCC Agreement is consistent with Commission rules and policies and will serve the public interest. Specifically, the Commission finds that the Tak-SCC Agreement is consistent with Commission policies as announced in Public Notice, FCC Waives Limitations on Payments To Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy (FCC-95-591, released September 15, 1995) ("Public Notice"). The concerns that I expressed when I did not support the Public Notice are now apparent. As a result, I feel obliged to dissent to the actions we take today.

As indicated in my dissent to the Public Notice, the Commission's adoption of the prohibition against "green mail" was developed as a means of ensuring that only those parties that were interested in providing new services or that had mounted a legitimate challenge to the renewal of a broadcast license would be subject to the comparative hearing process. This prohibition, I would argue, is clearly in the public interest. I supported the Commission's original decision because of my concern that new service to consumers would be delayed by parties whose sole purpose was to garner monies through the comparative hearing process. I also supported the decision to apply the prohibition to the mutually exclusive renewal applications as the Commission began to recognize that there were, in certain instances, unsubstantiated challenges levied against broadcasters with sound records. By permitting settlements such as the one proposed in Tak-SCC, I am convinced that the Commission, while attempting to reduce a backlog of applications, will instead approve behavior that disserves the public interest.

As I have stated before, I believe that the best strategy for reducing the backlog of comparative hearing matters for renewal and new service applications would simply be to address the outstanding issues in a rule making proceeding. This Commission action has only served to strengthen my conviction against the ninety (90) day waiver of the "green mail" prohibition. I therefore feel compelled to dissent in this matter.