Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Complaint and Request for Emergency Relief	)
Regarding Shared Services Agreement	)
between Raycom Media and MCG Capital for	)
Joint Operation of Television Stations KHNL,	)
KFVE, and KGMB, Honolulu, Hawai`i	)

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Summary

Media Council Hawai'i replies to the Responses of Raycom Media, Inc. and MCG/HITV, the licensee of KGMB, that attempt to discredit Media Council Hawai'i's claims as speculation and hearsay. However, the Broadcast Parties have not identified a single factual claim as untrue. Indeed, the Shared Services Agreement submitted by Raycom provides additional support for the Media Council Hawai'i's claim that this arrangement violates the Commission's rules prohibiting unauthorized transfers of control and the Local Television Ownership Rule.

If the Commission fails to act, Raycom will obtain *de facto* control over KGMB. Raycom will be ultimately responsible for the programming, personnel, and finances of KGMB. Raycom will provide KGMB with prepackaged local news programs, produce University of Hawai'i sports programming and local cultural programming, and reimburse MCG for all costs associated, along with programming contracts. Raycom will also pay the salaries of both KGMB's employees. These two employees will replace the over sixty that were employed by KGMB. The new general manager of KGMB is the same individual who was previously General Manager of the Raycom stations. In addition to paying almost every expense associated with the running of KGMB, Raycom will furnish the employees who will sell the advertising time on KGMB. Raycom has also given a promissory note to MCG. This information makes it clear that, regardless of contractual language preserving certain rights to MCG, Raycom will be making the decisions regarding core station functions.

Raycom and MCG are unable to point to a decision in which a similar arrangement was upheld by the Commission. They cite a handful of Media Bureau letter rulings issued from 2004 to 2008, but none appear to present facts identical to those here. For example, none addressed a situation where a licensee, that already had two television stations in a market, entered into an

agreement to provide programming and other services to a third station. None also involved the transfer of a network affiliation so that a licensee would have two major network affiliates in violation of the top-four limitation. In any event, applications for review by the full Commission of several of these Bureau decisions are pending. These applications persuasively demonstrate that the Media Bureau decisions ignored the public interest, misinterpreted Section 73.3555, misapplied the Commission's standards for station control and raised important policy questions that require Commission action. The sole Commission decision cited actually demonstrates that the arrangement here violates Commission policy

Raycom and MCG claim that this arrangement is necessitated for the economic survival of the stations. However, if this is the case, they should request a waiver under the Commission's failing station policy. The fact that the economy is not doing well cannot justify ignoring the Commission's rules and polices.

Thus, Media Council Hawai'i reiterates its request that the Commission issue an order directing that Raycom and MCG show cause why a cease and desist order should not be issued to enjoin the implementation of the Agreement and/or revoke their licenses. If the Commission does not act promptly to stop this end run around its ownership limits, stations all over the will likely enter into similar arrangements, thus rendering the upcoming 2010 Quadrennial Review of local television rules virtually meaningless, as substantial consolidation will have occurred even without changing the rules.

TABLE OF CONTENTS

Page

Summary i

A. The Reponses Provide Additional Evidence that Raycom is Taking Control over a Third Television Station and a Second Network Affiliate 2

B. If the Commission Fails to Act, Raycom will obtain Control over KGMB 4

C. The Commission has Never Approved of a Similar Arrangement 8

D. This Agreement is Not Justified by Economic Conditions 11

Request for Relief 12

REPLY TO RESPONSE

Media Council Hawai`i replies to the Responses of Raycom Media, Inc. ("Raycom") filed October 16, 2009, and HITV Licensee Subsidiary on behalf of MCG Capital Corp. ("MCG") filed October 19, 2009 (collectively "Broadcast Parties").

Although the Broadcast Parties try to brush off Media Council Hawai`i's concerns as "misconceptions, speculation and hearsay press reports that are incorrect," they fail to identify a single factual allegation made by Media Council Hawai`i that is incorrect.[1] Indeed, the Shared Service Agreement ("SSA") attached to Raycom's Response, as well as certain statements in the Responses lend additional support to Media Council Hawai`i's allegation that Raycom is effectively taking over the CBS television affiliate KGMB in violation of both §310(d) of the Communications Act and the Local Television Multiple Ownership rule. Stripped of rhetoric, the Broadcast Parties' put forth two claims: first, that the agreements do not give Raycom *de facto* control over KGMB but are "routine" and consistent with FCC policy, and second, the agreements are necessitated by the poor economy. Media Council Hawai`i demonstrates that both contentions are unfounded and the only unprecedented action here is the extent to which the Broadcast Parties are flouting the FCC rules.

At the outset, we note that Broadcast Parties direct their response to the Media Bureau. However, only the full Commission can resolve the issue here. Section 0.283(c) of the FCC rules requires that the Media Bureau refer matters presenting novel question of law, fact or policy to the full Commission. As discussed below, this case presents novel questions. Moreover, several

[1]Raycom Response at ii. This is because the Complaint is largely based on statements made in Raycom's own press release, by representatives of the Broadcast Parties at their press conferences, and news coverage from the Raycom and MGC own stations. Such statements constitute admissions rather than hearsay. Fed. R. Evid. 801(d)(2).

of the Media Bureau decisions that the Broadcast Parties rely upon are subject to pending applications for review to the Commission.[2]

If the Commission does not act promptly to stop this end run around its ownership limits, stations all over the country that are experiencing financial difficulties will enter into similar arrangements. If this deal is not found to be a *de facto* transfer of control, what is to stop other stations, without even telling the Commission, to take over the operation of one, two or more stations in the same market, regardless of market size? The Commission's failure to act would also render the 2010 Quadrennial Review of the local television rules virtually meaningless, as substantial consolidation will have occurred even without changing the rules.[3]

A. The Reponses Provide Additional Evidence that Raycom is Taking Control over a Third Television Station and a Second Network Affiliate

To fully understand what is occurring in Honolulu, the Commission needs to examine at least four different agreements: the Shared Services Agreement (SSA), the Asset Exchange Agreement (Exchange Agreement), the Options Agreement and the Studio Lease. Unfortunately, Raycom has only provided an incomplete copy of the SSA, which, in the absence of a standstill order, will be signed on Monday, October 26, 2009.[4] Once consummated, Raycom will directly control two stations, KHNL-TV, an NBC affiliate, and KFVE(TV), which will become a CBS-affiliate and change its call sign to KGMB. Although technically, KGMB (whose call sign will change to KFVE) will be licensed to MCG, Raycom will control the core

[2] See *infra* at note 31.

[3] Although the Commission has the power to order divestures, as a practical matter, the Commission has been reluctant to use this authority. See, e.g. *Tribune*, *Fox*.

[4] Counsel for Raycom has ignored Media Council Hawai`i's request for copies of the other agreements. Email from Angela Campbell to Jonathan Blake, October 16, 2009. On October 23, 2009 the Commission required Raycom and MCG to disclose all the relevant agreements involved in this transaction, however they had not been delivered to Media Council Hawai`i by the time of this filing.

Section 1(b) of SSA purports to reserve certain functions for MCG. For example, MCG remains responsible for program selection, procurement and scheduling, and control over sales staff (provided by Raycom) that will sell advertising time on KGMB. Yet, the SSA only requires MCG to have two employees, one of whom is managerial. It is difficult to imagine how a station that had over 60 employees can be run by only two. Moreover, one of the two employees at MCG licensed station, Raycom admits, will be the former General Manager of the Raycom's stations.

Raycom also acknowledges that it will deliver a promissory note to MCG. However, it does not disclose the amount of this note. Although MCG must pay a "service fee" to Raycom for the services rendered, neither party has disclosed the amount of this fee.[9] Finally, Raycom has an option to purchase the station outright at a later date. Again, however, neither party has yet to provide any of the details of the option agreement.[10] But even in the absence of this information, it is clear that Raycom is effectively taking over the operation of the station currently known as KGMB as well as acquiring the CBS network affiliation for its station currently known as KFVE.

B. If the Commission Fails to Act, Raycom will obtain Control over KGMB

Broadcast Parties contend that MCG and Raycom will continue to retain the requisite control over the core functions of their respective stations, including programming, personnel and finances, by citing to SSA Section 1(a) which states that "neither Party shall have any right

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[9] In other cases, the Media Bureau has required licensees to disclose the full details about the finances to permit a thorough analysis. *See Piedmont Television of Springfield License,* LLC, 22 FCC Rcd 13910 (M.B. 2007).

[10] Raycom originally disclosed to Barbara Kreisman that Raycom would have the option to purchase KGMB. In a later email Raycom said that it would assign the option to Ottumwa Media Holdings, LCC. Email from Jonathan Blake, Counsel for Raycom to Barbara Kreisman, Fed. Comm. Comm'n, Chief, Video Division, Media Bureau (October 16, 2009).This change, occurring only after Media Council Hawai'i objected raises questions about Raycom's intentions.

functions of the station for seven years, which can be automatically extended for five additional years.[5]

Specifically, Raycom will provide, with a few exceptions discussed below, all "services, equipment, assets, and facilities, as my be reasonably necessary and appropriate for the business and operation of KGMB." The services provided by Raycom to KGMB include the promotion of the station, including graphic design, production, media placement and buying, continuity, traffic support, back-office and other related functions for the operations of KGMB, master control function, maintaining KGMB's transmission facilities, grounds-keeping, janitorial services, maintenance, and security for the main studio facilities and transmitter. KGMB will share the facilities with the Raycom stations and Raycom will be responsible for the "decommissioning of the tower at KGMB's Kapiolani Boulevard studios," thus making it virtually impossible for KGMB to resume operations separate from Raycom.[6]

In addition, Raycom will have substantial control over the programming on KGMB. The SSA confirms that Raycom will be using its own personnel and facilities to "provide live-feed, fully-staffed and produced newscasts" to KGMB. Raycom will maintain editorial control and responsibility for the content of the news. MCG may pre-empt this programming only in limited circumstances.[7] In addition to providing newscasts, Raycom will provide University of Hawaii sports and coverage of local cultural events. MCG obtained the rights to the University of Hawai`i sports programming from Raycom as part of the asset exchange.[8] However, under the SSA Section 2(i)(i), Raycom will continue to produce this programming and provide it to MCG.

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[5] SSA §8
[6] SSA §§ 1(b); 2(a); 2(b); 2(c); 2(e); 2(f).
[7] SSA §§ 2(h)(i); 2(h)(iii)
[8] Email from Jonathan Blake, Counsel for Raycom to Barbara Kreisman, Fed. Comm. Comm'n, Chief, Video Division, Media Bureau (Oct. 16, 2009).

to control the policies, operations, management, or other matters relating to the Station owned and operated by the other Party." However, the Commission looks past the title or language of an agreement to examine what is actually taking place.[11] Thus, merely stating that each party will maintain control over its station is not enough when the facts show otherwise.

Programming. The Parties argue that because Raycom will supply less than 15% of KGMB's weekly programming, and therefore ownership should not be attributed to Raycom under the FCC's attribution rules.[12] However, this argument conflates the attributable interest threshold with the test for determining whether an unauthorized transfer of control has occurred. The Commission uses the 15% threshold to determine whether station A has an attributable interest in station B when station A provides programming to station B, another station in the same market.[13] The 15% threshold does not determine whether the *licensee* of Station B still maintains control over Station B's programming. What matters is who actually controls the programming, not the amount of programming provided by another station.[14]

Here, Raycom will provide up to 15% of KGMB's programming in the form of local newscasts, and also provide the University of Hawai`i sports programming and local cultural programming. KGMB will lack any production facilities or staff to produce programming on its own. Although the Broadcast Parties do not state whether KGMB has also acquired KVFE's

[11] *See Golden Triangle Radio, Inc.*, 17 FCC Rcd 5373, 5386, ¶ 43 (2002); *Southwest Texas Public Broadcasting Council For Renewal of Licenses*, 85 FCC 2d 713, 715 (1981); *Nexstar Broadcasting, Inc.*, 23 FCC Rcd 3528 (M.B. 2008).
[12] Raycom Response at 7.
[13] Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interest, *Report and Order,* 14 FCC Rcd 12559 (1999) (*"Attribution Order"*).
[14] *See, e.g,. Golden Triangle*, 17 FCC Rcd at 5386, ¶ 44; *Solar*, 17 FCC Rcd at 5486, ¶71; *Applications of Brian L. O'Neill*, 6 FCC Rcd 2572, 2575, ¶ 26 (1991); *Roy R. Russo, Letter*, 5 FCC Rcd 7586, 7587 (1990). Even if providing 15% of the programming were the relevant test for control over programming, it appears that Raycom may exceed that amount. Although the Broadcast Parties estimate that Raycom will provide 6.5% of KGMB's programming in the form of local news broadcasts, it is permitted to provide up to 15%. In addition, Raycom is producing the University of Hawaii sports programming and cultural programming and paying for other program contracts. Thus, Raycom will likely provide more than 15% of the programming shown on KGMB.

network affiliation agreement with MyNetworkTV, presumably these rights were included as part of the Asset Exchange, and KGMB will continue to run all of the programming that now airs on KVFE. However, Raycom will pay for the MyNetworkTV or other programming, as the SSA requires it to reimburse MCG for any expenses associated with programming, including program licensing and contract fees and costs associated with acquiring and maintaining network affiliation.[15] In addition, even though KGMB's General Manager will nominally be responsible for the programming on KGMB, Raycom also pays his salary under SSA Schedule 2, ¶12. Thus, it is clear that Raycom will have ultimate control over programming on KGMB.

Personnel. After the SSA takes effect, MCG will have only two employees instead of over 60. Raycom will reimburse MCG for their salaries.[16] Raycom admits that John Fink, the current General Manager of the Raycom stations will be hired as the General Manager of KGMB.[17] It also admits that a "Content Manager" hired by Raycom will "assist" in providing news programming to KGMB subject to HITV's supervision.[18] However, since the same news programming will be simulcast on both stations, HITV's right to "supervise" is meaningless. Thus, Raycom employees will be handling virtually all of the station's operations, from janitorial services to producing the local newscasts and selling the advertising time.

Broadcast Parties argue that maintaining two employees is enough demonstrate that no transfer of control has occurred, citing *Jones Eastern of the Outer Banks Inc.*[19] In *Jones Eastern,* the Commission found that a radio station could comply with the requirement to maintain "meaningful management and staff presence" so long as it had two employees, including a

[15] *See* SSA at Schedule 2, ¶6.
[16] SSA at Schedule 2, ¶ 12.
[17] Raycom Response at 8, n. 18.
[18] *Id.* at n. 19.
[19] Raycom Response at 8.

manager, working at its main studio.[20] In that case, however, the station had more than two employees, but they worked at a different studio. Thus, *Jones Eastern* does not support the Broadcast Parties' position. And even assuming, for arguments sake, that two employees could run a radio station, television station operations are much more complex than radio stations and require more personnel to maintain control. Because KGMB will only have two employees, both of whom will be paid by Raycom, and one of whom is a former Raycom manager, it is clear that Raycom has ultimate control over personnel.

Financial. The SSA provides further evidence that Raycom will exercise control over the finances of KGMB. Raycom is obligated to reimburse MCG for the majority of expenses associated with the running of KGMB. Raycom will pay all costs associated with the operation of KGMB and the maintenance of its licenses; all lease payments for equipment or property; all utility costs; all legal, accounting, and clerical fees and expenses related to annual audits; all program licensing and contract fees; music licensing fees; insurance, security, equipment and vehicle expenses; payments of commissions to ad rep firms, and intellectual property licensing fees; all real estate and personal property taxes; all FCC regulatory fees; all costs associated with operation of the Stations; all necessary engineering costs; all costs incurred by KGMB that are consistent with past practices; and all employee costs and expenses.[21] Although MCG is to pay Raycom a fee for the services provided, the Broadcast Parties have not disclosed the amount of the fee, how it is assessed, or how it compares to the expenses incurred by Raycom.

The parties have yet to disclose other key financial information. They explain that "HITV will sell advertising on HITV-22 and will obtain and retain the revenue from such sales,

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[20] *Jones Eastern of the Outer Banks Inc.*, 6 FCC Rcd 3615, 3615 ¶ 1 (1991), *clarified*, 7 FCC Rcd 6800 (1992), *aff'd* 10 FCC Rcd 3759 (1995)7 FCC Rcd at 6801 ¶9.
[21] SSA at Schedule 2.

subject to payment of its obligations."[22] But they do not say what the "obligations" comprise. Because two employees would not be sufficient to sell the advertising time on KGMB, Section 2(g) of the SSA provides that Raycom will provide KGMB with employees to sell advertising time on KGMB. Raycom will pay their salaries and their workers compensation and liability insurance. Although Raycom promises to take "reasonable measures" to ensure that KGMB's advertising rates are not shared with other Raycom employees, it is difficult to imagine how this could be possible where the employees are hired, trained, and paid by Raycom. Although the Broadcast Parties claim that this arrangement differs from a Joint Sales Agreement, it is a difference in form not in substance. Thus, if permitted to proceed, Raycom will obtain control over the core functions of KGMB.

C. The Commission has Never Approved of a Similar Arrangement

Contrary to the Broadcast Parties' arguments, the Commission has never found that a similar arrangement was consistent with the Communications Act and FCC rules and policies. Broadcast Parties cite only one Commission decision in support of its argument that the Agreement complies with well-established rules and precedent.[23] That decision, however, demonstrates that the arrangement here violates Commission policy. In *Clear Channel*, the Commission denied a petition for reconsideration of its decision in *Ackerley Group, Inc.*[24] In that case, the Commission found that Clear Channel's assumption of Ackerley's Time Brokerage Agreement (TBA) with another television station serving the Monterrey-Salinas DMA that was licensed to Seal Rock, created an unlawful duopoly. It found that

[22] Raycom Response at 9 (emphasis added).
[23] *See Id. at 3.* (citing *Clear Channel Broadcasting Licenses, Inc.*, 22 FCC Rcd 21196, 21205-06 at ¶¶ 21-25 ("*Clear Channel*") (2007)).
[24] *Ackerley Group, Inc.*, 17 FCC Rcd 10828 (2002).

> After examining the full extent of the relationship between Ackerley and Seal Rock, in particular the joint sales arrangement . . as well as Ackerley's response to the staff's inquiry. . we do not believe that the 15% limitation recited in the TBA is sufficient to avoid attribution. The combination of agreements raises a level of concern sufficient for the Commission to closely examine the facts of this case. [25]

This review determined that Seal Rock lacked an economic incentive to control the 85% of programming not provided by the broker, and consequently, the Commission required the parties to change the terms of the agreement so that the broker would be limited to the advertising revenues soley from the programming it provided.[26] In *Clear Channel,* the Commission denied reconsideration because it found that the revised version of the agreement gave Seal Rock an incentive to collect as much advertising revenue from its programming as possible, as well as to limit the amount of expenses reimbursed by Ackerley from revenue collection.[27]

Unlike *Clear Channel,* the Broadcast Parties' agreement does not to leave MCG with an economic incentive to collect as much revenue as possible from its programming. It has little control over the programming, all of its operating expenses are reimbursed by Raycom, the advertising time on KGMB will be sold by Raycom employees under MCG's "supervision." Although the revenues are supposed to go to MCG, MCG in turn must pay an undisclosed amount of "service fees" to Raycom. Since Raycom is bearing virtually all of the risks of operating KGMB, it is inconceivable that it is also not getting most of the rewards through the "service fee" or another mechanism.

The only other decisions cited by the Broadcast Parties are a handful of Media Bureau letter rulings issued from 2004 to 2008. None appear to present facts identical to those presented

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[25] *Id.* ¶ 31.
[26] *Id.* ¶ 33.
[27] *Clear Channel*, 22 FCC Rcd at 21206 ¶ 25.

here.[28] The outcome in each case depended on a careful review of the specific facts of the arrangements, which differ in material respects from the Raycom-MCG arrangement.[29] For example, none of the cases addressed a situation where a licensee that already had two television stations in a market entered into an agreement to provide programming and other services to a third station. Similarly, none involved the transfer of a network affiliation so that a licensee would have two major network affiliates in violation of the top-four limitation.

We are also aware of no case where the Media Bureau allowed an agreement that made it impossible for the station sharing service to operate independently by taking down its tower and selling its studio. Nor do we know of any that included a call sign swap. The Broadcast Parties do not deny that Raycom's vice president Dave Folsom publicly stated that the plan is to "take CBS and NBC programming and place those on channels that *Raycom* currently has, and the University of Hawaii sports and other programming would go on to what was KGMB, which will be KFVE . . . . Don't worry about the underlying licenses, the viewers don't see the licenses anyway."[30] Nor do the Broadcast Parties even attempt to explain how this arrangement is consistent with the top-four limitation.

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[28] Because the Media Bureau decisions are short and do not include copies of the relevant agreements, and because Raycom has not submitted all of the relevant agreements yet, a comprehensive comparison is not possible. Further, one Media Bureau ruling cited by HITV in its response is unpublished and could not be located. HITV at 4, n.3, citing Letter from Barbara A. Kreisman to KAAL-TV, Inc (Mar. 11, 2005), *app. rev pending*. Nonetheless, each case presents somewhat different facts. For example, in *Chelsey Broadcasting Co. of Youngstown, LLC,* 22 FCC Rcd 13905 (M.B. 2007), the Bureau permitted a somewhat similar sharing agreement only after determining that the station receiving the services maintained financial control because it would retain 100% of the advertising revenue and that the service fee paid was less than the actual operating costs. In contrast here, we do not know how the service fee compares to the advertising revenues.

[29] For example, in *CMF Communications, LLC,* 20 FCC Rcd 9738 (M.B. 2005), the two stations with a sharing arrangement did not share a studio. Moreover, the Bureau required modification of the agreement to ensure that the station providing the 15% local programming, would unlike here, have no influence over the other programming provided by the station.

[30] Erika Engle, *Execs explain TV swap, but some see it as blurry*, Honolulu Star Bulletin, Aug. 20, 2009 (emphasis added).

However, even assuming for purposes of argument that the Raycom-MCG arrangements did not differ in any material respect from those previously allowed by the Media Bureau, all of those decisions are premised on the Media Bureau's 2004 decision in *Malara.*[31] An Application for Review to the full Commission has been pending in the *Malara* case since 2005. Applications for Review are pending in several other cases as well.

The Applications for Review, which are attached for the convenience of the Commission, persuasively demonstrate that the Media Bureau decision ignored the public interest, misinterpreted Section 73.3555, misapplied the Commission's standards for station control and raised important policy questions that require Commission action. For example, the *Application for Review in Piedmont Television of Springfield* argued that

> What the Bureau has authorized in Springfield is nothing short of a complete evisceration of the Commission multiple ownership rules. . . Taken to its logical conclusion, the Decision would support the combination of three, four or more television stations within the same market so long as the legalistic forms of agreements were observed, at least on paper.[32]

Because the Commission has never found a similar arrangement to be consistent with the Communications Act requirement that it must review and approve all license transfers in advance, or with its local television ownership rules, the Media Bureau cannot find the Raycom-MCG arrangement to be consistent with the public interest.

D. This Agreement is Not Justified by Economic Conditions

Broadcast Parties argue that the SSA is imperative for the economic survival of the stations. However, if that is true, then the Broadcast Parties should file an application to transfer with a request for a waiver. Note 7 to §73.3555 provides for waivers of the local television

[31] *Malara Broadcast Group of Duluth Licensee LLC*, 19 FCC Rcd 24070 (M.B. 2004), application for review filed by KQDS Acquisition Corp. et al. on Jan. 13, 2005.
[32] *E.g,. Piedmont Television of Springfield License,* LLC, 22 FCC Rcd 13910 (M.B. 2007), application for review filed by Koplar Communications on Aug. 29, 2007.

limits where the applicants show that "the in-market buyer is the only entity ready, willing and able to operate the station, that sale to an out-of-market applicant would result in an artificially depressed price, and that the waiver applicant does not already directly or indirectly own, operate, or control interest in two television stations within the relevant DMA." The note further explains that the Commission will entertain waiver requests where one of the stations is failed or failing, and provides definitions for those terms. Although it does not appear that Raycom and MCG would qualify for such a waiver, it is impossible to tell in the absence of an application and waiver request.

The mere fact that the current state of the economy is difficult is no reason to to allow three television stations to merge operations.[33] The economy is bad everywhere, and in fact, even worse in some other communities.[34] Revenues at many stations have fallen and some broadcaster owners have filed for bankruptcy. But the same can be said of most businesses. Nothing in the Communications Act or Commission guarantees that broadcasters will make a profit. And even assuming *arguendo* some short term benefits from joint operations, the economy will likely turn around during the seven-year term of this Agreement,[35] and any such benefits would be exceeded by the harms from the lack of competition and diversity.

Request for Relief

Media Council Hawai`i renews its request that the Commission issue an order, pursuant to 47 USC §§154(i) and 303(r) and 47 CFR §1.91, directing that Raycom and MCG show cause why a cease and desist order should not be issued to enjoin the implementation of the Agreement and/or revoke their licenses because consummation of the Agreement would result in an

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[33] Raycom Response at 3-4; MCG/HITV Response at 2-3.

[34] For example, many states would be happy if there unemployment rate was 7.5%. Raycom Response at 9. *See also* Reuter, Michigan Reports Highest Jobless Rate, NY Times (Oct. 22, 2009) (reporting Michigan's jobless rate at more than 15%).

[35] SSA §8.

unauthorized transfer of control in violation of 47 U.S.C. § 310(d) and 47 CFR § 73.3540 and violate the local television multiple ownership rule, 47 CFR §73.3555(b). Contrary to Raycom's argument, Raycom Response at 11, the FCC need not have an application before it in order to act. The Commission can act on the basis of the Complaint and the Response to it. Raycom's argument would lead to the illogical result that licensees could insulate themselves from liability for violations of the Communication Act or FCC rules simply by refusing to file applications with the Commission.[36]

We also renew our request for the Commission to issue a "standstill order" enjoining Raycom and MCG from taking any further action pursuant to the agreements until after the Commission has held a hearing on the order to show cause pursuant to 47 CFR §1.91 or Respondents have waived their right to a hearing under 47 CFR §1.92. Raycom's Response indicates that it intends to consummate the deal on Monday, October 26, 2009. Moreover, KGMB has begun to dismantle its news set and Raycom has announced the line-up for the newscasts to be simulcast on all three stations.[37] Although Raycom and MCG would proceed at their own risk in the absence of an FCC ruling,[38] the FCC's failure to issue a standstill order would both harms viewers in Honolulu and would encourage similar arrangements in other communities that would undermine the goals of localism, diversity and competition.

[36] Raycom's argument that Commission cannot act before the agreement actually takes effect, Raycom Response at 10-11, is likely to become moot. But in any case, it ignores the fact that parts of this arrangement, such as the Asset Exchange agreement, have already been signed. Moreover, the Commission is charged with protecting the public interest. Failing to act before the harm occurs would be harmful to the public.

[37] The Commission should reject Raycom's argument that nothing has occurred yet. *See* Rick Daysog, *KHNL-KGMB unveils new Lineup*, Honolulu Advertiser (Oct. 20, 2009).

[38] *See, e.g.* World Investments, Inc., 20 FCC Rcd 13874, 13875 (MB 2005).

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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In Re Application of NVG-DULUTH II, LLC (Assignor) and MALARA BROADCAST GROUP OF DULUTH LICENSEE LLC (Assignee) For Consent to the Voluntary Assignment of the License for Station KDLH-TV, Duluth, MN	))))))))))))))))	File No. BALCT-20040504ABU Facility ID No. 4691 DA 04-3908

APPLICATION FOR REVIEW

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TABLE OF CONTENTS

Table Contents i

Summary ii

I. Introduction 3
  A. The Application 3
  B. The Joint Petition to Deny 4
  C. The *Decision* 6

II. The Commission Should Address the Public Interest Standard Ignored by the Bureau 8

III. The Bureau's Interpretation of Section 73.3555 Was Incorrect 14

IV. The Bureau Misapplied the Commission's Standards for Station Control 16
  A. Personnel and Programming 16
  B. Finances 18
  C. The Piecemeal Approach is Contrary to Commission Precedent 20

V. The Commission Should Either Reverse the *Decision* or Designate the Application for a Hearing 21

VI. Conclusion 21

SUMMARY

The Media Bureau's *Decision* in this proceeding granted the assignment of the license of KDLH-TV, Duluth, Minnesota, despite the Petitioners' substantiated allegations of fact that such an assignment violates Commission rules. In doing so, the Bureau allowed the combination of same-market stations KDLH-TV and KBJR-TV under the common control of Granite Broadcasting Corporation ("Granite"). The Bureau ignored essential market-based facts and party admissions, and irrationally granted the application even though material facts were absent from the record because the applicants intentionally withheld them. In short, the Bureau abandoned the public interest processing standard requiring full disclosure of information and transaction documents in favor of a new one: "Don't Ask, Don't Tell."

The upshot of the *Decision* is a reversal of the Commission's prohibition of television duopolies in small markets such as Duluth, Minnesota, which has only four commercial television stations. Granite certified to the Securities and Exchange Commission that it planned to form "duopoly-type" arrangements. The Bureau has allowed Granite to combine KBJR and KDLH, respectively the NBC and CBS affiliates for that small market. Even though the Bureau was informed that Granite intended to form television duopolies, instead of examining the transaction strictly and requiring a complete evidentiary record, the Bureau permitted Granite to hide relevant transaction documents and granted the Application. The *Decision* overtly ignores essential evidence.

In taking this unjustified action, the Bureau has overlooked the Commission's precedents on attributable ownership and control. The Bureau flatly ignored Petitioners' demonstration that all advertising for KBJR, KDLH, and the local outlets of the WB and UPN networks can now be sold in common by one entity, which permits consolidation of a large majority of the television

advertising revenues for the Duluth market. In addition, the local television news operations of two of the three stations presently serving the market will be combined and the impact of this significant consolidation will be extended substantially, due to existing contractual relationships with the dominant daily newspaper, four other regional newspapers, and several radio stations in and around Duluth.

The *Decision* makes a cynical mockery of the Commission's ownership rules. It drastically undermines localism and diversity and will stand as a "how to" guide for all entities interested in forming otherwise prohibited television duopolies. The public interest goals underpinning the Commission's anti-duopoly rules and policies have been repealed by the Bureau without benefit of public participation and rule making proceedings, allowing the applicants to replace the public interest with personal greed. Therefore, the *Decision* must be reversed to prevent the monopolization of television broadcasting in smaller markets and to preserve the industry *status quo* while the Commission is subject to the *Prometheus* court's mandate to implement consistent standards for its media ownership regulations.

2529347_v1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Application of NVG-DULUTH II, LLC (Assignor) and MALARA BROADCAST GROUP OF DULUTH LICENSEE LLC (Assignee) For Consent to the Voluntary Assignment of the License for Station KDLH-TV, Duluth, MN	))))))))))))))))	File No. BALCT-20040504ABU Facility ID No. 4691 DA 04-3908

To: The Commission

APPLICATION FOR REVIEW

KQDS Acquisition Corp., the licensee of KQDS-TV, Duluth, Minnesota ("KQDS") and WDIO-TV, LLC, the licensee of WDIO-TV, Duluth, Minnesota ("WDIO") (collectively, the "Petitioners"), by their counsel and pursuant to Section 1.115(a) of the Commission's Rules, 47 C.F.R. § 1.115(a), hereby request that the Commission review and reverse the Media Bureau's Video Division ("Bureau") *Decision* of December 14, 2004,[1] which granted the assignment of the license of KDLH-TV, Duluth, Minnesota ("KDLH") in the above-referenced proceeding.

[1] *Application for Assignment of License of KDLH-TV, Duluth, Minnesota (Facility ID # 4691)*, Letter Decision, FCC File No. BALCT-20040504ABU, DA 04-3908 (MB rel. Dec. 14, 2004) ("*Decision*"); *see also* WDIO and KQDS *Joint Petition to Deny* (filed June 14, 2004); Malara *Opposition to Joint Petition to Deny* (filed June 29, 2004); WDIO and KQDS *Reply* (filed July 12, 2004); and WDIO and KQDS *Motion for Leave to File Supplement* and *Supplement* (filed Dec. 8, 2004).

The Bureau's *Decision* must be reversed because it authorizes the illegal consolidation of two network affiliated television stations in a four-station market, in overt violation of the Commission's ownership rules and policies.

QUESTIONS PRESENTED

1. Whether the *Decision* is in conflict with Commission regulations prohibiting the *de facto* control of 50% of the top-four network television stations in a single market;[2]

2. Whether the Bureau's *Decision* is in conflict with Commission regulations by finding that commercial time aired by television stations is not "broadcast time" for purposes of attributing time brokerage agreements;[3]

3. Whether the Bureau committed prejudicial procedural error by failing even to address Petitioners' argument that a grant of the Application would harm the public interest by reducing competition for television services in the small geographic market of Duluth and allowing one entity to possess a 62% market share;[4] and

4. Whether the *Decision* is premised on erroneous findings as to material questions of fact raised by Petitioners that the Assignee in this proceeding is not a truly independent buyer.[5]

I. INTRODUCTION

A. The Application

On May 4, 2004, NVG-Duluth II, LLC ("NVG"), the current licensee of KDLH, filed a joint application with Malara Broadcast Group of Duluth Licensee LLC ("Malara") proposing to assign the license for KDLH from NVG to Malara (the "Application").[6] Under the terms of the agreements between NVG and Malara, some of which were disclosed but several essential

[2] *See* 47 C.F.R. § 1.115(b)(2)(i).

[3] *Id.*

[4] *Id.* § 1.115(b)(2)(v).

[5] *Id.* § 1.115(b)(2)(iv).

[6] FCC File No. BALCT-20040504ABU.

agreements of which were withheld from the Commission by the parties,[7] Malara would be the facial licensee of KDLH while the station actually would be programmed and operated by Granite Broadcasting Corporation ("Granite"). Granite is already the licensee of another television station in the small Duluth-Superior Designated Market Area ("DMA"): KBJR(TV), Superior, Wisconsin.[8]

NVG consummated its acquisition of KDLH in February 2004, for a purchase price of $7,500,000.[9] As shown in the Application, in April 2004, Malara agreed to purchase KDLH for $10,800,000, nearly a 50% increase in only two months. Obviously, the stunning increase in purchase price was premised on the duopoly arrangements between Malara and Granite.

B. The Joint Petition to Deny

On June 14, 2004, the Petitioners filed a timely petition to deny the Application.[10] Petitioners argued that Granite was using Malara as a front, and that Granite would actually operate and control KDLH. The Commission's rules prohibit one entity from owning and controlling two television stations in a small market such as Duluth.[11] By operating and controlling KDLH and KBJR, Petitioners argued, Granite would be in violation of the multiple

[7] The Granite and Malara agreements were:

Agreement	Status
Advertising Representation Agreement	Disclosed
Shared Services Agreement	Disclosed
Management Services Agreement	Withheld
Credit Agreement	Withheld
Operating Conditions Agreement	Withheld
Put and Call Option Agreement	Disclosed
Priority Capital Expenditures	Withheld

[8] Granite holds the license for KBJR-TV through a wholly-owned subsidiary, KBJR, Inc.

[9] *See* BALCT-20031216ABZ.

[10] WDIO/KQDS Joint Petition to Deny (filed June 14, 2004).

[11] 47 C.F.R. § 73.3555(b). The Duluth-Superior market, the 135th ranked DMA, has four commercial television stations: KBJR, KDLH, KQDS and WDIO.

ownership rules. No version of the Commission's ownership rules has ever permitted common ownership of two television stations in a four-station market such as Duluth.

i. The 15% *Per Se* Attribution Rule

The Petitioners established that Granite would obtain an impermissible ownership interest in KDLH in two separate ways. First, Petitioners argued that Granite would obtain a *per se* attributable interest in KDLH because it would have the contractual right to program in excess of 15% of KDLH's broadcast time. Specifically, Granite would have the right to program 15% of KDLH's programming per week, plus provide and control all of KDLH's advertising, other than pre-sold network and syndicated spots.[12] Such an arrangement is prohibited flatly by the Commission's rules limiting non-attributable LMAs to 15% or less of a station's "broadcast time per week."[13] As Petitioners demonstrated, Granite's arrangement with Malara results in the inescapable conclusion that Granite would acquire a *per se* attributable interest in KDLH by brokering more than 15% of the programming.[14]

ii. *De Facto* Control by Granite

Second, the Petitioners showed that Granite would acquire an attributable ownership interest in KDLH through *de facto* control of its programming, personnel and finances. For example, Malara represented to the Commission that it would staff KDLH with "fewer than five" full time employees, cutting its full-time staff from 51 persons, almost 80%.[15] Malara's contractual commitment is to staff KDLH with only two full-time persons, a cut of almost 96%

[12] Shared Services Agreement § 2.1.5; Advertising Representation Agreement § 2.1; *see* Joint Petition to Deny at 6-8.

[13] 47 C.F.R. § 73.3555, Note 2(j)(2).

[14] *See id.*

[15] *See* Malara Application (Response to Question III(14)); Joint Reply at 8; Malara Opposition at 6 n.13 (citing Application).

in the station's staff. All other KDLH personnel functions are to be carried out by Granite employees.[16] Petitioners argued that, absent further fact-finding, it would be irrational to assume that two Malara employees, or at most four, could make the programming and business decisions necessary for the entire operations of a local CBS affiliate. Such functions necessarily would fall to Granite employees.

Granite also would exert substantial control over KDLH finances. In addition to placing all advertising, Granite would guarantee Malara's debt, set KDLH budgets, determine and have veto power over KDLH capital expenditures, directly own KDLH's studios, tower and other major facilities, and ultimately, have the right to buy the station or sell it to a third party.[17] Even the future "sales price" of KDLH would be influenced by Granite because it is to be based upon cashflow, which, of course, would be controlled substantially by Granite through advertising sales.

C. The *Decision*

In the *Decision*, the Bureau reached the erroneous conclusion that television commercials are not part of broadcast programming, and thus cannot "count" toward the 15% programming limit. As set forth in Section III below, the Bureau has misinterpreted the Commission's 15% attribution rule and the *Decision* should be reversed.

In addition, without credible explanation or precedent, the *Decision* did not find that Granite's obvious indicia of *de facto* control creates an impermissible interest in KDLH. The *Decision* fails to acknowledge that Malara affirmatively represented that it intends to employ no more than four full-time employees. Indeed, although Petitioners urged the Commission to

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[16] *See* Joint Petition at 11-12; Shared Services Agreement §§ 2.1.1-2.1.5, 2.2.1.

[17] *See* Joint Petition at 12-15.

require Malara and Granite to provide complete details of their arrangements, including the undisclosed management and financial arrangements noted above, the *Decision* found that the absence of such information failed to raise questions of material fact.[18] Thus, the *Decision* reverses the statutory requirement that the Commission make affirmative public interest determinations,[19] replacing the Communications Act standard with a new one of "Don't Ask, Don't Tell."

The Bureau turned a blind eye to the far-reaching severe policy implications of its *Decision*. The *Decision* totally fails to acknowledge that Petitioners provided thorough Duluth market competition analysis, in the form of an affidavit, that proved the harmful competitive aspects of the intended arrangements between Granite and Malara.[20] The data provided were unchallenged by Granite and Malara, as well as ignored by the Bureau. Similarly, the Bureau did not note the Herfindahl-Hirschman Index ("HHI") assertion of the Petitioners[21] or address the enormous consolidation of media in the Duluth market. In short, the *Decision* makes a mockery of the Commission's ownership rules, encourages small market consolidations through subterfuge, and affronts the media ownership policies established in the *Prometheus* decision,[22]

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[18] See also Amendment to Application (filed Nov. 29, 2004) and WDIO/KQDS Supplement to Joint Petition to Deny and Motion for Leave to File Supplement (filed December 9, 2004), showing that Granite and Malara continued to "adjust" their intended arrangements for control of KDLH while affirmatively withholding the controlling documents from Commission and public scrutiny. Petitioners submit that the Bureau committed prejudicial procedural error by ignoring this part of the record. *See* 47 C.F.R. § 1.115(b)(2)(v).

[19] 47 U.S.C. § 310(d).

[20] Joint Petition, Exhibit 1 ("Couture Declaration").

[21] *Id.*; Joint Reply at 13 n.34.

[22] *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004). The *Prometheus* court endorsed FCC reliance on HHI "as its starting point for measuring diversity in local markets." *Id.* at 402. In the *Decision*, however, the Bureau never even reached the starting line and pretended that Petitioners had not alleged an HHI issue.

the Localism *Notice of Inquiry*[23] and the *Notice of Proposed Rulemaking* concerning television Joint Sales Arrangements.[24]

II. The Commission Should Address the Public Interest Standard Ignored by the Bureau.

The following sections demonstrate the Bureau's failure to correctly address the record in this proceeding and to properly apply the Commission's rules and policies. However, the discussion that follows must be considered in the overall context of the resulting severe harm to the public interest wrought by the *Decision*. The public interest must be the Commission's guide.[25]

Granite has stated publicly that it is forming television "duopoly-type" arrangements in markets in which duopolies are prohibited.[26] Clearly, its consolidation of KBJR and KDLH is one of the duopolies it is forming.[27] Irrationally, the Bureau found that Granite "allegedly"[28] stated that it would pursue duopolies as a business strategy, even though the Petitioners cited directly to Granite's most recent Annual Report, SEC Form 10K, which by law must be certified by its chief executive and chief financial officers as accurate.[29] The *Decision* even finds that

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23 *Broadcast Localism*, Notice of Inquiry, MB Docket No. 04-233, FCC 04-129 (rel. July 1, 2004) ("*Localism NOI*").

24 *Rules and Policies Concerning Attribution of Joint Sales Arrangements in Local Television Markets*, MB Docket No. 04-256, FCC 04-173 (rel Aug. 2, 2004) ("*JSA NPRM*").

25 47 U.S.C. § 310(d).

26 Granite 10-K, at 34; *see* Joint Petition at 16, Attachment 2.

27 Granite is also forming one in Fort Wayne, Indiana, combining its WISE-TV with WPTA-TV's operations, using Malara as a straw man again. *See* FCC File No. BALCT-20040504ACH (granted Dec. 8, 2004).

28 *Decision* at 7 n.12.

29 Pursuant to Section 302 of the Sarbanes-Oxley Act, Granite's Chief Executive Officer and Chief Financial Officer must certify that the Granite SEC Form 10-K filing does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the (continued)...

Granite's certified statement that it would form duopolies is "immaterial," dismissing a dispute of fact based upon Granite's own inconsistent statements, without a statutorily required hearing.[30]

To the contrary, we believe that these arrangements evidence an intention to circumvent the Commission's rules by creating a duopoly relationship which is not permitted in small markets such as Duluth-Superior. Under such circumstances it is imperative that the Commission create a complete record, requiring and then examining all relevant documents, so that it can determine if the proposed relationship, taken as a whole, violates the letter as well as the spirit of the Commission's ownership rules.

By allowing Granite to form television duopolies, the *Decision* blesses consolidation of the CBS and NBC affiliate television stations in the four-station Duluth market. No matter how the Commission's ownership rules and policies are applied, as demonstrated below there can be no doubt or dispute that both stations will be managed, programmed and staffed from a single source, as Granite clearly represented to be the true nature of the deal to the SEC and its actual and potential investors by calling it a "duopoly-type" arrangement. "Duopoly" is a well-understood term meaning common ownership and/or control of two television stations in the same market.[31]

In addition to improperly approving formation of the KBJR-KDLH duopoly, the *Decision* fails to address the harm to the public interest that will result from media consolidation in the

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statements made, in light of the circumstances under which the statements were made, not misleading. 15 U.S.C. § 7241.

[30] 47 U.S.C. § 309(e).

[31] *See, e.g., Central Connecticut Broadcasting Co.*, Memorandum Opinion and Order 1 RR 2d 639 (rel. Dec. 11, 1963); *Edwin L. Edwards, Sr.*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236 (2001); *Prometheus v. FCC*, 373 F.3d 372, (3rd Cir. 2004).

small Duluth market. For example, the *Decision* does not discuss the unchallenged facts that Granite shall produce the local news broadcasts for both of KBJR and KDLH, and supply news programming to several local radio stations, five regional newspapers, including the dominant local daily newspaper, jointly sell the local advertising of KBJR, KDLH, and for the local UPN broadcast service, and the WB service carried on the Duluth cable television system, thus materially combining the local programming outlets of CBS, NBC, WB, and UPN, all under Granite.[32]

The *Decision* ignores these undisputed facts. It also fails to acknowledge the unchallenged facts that a combination of KBJR and KDLH will dominate the local advertising market, raising significant concern under HHI.[33] Thus, there is no serious dispute that the KBJR-KDLH combination would harm competition. On the contrary, KDLH's General Manager directly stated that the proposed station combination represents "a major change in the local broadcast landscape" that will "change the competitive nature of the market."[34] These facts are ignored in the *Decision*, as are their consequences.

In the same vein, the Bureau failed to address the losses of diversity and localism in the Duluth market.[35] The interlocking arrangements proposed by Granite represent a major setback

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[32] *See* Joint Petition to Deny at 17, Attachment 1.

[33] *See* Joint Petition, Attachment 1 (noting that Granite would control 62% of the local news viewing audience under the proposed arrangement); Joint Reply at 13 n.34.

[34] Peter Passi, "Sale of KDLH Comes Under Fire," *Duluth News Tribune*, at 7A (June 22, 2004).

[35] *See* Joint Petition at 18-19; Joint Reply at 13-14. As Petitioners showed, and the Bureau ignored, the Commission has recognized, "[S]ame-market broadcasters and certain other same-market media entities may raise particular concerns because of [the Commission's] goal of protecting local diversity and competition. Firms with existing local media interests may have an incentive and means to use financing or contractual arrangements to obtain a degree of horizontal integration within a particular local market that should be subject to local multiple (continued)...

to the Commission's goals of localism and diversity. Under Granite's control, KDLH will cease providing independent local news, thus reducing the quantity of local television news sources in the market by a factor of one third. Malara's business decision to sweep away almost all of its personnel means that KDLH news must mimic the programming of KBJR because Malara will have no local programming resources. The Commission must either presume that KDLH would cease to be an independent voice, or hold a factual inquiry to determine how Malara's two (or perhaps four) full time employees could simultaneously "control" all KDLH operations, finances and produce local news and other programming.

In remanding proposed ownership rules to the Commission, the *Prometheus* court provided significant guidance to the Commission by providing necessary considerations in shaping legally sustainable ownership rules.[36] The court instructed that, in considering broadcast markets, the Commission must draw a distinction between independent sources of local news as compared to outlets that merely republish the information disseminated by other media locally.[37] The court held that re-publishers are not independent voices and should not be considered as contributing diversity to a local market.[38] Therefore, replacing the KDLH news operation with repackaged news from KBJR represents a loss of local news diversity as a matter of law.

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ownership limitations." *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, Report and Order*, 14 FCC Rcd 12,559, para. 51 (1999). That is clearly the case here.

[36] *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004). Remaining in place is Section 73.3555 of the rules, which flatly prohibits common ownership of two of the top four television stations in a market as small as Duluth. Granite would establish common ownership and control of two of the *only* four commercial television stations in the market.

[37] *Id.* at 408.

[38] *Id.*

As proven by Malara's decision to pay a 50% premium over the price paid by NVG for KDLH, combining KBJR and KDLH has a large dollar value, obviously premised on a single entity's control of two network affiliated stations in Duluth. There has been no showing by the Applicants that KDLH could not operate independently as a successful network affiliate in the Duluth market.

The *Prometheus* court held that the size and strength of a news source should be relevant to its viewpoint diversity value, *i.e.* the local college radio station should not be viewed to be as potent as The New York Times.[39] Obviously, Malara's plan to profit by eliminating a long-standing source of local news by a major television station represents a considerable loss of diversity.

The *Prometheus* court endorsed the Commission's decision to consider radio station joint sales agreements in a market as an attributable common ownership,[40] which the Commission is now implementing.[41] Similarly, the Commission has initiated a proceeding to decide whether television station joint sales agreements ("JSAs") should be deemed to be an attributable interest, and offered its tentative conclusion that television JSAs would create attributable interests.[42] Consequently, Granite's exclusive right to sell all available advertising inventory of KDLH is legally suspect.

The *Decision* does not mention *Prometheus,* acknowledge Petitioners' reliance on it or, obviously, discuss the mandatory guidance provided by the court. In short, the *Decision* is arbitrary and capricious.

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[39] *Id.* at 429.

[40] *Id.* at 405-406.

[41] *Public Notice,* DA 04-4035 (January 3, 2005).

[42] *See JSA NPRM.*

Recently, the Commission initiated a sweeping new proceeding to examine broadcast localism.[43] In doing so, among other subjects the Commission intends to consider requiring broadcast stations to locally produce or originate programming,[44] to present required amounts of local news and public affairs programs,[45] and to adopt standards for the provision of local emergency warnings in addition to the Emergency Alert System.[46] The Commission also is considering strengthening the license renewal process to enforce broadcast station adherence to local public service.[47] Clearly, Malara will have no ability to comply with any such requirements, intending to use Granite for all local programming and management, and even to rely upon Granite to make responsive public interest programming decisions.[48]

Between them, the *Prometheus* decision and the Broadcast Localism Notice articulate broadcast policies which emphasize that the *Decision* is contrary to the public interest. The Bureau acted entirely outside its sphere of delegated authority by failing to harmonize its *Decision* with the binding precedent of the *Prometheus* court and the Commission's current policies concerning localism and television JSAs.

Competition is at the heart of the communications industry, as the Commission noted as far back as 1963.[49] The public interest requires that the Commission defend its fundamental

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[43] *Localism NOI.*

[44] *Id.* para. 14.

[45] *Id.*

[46] *Id.* paras. 27-29.

[47] *Id.* paras. 40-42.

[48] Shared Services Agreement, § 3.4. Malara does not deny that it will rely upon Granite for such decisions. Opposition n.22.

[49] *Frontier Broadcasting Co.*, 1 RR 50 (rel. Aug. 1, 1963) (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

broadcast industry policies by reversing this erroneous *Decision*. Failure to do so will result in a wave of *de facto*, and illegal, consolidation in smaller markets nationwide due to Commission support of the monetary value of small market duopolies. Such consolidation would undermine the *status quo* during a time in which the Commission has been ordered to review and justify its ownership rules.

III. The Bureau's Interpretation of Section 73.3555 Was Incorrect.

There is no dispute that Duluth is a four television station market and that KDLH and KBJR are two of those stations. No version of the Commission's ownership rules has ever permitted common ownership of two commercial television stations in a four station market such as Duluth.[50] Note 2(j) to the ownership rule provides:

> (j) "Time brokerage" (also known as "local marketing") is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.
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> ***
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> (2) Where two television stations are both located in the same market, as defined in the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b) and (c) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

Based upon the plain meaning of these provisions, Petitioners demonstrated that Granite would obtain an attributable ownership interest in KDLH because Granite would have the right to program 15% of KDLH's programming and, in addition to that 15%, place all of its advertising, thus necessarily pushing the total amount of "broadcast time per week" brokered by

[50] *Compare* 47 C.F.R. § 73.3555 (2003) *to* 47 C.F.R. § 73.3555 (2004) (stayed).

Granite to over 15%.[51] Accordingly, as a mathematical certainty, Granite would acquire a *per se* attributable ownership interest in KDLH, making its arrangements with Malara an overt violation of the ownership rule.

The *Decision* holds that advertisements are not part of a station's broadcast time: "We will not count advertising time sold by Granite and broadcast on KDLH toward the 15% limit because we do not believe that is the intention of the attribution rules."[52] The Bureau contends that the Commission rule "suggests" such a view.[53]

This novel interpretation of the Commission's rules is without substantial precedent and should be reversed.[54] The fundamental purpose of this attribution standard is to ensure that stations in the same market may not be commonly programmed to a substantial extent unless commonly owned, and thus avoid circumvention of the Commission's local ownership and control restrictions. Destruction of this fundamental understanding would leave industry participants free to provide unlimited amounts of commercial adverting to stations in the same market without concern for the ownership rules, including for example "infomercials" and other program-length commercials. This is obvious because, with the exception of children's programming, the Commission places no limit on commercial advertising. The Bureau has cleared the way for in-market television stations to program each other without concern for ownership attribution.

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[51] *See* Joint Petition at 6-8; Joint Reply at 5-6.

[52] *Decision* at 5.

[53] *Id.* (relying on *Attribution Reconsideration* at 1117). The Bureau is incorrect. That Commission statement merely described typical commercial arrangements between program brokers and licensees. It does not hold that advertising or other commercial material aired by a station is, magically, not part of broadcasting or broadcast time.

[54] Petitioners submit that the Bureau lacked delegated authority to address this question and instead should have referred the issue to the full Commission. *See* 47 C.F.R. § 1.115(b)(2)(ii).

The Bureau's unsupported interpretation also affronts other Commission precedent which treats commercials as part of a station's broadcast time. The Commission's regulation of children's programming, indecency, obscenity, sponsorship identification and political broadcasting all treat commercial time as part of broadcast time, and hold broadcasters responsible for them. Reversal of these understandings would be unwarranted and might leave the Commission without jurisdiction to regulate the content of advertisements as not part of broadcasting. If such an extreme rewrite of the Commission's rules and the Communications Act is intended, it cannot lawfully be done by the Bureau under delegated authority. The *Decision* should be reversed in order to achieve a rational harmony for the Commission's regulation of advertising and programming.

IV. The Bureau Misapplied the Commission's Standards for Station Control.

In making a case-by-case analysis of whether a licensee has given up control of its station to another entity, the Commission will examine control of personnel, programming and finances.[55] As shown below, the Bureau failed to consider material parts of the record before it, refused to require Granite and Malara to submit the documents necessary for a complete record, and relied on no Commission precedent to reach the conclusion that Granite would not obtain an impermissible concentration of control.[56] Fundamentally, the Bureau refused to deal with reality, that Granite would exercise actual control of both KBJR and KDLH.

A. Personnel and Programming

As stated above, Malara is committed to slashing KDLH employment by approximately 80%-95% and relying on Granite to replace all of those station functions. The *Decision* did not

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[55] *Roy M. Speer*, 11 FCC Rcd 18398, 18414 (1996).

[56] *Decision* at 7.

even note Malara's sworn representation to the Commission that it would employ "fewer than five" full time employees.[57] This failure of record warrants reversal.

Rather than explaining or further examining how a CBS affiliate could operate with a maximum of four licensee employees, the *Decision* states that "it is clear that Malara will control its employees."[58] Such a finding is irrational because there was no question about Malara's control of its own two (or four) employees. The issue that the Bureau avoided was: How is it possible for Malara's skeleton crew to control the programming, finances and operations of KDLH? It is not credible, or at least raises a substantial and material question of fact, whether a maximum of four employees would be able to maintain "ultimate licensee control" over essential KDLH functions handled by Granite employees, including oversight of programming, program selection, finances, sales, operations, and engineering, when prior to now, KDLH required 51 full time employees.[59]

The *Decision* found that the execution of KDLH functions by Granite employees was "not inconsistent with Commission policy regarding such arrangements."[60] The *Decision* does not rely on any Commission statement to that effect. Instead, the *Decision* holds:

> [W]e are not concerned that Granite and Malara are to execute an operating conditions memorandum in the future, nor will we require disclosure of a document that does not exist . . . . There is nothing to suggest that such a document will cede control to Granite, nor is there any evidence that Granite alone will set operating conditions.[61]

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[57] Application (Response to Question III(14)); *see also* Opposition at 6 n.13 (citing Application).

[58] *Decision* at 6.

[59] *See* Joint Petition at 11; Joint Reply at 8.

[60] *Decision* at 6.

[61] *Id.* at 6 n.11.

There is "nothing to suggest" that the operating conditions memorandum would cede control of KDLH to Granite for the simple reason that Granite and Malara withheld it and the Bureau acted in the absence of the facts. The Granite-Malara operating conditions commitments are part of the several arrangements that Petitioners urged the Bureau to require be placed on file. It is a material question of fact whether KDLH "operating conditions" would govern programming, personnel responsibilities and engineering. The *Decision* stands as precedent that material questions about the control of these essential television station functions are irrelevant to station control, and that the Commission will assume compliance without actual knowledge.[62] Those determinations should be reversed.

B. Finances

In addition to the secret Granite-Malara "operating conditions" and such matters as "priority capital expenditures," Granite would have substantial control of KDLH finances. In the Application the parties represented that Granite would have the exclusive right to sell local advertising; would have constant access to the financial books and records of KDLH (a novel right for a "competitor"); would guarantee lending, be a party to Malara's credit agreement, underwrite monthly KDLH cashflow, and have a say in setting budgets, including those for capital expenditures, such as construction of a tower or studio building.[63] In addition, Malara

[62] Indeed, the *Decision* reverses the Commission's customary application and ownership processes. Based on the logic of the *Decision*, applicants no longer need to file sales agreements with applications for assignments of license and transfers of control, but instead, keep them as unsigned drafts and withhold their terms from the Commission. Similarly, licensees would have no obligation to file copies of their debt, credit and option agreements with their applications and ownership reports. The Commission should simply "trust them" to comply, as the Bureau did with Granite and Malara under its new "Don't Ask, Don't Tell" processing standard.

[63] Put and Call Option Agreement (Second Whereas clause); Opposition n.34.

would transfer substantial control to Granite for the future sale of KDLH, whether to Granite or a third party.[64]

The intertwined arrangements between Granite and Malara prove that Malara will be no more than a passive investor in KDLH, with little direct interest in its financial performance. Malara does not dispute that its guaranteed cash flow from the arrangement is so enticing that it is willing to pay a 50% premium over the purchase price paid by NVG only two months earlier. Granite will control the KDLH monthly revenues, capital expenditures and future asset values.[65] Malara's only economic incentive in owning the KDLH license would be investing as little as possible in the station while pushing as much control — and thus investment — as possible toward Granite.

In granting the Application, the Bureau acted in ignorance of the terms of Granite's financial control of KDLH.[66] For example, the Bureau refused to require Granite and Malara to produce the material terms of the Credit Agreement to which they would be parties because it did not exist and "does not result in attribution."[67] That is a complete guess based upon the "Don't Ask, Don't Tell" policy established in the *Decision*. Indeed, given the remarkable financial ties alluded to by Granite and Malara, that Credit Agreement might lead to an attributable interest through exceeding the 33 percent debt/equity standard[68] or other control provisions. It was entirely arbitrary and capricious for the Bureau to assume that essential commitments between

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[64] Put-Call Option Agreement.

[65] Joint Petition at 12-14.

[66] *Decision* at 7 & n.13.

[67] *Id.* at 7 n.14.

[68] 47 C.F.R. § 73.3555, Note 2(i).

Granite and Malara would not result in Granite's control of KDLH when the Bureau did not know their terms.

C. The Piecemeal Approach is Contrary to Commission Precedent.

In determining station control, the Commission requires a case-by-case analysis of the totality of the circumstances.[69] In the *Decision*, however, the Bureau ignored the big picture and, instead, found that no one of the individual arrangements governing personnel, programming and finances leads to station control. The Bureau did so by viewing each arrangement in isolation without a reasoned analysis or explanation of the total effect of all of the circumstances of Granite's numerous connections to KDLH.

The Bureau ignored reality. Based even upon the disclosed commitments between Granite and Malara, it is beyond dispute that the combination of KBJR and KDLH will have: one production staff for local news and programming, one sales staff, one engineering and technical group, one financial management group, and one program purchasing group. Virtually all of the personnel for those functions will be employed by Granite. Granite directly will own and fund all essential capital improvements for both stations, including studios and transmission systems.

Therefore, and for at least ten years, Granite will: select 15% of KDLH's programming, place all of its advertising, provide virtually all of the station's staff, produce all of its news, determine (or at a minimum, significantly influence) all KDLH operations, priority expenditures and capital expenditures (including construction of a tower or studio building),[70] guarantee its debt, be a party to its credit agreement, buy or sell KDLH and substantially influence its sales

[69] *Chase Broadcasting, Inc.*, 5 FCC Rcd 1642, 1643 (1990).

[70] Put and Call Option Agreement (Second Whereas Clause); Opposition n.34.

price. The *Decision* did not, and could not, rely on Commission precedent that all of these combined circumstances do not create an attributable interest and station control.

V. The Commission Should Either Reverse the *Decision* or Designate the Application for a Hearing.

The Communications Act requires that the Commission hold a hearing on the Application if there are disputed issues of material fact.[71] In this case, the disputed material facts include the following.

- Is Granite forming a duopoly as it represented to the SEC or not as it represented to the FCC?
- What are the terms of understanding between Granite and Malara governing the control and operations of KDLH in their: Management Services Agreement, Credit Agreement, Operating Conditions Agreement, and Priority Capital Expenditures?
- What is the relevant media market within which to view and understand the effects of the proposed acquisition of KDLH?
- What will be the effects on that market of combining KBJR and KDLH, including substantial domination of television advertising and consolidation of the news outlets in television and radio broadcasting and newspapers?

These and other important missing facts were ignored in the *Decision*. The Commission should correct that statutory violation by reversing the *Decision* and taking the steps necessary to determine the facts that would be necessary to reach a lawful conclusion to this proceeding.

VI. Conclusion

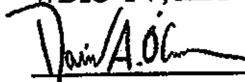
Based upon the foregoing, the Bureau's *Decision* should be reversed by the Commission, the grant of authority for assignment of the license of KDLH rescinded, and the Application either denied or designated for a hearing to determine the facts necessary for the Commission to

[71] 47 U.S.C. § 309(e).

act on the Application.

Respectfully submitted,

KQDS ACQUISITION CORP.
WDIO-TV, LLC



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January 13, 2005

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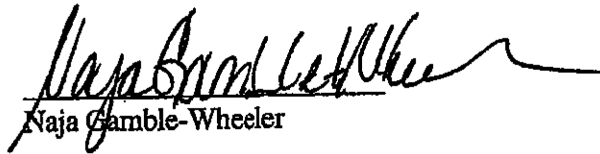

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Please Date Stamp and Return To
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED
AUG 29 2007
Federal Communications Commission
Office of the Secretary

In re Application of PIEDMONT TELEVISION OF SPRINGFIELD LICENSE LLC (Assignor) and PERKIN MEDIA, LLC (Assignee) For Consent to the Voluntary Assignment of the License for Station KSPR(TV), Springfield, MO	)))))))))))))))	File No. BALCT-20061005ADY Facility ID No. 35630

APPLICATION FOR REVIEW

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TABLE OF CONTENTS

Table of Contents ii

Summary iii

Questions Presented 4

I. Introduction 5
  A. The Application 5
  B. The Local Television Ownership Rule 6
  C. The Petitions to Deny 6
  D. The *Decision* 7

II. The Bureau's *Decision* Is in Conflict with Commission Rules and the Conditions Imposed by the Court in *Prometheus* 8

III. The Commission Should Address the Public Interest Standard Ignored by the Bureau 10

IV. The Bureau Misinterpreted the Plain Meaning of the Commission's Multiple Ownership Rules 12

V. The Bureau's Assessment of the *De Facto* Control Standard Does Not Withstand Scrutiny 15
  A. Station Personnel and Programming Will be Controlled by KY3 15
  B. Perkin's Passive Investor Status Confirms That It Will Not Control KSPR's Finances 16
  C. The Bureau's Piecemeal Approach Ignores the Compounding Effects of KY3's Control 20

VI. Conclusion 21

SUMMARY

On November 13, 2006, Koplar Communications International, Inc. ("Koplar") and EBC Harrison, Inc. filed separate Petitions to Deny the application to assign the license for KSPR(TV), Springfield, Missouri ("Application"). The pleadings set forth specific allegations of fact showing that the Application violates the Commission's multiple ownership rules because Perkin Media, LLC ("Perkin"), the purported Assignee, is a mere straw man and is not independent from KY3, Inc. ("KY3"), an in-market full-power television licensee. Thus, KY3 is using Perkin as a front to allow KY3 to control and operate two television stations in Springfield, in violation of the multiple ownership rules. KY3 and Perkin do not dispute that Mr. Perkin is a former employee of KY3 or that Perkin will hold nothing more than the bare FCC license and some intangible property.

The indicia of KY3's control of KSPR include:

- KY3 has paid for and owns 99% of KSPR, including all of the hard assets, such as the tower, studio and transmitter;
- KY3 provides all staffing of KSPR, except for a maximum of four full-time employees, and as a consequence, Perkin has slashed KSPR personnel by 94%, ceding all previous personnel functions over to KY3, including technical, ad sales and programming;
- KY3 places all programming and sells all KSPR advertising — indeed, Perkin is prohibited by contract from selling KSPR advertising; and
- KY3 guarantees the income and debt of Perkin, while Perkin is a passive investor in KSPR.

Thus, the petitioners showed that KY3 would control a "virtual duopoly" comprising the ABC and NBC network affiliates in Springfield, two of the top four stations in the market. And this is not the first duopoly in Springfield — Nexstar already controls the Fox and CBS affiliates in Springfield.

In a letter decision ("*Decision*"), the Media Bureau's Video Division ("Bureau") granted the Application by largely relying on a 2004 Bureau decision (the *Malara* decision) that remains subject to Commission review. In doing so, the Bureau failed to address critical issues raised by

the petitioners. The *Decision* does not even mention the fact that Mr. Perkin is a former employee of KY3 or address Koplar's argument that he could be subject to undue influence from KY3 as a result and thus may not be an independent buyer. The Bureau also improperly assessed the *per se* and *de facto* control standards, and failed to address specific allegations of fact raised by the petitioners that KY3 will be in substantial control of the programming, personnel and finances of KSPR. The Bureau also ignored the compounding effects of the numerous interlocking agreements that cede control of the station to KY3.

Most egregiously, the Bureau failed to address the far-reaching policy implications of the *Decision*. The effects of the *Decision* are devastating — in the small market of Springfield, the top four network affiliates (ABC, CBS, Fox and NBC) are now controlled by two entities, KY3 and Nexstar. Together KY3 and Nexstar control 98.1% of the television advertising revenue in the Springfield, with KY3 alone controlling 50% of the television advertising revenue through its illegal combination of KSPR and KYTV(TV). The degree of market concentration permitted by the Bureau cannot be justified under any public interest or market competition standard. Nor should the loss of diversity resulting from this transaction be ignored as it was by the Bureau. In short, the Bureau failed to apply any public interest standard to its analysis of the Application.

The Commission should correct the Bureau's errors by vacating the *Decision* and requiring the parties to unwind the KSPR transaction. Alternatively, Koplar urges the Commission to rescind the Application grant and designate the Application for a hearing to determine the facts necessary for the Commission to act on the Application.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of PIEDMONT TELEVISION OF SPRINGFIELD LICENSE LLC (Assignor) and PERKIN MEDIA, LLC (Assignee) For Consent to the Voluntary Assignment of the License for Station KSPR(TV), Springfield, MO	)	File No. BALCT-20061005ADY Facility ID No. 35630

To: Secretary, FCC
For: The Commission

APPLICATION FOR REVIEW

Koplar Communications International, Inc. ("Koplar"), by its counsel and pursuant to Section 1.115(a) of the Commission's Rules, 47 C.F.R. § 1.115(a), hereby requests that the Commission vacate the Decision of the Media Bureau's Video Division ("Bureau") dated July 30, 2007,[1] which granted the above-captioned application ("Application") to assign the license of KSPR(TV), Springfield, Missouri ("KSPR"). The pleadings in this case set forth specific allegations of fact that the Application violates the Commission's multiple ownership rules because KY3, Inc. ("KY3"), an in-market full-power television licensee, is the real party in

[1] Application for Assignment of License of (TV), Springfield, Missouri (Facility ID # 35630), Letter Decision, FCC File No. BALCT-20061005ADY, DA 07-3476 (Chief, Video Div., rel. July 30, 2007) ("Decision"); see also separate Petitions to Deny filed by Koplar and EBC Harrison, Inc. (filed Nov. 13, 2006); Opposition to Petitions to Deny (filed Nov. 28, 2006); separate Replies (filed Dec. 8, 2006).

interest, and that KY3 is using Perkin Media, LLC ("Perkin"), the purported Assignee whose principal, Mr. Perkin is a former employee of KY3, as a front to hold the license for KSPR. The pleadings show that KY3 will control and operate two of the top four network affiliated television stations in Springfield. Moreover, this is not the first illegal duopoly in Springfield — Nexstar and its alter ego, Mission Broadcasting, already control and operate two other network affiliates in Springfield.[2] Nonetheless, the Bureau granted the Application, effectively allowing two entities to control all four major network affiliated television stations in Springfield.

What the Bureau has authorized in Springfield is nothing short of a complete evisceration of the Commission's multiple ownership rules, in violation of Section 73.3555(b) of the Commission's rules and the conditions imposed by the court in *Prometheus Radio Project v. FCC*.[3] Taken to its logical conclusion, the *Decision* would support the combination of three, four or more television stations within the same market so long as the legalistic forms of agreements were observed, at least on paper. No Commission decision ever has allowed the level of consolidation proposed in the Application, particularly where, as here, a former employee is being used as a front for the real party in interest.[4] For these reasons, Koplar urges the Commission to vacate the *Decision* and require the parties to unwind the KSPR transaction.[5] Alternatively, the Commission should rescind the Application grant and designate the

[2] *See* Koplar Petition at 3 & n.4; *see also* pleadings filed in FCC File No. BRCT-20051003ABA.

[3] 373 F.3d 372 (3rd Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

[4] *See Edwin L. Edwards, Sr. (Transferor) and Carolyn C. Smith (Transferee)*, Memorandum Opinion and Order and Notice of Apparent Liability, FCC 01-336, 16 FCC Rcd 22236, 22249-22251 (2001) (issuing a substantial forfeiture to Sinclair under similar facts that were arguably less egregious than those presented here). Notably, the Bureau's *Decision* does not cite to this case, relying instead on a Bureau level decision.

[5] The Commission's CDBS reflects that the parties consummated the transaction on August 24, 2007.

Application for a hearing to determine the facts necessary for the Commission to act on the Application.

QUESTIONS PRESENTED

1. Whether the *Decision* is in conflict with Section 0.283(c) of the Commission's rules and applicable case law because this case presents novel questions of law and policy that cannot be resolved based on existing Commission precedent, and because the *Decision* solely relies on a previous Bureau-level decision (the *Malara* decision) that remains subject to review by the Commission;[6]

2. Whether the Bureau's *Decision* was arbitrary and capricious because it failed to address important allegations of fact raised in the petitions, particularly the fact that a grant of the Application would harm the public interest by reducing competition for television services in the small geographic market of Springfield and allowing two entities to control 98.1% of the television advertising revenues in Springfield;[7]

3. Whether, as a policy matter, the Commission should allow a merger that would increase the applicable Herfindahl-Hirschman Index ("HHI") to more than 700 points higher than the HHI score of 1800 considered by the Justice Department and Federal Trade Commission to indicate a "highly concentrated" market;[8]

4. Whether the *Decision* misinterpreted Commission rules by concluding that commercial time aired by television stations is not "broadcast time" for purposes of attributing time brokerage agreements;[9] and

5. Whether the *Decision* is premised on erroneous findings as to material questions of fact raised by petitioners, in particular that the Assignee is incapable of exercising *de facto* control of the station.[10]

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[6] 47 C.F.R. § 1.115(b)(2)(i).

[7] *Id.* § 1.115(b)(2)(v).

[8] *Id.* § 1.115(b)(2)(ii).

[9] *Id.* § 1.115(b)(2)(i).

[10] *Id.* § 1.115(b)(2)(iv).

I. Introduction

A. The Application

KSPR is the ABC network affiliate serving Springfield. The Springfield Designated Market Area ("DMA") is the 78th ranked DMA according to Nielsen, with only five commercial and one noncommercial full power television stations. On October 5, 2007, Piedmont Television of Springfield License LLC ("Piedmont"), the Assignor, filed a joint application with Perkin and KY3 proposing to assign the license for KSPR to Perkin along with certain intangible property, and to assign all remaining KSPR assets to KY3, an in-market full-power television licensee (the "Application").[11]

Under the terms of the agreements, some of which were disclosed and some of which were withheld by the parties,[12] Perkin, whose principal Mr. Perkin is a former employee of KY3, would be the licensee in name of KSPR while KY3 would own all of the station's assets, including the tower, transmitter building and studio, and KY3 would program and operate the station pursuant to a Shared Service Agreement, an Advertising Representation Agreement, a loan guaranty, an Option Agreement and various lease agreements.[13] KY3 already is the licensee

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[11] FCC File No. BALCT-20061005ADY.

[12] By letter dated May 22, 2007, the Bureau's staff requested further information concerning the transaction proposed in the Application. The letter requested that the parties to the Application furnish missing financial information. The Application was amended on May 30, 2007. However, the Bureau did not request, and to date the parties have not supplied, copies of an executed Option agreement, various lease agreements, or a loan guaranty of Perkin's debt by KY3. Koplar continues to urge the Commission to require disclosure of all transactional documents among the parties to this transaction and, Koplar submits, issuance of the *Decision* without access to such relevant information was arbitrary and capricious.

[13] Seemingly to avoid possession of a bare license, Perkin also would hold certain intangible property, such as programming contracts and intellectual property.

of the NBC affiliate in Springfield, KYTV(TV) ("KYTV").[14] Through this combination of interlocking agreements, KY3 would control the NBC and ABC affiliates in the market, two of the top four stations in the market, with Perkin as the straw man for the KSPR license.

B. The Local Television Ownership Rule

The Commission's rules prohibit one entity from owning and controlling two television stations in a small market such as Springfield, if the Grade B signals of the stations overlap and fewer than eight independent television "voices" are present in the market.[15] No version of the Commission's ownership rules has ever permitted common ownership of two television stations in a six-station market such as Springfield, let alone two television stations ranked among the top four stations in the market. Because KY3 may not lawfully hold the licenses for both KYTV and KSPR, KY3 crafted a series of agreements that provide it with the means of controlling both KYTV and KSPR as a single economic or business unit while using Perkin as a front for its KSPR operations.

C. The Petitions to Deny

On November 13, 2006, Koplar filed a Petition to deny the Application.[16] A separate Petition to deny the Application was filed on the same day by EBC Harrison, Inc. ("EBC"), the licensee of the MyNetworkTV affiliate serving the Springfield DMA, KWBM(TV). Both petitioners argued that KY3 was using a former employee as a straw man and that KY3 would

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[14] KY3 is a subsidiary of Schurz Communications, which owns numerous media outlets throughout the country.

[15] 47 C.F.R. § 73.3555(b) (2002).

[16] Koplar holds a construction permit for a new television station that will be assigned to the Springfield DMA. *See* FCC File No. BNPCT-20060421ACD (granted Aug. 11, 2006). The Bureau correctly concluded that Koplar, as a permittee, has standing to petition to deny the Application. *Decision* n.9.

actually operate and control KSPR. By operating and controlling KSPR and KYTV as a consolidated business, petitioners argued, KY3 would be in violation of the multiple ownership rules. Petitioners also demonstrated that KY3 will control the programming, personnel and finances of KSPR and thus have *de facto* control over the station. In addition, Koplar showed that the transaction constitutes a *per se* violation of the multiple ownership rules, because KY3 necessarily will program more than 15% of the programming on KSPR. Koplar also calculated that the market concentration resulting from the transaction will raise the HHI score for the Springfield market far above the level considered to be a "highly concentrated" market. Finally, the petitioners showed that the transaction will be devastating to competition and diversity in the Springfield television market, and thus, should be denied on public interest grounds.

D. The *Decision*

In the *Decision*, the Bureau accepted at face value, without further inquiry, the statements of KY3 and Perkin, and the incomplete set of transaction documents purporting to support those statements, that Perkin would be in nominal control of KSPR. The Bureau gave no weight to the fact that Perkin is a former employee of KY3 by failing to even mention that undisputed fact in its *Decision*. Without credible explanation or Commission precedent, the *Decision* failed to find that KY3's obvious indicia of *de facto* control create an impermissible interest in KSPR. The *Decision* fails to acknowledge that Perkin affirmatively represented that it intends to employ no more than four full-time employees and fails to address the implausibility of running a major network affiliate with four or fewer employees.

The Bureau also relied on its own 2004 *Malara* decision, which remains subject to Commission review, to reach the erroneous conclusion that television commercials are not part

of broadcast programming and thus cannot "count" toward the 15% programming limit.[17] As set forth below, the Bureau has misinterpreted the Commission's 15% attribution rule and the *Decision* should be reversed on that basis.

Most egregiously, the Bureau failed to address the far-reaching policy implications of its *Decision*. The *Decision* fails to acknowledge: (1) the undisputed fact that KY3 will control more than 50% of the television advertising revenues in the Springfield DMA and (2) that between KY3 and Nexstar they will control 98.1% of the television advertising revenues in the Springfield DMA. These uncontroverted facts demonstrate the harmful competitive aspects of the intended arrangements between KY3 and Perkin which were not addressed in the *Decision*.

Similarly, the Bureau dismissed without analysis the HHI calculations presented by Koplar[18] and failed to acknowledge the extreme consolidation of media taking place in the Springfield market. Finally, the Bureau failed to address petitioners' allegations that it was creating a precedent permitting any small market broadcaster to control and operate two (or more) television stations in contravention of the Commission's local ownership rules. The failure to address these critical aspects of the petitions constitutes reversible error, as further discussed below.[19]

II. The Bureau's *Decision* Is in Conflict with Commission Rules and the Conditions Imposed by the Court in *Prometheus*.

The *Decision* is in conflict with Section 0.283(c) of the Commission's rules because this case presents novel questions of law and policy that cannot be resolved based on existing

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[17] *Decision*, n.4 (citing *Malara Broadcast Group*, 19 FCC Rcd 24070 (2004), *pet. for recon. pending*).

[18] *Id.*; Joint Reply at 13 n.34.

[19] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Commission precedent, and because the *Decision* solely relies on a previous Bureau-level decision (the *Malara* decision) that remains subject to review by the full Commission. The *Decision* therefore represents an *ultra vires* act of the Bureau because it is an attempt to create new law in contravention of Section 0.283(c) of the Commission's rules. The Commission has never opined on whether a shell company run by a former employee of a competing television station may permissibly be the licensee of an in-market station, when the competing station's owner controls substantially all of the personnel, programming and finances of that station. Rather than relying on its own faulty precedent in *Malara*, the Bureau should have referred this case to the Commission for an *en banc* decision. On this basis alone, the *Decision* should be vacated so that the Commission may review the transaction *de novo*.

Koplar also submits that the *Decision* is inconsistent with the conditions imposed by the United States Court of Appeals for the Third Circuit ("Third Circuit") in the *Prometheus* case. In that case, the Third Circuit retained jurisdiction over the Commission's multiple ownership rulemaking proceeding and stayed any changes to the Commission's ownership rules until after court review.[20] The Bureau's *Decision* represents a new interpretation of multiple ownership rules contrary to the substantive holdings of *Prometheus* and in violation of the stay issued in that proceeding.

Koplar raised these issues before the Bureau, yet the *Decision* does not even mention *Prometheus*, acknowledge Koplar's reliance on it, or bother to discuss the mandatory guidance provided by the *Prometheus* court. These failures to consider important aspects of a petitioner's argument and binding court precedent constitute reversible error.[21]

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[20] *Prometheus*, 373 F.3d at 382.

[21] *State Farm*, 463 U.S. at 43.

III. The Commission Should Address the Public Interest Standard Ignored by the Bureau.

Koplar and EBC offered compelling arguments that the Application was dangerously inconsistent with the public interest, because it would result in reduced competition and a loss of diversity. These arguments largely were ignored by the Bureau and should be closely scrutinized on review.

The loss of competition in Springfield is not speculative — it is all too real. As a new television entrant in the market, Koplar has been unable to affiliate with any network because the Springfield television market has become a closed shop. Nexstar and KY3 are the only television game in town except for EBC's MyNetworkTV affiliation and a noncommercial PBS affiliate. Koplar attempted to affiliate with the CW network, but lost out to a Low Power TV station that is owned, unsurprisingly, by KY3.[22] All of these facts were detailed in the pleadings, yet the *Decision* makes no mention of them. The *Decision* ignores the reality that competition among stations simply cannot exist if two entities control 98.1% of the television advertising in a single market. And the *Decision* ignores the reality that a second virtual duopoly in one market is contrary to the public interest when even one *legal* duopoly in the market is prohibited.

The Bureau's *Decision* failed to address any of these arguments raised by EBC and Koplar, simply acknowledging in a footnote that EBC and Koplar raised competition arguments, and dismissing those arguments on the specious logic that such arguments should be addressed in a rulemaking proceeding. Dismissing important competition arguments in a footnote, and on largely procedural grounds, is not consistent with the Commission's statutory duty to consider

[22] *See* Koplar Petition at 19; Koplar Reply n.9.

the public interest effects of its decisions. Therefore, Koplar urges the Commission to give due consideration to the competition arguments raised by Koplar and EBC.

The Bureau also failed to address the Application's adverse effects on diversity in the Springfield market. The Commission has recognized, yet the Bureau ignored, that

> same-market broadcasters and certain other same-market media entities may raise particular concerns because of [the Commission's] goal of protecting local diversity and competition. Firms with existing local media interests may have an incentive and means to use financing or contractual arrangements to obtain a degree of horizontal integration within a particular local market that should be subject to local multiple ownership limitations.[23]

That is clearly the case here. The interlocking arrangements crafted by KY3 to control Perkin represent a major setback to the Commission's goals of localism and diversity. Diversity requires a number of independent voices. In Springfield, as a result of the *Decision*, an independent voice (a major television network affiliate) is being removed from the market. Under KY3's control, any local programming added to KSPR will be provided by KY3 which already programs KYTV. The Commission must either presume that KSPR will cease to be an independent voice, or hold a factual inquiry to determine how Mr. Perkin and his three (at most) full-time employees can simultaneously "control" all KSPR operations, finances and produce local news and other programming.

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[23] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, Report and Order, 14 FCC Rcd 12559, para. 51 (1999).

Competition and diversity are at the heart of the communications industry, as the Commission has noted repeatedly.[24] The public interest requires that the Commission defend its fundamental broadcast industry policies by vacating the *Decision*.

IV. The Bureau's Misinterpreted the Plain Meaning of the Commission's Multiple Ownership Rules

Koplar demonstrated in its Petition that KY3's effort to acquire KSPR constituted a *per se* violation of the multiple ownership rules. The Bureau rejected this argument because, as shown below, it misinterpreted the applicable rules.

There is no dispute that the Springfield market contains only six television stations and that KSPR and KYTV are two of those stations. No version of the Commission's ownership rules has ever permitted common ownership of two commercial television stations in a six station market such as Springfield.[25] Note 2(j) to the ownership rule provides:

> (j) "Time brokerage" (also known as "local marketing") is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.
>
> ***
>
> (2) Where two television stations are both located in the same market, as defined in the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b) and (c) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.[26]

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[24] *Frontier Broadcasting Co.*, 1 RR 50 (rel. Aug. 1, 1963) (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940)).

[25] *Compare* 47 C.F.R. § 73.3555 (2003) *to* 47 C.F.R. § 73.3555 (2006) (stayed).

[26] 47 C.F.R. § 73.3555, Note 2(j).

Based upon the plain meaning of these provisions, Koplar demonstrated in its pleadings that KY3 would acquire an attributable ownership interest in KSPR because KY3 would have the right to program 15% of KSPR's programming pursuant to the Advertising Representation Agreement and, in addition to that 15%, KY3 would control and place all of KSPR's advertising, thus necessarily pushing the total amount of "broadcast time per week" brokered by KY3 beyond the 15% limit.[27] The 15% limitation applies regardless of the source of the programming, meaning that advertising, including paid programming advertising, is included in "broadcast time." Because application of the rule is without regard to the source, any material from advertisers, networks or independent programmers falls under programming included in broadcast time. Accordingly, KY3 would acquire a *per se* attributable ownership interest in KSPR, making its arrangements with Perkin an overt violation of the multiple ownership rules.

The *Decision* did not interpret the plain meaning of the rules, instead holding that advertisements are not part of a station's "broadcast time." In support of this novel interpretation, the Bureau cited to *Malara*, itself a Bureau decision on review before the Commission, and relegated the discussion to a footnote: "We have previously held that such advertising time is not to be counted in computing whether the 15% limit has been reached."[28] The *Malara* decision cites no relevant Commission precedent for its interpretation, contending merely that the Commission rule "suggests" such a view.[29] Neither the *Decision* nor *Malara*

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[27] See Koplar Petition at 10-11; Koplar Reply at 7-8.

[28] *Decision* at 2 n.4 (citing *Malara*).

[29] *Malara*, 19 FCC Rcd at 24074. The *Malara* decision improperly relied on the *Attribution Reconsideration* in support. *See id.* (citing *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 16 FCC Rcd 1097, 1117 (2001)). However, the Commission's statement in that case merely describes typical commercial arrangements between program brokers and licensees. It does not hold that advertising or other commercial material aired by a station is not part of broadcasting or broadcast time.

offers any rational explanation of why advertisements broadcast by a television station are not part of "broadcast time" but that other, undefined materials transmitted by a station constitute "broadcast time." Such an unexplained and novel interpretation of a rule by the Bureau should not be permitted to stand.

The Bureau's improper reliance on *Malara* and its interpretation of the Commission's rules lacks any direct Commission precedent and should be reversed.[30] The fundamental purpose of the attribution rule is to ensure that stations in the same market may not be commonly programmed to a substantial extent unless commonly owned and thus avoid circumvention of the Commission's local ownership and control restrictions. Destruction of this fundamental understanding would leave industry participants free to provide unlimited amounts of commercial advertising to stations in the same market without concern for the ownership rules, including, for example, "infomercials" and other program-length commercials.

The Bureau's unsupported interpretation also runs counter to Commission precedent which treats commercials as part of a station's broadcast time. The Commission's regulation of children's programming, indecency, obscenity, sponsorship identification, Video News Releases and political broadcasting all treat commercial time as part of broadcast time and hold broadcasters responsible for them. Reversal of these understandings would be unwarranted and might leave the Commission without jurisdiction to regulate the content of advertisements as not part of broadcasting. If such an extreme rewrite of the Commission's rules and the Communications Act is intended, it cannot lawfully be done by the Bureau under delegated

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[30] Koplar submits that the Bureau lacked delegated authority to address this question and instead should have referred the issue to the full Commission. *See* 47 C.F.R. § 1.115(b)(2)(ii).

authority. The *Decision* should be reversed in order to achieve a rational harmony for the Commission's regulation of advertising and programming.

V. The Bureau Misapplied the Commission's Standards for Station Control.

In making a case-by-case analysis of whether a purported licensee is in control of a station, the Commission examines control of personnel, programming and finances.[31] As shown below, the Bureau failed to consider material parts of the record before it and relied on no Commission precedent to reach the conclusion that KY3 would not obtain an impermissible concentration of control.[32]

A. Station Personnel and Programming Will Be Controlled by KY3

It is uncontested that Perkin will slash KSPR full-time employees from 65 to 4 or fewer persons, a reduction in force of approximately 94%, and will rely instead on KY3 employees. It is also uncontested that Perkin is a former employee of KY3. Yet the *Decision* did not even note Perkin's sworn representation to the Commission that it would employ "fewer than five" full time employees.[33] Nor did the Bureau's analysis even acknowledge the undisputed fact that Mr. Perkin is a former employee of KY3 or analyze whether, as a result, Perkin may be subject to undue influence from his former employer. This is a substantial and material question of fact that at the very least requires resolution in a hearing. The failure of record warrants reversal.

Rather than explaining or further examining how an ABC affiliate could operate with a maximum of four full-time employees, the *Decision* states that "[Perkin] will control its

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[31] *Roy M. Speer*, 11 FCC Rcd 18398, 18414 (1996).

[32] *Decision* at 4.

[33] Application (Response to Question III(14)).

employees."[34] Such a finding is irrelevant because there was no question about Perkin's control of Mr. Perkin and his (at most) three employees. The issue that the Bureau avoided was: How is it possible for Mr. Perkin and his skeleton crew to control the programming, finances and operations of KSPR? It is not credible, or at least raises a substantial and material question of fact, that a maximum of four such employees is able to maintain "ultimate licensee control" over the essential KSPR functions handled by KY3 employees, including oversight of programming, program selection, finances, sales, operations, and engineering, when prior to now, KSPR required 65 full-time employees.[35] Nor is it credible to conclude that Perkin will control station programming when 85% of the programming comes from the ABC network and the other 15% comes from KY3. The Commission should require Mr. Perkin to demonstrate at a hearing how he and his three employees exercise control over KSPR's programming under these facts. In reality, Perkin does not generate or control any of KSPR's originated programming.

B. Perkin's Passive Investor Status Confirms That It Will Not Control KSPR's Finances

KY3 did not disclose the financial arrangements it has with Perkin until specifically requested to do so by the Bureau.[36] In light of the disclosure of some of the details of these financial arrangements, Perkin's passive investor status is all the more clear, yet the Bureau appears to have overlooked much of the financial details and offered only scant analysis of the arrangements in its *Decision*.

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[34] *Decision* at 4.

[35] *See* Koplar Petition at 8; Koplar Reply at 6.

[36] See Bureau Letter dated May 22, 2007 and the subsequent amendment to the Application.

It is undisputed that KY3 fronted the money for Perkin to buy the KSPR license.[37] The Bureau did not address that fact. It is also clear that KY3 is guaranteeing all of Perkin's expenditures to nominally run the station. Specifically, under the Shared Services Agreement, payment of an $8,333.33 "Services Fee" by Perkin to KY3 is contingent on payment by KY3 to Perkin of a "Sales Commission" under the Advertising Representation Agreement.[38] The "Sales Commission" guarantees Perkin 35% of all station advertising revenue regardless of station performance.[39] If total advertising revenue exceeds $5.8 million annually, Perkin receives a 7% bonus. If the Sales Commission is less than Perkin's actual expenditures in any given month, KY3 will pay Perkin the difference.[40] In other words, if KY3 does not pay Perkin, Perkin does not pay KY3. Perkin cannot lose because it has a guaranteed revenue stream, with no evident financial incentive to operate the station efficiently, or even at all, and thus no incentive to be responsive to the programming needs, concerns and interests of KSPR viewers. In short, the *Decision* blessed an arrangement that divorces a television station licensee from any economic incentive to serve the public interest.

The Bureau appears to have overlooked all these arrangements other than the 7% bonus, and concluded that the possibility of an additional 7% bonus "gives Perkin a vested interest in being active in running the station in order to improve station operations and programming and, thereby, attract more advertisers."[41] That statement is irrational given the clear allegations of fact that Perkin lacks legal authority or personnel to place programming or to sell advertising.

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[37] Koplar Reply at 9.

[38] *See* Shared Services Agreement, Section 5(c).

[39] Advertising Representation Agreement § 2.8.

[40] *Id.*

[41] *Decision* at 4.

KY3 alone controls station revenues because it is solely responsible for selling advertising. KY3 owns and controls all "station operations" and programs all local programming, with the network providing the bulk of programming. Indeed, Perkin employs far too few persons to even have the ability to operate the station, program it, oversee programming or sell advertising.

It is KY3 that will be in control of determining whether additional compensation may be given to Perkin. Perkin enjoys a set compensation even if actual station performance is poor or nonexistent. If the station performs financially better than a benchmark under KY3's control, then Perkin enjoys a little extra compensation.[42] Thus, there is no rational connection between the Bureau's conclusion that Perkin will control station finances and the fact that Perkin is forbidden by contract from selling the advertising that generates station revenue or placing programming that would attract local viewers.

KY3, not Perkin, is be responsible for paying for the technical and engineering support of KSPR.[43] Consistent with its technical control of KSPR, KY3 will own, and thus control, the KSPR tower, transmitter building, offices and studios.[44] Perkin will be a mere lessee of all the facilities necessary to operate the station, pursuant to an undisclosed lease agreement. Obviously, the Bureau could not have considered the terms of that undisclosed lease, even though the overall arrangements establish that Perkin should not be considered a true "lessee" because it is paid consideration by KY3, the "lessor." These arrangements are additional indicia of the substantial control of the station ceded to KY3, as are the fact that KY3 will control

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[42] It is certainly a great deal for Perkin. It is not a great deal for the public, who are losing another independent voice in an already small and highly concentrated market with few voices.

[43] Shared Services Agreement, Section 5(a)(ii).

[44] *Id.* Section 5(b).

Perkin's debt obligations and that payment of Perkin's debt is guaranteed by KY3 with KY3's guaranteed revenues to Perkin.

In addition, as part of the overall transaction, KY3 has an option to buy the license for KSPR from Perkin for a Cash Purchase Price of $300,000 within three years and for $200,000 thereafter, for up to 15 years.[45] The *Decision* granted the Application under which Perkin was permitted to acquire the KSPR license for a "Base Purchase Price" of $20,629,239.[46] And as noted above, KY3 fronted the Base Purchase Price to Perkin. The *Decision* ignores that the Option price represents approximately one percent (1%) of the Base Purchase Price. The minuscule Cash Purchase Price for a network-affiliated full power television station establishes that the parties themselves believe that KY3 has already purchased 99% of the equity of KSPR, a stunning depth of control that the Bureau did not even acknowledge.

The *Decision* dismissed these indicia of financial control citing to a 1998 decision of the Chief of the Video Services Division.[47] The Bureau did not cite to any Commission-level decision on this point. In any event, the 1998 case did not include the multitude of additional arrangements involved in this transaction, as detailed below. Given KY3's commitment to front Perkin's purchase of the license, KY3's staffing of the station, Perkin's guaranteed receipt of cash flow regardless of station performance, KY3's complete control of station advertising, local programming and station equipment, KY3's guarantee of Perkin's debt obligations and KY3's Option to buy the station, which establishes KY3's 99% ownership of KSPR assets, the financial details of the transaction clearly demonstrate that Perkin will not control station finances.

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[45] Draft Option Agreement, § 2.1(b); § 1.2.

[46] Asset Purchase Agreement, § 2.4, Application, Exhibit 4.

[47] *Decision* at 4 (citing *US Broadcast Group Licensee*, 13 FCC Rcd 13963 (Chief, Video Services Division 1998)).

The Commission cannot rationally determine whether Perkin is sufficiently independent of KY3 under these arrangements unless the parties are required to submit the lease agreement. Indeed, the record clearly establishes that Perkin is utterly dependant upon KY3 for finances, operations and personnel.

C. The Bureau's Piecemeal Approach is Contrary to Commission Precedent

In determining station control, the Commission requires a case-by-case analysis of the totality of the circumstances.[48] In the *Decision*, however, the Bureau ignored the big picture and, instead, found that no one of the individual arrangements governing personnel, programming and finances leads to station control. The Bureau did so by viewing each arrangement in isolation without a reasoned analysis or explanation of the total effect of all of the circumstances of KY3's numerous connections to KSPR.

For at least fifteen years, KY3 will: originate all of KSPR's local programming, place all of its advertising, provide virtually all of the station's staff, produce all of its news, own all equipment necessary for KSPR to operate, guarantee Perkin's debt pursuant to a draft loan guaranty, and have an option to buy KSPR pursuant to a draft option agreement.[49] The *Decision* did not, and could not, rely on Commission precedent that all of these combined circumstances do not create an attributable interest and station control. The Commission should take this opportunity to find that KY3's arrangement, viewed in its totality and combined effect, constitutes *de facto* control of KSPR by KY3.

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[48] *Chase Broadcasting, Inc.*, 5 FCC Rcd 1642, 1643 (1990).

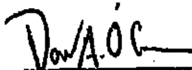
[49] The *Decision* did not require the parties to supply executed copies of the option agreement to loan guaranty, or require the parties to commit not to substantially alter the terms of those agreements.

VI. Conclusion

Based upon the foregoing, the Commission should vacate the Bureau's *Decision*, rescind the grant of authority for assignment of the license of KSPR and require the parties to unwind the transaction. In the alternative, the Commission should rescind the Application grant and designate the Application for a hearing to determine the facts necessary for the Commission to act on the Application.

Respectfully submitted,

KOPLAR COMMUNICATIONS
INTERNATIONAL, INC.



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August 29, 2007

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I, Adrienne Biddings, hereby certify that copies of the Complaint and Request for Emergency Relief by Media Council Hawai`i, through their attorneys, the Institute for Public Representation, have been served by first-class mail and courtesy copy by e-mail, this 23rd of October, 2009, on the following persons at the addresses shown below.

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