

*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
KHNL/KGMB License Subsidiary, LLC	)	Fac. ID Nos. 34867 and 34445
	)	
Licensee of Stations KHNL(TV) and	)	Fac. ID No. 36917
KGMB(TV),	)	NAL Acct. No. 201141410015
Honolulu, Hawai`i	)	FRN No. 0016152480
	)	
And	)	
	)	
HITV License Subsidiary, Inc.	)	
	)	
Licensee of Station KFVE(TV), Honolulu,	)	
Hawa`ii	)	

Application for Review

December 27, 2011

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## Summary

Media Council Hawai'i requests that the full Commission reverse the November 25, 2011 Order by the Media Bureau denying Media Council Hawai'i's Complaint and Request for Emergency Relief filed on October 7, 2009. The Complaint alleged that Raycom and HITV entered into a series of agreements that violate the Communications Act and Rules by giving Raycom *de facto* control over three television stations in Honolulu without prior FCC approval. In addition, it contends that this arrangement violates the FCC's "local television ownership limit," which prohibits common control of more than one or two television stations within the same market and common control of more than one top-four ranked station.

The Bureau Order should be reversed because it involves an important question of law or policy that has not previously been resolved by the Commission. That question is whether the local television ownership rule's prohibition against common control of more than one top-four ranked television station should not apply where the second top-four ranked station was acquired by means of a network affiliation and asset swap instead of by outright acquisition. Here, it is undisputed that Raycom directly controls two of the top-four stations in Honolulu -- KHNL, the NBC affiliate and KGMB, the CBS affiliate. The Bureau concedes that this result is inconsistent with the intent of the television duopoly rule to preclude common control of two top-four ranked stations and to allow duopolies only in limited circumstances where necessary to assist "weaker" stations. But, the Bureau nonetheless reasons that because the duopoly rule refers to the creation of duopolies "at the time of application," it is "unclear" whether the prohibition applies here because no transfer application has been filed. Where the meaning of a regulation is unclear and/or presents a novel question, the Bureau should refer the issue to the full Commission. Here, the question is particularly important because there are many other situations around the country

where stations are utilizing similar agreements to circumvent the local television ownership rules and create "virtual duopolies."

The Bureau's conclusion that no application for transfer of control is needed because Raycom has not acquired *de facto* control over the HITV station KFVE should also be reviewed by the full Commission because it is based on erroneous findings as to material questions of fact. Whether an unlawful *de facto* transfer of control has taken place depends on an analysis of the specific facts regarding programming, personnel, and finances. Despite the large factual record, the Bureau devotes only one or two paragraphs to analyzing each factor. It ignores record evidence presented by MCH that Raycom is providing essentially the same local news programming for all three stations, that HTIV's KFVE has only two employees (one of whom was formerly a Raycom General Manager), that KFVE has no tower, studio, or capacity to produce or broadcast programming on its own, and that Raycom reaps most of the profits and carries most of the financial risk from KFVE's performance.

For both of these reasons, the Commission should reverse the Bureau Order and grant appropriate relief.

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Application for Review

Media Council Hawai`i (MCH), by its attorney, the Institute for Public Representation, pursuant to 47 CFR §1.115, respectfully requests that the full Commission reverse the Order issued by the Media Bureau on November 25, 2011, in the above-referenced proceeding. The order denied MCH’s Complaint and Request for Emergency Relief filed on October 7, 2009, alleging that Raycom had obtained *de facto* control over three television stations in Honolulu in violation of 47 USC § 310(d) and 47 CFR § 73.3540, which prohibit the transfer of a broadcast license without prior FCC approval, and 47 CFR §73.3555(b), the “local television ownership limit” or “duopoly rule,” which prohibits common control of more than one or two television stations within the same market and common control of more than one top-four ranked station. The Bureau Order should be reversed because involves an important question of law or policy which has not previously been resolved by the Commission and is based on erroneous findings as to material questions of fact.

## **I. Issues Presented**

1. Whether the Bureau's decision, that the local television ownership rule's prohibition against common control of more than one top-four ranked television station should not apply where the second top-four ranked station was acquired by means of a network affiliation swap instead of by outright acquisition, presents a novel question that can only be decided by the full Commission?

2. Whether the Bureau's determination that Raycom does not exercise *de facto* control over the station nominally licensed to HITV was based on erroneous findings as to a material questions of fact?

## **II. Background**

MCH's complaint was prompted by an announcement that Raycom<sup>1</sup> and HITV<sup>2</sup> (collectively "licensees" or "Broadcast Parties") planned to enter into a Shared Services Agreement ("SSA") without seeking prior FCC approval. Under this agreement, Raycom, then-licensee of Honolulu television stations KHNL, an NBC affiliate, and KFVE, a MyNetworkTV affiliate, would take over the operation of KGMB, a CBS affiliate, licensed to HITV. The Complaint alleged that because Raycom would exercise control over the programming, personnel, and finances of the station nominally licensed to HITV, the agreement would result in an unauthorized transfer of control in contravention of the Communications Act and FCC rules. Permitting this Agreement to take effect would also violate the local television rule by giving Raycom control over three television stations in the Honolulu DMA, including two top-four network affiliates. Further, Raycom's plan to combine the news operation of all three stations in a single operation called Hawai'i News Now, and to lay off about one third of the stations' combined workforce, would harm the MCH members and the public generally by reducing the

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<sup>1</sup> Raycom Media, headquartered in Montgomery, AL, through various subsidiaries, owns approximately 46 television stations as well as other media-related properties.

<sup>2</sup> The parent company of HITV is MCG Capital Corp., a venture capital firm based in Arlington, VA, has no other television stations.

number of independent voices providing local news from four to three, and by substantially reducing competition in the provision of local news and the sale of advertising time.<sup>3</sup>

MCH requested that the FCC issue a “standstill” order to prevent the execution of the SSA. MCH also requested that the Commission issue an order directing that Raycom and HITV show cause why a cease and desist order should not be issued to enjoin the implementation of the Agreement and/or revoke their licenses pursuant to 47 USC §§154(i) and 303(r) and 47 CFR §1.91.

The Commission took no action on the request for a “standstill” order and thus the SSA and several other related agreements were executed in October 2009. Pursuant to these agreements, KGMB, the CBS affiliate licensed to HITV and KFVE, the MyNetwork affiliate licensed to Raycom, swapped both network affiliations and call signs. As a result, Raycom now directly controls both KHNL, the NBC affiliate, and KGMB, the CBS affiliate. These stations simulcast identical local news programs produced by Raycom under the name of Hawai`i News Now. Raycom also exercises *de facto* control over KFVE, the MyNetwork affiliate nominally licensed to HITV. Raycom also produces local news programming for broadcast on KFVE under the name Hawai`i News Now.

#### **A. The Record in this Case**

MCH’s complaint prompted the Media Bureau to engage in a lengthy factual investigation. On Oct. 23, 2009, the Bureau requested that the licensees provide copies of their agreements.<sup>5</sup> After the licensees submitted redacted copies, the Bureau requested unredacted

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<sup>3</sup> Media Council Hawai`i asks the FCC to promptly issue a “standstill order” enjoining Raycom and MCG from taking any further action pursuant to the Agreement until the FCC has issued the order to show cause, the media companies have had the opportunity to respond, and a final order has been issued.

<sup>5</sup> Letter from Barbara A. Kreisman to Jonathan D. Blake (Oct. 23, 2009).

copies.<sup>6</sup> The licensees then submitted unredacted copies to the Commission, but asked for them to be treated confidentially.<sup>7</sup> Raycom and HITV also amended the agreements in response to Bureau's request for clarification, claiming that the provision of concern to the Bureau was the result of a "scrivener's error."<sup>8</sup>

Eventually, on March 29, 2010, the Bureau denied the request for confidential treatment and ordered that unredacted copies (with a few exceptions) of all five agreements be made available for public inspection.<sup>9</sup> Here is a brief summary of each of the agreements.

(1) Shared Services Agreement – Raycom provides HITV with virtually all the services associated with running a television station. HITV pays Raycom a service fee equivalent to 75% of the station's monthly cash flow (revenue minus expenses). Although HITV is responsible for paying certain expenses including utility costs, insurance, its employee salaries, and FCC license fees, Raycom is obligated to reimburse HITV for these expenses.

(2) Term Loan Note - HITV receives a note from Raycom for \$22 million payable over approximately seven years at 5% interest.

(3) Studio Lease - Gives HITV employees nonexclusive access to Raycom's studio and additional space to keep the station's public inspection file. For this access, HITV pays a monthly fee equivalent to 15% of its cash flow.

(4) Purchase Option Agreement - Although Raycom initially held the option right to purchase the HITV station, the Purchase Option Agreement was amended to give to Ottumwa Media Holdings the right to acquire the HITV-licensed station for seven years. The exercise price is the difference between \$22 million (the amount of the Note), plus \$100, plus Excess Decommissioning Costs, if any,

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<sup>6</sup> Letter from Barbara A. Kreisman to Jonathan D. Blake and John Griffith Johnson, Jr. (Nov. 10, 2009).

<sup>7</sup> Letter from Jonathan D. Blake and John Griffith Johnson, Jr. to Marlene H. Dortch, Secretary (Nov. 9, 2009).

<sup>8</sup> Letter from Jonathan D. Blake and John Griffith Johnson, Jr. to Barbara A. Kreisman, at 2 (Nov. 24, 2009).

<sup>9</sup> Letter from Barbara A. Kreisman to Rick Daysog, et al, (Mar. 28, 2010). Mr. Daysog is a reporter who filed a request for the agreements under FOIA.

and the amount of principal Raycom already paid on the Note plus any profits HITV retained in excess of \$250,000 per year.

(5) Asset Exchange Agreement – KGMB and KFVE swap network affiliation agreements, program contracts, employment contracts, and all other assets and intangibles used to operate the stations, except for the FCC licenses.

After reviewing the unredacted agreements, MCH supplemented its complaint. It contended that the unredacted agreements conclusively demonstrated that Raycom had acquired *de facto* control over the station licensed to HITV and that, as a practical matter, HITV had “sold” its station to Raycom for \$22 million.<sup>10</sup>

Raycom and HITV denied that an unauthorized transfer of control had taken place, but failed to rebut MCH’s fundamental contention that HITV neither benefited from KFVE’s financial success nor did it bear the risk of KFVE’s losses. KFVE’s profits were essentially capped at a fixed amount, and if the station’s cash flow was less than a certain amount, Raycom was obligated to make a fixed payment to HITV. Furthermore, if cash flow was negative, Raycom—not HITV—would be responsible for covering all of the station’s operating costs.<sup>11</sup>

On September 28, 2010, after meeting with the Bureau staff, Raycom and HITV informed the Bureau that they would renegotiate and modify certain aspects of their arrangement.<sup>12</sup> On October 8, 2010, they submitted copies of the amended contracts which, among other things, eliminated Raycom’s obligation to pay all of HITV’s expenses and required HITV to pay Raycom a monthly flat fee plus 15% of its cash flow.<sup>13</sup> After reviewing these modifications, MCH responded that the fundamental public interest problems remained unchanged. News programming from all three stations would still come from a single

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<sup>10</sup> MCH Supplement, at i, May 10, 2010.

<sup>11</sup> MCH Reply to Joint Response to Supplement, at 2, June 30, 2010.

<sup>12</sup> Letter from John S. Logan, et al, to Marlene Dortch, Secretary (Sept. 28, 2010).

<sup>13</sup> Letter from John S. Logan, et al., to Marlene Dortch, Secretary (Oct. 8, 2010).

newsroom. All three stations would use the “Hawai`i News Now” brand, the same reporters, staff, video, and anchors. Raycom would still provides KFVE with prepackaged local news programs and produces KFVE’s local programming, including the University of Hawai`i sports programming and local cultural programming. KFVE would still have only two employees, no tower and no studio of its own. In short, HITV would still have no incentive to control the core operations of KFVE.<sup>14</sup>

MCH subsequently submitted a study documenting the detrimental effects of the SSA on local news diversity in Honolulu.<sup>15</sup> The study compared a constructed week of broadcasts for all five stations that broadcast news in Honolulu both before and after the implementation of the SSA. It concluded, among other things, that the proportion of news stories devoted to public issues dropped significantly for both the SSA station group (KFVE, KGMB, KHNL) and the non-SSA station group (KHON and KTTV) after the SSA took effect.<sup>16</sup> It also found that the SSA station group aired fewer local stories than the non-SSA group, and that this disparity increased after the SSA took effect.<sup>17</sup> Further, the duration of news stories on the SSA stations was significantly shorter after the SSA went into effect.<sup>18</sup> At the same time MCH submitted this study, it informed the Bureau that diversity of news sources had been dealt a further blow

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<sup>14</sup> MCH Response, at 4, Nov. 8, 2010.

<sup>15</sup> Letter from Adrienne T. Biddings to Marlene H. Dortch, Secretary (Feb. 18, 2011), attaching Danilo Yanich, *Local TV & Shared Services Agreements: Examining News Content in Honolulu* (Feb. 2011).

<sup>16</sup> Yanich, *supra* note 15, at 11.

<sup>17</sup> *Id.* at 13.

<sup>18</sup> *Id.* at 14. Another indication of the diminution of news quality in Honolulu is the use of less sophisticated reporting techniques post-SSA. For example, the stations turned to less expensive presentation modes, such as the use of voice-over by anchor. *Id.* at 19. By contrast, use of the more expensive “package presentation mode,” in which a news crew actually goes to the scene of the story to shoot video and investigate, was cut in half by the three stations involved in the SSA. *Id.* at 20. Given the trend toward shorter and less expensive stories, the study concluded that the “hypothetical” benefit that combined news stations would provide more enterprising news content had not materialized. *Id.* at 29.

because Honolulu's two daily newspapers merged and the combined *Honolulu Star-Advertiser* entered into a news sharing agreement with Raycom's Hawaii News Now.<sup>19</sup>

Next, the Bureau apparently sought additional information from the licensees regarding their programming and financial arrangements. MCH only learned of these requests when the licensees made two *ex parte* submissions in April 2011. The first *ex parte* dated April 1, 2011, states that the presentation was made in response to verbally transmitted inquiries of the Media Bureau regarding KFVE's operations and finances. The filing contained two Annexes. Annex A answered specific question about KFVE's programming and public file. Annex B concerned financial arrangements, but the actual figures were redacted. The second *ex parte* submission on April 22, 2011, responded to verbally transmitted requests for copies of the stations' quarterly issues/programs (I/P) lists for the fourth quarter of 2008 through the fourth quarter of 2010. Because some of the I/P lists were "missing" or incomplete due to "erroneous" logging, this submission included both "originally prepared" versions of their I/P lists as well as recently "reconstructed" and "revised" versions of those lists.<sup>20</sup>

On May 23, 2011, MCH responded to the *ex parte* submission regarding programming. MCH's analysis of the 2010 I/P lists showed that all three stations were providing essentially the same issue-responsive programming. Although there were some variations from quarter to quarter, the I/P lists for each quarter were identical in format. Moreover, most of the issue-responsive programming reported by Raycom's KGMB and KHNL was also reported by HITV's KFVE. For example, in the first quarter 2010, all three stations identified the same seven community issues.<sup>21</sup>

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<sup>19</sup> Letter from Adrienne T. Biddings to Marlene H. Dortch, Secretary, at 2 (Feb. 18, 2011).

<sup>20</sup> *Ex Parte Presentation of Broadcast Parties* (Apr. 22, 2011).

<sup>21</sup> Letter from Adrienne T. Biddings to Marlene H. Dortch, Secretary, at 3 (May 23, 2011).

MCH's response also described how members and supporters of MCH had attempted to inspect the stations' public files on September 3, 2009, shortly after they learned that Raycom planned to merge the operations of all three stations. When they visited the studio for Raycom stations, they were told by Raycom General Manager John Fink (who is now the General Manager of HITV's KFVE) that he did not know where the public file was located. Subsequently, Mr. Fink determined that public file was locked and he did not have a key.<sup>22</sup>

MCH pointed out that the Broadcast Parties failed to properly maintain their public inspection file as required by FCC Rule 73.3526.<sup>23</sup> Moreover, the Broadcast Parties' creation of "reconstructed" and "revised" I/P lists *after* the Media Bureau requested copies was not the first time that the Broadcast Parties had revised critical documents after their practices had been questioned. For example, they amended their Asset Exchange Agreement one week after MCH filed its Complaint, and again after the Media Bureau asked them to clarify certain provisions of the agreements. Finally, in October 2010, after MCH demonstrated that the financial arrangements were inconsistent with FCC precedent, the Broadcast Parties amended the contracts to reduce the appearance of HITV's financial dependency on Raycom. MCH argued that these actions, along with the violations of the public file rule, evidenced a lack of candor and raised questions about whether Raycom and HITV possessed the requisite character to remain as licensees.<sup>26</sup>

On June 7, 2011, MCH filed its response to the licensees' *ex parte* submission of financial data on April 1, 2011, which MCH's counsel were able to review only after signing a protective order. MCH used the formulae from the original and amended agreements to

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<sup>22</sup> *Id.* at 2-3. The group then went to KGMB where they were shown to the room where the file was located. However, the public file was in such disarray that it was not usable.

<sup>23</sup> *Id.* at 6-8.

<sup>26</sup> *Id.* at 9.

determine how KFVE's profits were divided between Raycom and HITV. MCH concluded that under both, Raycom reaped virtually all of the economic benefits and bore all of the risks associated with KFVE, thus leaving little incentive for HITV to control the station's core operations.<sup>27</sup>

## **B. The Bureau Order**

The Bureau's Order fails to discuss this extensive record. Instead, it summarily concludes that no unauthorized transfer occurred.<sup>28</sup> It goes on to state that "we agree with Media Council insofar as it suggests that the net effect of the transactions in this case – an extensive exchange of critical programming and branding assets with an existing in-market, top-four, network affiliate – is clearly at odds with the purpose and intent of the duopoly rule."<sup>29</sup> But it nonetheless declines to issue the order to show cause requested by MCH. Instead it states that it "will include in the ongoing 2010 quadrennial review proceeding the duopoly rule issues that this and similar cases raise. Moreover, as we have noted, our decision here does not preclude us from considering whether this or similar transactions are consistent with the public interest within the context of individual licensing proceedings."<sup>30</sup>

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<sup>27</sup> MCH Response, at 3 (June 7, 2011).

<sup>28</sup> Order at ¶14.

<sup>29</sup> *Id.* at ¶23.

<sup>30</sup> *Id.* (footnotes omitted). The Bureau also found that HITV had violated the public file rules and was "apparently liable for the base forfeiture of \$10,000 for the failure to include three issues/programs lists and to provide adequate access to its station's public inspection files." In response to a separate complaint filed by Honolulu citizen Larry Geller, the Bureau merely admonished Raycom for failure to provide timely access to its stations' public inspection files in September 2009. *Id.* at ¶27.

### **III. The Commission Should Reverse the Bureau Order Because It Involves an Important Question of Law and Policy that has not Previously Been Resolved by the Commission**

One ground for Commission review under 47 CFR §1.115(b)(2)(ii), is that the Bureau’s “action involves a question of law or policy which has not previously been resolved by the Commission.” Further, 47 CFR §0.283(c) requires the Media Bureau to refer to the full Commission “[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.” Because the Media Council’s complaint raised novel questions, the Bureau lacked authority to rule on it.<sup>31</sup>

There is no dispute that as a result of these agreements, Raycom now directly controls of two top-four stations – KHNL, the NBC affiliate and KGMB, the CBS affiliate. Indeed, the Bureau found that the agreements “gave Raycom control over two of the top four stations in the Honolulu, HI market.”<sup>32</sup>

MCH demonstrated that the Commission has never found a similar arrangement to be consistent with the Communications Act and FCC rules and policies. Indeed, the Commission has issued only a single decision involving sharing arrangements, and that decision *reversed* a Bureau Decision allowing sharing.<sup>33</sup> Even the Bureau’s own prior rulings have never addressed the questions presented here. As MCH explained in its Reply:

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.

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<sup>31</sup> See MCH Reply at 1 (Oct. 23, 2009).

<sup>32</sup> Order at ¶14.

<sup>33</sup> *Ackerley Group, Inc.*, 17 FCC Rcd 10828 (2002).

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.

. . . Nor do the Broadcast Parties even attempt to explain how this arrangement is consistent with the top-four limitation.<sup>34</sup>

The Bureau seems troubled by Raycom’s control over two top-four stations and suggests that it is inconsistent with the intent of the television duopoly rule to preclude common control of two top-four ranked stations and to allow duopolies only in limited circumstances where it is necessary to assist “weaker” stations.<sup>35</sup> But, the Bureau nonetheless concludes that because the duopoly rule “specifically refers to ‘at the time of application,’ . . . the applicability of the top-four prohibition in the case presented here, where no application was required, is unclear.”<sup>36</sup>

Where the meaning of a regulation is unclear, the Bureau should refer the issue to the full Commission. Instead, *without citing any precedent*, the Bureau concluded that “[b]ecause no application was involved in these transactions, and none was required, the applicability of the

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<sup>34</sup> MCH Reply, at 10 (Oct. 23, 2009).

<sup>35</sup> Order at ¶22.

<sup>36</sup> *Id.* To the extent that the Bureau’s order could be read as indicating that it lacks an appropriate remedy for this violation of the top-four prohibition because there is no pending application, it is wrong. The Bureau could have asked the Commission to issue the order to show cause requested by MCH under 47 CFR §1.91. Alternatively, it could have asked the Commission to call for early license renewal under 47 CFR §73.3539(c); *see WWOR-TV, Inc.*, 6 FCCRcd 6569, 6574 (1991). In contrast, the alternative forms of relief suggested by the Bureau are unacceptable. Forcing MCH to wait until the licenses come up for renewal in 2014 and file a new challenge at that time, would be ineffective given the fact that the Commission almost never denies license renewals. Steven Waldman, *The Information Needs of Communities*, at 286-88 (June 2011). Even if this practice were to change, the public would still suffer from the lack of diversity and competition for many years. Similarly, while MCH welcome the Commission’s decision to seek comment on attribution of shared arrangements in *2010 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, MB Docket 09-182, at ¶¶194-208 (rel. Dec. 22, 2011), it could take many years to change the attribution rule, and it is unlikely that even if changed, the FCC would apply it retroactively.

duopoly rule to these circumstances is problematic and finding a violation of that rule in this case would be similarly problematic.”<sup>37</sup>

It relaxing the local television rule in 1999 to allow duopolies in certain circumstances, the Commission explained that

The “top four ranked station” component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition. In addition, our analysis has indicated that the top four-ranked stations in each market generally have a local newscast, whereas lower-ranked stations often do not have significant local news programming, given the costs involved. Permitting mergers among these two categories of stations, but not among the top four-ranked stations, will consequently pose less concern over diversity of viewpoints in local news presentation, which is at the heart of our diversity goal.<sup>38</sup>

By allowing a top four station to acquire a smaller station, the Commission hoped to “improve the ability of small stations to compete.”<sup>39</sup> Thus, it makes sense that the Commission would not require subsequent divestiture simply because the efforts to nurture the weaker station were successful to the point that it made it to the top four.<sup>40</sup> The Commission did not appear to contemplate that single entity might be able to control two top four stations by engaging in a network affiliation and assets swap.

Thus, the issue -- whether the duopoly rule’s prohibition against common control of more than one top four ranked television station should not apply where the second top four ranked station was acquired by means of a network affiliation swap instead of by outright acquisition -- is not only novel, but it is an important matter of policy that should be determined by the

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<sup>37</sup> Order at ¶14.

<sup>38</sup> 14 FCC Rcd 12903, 12933-34 (1999).

<sup>39</sup> *Id.* at 12934.

<sup>40</sup> *Id.* at 12933.

Commission. In fact, the Commission already has before it two other applications for review raising the same question. The application for review of the Bureau's decision in *Malara Broadcast Group of Duluth Licensee, LCC*,<sup>41</sup> challenges the approval of a transfer involving a sharing arrangement that permits "consolidation of the CBS and NBC affiliate television stations in the four-station Duluth market."<sup>42</sup> Another application challenges the Bureau's decision in *Piedmont Television of Springfield Licensee, LLC*.<sup>43</sup> That application contends that the assignee, which was run by a former employee of another station in the market, was a shell to give the station "a virtual duopoly' comprising the ABC and NBC network affiliates in Springfield, [MO], two of the top four stations in the market."<sup>44</sup> It further argues that the Bureau's decision completely eviscerated the local television ownership rule and that "taken to its logical conclusion the [bureau decision] would support the combination of three, four or more television stations within the same market so long as the legalist forms of agreements were observed, at least on paper."<sup>45</sup>

Similarly, MCH warned that:

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

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<sup>41</sup> 19 FCC Rcd 24070 (2004).

<sup>42</sup> Application for Review, at 9 (filed Jan. 13, 2005) (a copy attached to the MCH Reply, Oct. 23, 2009).

<sup>43</sup> 22 FCC Rcd 13910 (2007).

<sup>44</sup> Application for Review, at iii (filed Aug. 29, 2007) (a copy attached to the MCH Reply, Oct. 23, 2009).

<sup>45</sup> MCH Reply, at 3 (Oct. 23, 2009).

meaningless, as substantial consolidation will have occurred even without changing the rules.<sup>46</sup>

In fact, over the past several years, many station owners have sought to get around the local television limits by creating “virtual duopolies” and other cooperative ventures. One recent study found that sharing agreements of various types were present in 83 of 210 television markets.<sup>47</sup> And now, because of this decision, more are on the way.

A recent article by Harry A. Jessell in *TVNewsCheck* proclaims that “Now’s the Time to Make Virtual Duopolies.”<sup>48</sup> Jessell notes that broadcasters interested in shared services agreements had “better act fast” because the “FCC will soon launch a rulemaking to determine whether such arrangements, which essentially allow broadcasters to circumvent the ban against actual ownership of two stations in small markets, are still a good idea.”<sup>49</sup> He explains that even if the Commission decides to prohibit virtual duopolies, the “[o]ne thing broadcasters can count on the FCC not doing is ordering the dismantling of any existing arrangements.”<sup>50</sup> He predicts that the FCC may do something to crack down on virtual duopolies, noting “What’s the point of having a ban against two Big Four network affiliates in a small market merging through station-sale contract if they can do it with a bunch of management contracts?”<sup>51</sup>

Thus, it is important for the Commission to resolve the novel question of whether its rules permit common control of two top-four television stations so long as the common control is

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<sup>46</sup> Reply, at 2 (footnote omitted).

<sup>47</sup> Danilo Yanich, CTR. FOR COMMUNITY RESEARCH & SERVICE, LOCAL TELEVISION NEWS MEDIA PROJECT, SCHOOL OF PUBLIC POLICY & ADMINISTRATION, UNIVERSITY OF DELAWARE, LOCAL TV NEWS & SERVICE AGREEMENTS: A CRITICAL LOOK 3 (Oct. 2011), *available at* <http://www.udel.edu/ocm/pdf/DYanichSSAFINALReport-102411.pdf>.

<sup>48</sup> Harry A. Jessell, *Now's The Time To Make Virtual Duopolies*, TV NEWS CHECK, Dec. 9, 2011, *available at* <http://www.tvnewscheck.com/article/2011/12/09/55959/nows-the-time-to-make-virtual-duopolies>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

accomplished through a sharing agreement rather than an outright acquisition or transfer of control. Failure to quickly resolve this issue will be interpreted as “tacit” approval of these arrangements and will lead to even further consolidation and reduced diversity in local news, thus undermining the Commission's tentative conclusion that local television rule remains in the public interest.<sup>52</sup>

#### **IV. The Commission Should Reverse the Bureau Order Because it is Based on Erroneous Findings as to Material Questions of Fact**

Commission review of the Bureau decision is also warranted under 47 CFR §1.115(b)(iv) because the Bureau’s action is based on “erroneous finding[s] as to an important or material question of fact.” Here, the Bureau’s determination, that the sharing arrangements did not amount to a *de facto* transfer of control in violation of §310 of the Communications Act, turns on the analysis of the specific facts of this case. Indeed, the Bureau acknowledges that the analysis “transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented,” and must be determined on a case-by-case basis.<sup>53</sup>

Despite the large record, the Bureau devotes only one or two paragraphs to analyzing each of the three relevant factors -- programming, personnel, and finances. Its analysis fails to consider material facts presented by MCH and its conclusions are based on erroneous factual findings.

##### **A. Programming**

The Order states that “based on a review of the entire record in this case, in particular Raycom’s April 1, 2011, *ex parte* letter, we agree that HITV does, in fact, exercise programming

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<sup>52</sup> 2010 Quadrennial Regulatory Review, Notice of Proposed Rulemaking, MB Docket 09-182, at ¶26 (rel. Dec. 22, 2011).

<sup>53</sup> Order at ¶16 (footnotes omitted) citing *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8514 (1995).

control over Station KFVE(TV).”<sup>54</sup> Yet, the Bureau makes no findings about, or even discusses, the stations’ I/P lists it requested. Instead, the Bureau minimizes the fact that Raycom produces the local news programming for KFVE, noting that such programming constitutes only 6.5% of total weekly programming aired on the station.<sup>55</sup> Yet, this constitutes all of KFVE’s local news.

The Bureau also accepts without question the representations of Raycom and HITV that “the agreements are working as designed, permitting HITV to air newscasts produced and supplied specifically for broadcast on Station KFVE(TV) without simulcast or repetition on Raycom’s television stations.”<sup>56</sup> This conclusion ignores the fact that the I/P lists showed substantial overlap in the local news aired on KFVE and the local news aired on KHNL and KGMB.<sup>57</sup> It also ignores MCH's allegations, based on the viewing experience of its members, that the news programs on all three stations were identical or virtually identical.”<sup>58</sup> To ensure that MCH's allegations were correct, MCH asked Professor Yanich Danilo to independently compare recordings of the evening newscasts by KGMB and KFVE for November 11, 2011. He found no significant difference. Specifically, he found:

1. Each broadcast is preceded by the same opening which announces Hawai`i News Now. It is the exact same graphics, music, and voice-over.
2. There were 15 stories presented on the KGMB newscast at 5, but they only referred to

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<sup>54</sup> Order at ¶18.

<sup>55</sup> Order at ¶18.

<sup>56</sup> Order at ¶11.

<sup>57</sup> Letter from Adrienne T. Biddings to Marlene H. Dortch, at 3-4 (May 23, 2011).

<sup>58</sup> *See, e.g.*, Letter from Adrienne T. Biddings to Marlene H. Dortch, at 2 (Dec. 7, 2009) (HITV and Raycom have branded their joint news operations under a single title, Hawai`i News Now; and are simulcasting identical local newscasts on all three stations."); Letter from Adrienne T. Biddings to Marlene H. Dortch, at 2 ("Before, each of the network affiliates offered independent local television coverage. Since Raycom acquired the KGMB’s CBS network affiliation (as well as the KGMB call sign), KGMB no longer offers independent local news. Instead, it simulcasts a single newscast, known as Hawai`i News Now, which is also shown on Raycom’s NBC affiliate KHNL. Hawai`i News Now also provides local news programming that is virtually identical to KFVE.").

4 separate issues: a helicopter crash on Moloka'i; the beginning of the APEC conference in Honolulu; the strike of the telecom workers and Billy Crystal assuming the Oscar host duties.

3. Of the 15 stories, 8 referred to aspects of the APEC (Asia-Pacific Economic Cooperation) conference and they were “anchored” at the live location by a KGMB reporter.

4. When the stories were reported on KFVE, the stories were introduced by the same anchors, reported by the same reporters, using the same script and the same video. Over the course of the evening as more information came in about the helicopter crash, new video was added to the story. The APEC story, however, was covered in the exact same way across the stations.

The Bureau also accepts without question the licensees' representations that the sharing arrangement has improved the quality of their local news programming.<sup>59</sup> This conclusion ignores the prior findings of Professor Yanich that the quality of the news programming has declined since Hawai'i News Network started producing news for all three stations.<sup>60</sup>

The Bureau also points to the fact that KFVE's General Manager writes and delivers two editorials that are aired four times weekly. However, the Bureau ignores fact that all three stations ran the same editorials. As MCH pointed out in its analysis of the I/P lists:

The “Local Connections” segments produced by Rick Blangiardi, the General Manager of KGMB and KHNL, also aired on KFVE. At the same time, the “Think About It” editorials produced by John Fink, HITV's General Manager, aired on Raycom's KGMB and KHNL stations. Comparison of Appendix A and Appendix B reveals that, for example, on February 1, 2010, a segment titled “Local Connections – Rick Blangiardi” aired on both KFVE and KGMB. In a competitive marketplace, it would be unthinkable for one station to air the editorial segments produced by the General Manager of a competing station. There is simply no viewpoint diversity when the respective General Managers appear on both Raycom and HITV stations.<sup>61</sup>

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<sup>59</sup> Order at ¶11.

<sup>60</sup> Yanich, *supra* note 15, at 28.

<sup>61</sup> Letter from Adrienne T. Biddings to Marlene H. Dortch, at 4 (May 23, 2011) (citations omitted).

The fact that much of KFVE's programming is provided through an affiliation agreement with MyNetworkTV does not reflect HITV's exercise of editorial control since HITV was required to take the MyNetworkTV affiliation under the terms of the Asset Exchange Agreement. And while KFVE may have rejected some the MyNetwork programming, it is much more significant that the station has *never* rejected a local newscast provided by Raycom.<sup>62</sup>

Significantly, KFVE's current General Manager, John Fink, was the former General Manager for Raycom's stations. Given this relationship, Fink's recent efforts to bid for syndicated programming and local programs reported in the April 1, 2011 filing do not show independent editorial control if done with Raycom's knowledge and approval. The Bureau order does not even mention Fink's longstanding relationship with Raycom, much less explore the implications for whether a *de facto* transfer has occurred. Finally, even if Mr. Fink were inclined to exercise independent editorial control over programming on KFVE, it is impossible to see how he could do so. KFVE only has two employees, no production facilities, no studio, no tower, and very limited resources to procure programming.

**B. Personnel:**

The Order acknowledges that KFVE only has two employees, but finds that two employees provide a "meaningful staff presence" as required by the main studio rule.<sup>63</sup> But as MCH pointed out, whether a station complies with the main studio rule is an entirely different question than whether the station is under *de facto* control of another.<sup>64</sup> It is difficult to imagine how two individuals can operate a television station, especially when other stations have upwards of 60 employees.

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<sup>62</sup> April 1, 2011 *ex parte* at 5.

<sup>63</sup> Order at ¶20.

<sup>64</sup> MCH Reply, at 6-7 (Oct. 23, 2009).

Moreover, it is undisputed that Raycom employees will sell advertising on KFVE. The Bureau notes that the

Commission has long permitted brokers to place employees at brokered stations, as long as the licensee complies with its obligation to retain ultimate control of station operations and to comply with the minimum staffing requirements set forth in the main studio rule. Section 1(b)(ii) of the Shared Services Agreement provides that HITV will “direct and control the employees performing services [] relating to the sale of television advertising.”<sup>65</sup>

This analysis looks solely at the “rights” stated in the Shared Services Agreement rather than what is actually occurring, as required by FCC policy.<sup>66</sup>

### **C. Finances**

The Bureau’s analysis of the complex financial arrangements is likewise superficial and incomplete. Under the Commission decision in *Ackerley*, a key consideration in whether a *de facto* transfer has occurred is whether the licensee retains the economic incentive to control programming.<sup>67</sup> MCH showed that HITV lacks the economic incentive to control programming under both sets of agreements. Under the original agreements, which were in effect from November 2009 until October 2010, Raycom was entitled receive to up to 90% of KFVE’s monthly profits. Furthermore, using the confidential figures provided by Raycom and HITV, MCH determined that in fact, Raycom received approximately that percentage of KFVE’s cash flow.<sup>68</sup>

Under the amended Agreement, which took effect in November 2010, Raycom is entitled to 30% of KFVE’s monthly cash flow, but HITV must also pay Raycom a flat monthly fee in the

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<sup>65</sup> Order at ¶20 (citations omitted).

<sup>66</sup> See, e.g., *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8514, (1995).

<sup>67</sup> 17 FCC Rcd 10828, 10841 (2002).

<sup>68</sup> See MCH Response, at 4 (June 7, 2011)(filed under protective order).

amount of \$208,333.<sup>69</sup> The actual figures for the four month period during which the licensees provided financial data showed that, in fact, far more than 30% of KFVE's cash flow accrued to Raycom.<sup>70</sup>

The Bureau does not dispute MCH's analysis, but nonetheless inexplicably "conclude[s], based on the entire record before us, that the payment terms operate in a manner that aligns the profits arising from operation of the station with HITV's ownership and, thus, HITV has had sufficient economic incentive to control programming aired on Station KFVE(TV), *both prior to and after the October 2010 revisions.*"<sup>71</sup> (emphasis added). The Bureau order provides no analysis to support its conclusion about the financial arrangements prior to October 2010.

Regarding the period after October 2010, the Bureau finds that that "[a]ccording to the terms of the revised agreements, HITV retains 70% of cash flow resulting from operation of the station, a split the staff has previously approved."<sup>72</sup> But the Bureau brushes aside MCH's showing that that HITV actually retained a much lower percentage when the flat fee was taken into account, noting that the Bureau has "approved previous relationships where a flat fee for services rendered, as part of a shared services agreement, was combined with a split of advertising revenue."<sup>73</sup>

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<sup>69</sup> Under the Amended Studio Lease and Shared Services Agreement, HITV must pay Raycom 15% of its monthly cash flow as a studio fee *plus* another 15% of cash flow as a performance fee *plus* a flat fee of \$208,333. *See* Amended Shared Services Agreement, Sched. B (defining service fee and performance fee).

<sup>70</sup> MCH Response, at 5 (June 7, 2011)(filed under protective order).

<sup>71</sup> Order at ¶ 19.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* & n.40, citing *Malara Broadcast Group of Duluth Licensee*, 19 FCC Rcd at 24076. As noted *supra*, an application for review of this Bureau decision is still pending. In any event, Malara ruling does not provide sufficient detail to determine whether the two factual situations are really comparable.

In sum, the Bureau's determination that Raycom does not exercise *de facto* control over KFVE, is based on the uncritical acceptance of claims made by the licensees while ignoring contrary evidence presented by MCH. The Bureau's erroneous finding regarding control over programming, personnel, and finances infect the entire analysis and should be reviewed by the Commission in full.

**V. Conclusion**

The Commission should take this opportunity to rule on a novel question of law with important implications for its broadcast ownership rules as the extent of competition and viewpoint diversity available to the public in Hawai'i and in many other areas. MCH respectfully urges the Commission to reverse the Bureau Order and to issue an order to show cause why Raycom and HITV should not have their licenses revoked for repeated violations of Communications Act, the FCC rules, and the duty of candor.

Respectfully Submitted,

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December 27, 2011

Counsel for Media Council Hawai'i

**CERTIFICATE OF SERVICE**

I, Angela J. Campbell, hereby certify that copies of the attached “Application for Review,” have been served by first-class mail, postage paid, this 27th of December, 2011, on the following persons at the addresses shown below.

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