Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of

KDAI Licensing, LLC, Assignor and RBC License LLC, Assignee For Consent to the Assignment of License of KDEY-FM, Ontario, CA	)))))))))	File No. BALH-20130408ACM Facility ID No. 10099

To: Office of the Secretary
Attn: Chief, Audio Division

SECOND SUPPLEMENT TO PETITION TO DENY

Brett Hamilton ("Hamilton"), by his attorney, submits a second Supplement to his May 13, 2013 Petition to Deny. In support, Hamilton respectfully submits the following:

In response to Hamilton's Petition, RBC License, LLC ("RBC") on May 29, 2013, submitted an "Opposition to Petition to Deny." Therein, RBC stated, *inter alia*, the following:

> "However, to the extent the Commission may have any concerns regarding the national security implications of involvement by Chinese parties or the Chinese government with the operation of the stations, RBC notes that on May 24, 2013 the parties filed a preliminary notification with the Committee on Foreign Investment in the United States (CFIUS) with respect to the proposed transaction. Counsel to the parties have had discussions with CFIUS representatives regarding the transaction, and the parties intend to file a formal notification with CFIUS on or about May 31, 2013. The CFIUS process commenced voluntarily by the parties will result in a careful review of the proposed transaction by the appropriate expert government agencies with respect to any national security concerns."

On June 10, 2013 Hamilton submitted his Reply. In that submission Hamilton pointed out the CFIUS review does not trump the Commission's authority under the mandate of the Communications Act. Hamilton pointed out that neither the Commission or Hamilton was advised as to what information was submitted for CFIUS review. Furthermore, RBC has not made any commitment to make the CFIUS determination available to Hamilton and the Commission.

It is assumed that the CFIUS review process is complete since it involves a 30 day review period. It should also be pointed out that CFIUS considers the transaction at hand to involve "national security assets" or "critical infrastructure." *See* page 15 of Exhibit A, attached hereto.[1] CFIUS review concerns foreign acquisition and certain investments in U.S. businesses. Telecommunications and broadcast facilities are specifically subjects of review.

Predicated on the voluntary submission by the parties of the transaction for CFIUS review, it is clear that there must have been a concern by the parties. It should also be noted that pursuant to the Asset Purchase Agreement the CFIUS clearance is a condition precedent to RBC's obligation to close. *See* Section 5.1(b). It should also be noted that Section 4.1(b) of the Asset Purchase Agreement requires CFIUS Notification. Once again, if there were not concerns the parties would not have agreed to this purely voluntary procedure. Moreover, it is incredible that RBC would utilize the CFIUS procedure as a defense but not provide the submission or the results. It is incumbent on the Commission to investigate these matters before granting the assignment. *See* Section 309(a) of the Communications Act of 1934, as amended. 47 CFR §309(a).

[1] Exhibit A is a recently released overview of the CFIUS Review Process.

Respectfully submitted,

BRETT HAMILTON

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July 11, 2013

EXHIBIT A

Morgan Lewis

April 25, 2013

The CFIUS Review Process: Current Issues and Enforcement Trends

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Morgan Lewis Webinar

Importance of CFIUS to U.S. Investment Decisions

- Increased importance of the Committee on Foreign Investment in the United States (CFIUS) to decisions on strategy for U.S. investment and acquisitions
- Broad scope of industries ordinarily reviewed by CFIUS, from national security and defense to critical infrastructure
- Relatively little guidance from CFIUS and lack of transparency of CFIUS decisions

What is CFIUS?

- Section 721 of the Defense Production Act ("DPA"), as amended by the Foreign Investment and National Security Act of 2007 ("FINSA") establishes the process for reviewing the national security impact of foreign acquisitions and certain investments and joint ventures of U.S.-located businesses by CFIUS.
  - Applies to all foreign investments in U.S. defense and critical infrastructure businesses regardless of whether they have classified contracts with the government
  - The President of the U.S. has the authority to suspend or terminate such transactions if they present "credible threats" to national security that cannot be adequately mitigated under other laws, excluding the International Economic Emergency Powers Act

What is CFIUS?

- **Permanent members of CFIUS (by statute)**
  - Treasury Department (chair)
  - State Department
  - Commerce Department
  - Department of Defense
  - Department of Justice
  - Department of Homeland Security
  - Department of Energy, and
  - Department of Labor (*ex officio*)
  - Director of National Intelligence (*ex officio*)

- **White House, by Executive Order, added:**
  - US Trade Representative and Office of Science and Technology Policy, as members; and
  - National Security Council, Council of Economic Advisors, Office of Management & Budget, and others, as non-voting participants
  - Other agencies participate as relevant to particular cases

What Does CFIUS Review?

- CFIUS has jurisdiction to review “covered transactions” -- defined as a foreign person or entity’s acquisition of control of a U.S. business with products, services, or intellectual property that presents a national security concern.
  - U.S. Business – An existing business, not a “greenfield” investment, or acquisition of patents, or technology license
  - Control – Any arrangement that allows a foreign person to "determine, direct, or decide important matters affecting an entity.” As a practical matter, CFIUS typically considers sufficient control to be present when a minority foreign investor obtains protective supermajority rights often seen in M&A and investment transactions.

Covered Transactions

- National Security or Critical Infrastructure – CFIUS interprets these terms very broadly and does not define them
- Foreign Person - any "foreign national, foreign government, foreign entity," or "any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity."
  - Includes acquisitions of control in U.S. companies or entities with foreign parents or significant foreign shareholders
- Financial investments or convertible voting instruments may not constitute "control" and thus not be subject to filing depending upon their terms.

Recent Review Activity: Filings

Covered Transactions, Withdrawals, and Presidential Decisions 2007 – 2011 (CFIUS Annual Report to Congress, 2012)					
Year	**Number of Notices**	**Notices Withdrawn During Review**	**Number of Investigations**	**Notices Withdrawn During Investigation**	**Presidential Decisions**
2007	138	10	6	5	0
2008	155	18	23	5	0
2009	65	5	25	2	0
2010	93	6	35	6	0
2011	111	1	40	5	0
Total	562	40	129	23	0

Recent Review Activity: Industries

Covered Transactions by Sector and Year, 2007-2011 (CFIUS Annual Report to Congress, 2012)

Year	Manufacturing	Information	Mining, Utilities and Construction	Wholesale and Retail Trade	Total
2007	60 (43%)	58 (42%)	11 (8%)	9 (7%)	138
2008	72 (46%)	42 (27%)	25 (16%)	16 (10%)	155
2009	21 (32%)	22 (34%)	19 (29%)	3 (5%)	65
2010	36 (39%)	35 (38%)	13 (14%)	9 (10%)	93
2011	49 (44%)	38 (34%)	16 (14%)	8 (7%)	111
Total	238 (42%)	195 (35%)	84 (15%)	45 (8%)	562

Recent Review Activity: Nationality

Covered Transactions by Acquirer Nation (CFIUS Annual Report to Congress, 2012)						
Country	**2007**	**2008**	**2009**	**2010**	**2011**	**Total**
United Kingdom	33	48	17	26	25	149
Canada	21	6	9	9	9	54
France	7	12	7	6	14	46
Israel	6	12	5	7	6	36
China	3	6	4	6	10	29
Australia	9	11	1	3	4	28
Japan	1	8	4	7	7	27
Netherlands	7	2	5	2	7	23
Italy	3	5	2	3	2	15

Recent Review Activity: Nationality (Cont'd)

Covered Transactions by Acquirer Nation (CFIUS Annual Report to Congress, 2012)						
Country	2007	2008	2009	2010	2011	Total
Germany	6	3	1	2	3	15
Sweden			3	5	6	14
Spain	6	1		3	4	14
Switzerland	6	4		2	1	13
Russian Federation		8		4		12
United Arab Emirates	7	2	2	1		12
India	5	1		1	1	8
Singapore	1	1		1	2	5
Norway	1	2			2	5

CFIUS: Filing Process

- The CFIUS review process typically begins with the parties filing a voluntary joint notice with the Agency.
  - It is common practice if possible to notify CFIUS of a pending transaction and provide a "pre-filing" one week prior to the final filing.
  - CFIUS may ask questions of the parties or request additional information, either as part of the pre-filing process or after accepting the joint notice.
  - A pre-filing allows the parties to gather any requested information and incorporate it into the final joint notice without being subject to any regulatory time constraints.
  - After filing a joint notice, the parties are required to respond to CFIUS' requests for additional information within three business days.

CFIUS: Filing Process

- CFIUS also can unilaterally initiate a review of any defense or critical infrastructure-related transaction, so parties to such transactions ordinarily file a joint notice voluntarily.
- Under the National Information Security Program Operating Manual ("NISPOM"), when a government contractor with a facilities security clearance enters into negotiations for a proposed transaction affecting control, it must notify the Defense Security Service ("DSS") of the commencement of the negotiations.
- CFIUS filings are confidential and not subject to disclosure.

CFIUS: Timing

- **30 Day Initial Review Period**
  - The majority of transactions filed with CFIUS are cleared at end of this period or determined not to be "covered transactions" subject to CFIUS jurisdiction
    - State owned or controlled enterprises may be subject to a 45-day initial review period
- **45 Day Investigation Period**
  - If CFIUS still has concerns about the transactions after the 30 day initial review, it may initiate a second, 45 day, investigation period
  - Pursuant to FINSA, a 45 day investigation is mandatory when a transaction involves foreign government control or the acquisition of critical infrastructure. This requirement can only be waived by the deputy heads of the co-lead agencies reviewing the transaction. The co-lead agencies are CFIUS and the member agency most related to the industry involved.
- **15 Day Presidential Review Period**
  - If CFIUS cannot reach a consensus to allow the transaction, or recommends a Presidential rejection, or in other special circumstances such as a refusal by the parties to comply, the transaction goes to the President for a final decision, followed by a report to the Congress

CFIUS: Practical Considerations

- What happens if the parties don't file a voluntary notice and CFIUS decides to investigate the transaction?
  - FINSA does not apply only before closing of a transaction; if security issues are raised post-closing, and CFIUS calls the parties requesting a filing, it could then review and force dissolution of the transaction.
  - If CFIUS calls the parties before closing and requests a filing, the closing of the transaction could be delayed or compromised if the purchase agreement does not contemplate such government clearance or filings and the 30-day (or 45-day) review period extends beyond the purchase agreement's closing date.
  - As a practical matter, if a voluntary filing is not made, CFIUS may learn of any security concerns from other sources (e.g. competing bidders who may complain to Congressional representatives; public notices required by U.S. securities law; CFIUS' own monitoring of acquisitions)
    - Many government-supply contracts contain provisions requiring notification to the relevant agency in the event of a transfer of control.

CFIUS: Practical Considerations

- How do you know whether the contemplated transaction involves "national security assets" or "critical infrastructure"?
  - The definition of national security and critical infrastructure assets is vague and imprecise.
  - In practice, it clearly covers traditional categories such as military weapons and technology, but also includes, for example:
    - Items and materials used in weapons research;
    - Certain computer software;
    - Bioterrorism agents, such as certain drugs, facilities, equipment, material and technologies;
    - Natural gas and oil transmission lines;
    - Oil reserves and refineries;
    - Telecommunications and broadcast facilities;
    - Certain computer and information technology products;
    - Bridges and ports.

CFIUS: Practical Considerations

- Critical questions in determining whether CFIUS likely would want to review a transaction, and thus whether the parties should decide to voluntarily file, include:
  - Is the foreign purchaser a private or public (i.e., state-owned or government controlled) entity (if the latter, special rules of review timing apply)?;
  - What is the nationality of the purchaser (for example, China, Israel, and France can be expected to raise more interest in review than Great Britain, Italy, or Japan), including that of sovereign wealth funds?;
  - Do the facilities or personnel of the acquired entity have security clearances and, if so, at what level?;
  - Are the products or services direct or indirect components of weapons systems or critical infrastructure and, if indirect, how many steps removed they are from the final product or service and the degree of modification of the components in final assembly?;

CFIUS: Practical Considerations

- Whether the assets are connected to critical infrastructure, such as energy or communications grids?
- What government supply contracts exist, with what security classifications, and with what obligations of confidentiality and restrictions on the ability to transfer such contractual obligations to others without notice and/or permission?;
- Whether production or research facilities to be acquired will be closed or removed from the U.S. post-acquisition?
- Has the foreign acquirer or one of its affiliates ever taken action adverse to U.S. national security policy or interests?
- Whether any ancillary agreements required to be entered into as conditions of the acquisition raise concerns?
- The proximity of the physical assets or any assets to be constructed to existing U.S. security facilities?

CFIUS: Practical Considerations -- Political and Public Relations Contacts

- Government contacts:
  - It is often advisable for officials of the U.S. target company and the foreign purchaser to alert government purchasing and Defense Security Services officials to the potential transaction to obtain their views as to whether a FOCI mitigation agreement appears necessary or warranted and determine if there appear to be any initial concerns regarding the potential transaction.
- Political contacts:
  - Where it is likely that a transaction will result in an investigation by CFIUS, it may also be advisable for the parties to contact appropriate Congressional representatives, of the states in which facilities are located or who are on relevant Congressional committees, and state and local government officials, to inform them of the proposed transaction and emphasize the positive aspects of the transaction (e.g., new investment, job protection, no shutdown of plants).
- Public relations contacts:
  - It also may be advisable to contact unions/employee groups, and national, local, and trade press to explain the purpose and positive effects of the transaction.
- All government and public relations contacts must be closely coordinated and must present a consistent message about the transaction.

CFIUS: FOCI Mitigation

- If CFIUS determines that the transaction will result in Foreign Ownership, Control, or Influence ("FOCI") over a company that has access to classified information or that FOCI might adversely affect the performance of classified contracts, CFIUS ordinarily will require the parties to enter into a mitigation agreement prior to approving the transaction.
- From 2009 through 2011, 22 transactions filed resulted in mitigation agreements.
- In 2011, member agencies of CFIUS negotiated mitigation measures for eight transactions, involving acquisitions of U.S. companies in the software, computer programming, computer and electronic manufacturing, electrical equipment and component manufacturing, aerospace manufacturing, and finance sectors.
- Penalties for violations of mitigation agreements can range from fines, to revocation of contracts, to dissolution of the acquisition.

CFIUS: FOCI Mitigation

- There are standard types of mitigation agreements that CFIUS may require the parties to enter into depending on the level of foreign ownership, control, or influence.
  - These include: Board Resolution; Security Control Agreement; Special Security Agreement; Proxy Agreement; Voting Trust Agreement.
- In 2011, the most recent year for which data is available, CFIUS required one or more of the following types of specific mitigation as conditions for clearance of particular transactions:
  - Establishing a Security Committee, security officers and other mechanisms to ensure compliance with required actions, including annual reports and independent audits;
  - Ensuring compliance with established guidelines and terms for handling existing or future U.S. Government ("USG") contracts and USG customer information;
  - Ensuring only U.S. persons handle certain products and services, and ensuring that certain activities and products are located only in the United States;
  - Notifying relevant USG parties in advance of foreign national visits to the U.S. business;
  - Notifying relevant USG parties of any material introduction, modification or discontinuation of a product or service, as well as any awareness of any vulnerability or security incidents; and
  - Ensuring continued production of certain products for relevant USG parties for specified periods;
  - Requiring a proxy entity to perform certain functions and activities of the U.S. business.

Recent Challenges & Developments

- Huawei Technologies
  - In May 2010, Huawei purchased the intellectual property of a U.S. computer software company, 3Leaf, and hired many of its employees, for $2 million. It did not file a voluntary notice with CFIUS.
  - In late 2010, CFIUS notified Huawei that it was retroactively reviewing the transaction.
  - In early 2011, CFIUS concluded that the transaction posed a threat to national security and informed Huawei that it would recommend that the President block the transaction if the assets were not divested voluntarily.
  - After initially proposing to challenge CFIUS' conclusion, Huawei decided to divest the 3Leaf assets and took the novel step of negotiating an ongoing oversight agreement in April 2011 with CFIUS to encourage open communication between Huawei and CFIUS concerning any future proposed transactions.

Recent Challenges & Developments

- U.S. House of Representatives Intelligence Committee Report
  - In October 2012, the Intelligence Committee of the U.S. House of Representatives issued an over 50-page report urging U.S. businesses to avoid doing business with Huawei Technologies and ZTE Corporation because of national security concerns relating to U.S. telecommunications networks.
  - The Report focused on alleged connections between the two companies and Chinese military or intelligence services.
  - In March 2013, Sprint Nextel and Softbank of Japan reportedly assured the House Committee, during CFIUS review of their proposed acquisition of a wireless communications company, Clearwire Corp., that they would phase out equipment from Huawei Technologies used in Clearwire's network.

Recent Challenges & Developments

- Hybrid Kinetic Group
  - In June 2012, Nevada Gold Holdings disclosed that CFIUS had required its parent, Hybrid Kinetic Group of Hong Kong, to divest its controlling interest.
  - CFIUS' concerns related to the proximity of Nevada Gold's primary mining operation to a U.S. Navy air training facility.

Recent Challenges & Developments

- A123 Systems
  - In January 2013, CFIUS approved the acquisition of bankrupt battery manufacturer A123 Systems by Wanxiang Group.
  - The decision to permit the acquisition received political opposition from some members of the U.S. Congress. Unlike prior transactions, in which opposition to a Chinese investment was motivated by security concerns, the A123 acquisition raised issues related to its receipt of substantial funding from the Department of Energy.
  - To respond to these concerns, Wanxiang excluded government contracts from the bankruptcy acquisition, and agreed to keep the two A123 facilities to be acquired that were built with DOE funds operating in Michigan.

Recent Challenges & Developments

- Ralls Corporation – first court challenge to a CFIUS / Presidential decision
  - In September 2012, President Obama ordered Ralls Corporation, a subsidiary of Sany Group, to divest four Oregon wind farms it had previously acquired from Innovative Renewable Energy LLC, confirming CFIUS' refusal to clear the transaction.
  - Ralls had not made a filing with CFIUS prior to its acquisition of the four wind farms, which were located in and adjacent to restricted airspace near a U.S. Navy training facility. Ralls later submitted a notice to CFIUS after the U.S. Navy requested Ralls relocate one of the wind farm projects to avoid interfering with military training operations.

Recent Challenges & Developments

- Ralls Corporation (cont'd)
  - After CFIUS made its recommendation and the President ordered Ralls to divest the wind farm assets, Ralls challenged the order in federal court. In February 2013, the court dismissed Ralls' claims that the President lacked the authority to order the divestiture of the assets; the suit continues only with respect to whether Ralls is entitled to a more detailed rationale for the order.
  - Ralls has continued to make acquisitions in the U.S. despite its pending litigation with CFIUS. In March 2013, Ralls announced an $80 million acquisition of a wind farm project in Colorado. The company noted that, unlike the challenged Oregon project, the Colorado project was structured so that it would be owned and controlled by U.S. citizens and that CFIUS was notified of the proposed transaction.

Recent Challenges & Developments

- CNOOC
  - In February 2013, CFIUS cleared the acquisition by CNOOC, a Chinese state-owned enterprise, of Nexen, a large Canadian oil and gas company which also had assets in the U.S. Gulf Coast.
  - Following at least two review cycles, with the parties having withdrawn and resubmitted their filing, CFIUS cleared the transaction.
  - Reportedly, CFIUS required alteration of certain U.S. oil drilling leases as a condition of clearance, presumably affecting CNOOC's access to information and control regarding Gulf Coast operations in view of their locations near U.S. Navy facilities and subsea telecommunications facilities.

Future Investigation Trends and Issues

- Cybersecurity
  - CFIUS is increasingly concerned about potential cybersecurity threats to national security or critical infrastructure systems.
  - Cybersecurity issues can arise in a variety of transactions:
    - CFIUS and Congress has expressed concern that the acquisition of key hardware or software companies by foreign companies could lead to the introduction of "back doors" or other malicious code into U.S. computer systems
    - CFIUS is also concerned about the acquisition of infrastructure assets that are connected to integrated utility systems (e.g., electrical grids, natural gas transmission lines) and whether foreign companies will adequately protect those assets from cyber attacks that could affect these systems

Future Investigation Trends and Issues

- Coordinated Impact Analysis
  - Under FINSA, CFIUS is required to determine and report to Congress on an annual basis "whether there is credible evidence of a coordinated strategy by one or more countries or companies to acquire United States companies involved in research, development, or production of critical technologies for which the United States is the leading supplier."
  - In its December 2012 report to Congress, CFIUS stated for the first time that the intelligence community is moderately confident such a coordinated strategy exists, although all details of the findings were excluded from the unclassified version of the report.
  - The finding of a coordinated strategy may result in increased CFIUS scrutiny of transactions that, while insignificant on their own, could pose a risk to U.S. national security or critical infrastructure in the aggregate.

Impact of CFIUS on U.S. Investment and Acquisitions

- Important to assess at an early stage whether a filing with CFIUS is warranted in considering potential U.S. investments and acquisitions.
- Important to evaluate and include the CFIUS review process in corporate agreements and transaction timelines.
- Important to evaluate utility of advance contact with CFIUS and other appropriate government officials to reduce the potential for security objections to be raised.

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Morgan Lewis

April 25, 2013

The CFIUS Review Process: Current Issues and Enforcement Trends

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CERTIFICATE OF SERVICE

I, Malinda Markland, do hereby certify that copies of the foregoing "Second Supplement to Petition to Deny" were sent via First Class U.S. Mail, postage prepaid, this 11th day of July, 2013 to the following:

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