

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

In the Matter of)
)
KHNL/KGMB License Subsidiary, LLC)
)
Licensee of Stations KHNL(TV) and KGMB(TV),) Fac. ID Nos. 34867 and 34445
Honolulu, Hawaii)
)
And)
)
HITV License Subsidiary, Inc.)
)
Licensee of Station KFVE(TV), Honolulu, Hawaii) Fac. ID No. 36917
)
)
Application for Renewal of License of) File No. BRCDDT-20141001CEM
KHNL(TV), Honolulu, Hawaii)
)
Application for Renewal of License of) File No. BRCDDT-20141001CDU
KGMB(TV), Honolulu, Hawaii)
)
Application for Renewal of License of) File No. BRCDDT-20140930AFX
KFVE(TV), Honolulu, Hawaii)

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 2018

Released: December 17, 2018

By the Commission:

I. INTRODUCTION

1. The Commission has before it an "Application for Review" (AFR), filed on December 27, 2011, by Media Council Hawai'i (Media Council), which requests that we reverse the decision of the Media Bureau (Bureau) denying, in the main, its "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" (Complaint).¹ Raycom Media, Inc. (Raycom), the parent of the licensee of stations KHNL(TV) and KGMB(TV), Honolulu, Hawaii, and HITV License Subsidiary, Inc. (HITV), the licensee of station KFVE(TV), Honolulu, Hawaii (collectively, the Stations), filed a "Joint Opposition to Application for Review" (Joint Opposition) on January 11, 2012, and Media Council filed a "Reply to Opposition to Application for Review" (Reply) on January 23, 2012. For the reasons set forth below, we find that Media Council has not demonstrated that the Bureau erred in its denial of the Complaint, and we deny the AFR.²

¹ KHNL/KGMB License Subsidiary, LLC, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16087 (MB 2011) (Bureau Order).

² Our review of the Bureau's decision on the merits and our denial of the AFR moot the claim that the Bureau acted improperly on delegated authority. See AFR at 10; Murray Energy Corp. v. FERC, 629 F.3d 231, 236 (D.C. Cir.

(continued....)

2. Media Council has also contested the Stations' applications for renewal of license,³ in each instance reiterating the arguments advanced in its Complaint, and again in its AFR, concerning Raycom's compliance with the Commission's local television ownership (or "duopoly") rule⁴ and Section 310(d) of the Communications Act of 1934, as amended (Act).⁵ Although these applications are currently pending before the Bureau, in the interest of administrative efficiency we will consolidate them with our consideration of Media Council's AFR. For the reasons set forth below, we deny Media Council's petition to deny and grant the applications.

II. APPLICATION FOR REVIEW

3. *Background.* On October 26, 2009, Raycom and HITV executed an agreement to exchange certain non-license assets of stations KFVE and KGMB—most notably their network affiliation agreements—as a result of which a Raycom subsidiary now owns stations affiliated with NBC (KHNL) and CBS (KGMB), while HITV owns a MyNetwork affiliate (KFVE). In addition, Raycom and HITV entered into a series of agreements that include a Term Loan Note, Shared Services Agreement (SSA), and Studio Lease.⁶ The companies took these steps without seeking prior Commission approval, asserting that no application was required because there had been no change in ownership or control of a broadcast television license.⁷

4. In its Complaint and supplemental *ex parte* filings, Media Council argued that Raycom, in acquiring the CBS network affiliation for KGMB and, thereby, turning it into a top-four ranked station (Raycom's second in the Honolulu DMA), had violated the duopoly rule, the result of the affiliation swap being tantamount to the outright purchase of a CBS-affiliated station, which the rule clearly would have prohibited. It further contended that the series of agreements between Raycom and HITV permitted Raycom to exercise *de facto* control over KFVE, in violation of Section 310(d) of the Act and contrary to Commission precedent, claiming, *inter alia*, that HITV has only two employees, no production facilities or studio, limited resources to procure programming, and leases employees from Raycom to aid in the

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2011) (agency's ratification of staff decision resolved any potential problems with staff's exercise of delegated authority).

³ File Nos. BRC DT-20141001CEM (KHNL), BRC DT-20141001CDU (KGMB), and BRC DT-20140930AFX (KFVE). Media Council filed a "Petition to Deny License Renewals" on January 2, 2015 (Renewal Petition). Raycom and HITV filed separate oppositions on February 2, 2015. On December 16, 2014, the Hawaii State Teachers Association (HSTA) submitted a letter seeking denial of the renewal applications. The letter was not served on the applicants, and it is not accompanied by an affidavit supporting the factual assertions set forth therein. It therefore fails to satisfy the requirements for petitions to deny. 47 U.S.C. § 309(d)(1); 47 CFR § 73.3584(c). Nevertheless, in the interest of considering a full record, we will treat this letter as an informal objection. 47 CFR § 73.3587.

⁴ 47 CFR § 73.3555(b). At the time the pleadings were filed, the local television ownership rule provided, in relevant part, that "[an entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) if . . . : The digital noise limited service contours of the stations (computed in accordance with § 73.622(e)) do not overlap; or (i) At the time of application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA...; and (ii) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located." *Id.* The Commission recently revised the duopoly rule by eliminating the requirement that at least eight independently owned and operating full power stations remain in the market and relaxing the top-four prohibition to include an option for case-by-case review of top-four combinations subject to a public interest showing. *2014 Quadrennial Regulatory Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9831 (2017) ("*Order on Reconsideration*"). This amendment to the Commission's rules became effective on February 7, 2018. *See id.* at 9867.

sale of advertising time.⁸

5. Raycom and HITV responded that it is bedrock Commission policy not to intervene in the exercise of a licensee's broad discretion to change programming; that the language of the duopoly rule does not bar the licensee of a compliant duopoly from changing the programming on its stations, even if that change results in both stations becoming top-four ranked; and that the Commission has stated that it will not require the owner of a compliant duopoly "to divest if . . . the two merged stations subsequently are both ranked among the top four stations in the market."⁹ Raycom also denied exercising *de facto* control over KFVE, asserting that HITV maintains control of the implementation and execution of core policies concerning the station's programming, personnel, and finances, as well as the economic incentive to do so.

6. The Bureau concluded that, because there had been no change in control of a license under applicable Commission and staff precedent, Raycom and HITV were not required to file an application for consent to the affiliation swap and exchange of other assets, and, therefore, its execution did not violate Section 310(d) of the Act. It further concluded that the exchange did not violate the duopoly rule, notwithstanding that it gave Raycom control over two top-four ranked stations in the Honolulu market, observing that applying the rule to these circumstances would be "problematic," insofar as the rule provides that a party may "own . . . two television stations licensed in the same Designated Market Area (DMA) . . . only [if] at the time of application to acquire . . . the station, at least one of the stations is not ranked among the top four stations in the DMA . . ."¹⁰ Instead, the Bureau stated that it would seek to include the affiliation swap issue in the then-pending quadrennial review of our broadcast ownership rules (Quadrennial Review Proceeding).¹¹ Finally, the Bureau determined that Raycom did not exercise *de facto* control over KFVE, finding specifically that "the Shared Services Agreement and related cooperative agreements are consistent with existing rules and precedent."¹²

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⁵ 47 U.S.C. § 310(d). Section 310(d) provides that "[n]o . . . station license . . . shall be transferred, assigned, or disposed of in any manner . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

⁶ The agreements also included a Purchase Option Agreement for KFVE that Raycom later assigned to American Spirit Media, LLC (American Spirit), which subsequently exercised the option and filed an application seeking consent to the transfer of control of the station's license. File No. BTCCDT-20131120AEP. Media Council contested the application, requesting that the Commission deny it "because the facts and issues presented are the same as in [its] pending application for review . . . and because it is at odds with the purpose of the duopoly rule." Petition to Deny Application for Consent to Transfer Control of HITV License Subsidiary, Inc. to Southeastern Media Holdings, Inc., File No. BTCCDT-20131120AEP (Feb. 12, 2014), at 1-2. Media Council further asked that the Commission "investigate whether Raycom remains qualified to hold broadcast licenses in light of its lack of candor in representations to the Commission" concerning the nature of its relationship with American Spirit. *Id.* at 7. On August 17, 2018, HITV and American Spirit jointly requested that we dismiss the application. See Letter from John Logan, Counsel for HITV Operating Co., Inc., and Daniel Kirkpatrick, Counsel for Southeastern Media Holdings, Inc., to Marlene Dortch, Secretary, Federal Communications Commission (Aug. 17, 2018). We dismiss the application and consider herein the merits of the issues raised by Media Council in its pleading. See *Booth American Co.*, 58 FCC 2d 553 (1976).

⁷ The Bureau Order contains a comprehensive discussion of the factual background and procedural history of these matters. We need not revisit them here.

⁸ See *Bureau Order*, 26 FCC Rcd at 16089 (quoting Media Council's contention that, as a practical matter, "HITV [] sold its station to Raycom for \$22 million.")

⁹ *Id.* at 16091 (noting Raycom and HITV's citation of language from *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12933 (1999), *subseq. hist. omit.* (1999 *Ownership Order*)).

¹⁰ 47 C.F.R. § 73.3555(b)(1).

7. In its AFR, Media Council argues that the *Bureau Order* should be reversed because, with respect to the applicability of the duopoly rule, its action “involves an important question of law or policy which has not previously been resolved by the Commission,”¹³ namely, “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.”¹⁴ It opines that the “Commission did not appear to contemplate”¹⁵ such an occurrence in adopting the duopoly rule and further contends, therefore, that the Bureau lacked authority to rule on this “novel” question and was required to refer the matter to the Commission.¹⁶ Concerning its allegations that Raycom exercises *de facto* control over KFVE, Media Council claims that the *Bureau Order* is “based on erroneous findings as to material questions of fact.”¹⁷ It faults the Bureau for “devot[ing] only one or two paragraphs to analyzing each of the three relevant factors—programming, personnel, and finances;” for “minimiz[ing] the fact that Raycom produces the local news programming for KFVE” and “accept[ing] without question the licensees’ representations that the sharing arrangement has improved the quality of their local news programming;” and for producing an “analysis of the complex financial arrangements [that] is likewise superficial and incomplete.”¹⁸ Media Council urges the Commission to issue an order to show cause why Raycom and HITV should not have their licenses revoked for repeated violations of the Communications Act, the Commission’s rules, and the duty of candor.¹⁹

8. Raycom and HITV respond that Media Council is mistaken in claiming that the Commission has not spoken regarding the applicability of the duopoly rule to the network affiliation swap at issue, asserting that the “plain language of the rule . . . makes clear that the Commission intended that compliance with the top-four standard should be determined ‘at the time the application to acquire . . . the station is filed’” and that the “Commission order adopting the rule was similarly unequivocal.”²⁰ They also contend that Media Council’s “efforts to read ‘at the time the application is filed’ out of the . . . rule’s plain language” confirm the propriety of the Commission’s decision to seek comment on revisions to the rule in the context of the Quadrennial Review Proceeding and that any “attempt to change the . . . rule through this adjudication would be contrary to well-settled administrative law.”²¹ As for Media Council’s allegations concerning *de facto* control over KFVE, Raycom and HITV reply that it “fails even to allege” that any of the Bureau’s factual findings are incorrect and that its disagreement “with the ultimate *legal conclusions* the Bureau . . . drew from those facts” is “not the same as showing the findings of those facts were erroneous, and thus is not grounds for granting an application for review.”²² They further contend

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¹¹ 2010 *Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 09-182, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011) (Quadrennial Review Notice), subsequent hist. omitted. As discussed below, the Commission modified its duopoly rule in this regard. See *infra*, para. 10.

¹² *Bureau Order*, 26 FCC Rcd at 16092-16094.

¹³ AFR, at 1.

¹⁴ *Id.* at 12.

¹⁵ *Id.*

¹⁶ *Id.* at 10. See 47 CFR § 0.283(c). See *supra*, Note 2.

¹⁷ AFR, at 1.

¹⁸ *Id.* at 15-21.

¹⁹ *Id.* at 21.

²⁰ Joint Opposition, at 16.

²¹ *Id.* at 16-18.

²² *Id.* at 8-9 (emphasis in original).

that Media Council’s argument depends on “factors that the Commission has never before found relevant to a *de facto* transfer of control,” such as “alleged similarities between the issues covered by the news programming Raycom aired on its own stations and those covered in the news programming Raycom provided to HITV.”²³

9. In its Reply, Media Council repeats its contention that the affiliation swap presents a novel question that must be resolved by the Commission, stating “[t]he Bureau even noted that it is ‘unclear’ whether the [top-four] prohibition applies where no transfer application has been filed.”²⁴ Media Council also disputes Raycom and HITV’s claim that it failed to challenge the Bureau’s factual findings, asserting “the Bureau reached its factual conclusions by citing only the factual allegations of the broadcast parties without considering the factual showings” it had made.²⁵

10. *Discussion.* We affirm the Bureau’s determination that the duopoly rule did not bar the affiliation swap at issue here. The Commission determined in the Quadrennial Review Proceeding²⁶ that affiliation swaps must comply with the duopoly rule’s top-four prohibition at the time the agreement is executed.²⁷ The Commission also stated in 2016, however, that application of the duopoly rule to affiliation swaps was going to be “prospective” and that “[p]arties that acquired control over a second in-market top-four station by engaging in affiliation swaps prior to the release date of this Order will not be subject to divestiture or enforcement action.”²⁸ Accordingly, consistent with this clear precedent, we will not require Raycom and HITV to unwind their agreements.

11. We likewise find no error in the Bureau’s determination that Raycom does not exercise *de facto* control over KFVE.²⁹ As even Media Council concedes, its Complaint prompted the Bureau to conduct a “lengthy factual investigation,”³⁰ which included, in addition to the initial round of pleadings, several requests from the Bureau for additional information and numerous *ex parte* communications and responses. Moreover, as the *Bureau Order* states, “staff has reviewed both the specific language of the various agreements, along with financial data indicating how the various payment terms have operated

²³ *Id.* at 9-10.

²⁴ Reply, at 2.

²⁵ *Id.* at 4-5.

²⁶ *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 14-50, Report and Order, 31 FCC Rcd 9864, 9882 (2016) (*Quadrennial Report and Order*), review pending sub nom. *Prometheus Radio Project v. FCC*, 3d Cir. No. 17-1107 (filed Nov. 3, 2016), recon. granted in part and denied in part, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802 (2017), petitions for review pending, *Prometheus Radio Project and Media Mobilizing Project v. FCC*, No. 18-1092, Document No. 003112828343 (3rd Cir. Jan. 16, 2018); *Independent Television Group v. FCC*, No. 18-1050, Document No. 1719478 (D.C. Cir. Feb. 20, 2018); *Multicultural Media, Telecom and Internet Council and National Association of Black-Owned Broadcasters v. FCC*, No. 18-1071, Document No. 1721291 (D.C. Cir. Mar. 7, 2018); *Free Press et al. v. FCC*, No. 18-1072, Document No. 1722268 (D.C. Cir. Mar. 8, 2018). Petitions for Review filed in the D.C. Circuit were consolidated and transferred to the Third Circuit. Order, *Independent Television Group v. FCC*, No. 18-1050, Document No. 1723537 (D.C. Cir. Mar. 23, 2018).

²⁷ *Id.* at 9885.

²⁸ *Id.* at n.142.

²⁹ On November 6, 2018, HITV filed an application to assign the license of KFVE to Nexstar Broadcasting, Inc. (Nexstar). File No. BALCDT-20181106ABF. We note that the transaction documents include a Time Brokerage Agreement, pursuant to which Nexstar currently programs KFVE, terminating the various agreements between Raycom and HITV.

³⁰ AFR, at 3.

since Raycom and HITV first executed the agreements.”³¹ In addition, the record includes information documenting HITV’s operation of the station pursuant to the agreements. Thus, despite Media Council’s contention that the *Bureau Order* “fails to discuss this extensive record” and “summarily concludes that no unauthorized transfer occurred,”³² we find, for the reasons stated herein, that the record supports the Bureau’s denial of the Complaint.

12. In particular, we disagree with Media Council’s claim that the Bureau’s determination was based on material factual errors.³³ Media Council states that the Bureau should have considered additional facts concerning programming, alleging specifically that (1) as a result of the news sharing arrangement, there is “substantial overlap” in the content of local news aired by the Stations, the quality of which has declined; (2) the Stations air the same editorials; (3) HITV has never rejected programming offered by Raycom; and (4) HITV’s General Manager was previously employed by Raycom, undermining the exercise of independent editorial control.³⁴ Media Council further contends that the financial terms resulting in a combined flat fee and revenue sharing arrangement do not provide HITV with a sufficient economic incentive to control the programming on KFVE.³⁵ Finally, Media Council asserts that, with respect to control over personnel, the Bureau looked only to contractual rights, rather than actual practice.³⁶

13. In determining whether an entity has *de facto* control of a broadcast applicant or licensee, we have traditionally looked beyond legal title and financial interests to determine who holds operational control of the station.³⁷ The Commission, in particular, looks to whether the entity in question establishes the policies governing station programming, personnel, and finances, and has long held that a licensee may delegate day-to-day operations regarding those three areas without surrendering *de facto* control, so long as the licensee continues to set the policies governing those operations.³⁸ As the Bureau correctly noted, the Commission’s analysis of *de facto* control “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.³⁹

14. Media Council has failed to demonstrate that the Bureau erred in concluding that Raycom has not exercised *de facto* control over HITV. After a detailed examination of the agreements, the Bureau concluded that they do not deprive HITV of control of its programming, a conclusion we affirm. Sections

³¹ *Bureau Order*, 26 FCC Rcd at 16093.

³² AFR, at 9.

³³ AFR, at 15-21; Reply, at 5.

³⁴ AFR, at 16-18. Raycom and HITV dispute the legal relevance of these allegations and note that, in any event, Media Council misstates the facts. Joint Opposition, at 10-11.

³⁵ AFR at 19-20. Media Council states that the Bureau overstated the revenue retained by HITV under the amended agreements, relied on Bureau precedent that may be distinguishable on the facts, and failed to provide any analysis of its conclusion that the agreements in place before October 2010 gave HITV the economic incentive to control its programming. *Id.* (citing *Malara Broadcast Group of Duluth Licensee*, Letter Order, 19 FCC Rcd 24070 (MB 2004), *app. for review pending*) (*Malara*).

³⁶ AFR at 19.

³⁷ See *WHDH, Inc.*, 17 F.C.C. 2d 856, 863 (1969), *aff’d sub nom.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970); *Paxson Mgmt. Corp. & Lowell W. Paxson (Transferors) & CIG Media LLC (Transferee)*, Memorandum Opinion and Order, 22 FCC Rcd 22224, 22234, para. 28 (2007).

³⁸ See, e.g., *Radio Moultrie, Inc.*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 24304, 24306 (2002).

³⁹ *Bureau Order*, 26 FCC Rcd at 16092 (quoting *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8452, 8514 (1995)).

1(a) and 1(b)(iii) of the Shared Services Agreement provide that Raycom does not control the “policies, operations, management or any other matters” relating to KFVE and that HITV shall control the programming aired on the station.⁴⁰ Moreover, in contrast with situations in which agreements were evaluated prior to grant of an application, we emphasize that we need not rely here on a prospective analysis based on the terms of an agreement that has not yet been implemented. Rather, as detailed in the *Bureau Order* and herein, there is ample record evidence showing that HITV, in fact, has retained control over its own programming. Pursuant to its contract, for example, HITV’s General Manager writes and delivers two editorials per week, and Raycom and HITV each air their editorials only on their own stations.⁴¹ Additionally, HITV retains the right to reject local news programming, and the record shows that HITV has exercised this right.⁴² The record also provides no basis to conclude that the HITV General Manager’s past employment with Raycom deprives HITV of control of programming.⁴³ Finally, the local news programming supplied to KFVE by Hawaii News Now (HNN) amounts to well under 15 percent of its weekly time, the threshold above which an agreement to program a station’s airtime is deemed to confer a degree of potential influence (but not necessarily control) that warrants ownership attribution.⁴⁴ These facts, together with the Bureau’s numerous other findings of fact, are sufficient to support its conclusion that HITV controls programming policy.⁴⁵

15. Media Council states that “[u]nder 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.”⁴⁶ In *Ackerley*, the Commission concluded that a series of agreements, including a Joint Sales Agreement and a Local Marketing Agreement, had the combined effect of depriving the licensee of the economic incentive to control its programming and determined that the agreements therefore created an attributable interest for purposes of the multiple ownership rules.⁴⁷ The Commission does not apply this principle as a means of determining whether an entity exercises *de facto* control, and we overrule the *Bureau Order* to the extent it could be read as doing so.⁴⁸ To the extent that Media Council reads the Bureau’s decisions in other cases as establishing a specific revenue-sharing formula that is necessary in order to ensure that the licensee retains *de facto* control, we disagree with this

⁴⁰ See *Bureau Order*, 26 FCC Rcd at 16092-93.

⁴¹ See *Bureau Order*, 26 FCC Rcd at 16093 (citing Raycom and HITV April 1, 2011 *Ex Parte* Letter, Annex A at 2); Joint Opposition at 10 & n.15 (citing issues/programs lists). See also HITV Opposition to Renewal Petition at 14, App. F & Fink Decl. (discussing editorials by KFVE’s General Manager, which air exclusively on that station).

⁴² Joint Opposition, at 10 (citing Raycom and HITV April 1, 2011 *Ex Parte* Letter, HITV Response at Annex A, p. 5). The question of whether the quality of HITV’s local programming has declined since HITV entered into a news sharing agreement with Raycom, as Media Council alleges, AFR at 21, has no bearing on whether HITV determines or executes programming policies and thus is not relevant to our inquiry.

⁴³ Media Council faults the Bureau for failing to examine the implications of this past employment relationship and states that the General Manager’s program acquisition activities “do not show independent editorial control if done with Raycom’s knowledge and approval.” AFR, at 18. Media Council’s bare allegation that the HITV General Manager previously served as general manager of Raycom’s stations, without any evidence of actions indicative of influence or control, does not provide a rational basis to infer that Raycom controls HITV’s programming decisions or other core operations. See *Applications of BBC License Subsidiary L.P. (Assignor) & SF Green Bay License Subsidiary, Inc. (Assignee)*, Memorandum Opinion and Order, 10 FCC Rcd 7926, 7933 (1995) (“[A] former network employee hired by a new broadcast enterprise does not, without anything more, impart to the network a cognizable interest.”) (citations omitted).

⁴⁴ *Review of the Commission’s Regulations Governing Attribution of Broad. & Cable/MDS Interests Review of the Commission’s Regulations & Policies Affecting Inv. in the Broad. Indus. Reexamination of the Commission’s Cross-Interest Policy*, Report and Order, 14 FCC Rcd 12559, 12598 (1999), *subseq. hist. omitted*. The news sharing arrangement presents even less potential for Raycom to influence KFVE’s programming, because it does not permit Raycom to sell advertising on KFVE. See HITV Opposition to Renewal Petition at 2 & Fink Decl. (KFVE’s employees sell the station’s advertising and its advertising is not sold jointly with the advertising time of Raycom’s stations); Joint Opp. at 13 n.18 (stating that Raycom sells no advertising time on KFVE).

interpretation.⁴⁹ The Commission has never held that a sharing arrangement in which the station receiving services retains less than a specified percentage of its revenues lacks financial control or an incentive to control programming. We disavow any such formulaic approach as being fundamentally inconsistent with the Commission's longstanding practice of examining the totality of the circumstances in each case to determine whether a licensee retains operational control of the station. In the AFR, Media Council does not claim that, under the revised agreements, HITV did not receive a portion of the station's revenues or that it did not have the opportunity to benefit financially from improved performance. In addition, Media Council has not shown how the revenue sharing terms of the agreements, in theory or in practice, have deprived HITV of financial control of the station. Media Council points to the revenue split and flat fee arrangements but has not identified any record evidence indicating that Raycom, rather than HITV, exercises control over station financial matters, such as establishing budgets, controlling bank accounts, and setting financial policies.⁵⁰

16. Finally, with respect to control over personnel, HITV employs its own General Manager and General Sales Manager, and Raycom and HITV have provided evidence that, in practice, HITV exercises control over KFVE personnel, specifically including those employees leased from Raycom to aid in the sale of advertising time.⁵¹ Media Council has provided no evidence to the contrary.⁵²

III. LICENSE RENEWALS

17. *Background.* Raycom seeks renewal of the licenses for Honolulu stations KHNL and KGMB, and HITV seeks renewal of the license for Honolulu station KFVE.⁵³ Media Council requests that the Commission dismiss the license renewal applications, or, in the alternative, "require Raycom to divest at least one station" and "require KFVE to resume independent operation within six months."⁵⁴ It claims that the applications "should be dismissed as defective on their face," as a result of Raycom's "two *prima facie* violations of the Commission's duopoly rule."⁵⁵ It further declares that the Stations have not served the public interest, because the operation of the HITV-Raycom series of agreements "has reduced

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⁴⁵ *Bureau Order*, 26 FCC Rcd at 16092-93 (discussing contractual rights and finding that Raycom supplies only 6.5% of the total weekly programming aired on KFVE; the content subject to the news sharing agreement is produced jointly by Raycom and HITV; HITV's General Manager writes and delivers two editorials each week; most of KFVE's programming is supplied through its network affiliation agreement, and KFVE has rejected network programming on a regular basis; and KFVE's General Manager reports to HITV's headquarters, has submitted bids for syndicated programming, schedules the station's programming, and has negotiated with a local producer to acquire weekly local interest programming, all of which are indicia of control). Media Council has provided no record evidence rebutting these findings or otherwise demonstrating that they were erroneous.

⁴⁶ See AFR at 19 (citing *Ackerley Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10841 (2002)).

⁴⁷ *Id.* at 10840-41.

⁴⁸ *Bureau Order*, 26 FCC Rcd at 16093-94; see also *2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13743-44, para. 318 (2003), subsequent hist. omitted (finding that certain radio joint sales agreements convey a level of influence sufficient to warrant attribution but that licensees with stations subject to such agreements do not thereby abdicate control).

⁴⁹ See AFR at 20 (citing *Malara, supra*). In any event, we are not bound by Bureau precedent. See *Comcast Corp. v. FCC*, 526 F.3d 763, 769-70 (D.C. Cir. 2008) ("[A]n agency is not bound by the actions of its staff if the agency has not endorsed those actions.").

⁵⁰ See Raycom and HITV April 1, 2011 Ex Parte Letter, Annex A at 1 n.1 ("HITV's corporate office maintains its own bank accounts, insurance programs, and payroll administration, all of which are separate from Raycom.").

⁵¹ See Joint. Opp. at 6 n.8 (HITV sales team is "screened from employees selling time on Raycom stations," and HITV employs its own national sales representative); *id.* at 13-14 (leased employees report "directly and solely" to HITV) (citing Joint Ex Parte Response to "Supplement," June 8, 2010, at 19 & Ex. A-B).

competition in the production of local news, competition in the sale of advertising, and the diversity of viewpoints available to the public.”⁵⁶ Moreover, Media Council questions the character qualifications of Raycom and HITV. In particular, it asserts that they have “engaged in misrepresentation or lack of candor in their dealings with the Commission” by certifying in their renewal applications that there were no pending applications in which character issues had been raised, “when in fact, character issues remain pending in connection with the KFVE application for transfer of control.”⁵⁷ Media Council also alleges that Raycom has “made a new material misrepresentation of fact” by falsely stating that Common Cause Hawaii Executive Director Carmille Lim expressed regret for supporting the Renewal Petition.⁵⁸ Finally, Media Council claims that Raycom’s and HITV’s violations of the public file rule, as discussed in the NAL accompanying the *Bureau Order*, raise questions about their character qualifications, and that HITV’s “reconstructed and revised I/P lists,” together with Raycom’s and HITV’s revisions to various agreement terms after it raised concerns, “evidence a lack of forthrightness in dealing with the Commission.”⁵⁹

18. In support of its contention that the Stations have failed to serve the public interest, Media Council submits declarations and letters from local organizations and refers to academic studies of the Honolulu market. For instance, UNITE HERE Local 5, a labor union representing “workers in Hawai’i’s visitor industry,” states that HNN offers “only bland and superficial” coverage of the “election issue and voting concerns” of importance to its members; that it perceives HNN “has substantially less reporting of the State legislature and city and [county] council activities;” that HNN stations “dominate the local advertising market;” and that there is “a troubling pressure to have . . . ads produced in house by Raycom.”⁶⁰ Tom Coffman, a former political reporter in Hawaii, laments that “the process of chain ownership and media consolidation” has “weaken[ed] our previously robust practice of journalism” and claims that “[i]f you were to do a content study, you would find that the single biggest time-fillers on KGMB/KHNL/KFVE are weather reports and police-blotter reports.”⁶¹ Americans for Democratic

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⁵² See AFR, at 19. Although Media Council seeks review on the basis of claimed errors of fact, it asserts that the Bureau erred as a legal matter when it concluded, based on the main studio staffing requirement, that HITV maintains adequate staffing to exercise control over KFVE personnel. AFR at 18. Media Council ignores longstanding precedent supporting the Bureau’s conclusion. See *Bureau Order*, 26 FCC Rcd at 16094 & n.42.

⁵³ File Nos. BRCDDT-20141001CEM (KHNL), BRCDDT-20141001CDU (KGMB), and BRCDDT-20140930AFX (KFVE).

⁵⁴ Petition to Deny License Renewals of Media Council Hawai’i, File Nos. BRCDDT-20141001CEM, BRCDDT-20141001CDU, and BRCDDT-20140930AFX (filed Jan. 2, 2015), at i (Renewal Petition). See also *id.* at 5-7 (stating that the Bureau concluded that the affiliate swap was “clearly at odds with the purpose and intent of the duopoly rule” and that it could be considered in the context of a future licensing proceeding) (citing *Bureau Order*, 26 FCC Rcd at 16095; *Quadrennial Review Notice*, 29 FCC Rcd at 4390).

⁵⁵ *Id.* at 11-12 (alleging that the affiliation swap resulted in a violation of the duopoly rule’s top-four restriction, and the sharing agreement with HITV gave Raycom *de facto* control over KFVE, resulting in a further violation of the duopoly rule).

⁵⁶ *Id.* at 13. The Hawaii State Teachers Association also seeks denial of the applications due to the alleged reduction in diversity and competition resulting from Raycom’s “outright owner[ship]” of the two Raycom stations and KFVE. HSTA Informal Objection.

⁵⁷ *Id.* at 20.

⁵⁸ Joint Reply to Oppositions of Media Council Hawai’i, File Nos. BRCDDT-20141001CEM, BRCDDT-20141001CDU, and BRCDDT-20140930AFX (filed Feb. 23, 2015), at 7-8.

⁵⁹ Petition to Deny at 9-10 (citing *Bureau Order*, 26 FCC Rcd at 26 FCC Rcd 16095-96 (finding HITV apparently liable for \$10,000 forfeiture for violations of 47 CFR 73.3526 based on missing issues/programs lists covering three quarters and for failure to provide access to the public file during normal business hours, and admonishing Raycom for failure to provide access during normal business hours)).

Action/Hawai'i and Common Cause Hawai'i "are particularly concerned about the lack of information on political issues and the positions of candidates" and "believe that their efforts to increase voter participation are hampered by the failure of [the Stations] to adequately report on political news."⁶² A study by Professor Danilo Yanich of the University of Delaware, states that the SSA between Raycom and HITV has produced a "diminution of news quality" through the "use of less sophisticated reporting techniques," such as the use of "voice-over by anchor," instead 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."⁶³ Finally, Media Council objects to HNN's news sharing arrangement with Honolulu's sole daily newspaper.⁶⁴

19. Raycom counters that "[s]ettled precedent establishes that the Commission may not penalize a licensee based on . . . disagreements with a station's programming judgments" and that, in any event, its "Stations have provided an extensive and diverse array of high quality coverage of their community," including "extensive political coverage" that "has been recognized by press organizations, local elected officials, and viewers."⁶⁵ It states that, though "it is not a precondition to secure license renewal that a station have provided any local news," the "amount and quality of the news" provided by HNN (a total of 51 hours per week on KHNL/KGMB and 11 hours per week exclusively for KFVE) is "remarkable relative to . . . stations in comparably sized markets."⁶⁶ It also observes that the Yanich Study "found that the number of stories devoted to public issues dropped *more than twice as much* for stations *not* involved in the SSA, and that coverage of government and political affairs by Honolulu stations *increased* by about 50 percent after the SSA was implemented," which Media Council "fail[ed] to note."⁶⁷ As for its "limited cooperation" with the Honolulu Star-Advertiser "on matters such as conducting polls and co-hosting debates," Raycom asserts that the "informal partnership carries no firm commitments nor financial arrangements" and that it "is a far cry" from Media Council's "distorted depiction of a large-scale 'news sharing arrangement.'"⁶⁸ Raycom denies that its public file violation and amendments to transaction agreements call its character qualifications into question and asserts that it was not required to report the character qualifications issues raised in the transfer of control proceeding.⁶⁹ Raycom concedes that its statement that Ms. Lim had expressed regret for supporting Media Council's

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⁶⁰ Letter from UNITE HERE Local 5 to FCC (Nov. 5, 2014).

⁶¹ Letter from Tom Coffman to Marlene H. Dortch (Nov. 22, 2014).

⁶² Renewal Petition, at 16 (citing Letter from Common Cause Hawai'i to Marlene H. Dortch (Dec. 8, 2014)).

⁶³ *Id.* at 17-18 (citing Danilo Yanich, Local TV & Shared Services Agreements: Examining News Content in Honolulu, MB Dkt. No. 09-182 (filed Feb. 10, 2011) (Yanich Study)). Media Council previously submitted the Yanich Study to the Commission in an *ex parte* letter on February 18, 2011.

⁶⁴ *Id.* at 18.

⁶⁵ Opposition of Raycom Media, Inc. to Petition to Deny, File Nos. BRC DT-20141001CEM, BRC DT-20141001CDU, and BRC DT-20140930AFX (filed Feb. 2, 2015), at 4-5 (Raycom Renewal Opposition). Raycom catalogues numerous examples of its political coverage during the 2012 and 2014 election cycles; observes that, since 2010, its stations "have won 13 Murrow Awards, eight first-place (and three second-place) Associated Press awards (including the Best Newscast award for the past three years), four Emmy awards, and a National Murrow Award for best small-market newscast;" submits an "illustrative but by no means comprehensive" set of viewer correspondence and praise by elected officials; and samples efforts beyond on-air programming to serve the community, including the creation of an advisory panel and assistance to non-profit organizations seeking to secure state and federal grants.

⁶⁶ *Id.* at 5 and Note 14.

⁶⁷ *Id.* at 8-9 (emphasis in original).

⁶⁸ *Id.* at 12.

⁶⁹ *Id.* at 14, 19-21.

Renewal Petition was mistaken, the result of “miscommunica[ti]on in discussions among station employees and other Raycom personnel,” but rejects the allegation that its mistaken representations evidence a lack of candor.⁷⁰

20. HITV likewise claims that KFVE “fully meets the statutory renewal criteria” and defends the station’s “extensive line-up of unique, locally produced and locally focused cultural and informational programming, including editorial and public affairs programming.”⁷¹ It notes that the only rule violations during the renewal term are “a fine relating to three issues/programs lists missing from KFVE’s physical public file . . . and an admonition for delay in locating the key to the file,” which “minor deficiencies” not even Media Council has asserted “were either a ‘serious’ violation or part of a pattern amounting to ‘abuse.’”⁷² HITV further recounts ways in which KFVE, as “a station without a major network affiliation,” attracts viewers, such as providing “the only 9:00 PM newscast airing seven days each week,” working with “independent producers in Hawaii’s creative community to air Hawaii-focused programs,” and presenting exclusive editorials from its general manager twice a week “encourag[ing] viewers to consider a local topic of interest,” even “controversial topics.”⁷³ It also observes that Media Council “does not argue that KFVE provides no news coverage, or no unique news coverage, but rather that [it] would prefer that KFVE provide *different* news coverage,” which, it asserts, is not an adequate basis to support a petition to deny.⁷⁴

21. *Discussion.* Section 309(k)(1) of the Act states that the Commission shall grant a license renewal application if it finds, with respect to that station, that (a) the station has served the public interest, convenience, and necessity; (b) there have been no serious violations by the licensee of the Act or Commission rules and regulations; and (c) there have been no other violations by the licensee of the Act or Commission rules or regulations which, taken together, would constitute a pattern of abuse.⁷⁵ If the licensee fails to meet this standard, the Commission may deny the application—after notice and opportunity for a hearing under Section 309(e) of the Act—or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”⁷⁶ Applying the established two-step analysis for review of petitions to deny,⁷⁷ and based on a

⁷⁰ See Letter from Kurt Wimmer, Counsel for Raycom Media, Inc., to Marlene Dortch, Secretary, Federal Communications Commission (Mar. 9, 2015) (Wimmer Letter); Raycom Renewal Opposition, at 7-8, n.20 (“Ms. Lim called the Station’s General Manager following the filing of the petition and expressed regret for having supported it.”).

⁷¹ Opposition of HITV License Subsidiary, Inc. to Petition to Deny License Renewals, File Nos. BRCDD-20141001CEM, BRCDD-20141001CDU, and BRCDD-20140930AFX (filed Feb. 2, 2015), at 7.

⁷² *Id.* HITV also explains that Raycom and HITV clarified and modified various terms of the transaction agreements in response to staff requests and concerns expressed by Media Council. *Id.* at 3-4.

⁷³ *Id.* at 11-14. HITV provides a listing of the topics covered by editorials that aired on KFVE since August 2013, along with a sample of viewer e-mails in response to them.

⁷⁴ *Id.* at 15-16.

⁷⁵ 47 U.S.C. §309(k)(1).

⁷⁶ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

⁷⁷ The Commission applies a two-step analysis to a petition to deny (or informal objection) under the public interest standard. First, it must determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d)(1); *Astroline Communications Co., Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 note 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested). This first step “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the

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review of the record as a whole, we find that Media Council has failed to raise a substantial and material question of fact as to whether there have been either any serious rule violations, or any other rule violations that would constitute a pattern of abuse, during the previous renewal cycle. We further find that Media Council has failed to raise a substantial and material question of fact as to whether the Stations have served the public interest or why grant of the license renewal applications would not be in the public interest. We conclude that Raycom and HITV have established that renewal is warranted under the standard set forth in section 309(k).⁷⁸

22. Media Council's allegations that Raycom violated the duopoly rule and acquired *de facto* control over KFVE in violation of section 310(d) of the Act were first presented in its Complaint, which the Bureau denied after finding the transactions and agreements did not violate the Act or rules. Media Council sought review of the *Bureau Order* denying the Complaint on two issues: whether the Bureau had determined correctly that the duopoly rule did not bar the affiliation swap and whether its conclusion that Raycom had not acquired *de facto* control over KFVE was based on erroneous findings as to material questions of fact. We have addressed and denied the AFR above.⁷⁹ Media Council raises these issues once again in its Renewal Petition, stating that consideration of the affiliation swap here is appropriate because the Bureau stated that its decision did not "preclude [consideration of] whether this or similar transactions are consistent with the public interest within the context of individual license proceedings."⁸⁰ Subsequently, however, the Commission determined that, although affiliation swaps will be subject to the duopoly rule going forward, licensees that had previously executed such agreements would not be subject to divestiture or enforcement action.⁸¹ Non-renewal or conditional renewal premised on divestiture or unwinding of the affiliation swap would be inconsistent with the Commission's decision to grandfather pre-existing affiliation swaps such as the one at issue here.⁸² Therefore, as discussed above in connection

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[petition] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established." *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). If the petition meets this first step, the Commission then must determine whether "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," the petitioner has raised a substantial and material question of fact as to whether the application would serve the public interest. *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e). A substantial and material question is raised when "the totality of the evidence arouses a sufficient doubt . . . that further inquiry is called for." *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). The D.C. Circuit has held that the Commission can focus on the second step first when evaluating petitions to deny. See *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir. 1996), cert. denied, 519 U.S. 823 (1996).

⁷⁸ We disagree with Media Council's contention that section 309(a) establishes a different, additional "forward-looking" standard that must be satisfied before the Commission may grant renewal. Media Council Reply at 4. Section 309(k) establishes the standard that applies specifically to the grant of renewal applications and directs the Commission to grant a renewal application if the renewal applicant meets that standard. See 47 U.S.C. § 309(k). Accordingly, that is the standard that we apply here.

⁷⁹ See *supra*, paras. 10-16.

⁸⁰ Renewal Petition at 5 (citing *Bureau Order*, 26 FCC Rcd at 16095). See also *Bureau Order*, 26 FCC Rcd at 16092 ("[C]onsideration of the impact such agreements have on competition and diversity may be relevant in determining whether license renewal for one or either of the stations that are the subject of the transaction would be consistent with the public interest. . ."); see also Media Council Reply at 7 (same).

⁸¹ *Quadrennial Report and Order*, 31 FCC Rcd at 9885 n.142; see also *Quadrennial Notice*, 29 FCC Rcd at 4392 n.124 (proposing to apply the revised rule prospectively only). The Commission did not adopt the proposal in the *Quadrennial Notice*, *id.*, that pre-existing affiliation swaps "could still be considered in the context of individual licensing proceedings." The Commission's grandfathering decision was consistent with longstanding precedent in which the Commission has balanced the interest in implementing a new policy on an industry-wide basis against the interests in avoiding disruption to industry and consumers, as well as hardship to licensees that acted in reliance on pre-existing rules, concluding that such licensees should not be subject to forced divestiture based on new rules. See, e.g., *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership*

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with the AFR, we will not require Raycom and HITV to unwind the affiliation swap or divest a station as a condition of renewal. Further, considering the record as a whole, we conclude that Raycom and HITV have satisfied the statutory standard for renewal, as discussed below.

23. As we have already addressed the arguments raised in the AFR, the gravamen of Media Council's pleading is that the stations have failed to serve the public interest based on their selection of news programming and their claim that the HNN and Honolulu *Star-Advertiser* news sharing arrangements harm diversity and competition.⁸³ We agree with Raycom and HITV that the complaints regarding the news sharing arrangements, even if true, do not constitute a violation of any Commission rule and that Media Council has not alleged facts sufficient to show that grant of the applications is *prima facie* inconsistent with the public interest on the basis of the programming choices and news format of the Stations.⁸⁴ Further, the sharing agreements between Raycom and HITV have not deprived HITV of control of KFVE or conferred on Raycom an attributable interest in the station.⁸⁵ As for the Stations' choice of programming, the Commission is prohibited by the First Amendment to the United States Constitution and Section 326 of the Act from censoring programs or from interfering with freedom of expression in broadcasting.⁸⁶ The choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee's good faith discretion, and it is "well-settled law that the Commission does not substitute its own editorial judgment for that of a licensee."⁸⁷ As the Commission has stated, "[a]lthough every licensee has an obligation to present programming which is responsive to the problems, needs and interests of its service area, it is the responsibility of, and within the discretion of, each individual licensee to select the problems, needs and interests to be covered, as well as the particular programs to address those interests."⁸⁸ Those seeking to demonstrate that a licensee has abused its editorial discretion carry a heavy burden, one that has not been met in this case.⁸⁹ The only question before us is whether the licensee met its obligation to serve its community of license. Based on the record before us, we find that Raycom and HITV met that obligation by airing programming that is

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Rule, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213, 10234 (2016) (grandfathering appropriately balances expectations of broadcasters that acted in compliance with previous rules and interest in achieving goals of newly adopted regulation), *recon. granted on other grounds*, 32 FCC Rcd 3390 (2017), *petition for review pending sub nom. Free Press v. FCC*, D.C. Cir. No. 17-1129 (pet. for review filed May 12, 2017); *FCC v. Nat'l Citizens Cmte for Broad'g*, 436 US 775, 806-07. The decision was also consistent with the Commission's contemporaneous decisions to grandfather various types of ownership combinations following other modifications of the ownership rules. See *Quadrennial Report and Order*, 31 FCC Rcd at 9877, 9941, 9951 (grandfathering previously compliant local TV, newspaper-broadcast, and TV-radio combinations that would be newly non-compliant as a result of rule modifications, but for grandfathering).

⁸² As the Bureau correctly concluded, Raycom and HITV did not violate any rule when they undertook the affiliation swap. The Commission did not even propose to apply the duopoly rule to affiliation swaps (which it proposed to do on a prospective basis only) until approximately five years after the licensees consummated their agreement, see *Quadrennial Notice*, 29 FCC Rcd at 4392, and the rule was ultimately adopted approximately seven years after consummation, *Quadrennial Report and Order*, 31 FCC Rcd at 9885. In light of the licensees' reliance on Commission rules in effect at the time of the affiliation swap and the potentially disruptive effect of non-renewal or divestiture on service to the public, the Commission's grandfathering decision as applied here serves the public interest.

⁸³ Renewal Petition at 12-19. For example, Media Council claims that HNN provides "bland and superficial" news coverage, *id.* at 14, and that the news sharing arrangement between the three stations has resulted in "substantially less reporting of the State legislature and city and [county] council activities," *id.*, "little investigative reporting," *id.* at 15, more political advertisements than political stories, *id.* at 17, and shorter news stories and less expensive presentation modes such as the use of voice-over by an anchor instead of sending a news crew to the scene, *id.* at 18.

⁸⁴ See Raycom Opposition at 4-13; HITV Opposition at 11-16.

responsive to issues of concern to their community.⁹⁰

24. Finally, Media Council fails to support its character allegations against Raycom with evidence suggesting that Raycom intended to deceive the Commission, nor do we find any such indication based on a review of the record as a whole.⁹¹ With respect to its allegation that Raycom and HITV engaged in misrepresentation or lack of candor by certifying in their license renewal applications that “neither the licensee nor any party to the application has any pending broadcast application in which character issues have been raised,” the Commission had not determined that the allegation raised by Media Council in the transfer of control proceeding had merit and had not designated it for hearing prior to the licensees’ certifications (and we find here that the allegation does not have merit). We therefore agree with Raycom and HITV that they were not required to report the allegation.⁹² Further, as the character qualifications allegations were a matter of public record on file with the Commission, we find no basis to infer an intent to deceive.⁹³ Raycom’s statement characterizing the nature of Ms. Lim’s communications with station employees as an expression of regret for supporting Media Council’s Renewal Petition, though admittedly mistaken, does not, absent evidence of intent to deceive, amount to misrepresentation or lack of candor.⁹⁴ We find that that this error is attributable to simple miscommunication, rather than deceptive intent.⁹⁵ Media Council has provided no evidence that Raycom or HITV intended to deceive the Commission in connection with their violations of the public file rule or their revisions to transaction agreements. Thus, Media Council’s allegations do not raise a substantial and material question of fact regarding Raycom’s character qualifications warranting further investigation. Further, Raycom’s and HITV’s violations of the public file rule are not “serious,” nor do they amount to a

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⁸⁵ See *supra*, paras. 14-16. Media Council alleges incorrectly, and without evidentiary support, that Raycom sells advertising for KFVE. Petition to Deny at 14. Although Raycom leases employees to HITV for the purpose of selling advertising on KFVE, Raycom does not broker the station’s advertising time. Raycom Opposition at 3 n.11; HITV Opposition at 2 & Declaration of John L. Fink.

⁸⁶ 47 U.S.C. § 326; U.S. CONST., amend. I.

⁸⁷ *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 9564, 9574 (MB 2014) (citing *Complaints Concerning Network Coverage of the Democratic National Convention*, Decision, 16 FCC 2d 650, 654 (1969)).

⁸⁸ *WHYY Licensee, LLC*, Letter, 25 FCC Rcd 10044, 10045 (Vid. Div. rel. July 23, 2010).

⁸⁹ *License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 5 FCC Rcd 3847, 3848 (1990). See, also, *Commercial TV Stations*, Report and Order, 98 FCC 2d 1076, 1093-94 (1984).

⁹⁰ See Raycom Opp. to Petition to Deny at 4-11; HITV Opp. at 11-14 & Appendices;. Media Council alleges, without support, that the affiliation swap and sharing agreement with HITV “would also result in Raycom’s control of approximately 44 percent of the market, thereby decreasing competition for both the sale of advertising and the production of local news.” Renewal Petition, Conybeare Decl. at ¶ 4 (summarizing allegation made in Media Council’s Complaint). To the extent Media Council attempts to rely on its Complaint to support this allegation, the Complaint assumes Raycom controls KFVE, which we have concluded is not the case. See Complaint at 6. Media Council also speculates, without offering any evidentiary support or legal analysis, that Raycom may be violating

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“pattern of abuse.”⁹⁶

IV. ORDERING CLAUSES

25. Accordingly, **IT IS ORDERED**, That the Application for Review filed by Media Council Hawai'i on December 27, 2011, **IS DENIED**.

26. **IT IS FURTHER ORDERED**, That the Petition to Deny License Renewals filed by Media Council Hawai'i on January 2, 2015, **IS DENIED**.

27. **IT IS FURTHER ORDERED**, That the applications for renewal of license of KFVE(TV), Honolulu, Hawaii, File No. BRC DT-210140930AFX; KGMB(TV), Honolulu, Hawaii, File No. BRC DT-20141001CDU; and KHNL(TV), Honolulu, Hawaii, File No. BRC DT-20141001CEM,

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antitrust laws in connection with the production of advertising. Renewal Petition at 14. These generalized allegations do not raise a substantial and material question of fact warranting further investigation.

⁹¹ See *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994) (intent to deceive is a critical element of misrepresentation and lack of candor); *Citadel Broadcasting Co.* 22 FCC Rcd 7083, 7090 (2007) (same). Indeed, as to Media Council's underlying allegation that Raycom's characterization of American Spirit as a “non-Raycom entity” amounted to lack of candor, Media Council provides no evidence indicating that Raycom has an ownership interest in or controls American Spirit, such that the characterization would even be false, and the supporting declaration for its Informal Objection neglects to mention the misrepresentation allegation. Raycom, on the other hand, states that it holds no ownership interest in American Spirit and that there are no interlocking directorates. Opposition to Petition to Deny of Raycom Media, Inc., File No. BTCCDT-20131120AEP (filed Feb. 25, 2014), at 1-2. We agree with HITV that it is not reasonable to read Raycom's statement to mean that Raycom and American Spirit have no business relationships. HITV Opposition to Informal Objection at 7. Further, it is not logical to infer any intent to deceive when the fact that American Spirit and Raycom had entered into sharing agreements relating to other American Spirit stations was a matter of public record, as indicated in various applications on file with the Commission. See Henson Declaration at 3 (listing applications). See *Mary v. Harris Found. c/o Barry D. Wood*, 22 FCC Rcd 16948, 16951 (MB 2007) (disclosure in ownership reports on file with Commission was “at odds with any alleged intent to conceal” information relevant to pending application).

⁹² See *KAXT, LLC (Assignor) and OTA Broadcasting (SFO), LLC (Assignee) For Consent to Assign the License of Class A Station KAXT-CD, San Francisco-San Jose, California*, Memorandum Opinion and Order, 32 FCC Rcd 9638 (2017); *Application of Greater Muskegon Broadcasters, Inc., Tim Achterhoff, Randy Crow, David Dexter, Fifth Reformed Church, Clara Nedeau, Alexis Rogoski, Elise Hanson, & Frances Sova, (Transferors) & KQDS, Inc., (Transferee)*, Memorandum Opinion and Order, 11 FCC Rcd 15464, 15472 (1996) (*Greater Muskegon*); *Coosa Valley News, Inc. c/o Richard F. Swift, Esq. Preston Coleman, Ph.d. S. Broad. of Athens, Inc. S. Broad. Companies, Inc. New Broad. Inv. Properties, Inc. S. Broad. of Pensacola, Inc. c/o Lee W. Shubert, Esq. Cox Radio, Inc. c/o Kevin F. Reed, Esq.*, Letter Order, 23 FCC Rcd 9146, 9149 (MB 2008).

⁹³ See *Greater Muskegon*, 11 FCC Rcd at 15472 (finding no intent to deceive where information was already on file with the Commission).

⁹⁴ *Eddie Floyd, et al.*, Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability, 25 FCC Rcd 11348, 11351, para. 8 (2010) (“The mere existence of an inaccuracy in any application, without any indication that there was intentional deception, is insufficient to justify consideration of a misrepresentation or lack of candor issue in an evidentiary hearing.”); *Solar Broad. Co., Inc.*, 17 FCC Rcd 5467, 5491 (2002) (absent evidence of intent to deceive, mistake was not misrepresentation).

⁹⁵ See Wimmer Letter. Media Council has provided no evidence of intent to deceive.

⁹⁶ See *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 7433, 7440 (2004). We do not find here that the licensees' station operations were “conducted in an exceedingly careless, inept and negligent manner,” that the licensees are “either incapable of correcting or unwilling to correct . . . operating deficiencies,” or that “the number, nature and extent of the violations indicate that the licensee[s] cannot be relied upon to operate [the stations] in the future in accordance with the requirements of [their] licenses and the Commission's Rules.” *Id.* (citations and internal quotation marks omitted).

ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary