

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

In the Matter of Applications for )
)
Consent to Transfer Control of Certain License ) MB Docket No. 18-230
Subsidiaries of Raycom Media, Inc. to Gray )
Television, Inc. ) File Nos. BALCDT-20180709ACV, et al.
)
Consent to Assignment of Certain Licenses from )
Subsidiaries of Raycom Media, Inc. to a Subsidiary )
of Gray Television, Inc. )
)
Consent to Assignment of Certain Licenses from )
Subsidiaries of Raycom Media, Inc. to )
Subsidiaries of Lockwood Broadcasting, Inc. ) File Nos. BALCDT-20180828AAE, et al
)
Consent to Assignment of Certain Licenses from )
Subsidiaries of Raycom Media, Inc. to )
Subsidiaries of the E.W. Scripps Company ) File Nos. BALCDT-20180828AAK, et al.
)
Consent to Assignment of Certain Licenses from )
Subsidiaries of Raycom Media, Inc. to )
Subsidiaries of TEGNA, Inc. ) File Nos. BALCDT-20180829AAY, et al.
)
Consent to Assignment of WSWG(DT), Valdosta, )
Georgia from a Subsidiary of Gray Television )
Licensee, LLC to Marquee Broadcasting Georgia, ) File No. BALCDT-20180823AAT
Inc. )

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 2018

Released: December 20, 2018

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (Bureau) has before it applications in the attached appendices that: (1) seek consent to the assignment of certain television broadcast licenses held by subsidiaries of Raycom Media, Inc. (Raycom) to a subsidiary of Gray Television, Inc. (Gray) (jointly, the Applicants), and to the transfer of control of subsidiaries of Raycom holding television broadcast licenses to Gray (the Applications);<sup>1</sup> and (2) seek consent to divest certain stations necessary to bring the post-transaction Gray into compliance with the Local Television Ownership Rule.<sup>2</sup> DISH Network L.L.C. (DISH), the

<sup>1</sup> The Applicants have filed separate applications requesting Commission consent for the transfer of control or assignment of earth station, microwave, and land mobile facilities that are currently held by Raycom subsidiaries.

<sup>2</sup> 47 CFR § 73.3555(b). 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 (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

(continued....)

American Cable Association (ACA), and NCTA – The Internet & Television Association (NCTA) have filed comments arguing that grant of the Applications would not serve the public interest, which we find are without merit for the reasons set forth below.<sup>3</sup> As a result of the divestitures proposed in the Applications, the Bureau finds that Gray, following consummation, will be in compliance with the Local Television Ownership Rule in nine markets. In addition, in the Amarillo, Texas, and Honolulu, Hawaii, markets, where Gray proposes to own two top-four ranked stations, we find that application of the Local Television Ownership Rule’s Top-Four Prohibition is not warranted based on the unique facts and circumstances of the stations at issue.<sup>4</sup> Lastly, we grant continued authority to operate four stations pursuant to the satellite exception to the Local Television Ownership Rule.<sup>5</sup> As discussed herein, we find that grant of the Applications would serve the public interest, convenience, and necessity.<sup>6</sup>

## II. BACKGROUND

### A. Transaction

2. Pursuant to an Agreement and Plan of Merger dated June 23, 2018, Gray seeks to acquire Raycom through a series of mergers that will be completed contemporaneously at a single closing. Gray proposes to acquire Raycom for \$3.467 billion in total proceeds, and consideration will consist of \$2.85 billion in cash, \$650 million in a new series of preferred stock, and 11.5 million shares of Gray common stock. At closing, Gray’s shareholders will own 89% of the merged company.<sup>7</sup> After the proposed acquisition of Raycom and completion of the required divestitures, Gray will own 124 television stations across 92 markets.<sup>8</sup> Gray amended the Applications on August 20, 2018, to identify four proposed divestiture buyers and to pledge that after divestiture it will not have any joint sales, shared services, or local marketing arrangements with any of the divestiture assignees; nor will Gray finance or guarantee any divestiture assignee’s debt.<sup>9</sup>

3. The Applicants argue that the grant of the Applications will “serve the public interest by helping the combined company realize the efficiencies of scale and scope necessary to maintain current levels of top-quality service and to make the capital investments necessary to improve that service” and “secure Gray’s ability to continue fulfilling its mission of providing [quality service to] small and medium sized markets.”<sup>10</sup> Gray states that as a result of the transaction, it “will take” a number of “specific

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*part*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9837-9838 (2017) (*Quadrennial Order on Reconsideration*), *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).

<sup>3</sup> None of the commenters has asserted standing as a petitioner to deny pursuant to Section 309(d)(1) of the Act. 47 U.S.C. § 309(d)(1). We will accordingly consider their filings as informal objections pursuant to Section 73.3587 of the Commission’s Rules (Rules). 47 CFR § 73.3587.

<sup>4</sup> 47 CFR § 73.3555(b)(2).

<sup>5</sup> 47 CFR § 73.3555, Note 5.

<sup>6</sup> 47 U.S.C. § 310(d).

<sup>7</sup> See Applications, Attach. 6, Comprehensive Exhibit at 2 (Comprehensive Exhibit).

<sup>8</sup> Comprehensive Exhibit at 3.

<sup>9</sup> Comprehensive Exhibit, Aug. 20, 2018 Amendment at 1.

<sup>10</sup> Comprehensive Exhibit at 3.

statewide and regional initiatives” to improve program service and “will pair the tremendous local and regional newsgathering capabilities of the merged company with its Washington, D.C. news bureau to ensure that its local communities are fully informed of developments in the nation’s capital that affect them every day.”<sup>11</sup> More specifically, the Applicants state that the transaction will allow Gray to:

“create[] statewide and regional news networks in Alabama, Louisiana, Kentucky, the Atlantic Coast region, the Gulf Coast region, South Carolina, Ohio, and Mississippi; found[] news bureaus in underserved areas, like Vernon Parish, Louisiana, that Gray will serve after the transaction; provide[] the legacy Raycom stations with news and information from Gray’s Washington, DC news bureau; supply[] the legacy Gray stations with news and information from Raycom’s national investigative unit; expand[] the number of journalists that work in the Washington, DC news bureau and the national investigative unit; and realize[] economies of scope and scale to invest more in the stations’ physical plant and programming production assets than [it] could without the merger.”<sup>12</sup>

4. The Local Television Ownership Rule allows an entity to own two television stations licensed in the same Nielsen Designated Market Area (DMA or market) if: (1) the digital noise limited service contours (NLSCs) of the stations (as determined by Section 73.622(e) of the Commission’s rules) do not overlap; or (2) at the time the 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, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service.<sup>13</sup> With respect to the latter provision—the Top-Four Prohibition—an applicant may request that the Commission examine the facts and circumstances in a market regarding a particular transaction, and based on the showing made by the applicant in a particular case, make a finding that permitting an entity to directly or indirectly own, operate, or control two top-four television stations licensed in the same DMA would serve the public interest, convenience, and necessity.<sup>14</sup> The Commission evaluates showings that the Top-Four Prohibition should not apply based on specific circumstances in a local market or with respect to a specific transaction on a case-by-case basis.<sup>15</sup>

5. The Applicants state that common ownership of Gray and Raycom stations would result in Gray violating the Local Television Ownership Rule in the following DMAs: (i) Knoxville, Tennessee; (ii) Toledo, Ohio; (iii) Waco-Temple-Bryan, Texas; (iv) Tallahassee, Florida-Thomasville, Georgia; (v) Augusta, Georgia-Aiken, South Carolina; (vi) Odessa-Midland, Texas; (vii) Albany, Georgia; (viii) Panama City, Florida; and (ix) Dothan, Alabama.<sup>16</sup> The Applicants have filed divestiture applications to come into compliance in each market.<sup>17</sup> In two other markets, Cleveland-Akron (Canton), Ohio, and Richmond-Petersburg, Virginia, the Applications represent, and we find, that at least one station in each market is ranked outside of the top four, and thus combined ownership of the Gray and

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<sup>11</sup> *Id.* at 4, 6.

<sup>12</sup> Gray and Raycom Joint Response Comments (Joint Opposition) at 10-11.

<sup>13</sup> 47 CFR § 73.3555(b)(1).

<sup>14</sup> *Id.* § 73.3555(b)(2).

<sup>15</sup> *Id.*

<sup>16</sup> Comprehensive Exhibit at 2, 27-28. In the Knoxville, Tennessee, and Tallahassee, Florida-Thomasville, Georgia, markets, Gray and Raycom together currently own three television stations, two of which are owned by Gray. Following consummation, Gray would continue to own two television stations, one of which would not rank in the top four in all-day audience share. Thus, we find that continued common ownership of the two Gray stations in the two markets would comply with the Local Television Ownership Rule. *Id.* at 27-28.

<sup>17</sup> All of these applications are uncontested.

Raycom stations would not violate the Local Television Ownership Rule.<sup>18</sup> In two markets- Amarillo, Texas and Honolulu, Hawaii-Raycom owned two stations that were ranked in the top four in audience share at the time the Applications were filed. The Applicants do not propose divestiture in these markets but instead argue that continued common ownership of the stations is in the public interest.<sup>19</sup>

6. The national television ownership rule prohibits a single entity from owning television stations that, in the aggregate, reach more than 39 percent of the total television households in the United States.<sup>20</sup> In determining compliance with the 39 percent national audience reach cap, stations broadcasting in the VHF spectrum are attributed with all television households in their DMAs, while UHF stations are attributed with only 50 percent of the households in their DMAs (the UHF discount).<sup>21</sup> The Applicants submit that, following consummation, Gray would have an attributable interest in television stations having an aggregate national audience reach, when applying the UHF discount, of just 16.372 percent. Staff calculations suggest that Gray would have a discounted national audience reach of 17.08 percent.<sup>22</sup>

## B. Pleadings

7. Although no petitions to deny were filed in response to this transaction, the Commission received three comments from multichannel video programming distributors (MVPDs) that express general concern about the proposed top-four combinations and the potential impact the merger would have on the retransmission consent market.<sup>23</sup> For example, DISH contends that the Applicants have not met their burden of proving that the transaction is in the public interest, because the Applicants assert unverifiable and unquantified benefits and do not address the transaction's negative competitive effects on the retransmission consent market.<sup>24</sup> DISH asserts that the Applicants should supplement the Applications with substantial additional information, including support for the specific business synergies and efficiencies that would facilitate the capital investments needed to improve service, as well as all shared service agreements between Gray or Raycom stations and third-party stations.<sup>25</sup> DISH also

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<sup>18</sup> *Id.* at 26-27.

<sup>19</sup> *Id.* at 25-27, Exh. F.

<sup>20</sup> 47 CFR § 73.3555(e)(1). *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213 (2016), *reconsidered in part*, Order on Reconsideration, 32 FCC Rcd 3390 (2017) (*UHF Discount Recon Order*), *pet. for rev. dismissed*, *Free Press et al. v. Federal Communications Commission*, No. 17-1179 (D.C. Cir. July 25, 2018).

<sup>21</sup> *UHF Discount Recon Order*, 32 FCC Rcd at 3391.

<sup>22</sup> The Applicants appear to list Cleveland (WOIO, WUAB) as a UHF market, but Bureau staff finds that Cleveland should be counted as a VHF market. This issue accounts for the discrepancy in the national cap estimates. Without the UHF discount, Gray would have a national audience reach of 24.06 percent. The Applicants also certify that Gray proposes to acquire two radio stations and does not currently own any radio stations. Therefore, we find grant of the Applications would comply with the Commission's local radio ownership rule. Comprehensive Exhibit at 36 (citing 47 CFR § 73.3555(a)(1)).

<sup>23</sup> *See supra* note 3 (treating the comments as informal objections).

<sup>24</sup> DISH Comments at 4-6.

<sup>25</sup> *Id.* at 5-6. As requested by staff, and consistent with processing procedures, the Applicants submitted all of the Shared Services Agreements with American Spirit Media, LLC (American Spirit), and American Spirit subsidiaries, that Gray would assume from Raycom as part of this deal. We note, however, that KFVE is being acquired by Nexstar and is no longer a party to any sharing agreements with Raycom. File No. BALCDT-20181106ABF (granted Dec. 17, 2018). We reject the argument that Gray is required to submit all sharing agreements between it and third parties that are currently in effect. Many of these are either already submitted with the Commission as required by 47 CFR § 73.3526(e)(18), are in the public files, or have been reviewed during processing of previous Gray applications.

contends that the proposed transaction threatens to drive up retransmission consent fees and to increase the risk and incidence of broadcast programming blackouts in the impacted DMAs.<sup>26</sup> To support its assertion that the transaction will lead to higher prices for DISH and consumers, DISH cites to the economic analyses it submitted in connection with the proposed acquisition of Tribune Media Company (Tribune) by Sinclair Media Group, Inc. (Sinclair), which contends that consolidation in general leads to higher retransmission consent prices, even where geographic markets do not overlap.<sup>27</sup>

8. ACA maintains that, regardless of any divestitures that would limit local consolidation, Gray's purchase of 57 Raycom stations would result in considerable national consolidation that would raise retransmission consent prices. ACA requests that the Commission, possibly by issuing a conditional grant, prohibit Gray from "effectuating any after-acquired station clauses in retransmission consent agreements with MVPDs for acquired Raycom stations it [has] committed to divest."<sup>28</sup> These after-acquired station clauses would adjust rates for any station acquired by Gray to match the rates that an MVPD pays for Gray's other stations. While acknowledging that "[l]ongstanding Commission precedent states that Gray does not obtain 'control' of a station for purposes of the Communications Act through an 'essentially instantaneous' transaction," ACA argues that "Gray may take a bolder approach and structure its divestitures to give it ownership and control for longer than such fleeting moment for the purpose of strengthening its case that an after acquired-station clause was triggered."<sup>29</sup> While contending that Gray's commitment not to have any sharing or financing agreements with the divestiture assignees is a laudable first step, ACA suggests that in light of the revelations that resulted in the *Sinclair/Tribune HDO* the Commission should seek information regarding any ongoing relationship it intends to have with the divestiture stations.<sup>30</sup> Apart from these concerns, no commenter challenges the divestiture transactions.<sup>31</sup>

9. NCTA contends that merely showing "that joint ownership resulted in cost savings and increased revenues and supposedly better programming" is insufficient to "overcome the prohibition on joint ownership of two [t]op-[f]our stations" and that the exception should be "reserved for truly exceptional cases – cases in which the anticompetitive harms associated with common ownership and joint negotiation are unusually constrained or in which the benefits to the viewing public are extraordinary."<sup>32</sup> NCTA concedes that the spike in viewership from the coverage of the World Cup for the traditionally fifth-ranked station in the Amarillo market, KEYU(DT), leading to a fourth place ranking

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<sup>26</sup> See DISH Reply at 2-4 (arguing that the Applicants are unsuccessful in their attempt to minimize the evidence of larger broadcast groups overcharging for retransmission consent fees; reiterating that the Applicants have not met their burden of proving that the transaction is in the public interest; and maintaining that any claim of benefits, such as the creation of statewide news networks and the expansion of the number of journalists that work in the Washington, DC news bureau, are just thinly veiled references to attacks on local content.).

<sup>27</sup> DISH Comments at 8-9 (citations omitted). See *Applications of Tribune Media Co. and Sinclair Broad. Group, Inc.*, Hearing Designation Order, MB Docket No. 17-179, FCC 18-100 (rel. Jul. 19, 2018) (designated on real-party-in-interest and related issues) (*Sinclair/Tribune HDO*).

<sup>28</sup> ACA Comments at 2.

<sup>29</sup> *Id.* at 12 (citing *John C. Phipps, Inc. (Assignor) and WCTV Licensee Corp. (Assignee)*, Memorandum Opinion and Order, 11 FCC Rcd 13053 (1996)); see also, ACA Reply at 2-3 (maintaining that even if the transaction "does not violate the national audience reach rules, [it] will cause retransmission consent prices to rise" and "[a]nd higher prices are one factor that the Commission must consider in its public-interest analysis of the proposed transaction;" reiterating a request for conditional grant but conceding that "Gray now states plainly that it 'will not acquire' Raycom stations prior to divestiture," and that "[w]e take this to mean that no after-acquired station clause in any Gray retransmission consent agreement applies with respect to any of these divested stations.").

<sup>30</sup> ACA Comments at 10 n.31.

<sup>31</sup> See *supra* note 3 (treating comments as informal objections).

<sup>32</sup> NCTA Comments at 3-4.

by a slim margin, is the sort of short-term aberration that may warrant a finding that the prohibition on common ownership should not apply.<sup>33</sup>

10. In contrast, in response to the Applicants' assertion that the competitiveness of the local affiliates in the Honolulu DMA warrants continued common ownership of the second and third-ranked stations there, NCTA argues that "a top-four duopoly will virtually *always* face competition from affiliates of the other two networks as well as independent stations and other non-broadcast entities."<sup>34</sup> Specifically, NCTA asserts that the Applicants fail to address the harms associated with common ownership of two top-four stations.<sup>35</sup> NCTA states that the mere existence of other broadcast competitors in the Honolulu DMA does not prove the Applicants' assertion that KHNL(TV) and KGMB(TV) (collectively, the Honolulu Stations) face strong, effective competitors. Moreover, NCTA contends that the Applicants fail to show that the combined market share of the Honolulu Stations does not significantly exceed the share of any other station in the market.<sup>36</sup> NCTA states further that the Applicants do not show that the Honolulu Stations' top-four duopoly does not have a harmful effect on retransmission consent negotiations.<sup>37</sup> Finally, NCTA maintains that the Applicants fail to show how the benefits of the top-four combination exceed the harms of such a combination to the public interest.<sup>38</sup>

11. In their Joint Opposition, the Applicants assert that the three commenters are merely recycling generalized objections regarding the retransmission consent marketplace and restating their preference that broadcasters stay small while gigantic MVPDs pursue acquisitions.<sup>39</sup> They contend that, if approved, the transaction would still leave Gray well below the national ownership cap and that any claim of increased bargaining leverage is speculative and inappropriately raised in an adjudication.<sup>40</sup> They further argue that the large size of national MVPDs undercut the theory of consumer harm caused by a supposed increase in Gray's bargaining power.<sup>41</sup> The Applicants also maintain that there is no basis for the Commission to intervene in the operation of freely negotiated retransmission consent agreements and that ACA's request is directly contrary to longstanding Commission and court precedent.<sup>42</sup> With regard to concerns surrounding its proposed top-four combination in the Honolulu market, the Applicants reiterate that experience has shown that allowing Raycom's two Honolulu stations to operate together has greatly enhanced local programming while preserving competition in the broadcast television market, and that Gray's acquisition of the stations would result in even greater benefits to the public interest.<sup>43</sup>

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<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 5 (emphasis in original).

<sup>35</sup> *Id.* at 2.

<sup>36</sup> *Id.* at 4-6.

<sup>37</sup> *Id.* at 5.

<sup>38</sup> *Id.* at 5-6.

<sup>39</sup> Joint Opposition at 1-2.

<sup>40</sup> *Id.* at i, 2, 4-7, citing *Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd 183 (MB 2017) (*Nexstar-Media General MO&O*); *Applications for Consent to Transfer of Control of Belo Corp.*, Memorandum Opinion and Order, 28 FCC Rcd 16867 (MB 2013) (*2013 Gannett Order*); High Maintenance Broadcasting, LLC, FCC File No. BALCDT-20120315ADD, rel. Aug. 28, 2012; *ACME Television Licenses of Ohio, LLC*, Letter Order, 26 FCC Rcd 5198 (Vid. Div. 2011); *Free State Commc'ns, LLC*, Letter Order, 26 FCC Rcd 10310 (Vid. Div. 2011).

<sup>41</sup> Joint Opposition at 6-7.

<sup>42</sup> *Id.* at 9-10.

<sup>43</sup> *Id.* at 11-13

### C. Standard of Review

12. Section 310(d) of the Act provides that no station license shall be transferred or assigned unless the Commission, on application, determines that the public interest, convenience, and necessity will be served thereby. In making this assessment, the Commission must first determine whether the proposed transaction would comply with the specific provisions of the Act,<sup>44</sup> other applicable statutes, and the Commission's rules.<sup>45</sup> If the transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.<sup>46</sup> The applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, would serve the public interest.<sup>47</sup> If the Commission is unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact as to whether the transaction serves the public interest, Section 309(e) of the Act requires that the applications be designated for hearing.<sup>48</sup>

13. The Commission applies a two-part test when evaluating an informal objection under the public interest standard. First, the Commission must determine whether the informal objection contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.<sup>49</sup> The 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 [petition] were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established."<sup>50</sup> Second, the Commission must then determine whether, "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," a substantial and material question of fact has been raised as to whether the application would serve the public interest.<sup>51</sup> The D.C. Circuit has made

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<sup>44</sup> Section 310(d) requires that the Commission consider an application as if the proposed transferee were applying for the license directly. 47 U.S.C. § 310(d). See *SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18300, para. 16 (2005) (*SBC-AT&T Order*); *Verizon Commc'ns, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18442-43, para. 16 (2005) (*Verizon-MCI Order*); *Applications of Nextel Commc'ns, Inc. and Sprint Corp.*, Memorandum Opinion and Order, 20 FCC Rcd 13967, 13976, para. 20 (2005) (*Sprint-Nextel Order*); *News Corp.-Hughes Order*, 19 FCC Rcd at 483, para. 15; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23255, para. 26 (*Comcast-AT&T Order*).

<sup>45</sup> See, e.g., *SBC-AT&T Order*, 20 FCC Rcd at 18300, para. 16; *Verizon-MCI Order*, 20 FCC Rcd at 18442-43, para. 16; *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Commc'ns Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC*, Memorandum Opinion and Order, 19 FCC Rcd 2570, 2580-81, para. 24 (2004); *EchoStar Commc'ns Corp., General Motors Corp. and Hughes Electronics Corp., and EchoStar Commc'ns Corp.*, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 25 (2002) (*EchoStarDIRECTV HDO*).

<sup>46</sup> See *SBC-AT&T Order*, 20 FCC Rcd at 18300, para. 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, para. 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976, para. 20.

<sup>47</sup> See *SBC-AT&T Order*, 20 FCC Rcd at 18300, para. 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, para. 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255, para. 26; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574, para. 25.

<sup>48</sup> 47 U.S.C. § 309(e); see also *News Corp.-Hughes Order*, 19 FCC Rcd at 483, para. 15 n.49; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574, para. 25.

<sup>49</sup> 47 U.S.C. § 309(d)(1); *Astroline Commc'ns Co., Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*).

<sup>50</sup> *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (*Gencom*).

<sup>51</sup> *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

clear that the two steps of the statutory inquiry “are typically made concurrently.”<sup>52</sup> That is, the Commission ordinarily does not consider separately whether a petition makes out a *prima facie* case for denial of the application because “a negative resolution of the second question alone [whether the record presents a substantial and material question of fact that warrants further inquiry in a hearing] makes the first question moot.”<sup>53</sup>

### III. DISCUSSION

14. For the reasons described below, we find that the commenters have failed to raise a substantial and material question of fact as to whether grant of the Applications would serve the public interest. Moreover, we find that the proposed establishment of the statewide news bureaus, as well as access to reporting from Gray’s Washington, DC news bureau, provide transaction-specific, public interest benefits to Gray’s and Raycom’s viewers.<sup>54</sup> Accordingly, we conclude that the instant transaction serves the public interest, convenience, and necessity and grant the Applications. As discussed below, we reject the concerns raised by commenters and permit the two top-four combinations.

#### A. Retransmission Consent

15. We conclude that the commenters’ allegations regarding retransmission consent do not raise a substantial and material question of fact as to whether grant of the Applications would serve the public interest. The transaction would not violate any Commission rule or the Communications Act or produce any transaction-specific public interest harm. As described above, ACA and DISH rely on a generalized study prepared in connection with a different transaction to contend that increased national consolidation of broadcast television ownership threatens to drive up retransmission consent fees and to increase the risk and incidence of broadcast programming blackouts as a result of increased bargaining leverage. The commenters do not proffer any particularized evidence that this transaction, based on the stations and markets involved in this case, is likely to result in increased retransmission consent fees or that any theoretical increase that might result from this transaction would be anticompetitive. Further, the commenters do not contend that the transaction will result in increased local consolidation. We conclude that with our simultaneous approval of the proposed divestitures in this proceeding, the transaction will not change whatever bargaining leverage Gray currently has as a result of joint negotiation in the affected local markets.<sup>55</sup> We note that on December 14, 2018, the United States Department of Justice (DOJ) filed with the U.S. District Court for the District of Columbia<sup>56</sup> a Complaint, Proposed Final Judgment, and Competitive Impact Statement. Although the Complaint states that “the proposed merger of Gray and Raycom likely would substantially lessen competition in the licensing of Big 4 television retransmission consent in each of the Overlap DMAs,”<sup>57</sup> the Competitive Impact Statement explains that “[t]he divestiture requirements of the proposed Final Judgment will eliminate the substantial anticompetitive

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<sup>52</sup> *Mobile Commc’ns Corp. of Am. v FCC*, 77 F.3d 1399, 1410 (D.C. Cir. 1996) (quoting *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)).

<sup>53</sup> *Id.* (quoting *Citizens for Jazz on WRVR v. FCC*, 775 F.2d at 394).

<sup>54</sup> See *Nexstar-Media General MO&O*, 32 FCC Rcd at 195, para. 29 (finding that “increased access to reporting on federal and state policies and laws would increase the combined company’s viewers’ awareness of issues that may directly affect them”).

<sup>55</sup> In those markets where Gray will acquire existing duopolies owned by Raycom, Gray will simply step into Raycom’s shoes, with no change in market concentration.

<sup>56</sup> *United States of America v. Gray Television, Inc. et al.*, Case No. 18-cv-2951 (filed Dec. 14, 2018) (filing a Complaint, proposed Final Judgment and Competitive Impact Statement with the United States District Court for the District of Columbia).

<sup>57</sup> *United States of America v. Gray Television, Inc., et al*, Complaint, Case No. 18-cv-2951 (filed Dec. 14, 2018), at 8.



effects in each Overlap DMA, by maintaining the [d]ivestiture [s]tations as independent, economically viable competitors.”<sup>58</sup>

16. Significantly, no commenter alleges that the transaction violates any rule or the Communications Act. The arguments raised by commenters are so generalized as to apply to any transaction that would increase the size of a station group. With regard to allegations raised by DISH and ACA regarding harm to a “national market” – in particular a potential rise in overall retransmission consent fees even where commonly owned stations are not located in the same local market – the Commission has not previously determined that such a national market for retransmission consent exists and has not previously found that increasing the number of stations owned at the regional or national level within the national ownership cap leads to public interest harms with regard to retransmission consent negotiations.<sup>59</sup> We do not believe that the record in this case justifies departure from this precedent. As we explained in the *Nexstar-Media General MO&O*, retransmission consent-related harms “must be demonstrably transaction-specific and not industry-wide in nature to be addressed in the context of a transfer of control proceeding.”<sup>60</sup> Here, the economic analyses submitted into the record of the Commission’s consideration of the Sinclair/Tribune merger are, as relates to the instant transaction, neither market-specific nor transaction-specific. Nor do they demonstrate “which of the negotiating parties – if any – may have leverage over the other,”<sup>61</sup> particularly with respect to MVPDs with a nationwide footprint or how, even for smaller MVPDs, acquisition by Gray of stations in markets not served by an MVPD would result in increased leverage in retransmission consent negotiations in markets the MVPD serves.

17. We likewise reject ACA’s argument with regard to the purported harms caused by after-acquired station clauses. According to ACA, Gray’s existing retransmission consent contracts contain after-acquired station clauses that adjust the rates for any station acquired by Gray to match the rates that an MVPD currently pays for its other stations.<sup>62</sup> ACA asks the Commission to prohibit Gray from exercising these clauses with respect to the stations to be divested.<sup>63</sup> The Applicants state that Gray will not acquire the stations to be divested and the after-acquired clauses therefore will not apply to those stations.<sup>64</sup> ACA states that this clarification is welcome but asks the Commission to condition its approval on Gray’s representation.<sup>65</sup> We find that given the Applicants’ statement that Gray will not acquire the stations, ACA’s concerns about the application of after-acquired station clauses to Raycom stations to be divested are unfounded. As all licensees are bound by the Commission’s rules and

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<sup>58</sup> *United States of America v. Gray Television, Inc., et al*, Competitive Impact Statement, 18-cv-2951 (filed Dec. 14, 2018), at 11.

<sup>59</sup> See, e.g., *Nexstar-Media General MO&O*, 32 FCC Rcd at 196, para. 35 (Media Bureau finding that “[w]ith regard to the claims that the Applicants will increase their bargaining leverage by the common ownership of multiple stations in a region broader than the local market, the Commission has not previously found that, with regard to retransmission consent negotiations, where the ownership of multiple stations does not violate the national audience reach cap, increasing the number of stations owned at the regional or national level leads to public interest harms, and we decline to do so here based on the evidence before us”).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> ACA Comments at 1.

<sup>63</sup> *Id.* at 10-12.

<sup>64</sup> Joint Opposition at 9 n.26.

<sup>65</sup> ACA Reply at 7.

character policy to deal truthfully with the Commission, we find it unnecessary to condition our approval on the truthfulness of Gray's representation upon which we rely here.<sup>66</sup>

## B. Amarillo, Texas and Honolulu, Hawaii

18. For the reasons discussed below, we grant the Applicants' requests and consent to the assignments of both the Amarillo Stations and the Honolulu Stations from Raycom to Gray. In both instances, we find that application of the Top-Four Prohibition is not warranted based on the unique facts and circumstances concerning the stations at issue.

19. As stated above, the Commission's Local Television Ownership Rule provides that an entity may own up to two television stations in the same DMA if at the time the application to acquire the stations is filed, at least one of the stations is not ranked among the top-four stations in the DMA.<sup>67</sup> Upon request, however, the Commission considers showings that the application of this Top-Four Prohibition is not in the public interest due to specific circumstances in a local market or with respect to a specific transaction on a case-by-case basis.<sup>68</sup>

20. The Applicants seek to assign television stations KFDA-TV and KEYU in the Amarillo, Texas DMA (collectively the Amarillo Stations) from Raycom to Gray.<sup>69</sup> KFDA-TV is the top-ranked station in the Amarillo DMA.<sup>70</sup> At the time of the application, the most recent Nielsen ratings period showed KEYU, a Telemundo affiliate, ranked fourth in the Amarillo DMA.<sup>71</sup> The Applicants assert that this recent top-four ranking was due to anomalous circumstances and that application of the Top-Four Prohibition would not be in the public interest as KEYU has not been a top-four station historically.<sup>72</sup>

21. The Applicants also request the Commission's consent to the assignment of television stations KHNL and KGMB in the Honolulu, Hawaii DMA, (collectively the Honolulu Stations) from Raycom to Gray.<sup>73</sup> Both Honolulu Stations are among the top-four stations in the Honolulu DMA.<sup>74</sup> The Applicants assert that application of the Top-Four Prohibition would not be in the public interest given the history of the Honolulu Stations and the characteristics of the Honolulu DMA.<sup>75</sup>

### 1. Amarillo Stations

22. *Background.* KEYU first came under common ownership with KFDA in 2010 pursuant to a failing station waiver.<sup>76</sup> The Commission renewed KEYU's failing station waiver in 2015.<sup>77</sup> The

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<sup>66</sup> 47 CFR §§ 1.17, 1.65; *Policy Regarding Character Qualifications in Broadcast Licensing*, Order and Policy Statement, 102 FCC 2d 1179 (1986), *subsequent hist. omitted*.

<sup>67</sup> 47 CFR § 73.3555 (b)(1)(ii). Ownership of up to two television stations in the same DMA is also permitted by the rule when the digital noise limited service contours of the stations do not overlap. *See id.* at § 73.3555(b)(1)(i).

<sup>68</sup> 47 CFR § 73.3555 (b)(2).

<sup>69</sup> Comprehensive Exhibit, Attach. 2 at 1.

<sup>70</sup> *See id.* at 2.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1-2.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>77</sup> *Id.* The Commission found that there was sufficient information submitted to show that KEYU was a "failing station" and that its combined operation with KFDA would pose minimal harm to diversity and competition.

(continued....)

Applicants state that, during the May 2018 Nielsen ratings period, KEYU, a Telemundo affiliate, was the fourth-ranked station in the Amarillo DMA with a 2.5 audience share while the fifth-ranked station had an audience share of 2.4.<sup>78</sup> The May 2018 Nielsen ratings data was the most recent data available at the time the Applicants submitted the Applications to the Commission on July 10, 2018.<sup>79</sup> The Applicants also submit the average of the four ratings periods in the 2017–2018 television season, which show that KEYU ranks fifth in the DMA.<sup>80</sup> The Applicants contend that the Commission should evaluate the assignment of the Amarillo Stations based on KEYU’s ranking for the most recent 2017–2018 television season rather than rely on the May 2018 ranking, which it claims is an aberration.<sup>81</sup> Alternatively, the Applicants request that the Commission not apply the Top-Four Prohibition to the assignment of the Amarillo Stations and permit the continued common ownership of the stations under the Commission’s case-by-case approach.<sup>82</sup>

23. No commenter objects to the assignment of the Amarillo Stations. As described above, NCTA concedes that the Amarillo Stations exemplify a circumstance in which the Commission may find that rigid application of the Top-Four Prohibition would not be in the public interest.<sup>83</sup>

24. *Discussion.* We find that application of the Top-Four Prohibition to the Amarillo Stations would not be in the public interest, given the exceptional scenario where, in contrast to the historical characteristics of the market, at the time of application, one of the stations at issue had moved just ahead of another station in the ratings to achieve a top-four ranking.<sup>84</sup> Based on the facts presented here, it appears that unique programming occurring only once every several years is responsible for the Telemundo affiliate KEYU’s anomalous top-four ranking during the period just before the Applicants filed the Application.<sup>85</sup> The ratings data for the three sweeps periods prior to May 2018 all show KEYU as the fifth-ranked station in the market.<sup>86</sup> The Applicants attribute KEYU’s top-four ranking in May 2018 to the station’s coverage of the buildup to the World Cup and note that this unique programming airing only every four years is of particular interest to the Telemundo affiliate’s Spanish-language audience.<sup>87</sup> Furthermore, no commenter questions or raises any objection to the Applicants’ assertions, and with respect to the request, NCTA states that “it would not be unreasonable to exempt ownership of a station whose Top-Four status is a short-term aberration.”<sup>88</sup> We also find that the Applicants have demonstrated that KEYU’s ratings are not typically as high as they were during the time the Application was filed.<sup>89</sup> Accordingly, we find that the applicability of the Top-Four Prohibition in this instance is

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*Drewry Commc’ns Grp. Raycom Media, Inc.*, Letter Order, 30 FCC Rcd 12499, 12502 (MB 2015) (*Drewry Communications*). The Commission stated that allowing KEYU to operate in tandem with a stronger station would help it remain a viable voice in the market and would benefit the public interest. *Id.*

<sup>78</sup> Comprehensive Exhibit, Attach. 2 at 2.

<sup>79</sup> *See id.* at 1-2.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 3-7.

<sup>82</sup> *Id.* at 3, 7-12.

<sup>83</sup> NCTA Comments at 4.

<sup>84</sup> As noted above, KEYU came under common ownership with KFDA in 2010 pursuant to a failing station waiver. This was subsequently renewed in 2015.

<sup>85</sup> Comprehensive Exhibit, Attach. 2 at 2-3.

<sup>86</sup> *Id.* at 2.

<sup>87</sup> *Id.* at 2-3.

<sup>88</sup> *See* NCTA Comments at 4.

<sup>89</sup> Comprehensive Exhibit, Attach. 2 at 1-2.

based on an anomalous occurrence and that applying the prohibition to the Amarillo Stations would not serve the purposes of the prohibition. For these reasons, we grant the Applicants' request to retain this top-four combination.

## 2. Honolulu Stations

25. *Background.* Raycom has owned both Honolulu Stations since 1999,<sup>90</sup> and on October 26, 2009, Raycom and HITV License Subsidiary, Inc. (HITV), executed an agreement to exchange certain non-license assets of stations KFVE(TV), Honolulu, Hawaii, and KGMB – most notably their network affiliation agreements – as a result of which a Raycom subsidiary owned stations affiliated with NBC(KHNL) and CBS(KGMB). Thus, as of October 26, 2009, both Honolulu Stations have been ranked in the top four in the Honolulu DMA.<sup>91</sup>

26. The Applicants state that common ownership of the Honolulu Stations has enabled the stations to dramatically increase their investment in high-quality local programming and newsgathering.<sup>92</sup> The Applicants point to the Honolulu Stations' receipt of over 60 awards during the time they have been commonly owned as a testament to their public service commitment.<sup>93</sup> The Applicants also assert that the broadcast television market in Honolulu has remained competitive during the past nine years of common ownership.<sup>94</sup> The Applicants state that permitting the Honolulu Stations to be assigned from Raycom to Gray would result in greater public interest benefits by enabling the Honolulu Stations to utilize Gray's resources such as its Washington News Bureau to improve their coverage of the federal government and national issues.<sup>95</sup> The Applicants argue further that separating the Honolulu Stations at this point would cause service reductions to the detriment of both viewers and station staff.<sup>96</sup>

27. As described above, NCTA maintains that the Applicants have failed to address the harms associated with the common ownership of two top-four stations.<sup>97</sup> Further, NCTA adds that the Applicants' claimed benefit of enabling the Honolulu Stations to utilize Gray's Washington News Bureau does not explain how Honolulu viewers would benefit from two local stations reporting news from the same news bureau as opposed to having two separate news sources.<sup>98</sup>

28. *Discussion.* Given the longstanding nature of the Honolulu duopoly and the lack of evidence of harms in the record of this proceeding, we find that application of the Top-Four Prohibition to the Honolulu Stations would not serve the public interest. As noted above, there are exceptional circumstances present in this case. The Honolulu Stations have been commonly owned by Raycom for the past nineteen years and have existed as a top-four duopoly for the past nine years. When the Commission clarified in the *Quadrennial Report and Order* that the Top-Four Prohibition applied equally to affiliation swaps, it did so prospectively, and rather than requiring divestiture at that time, the Commission affirmatively grandfathered then-existing top-four combinations previously achieved by affiliation swaps, such as the one at issue here.<sup>99</sup> In doing so, the Commission effectively permitted

<sup>90</sup> Comprehensive Exhibit, Attach. 1 at 2.

<sup>91</sup> See *KHNL/KGMB License Subsidiary*, Memorandum Opinion and Order, FCC No. 18-185 (rel. Dec. 17, 2018) (discussing in detail the procedural and operational history of the Honolulu Stations).

<sup>92</sup> Comprehensive Exhibit, Attach. 1 at 3-4.

<sup>93</sup> *Id.* at 4-5.

<sup>94</sup> *Id.* at 11-13.

<sup>95</sup> *Id.* at 9-10.

<sup>96</sup> *Id.* at 8-9; Joint Opposition at 11-13.

<sup>97</sup> NCTA Comments at 5.

<sup>98</sup> NCTA Reply at 3.

<sup>99</sup> *Quadrennial Report and Order*, 31 FCC Rcd at 9885, para. 52 n.142

Raycom to continue to hold the top-four duopoly in Honolulu. The Commission, however, also stipulated that future transactions would be required to comply with the Commission's rules then in effect.<sup>100</sup> It is pursuant to this requirement that we now examine the existing duopoly in the Honolulu DMA.

29. Rather than examining a proposal to combine ownership of two top-four stations in a DMA and analyzing the potential effects that such a top-four duopoly could produce—as was explicitly contemplated in the *Quadrennial Order on Reconsideration*—we are presented here with an unusual situation under a prior regulatory regime, which led to a now long-existing top-four duopoly in the context of a license assignment. We must determine whether the benefits of continuing to allow common ownership outweigh any public interest harms that have resulted or may yet result from the combination.<sup>101</sup>

30. As noted above, the Applicants in this proceeding assert that common ownership of the Honolulu Stations have led to numerous benefits in the Honolulu DMA, including production of extensive local news and other programming responsive to the needs of Hawaiian viewers, development of multimedia news coverage, and civic engagement with local nonprofit organizations.<sup>102</sup> Historically, the Commission has been hesitant to require divestiture when doing so would create disruption to the marketplace and hardship for owners that outweigh any benefits of divestiture.<sup>103</sup> Accordingly, when the Commission applied the Top-Four Prohibition to affiliation swaps, it elected to grandfather then-existing combinations, including the one at issue here, rather than requiring divestiture.<sup>104</sup> In this instance, we find that the potential for disruption from divestiture is particularly acute, given the existing benefits that are asserted and the fact that common ownership of the duopoly has been in place for nearly two decades, with the stations operating for over nine years as a top-four combination. For example, the Applicants assert that breaking apart the Honolulu Stations would cause service reductions resulting in harm to both viewers and staff of the stations.<sup>105</sup> The Applicants also state that separating the Honolulu Stations necessarily would increase each station's costs and thus divert resources from the production of news and other programming.<sup>106</sup> No commenter disputed these assertions.

31. We also reject NCTA's challenge to the asserted benefit of having both Honolulu Stations reporting news from the same news bureau, as opposed to each having separate news sources.<sup>107</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> *Quadrennial Order on Recon*, 32 FCC Rcd at 9839, para. 82 (stating that “applicants must demonstrate that the benefits of the proposed transaction would outweigh the harms”); *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.*, Further Notice of Proposed Rulemaking and Order, 29 FCC 4371, 4385, para. 33 (2014) (finding that marketplace disruptions and hardships to station owners caused by compulsory divestitures outweighed benefits to the Commission’s policy goals).

<sup>102</sup> Comprehensive Exhibit, Attach. 1 at 3-6, 9. Commenters in this proceeding have not refuted these existing benefits. In addition, NCTA apparently does not deny that viewers in the Honolulu DMA would benefit from the Honolulu Stations having access to Gray’s Washington News Bureau.

<sup>103</sup> See, e.g., *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1080, para. 112 (1975) (stating that “divestiture should be limited to use in only the most egregious cases”), *aff’d sub nom. FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 803-808 (1978) (upholding Commission’s emphasis on the importance of “stability and continuity of meritorious service”); see also *2002 Biennial Review Order*, 18 FCC Rcd at 13808, para. 484.

<sup>104</sup> *Quadrennial Report and Order*, 31 FCC Rcd at 9885, para. 52 n.142.

<sup>105</sup> Comprehensive Exhibit, Attach. 1 at 8-9.

<sup>106</sup> Joint Opposition at 12.

<sup>107</sup> NCTA Reply at 3.

Because providing the Honolulu Stations with access to a news source to which they did not have prior access could be a benefit to consumers in the Honolulu DMA, we do not discount the benefit simply because it will be shared by the two Honolulu Stations.<sup>108</sup>

32. In addition, we find no evidence in the record of this proceeding that common ownership of the Honolulu Stations for the past nineteen years—including the most recent nine years during which the Honolulu Stations were a top-four duopoly—has caused measurable public interest harms. No commenter in this proceeding has submitted evidence showing how the Honolulu Stations' market share or other factors have had a detrimental effect on competition or local programming in the Honolulu DMA during the nine years in which the top-four duopoly has existed.

33. Furthermore, no commenter has alleged any incremental harm that would result in this instance from the assignment of the duopoly from Raycom to Gray. With respect to the local market and NCTA's contention that the Applicants failed to show that the combined market share of the Honolulu Stations does not significantly exceed the share of any other station in the market, there is no reason to believe that the transaction would lead to an increase in bargaining power as the two stations combined will have the same market share post-transaction as they did pre-transaction.<sup>109</sup> Similarly, there would be no increased incentive for the Honolulu Stations to engage in anticompetitive behavior post-transaction.

34. Lastly, with respect to alleged harms involving retransmission consent negotiations, we find that commenters opposing the transaction have not raised sufficiently any harms specific to the Honolulu Stations and the Honolulu DMA. Commenters argue that Gray will be able to exercise more leverage in retransmission consent fee negotiations than Raycom, resulting in higher retransmission consent fees that will be passed on to consumers.<sup>110</sup> We note, however, that there is no evidence Gray would acquire additional leverage within the Honolulu market. Notably, the Honolulu Stations, being commonly owned today, already have the ability to negotiate jointly, consistent with existing rules and statutes, and no commenter has provided any evidence of public interest harm arising from such joint negotiations in Honolulu. As the Commission has said in the context of the larger transaction, the Commission has not previously found that increasing the number of stations owned at the regional or national level within the national ownership cap leads to public interest harms with regard to retransmission consent negotiations.<sup>111</sup> Accordingly, we do not find that the record demonstrates any harm related to retransmission consent that would warrant requiring divestiture of one of the Honolulu Stations.

35. Because we find that the harms attendant to requiring a divestiture of one of these stations would outweigh any potential benefits that might accrue, we grant the Applicants' request to retain this top-four combination and deny NCTA's assertion that the Applicants have failed to carry their burden.<sup>112</sup> In doing so, however, we emphasize that our decision herein is based on the specific facts presented and the record compiled in this proceeding.

### C. Requests for Continuing Satellite Exceptions

36. We grant the Applicants' unopposed request for continuing satellite exceptions to the Local Television Ownership Rule pursuant to Note 5 of Section 73.3555 for the following combinations currently owned and operated by Raycom:<sup>113</sup>

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<sup>108</sup> In any event, even if we were to not credit this benefit, we would still approve the transfer of common ownership for the reasons set forth above.

<sup>109</sup> See NCTA Comments at 5.

<sup>110</sup> DISH Comments at 7-9; ACA Comments at 3-8.

<sup>111</sup> *Supra* para 16.

<sup>112</sup> See NCTA Comments at 4.

<sup>113</sup> 47 CFR § 73.3555, Note 5.

- KTRE(DT), Lufkin, Texas as a satellite of KLTV(DT), Tyler, Texas, in the Tyler-Longview (Lufkin and Nacogdoches), Texas DMA;<sup>114</sup>
- KHBC-TV, Hilo, Hawaii and KOGG(DT), Wailuku, Hawaii, as satellites of KHNL(DT), Honolulu, Hawaii, in the Honolulu, Hawaii DMA;<sup>115</sup> and
- KWAB-TV, Big Spring, Texas as a satellite of KWES-TV, Odessa, Texas, in the Odessa-Midland, Texas DMA, with the reassociation of KWAB-TV as a satellite of KOSA-TV, Odessa, Texas.<sup>116</sup>

37. In *Television Satellite Stations*,<sup>117</sup> the Commission stated that applicants seeking to transfer or assign a television satellite station are entitled to a “presumptive” exception from Section 73.3555(b) of the Commission’s rules if the parent/satellite combination meets three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station.<sup>118</sup> If an applicant cannot qualify for the presumption, the Commission will evaluate the proposal on an *ad hoc* basis and grant the application if there are compelling circumstances that warrant approval.<sup>119</sup> In the *Quadrennial Report and Order*, the Commission stated that there “is no digital counterpart to a station’s analog [C]ity [G]rade contour,” and “[a]ccordingly, consistent with case law developed after the digital transition, [the staff will] evaluate all future requests for new or continued satellite status on an *ad hoc* basis.”<sup>120</sup> Therefore, criterion one is no longer relevant in the digital context. The staff has previously granted satellite exceptions for all four stations at issue in this transaction.<sup>121</sup>

38. *Tyler-Longview (Lufkin and Nacogdoches), Texas DMA*. Gray requests authorization to continue operating KTRE as a satellite rebroadcasting ABC and syndicated programming from KLTV, which it has done since approximately 1954. With regard to the second criterion of the three-prong traditional analysis, a proposed satellite serves an underserved area if either: (a) there are two or fewer full-service television stations licensed to the station’s community of license (the “transmission test”), or (b) 25% or more of the area within the satellite’s Grade B contour, but outside the parent station’s Grade B contour, is served by four or fewer services (the “reception test”).<sup>122</sup> As demonstrated by the Applicants, KTRE qualifies under the “transmission test,” since it is the only full-service station licensed to the community of Lufkin, Texas.<sup>123</sup>

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<sup>114</sup> File No. BALCDT - 20180709AEW.

<sup>115</sup> File No. BALCDT - 20180709ADY.

<sup>116</sup> File No. BALCDT - 20180709ACH.

<sup>117</sup> *Television Satellite Stations Review of Policies and Rules*, Report and Order, 6 FCC Rcd 4212 (1991), *subsequent history omitted (Television Satellite Stations)*.

<sup>118</sup> *Id.* at 4213-4214, para. 12.

<sup>119</sup> *Id.* at 4214, para. 14.

<sup>120</sup> *Quadrennial Report and Order*, 31 FCC Rcd at 9876, para. 32 n. 72.

<sup>121</sup> See *The Liberty Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 24 (MB 2006) (KTRE(DT)); *Providence Journal Co.*, Memorandum Opinion and Order, 12 FCC Rcd, 2883 (1997) (KHBC-TV and KOGG(TV)); *Drewry Communications*, 30 FCC Rcd at 12499 (KWAB-TV).

<sup>122</sup> See *Television Satellite Stations*, 6 FCC Rcd at 4215.

<sup>122</sup> *Id.*

<sup>123</sup> Comprehensive Exhibit at 30.

39. To demonstrate compliance with the third criterion of the traditional analysis, the Applicants provide a letter from Mr. Bruce Levy, Managing Director, Wells Fargo Securities. Mr. Levy states that Wells Fargo has been a lead broker in a number of large broadcast television transactions.<sup>124</sup> Mr. Levy states that KTRE's operation as a satellite of KLTW since the mid-1960's has led to only a limited technical and programming staff and limited capabilities to originate programming, and any future buyer would have to undertake substantial facility investments and hire additional staff.<sup>125</sup> In addition, he contends that operation as a stand-alone station would be difficult because KTRE's over-the-air signal does not reach Tyler, Longview, or other major population centers within the DMA.<sup>126</sup> Moreover, Mr. Levy represents that were KTRE not a satellite station, it would no longer have access to KLTW's ABC programming and would consequently have trouble selling advertising or generating significant retransmission consent revenues.<sup>127</sup> According to Mr. Levy, KTRE would be unlikely to obtain a top network affiliation because of its limited coverage and the fact that networks have already affiliated with other established stations in the market.<sup>128</sup>

40. We find that the Applicants have set forth information sufficient to warrant continued satellite status for KTRE pursuant to our *ad hoc* analysis. Given that KTRE is the only full-power television station in its community of license, does not cover the major population centers in the DMA, and would be costly to operate as a stand-alone station with little prospect for significant revenue, we find it unlikely that an alternative operator would be willing and able to purchase or operate the station as a stand-alone facility. Moreover, KTRE has operated as a satellite of KTLV under Commission authority for more than 50 years, having been most recently reauthorized in 2006, and we see no evidence in the record that continuing the satellite exception will harm competition in that market.

41. *Honolulu, Hawaii DMA.* In the Honolulu DMA, as discussed above, Raycom currently owns KHNL and KGMB, and seeks a satellite exception to the Local Television Ownership Rule for KHBC-TV and KOGG, which are located on outer islands. The Applicants contend that satellite station KHBC-TV serves an underserved area pursuant to the Commission's "reception test," demonstrating that 84.8% of the land area within what was the KHBC-TV Grade B contour received service from four or fewer stations.<sup>129</sup> The Applicants concede that KOGG does not serve an underserved area because the station satisfies neither the transmission test nor the reception test, but argue that other factors justify continued satellite status under an *ad hoc* analysis.<sup>130</sup>

42. The Applicants further assert that no alternative operator is ready and able to purchase and operate KHBC-TV or KOGG as a full-service station. In support, they submit another statement from Mr. Levy, recommending that neither station be marketed for sale as a standalone station.<sup>131</sup> The Application explains that while all the islands in the State of Hawaii comprise a single DMA, the island of Oahu -- which contains Honolulu -- has more than two-thirds of the population in the state.<sup>132</sup> Each of the

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<sup>124</sup> Comprehensive Exhibit, Exh. H, Letter from Bruce Levy, Managing Director, Wells Fargo Securities to Marlene H. Dortch, Secretary, FCC (dated Jul. 9, 2018).

<sup>125</sup> *Id.* at 1.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Comprehensive Exhibit at 32.

<sup>130</sup> *Id.*

<sup>131</sup> Comprehensive Exhibit, Exh. H, Letter from Bruce Levy, Managing Director, Wells Fargo Securities to Marlene H. Dortch, Secretary, FCC (dated Jul. 9, 2018) (Levy Honolulu Letter).

<sup>132</sup> Comprehensive Exhibit at 33. Of the 419,540 television households in the DMA, Hawaii Island (which encompasses Hilo, KHBC-TV's community of license) has 66,064 households and Maui (which encompasses  
(continued....)



major networks has an existing affiliate in the market that serves Honolulu and operates satellite television stations that serve Hawaii Island and Maui. Because neither KHBC-TV nor KOGG serves Honolulu with an over-the-air signal, according to the Applicants these stations would have trouble selling advertising, obtaining a top network affiliation, or generating significant retransmission consent revenues if operated independently.<sup>133</sup>

43. We find that the Applicants have set forth information sufficient to warrant continued satellite status for both KHBC-TV and KOGG pursuant to our *ad hoc* analysis. In approving a satellite exemption for KOGG in 1995 and 1997, the Commission held that “satellite status is warranted in Wailuku and Hilo because, ‘Hawaii’s geographical constraints and limited population outside of Honolulu constitute . . . compelling circumstances.’”<sup>134</sup> Reasoning that, because the eight islands comprising the State of Hawaii are separated by large expanses of water and are mountainous, and that most Honolulu stations maintain satellites in the outer islands, the Commission concluded in 1997 that the termination of continued satellite status to KOGG could deprive Wailuku of service that would not likely be provided by a stand-alone operation, and that continued operation of KOGG and KHBC-TV as satellites of KHNL(TV) would be in the public interest.<sup>135</sup>

44. The basic geographic and demographic challenges facing stations that serve the outer islands have not changed since 1997, and we find that these challenges constitute compelling circumstances justifying continued satellite status under the *ad hoc* standard. According to the Applicants, the population of Maui is only 11.6% of the total population of the state of Hawaii, and KOGG cannot practically provide service to Oahu or Honolulu from a location that is also capable of covering Wailuku, which is 89 miles apart on an island that includes rugged mountain terrain.<sup>136</sup> Similarly, KHBC-TV serves the Island of Hawaii which has only 14% of the state’s population, and Hilo and Honolulu are 210 miles apart.<sup>137</sup> Accordingly, we conclude that allowing the continued operation of both stations as satellites of KHNL(TV) would be in the public interest.

45. *Odessa-Midland, Texas DMA*. In the Odessa-Midland, Texas DMA, Raycom currently operates KWAB-TV as a satellite of KWES-TV, and because Gray proposes to divest KWES-TV as part of this transaction, Gray asks for authority to reassociate KWAB-TV as the satellite of Gray’s KOSA-TV. Raycom was most recently granted authority for continued operation of KWAB-TV as a satellite in 2015, when the Video Division applied the *ad hoc* analysis and found that the information Raycom provided was sufficient to warrant KWAB-TV’s continued satellite operation.<sup>138</sup> Specifically, the Division held that “[g]iven the station’s long history as a satellite, the sparse population within its coverage area, and insufficient advertising revenues to support ongoing operational costs, it is unlikely that an alternative operator would be willing and able to operate KWAB-TV as a satellite facility.”<sup>139</sup>

46. The Applicants seek a continuation of the satellite exception, and a reassociation of satellite status with KOSA-TV, for substantially the same reasons as *Drewry Communications* relied upon

(Continued from previous page) \_\_\_\_\_

Wailuku, KOGG’s community of license) has 53,903 households, compared to the 309,458 households of Honolulu. Levy Honolulu Letter at 1.

<sup>133</sup> *Id.* at 1-2.

<sup>134</sup> *Providence Journal Co.*, 12 FCC Rcd at 2889-990, para. 17 (quoting *BBC License Subsidiary*, 10 FCC Rcd 10968, 10976 (1995)).

<sup>135</sup> *Id.*

<sup>136</sup> Comprehensive Exhibit at 34.

<sup>137</sup> *Id.*

<sup>138</sup> *Drewry Communications*, 30 FCC Rcd at 12503.

<sup>139</sup> *Id.* at 12502.

to approve satellite authority previously. According to the Applicants, KWAB-TV serves an unserved area as demonstrated pursuant to the “transmission test,” as KWAB-TV is the only full-service station licensed to the small community of Big Spring, Texas.<sup>140</sup> The Applicants also provide evidence that there is no alternative operator that is ready and able to construct or to purchase and operate the satellite in this DMA as a full-service station. KWAB-TV serves fewer than 50,000 people in the eastern portion of the Odessa-Midland market and, most notably, does not serve the two primary population centers of the DMA – Odessa and Midland.<sup>141</sup> According to another letter from Mr. Levy, KWAB-TV would have trouble selling advertising, obtaining a top network affiliation or generating significant retransmission consent revenues if operated independently.<sup>142</sup>

47. We find that the Applicants have set forth information sufficient to warrant continued satellite status for KWAB-TV pursuant to our *ad hoc* analysis, and to establish parent-satellite association between KOSA-TV and KWAB-TV. The fact that KWAB-TV is the only full-power television station in its community of license, is located in a community of license with limited economic viability and would be costly to operate as a stand-alone station, constitute compelling circumstances justifying satellite status, even with a change in the parent station. We find that associating KWAB-TV as a satellite of KOSA-TV would be in the public interest. Further, Gray commits to using KWAB-TV to “expand the distribution of KOSA-TV’s locally produced news . . . to more than 37,000 people that are not currently served by KOSA-TV.”<sup>143</sup>

#### IV. CONCLUSION

48. After reviewing the record, we conclude that grant of the Applications will comply with Section 310(d) of the Act. We conclude that all the applicants listed in the attached appendices are fully qualified and that grant of the applications listed therein will serve the public interest, convenience, and necessity.

#### V. ORDERING CLAUSES

49. Accordingly, **IT IS ORDERED**, That the applications listed in Appendix A seeking consent to transfer control of certain license subsidiaries of Raycom Media, Inc. and to assign certain license subsidiaries of Raycom Media, Inc. to subsidiaries of Gray Television, Inc. pursuant to Section 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d), **ARE GRANTED**, conditioned upon consummation of transactions represented by the applications listed in Appendix B.

50. **IT IS FURTHER ORDERED**, That the requests for continued operation of KTRE(DT), Lufkin, Texas, as a satellite of KLTV(DT), Tyler, Texas; and KHBC-TV, Hilo, Hawaii and KOGG(DT), Wailuku, Hawaii, as satellites of KHNL(DT), Honolulu, Hawaii; and the reassignment of KWAB-TV, Big Spring, Texas, as a satellite of KOSA-TV, Odessa, Texas, pursuant to the “satellite exception” of Note 5 to Section 73.3555 of the Commission’s rules, 47 CFR § 73.3555, **ARE GRANTED**.

51. **IT IS FURTHER ORDERED**, That the applications seeking consent to assign the licenses of WTOL, Toledo, Ohio, File No. BALCDT-20180829AAY, and KWES-TV, Odessa, Texas, File No. BALCDT-20180829AAZ from license subsidiaries of Raycom Media, Inc. to subsidiaries of TEGNA, Inc., pursuant to Section 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d), **ARE GRANTED**.

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<sup>140</sup> Comprehensive Exhibit at 30.

<sup>141</sup> Comprehensive Exhibit at 35-36; Comprehensive Exhibit, Exh. M, Letter from Bruce Levy, Managing Director, Wells Fargo Securities to Marlene H. Dortch, Secretary, FCC (dated Jul. 9, 2018) (Levy Odessa-Midland Letter).

<sup>142</sup> Levy Odessa-Midland Letter at 1-2.

<sup>143</sup> Comprehensive Exhibit at 36.

52. **IT IS FURTHER ORDERED**, That the applications seeking consent to assign the licenses of WTNZ, Knoxville, Tennessee, File No. BALCDT-20180828AAE; WFXG, Augusta, Georgia, File No. BALCDT-20180828AAH; WPGX, Panama City, Florida, File No. BALCDT-20180828AAI; and WDFX-TV, Ozark, Alabama, File No. BALCDT-20180828AAJ from license subsidiaries of Raycom Media, Inc., to a subsidiary of Lockwood Broadcasting, Inc., pursuant to Section 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d), **ARE GRANTED**.

53. **IT IS FURTHER ORDERED**, That the application seeking consent to assign the licenses of KXXV, Waco, Texas, File No. BALCDT-20180828AAK; KRHD-CD, Bryan, Texas, File No. BAL-20180828AAL; and WTXL-TV, Tallahassee, Florida, File No. BALCDT-20180828AAM, from license subsidiaries of Raycom Media, Inc. to subsidiaries of the E.W. Scripps Company, pursuant to Section 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d), **IS GRANTED**.

54. **IT IS FURTHER ORDERED**, That the application seeking consent to assign the license of WSWG, Valdosta, Georgia, File No. 20180823AAT from a license subsidiary of Gray Television, Inc. to a subsidiary of Marquee Broadcasting, Inc., pursuant to Section 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d), **IS GRANTED**.

55. These actions are taken pursuant to Section 0.61 and 0.283 of the Commission's rules, 47 CFR §§ 0.61, 0.283, and Sections 4(i) and (j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d).

FEDERAL COMMUNICATIONS COMMISSION



Michelle M. Carey  
Chief, Media Bureau

## Appendix A

Call Sign/Community of License	Fac. ID	Licensee	File Number
KAIT(TV), Jonesboro, AR	13988	KAIT License Subsidiary, LLC	BALCDT-20180709ACV
KCBD(TV), Lubbock, TX	27507	KCBD License Subsidiary, LLC	BALCDT-20180709ACZ
KFDA-TV, Amarillo, TX	51466	KFDA/KEYU License Subsidiary, LLC	BALCDT-20180709ADH
K29HB-D, Clovis, NM	130253	KFDA/KEYU License Subsidiary, LLC	BALDTL-20180709ADJ
KEYU(TV), Borger, TX	83715	KFDA/KEYU License Subsidiary, LLC	BALCDT-20180709ADF
KZBZ-CD, Clovis, NM	51469	KFDA/KEYU License Subsidiary, LLC	BALDTA-20180709ADI
KEYU-FM, Amarillo, TX	39892	KFDA/KEYU License Subsidiary, LLC	BALH-20180709ADG
KFVS-TV, Cape Girardeau, MO	592	KFVS License Subsidiary, LLC	BALCDT-20180709ADP
WQTV-LP, Murray, KY	31410	KFVS License Subsidiary, LLC	BALDTL-20180709ADR
WQWQ-LP, Paducah, KY	19595	KFVS License Subsidiary, LLC	BALDTL-20180709ADQ
KHNL(TV), Honolulu, HI	34867	KHNL/KGMB License Subsidiary, LLC	BALCDT-20180709AEA
K32IX-D, Lihue, HI	34878	KHNL/KGMB License Subsidiary, LLC	BALDTL-2018709AED
KGMB(TV), Honolulu, HI	34445	KHNL/KGMB License Subsidiary, LLC	BALCDT-20180709ADY
K28NN-D, Wailuku, HI	34448	KHNL/KGMB License Subsidiary, LLC	BALDTL-20180709AEC
K45CT-D, Hilo, HI	34446	KHNL/KGMB License Subsidiary, LLC	BALDTL-20180709AEE
KHBC-TV, Hilo, HI	34846	KHNL/KGMB License Subsidiary, LLC	BALCDT-20180709ADZ
KOGG(TV), Wailuku, HI	34859	KHNL/KGMB License Subsidiary, LLC	BALCDT-20180709AEB
KLTV(TV), Tyler, TX	68540	KLTV/KTRE License Subsidiary, LLC	BALCDT-20180709AEW
KTRE(TV), Lufkin, TX	38541	KLTV/KTRE License Subsidiary, LLC	BALCDT-20180709AEX
KNIN-TV, Caldwell, ID	59363	KNIN License Subsidiary, LLC	BTCCDT-20180709ABN
KOLD-TV, Tucson, AZ	48663	KOLD License Subsidiary, LLC	BALCDT-20180709ABP
KPLC(TV), Lake Charles, LA	13994	KPLC License Subsidiary, LLC	BALCDT-20180709ABT
KSLA(TV), Shreveport, LA	70482	KSLA License Subsidiary, LLC	BALCDT-20180709ABV

KSWO-TV, Lawton, OK	35645	KSWO License Subsidiary, LLC	BALCDT-20180709ABZ
KKTM-LP, Altus, OK	130241	KSWO License Subsidiary, LLC	BALTTL-20180709ACA
KSWX-LP, Duncan, OK	130242	KSWO License Subsidiary, LLC	BALTTL-20180709ACB
KWAB-TV, Big Spring, TX	42008	KWES License Subsidiary, LLC	BALCDT-20180709ACH
KTLE-LP, Odessa, TX	64993	KWES License Subsidiary, LLC	BALDTL-20180709ACJ
KTXC(FM), Lamesa, TX	71650	KWES License Subsidiary, LLC	BALH-20180709ACI
WAFB(TV), Baton Rouge, LA	589	WAFB License Subsidiary, LLC	BALCDT-20180709ACP
WBXH-CD, Baton Rouge, LA	51806	WAFB License Subsidiary, LLC	BALDTA-20180709ACQ
WAFF(TV), Huntsville, AL	591	WAFF License Subsidiary, LLC	BALCDT-20180709ACS
WALB(TV), Albany, GA	70713	WALB License Subsidiary, LLC	BALCDT-20180709ADB
WAVE(TV), Louisville, KY	13989	WAVE License Subsidiary, LLC	BALCDT-20180709ADD
WBRC(TV), Birmingham, AL	71221	WBRC License Subsidiary, LLC	BTCCDT-20180709ABS
WBTV(TV), Charlotte, NC	30826	WBTV License Subsidiary, LLC	BALCDT-20180709ADM
WCSC-TV, Charleston, SC	71297	WCSC License Subsidiary, LLC	BALCDT-20180709ADU
WDAM-TV, Laurel, MS	21250	WDAM License Subsidiary, LLC	BALCDT-20180709ADW
WECT(TV), Wilmington, NC	48666	WECT License Subsidiary, LLC	BALCDT-20180709AFB
WFIE(TV), Evansville, IN	13991	WFIE License Subsidiary, LLC	BALCDT-20180709AEU
WFLX(TV), West Palm Beach, FL	39736	WFLX License Subsidiary, LLC	BTCCDT-20180709ACG
WIS(TV), Columbia, SC	13990	WIS License Subsidiary, LLC	BALCDT-20180709ACU
WLBT(TV), Jackson, MS	68542	WLBT License Subsidiary, LLC	BALCDT-20180709ACY
WLOX(TV), Biloxi, MS	13995	WLOX License Subsidiary, LLC	BALCDT-20180709ADK
WMBF-TV, Myrtle Beach, SC	83969	WMBF License Subsidiary, LLC	BALCDT-20180709ADT
WMC-TV, Memphis, TN	19184	WMC License Subsidiary, LLC	BALCDT-20180709AEG
WOIO(TV), Shaker Heights, OH	39746	WOIO License Subsidiary, LLC	BALCDT-20180709ABQ
WUAB(TV), Lorain, OH	8532	WOIO License Subsidiary, LLC	BALCDT-20180709ABR
WSFA(TV), Montgomery,	13993	WSFA License Subsidiary,	BALCDT-20180709ABY

AL		LLC	
WTOC-TV, Savannah, GA	590	WTOC License Subsidiary, LLC	BALCDT-20180709ACC
WTVM(TV), Columbus, GA	595	WTVM License Subsidiary, LLC	BALCDT-20180709ACD
WVUE-DT, New Orleans, LA	4149	WVUE License Subsidiary, LLC	BTCCDT-20180709ACL
WWBT(TV), Richmond, VA	30833	WWBT License Subsidiary, LLC	BALCDT-20180709ACE
WWSB(TV), Sarasota, FL	61251	WWSB License Subsidiary, LLC	BALCDT-20180709ACF
WXIX-TV, Newport, KY	39738	WXIX License Subsidiary, LLC	BTCCDT-20180709ACO