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Re: Application for Assignment of License of

KDLH-TV, Duluth, Minnesota (Facility ID # 4691)
File No. BALCT-20040504ABU

Dear Counsel:

This is in regard to an application to assign the license of KDLH-TV, Duluth, Minnesota (CBS) (Channel 3), from NVG-Duluth II, LLC, to Malara Broadcast Group of Duluth Licensee, LLC (Malara) (File No. BALCT-20040504ABU). KQDS Acquisition Corp. and WDIO-TV, LLC (KQDS/WDIO or Petitioners), filed a joint petition to deny the application. Malara filed an opposition to the petition and KQDS/WDIO replied.

Petition. Petitioners operate television stations in the same market as KDLH. They argue that

the above-captioned assignment application should be dismissed, denied, or designated for hearing because its grant would result in the acquisition by Granite Broadcasting Corporation (Granite) of attributable interests in two television stations in the same market, in violation of the Commission's multiple ownership rules.[1] Granite is the parent of KBJR, Inc., the licensee of KBJR(TV), Superior, Wisconsin (NBC), which is in the same Designated Market Area as KDLH, Duluth, Minnesota. The Grade B contours of the two stations overlap.

In the assignment application, the buyer, Malara, disclosed that, upon acquiring KDLH, it plans to enter into certain agreements with a subsidiary of Granite. Although the applicants provided drafts, none of these agreements has been executed. These agreements include: a Shared Services Agreement, pursuant to which Granite will provide certain station-related services to KDLH; an Advertising Representation Agreement, pursuant to which Granite will be primarily responsible for selling advertising time on KDLH; and an Option Agreement that grants Granite a call option to purchase KDLH and gives Malara a put option. Malara also disclosed that Granite would likely guarantee the debt that Malara incurs in acquiring KDLH.

Petitioners KQDS/WDIO argue that, through these agreements, Granite would acquire an attributable interest in KDLH. First, Petitioners point out that, under the proposed Shared Services Agreement, Granite will have the right to program up to 15% of KDLH's program time, the maximum amount authorized for two stations in the same market without creating an attributable interest.[2] Petitioners further note that, under the proposed Advertising Representation Agreement, Granite will also have the exclusive right to sell all of KDLH's available advertising time. Petitioners claim that the 15% of program time under the Shared Services Agreement, together with the advertising time subject to the Advertising Representation Agreement, would exceed the 15% cap.

Petitioners go on to contend that Granite will have *de facto* control of KDLH, an additional, separate violation of the Commission's multiple ownership rules. Through its agreements with Malara, petitioners maintain, Granite will have control over the vast majority of KDLH's programming, personnel and finances. Specifically, they state that Granite will control: joint sales of KDLH advertising, including advertising representation; authority to provide shared services between KBJR and KDLH; authority to provide management services to KDLH; authority to set KDLH operating conditions, KDLH revenues, and KDLH priority capital expenditures. In addition, petitioners point out that Granite would apparently guarantee all of Malara's debt obligations under an undisclosed Credit Agreement, and control the right to buy or sell KDLH, including the ability to set its sales price. The sales price would be based upon a cash flow formula, and Granite would control cash flow through its advertising sales and capital expenditures.

Petitioners argue that Granite will control programming through its provision of up to 15% of KDLH's programming, and a substantial amount of its advertising. Petitioners also claim that

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[1] *See* Section 73.3555 of the Commission's Rules, 47 C.F.R. § 73.3555.

[2] *See* Section 73.3555(b) of the Commission's rules, 47 C.F.R. § 73.3555(b)

Granite will have control over personnel, because it proposes to cut KDLH's staff from 51 full-time and 18 part-time employees, to only two. According to petitioners, Granite will control KDLH's finances through the Credit Agreement and through its exclusive authority over major expenditures through an undisclosed Priority Capital Expenditures Agreement. Malara will be obligated to pay a monthly "sales commission" to Granite, limited to cash on hand after Malara pays off its "Priority Obligations."

According to petitioners, the public interest would be harmed by the proposed combination of KDLH and KBJR. Specifically, localism and diversity will be harmed and competition in the market will be reduced. KQDS/WDIO state that KDLH is already handling advertising sales for the local WB channel and shares local news resources with five newspapers owned by Knight-Ridder. At the same time, petitioners assert, KBJR, licensed to Granite, and KDLH share their news resources with four radio stations in the market, and KBJR's digital station multicasts the UPN network.

In opposition, Malara argues that its arrangement with Granite is consistent with the Commission's attribution rules and in line with other similar arrangements approved by the Commission. Malara maintains that it, not Granite, will control KDLH.

First, Malara insists that only the time that a same-market entity actually "brokers", as defined in Section 73.3555 of the Commission's rules, at Note 2(j)[3], counts toward the 15% time brokerage threshold. Thus, none of the advertising time, outside of the time brokered slots, which Granite sells for KDLH pursuant to the Advertising Representation Agreement would be included in the calculation.

Secondly, Malara maintains that it has not ceded *de facto* control of KDLH. With respect to personnel, Malara points out that it is not required under the agreements to have only two employees. Rather, it must have *at least* two employees. Malara states that management services to KDLH will be provided by TCM Media Associates, LLC (TCM). However, TCM is not controlled by Granite. Rather, it is Malara's parent. Malara insists that it will control its employees. Specifically, it will pay its employees' salaries, and will have the sole discretion to hire and fire them. Moreover, it will supervise all of Granite's employees that provide services for KDLH.

According to Malara, it will control KDLH's programming, and will decide, in its sole discretion, what programming will air on the station. First, it states, under the Shared Services Agreement, the programming Granite provides KDLH must be consistent with Malara's programming policies. Second, Malara may reject or replace the programming supplied by Granite and the advertising sold by Granite; and, in addition, Granite's time brokerage is consistent with Commission policy.

Nor will Granite control Malara's finances, according to Malara. Malara maintains that, while Granite may guarantee Malara's debt related to the acquisition of KDLH, it will not lend Malara

[3] 47 C.F.R. § 73.3555, Note 2(j).

any money.[4] Malara points out that the Commission's attribution decisions clearly state that a guarantee does not create an attributable interest.[5] Furthermore, Malara disagrees that Granite's right to inspect Malara's financial records creates an attributable interest, pointing out that such inspection rights are standard practice in option agreements. Malara also disputes that it will have little financial interest in the future value of KDLH because the future sales price under the Option Agreement is based on a multiple of cash flow and Granite allegedly controls cash flow. Rather, Malara states that defining the cash purchase price as a multiple of cash flow positions Malara to realize a benefit from an increase in KDLH's value.

Malara mentions that Petitioners find fault with the fact that Malara will not incur any obligation to pay Granite for the services it provides or the advertising it sells unless and until Malara pays its "Priority Obligations" and makes any "Priority Capital Expenditures." Malara indicates that "Priority Obligations" is defined to include KDLH's operating expenses, Malara's debt service, and such reasonable reserves as Malara deems necessary for contingent liabilities and "Priority Capital Expenditures." The agreements define "Priority Capital Expenditures" as expenditures that Granite and Malara agree to define as such. According to Malara, the term may cover contingent needs such as a new tower or studio building. Malara states that these are terms defined in the agreements, not separate undisclosed agreements as Petitioners contend. Malara argues that this concession was the result of an arms-length negotiation, designed to ensure that Malara could pay expenses if the arrangement with Granite fails to produce the anticipated savings and increased revenues.

Malara admits that it plans to develop a written operating conditions memorandum, designed to clarify the parties' roles to employees. According to Malara, this memorandum has not been disclosed because it does not yet exist.

Finally, Malara insists that grant of the application will promote, not harm, the public interest. Rather than removing a voice from the market, it will make that voice stronger. Malara indicates that Petitioners are wrong when they state that Granite shares news resources with Knight-Ridder, and other newspapers in the area, or that Granite shares its news resources with four Duluth market radio stations owned by Clear Channel. Granite does provide some assistance to one Duluth area radio station owned by Red Rock, in that Granite provides local weather reports and permits its local news talent to appear on the radio station occasionally. In addition, Granite provides some news information to four small newspapers in the outlying area. Moreover, Malara admits that Granite-owned KBJR provides UPN programming through its digital multicasting and that KDLH sells advertising for the cable-only WB programming in the Duluth market, but disputes that this is harmful to localism and diversity. Malara indicates that there are not enough television channels in the area to carry the four major television networks along with the new emerging networks. Through the efforts of KBJR and KDLH, area viewers are able to

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[4] Malara states that the Credit Agreement was not provided because it has not been fully negotiated and no draft exists. However, a copy will be provided to the Commission within thirty days of execution.

[5] Citing, *inter alia*, *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (Attribution Reconsideration)*, 16 FCC Rcd 1097, 1112 (2001).

receive three additional network programming services not otherwise available to them. This, according to Malara, furthers diversity and the public interest.

Discussion. In assessing the merits of a petition to deny, we follow a two-step analysis. First, we determine whether the petition makes specific allegations of fact which, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. If so, we then proceed to examine and weigh all of the material before us, including the applicant's submissions, to determine whether there is a substantial and material question of fact requiring resolution in a hearing.[6] If the facts are not disputed, but disposition turns on inferences and legal conclusions to be drawn from facts already known, a hearing is unnecessary.[7]

Petitioners have failed to raise a substantial and material question of fact that grant of the subject applications would be inconsistent with the public interest. Accordingly, KQDS/WDIO's petition will be denied.

As an initial matter, we do not consider Granite to have an attributable interest in KDLH by virtue of the fact that, under the proposed Shared Services Agreement, Granite plans to program up to 15% of KDLH's weekly program time, and, under the proposed Advertising Representation Agreement, Granite will also have the right to sell all of KDLH's available advertising time. In *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (Attribution Order)*, 14 FCC Rcd 12559, 12597 (1999), the Commission decided to attribute local marketing agreements (LMAs) or time brokerage agreements of another television station in the same market for more than 15% of the brokered station's broadcast hours per week.

Here, however, Granite would provide no more than 15% of KDLH's weekly program time. We will not count advertising time sold by Granite and broadcast on KDLH toward the 15% limit because we do not believe that is the intention of the attribution rules. In defining LMAs or time brokerage agreements, Note (2)(j) of Section 73.3555 of the Commission's rules[8] uses the following language:

> The sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.

In making a distinction between "programming" and "commercial spot announcements", this definition suggests that advertising is not to be considered program time for purposes of time brokerage limits. *See also, Attribution Reconsideration* at 1117. Furthermore, in *Attribution Order,* at 12579, the Commission defines a "major program supplier" as including

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6 *See* 47 U.S.C. Sections 309(d)(1) and (2), as explained in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988).

7 *Stone v. FCC*, 466 F.2d 316, 323 (D.C.Cir. 1972).

8 47 C.F.R. § 73.3555.

> all programming entities (including networks and inter-market time brokers) that supply over 15 percent of a station's total weekly broadcast *programming* hours. (emphasis added)

If all broadcast hours constituted "programming", the use of the word "programming" in this definition would be redundant.

Attribution Order, at 12612, defines Joint Sales Agreements (JSA's) as

> contracts that affect primarily the sales of advertising time, as distinguished from LMA's, which may affect programming, personnel, advertising, physical facilities, and other core operations of stations.

Based on the record in that proceeding, the Commission concluded that arrangements which meet the definition of JSAs would not be attributed. [9] Aside from the merits of that conclusion, it makes clear that the Commission draws a distinction between station programming and sale of advertising.

We further conclude that grant of the above-captioned application would not result in Granite's *de facto* control of KDLH. In making decisions regarding *de facto* control, the Commission looks at whether the entity in question makes policies and decisions concerning three main areas of station operation: programming, personnel and finances.[10]

As indicated above, Granite's time brokerage of KDLH complies with Commission policies. Moreover, the agreements to be executed by the parties make clear that Malara has ultimate control over all programming decisions and policies.

With respect to personnel, it is clear that Malara will control its employees. To the extent that Granite will provide employees to carry out its shared services agreement, this is not inconsistent with Commission policy regarding such arrangements.[11] This agreement, like the Advertising Representation Agreement, is akin to a JSA. The Commission's current policy that such

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[9] We note that there is a *Notice of Proposed Rulemaking* outstanding in which the Commission seeks comment on whether or not television JSA's should be attributed. *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, 19 FCC Rcd 15238 (2004).

[10] *See WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom, Greater Boston Television Corp. v. FCC,* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971)

[11] For this reason, we are not concerned that Granite and Malara are to execute an operating conditions memorandum in the future, nor will we require disclosure of a document that does not exist and, in any event, governs the business practices of KDLH. There is nothing to suggest that such a document will cede control to Granite, nor is there any evidence that Granite alone will set operating conditions. Similarly, we will not require disclosure of an agreement between Malara and its own parent for the provision of management services to KDLH, for such an agreement does not call into question Malara's control of KDLH.

agreements are not attributable is based on the view that they do not result in an impermissible degree of control.[12]

Furthermore, control by Granite is not evidenced by the fact that Malara will not have to pay for the services it provides until after it has paid its "priority obligations" and "priority capital expenditures."[13] On the contrary, as Malara maintains, this provision appears to have resulted from arms-length negotiation, because the higher Malara's expenses are, the lower the fee to be received by Granite. If anything, the benefits of such a provision would seem to flow to Malara.

We do not find that Granite's guarantee of Malara's debt confers control to Granite, nor does Granite's call option. In concluding that loan guarantees are not attributable, and that options are not attributable until exercised, the Commission indicated that such relationships do not provide the interest holder with the incentive and means to exert influence over the core operations of a licensee.[14] Furthermore, we do not agree that a sales price under the option which is based on cash flow is impermissible. We agree with Malara that such a formula permits Malara to benefit from an increase in KDLH's value. Indeed, it also gives Malara an incentive, as the licensee, to provide better programming in order to increase value. We also agree with Malara that Granite's right to inspect Malara's financial records does not confer control.

Finally, we reject Petitioners' claim that localism and diversity will be harmed by a grant of the above-captioned application. As explained above, we find that the agreements between Malara and Granite are consistent with the sorts of agreements allowed by the Commission. We have examined all of the facts and circumstances set forth by KQDS/WDIO and we do not find them, even if true, to amount to an impermissible concentration of control by Granite.

Having found the applicants fully qualified, we conclude that grant of the subject application would serve the public interest. Accordingly, the joint petition to deny filed by KQDS Acquisition Corp. and WDIO-TV, LLC, IS DENIED.

Further, the application to assign the license of KDLH, Duluth, Minnesota, from NVG-Duluth II,

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[12] *See Attribution Order* at 12612. At n. 261, the Commission also stated that separately owned stations can function cooperatively in terms of advertising sales and other aspects, as long as the licensee retains control of its station and complies with the Communications Act of 1934, as amended, the Commission's rules and policies and the antitrust laws. Thus, we view as immaterial to our resolution of this case statements allegedly made by Granite in an SEC filing. In any event, we agree with Malara that the statements make clear that Granite would not control Malara.

[13] These terms are either defined to include operating expenses, debt service and reserves or are left to be jointly determined by Malara and Granite at a later time. They are not documents that require disclosure. Moreover, the fact that "priority capital expenditures" may be defined at a later time by both parties militates against the argument that they will be set by Granite alone.

[14] *Attribution Reconsideration* at 1112. Moreover, we will not require disclosure of a Credit Agreement that does not result in attribution and that does not exist.

LLC, to Malara Broadcast Group of Duluth Licensee, LLC (File No. BALCT-20040504ABU), IS GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc: Tom W. Davidson, Esq.