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In re: **Rocking M Radio, Inc.**
KXXX(AM), Colby, Kansas
Facility No. 37125
KRDQ(FM), Colby Kansas
Facility No. 37124
KGNO(AM), Dodge City, Kansas
Facility No. 37130
KAHE(FM), Dodge City, Kansas
Facility No. 37131
KZRD(FM), Dodge City, Kansas
Facility No. 13010
KZRS(FM), Great Bend, Kansas
Facility No. 37129
KSOB(FM), Larned, Kansas
Facility No. 7990
KNNS(AM), Larned, Kansas
Facility No 7991
KZUH(FM), Minneapolis, Kansas
Facility No. 37127
KMMM(AM), Pratt, Kansas
Facility No. 27126
KSMM(FM), Liberal, Kansas
Facility No. 37120

Request for a Declaratory Ruling

Dear Counsel:

We have before us a Request for Declaratory Ruling (the "Request") filed on March 17, 2008, by Rocking M Radio, Inc. ("Rocking M"), licensee of the referenced stations (collectively "Stations").[1] Rocking M requests the Commission to declare whether certain provisions of affiliation agreements (the "Affiliation Agreements") between Rocking M and Steckline Communications, Inc. ("SCI")[2] conform to the Commission's Rules (the "Rules") and policies. We grant Rocking M's Request to the extent set forth below.

Background. Lesso, Inc. ("Lesso"), a predecessor licensee of the Stations, entered into Affiliation Agreements, in 1996, with Mid-America Ag Network and Mid-America News Network, (individually, the "Network", collectively, the "Networks") both owned by Mid-America Ag Network, Inc. At that time, Lawrence Steckline held a majority interest in Lesso and an 88% interest in Mid-America Ag Network, Inc. His son, Gregory Steckline, owned the remaining 12% interest in Mid-America Ag Network, Inc.[3]

The Affiliation Agreements have a perpetual term, but may be terminated by either of the Networks.[4] Unless released by the Networks, a licensee remains liable for performance of the Affiliation Agreements if the licensee changes a station's format, if a successor licensee fails to perform the Affiliation Agreements, or if the station is "cancelled."[5] Each successive licensee of the Stations, including Rocking M, has assumed the Affiliation Agreements.

In 2005, Lawrence Steckline sold the assets of Mid-America Ag Network, Inc. – including the Affiliation Agreements – to SCI, owned by his son Gregory Steckline.[6] Currently, SCI, under the trade name Mid-America Network, operates the two Networks.

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[1] On March 26, 2008, Steckline Communications, Inc. filed an unopposed Motion for Extension of Time to Respond. Although the Commission does not routinely grant extensions of time, we will do so in this instance in the interest of a complete record and because neither party is prejudiced thereby. On April 11, 2008, Steckline Communications, Inc. filed Comments on Request for Declaratory Ruling and Opposition to the Conclusions Argued for in the Request (the "Comments") On May 14, 2008, Rocking M filed a Reply to Comments on Request for Declaratory Ruling and Opposition to the Conclusions Argued for in the Request (the "Reply to Comments"). On June 23, 2008, SCI filed a Supplement to Comments on Request for Declaratory Ruling (the "Supplement"). On July 11, 2008, Rocking M filed a Response to Supplement to Comments on Request for Declaratory Ruling (the "Response to Supplement"). On July 28, 2008, SCI filed a Reply to Response to Supplement to Comments (the "Reply to Response"). On July 11, 2008, Rocking M filed a complaint with the Commission's Enforcement Bureau concerning the agreements discussed herein. On Nov. 7, 2008, Rocking M sent a letter, directed to Commission staff, requesting an expedited ruling on its Request. On Nov. 12, 2008, SCI sent a letter, directed to Commission staff, urging the Commission to expend whatever time was required to fully consider this matter. The letters, which were not filed with the Commission's Secretary are not part of the record. In any event, Rocking M's Request has been handled in the normal course and the issues raised in the letters are, therefore, moot.

[2] SCI is the licensee of stations KIUL(AM), Garden City, Kansas, KYUL(AM), Scott City, Kansas, and KGSO(AM), Wichita, Kansas.

[3] *See* Comments, Ex. A at 1.

[4] Rocking M furnished copies of two of the Affiliation Agreements with its Request. *See* Request at Ex. A. The initial term of the Affiliation Agreements is 120 months and, absent termination by the Networks, the agreements continue in force, automatically, for consecutive 60 month periods, *ad infinitum*. *See id.* The first Affiliation Agreement requires the stations to broadcast eight of Mid-America News Network's state news and sports programs per day and eight commercials. The second Affiliation Agreement requires the stations to broadcast 15 of Mid-America Ag Network's agricultural programs and 15 commercials per day.

[5] *See* Request, Ex. A.

[6] When he sold the assets of Mid-America Ag Network, Inc. to his son, Lawrence Steckline retained the use of the corporate name Mid-America Ag Network, Inc. *See* Comments, Ex. A at 1. Mid-America Ag Network, Inc. currently is the licensee of station KWLS(FM), Winfield, Kansas.

Rocking M changed its Liberal, Kansas, stations, KSMM-FM[7] and KSMM(AM),[8] to a Spanish language format and advised SCI that the stations would no longer broadcast SCI's English language programs or commercials.[9] SCI responded by demanding carriage of the programs and commercials unless an alternative solution could be reached.[10] The parties did not reach an alternative solution; Rocking M discontinued SCI's programming on KSMM-FM and KSMM(AM) and SCI filed suit in state court for breach of contract.[11]

Rocking M requests pursuant to Section 1.2 of the Commission's Rules that the Commission issue a Declaratory Ruling to resolve what Rocking M characterizes as uncertainty concerning whether the Affiliation Agreements, and SCI's attempted enforcement thereof, comport with the Commission's Rules and policies, including whether the Affiliation Agreements afforded Lesso (in the person of its majority shareholder, Lawrence Steckline) an impermissible reversionary right to use the facilities of the Stations when Lesso assigned the Stations' licenses to Great Empire Broadcasting, Inc.[12]

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[7] The station's prior call sign was KSLS(FM) and sometimes is referred to as such in the attachments to the pleadings.

[8] The station's prior call sign was KYUU(AM) and sometimes is referred to as such in the attachments to the pleadings.

[9] *See* Reply to Response at Ex. B.

[10] *See* Request at Ex. B.

[11] Although Rocking M changed both its Liberal, Kansas, stations to a Spanish language format, the lawsuit alleges breach of contract only with respect to Rocking M's operation of Liberal, Kansas, station KSMM-FM (formerly KSLS(FM) and referred to as such in the lawsuit). *See* Reply to Response at Ex. A (a petition filed in the Eighteenth Judicial District Court, Sedgwick County, Kansas, seeking damages in excess of $ 75,000). Rocking M's station, KSMM(AM) (formerly KYUU(AM)) was "deleted" from the Affiliation Agreements in 1998 for reasons not disclosed in the record. *See* Request, Ex. A (handwritten annotations). Subsequently, SCI proposed to certain of its "affiliates," including Rocking M, that they could decline to broadcast SCI's programs but had to continue to broadcast the related commercials, *i.e.,* "the affiliates will be obligated only to broadcast the commercial spot announcements which SCI will provide to them with the programming." Supplement at 2. SCI also stated that it would not enforce its Affiliation Agreements with stations KIMB(AM) and KMMJ(AM), which are not owned by Rocking M, to the extent those agreements prohibited certain format changes, barred broadcast of any other agricultural programming, and provided for injunctive relief in the event of breach. *Id.* SCI also stated that it intended to give its affiliates the option of amending the perpetual duration terms in their Affiliation Agreements to provide for a maximum term of forty years. *Id.*

[12] Request at 1. Rocking M presents the following issues for resolution: (1) "Can a broadcast licensee enter into a network affiliation agreement or programming agreement obligating that licensee to air programming and/or commercial matter in perpetuity or for whatever period the program provider should decide to provide the programming? If so, is the broadcast licensee bound to air whatever programming or commercial matter is provided by the network or program provider? (2) If a broadcast licensee enters into a network affiliation or programming agreement and then later chooses to change the station's broadcast format in such a way that the programming provided under the programming agreement becomes inconsistent with or inappropriate for the new format (in the exercise of reasonable discretion of the licensee) is the licensee nevertheless obligated to continue to air the programming or commercial announcements provided by the network or program provider, or alternatively to have to pay substantial damages to the program provider for breach of the network or programming agreement? (3) May a broadcast licensee consistent with the control obligations inherent in Section 310(d) of the Communications Act of 1934, obligate itself to air certain programming or to incur substantial penalties if the licensee fails to air the programming at any point in the future during which the program provider provides programming under the agreement? (4) Where a program provider once owned a substantial interest in a broadcast station subject to a program agreement, can that provider, consistent with 47 C.F.R. § 73.1150, enforce a programming agreement originally entered into at the time that the program provider owned the interest in that station, against a subsequent licensee of that same broadcast station, forcing the subsequent licensee to

SCI opposes the Request, contending that Lawrence Steckline is not a principal of SCI and, therefore, that SCI retains no reversionary interest in the Rocking M Stations.[13] It also contends that its proposed undertaking not to enforce certain provisions of the Affiliation Agreements, and its allowing affiliates the option of modifying the term of the Affiliation Agreements, obviates the need for a declaratory ruling.[14] It argues that the Affiliation Agreements are typical of similar agreements entered into by television networks when they sell owned and operated stations to third parties.[15]

Discussion. As explained below, a licensee must maintain, and may not delegate, "the flexibility to address the needs and interests of its local communities, to react to changing audience tastes and preferences, to respond to other competitors in the market, and to select its programming accordingly."[16] The Commission will refuse to approve applications for assignment of license or transfer of control when, as part of the transaction, there are agreements restricting a licensee's ultimate rights to determine programming.[17] Moreover, the Commission has explicitly countenanced the use of liquidated damages provisions in otherwise permissible agreements;[18] however, the Commission has noted that excessive liquidated damages for breach or an unreasonably lengthy brokerage agreement could bring into question a licensee's control of a station.[19] Moreover, should an assignor or assignee falsely certify, in an assignment application, that the agreements for acquisition of a station comply with the Commission's Rules and policies, the Commission may institute enforcement proceedings based on such false

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air the programming provided by that program provider under threat of a damage award? (5) Must a licensee, in order to comply with the control requirements of Section 310(d) of the Commission's rules (sic), preserve for the licensee and not delegate to a third party the absolute right to determine what programming should be aired on the station and to be free from incurring substantial penalties as the result of the exercise of the licensee's discretion in determining what programming is best suited to the needs and interests of the public?" Request at 2-3. Following assignment of the Stations' licenses to Great Empire Broadcasting, Inc., the licenses were reassigned, *seriatim*, to Goldstar Communications, Waitt Radio, NRG License Sub, LLC and Rocking M. *See* Request at 5.

[13] Comments at 2.

[14] *See* Reply to Response at 2-5.

[15] *See id.* at 6-7 and Ex. C (Stock and Asset Purchase Agreement between Outlet Broadcasting, Inc., NBC Sub (WCMH), LLC, *et al.* and Media General, Inc.)

[16] *Cumulus Licensing, LLC*, Letter, 21 FCC Rcd 2998, 3005 (MB 2006) ("*Cumulus*") (citing *National Ass'n for Better Broadcasting*, Letter, 55 FCC 2d 800 (1975) ("*NABB*") ("[t]his duty [for programming decisions] cannot be delegated and a licensee cannot, even unilaterally, foreclose its discretion and continuous responsibility to determine the public interest and operate in accordance with that determination")). In deciding whether there has been a transfer or delegation of these licensee rights, the Commission determines, *inter alia*, who has ultimate control of a station's programming. *See Southwest Texas Public Broadcasting Council*, Letter, 85 FCC 2d 713, 715 (1981); *Alabama Educational Television Commission*, Memorandum Opinion and Order, 33 FCC 2d 495, 508 (1972).

[17] *See Cumulus,* 21 FCC Rcd at 3005-3006 (a prohibition against an assignee instituting certain formats on its stations "improperly infringes on [the assignee's] programming responsibilities" and must be deleted from a sales agreement).

[18] *See Revision of Radio Rules and Policies,* Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 7 FCC Rcd 6387, 6402 (1992) ("*Revision of Radio Rules*"), *recon. granted in part,* Second Memorandum Opinion and Order, 9 FCC Rcd 7183 (1994) (Commission will not interfere with parties decisions regarding liquidated damages).

[19] *See id. See also 1998 Biennial Regulatory Review - Streamlining of Mass Media Applications Rules and Processes,* 13 FCC Rcd 23056, 23224 (1998). *See* Form 314 Instructions - Time Brokerage/Local Market Agreements, Worksheet, Items 2 (a)-(b)) (requiring explanatory exhibit if agreement has an excessive fee or penalty for termination).

certification.[20] It is a violation of Section 310(d) of the Act if a program supplier seeks judicial enforcement of any provision of an affiliation agreement that abridges a licensee's right to determine programming.[21]

Licensee Control Over Programming. The Commission's has consistently interpreted Section 310(d) of the Communications Act of 1934, as amended (the "Act") to require that a licensee retain ultimate control over programming.[22] In cases involving Local Management Agreements (LMAs), time brokerage agreements or affiliation agreements, the right of a licensee to terminate agreements or reject programming has been a paramount consideration in the Commission's analysis of whether the agreements constituted a transfer of control.[23] Similarly, the Commission has rejected agreements with members of the public that restrict licensees to "fixed and unchangeable types and amounts of programming."[24]

Here, the Affiliation Agreements bind Rocking M to broadcast fixed amounts of agricultural and news and sports programming and commercials, in perpetuity, notwithstanding the fact that Rocking M has elected to change a station to a foreign language format in which SCI's English-language programming and commercials would be of limited interest to the

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[20] *See Mid Atlantic Network, Inc.,* Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7582, 7589-7590 (MB 2008) (*"Mid Atlantic"*) (finding violation but not assessing forfeiture because Commission approval of assignment application had become final.) *See also* FCC Form 314, Section II, Item 3.

[21] *See Mid Atlantic,* 23 FCC Rcd at 7590. *See also Citicasters, Inc*., Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 3415, 3420 (EB 2001) ("*Citicasters"*), *application for review denied,* 16 FCC Rcd 14137 (2001), *recon. denied*, 17 FCC Rcd 1997 (2002) ($ 25,000 forfeiture imposed when a proposed assignee of a license obtained a restraining order from a state court to enforce a time brokerage agreement which required the assignor licensee to accept programming from the proposed assignee ("[i]t is a violation of the Communications Act to invoke remedies for breach, including injunctive or other equitable relief, that impinge on such control, without obtaining prior Commission consent.")).

[22] *E.g.*, *Network Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 13610, 13611 (2008) ("*NASA Declaratory Ruling*").

[23] *See, e.g., Choctaw Broadcasting Corp.,* Memorandum Opinion and Order, 12 FCC Rcd 8534, 8539 (1997) (LMA approved where licensee retained right to terminate if agreement was contrary to the public interest or otherwise inconsistent with licensee's obligations as a Commission licensee); *Gisela Huberman, Esq.,* Letter, 6 FCC Rcd 5397, 5398 (MMB 1991) (LMA approved where licensee had unqualified right to terminate on 90 days notice); *J. Dominic Monahan, Esq.*, Letter, 6 FCC Rcd 1867 (MMB 1991) (mutual right to terminate brokerage agreement if programming fails to serve audience needs or is otherwise contrary to public interest); *Roy M. Speer,* Memorandum Opinion and Order and Notice of Apparent Liability, 11 FCC Rcd 18393, 18418 (1996) ("*Speer"*) (subsequent history omitted) (affiliation agreement approved where licensee was functionally endowed with veto power over programming with no resultant penalty); *Manahawkin Communications Corp*., Memorandum Opinion and Order, 17 FCC Rcd 342, 348 (2001) (time brokerage agreement approved where licensee had right to reject programming not meeting specified standards).

[24] *NABB* 55 FCC 2d at 802 (disapproving licensee's agreement with citizens group that restricted licensee to "fixed and unchangeable types and amounts of programming" (citing *Ellen S. Agress,* Letter, 54 FCC 2d 1238 (1975) ("*Agress*") (rejecting agreement imposing a quota for minority programming and employment)); *Cumulus*, 21 FCC Rcd at 3005-3006 (striking provision in agreement requiring licensee to change programming format); *Twin States Broadcasting Inc.,* Memorandum Opinion and Order, 42 FCC 2d 1091 (1973) (rejecting agreement requiring licensee to change programming format under certain circumstances and expressing a Commissioner's concern over "willingness of some licensees, in an apparent attempt to avoid the Commission's processes, to abrogate their obligations as public trustees and turn over to third parties responsibilities which are uniquely their own." *Id.* (Separate Statement of Commissioner Richard E. Wiley)).

station's listeners. Although the Affiliation Agreements do allow Rocking M to reject specific programs – but not commercials – on a case-by-case basis, the underlying Affiliation Agreements, themselves, may not be terminated by Rocking M, thus impermissibly binding Rocking M to fixed types and amounts of the Networks' programming.

SCI's Recourse to State Court. Rocking M claims that SCI's filing suit in state court to enforce the Affiliation Agreements is contrary to the holding in the *Citicasters* decision, *i.e.*, Rocking M argues that the "suit attempts to seek equitable relief from a court that effectively restricts a licensee's ability to control programming policies and decisions."[25] We disagree. Review of the petition that SCI filed in state court,[26] discloses that SCI seeks only monetary damages, not an injunction or other equitable relief, thus making *Citicasters*, and the subsequent *Mid Atlantic Network* decision[27] – both of which were confined to complaints for equitable relief – inapposite here.[28] Thus, SCI has properly brought its private contractual dispute with Rocking M concerning money damages before a local court of competent jurisdiction.[29] The Commission does not decide such contractual matters.[30]

We note that the Commission has imposed additional limitations in the context of *television* network affiliation agreements, prohibiting the imposition of monetary penalties on television affiliates in the narrow context of preemptions protected by the "right to reject" rule, Section 73.658(e).[31] That rule is inapplicable to the Affiliation Agreements. The Commission has not imposed a similar restriction with regard to radio LMAs or any other type of radio programming agreement. As noted above and to the contrary, it has concluded that reasonable liquidated damages are consistent with Section 310(d) requirements. We hold that reasonable monetary damages relating to an otherwise enforceable agreement and subject to limitations imposed by Commission rule are permissible.

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[25] Response to Supplement at 7 and n.7 (citing *Citicasters,* 16 FCC Rcd at 3420).

[26] *See* Reply to Response, Ex. B.

[27] *See Mid Atlantic,* 23 FCC Rcd at 7589-7590 (apparent violation of 47 U.S.C. § 310(d) and 47 C.F.R. § 73.3540 when seller sought and received injunction restricting format that buyer could employ).

[28] Rocking M's contention that the lawsuit seeks equitable relief apparently rests on SCI's seeking money damages and "such other and further relief as the Court deems just." Reply to Response, Ex. B. We take notice that the quoted phrase is commonplace legal "boilerplate" and that SCI has not pleaded for specific equitable relief in its complaint.

[29] Licensees are not insulated against a program supplier seeking money damages for breach of a programming agreement. *Mid Atlantic*, 23 FCC Rcd at 7586 ("a violation of the Act and the Commission's Rules is an "issue separate and distinct from the issue of whether the . . . Agreement is enforceable under state contract law" (citing *Citicasters,* 16 FCC Rcd at 3419 ("assessment of licensee obligations under the Act is not an adjudication of contractual rights and responsibilities)). *See also Air Virginia*, Hearing Designation Order, 17 FCC Rcd 5423, 5435 (2002). ("The fact that the TBA provides for penalties for the unilateral termination of the agreement does not mean that Air Virginia is not without recourse to terminate the agreement. Such contractual provisions provide only that the terminating party may be subject to penalties for breach of contract under applicable state law."); *Edwin L. Edwards, et al.,* Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236, 22255 (2001) ("while damages may be an appropriate remedy for a licensee's breach of an LMA, the staff stated that a licensee must remain free to choose who will program its station").

[30] It is well established that the Commission is not the proper forum for adjudication of such disputes. *See John R. Kingsbury*, Memorandum Opinion and Order, 71 FCC 2d 1173 (1979); *John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR 2d 773 (1976); *Transcontinent Television Corp*., Memorandum Opinion and Order, 21 RR 945 (1961).

[31] 47 C.F.R. § 73.658(e); *see also NASA Declaratory Ruling*, 23 FCC Rcd at 13612.

Rocking M, however, asserts that the mere prospect of money damages for breach of the Affiliation Agreements has a chilling effect on Rocking M's ability to exercise the degree of control necessary to program its stations in the public interest.[32] We note that, although the Commission has cautioned that agreements that impose excessive penalties or provide for excessively high liquidated damages for breach may bring a licensee's control of a station into question,[33] it has not suggested that there is a comparable threat with respect to actual damages for breach of an otherwise valid portion of a contract. Indeed, were the Commission to foreclose actual damages, licensees could ignore their program-related contractual obligations with impunity, to the detriment of program suppliers and with no concomitant benefit to the listening public.

Term of the Affiliation Agreements. In *Revision of Radio Rules,* the Commission stated that, if a licensee entered into "an unreasonably lengthy brokerage agreement, [a] licensee's control of its station may be questioned."[34] That control concern applies with equal force to programming agreements more generally. Agreements with a perpetual duration – such as the Affiliation Agreements – are *per se* "unreasonably lengthy" and unacceptable because they inhibit a licensee's ability to structure its programming to be responsive to the current needs of its audience.[35] A licensee's ability to meet those needs "can be freely exercised only if program plans or structure remain flexible. This carries with it the licensee's obligation to refrain from taking any action by contract or otherwise which constitutes restrictions or impediments to reasonable flexibility and thus to change."[36] The Commission contemplates "that licensees will retain the flexibility necessary to respond to ever-changing audience tastes and preferences; to the extent that flexibility is diminished we believe responsiveness will be inhibited."[37] Programming agreements having a perpetual term are facially inconsistent with licensees' obligation not to enter into agreements that restrict or impede their ability to retain control over programming pursuant to Section 310(d) of the Act, *i.e.*, licensees may not be "forced into an ongoing and indefinite affiliation with [a program supplier]."[38] Accordingly, we find that the term of the Affiliation Agreements is in conflict with Section 310(d) of the Act and unenforceable.

Impermissible Reversionary Interest. Section 73.1150(a) of the Rules[39] states that "[i]n transferring a broadcast station, the licensee . . . may not reserve the right to use the facilities of the station for any period whatsoever." When Lesso's licenses were assigned to Great Empire Broadcasting, Inc., Lawrence Steckline was a principal both of the licensee, Lesso,[40] and of Mid-America Ag Network, Inc., the owner of the Networks and SCI's predecessor. A portion of the consideration for the assignment of the Stations' licenses was that Mid-America Ag Network, Inc. – after consummation of the assignment – would continue to have "ongoing access to a

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[32] *See* Request at 8.

[33] *See Revision of Radio Rules,* 7 FCC Rcd at 6387.

[34] *Id.* at 6402.

[35] Rocking M asserts that it initiated Spanish language programming on its Liberal, Kansas, stations in response to "changing demographics in southwestern Kansas." Request at 7.

[36] *Grand Canyon Broadcasters,* Letter, 9 FCC 2d 830, 831 (1967) (citing *New Mexico College of Agriculture and Mechanical Arts,* 5 RR 976 (1949)); and *Churchill Tabernacle v. FCC*, 160 F.2d 244 (D.C. Cir. 1947) (rejecting 100 year right to broadcast time on a station).

[37] *Twin States Broadcasting, Inc.,* Memorandum Opinion and Order, 42 FCC 2d 1091, 1092 (1973) ("*Twin States*").

[38] *Speer,* 11 FCC Rcd at 18431-18432 (provisions in agreement stricken where they "effectively insure that [the licensee] will be forced into an ongoing and indefinite affiliation with [a program supplier]").

[39] 47 C.F.R. § 73.1150(a).

[40] Lawrence Steckline was an 88% principal and Gregory Steckline was a 12% principal of Lesso.

number of its [the America Ag Network, Inc.] important affiliate stations."[41] This "ongoing access" to the facilities of the stations was assured because (a) the Affiliation Agreements, as a practical matter, ran with the station licenses,[42] and (b) the Affiliation Agreements had a perpetual term.[43]

SCI argues that there was no prohibited reservation of right to use the stations' facilities because "Lesso was a wholly separate entity, financially and operationally from Mid-America Ag Network."[44] Nonetheless – at the time the licensees were assigned to Great Empire Broadcasting, Inc.[45] – there was an identity of interest between Lesso and its "sister company" Mid-America Ag Network, Inc.[46] That interest persists today because Gregory Steckline – originally a principal in Mid-America Ag Network, Inc. – remains as the sole principal of the successor company, SCI.[47] We therefore disagree with SCI that Lesso was "a wholly separate entity" from Mid-America Ag Network, Inc.[48] The two corporations – Mid Atlantic Ag Network, Inc. and Lesso – were *alter egos* of the Stecklines. Because Lawrence Steckline held a majority interest in both entities, he was able to introduce adhesive provisions into the Affiliation Agreements that overwhelmingly favored Mid-America Ag Network, Inc. and bound successive licensees, in perpetuity, to provisions that only the Stecklines could terminate.

SCI, itself, has conceded that the Affiliation Agreements were intended to ensure that Mid-America Ag Network, Inc. had perpetual, reversionary, "ongoing access" to its affiliate stations notwithstanding changes in station ownership or format. We conclude, therefore, that the self-dealing between Lesso and Mid-America Ag Net, Inc. resulted in Affiliation Agreements whereby the Stecklines impermissibly "reserve[d] the right to use the facilities of the station[s]"[49] in clear violation of Section 73.1150(a) of the Rules.

The fact that Great Empire Broadcasting, Inc., and successor licensees, including Rocking M, may have knowingly acquiesced to the programming restrictions imposed by the Affiliation Agreements does not legitimize the agreements as SCI implies.[50] Parties may not escape a

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[41] Request at Ex. B (emphasis supplied). ("As part of the transaction, the purchaser of the stations expressly agreed that it would leave in place and honor all of the long-term MAAN affiliation agreements (which included both ag affiliation agreements and news affiliation agreements). The price for which Lesso and the Stecklines were willing to sell these stations was determined with the recognition that the affiliation agreements would remain in place, thereby providing MAAN with ongoing access to a number of its affiliate stations.")

[42] *See* Request, Ex. A. (If an assignor did not require an assignee to assume the Affiliation Agreements, or if the Affiliation Agreements were assumed but not performed by the assignee, the assignor remained liable "to perform its duties and obligations under this agreement."

[43] *See id.* (Initial 120 month term with "automatic" renewal for subsequent 60 month terms at the sole option of Mid-America Ag Network (owned by SCI)).

[44] Comments at 3.

[45] *See id.*

[46] SCI's counsel describes Lesso and Mid-America Ag Network, Inc. as "sister companies." Request Ex. B at 1. *But see* Comments at 2 ("[u]nfortunately, Lesso has been mischaracterized [by SCI's own counsel] as having been the 'sister company' to Mid-America Ag Network, Inc.").

[47] *See* Comments at Ex. A. (Declaration of Gregory R. Steckline: "I am the 100% owner of all of the assets, debt, equity, and voting interest in Steckline Communications, Inc.")

[48] *Cf. Nos Communications Inc. et al.*, Order to Show Cause and Notice of Opportunity for Hearing, 18 FCC Rcd 6952, 6954 n.4 (2003). (Finding parties jointly and severally liable because "Although NOS, ANI, and NOSVA are set up as different corporations, they apparently share the same offices, directors, and major shareholders.")

[49] 47 C.F.R. § 73.1150(a).

[50] *See* Comments at 3. ("Rocking M can hardly claim to have been unaware of the terms and agreements".)

Commission Rule by agreeing to violate it. Any provision in a programming agreement that forecloses a licensee from making independent programming judgments is void *ab initio*. The provision will not be given effect by the Commission,[51] and does not bind subsequent licensees.[52]

Television Network Affiliation Agreements. SCI contends that the Affiliation Agreements are permissible because they do not differ, substantially, from the asset purchase agreement and network affiliation agreement that SCI appended to its Reply to Response, whereby NBC assigned licenses of network-owned television stations to a third party.[53] We disagree.

As an initial matter, the submitted NBC affiliation agreement is for a fixed five and one-half year term with no "automatic" extensions - it is not perpetual as are the Affiliation Agreements.[54] Second, the agreement does not "run with the license," *i.e.,* the NBC affiliate licensee is not obliged to require a subsequent licensee to assume the agreement under penalty of remaining liable for performance of the agreement, as with the Affiliation Agreements.[55] Third, unlike the Affiliation Agreements here at issue, the NBC affiliation agreement requires compliance with Section 78.658 of the Rules. This rule contains specific provisions concerning a television licensee's right to reject programs, and was adopted to protect television station autonomy and responsibility for broadcast material.[56] Finally, under NBC's affiliation agreement, NBC has no right to the "facilities of the station" – the licensee may reject any content – including commercial content – it reasonably believes is contrary to the public interest. The Affiliation Agreements, by comparison, allow the licensee to reject program material under certain circumstances but have no comparable provisions respecting commercial material.[57] Thus, under SCI's interpretation of the Affiliation Agreements, even if a licensee declines to broadcast the Networks' programs, it still must broadcast the commercials associated with those programs.[58] Such provisions that are "absolutely binding" on licensees are inconsistent with licensees' obligation to retain independent control over material broadcast on their stations.[59]

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[51] *See NABB,* 55 FCC 2d at 801, 802 (to the extent an agreement surrenders a licensee's programming responsibility to others "it cannot be considered by the Commission as having any force and effect.") *Id.* (citing *NBC v U.S.*, 319 U.S. 190 (1943)).

[52] *See NABB,* 55 FCC 2d at 802 (licensee has "no right or authority to make the provisions of the Agreement . . . binding on any future assignee . . .).

[53] Reply to Response at 5-6 and Ex. C (excerpts from asset purchase agreement between NBC Sub WCMH, LLC, *et al.* and Media General, Inc.) and Ex. D (excerpts from redacted copy of network affiliation agreement between NBC and Media General Communications, Inc.).

[54] *See* Reply to Response, Ex. D at 1.

[55] *Id.* at 7-8. *See supra* n.52.

[56] *See* 47 C.F.R. § 73.658; Reply to Response at 2. *See also NASA Declaratory* Ruling, 23 FCC Rcd at 13611 ("Affiliates, as the licensees of local television stations, must retain ultimate control over station programming, operations and other critical decisions with respect to their stations, and network affiliations must not undercut this basic control. Retention of this control by Commission licensees is required by Section 310(d) of the Communications Act and the Commission's Rules.")

[57] The Affiliation Agreements provide that stations may reject an SCI agricultural or news program and substitute a program of "outstanding local or national importance." Request, Ex. A at 2. The Affiliation Agreements, however, as they stand now, contain no provisions whereby licensees may reject SCI's commercials. *Id.* SCI has proposed to amend the Affiliation Agreements so that a licensee may reject commercials it deems "unsatisfactory, unsuitable or contrary to the public interest." Supplement at 2-3. SCI has not, however, implemented the proposed amendment.

[58] *See* Reply to Response at 4 ("stations electing not to air the programming must nevertheless air the commercials in order to uphold their end of the bargained-for contracts"). SCI has notified its affiliates that they may reject a particular commercial spot that an affiliate deems "unsatisfactory, unsuitable or contrary to the public interest." In the event an affiliate rejects a commercial spot, however, it is obligated to

SCI's Agreements With Other Licensees. Rocking M calls attention to affiliation agreements SCI has with other licensees, containing provisions Rocking M deems more onerous than those in its Affiliation Agreements. It includes a copy of an agreement between Mid-America Ag Network and Steckline Communications, LLC, in its capacity as licensee of station KIMB-AM, Kimball, Nebraska.[60] That agreement contains a specific provision that the licensee may not change to a foreign language format and that the "format of the Station will not be changed so as to render network programming inappropriate for broadcast on the station."[61] It binds the licensee not to broadcast the agricultural programming of any other network or news provider.[62] It also gives SCI the right to acquire additional commercial time at fixed rates.[63] The licensee's obligation to broadcast Mid-America Ag Network's commercials may be enforced by injunction.[64] The term of the agreement, unless sooner terminated by SCI, is 40 years.[65] Subsequent licensees are bound by the agreement and the licensee is liable if a subsequent licensee does not perform.[66] We agree with Rocking M that such provisions are inconsistent with licensees' obligation to retain independent control over material broadcast on their stations.[67]

Proposed Modification of the Agreements. In deciding this matter, we have dealt with the Affiliation Agreements submitted with the pleadings. We note, however, that SCI has proposed to amend the Affiliation Agreements so that licensees may elect a maximum 40-year term and have the option of discontinuing SCI's programming - but must continue broadcasting SCI's

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broadcast a replacement spot. Supplement at 2-3. SCI has not incorporated its "notification" as an amendment to the Affiliation Agreements.

[59] *See NABB*, 55 FCC 2d at 802. ("Thus, if the Agreement and Commitment impose restrictions on Metromedia which are absolutely binding, then these provisions curtail improperly the licensee's discretion to make programming judgments in the public interest.") The SCI Affiliation Agreements contain a "savings clause" to the effect that "[n]othing herein contained shall require the Station to do any act or thing which would constitute violation of any rule or regulation of the Federal Communications Commission." *See* Request, Ex. A at 2. That general clause cannot overcome the specific provisions of the Affiliation Agreements and SCI's attempt to enforce them. *See id.* (citing *Agress*, 54 FCC 2d at 1238).

[60] Reply to Comments, Ex. A. The agreement is signed by Lawrence Steckline as president of Mid-America Ag Network, owned by SCI, and Gregory Steckline as "manager" of the licensee, Steckline Communications, LLC. Rocking M claims that the "flip flopping" of the roles of Lawrence Steckline and Gregory Steckline – relative to earlier transactions in which Lawrence Steckline represented the licensee and Gregory Steckline represented Mid-America Ag Network – shows a "complete identity of interest" between Mid-America Ag Network and the licensees of the stations that initially entered into affiliation agreements. *See* Reply to Comments at 6, n.3.

[61] *See id* at 6, Ex. A at 1, ¶ 3.

[62] *See id.* at 7, Ex. A at 1, ¶ 1.

[63] *Id.,* Ex. A at 2, ¶ 6.

[64] *Id.,* Ex. A at 3, ¶ 9.

[65] *See id.* at 6, Ex. A at 2, ¶ 6.

[66] *See id.* at 7, Ex. A at 3, ¶ 12. SCI states that it "intends" to inform licensees governed by these agreements that it will not enforce the provisions concerning format changes and broadcast of agricultural programs supplied by others. Supplement at 2. It has not, however, stated it would not enforce the provisions of the agreement dealing with injunctive relief. We do not rely on SCI's "intent" not to enforce these provisions of the agreement, *inter alia*, because there is no record evidence that the intent has been effectuated or that SCI would not enforce the injunctive relief provision. Moreover, an agreement not to enforce an objectionable provision could be withdrawn at any time.

[67] *See NABB*, 55 FCC 2d at 802. ("Thus, if the Agreement and Commitment impose restrictions on Metromedia which are absolutely binding, then these provisions curtail improperly the licensee's discretion to make programming judgments in the public interest.")

commercials.[68] We find, however, that, even with those changes, the Affiliation Agreements would be "unreasonably lengthy"[69] and otherwise unacceptable. A 40-year term is excessive, given the dynamic state of the radio market, because it inhibits licensees from responding to audience needs, *e.g.,* by initiating foreign language or other programming incompatible with SCI's programming.[70] Moreover, giving a licensee the option to discontinue SCI's programming while continuing to broadcast its commercials, without compensation, for as long as 40 years is a penalty that likewise inhibits the licensee from providing programming responsive to community needs. Also, should a licensee decline the options offered by SCI, it would remain subject to the current Affiliation Agreements which, as established, *supra*, are inconsistent with licensees' obligation to retain independent control of programming.

Conclusion. Under Section 1.2 of the Rules, the Commission "may . . . issue a declaratory ruling terminating a controversy or removing uncertainty."[71] The Commission has broad discretion whether to issue such a ruling.[72] It will do so only when critical facts are explicitly stated.[73] We find that the record contains the requisite critical facts. Specifically, the record discloses a pattern of self-dealing by the Stecklines, that resulted in Affiliation Agreements which, in many material respects, are unilaterally favorable to SCI and contain provisions inconsistent with the Commission's Rules and policies governing licensee control over programming and prohibiting the retention of reversionary rights when broadcast licenses are assigned.

We agree with Rocking M that Commission guidance on its Affiliation Agreements with SCI would be useful in resolution of the instant controversy and such similar controversies as may arise in connection with other licensees' programming agreements. Therefore, pursuant to Section 1.2 of the Rules, and the foregoing discussion, we respond to the specific issues requested by Rocking M[74] as follows:

Rocking M Issue #1. May a licensee enter into a network affiliation agreement with a perpetual term (or a term dictated by the network) and, if so, is the licensee obligated to broadcast whatever programming the network supplies?[75]

Network affiliation agreements with perpetual terms are *per se* "unreasonably lengthy" and unacceptable because they inhibit a licensee's ability to structure its programming to be responsive to the needs of its audience. A licensee's ability to meet those needs "can be freely exercised only if program plans or structure remain flexible. This carries with it the licensee's obligation to refrain from taking any action by contract or otherwise which constitutes restrictions or impediments to reasonable flexibility and thus to change."[76] Thus, programming agreements

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[68] *See* Reply to Response at 2-3. *See also supra* n.58.

[69] *See Revision of Radio Rules,* 7 FCC Rcd at 6402.

[70] SCI notes that "it does not appear that the FCC has ever ruled that the duration of a contract for commercial spot broadcasts is excessive." *See* Reply to Response at 2-3. We observe, however, that the Commission has not, until now, had the occasion to address that issue.

[71] 47 C.F.R. § 1.2.

[72] *See Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (1973).

[73] *See id.* (citing *Use of Broadcast Facilities by Candidates for Public Office*, Public Notice, 24 FCC 2d 832, 885 (1970)).

[74] The issues, as presented *supra,* are abbreviated summaries of Rocking M's requested issues. For the full text of the issues, see *supra* n.12.

[75] *See* Request at 2.

[76] *Grand Canyon Broadcasters,* Letter, 9 FCC 2d at 830. *See also supra* n.23; *Speer,*11 FCC Rcd at 18431-18432 (provisions in agreement stricken where they "effectively insure that [the licensee] will be forced into an ongoing and indefinite affiliation with [the program supplier]").

with a perpetual, or indefinite, term are inconsistent with licensees' obligation to retain control over the programming of their stations pursuant to Section 310(d) of the Act.

An agreement binding a licensee to broadcast whatever programming a program supplier furnished would represent an unauthorized transfer of control. A licensee must be free to reject programming it reasonably deems unsuitable or contrary to the public interest and must be free to substitute programming it deems to be of greater local or national interest.[77]

Rocking M Issue #2. Whether a licensee that changes programming format, thereby rendering network programming inappropriate to the station's audience, is nonetheless obligated to continue broadcasting network programming or pay substantial damages to the program supplier for breach of contract?

An agreement barring changes in program format is unacceptable – regardless of provisions respecting damages – because it unduly restricts a licensee's ability to be responsive to the needs of the public and, hence, represents an assumption of control by the program supplier inconsistent with Section 310(d) of the Act.[78] The Commission may strike provisions of an agreement - or the entire agreement - to the extent it bars format changes.[79] However, an otherwise enforceable agreement that provides for actual damages in the event of breach of contract is permissible unless otherwise prohibited by Commission rule. Entitlement to such damages, and the amount thereof, is a matter for the civil courts.[80]

Rocking M Issue #3. Whether a licensee, consistent with Section 310(d) of the Act, may obligate itself to broadcast a network's programming or incur substantial penalties for failure to do so?

Any programming agreement assessing excessive liquidated damages or excessive penalties for breach is inconsistent with Section 310(d) of the Act.[81] However, an otherwise enforceable agreement that provides for actual damages in the event of breach of contract is permissible unless otherwise prohibited by Commission rule. Entitlement to such damages, and the amount thereof, is a matter for the civil courts.

Rocking M Issue #4. Whether a program supplier with an ownership interest in a broadcast licensee may enter into a programming agreement with that licensee and, thereafter, enforce that agreement by seeking monetary damages against subsequent licensees who have assumed the agreement?

Section 73.1150(a) of the Rules bars an assignor or transferor – whether a program supplier or otherwise – from retaining any right to use the facilities of a station. To the extent that an agreement includes a term that vests an assignor or transferor with rights to use the facilities, *e.g.,* does not contain provisions whereby a licensee reasonably may reject program content, including commercial content, such term is void *ab initio*. The Commission will not give effect to such an agreement and may require that provisions thereof – or the entire agreement – be stricken.[82] A party, under Commission jurisdiction, that obtains a Court order requiring specific performance

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[77] *See*, *e.g., NASA*, 45 Comm. Reg. at 1256; *Citicasters*, 16 FCC Rcd at 3419-3420.

[78] *See Cumulus,* 21 FCC Rcd at 3005-3006.

[79] *See Twin States,* 42 FCC 2d at 1092 (striking a binding agreement for station to change to a progressive rock format within three years under certain conditions).

[80] The Commission has consistently held that it is not the proper forum for the resolution of private contractual disputes. *See John R. Runner, Receiver (KBIF)*, 36 R.R. 773, 778 (1976) and *Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622 (MMB 1992).

[81] *See* text accompanying n.19 *supra*.

[82] *See NABB,* 55 FCC 2d at 803.

of such an agreement against a subsequent licensee would be subject to enforcement action by the Commission.[83]

Rocking M Issue #5. Whether a licensee, pursuant to Section 310(d) of the Act must retain the absolute right to determine what programming should be aired on the station? Is a licensee which reasonably exercises this right free from substantial penalties arising from a breach in the programming agreement?

A provision in an agreement delegating to a third party the absolute right to determine station programming will not be approved by the Commission whether or not the agreement provides penalties for breach of such a provision. It is well established that licensees must retain "the flexibility to address the needs and interests of its local communities, to react to changing audience tastes and preferences, to respond to other competitors in the market, and to select its programming accordingly."[84] However, reasonable monetary damages relating to an otherwise enforceable agreement and subject to limitations imposed by Commission rule are permissible.

Decision/Action. We have granted the relief requested by Rocking M in its Request to the extent indicated herein. Rocking M has a complaint pending before the Enforcement Bureau concerning the Affiliation Agreements and SCI's attempted enforcement of same, which complaint, as noted *supra*, will be addressed separately by the Enforcement Bureau. Therefore, we have not addressed the potential rule violations, or the consequences thereof, herein, except to the extent necessary to be responsive to Rocking M's Request for a Declaratory Ruling.

Accordingly IT IS ORDERED that the Request for a Declaratory Ruling filed by Rocking M Radio, Inc. IS GRANTED TO THE EXTENT INDICATED HEREIN.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[83] Assignors and assignees into such agreements would also be subject to enforcement action to the extent that they falsely certified in their assignment applications that agreements related to the assignment complied "fully with the Commission's rules and policies." FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, Sect. I, Item 3; Sect II, Item 3.

[84] *See supra* n.16.