

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

In the Matter of	)	
	)	
KHNL/KGMB License Subsidiary, LLC	)	
	)	
Licensee of Stations KHNL(TV) and KGMB(TV), Honolulu, Hawaii	)	Fac. ID Nos. 34867 and 34445
	)	
And	)	
	)	
HITV License Subsidiary, Inc.	)	
	)	
Licensee of Station KFVE(TV), Honolulu, Hawaii	)	Fac. ID No. 36917
	)	NAL Acct. No. 201141410015
	)	FRN No. 0016152480

**MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: November 22, 2011**

**Released: November 25, 2011**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. The Commission, by the Chief, Media Bureau, pursuant to delegated authority, has before it an October 7, 2009, “Complaint and Request for Emergency Relief Regarding Shared Services Agreement Between Raycom Media and MCG Capital for Joint Operation of Television Stations KHNL, KFVE, and KGMB, Honolulu, Hawai’i” (Complaint) filed by Media Council Hawai’i (Media Council).<sup>1</sup> Raycom Media Inc. (Raycom), the ultimate parent of KHNL/KGMB License Subsidiary, LLC,<sup>2</sup> licensee of Stations KHNL(TV) and KGMB(TV), Honolulu, Hawaii, and HITV License Subsidiary, Inc. (HITV),<sup>3</sup> the licensee of Station KFVE(TV), Honolulu, Hawaii, filed separate responses on October 19, 2009. Media Council filed a supplement to the Complaint in the form of a written *ex parte* communication on May 10, 2010. On June 8, 2010, Raycom and HITV filed a joint response, to which Media Council filed a reply on June 30, 2010. At the request of staff, Raycom and HITV filed public and redacted versions of an *ex parte* letter on April 1, 2011, and further public and redacted *ex parte* responses on April 22, 2011,

<sup>1</sup> The complaint proceeding is “restricted” for *ex parte* purposes. See 47 C.F.R. §1.1202(d)(2) (proceeding “restricted” where the subjects of a complaint or request for order to show cause are served). The staff accorded the proceeding permit-but-disclose *ex parte* status on May 5, 2010. *Media Bureau Announces Permit-But-Disclose Ex Parte Status for Media Council Hawai’i’s Complaint and Request for Emergency Relief Regarding Shared Services Agreement Between Raycom Media and MCG Capital*, 25 FCC Rcd 4675 (MB 2010). Unity: Journalists of Color, Inc., The Democratic Party of Hawaii, Oahu County Committee, and the International Brotherhood of Electrical Workers (Local Union 1260) filed letters in support of the Complaint.

<sup>2</sup> Raycom changed the legal name of the above-captioned licensee from KHNL/KFVE License Subsidiary, LLC, to KHNL/KGMB License Subsidiary, LLC, to reflect the call-sign exchange discussed in further detail below.

<sup>3</sup> MCG Capital Corporation, through intervening subsidiaries, is the ultimate parent of HITV.

and June 23, 2011, respectively.<sup>4</sup> Media Council has filed responses to the April 1, 2011 and April 22, 2011 *ex parte* letters.

2. For the reasons set forth below, we grant the Complaint, to the extent set forth herein, and deny it in all other respects. Pursuant to section 503(b) of the Communications Act of 1934, as amended (Act), and section 1.80 of the Commission's rules,<sup>5</sup> this order constitutes a Notice of Apparent Liability for Forfeiture (NAL) in the amount of \$10,000 for HITV's willful and repeated violation of section 73.3526 of the Commission's rules as a result of its failure to properly maintain and provide access to its public inspection file for Station KFVE(TV).<sup>6</sup>

## II. BACKGROUND

3. On August 18, 2009, Raycom and HITV announced an agreement to exchange certain non-license assets. The transaction, which at the time remained unexecuted, consisted of an exchange of Raycom's MyNetwork TV affiliation agreement, and Raycom's right, title and interest in certain other contracts (including certain other programming agreements) related to the business and operation of its Station KFVE(TV), for HITV's CBS Network affiliation and certain other assets related to the operation of its Station KGMB(TV), including a portion of KGMB(TV)'s real property. At the same time that Raycom and HITV planned to exchange network and limited non-network programming for their respective stations, they also planned to exchange call signs, purportedly to avoid viewer confusion.<sup>7</sup> The parties executed the exchange, and related agreements, on October 26, 2009.<sup>8</sup> Consequently, Raycom now controls the licensee of Station KHNL(TV), the NBC affiliate, and Station KGMB(TV), the CBS affiliate, in the Honolulu market, while HITV is the licensee of station KFVE(TV), the MyNetworkTV affiliate. Raycom and HITV did not file an application to effectuate the exchange, asserting that there was no change in ownership or control of a broadcast television license and, thus, no need to acquire Commission approval.

4. In addition to the asset exchange, Raycom and HITV entered into a series of agreements that include a Term Loan Note, a Purchase Option Agreement, a Shared Services Agreement, and a Studio Lease. Raycom and HITV have revised certain terms of these latter three agreements, with the most recent revisions submitted on October 8, 2010. Under the Term Loan Note, Raycom agreed to pay \$22 million to HITV, the balance to come due on October 1, 2016, as consideration for the exchange. In the meantime, Raycom makes quarterly 5% interest payments (\$275,000) to HITV and, starting on May 15, 2011, will make annual principal payments at the rate of 60% of the excess cash flow (cash flow minus certain expenses) of the Raycom subsidiaries in Honolulu. Under the Purchase Option Agreement, Raycom also acquired the right to purchase the license of station KFVE(TV) in the future. Raycom assigned the Purchase Option Agreement to Ottumwa Media Holdings, LLC (Ottumwa) on October 16, 2009.<sup>9</sup>

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<sup>4</sup> On April 25, 2011, the Bureau released a Protective Order with respect to material contained in the April 1, 2011, letter and alleged by Raycom and HITV to be confidential in nature. *Media Council Hawai'i*, Protective Order, 26 FCC Rcd 6090 (MB 2011).

<sup>5</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

<sup>6</sup> 47 C.F.R. § 73.670.

<sup>7</sup> For ease of reference, we will refer to the stations' current call signs.

<sup>8</sup> The signatories of the agreements at issue in this case include various subsidiaries of Raycom and the parent and/or affiliates of HITV. For ease of reference, we will refer to Raycom and HITV as the sole signatories.

<sup>9</sup> Ottumwa is the licensee of KYOU-TV, Ottumwa, Iowa. Commission records indicate that it is a party to a Shared Services Agreement with Raycom Media, Inc. Ottumwa has since changed its name to American Spirit Media, LLC. We will continue to refer to Ottumwa as the relevant party for ease of reference and based on the specific language of the option assignment agreement.

5. Under the Shared Services Agreement, Raycom is to provide certain back-office support to HITV's station and to produce local newscasts for the station, not to exceed 15% of Station KFVE(TV)'s weekly programming hours. Raycom also leases certain of its employees to assist in the sale of advertising time on KFVE(TV). Under the revised Studio Lease, HITV is to decommission its current facilities and lease studio space and other facilities from Raycom.<sup>10</sup>

6. Raycom receives as payment for the services provided in the revised Shared Services Agreement a Flat Fee of \$208,333 per month.<sup>11</sup> When considering both a "performance fee" contained in the Shared Services Agreement and the Lease Fee, Raycom receives an additional 30% of cash flow. HITV retains the remaining 70% of monthly cash flow, out of which it pays the Flat Fee of \$208,333 to Raycom. If HITV's share of cash flow is insufficient to pay the Flat Fee, then Raycom receives all available monthly cash flow in excess of \$25,000, which HITV retains. Monthly shortfalls do not carry over.

7. In its May 10, 2010, supplement, Media Council asks the Commission to issue an order to show cause why Raycom's and HITV's licenses in the market should not be revoked.<sup>12</sup> Media Council argues that the original agreements, when considered together, exceeded what the Commission has previously accepted and indicate an unauthorized transfer of control of Station KFVE(TV) from HITV to Raycom in violation of Section 310(d) of the Communications Act of 1934 (the "Act"), as well as a violation the local television ownership "duopoly" rule due to its control over three television stations, including two top-four ranked stations in the market. According to Media Council, the terms of the original agreements demonstrate that, as a practical matter, "HITV [] sold its station to Raycom for \$22 million."<sup>13</sup> Media Council, in particular, challenges the payment provisions in the Shared Services Agreement and Studio Lease. Media Council states that while "Raycom and HITV have argued that no transfer has taken place because HITV retains the right to exercise editorial control, in fact, HITV has no incentive or ability to do so."<sup>14</sup>

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<sup>10</sup> In addition to leasing studio space from KGMB(TV), Commission records indicate that HITV's Station KFVE(TV) also operates using much of the same physical transmission facilities as KGMB(TV); the signals of the two stations are multiplexed and use the same transmission line, tower and antenna. See File Nos. BPCDT-20081209ADF and BMPCDT-20080317AGC.

<sup>11</sup> Under the original Shared Services Agreement, HITV paid a Services Fee calculated as 75% of monthly cash flow, defined as monthly revenue minus monthly reimbursed expenses, *so long as monthly cash flow exceeded \$29,761.43*. In addition, virtually all operating expenses of HITV, including expenses associated with HITV's own employees, were reimbursed by Raycom. Pursuant to the original Studio Lease, Raycom received 15% of HITV's monthly cash flow, regardless of total monthly cash flow. Consequently, under the payment terms of the Shared Services Agreement and Studio Lease, as originally drafted, Raycom received 90% of monthly cash flow, so long as HITV's monthly cash flow exceeded \$29,761.43. Moreover, under the payment provisions of the original Studio Lease, HITV would receive a monthly payment of \$20,833, regardless of the monthly cash flow, with Raycom making up the difference between the actual amount received under the terms of the Shared Services Agreement and Studio Lease and \$20,833. Under the terms of the original Purchase Option Agreement, annual cash flow in excess of \$250,000 reduced the total price upon sale. The parties removed this provision of the original Purchase Option Agreement.

<sup>12</sup> In the initial Complaint, Media Council requested an order directing Raycom and HITV to show cause why a cease and desist order should not be issued, and further requested, in the alternative, that the Commission issue a related "standstill order," that would enjoin Raycom and HITV from taking any further action pursuant to the agreements until after the Commission has held a hearing on the order to show cause request. In light of our action herein, Media Council's request for interim relief will be dismissed as moot. See, e.g., *Delaware County Cable Television Co. et al*, Memorandum Opinion and Order, 12 FCC 2d 529 (1968).

<sup>13</sup> Supplement to Complaint, at 1.

<sup>14</sup> *Id.*

8. In a November 8, 2010, *ex parte* filing, Media Council argues that, even if Raycom and HITV have revised certain terms of their agreements, “HITV still reaps little reward if the station succeeds.”<sup>15</sup> Media Council cites the \$208,333 Flat Fee and argues that “there is reason to believe that Raycom will be recovering the majority of [] profits.”<sup>16</sup> Media Council maintains that, in any case, there is nothing that would prohibit further revision of these agreements in the future. Media Council argues that the asset exchange, by permitting Raycom to hold the CBS and NBC affiliations in the Honolulu, Hawaii, Nielsen Designated Market Area (DMA), violates the duopoly rule since Raycom owns two of the top-four ranked stations in the DMA.

9. In its May 10, 2010, filing Media Council contends that the fact that HITV has only two employees, has no production facilities or studio, and has very limited resources to procure programming is further evidence that HITV has relinquished control over Station KFVE(TV). Media Council further maintains that, not only does Raycom provide HITV’s television station with prepackaged local news and assist with the production of other local programming, but it also leases employees to HITV to aid in the sale of advertising time on HITV’s station.

10. Media Council contends in the Complaint, as well as several subsequent filings, that the asset exchange has not served the public interest, because it has harmed diversity and competition in the Honolulu market, citing, in particular, a reduction in the number of independent news sources from four to three. Media Council also states that Raycom has inordinate control over news production in the market as a result of elimination of competition between the local NBC and CBS affiliates. According to Media Council, Raycom now controls 44% of the advertising market.<sup>17</sup> Finally, Media Council alleged in its original Complaint that Raycom failed to make its public inspection files available for inspection during normal business hours and that HITV’s public files were incomplete because they did not contain the Shared Services Agreement at issue in this case. Attached to the Media Council Complaint is a separate complaint filed by Larry Geller, an individual in the Honolulu market, raising similar public file allegations.

11. Raycom and HITV respond that the cooperative arrangements “arose from the necessity to create savings and cost efficiencies that would put each of the parties’ stations on a less precarious economic footing and thereby allow them to *sustain and improve* (not diminish) service to the community.”<sup>18</sup> They further state that the economic situation facing their respective stations was dire, as exemplified by the fact that “local television station revenues had dropped nearly one-third in three years; the local Fox network affiliate had gone through Chapter 11 bankruptcy and reorganization; and the stations involved in the sharing arrangement had suffered millions of dollars in diminished cash flow in recent years.”<sup>19</sup> Despite these assertions, Raycom and HITV have not provided a specific showing of financial distress with respect to either station involved in the exchange. According to Raycom and HITV, the agreements are working as designed, permitting HITV to air newscasts produced and supplied

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<sup>15</sup> November 8, 2010, Response of Media Council, at 8.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> In a related argument, Media Council maintains that the arrangement violates the Commission’s cross-interest policy, which the Commission eliminated in 1999. *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559, 12609 (1999) (*1999 Attribution Order*). In the *1999 Attribution Order*, the Commission stated that the “regulatory costs and chilling effects of the cross-interest policy and the benefits of applying a clear and discernable standard outweigh any risks of potential abuses in eliminating the [cross-interest] policy.” *Id.* at 12610. We will not revisit this conclusion within the context of the instant complaint proceeding.

<sup>18</sup> Raycom and HITV Joint Response to Supplement, at 9 (emphasis in original).

<sup>19</sup> *Id.* at 9-10.

specifically for broadcast on Station KFVE(TV) without simulcast or repetition on Raycom's television stations. Raycom and HITV also cite the quality of the Raycom news programming and list a number of local interest programs aired on HITV's Station KFVE(TV). Raycom and HITV assert that HITV and its parents have the necessary personnel and experience to implement decisions on a variety of matters governing HITV's programming, personnel, and finances.

12. Raycom and HITV further contend that, despite delegation of certain back-office functions, HITV retains control over Station KFVE(TV)'s policies governing programming, personnel, and finances and, thus, the asset exchange and related agreements have not resulted in an unauthorized transfer of control. With respect to programming, Raycom and HITV cite Section 1(b)(iii) of the Shared Services Agreement, which provides that HITV "shall be solely responsible for the selection, procurement and scheduling of programming to be aired on" its station as well as the fact that the news programming produced by Raycom constitutes no more than 15% of Station KFVE(TV)'s weekly programming.<sup>20</sup> They also maintain that the Shared Services Agreement permits HITV to reject any news programming offered by Raycom. With respect to personnel, Raycom and HITV argue that HITV employs its own General Manager and General Sales Manager, who report only to HITV. In addition, according to Raycom and HITV, the General Sales Manager supervises the four additional staff members made available to HITV under the leased employee relationship. These employees report directly and solely to HITV and have, according to Raycom and HITV, no responsibilities to any station other than HITV's KFVE(TV).

13. Raycom and HITV further argue that the duopoly rule does not bar a licensee of a compliant TV duopoly from changing the programming of one or both of its stations if that change might result in the co-owned stations becoming top-four ranked.<sup>21</sup> As support, Raycom and HITV cite language in the *1999 Ownership Order* stating that the Commission will not require an owner to divest after acquiring a duopoly if both of the stations are subsequently ranked in the top-four in the market.<sup>22</sup> They also maintain that well-established precedent prohibits the Commission from intervening in the exercise of discretion by licensees to change programming or formats.

### III. DISCUSSION

14. As discussed below, we conclude that the instant transactions did not violate Section 310 of the Act, because Raycom has not acquired control of a new license under applicable Commission and staff precedent. We also conclude that the exchange of network affiliations and other assets did not violate the duopoly rule, notwithstanding that at the time of execution of the agreements, it gave Raycom control over two of the top four stations in the Honolulu, HI market. Under the duopoly rule, one party may "own ... two television stations licensed in the same Designated Market Area (DMA) ... only [if] at the time of application to acquire ... the station, at least one of the stations is not ranked among the top four stations in the DMA..."<sup>23</sup> Because no application was involved in these transactions, and none was required, the applicability of the duopoly rule to these circumstances is problematic and finding a violation of that rule in this case would be similarly problematic. As we discuss below, however, we do

<sup>20</sup> Shared Services Agreement, Section 1(b)(iii).

<sup>21</sup> Raycom and HITV Joint Response to Supplement, at 32.

<sup>22</sup> *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Red 12903, 12933 (1999), *subseq. hist. omit.* (1999 *Ownership Order*).

<sup>23</sup> The duopoly rule provides: "An entity may directly or indirectly own, operate, or control two television stations licensed in the same [Nielsen DMA] only under one or more of the following conditions: (1) [t]he Grade B contours of the stations...do not overlap; or (i) [a]t the time of application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA...; (ii) and [a]t least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA..." 47 C.F.R § 73.3555(b)(1).

believe that further action on our part is warranted with respect to this and analogous cases. And, as noted below, our decision here does not preclude us from considering in the context of licensing proceedings whether the actions taken by the licensees in this case, or analogous actions by other licensees, are consistent with the public interest.

15. Section 310(d) of the Act prohibits the transfer of control of a station license, or any rights thereunder, without prior Commission consent.<sup>24</sup> Because, as discussed in further detail below, we find no unauthorized transfer of control, Raycom and HITV were not obligated to file an assignment application to effectuate the exchange.<sup>25</sup> In the absence of an application or a rule violation, we will not evaluate the impact of the instant agreements on competition and diversity in the Honolulu market. However, consideration of the impact such agreements have on competition and diversity may be relevant in determining whether license renewal for one or either of the stations that are the subject of the transaction would be consistent with the public interest, a finding required under Section 309(k)(1)(A) of the Act.<sup>26</sup> As noted above, our decision here is not intended to prejudice this issue within the context of a license renewal proceeding. We find that the Shared Services Agreement and related cooperative agreements are consistent with existing rules and precedent.

16. *De Facto Control.* In determining whether an unauthorized transfer of control has occurred, the Commission looks to any acts or agreements vesting in a “new” entity the right to determine basic policies concerning the operation of the station.<sup>27</sup> The Commission’s analysis “transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented,” and must be determined on a case-by-case basis.<sup>28</sup> However, the focus of any Commission inquiry with respect to the locus of control of a station’s operations focuses on programming, personnel, and finances.<sup>29</sup>

17. We find that the Shared Services Agreement, Studio Lease, and Purchase Option do not create an unauthorized transfer of control under relevant precedent. First, with regard to programming, the terms of the relevant agreements are consistent with Commission precedent. Section 1(a) of the Shared Services Agreement states that “neither Party shall have any right to control the policies, operations, management or any other matters relating to the Station owned and operated by the other Party,”<sup>30</sup> and, as noted above, Section 1(b)(iii) of the Shared Services Agreement also states that HITV shall control the programming aired on Station KFVE(TV).

18. Instead, based on a review of the entire record in this case, in particular Raycom’s April 1, 2011, *ex parte* letter, we agree that HITV does, in fact, exercise programming control over Station KFVE(TV). The Hawai’i News Network programming, which is produced jointly by Raycom and HITV,

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<sup>24</sup> 47 U.S.C. § 310(d).

<sup>25</sup> Parties seeking to exchange call signs need not file an application. 47 C.F.R. § 73.3550 (a). Rather, two licensees can exchange call signs within the same service via the FCC’s on-line call sign reservation and authorization system, which requires only certification that both licensees consent to the exchange. *Id.*

<sup>26</sup> 47 U.S.C. § 309(k)(1)(A).

<sup>27</sup> See *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856 (1969), *aff’d sub nom.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, *cert. denied*, 403 U.S. 923 (1971).

<sup>28</sup> *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8452, 8514, (1995).

<sup>29</sup> *Stereo Broadcasters, Inc.*, Memorandum Opinion and Order, 55 FCC 2d 87 (1981).

<sup>30</sup> Shared Services Agreement, 1(a). See *SagamoreHill of Corpus Christi Licenses, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 2809, 2813 (MB 2010) (referring to provision in Shared Services Agreement that provided licensee with ultimate control over programming decisions and policies); *Nexstar Broadcasting, Inc.*, Letter, 23 FCC Rcd 3528, 3533 (Vid. Div. 2008) (noting that Joint Sales Agreement and Shared Services Agreement both contained language indicating that the licensee will maintain control over Station KFTA-TV).

constitutes only 6.5% of total weekly programming aired on Station KFVE(TV).<sup>31</sup> Station KFVE(TV)'s General Manager writes and delivers two editorials that are aired four times weekly.<sup>32</sup> Most of Station KFVE(TV)'s programming is provided through the station's affiliation agreement with MyNetworkTV. Consistent with programming control, Station KFVE(TV) has exercised its right to reject network programming approximately twice a week.<sup>33</sup> In contrast to what one would expect if Raycom were controlling the station, Station KFVE(TV)'s General Manager must make weekly programming reports to HITV's corporate headquarters in Arlington, Virginia.<sup>34</sup> The General Manager has also made separate bids for syndicated programming; schedules the programming for the station; has recently concluded negotiations with a local producer for two weekly local interest programs; and is negotiating with this same producer for additional programming.<sup>35</sup>

19. To determine that HITV retains financial control over Station KFVE(TV), we must, as with the other indicia mentioned above, find that HITV retains the right to determine the basic policies governing the station's financial operations. Payment for services rendered in cooperative agreements may factor into a case-by-case determination of financial control.<sup>36</sup> The Commission stated in the *2002 Ackerley Order* that a licensee must retain the economic incentive to control programming aired over its station.<sup>37</sup> We conclude, based on the entire record before us, that the payment terms operate in a manner that aligns the profits arising from operation of the station with HITV's ownership and, thus, HITV has had sufficient economic incentive to control programming aired on Station KFVE(TV), both prior to and after the October 2010 revisions. This case is unique in that the staff has reviewed both the specific language of the various agreements, along with financial data indicating how the various payment terms have operated since Raycom and HITV first executed the agreements on October 26, 2009.<sup>38</sup> According to the terms of the revised agreements, HITV retains 70% of cash flow resulting from operation of the station, a split the staff has previously approved.<sup>39</sup> While Media Council challenges the amount of the Flat Fee, we have approved previous relationships where a flat fee for services rendered, as part of a shared services agreement, was combined with a split of advertising revenue.<sup>40</sup> Our examination of the

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<sup>31</sup> Raycom and HITV April 1, 2011, *Ex Parte* Letter, Annex A, at 3.

<sup>32</sup> *Id.* at 2.

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

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *Id.* at 1-4.

<sup>36</sup> *See infra* notes 39 and 40.

<sup>37</sup> *Ackerley Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10841 (2002) (*2002 Ackerley Order*) (finding that a series of agreements, including a Joint Sales Agreement, in combination with a Local Marketing Agreement, resulted in attribution because it did not provide the licensee with the "economic incentive" to control the programming provided by the broker.)

<sup>38</sup> The financial data is subject to a Protective Order released April 25, 2011. *Media Council Hawai'i*, 26 FCC Rcd 6090 (MB 2011).

<sup>39</sup> *See SagamoreHill Of Corpus Christi Licenses, LLC*, 24 FCC Rcd at 2810 ("In exchange for its sales representation, Evening Post will retain the lesser of the revenues it collects minus a set Base Rate, or 30% of all revenues."); *Nexstar Broadcasting, Inc.*, 23 FCC Rcd at 3534 (licensee receives "70% of all revenue attributable to commercial advertisements."); *Malara Broadcast Group of Duluth Licensee*, 19 FCC Record 24070 (Vid. Div. 2004) (Schedule 2.8 of Advertising Representation Agreement provides that broker shall be entitled to 30% of revenue from sale of advertising.)

<sup>40</sup> In the contracts at issue in *Malara Broadcast Group of Duluth Licensee*, the revenue split included an additional monthly flat fee of \$150,000 payable in arrears. Similar to the instant case, the fee for services provided would only be payable after the licensee had paid its "priority obligations" and "priority capital expenditures." *Malara Broadcast Group of Duluth Licensee*, 19 FCC Record at 24076. The staff found that the "benefits of such a

financial data provided jointly by Raycom and HITV on April 1, 2011 confirms that the payment terms actually operate to provide HITV with an economic incentive to control its programming, despite the Flat Fee. Thus, we find no abdication of financial control as a result of either the payment structure contained in the Shared Services Agreement and Studio Lease, or the overall relationship between Raycom and HITV.

20. With respect to personnel, HITV will have at least one managerial and one non-managerial employee, thus maintaining a “meaningful staff presence” as required by the main studio rule.<sup>41</sup> The Commission has long permitted brokers to place employees at brokered stations, as long as the licensee complies with its obligation to retain ultimate control of station operations and to comply with the minimum staffing requirements set forth in the main studio rule.<sup>42</sup> Section 1(b)(ii) of the Shared Services Agreement provides that HITV will “direct and control the employees performing services [] relating to the sale of television advertising.”<sup>43</sup> Moreover, HITV and Raycom indicate that these “leased” employees have no responsibilities other than the sale of KFVE(TV)’s station’s advertising time. While there is a permissible sharing of personnel with regards to the production of news programming, HITV, as set forth above, retains the right to supervise and oversee the production of the news programming to be aired on station KFVE(TV), and the discretion to reject such programming.<sup>44</sup> HITV, moreover, states that it “has both invested in and exercised editorial control” over station KFVE(TV).<sup>45</sup> Having reviewed the agreements, as revised, and the entire record before us, we find that HITV has not relinquished control over Station KFVE(TV).

21. *Duopoly Rule.* Media Council maintains that, regardless of whether Raycom has acquired *de facto* control over Station KFVE(TV) as a result of its various agreements, it now controls two of the top four stations in the Honolulu DMA, thus placing it in violation of the duopoly rule’s “top four” restriction. As noted above, however, we conclude that finding a violation of the duopoly rule in the circumstances of this case is problematic.<sup>46</sup>

22. When the Commission adopted the current duopoly rule in 1999, it intended to preclude a top-four ranked station from acquiring a second top-four ranked station or any entity from acquiring two top-four ranked stations outright. On the other hand, it also intended to relax the then-absolute prohibition on television duopolies. The Commission sought to balance its competing goals by permitting a top-four ranked licensee to acquire a second, lower-ranked station or to buy such a combination, where the “eight-voice” restriction was met, and to retain the combination even if the lower-ranked station eventually became top-four ranked. It is clear that the Commission was attempting to assist “weaker”

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provision would seem to flow to” the licensee. *Id.* In any case, the staff found that it did not indicate control on the part of the broker. *Id.*

<sup>41</sup> See *Jones Eastern of Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), *clarified*, 7 FCC Rcd 6800 (1992), *aff’d*, 10 FCC Rcd 3759 (1995).

<sup>42</sup> *Nexstar Broadcasting, Inc.*, 23 FCC Rcd at 3534; *Hispanic Broadcasting Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 18834, 18848 n. 74 (2003); *Shareholders of the Ackerley Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10842 (2002); *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8143 (1995); *Main Studio and Program Origination Rules (Clarification)*, Memorandum Opinion and Order, 3 FCC Rcd 5024 (1998), *recon. denied in part and granted in part*, 7 FCC Rcd 6800 (1992).

<sup>43</sup> Shared Services Agreement, 1(b)(ii).

<sup>44</sup> Shared Services Agreement, 1(b)(iii).

<sup>45</sup> Raycom and HITV Joint Response to Supplement, at 14.

<sup>46</sup> *1999 Ownership Order*, 14 FCC Rcd at 12933. Section 73.3613 of the Commission’s rules requires that a licensee file network affiliation agreements with the Commission and notify the Commission when such agreements are terminated, but a licensee need not acquire Commission consent to change network affiliation. 44 C.F.R. § 73.3613(a)(1) and (3).



stations, while avoiding the adverse effects on diversity and competition that combinations of already strong, top-four ranked stations could produce. As the Commission stated in the *1999 Ownership Order*:

This standard provides measured relaxation of the television duopoly rule, particularly in the larger television markets. It will allow weaker television stations in the market to combine, either with each other or with a larger station, thereby preserving and strengthening these stations and improving their ability to compete. These station combinations will allow licensees to take advantage of efficiencies and cost savings that can benefit the public, such as allowing the stations to provide more local programming. At the same time, the station rank and voice criteria are designed to protect both our core competition and diversity concerns.<sup>47</sup>

23. Because the local television ownership rule specifically refers to “at the time of application,” however, the applicability of the top-four prohibition in the case presented here, where no application was required, is unclear.<sup>48</sup> Nonetheless, we agree with Media Council insofar as it suggests that the net effect of the transactions in this case – an extensive exchange of critical programming and branding assets with an existing in-market, top-four, network affiliate – is clearly at odds with the purpose and intent of the duopoly rule. For this reason, we will include in the ongoing 2010 quadrennial review proceeding the duopoly rule issues that this and similar cases raise.<sup>49</sup> Moreover, as we have noted, our decision here does not preclude us from considering whether this or similar transactions are consistent with the public interest within the context of individual licensing proceedings.

24. *Public File Allegations.* On April 22, 2011, HITV filed an *ex parte* letter in which it acknowledged that the issues/programs lists for the fourth quarter of 2008 and the first two quarters of 2009 were not in Station KFVE(TV)’s public files. HITV has reconstructed the files from station records. As discussed above, Media Council and Mr. Geller further allege in the original Complaint that Raycom and HITV failed to make their respective stations’ public files available for inspection during normal business hours. Raycom and HITV state that the delay in access to the Station KFVE(TV)’s and Station KGMB(TV)’s files was due to the fact that “the manager responsible for the security key needed to access the file cabinets where the files are stored was temporarily out of the office that morning and unreachable.”<sup>50</sup> They state that the individuals who had earlier attempted to view of the files’ contents were then contacted and told the public inspection files were available for review. Raycom and HITV

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<sup>47</sup> *1999 Ownership Order*, 14 FCC Rcd at 12933.

<sup>48</sup> No outright transfer or assignment of a license has occurred and, therefore, no application was required. As the Commission stated in the *1999 Ownership Order*, however, a non-compliant duopoly may not be transferred to a new owner. *Id.* Thus, Raycom’s ownership of stations KHNL(TV) and KGMB(TV) will need to comply with the “top four” restriction upon assignment or transfer to a new owner.

<sup>49</sup> See *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511(1983) (“rulemaking is generally better, fairer, and more effective method of implementing a new industry wide policy than uneven application of conditions in isolated [adjudicatory] proceedings.”); *Great Empire Broadcasting, Inc. and Journal Broadcast Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11145, 1148 (1999); *Stockholders of Renaissance Communications Corp. and Tribune Co.*, Memorandum Opinion & Order, 12 FCC Rcd. 11866, 11887-88 (1997). On February 8, 2011, Media Council filed a pleading notifying the Commission of a recent study and law article asserting the “concrete harms” of shared services agreements with respect to the quality and quantity of local news, with particular reference to the Honolulu market. The study referencing news production in the Honolulu market has been filed as part of the 2010 Quadrennial Review.

<sup>50</sup> Response to “Complaint and Request for Emergency Relief Regarding Shared Services Agreement,” at 4-5 Note 10.

also state that they have taken steps to improve access to public files, including ensuring that multiple employees have the necessary security key.

25. Section 73.3526 of the Commission's rules lists the kinds of materials that must be kept in a station's public files and requires that these materials be made available for public inspection during normal business hours.<sup>51</sup> The purpose of this requirement is to provide the public with timely information at regular intervals throughout the license period. Where lapses occur in maintaining the public inspection file, neither the negligent acts nor omissions of employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation.<sup>52</sup>

26. Section 503(b) of the Act and Section 1.80(a) of the Commission's rules state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the Commission's rules shall be liable for a forfeiture penalty.<sup>53</sup> For purposes of Section 503 of the Act, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules.<sup>54</sup> A continuing violation is "repeated" if it last more than one day.<sup>55</sup> The Commission has broad discretion to consider a variety of factors to determine the appropriate sanction for violation of its rules.<sup>56</sup>

27. The Note to Section 1.80(b)(4) of the Commission's rules sets a base forfeiture amount of \$10,000 for Public File Rule violations.<sup>57</sup> In the past, the staff has reduced the base forfeiture to \$3,000 for failure to include three issues/programs lists, in those instances where the licensee disclosed and rectified the violation.<sup>58</sup> HITV failed to disclose the absence of the issues/programs lists in its license renewal application, but it disclosed and rectified the violation as part of the instant complaint proceeding. Both Raycom and HITV, while acknowledging the failure to provide adequate access to their public inspection files, have implemented procedures to prevent similar instances in the future. Considering the record as a whole, we find HITV apparently liable for the base forfeiture of \$10,000 for the failure to include three issues/programs lists and to provide adequate access to its station's public inspection files. Based on the record before us, we do not find that Raycom failed to include issues/programs lists in its public inspection file, as the three instances cited by HITV occurred before the instant transaction. With respect to the failure to provide timely access to the Raycom station's public inspection files, we find a separate admonishment to be appropriate.<sup>59</sup> We do not rule out more severe sanctions should further

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<sup>51</sup> 47 C.F.R. § 73.3526(c) and (e).

<sup>52</sup> See *Padre Serra Communications, Inc.*, 14 FCC Rcd 9709 (1999).

<sup>53</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a).

<sup>54</sup> See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387-4388 (1991).

<sup>55</sup> *Id.* at 4388.

<sup>56</sup> See 47 U.S.C. § 504(b) (authorizing the Commission to remit or mitigate forfeitures imposed "under such regulations and methods of ascertaining the facts as may seem to it advisable"); 47 C.F.R. § 1.80 (setting forth factors that the Commission must consider in determining what amount of forfeiture to impose).

<sup>57</sup> 47 C.F.R. § 1.80(b)(4), Note.

<sup>58</sup> *Sudbury Services, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 1902, 1904 (Aud. Div. 2011). See also, *Mel Wheeler, Inc.*, Letter, 18 FCC Rcd 20215, 20216 (MB 2003); *Mel Wheeler, Inc.*, Letter, 18 FCC Rcd. 20211, 20212 (MB 2003).

<sup>59</sup> *Tabback Broadcasting Company*, Memorandum Opinion and Order, 15 FCC Rcd 11899, 11900 (2000) (licensee admonished for refusal to permit unrestricted access to public files on two occasions and for failure to include annual ownership reports).

violations of the Public File Rule come to light.<sup>60</sup>

#### IV. ORDERING CLAUSES

28. Accordingly, **IT IS ORDERED**, That the Complaint and Request for Emergency Relief Regarding Shared Services Agreement Between Raycom Media and MCG Capital for Joint Operation of Television Stations KHNL, KFVE, and KGMB, Honolulu, Hawai'i filed by Media Council Hawai'i **IS GRANTED**, to the extent set forth herein, and **DENIED** in all other respects.

29. **IT IS FURTHER ORDERED** That the request for interim relief pending action on the Complaint **IS DISMISSED** as moot.

30. **IT IS FURTHER ORDERED** That, pursuant to Section 503(b) of the Act and Section 1.80 of the Commission's Rules, HITV License Subsidiary, Inc., is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for failure to include issues/programs lists in Station KFVE(TV)'s public inspection files during three quarters, and for failure to provide unrestricted access to Station KFVE(TV)'s public inspection files, both in willful and repeated violation of Section 73.3526 of the Commission's rules

31. **IT IS FURTHER ORDERED** That KHNL/KGMB License Subsidiary, LLC is **ADMONISHED** for failure to provide unrestricted access to then-Station KFVE(TV)'s public inspection files, in willful and repeated violation of Section 73.3526 of the Commission's rules.<sup>61</sup>

32. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's Rules, that within thirty (30) days of the release date of this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, HITV License Subsidiary, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Commission's rules.<sup>62</sup>

33. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. HITV License Subsidiary, Inc. will also send electronic notification on the date said payment is made to David.Brown@fcc.gov.

<sup>60</sup> We find no violation with respect to Raycom's or HITV's failure to place a copy of the Shared Services Agreement in either station's public inspection file, as alleged by Media Council and Mr. Geller.

<sup>61</sup> See 47 U.S.C. § 503(b); 47 C.F.R. §§ 1.80, 73.3526.

<sup>62</sup> 47 C.F.R. §§ 1.80(f)(3); 1.16.

34. The response, if any, shall be mailed to Barbara A. Kreisman, Chief, Video Division, Media Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W, Room 2-A666, Washington D.C. 20554, and **SHALL INCLUDE** the NAL/Acct. No. referenced above. The licensee shall also, to the extent practicable, transmit a copy of the response via email to David.Brown@fcc.gov.

35. The Commission shall not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

36. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to John S. Logan, Esquire, Attorney for HITV License Subsidiary, Inc., Dow Lohnes PLLC, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, D.C. 20036, and to Jonathan D. Blake, Esquire, Attorney for Raycom Media, Inc., Covington & Burling LLP, 1201 Pennsylvania Avenue N.W., Washington, D.C. 20004.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau