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

In the Matter of	)	
	)	
Ketchikan TV, LLC	)	File Nos. BALCDT-20131209XYP &
(assignor)	)	BALCDT-20131209XYQ
	)	Facility ID Nos. 60520 & 60519
and	)	
	)	
Denali Media Juneau, Corp.	)	
(assignee)	)	
	)	
For Consent to Assign the Licenses of Station	)	
KUBD(TV), Ketchikan, Alaska; and Station	)	
KTNL-TV, Sitka, Alaska	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 2014 **Released: May 15, 2014**

By the Chief, Video Division, Media Bureau:

1. By this Memorandum Opinion and Order, the Commission, by the Chief, Video Division, Media Bureau, pursuant to delegated authority, grants consent to the assignment of the licenses of stations KUBD(TV), Ketchikan, Alaska and KTNL-TV, Sitka, Alaska, to Denali Media Juneau, Corp. ("Denali"), from Ketchikan TV, LLC ("Ketchikan TV"), and denies a Petition to Deny ("Petition") filed by the City of Ketchikan, Alaska, d/b/a Ketchikan Public Utilities ("KPU") opposing the assignment application of KUBD(TV) ("KUBD").[1] Specifically, the Petition requests that the Commission impose conditions on any grant of the application.[2]

I. BACKGROUND

2. KPU is one of two cable television system providers in Ketchikan, Alaska. The other cable provider in Ketchikan is General Communications, Inc. ("GCI"), the parent company of the proposed

[1] While we take action on the above captioned applications simultaneously, we note that the assignment application for KTNL-TV was unopposed and not the subject of the Petition discussed herein. Furthermore, we find that common ownership of KTNL-TV and KUBD complies with the Commission's local television ownership rule, as proposed in the recently released *2010 Quadrennial Review Order*. *See 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking and Report and Order, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, FCC 14-22, ¶ 28 (rel. April 15, 2014)(proposing to replace, for purposes of the local television ownership rule, the Grade B contour with the digital noise-limited contour); *see also Riverside Media*, Letter, 26 FCC Rcd 16038, 16060, n. 2 (2011) (determining that the Commission will treat the digital noise-limited contour as the "functional equivalent" of Grade B contours for purposes of the local television ownership rule) (citations omitted).

[2] Petition at 11.

licensee of KUBD. KPU argues that Ketchikan is a "unique market" where "[o]ver-the-air reception of local broadcast stations is virtually non-existent, and consequently cable penetration is over 90 percent."[3] According to KPU, KUBD is the only major network affiliate entitled to full must-carry/retransmission consent/network non-duplication protection in Ketchikan and thus its exclusive source of CBS broadcast networking programming.[4] KPU contends that granting KUBD's assignment application to Denali would result in KUBD ultimately being owned and controlled by KPU's "far larger cable competitor GCI."[5] According to KPU, this assignment would allow GCI to foreclose KPU's access to KUBD or unreasonably raise KPU's cost of access to KUBD. Even if Denali charged GCI the same "excessively high retransmission consent fee," KPU contends that GCI would be able to "absorb the higher retransmission fee while also shifting GCI's higher retransmission consent fee cost from one corporate pocket (GCI) to the revenue pocket of another GCI affiliate (D[enali])."[6]

3. KPU asserts that the anticompetitive risks set forth in its Petition are not speculative because at the end of 2014 KUBD's must carry election expires and GCI will be able to foreclose or inhibit KPU's access to KUBD by having Denali elect retransmission consent.[7] In order to prevent such a result, KPU requests the Commission either: (1) impose "baseball-style arbitration" requirements with respect to KPU's access to KUBD programming as the Commission did in the *Comcast-NBCU Order*; or (2) require that Denali make KUBD's programming available to KPU at "the same price and the same term as and conditions, as [Denali] makes KUBD's signal and programming available to GCI."[8] KPU contends that the instant transaction "presents the same kind of MVPD rival exclusionary conduct risk as the ones identified in the *Comcast-NBCU Order*."[9]

4. In a Joint Opposition filed on January 27, 2014, Denali and GCI contend that the proposed transaction will serve the public interest by upgrading broadcast facilities and building synergies between KUBD and GCI's other broadcast stations, which will include expanded news coverage throughout Alaska.[10] They maintain that KPU fails to identify any violation of Commission rules or policies and that KPU's request is based solely on speculation meant to advance its own "self-interest" with regards to retransmission consent policy.[11] In addition, the Joint Opposition contends that KPU's comparison of the

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[3] Petition at 2.

[4] *Id.* at 4-5.

[5] *Id.* KPU is a municipally-owned utility that began providing cable service in mid-2006 and has an annual revenue of about $14 million. In contrast, according to KPU, GCI passes approximately 90% of Alaska households with a penetration rate over 60%. GCI is a publicly traded company with annual revenues of approximately $800 million. *Id.* at 4.

[6] *Id.* at 6-7.

[7] *Id.* at 6.

[8] *Id.* at 7.

[9] *Id*. (citing *Applications of Comcast Corp., General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) ("*Comcast-NBCU Order*")).

[10] Joint Opposition at 2-3.

[11] *Id.* at 3-8.

instant transaction to that of the *Comcast-NBCU* merger "has no relevance" and is based on a "mistaken premise that it is inappropriate for an MVPD to own a broadcast station in the same market."[12]

5. On February 3, 2014, KPU filed a Reply reiterating its belief that approval of the transaction would result in competitive harms and dismisses the Joint Opposition's contention that its claims are speculative.[13] KPU contends that the risk of vertical foreclosure by GCI due to vertical integration is not solely a private harm, but a public harm that would result in decreased competition and higher prices for the residents of Ketchikan.[14] Regardless of whether Denali or GCI are able to identify specific rules or precedent that the transaction would violate, Section 310(d) prohibits the assignment of a license absent a finding that "the public interest, convenience and necessity will be served" by the grant.[15] KPU also reaffirms its comparison of the instant transaction and the need for conditions to the *Comcast-NBCU Order* and the conditions imposed in that proceeding by the Commission. KPU contends that its concerns are not general claims more appropriate for a rulemaking proceeding, but concerns that are specific to the Ketchikan market.[16]

II. DISCUSSION

6. The Commission applies a two-step analysis when evaluating a petition to deny under the public interest standard.[17] First, the Commission must determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.[18] Once a petition meets this first step, the Commission must determine "whether the totality of the evidence raises a substantial and material question of fact justifying further inquiry."[19] If no such question is raised, the Commission will deny the petition and grant the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity.[20]

7. The Petition fails to meet this statutory burden. Based on a review of the totality of the evidence before us, we conclude that KPU has failed to raise a substantial and material question of fact justifying further inquiry within the context of this adjudicatory proceeding. Although KPU has set forth scenarios in which it may be prevented from securing access to KUBD, KPU has failed to provide specific evidence that these scenarios are not, in fact, speculative, or more than hypothetical. KPU's arguments hinge not only on the unique nature of the Ketchikan market, but on the theory that KUBD will elect retransmission consent over must-carry when its current must carry election expires on

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[12] *Id.* at 9-10.

[13] Reply at 2-4 and 5-6.

[14] *Id.* at 5.

[15] *Id.* at 4-5. In furtherance of this point KPU points that despite the repeal of the cable/broadcast cross ownership rule does not mandate that the Commission "unconditionally approve" such transactions. *Id.* at 9.

[16] *Id.* at 7-9.

[17] 47 U.S.C. §309(d)(1); *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

[18] 47 U.S.C. §§309(d)(1) and 310(d).

[19] *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985); 47 U.S.C. §309(e).

[20] 47 U.S.C. §§ 309(d)(2) and 310(d).

December 31, 2014. This is a decision that has yet to occur, is well within the rights of KUBD,[21] and as discussed below is a process governed by regulations.[22]

8. Nonetheless, we remind Denali and GCI that "our public interest mandate encompasses giving careful attention to the economic effects of, and incentives created by, a proposed transaction taken as a whole…."[23] We will continue to closely scrutinize transactions that create economic incentives that are inconsistent with the Act and our policies that favor competition, diversity and localism. We agree with KPU that harms arising from vertical foreclosure may not merely be private harms; they may also be public harms. Accordingly, should specific evidence become available we maintain the right to examine competitive conduct and economic effects within the context of future adjudicatory proceedings, such as a license renewal proceeding.[24]

9. We also find the public interest concerns addressed in the *Comcast-NBCU Order* to be distinguishable from those presented in the instant transaction. In the *Comcast-NBCU Order*, the Commission stated that the merger proposed "in a single joint venture . . . the broadcast, cable programming, online content, movie studio, and other businesses of NBCU with some of Comcast's cable programming and online content businesses."[25] That proposed merger included common ownership of two broadcast networks, 26 television stations, and NBCU's cable programming, which included CNBC, MSNBC, Bravo and USA Network. The scope of holdings involved in the merger was "an unprecedented aggregation of video programming content" that provided Comcast-NBCU with "control over the means by which video programming is distributed to American viewers offline and, increasingly, online as well."[26]

10. In contrast, we find that KPU's concerns of vertical foreclosure are not on par with the market foreclosure concerns addressed by the *Comcast-NBCU Order*. First, the extent of vertical integration that occurred as a result of the merger between Comcast and NBCU was exponentially greater than what is proposed here. Second the Commission's rules require that cable operators and broadcasters negotiate retransmission consent in good faith and provides protections in the event that one party believes such duty is breached.[27] We believe in this instance that the Commission's current rules are sufficient to provide KPU the appropriate protections. As we have stated in response to similar requests, the appropriate place to address such generalized policy concerns and speculative harms involving the

[21] See 47 C.F.R. § 76.64.

[22] *See supra* ¶ 10 (discussing the Commission's rules governing retransmission consent).

[23] *Shareholders of Belo Corp.,* Memorandum Opinion and Order, 28 FCC Rcd 16867, 16879 (MB 2013).

[24] In order to grant a license renewal the Commission must find that during the preceding license term a station has served the public interest, convenience, and necessity. 47 U.S.C. §309(k)(1)(A). Absent such a finding the Commission may "deny the application for renewal…or grant such application on terms and conditions as are appropriate…." 47 U.S.C. § 309(k)(2).

[25] *Comcast-NBCU Order* at 4240.

[26] *Id.*

[27] 47 C.F.R. § 76.65 (requiring broadcasters and multichannel video programming distributors to negotiate retransmission consent in good faith and establishing a complaint process for breach of that duty).

retransmission consent process is not an adjudicatory proceeding like the one before us.[28] Furthermore, if KPU believes that changes in the video marketplace justify reviving the Commission's vacated cable-broadcast cross-ownership rule, the appropriate place to seek such a change would be an industrywide proceeding.[29]

11. Having reviewed the application, pleadings, and other facts before us, we conclude that, not only will grant of the applications comply with Commission rules, but that grant will serve the public interest, convenience, and necessity.

III. ORDERING CLAUSES

12. **ACCORDINGLY, IT IS ORDERED**, that the Petition to Deny filed by the City of Ketchikan, Alaska, d/b/a Ketchikan Public Utilities **IS DENIED**.

13. **IT IS FURTHER ORDERED**, that the above-captioned applications to assign the licenses of Stations KUBD(TV), Ketchikan, Alaska, and KTNL-TV, Sitka, Alaska, to Denali Media Juneau, Corp., from Ketchikan TV, LLC, **ARE GRANTED**.

14. These actions are taken pursuant to Section 0.61 and 0.283 of the Commission's rules, 47 C.F.R. §§ 0.61, 0.283, and Sections 4(i) and (j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309, and 310(d).

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

[28] *See e.g., Affiliated Media, Inc. FCC Trust, et al.*, Memorandum Opinion and Order, 28 FCC Rcd 14873, 14877 (MB 2013) ("[T]he Applications do not propose a transaction that would violate any Commission's rule or policy, and that the objections advanced by its proponents are more appropriate for industry-wide proceedings, are unsupported, or are otherwise speculative with regard to future harms."); *J. Stewart Bryan III and Media General Communications Holdings, LLC, et al.*, Memorandum Opinion and Order, 28 FCC Rcd 15509, 15518 (MB 2013) (finding that speculative harms involving potential anticompetitive behavior related to retransmission consent negotiations are improper in the context of adjudicatory proceedings).

[29] In *Fox Television System v. FCC*, the D.C. Circuit vacated the Commission's cable/broadcast cross-ownership rule holding that the Commission failed to "justify its retention of the CBCO Rule as necessary to safeguard competition" or necessary to promote the public interest, convenience, and necessity. *Fox Television Stations, Inc. v. FCC* , 280 F.3d 1027, 1050 (D.C. Cir. 2002); *see also* 1998 Biennial Regulatory Review—Review of the Commission's Broadcast Onwerhsip Rules and Other Rules Adopted Pursuant to Seciton 202 of the Telecommunciations Act of 1996, Order, 18 FCC Rcd 3002 (2003) (vacating the cable/broadcast cross-ownership rule as directd by the D.C.Circuit).