

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

In the Matter of	)	
	)	
Gray Television, Inc.	)	Facility ID Nos. 21488, 10173
	)	NAL/Acct. No. 202141420009
Parent of Gray Television Licensee, LLC, Licensee	)	FRN: 0006945398
of Stations KYES-TV, Anchorage, AK	)	
and KTUU-TV, Anchorage, AK	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: July 6, 2021****Released: July 7, 2021**

By the Commission:

1. In this Notice of Apparent Liability for Forfeiture (*NAL*), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (Act), and section 1.80 of the Commission's Rules (Rules),<sup>1</sup> we find that Gray Television, Inc. (Gray), the indirect parent of Gray Television Licensee, LLC, the licensee of Stations KYES-TV, Anchorage, Alaska and KTUU-TV, Anchorage, Alaska, apparently willfully and repeatedly violated the Commission's prohibition against owning two top-four television stations in the same Designated Market Area (DMA), by acquiring the CBS network affiliation for KTVA(TV), Anchorage Alaska, which resulted in the ownership and operation of two of the top-four stations in the Anchorage, Alaska DMA.<sup>2</sup> Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of five hundred eighteen thousand two hundred eighty three dollars (\$518,283), the statutory maximum for a single violation by a broadcaster.<sup>3</sup>

**I. BACKGROUND**

2. In order to promote competition and a diversity of viewpoints in local markets, the Commission adopted its Local Television Ownership Rule to establish that an entity may not own two full-power television stations in the same DMA if both commonly owned stations are ranked among the top four rated stations in the market (Top-Four Prohibition).<sup>4</sup> To provide more specific guidance and certainty to the application of this restriction and other aspects of its regulation of broadcast ownership and attribution, the Commission has adopted over the course of several rulemakings a series of amendments to section 73.3555. Of relevance here, in 2016, the Commission adopted Note 11 to section 73.3555 of the Commission's rules barring the common ownership of two top-four stations with overlapping contours in the same DMA through the acquisition of a network affiliation:

<sup>1</sup> 47 U.S.C. § 503(b); 47 CFR § 1.80.

<sup>2</sup> See 47 CFR § 73.3555, Note 11. The text of section 73.3555(b)(1) constrains the local television multiple ownership rule to a situation where the digital noise limited service contours of the stations overlap, which applies to the combination at issue here. 47 CFR § 73.3555(b)(1).

<sup>3</sup> 47 CFR § 1.80(b)(1); see also *infra* paras. 7-9.

<sup>4</sup> See 47 CFR § 73.3555(b)(1)(i).

an entity will not be permitted to directly or indirectly own, operate, or control two television stations in the same DMA through the execution of any agreement (or series of agreements) involving stations in the same DMA . . . in which a station (the “new affiliate”) acquires the network affiliation of another station (the “previous affiliate”), if the change in network affiliations would result in the licensee of the new affiliate, or any individual or entity with a cognizable interest in the new affiliate, directly or indirectly owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement.<sup>5</sup>

3. According to a press release issued by GCI -- the parent company to Denali Media Holdings (DMH), the parent of the licensee of KTVA(TV) -- and media reports published last summer, Gray and DMH closed on a sale to Gray of most of the non-license assets of KTVA(TV) on July 31, 2020.<sup>6</sup> Following the acquisition, Gray began broadcasting the same program schedule on KYES-TV that had previously appeared on DMH’s CBS station KTVA(TV). Gray also owns KTUU-TV, Anchorage, Alaska, an NBC affiliate, and at the time of closing KTUU-TV and KTVA(TV) were ranked numbers one and two, respectively, in the Anchorage market, under the audience share prong of the Local Television Ownership Rule.<sup>7</sup> Therefore, Gray was operating two top four full power stations in the same market.

4. On September 4, 2020, Denali Media Anchorage, Corp., the licensee of KTVA(TV), filed a request for special temporary authority to go silent and remains silent today.<sup>8</sup> Denali Media Anchorage, Corp. noted that the station “is off the air as of September 3, 2020,” and that “[t]he licensee recently sold and conveyed certain programming and related assets to a third party, including the station’s affiliation and programming agreements.”<sup>9</sup> Denali Media Anchorage, Corp. further stated: “Station personnel have also been substantially reduced as a result of this change. As such, KTVA is without a source of programming at this time.”<sup>10</sup>

<sup>5</sup> 47 CFR § 73.3555, Note 11; *see 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 14-50 et al., Second Report and Order, 31 FCC Rcd 9864, 9871, para. 18 (2016) (*Second Report and Order*). The rules in effect at the time relevant here were the 2016 rules that were reinstated after the Third Circuit’s decision in *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3rd Cir. 2019). *See 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Order, DA 19-1303 (Dec. 20, 2019).

<sup>6</sup> *See, e.g.*, Press Release, GCI, GCI Announces Sale of Broadcast Business (Jul. 30, 2020), <https://www.gci.com/about/newsreleases/denali-media-holdings-sale>; Anchorage Daily News, One Company Will Own Anchorage’s 2 Local TV News Stations after Deal with GCI (Jul. 31, 2020), <https://www.adn.com/business-economy/2020/07/31/one-company-will-own-anchorage-2-local-tv-news-stations-after-deal-with-gci/> (Anchorage Daily News Article); Alaska Public Media, Questions Remain after GCI Sells Television Assets to Competitor (Aug. 9, 2020), <https://www.alaskapublic.org/2020/08/09/questions-remain-after-gci-sells-television-assets-to-competitor/> (Alaska Public Media Article); Gray Television, Inc. 2020 Annual Report on SEC Form 10-K, at 74 (Feb. 25, 2021) (Gray 2020 Annual Report) (“On July 31, 2020, we completed the acquisition of television station operations in the Anchorage and Juneau, Alaska television market (DMA 148 and 207, respectively), for \$19 million, using cash on hand (the ‘Alaska Transactions’).”); Gray 2020 Annual Report at 75 (summarizing the values of assets acquired in the Alaska Transactions as: accounts receivable and other current assets (\$1 million); property and equipment (\$5 million); goodwill (\$2 million); broadcast licenses (\$2 million); and other intangible assets (\$9 million).

<sup>7</sup> 47 CFR § 73.3555(b).

<sup>8</sup> *See* LMS File No. 0000121181.

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

<sup>10</sup> *Id.*

5. Gray neither contacted Commission staff about the permissibility of the transaction with the licensee of KTVA(TV) nor filed a request for waiver of section 73.3555 prior to consummation. Gray has informed the Commission that, effective March 3, 2021, it has modified its operations by moving the CBS programming formerly broadcast on full power KYES-TV to the primary channel of its current low power translator station, K22HN-D, and airing a simulcast of the CBS programming carried by K22HN-D on a digital sub channel of its full power station KTUU-TV.

## II. DISCUSSION

6. *Section 73.3555 Violation.* We find that Gray apparently willfully and repeatedly violated section 73.3555 of the Rules. The Commission explicitly prohibits “transactions involving the sale or swap of network affiliations between in-market stations that result in an entity holding an attributable interest in two top-four stations,” finding that such transactions “serve as the functional equivalent of a transfer of control or assignment of license.”<sup>11</sup> To that end, the Commission modified its rules broadly to proscribe all such acquisitions of network affiliations, including sales and swaps. Accordingly, pursuant to Note 11 of section 73.3555 of the Commission’s Rules, licensees may not execute agreements that result in the sale or swap of an affiliation of another station in the same DMA if doing so brings them out of compliance with the Top-Four Prohibition.<sup>12</sup>

7. We find that Gray’s conduct with regard to KTVA(TV) violated the explicit prohibition in Note 11. By executing and consummating an agreement to apparently purchase the CBS affiliation from KTVA(TV) for KYES-TV, Gray caused a change in network affiliation that resulted in Gray’s owning and operating the top two of the top-four stations in the Anchorage DMA, as of July 31, 2020, in violation of Commission rules.<sup>13</sup> The Commission previously has placed licensees “on notice” that efforts to evade the Top-Four Prohibition through engaging in such a change of affiliation would be subject to “divestiture or enforcement action.”<sup>14</sup> Accordingly, we find that the continued ownership and operation of the KTUU-TV NBC-affiliated station and the KYES-TV CBS-affiliated station from July 31, 2020, until March 3, 2021, apparently violated Note 11 to section 73.3555 of the Rules and take appropriate enforcement action.

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<sup>11</sup> 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., MB Docket No. 14-50 et al., Second Report and Order, 31 FCC Rcd 9864, 9883, para. 48 (2016) (*Second Report and Order*); see also 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., MB Docket Nos. 14-50 et al., Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4390-93, paras. 45-50 (2014) (*FNPRM*) (describing the Commission’s intent broadly to address “transactions involving the sale or swap of network affiliations” that “are the functional equivalent of a transfer of control or assignment of license”).

<sup>12</sup> 47 CFR § 73.3555(b)(1) and Note 11; *Second Report and Order*, 31 FCC Rcd at 9885, para. 52 (presenting, nearly word-for-word, the language codified in Note 11). Note 11 further states that parties “should also refer” to the *Second Report and Order*. The *Second Report and Order* draws a narrow exception to Note 11 for circumstances that, unlike those present in this case, constitute “organic growth.” See *Second Report and Order*, 31 FCC Rcd at 9883-84, paras. 48 n.128, 51 n.138 (noting that the rule does not apply where a “network is no longer satisfied with the existing affiliate station” and engages in efforts to move its affiliation to an owner that has “demonstrated superior station operation”).

<sup>13</sup> For purposes of making this determination, the new affiliate’s post-consummation ranking is the ranking of the previous affiliate at the time the agreement is executed. *Id.* at 9884-85, para. 51 n.41. Therefore, the relevant ratings ranking, for purposes of the rule, is that of KTVA(TV).

<sup>14</sup> *Second Report and Order*, 31 FCC Rcd at 9885, para. 52 n.142; *FNPRM*, 29 FCC Rcd at 4392, para. 49 n.125.

8. We emphasize that, while the Commission's *Second Report and Order* makes several references to "swap" transactions, the rule adopted by the Commission clearly encompasses the "sale" transaction that Gray executed to acquire the CBS affiliation from KTVA(TV). The plain language of the Note 11 refers to "the execution of any agreement (or series of agreements) involving stations in the same DMA . . . in which a station (the 'new affiliate') *acquires* the network affiliation of another station."<sup>15</sup> Further, the Commission's *Second Report and Order*, and its prior *FNPRM*, clearly stated that the rule would prohibit sale transactions, as well as swaps.<sup>16</sup> The use of the word "swap" in the *FNPRM* and the *Second Report and Order* was simply a shorthand description for the types of transactions (sale or swap) that the Commission found to be the functional equivalent of a transfer of control or assignment of license.<sup>17</sup> These discussions, as well as the rule itself, make clear that the Commission was carefully trying to address similar types of agreements that would produce the same result—an end run around the Commission's Top-Four Prohibition. Gray unquestionably acquired KTVA(TV)'s CBS affiliation, which it then aired on KYES-TV. The disposition of KYES-TV's prior affiliation is of no consequence to the application of Note 11.

9. *Proposed Forfeiture.* We find Gray willfully and repeatedly violated section 73.3555 of the Commission rules and, given the duration of the violation and other relevant criteria, propose a forfeiture in the amount of \$518,283 for the violation. Pursuant to section 503(b)(1)(B) of the Act, a person who is found to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>18</sup> Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or

<sup>15</sup> 47 CFR § 73.3555, Note 11 (emphasis added).

<sup>16</sup> See *Second Report and Order*, 31 FCC Rcd at 9883, para. 48 (noting that the Commission's Top-4 prohibition is focused on "situations where a station actively transacts to become a top-four station via an ownership transfer or assignment," and stating that "transactions involving the *sale or swap* of network affiliations between in-market stations that result in an entity holding an attributable interest in two top-four stations serve as the functional equivalent of a transfer of control or assignment of license") (emphasis added); *FNPRM*, 29 FCC Rcd at 4392, para. 49 (proposing the language of Note 11, which was ultimately adopted, and stating "[w]e tentatively find that transactions involving the *sale or swap* of network affiliations between in-market stations that result in an entity holding an attributable interest in two top-four stations can be used to evade the top-four prohibition. Accordingly, in order to close this loophole, we propose to clarify that such transactions must comply with the top-four prohibition at the time the agreement is executed. . . . We propose to find any party that has control over two top-four stations in the same DMA as a result of such transactions to be in violation of the top-four prohibition and subject to enforcement action.") (emphasis added); see also *FNPRM*, 29 FCC Rcd at 4392, para. 49 (seeking comment "on whether and how station owners are attempting to circumvent the top-four prohibition, or any other of the media ownership rules, through the invention of similar devices").

<sup>17</sup> See, e.g., *Second Report and Order*, 31 FCC Rcd at 9871, para. 17 (placing quotes around the first use of the term "affiliation swaps"); *FNPRM*, 29 FCC Rcd at 4390, para. 45 (also using quotes on the first use of the term, and seeking comment "on certain circumstances in which a licensee is able to obtain control over two of the top-four stations in a market through a transaction or series of transactions, sometimes referred to as 'affiliation swaps,' that do not require prior Commission approval."). The reference to swap as shorthand for a broader set of transactions is not surprising, given that the Raycom Hawaii "swap" case was a widely-discussed example of a loophole in the Commission's Top-Four Prohibition. See, e.g., *FNPRM*, 29 FCC Rcd at 4391-92, para. 48 (describing the Honolulu affiliation swap transactions). As explained in the *FNPRM*, the parties executed an affiliation swap between a top-four station and a non-top-four station—which was commonly owned with a different top-four station in the market, and also swapped certain of the stations' non-network programming and the stations' call signs, purportedly to avoid viewer confusion. Accordingly, the stations (though not the licenses) effectively changed hands without prior Commission approval—approval that was not technically required at that time. *Id.*

<sup>18</sup> 47 U.S.C. § 503(b)(1)(B); see also 47 CFR § 1.80(a)(1).

omission of [any] act, irrespective of any intent to violate” the law.<sup>19</sup> This definition of willful applies to section 503(b) of the Act, as the Commission has previously established.<sup>20</sup> Section 312(f)(2) of the Act provides that “[t]he term ‘repeated,’ when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”<sup>21</sup>

10. Gray apparently willfully and continuously violated the Commission’s Top-Four Prohibition by owning, operating, and controlling two top-four rated stations in the Anchorage market for over seven months (July 2020 to March 2021) through its acquisition of the CBS affiliation of a second top-four rated station in the Anchorage DMA. Gray’s acquisition of the affiliation of another Top 4 station in the market was “conscious and deliberate,” and thus willful, as evidenced by the fact that it consummated an agreement to do so without prior Commission approval.

11. Section 503(b)(2)(A) of the Act authorizes us to assess a forfeiture against Gray, a broadcast licensee, of up to \$51,827 per violation or day of a continuing violation, up to a statutory maximum of \$518,283 for a single act or failure to act.<sup>22</sup> In exercising our forfeiture authority, we consider the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, substantial economic gain, and such other matters as justice may require.<sup>23</sup> As required by the Act, the Commission will apply these statutory factors to determine a forfeiture based on the Commission’s evaluation of each individual case on its own

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<sup>19</sup> 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, *see* H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See Southern California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recon. denied*, Memorandum Opinion and Order, 7 FCC Rcd 3454 (1992).

<sup>20</sup> *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991) (“[C]onsistent with congressional intent, recent Commission interpretations of ‘willful’ do not require licensee intent to engage in a violation.”), *recon. denied*, 7 FCC Rcd 3453 (1992).

<sup>21</sup> 47 U.S.C. § 312(f)(2).

<sup>22</sup> 47 U.S.C. § 503(b)(2)(A). These amounts reflect inflation adjustments of the forfeitures specified in section 503(b)(2)(A) of the Act. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015 Inflation Adjustment Act) requires agencies, starting in 2017, to adjust annually the civil monetary penalties covered thereunder, and to publish each such annual adjustment by January 15. 47 CFR § 1.80(b)(11). The 2015 Inflation Adjustment Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990, which is codified, as amended, at 28 U.S.C. § 2461 note (4). The Commission’s Enforcement Bureau released the order making the 2021 annual adjustment on December 29, 2020. *See Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 35 FCC Rcd 14879 (EB Dec. 29, 2020); *Annual Adjustment of Civil Monetary Penalties To Reflect Inflation*, 86 FR 3830 (Jan. 15, 2021) (new statutory maximums effective Jan. 15, 2021). The 2015 Inflation Adjustment Act provides that the new penalty levels shall apply to penalties assessed after the effective date of the increase, “including [penalties] whose associated violation predated such increase.” *See* 28 U.S.C. § 2461 note, citing Inflation Adjustment Act, as amended § 6. To the extent the Commission issues a Forfeiture Order in this proceeding after a subsequent increase in the statutory maximum forfeiture amount due to an inflation adjustment, the Commission reserves the right to assess a higher forfeiture amount to reflect the inflation-adjusted statutory maximum in effect at the time of a Forfeiture Order.

<sup>23</sup> 47 U.S.C. § 503(b)(2)(E); 47 CFR § 1.80(b)(10), Note 2.

merits.<sup>24</sup> We may also adjust the base forfeiture upward or downward, taking into account the particular facts of each individual case.<sup>25</sup>

12. The Commission has not previously proposed a forfeiture for the acquisition of an affiliation in violation of the restrictions set forth in Note 11 to section 73.3555.<sup>26</sup> Where no base forfeiture amount exists, the Commission looks at forfeitures established or issued in analogous cases for guidance.<sup>27</sup> In this instance, we find that the base forfeiture of \$8,000 for “unauthorized substantial transfer of control” cases is sufficiently analogous to the violation at hand in this case.<sup>28</sup> Gray’s apparent

<sup>24</sup> 47 U.S.C. § 503(b).

<sup>25</sup> *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17098-99, para. 22 (1997) (*Forfeiture Policy Statement*) (noting that “[a]lthough [the Commission has] adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, [the Commission] retain[s] the discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under [the] general forfeiture authority contained in Section 503 of the Act”), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999); *see also* 47 CFR § 1.80(b)(10), Table 3:

*Upward Adjustment Criteria*

- (1) Egregious misconduct.
- (2) Ability to pay/relative disincentive.
- (3) Intentional violation.
- (4) Substantial harm.
- (5) Prior violations of any FCC requirements.
- (6) Substantial economic gain.
- (7) Repeated or continuous violation.

*Downward Adjustment Criteria*

- (1) Minor violation.
- (2) Good faith or voluntary disclosure.
- (3) History of overall compliance.
- (4) Inability to pay.

<sup>26</sup> The Commission has issued NALs for violations of other subsections of section 73.3555, but virtually all involved simultaneous violations of other rules and therefore provide limited guidance here. *See, e.g., Hicks Broadcasting*, Initial Decision, 14 FCC Rcd 8412, 8473, para. 163 (ALJ 1999) (assessing a \$20,000 forfeiture for the combined violation of section 310(d) of the Act and section 73.3555 of the rules). In *FoxFur Communications*, however, addressing a shorter violation of section 73.3555 than in the instant case, the Media Bureau proposed a \$20,000 forfeiture. *FoxFur Communications*, Notice of Apparent Liability, 31 FCC Rcd 6872 (MB 2016) (the licensee knowingly established a cognizable interest in an eighth station in its market without seeking or receiving Commission staff approval).

<sup>27</sup> *See, e.g., Cumulus Radio LLC; Radio Licensing Holding CBC, LLC; Cumulus Licensing LLC; and Radio License Holdings LLC*, Notice of Apparent Liability for Forfeiture, 34 FCC Rcd 7289, at 7294-95, para. 14 (2019) (citing *Long Distance Direct, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3304, para. 19 (2000)).

<sup>28</sup> 47 CFR § 1.80(b)(10), Table 1. Although, in this instance, control of the actual license did not change hands, the sale of most of the station’s non-license assets, including the network affiliation, and the resulting change in programming as well as the need for viewers to watch a different station to obtain the CBS programming makes this the most analogous type of violation. The Commission took a similar approach in setting the base forfeiture for cramming. *See Long Distance Direct, Inc.*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 314 (1998); *see also Onelink Communications, Inc., TeleDias Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 1403, 1419, para. 28 (2016); *Norristown Telephone Company, LLC*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 8844, 8850, paras. 21-22 (2011). The Commission’s rules did not provide guidance for calculating forfeitures for cramming, but the Commission determined that cramming was akin to slamming – which had an established base forfeiture amount – because both involved misleading consumers. *Long Distance Direct, Inc.*, 14 FCC Rcd at 336-37, para. 29 (“The imposition of charges on a consumer’s telephone billing account without consumers’ authorization, much less their knowledge, for uncertain services is sufficiently misleading and serious to

(continued )

violation began when it consummated its acquisition of the CBS affiliation without first receiving prior Commission approval.<sup>29</sup> Its unlawful ownership, operation, and control of two of the top-four stations in the Anchorage DMA was ongoing for the entire period from July 31, 2020 – the date that Gray acquired the CBS affiliation – to March 3, 2021, a single dereliction which persisted until remedied. In other words, there existed in the case before us a continuing or persistent legal duty that Gray steadily failed to fulfill for 215 straight days.<sup>30</sup>

13. In applying the applicable statutory factors, we consider whether there is any basis to upwardly or downwardly adjust a proposed forfeiture, and other matters as justice may require.<sup>31</sup> Because the Act and our rules contemplate a separate \$8,000 forfeiture for each day of a continuing violation,<sup>32</sup> and 215 days x \$8,000 per day = \$1,720,000, our base forfeiture reaches the statutory maximum penalty of \$518,283. Although the Commission is barred from imposing a higher forfeiture amount given that we are assessing a fine at the statutory cap, we note that there would be a number of bases upon which to upwardly adjust a forfeiture in this case. Namely, the violation resulted in the substantial economic gain that comes from affiliation with a top-four network, particularly given that the timing of the acquisition enabled Gray to take advantage of the record-setting political advertising expenditures in the months leading up to the 2020 election.<sup>33</sup> Further, we recognize that the “[a]bility to pay/relative disincentive” criterion would support an upward adjustment for this defendant with its significantly higher-than-usual ability to pay<sup>34</sup> and establish a deterrent to such transgressions in the future. We have also reviewed all possible grounds for a downward adjustment, including the limited precedent in this area and Gray’s past compliance with this rule, and do not consider them sufficiently compelling to warrant a downward adjustment in this instance. After applying the *Forfeiture Policy Statement*, section 1.80 of the Commission’s rules, and the statutory factors, we therefore propose a \$518,283 forfeiture against Gray, for which it is apparently liable.

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deem it worthy of a forfeiture amount equal to that of slamming.”). The forfeiture amounts for the acquisition of an affiliation that violates our Top-Four Prohibition is worthy of that of an unauthorized transfer of control because of the similar damage they both do to competition, localism, and the Commission’s ability to monitor and regulate those policies. As noted above, the Commission has found that such transactions “serve as the functional equivalent of a transfer of control or assignment of license” with respect to the Commission’s Top-Four Prohibition. *Second Report and Order*, 31 FCC Rcd at 9883, para. 48.

<sup>29</sup> We note that parties to such an agreement should obtain Commission approval for the affiliation sale/swap prior to consummation (e.g., through a request for waiver of section 73.3555).

<sup>30</sup> See, e.g., *Enserch Corporation*, Forfeiture Order, 15 FCC Rcd 13551, 13554, para. 10 (2000) (treating unauthorized transfer of control as a continuing violation that does not end until the Commission grants a transfer of control application).

<sup>31</sup> See *supra* note 25.

<sup>32</sup> See, e.g., *Enserch Corporation*, Forfeiture Order, 15 FCC Rcd 13551, 13554, para. 10 (2000); see also *DIRECTV, LLC et al v. Deerfield Media et al*, MB Docket No. 19-168, FCC 20-122, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 2020 WL 5560945 (Sep. 15, 2020).

<sup>33</sup> See PBS News Hour Weekend, Unprecedented Spending for 2020 Political Ads, <https://www.pbs.org/newshour/show/unprecedented-spending-for-2020-political-ads> (Oct. 31, 2020); see also Gray 2020 Annual Report at 74 (stating that acquisition transactions including the Alaska Transactions “were and are expected to, among other things, increase our revenues and cash flows from operating activities, and allow us to operate more efficiently and effectively by increasing our scale and providing us, among other things, with the ability to negotiate more favorable terms in our agreements with third parties.”).

<sup>34</sup> See Gray Television, Inc., *Gray Reports Record Operating Results*, <https://graytv.gcs-web.com/node/17986/pdf> (Feb. 25, 2021).

### III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,<sup>35</sup> that Gray Television, Inc., is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred eighteen thousand two hundred eighty three dollars (\$518,283) for its apparent willful and repeated violation of section 73.3555, Note 11 of the Commission's rules.<sup>36</sup>

15. **IT IS FURTHER ORDERED**, pursuant to section 1.80 of the Commission's rules, that, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture, Gray Television, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

16. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),<sup>37</sup> or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:<sup>38</sup>

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to [RROGWireFaxes@fcc.gov](mailto:RROGWireFaxes@fcc.gov) on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN).<sup>39</sup> For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number associated with the NAL Account—the bill number is the NAL Account number with the first two digits excluded—and then choose the "Pay by Credit Card" option. Please note that there is a dollar limitation on credit card transactions, which cannot exceed \$24,999.99.
- Payment by ACH must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu and then select the bill number associated to the NAL Account—the bill number is the NAL Account number with the first two digits excluded—and choose the "Pay from Bank Account" option. Please contact the appropriate

<sup>35</sup> 47 U.S.C. § 503(b); 47 CFR § 1.80.

<sup>36</sup> 47 CFR § 73.3555, Note 11.

<sup>37</sup> Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

<sup>38</sup> For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov).

<sup>39</sup> Instructions for completing the form may be obtained at <https://www.fcc.gov/Forms/Form159/159.pdf>.



financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

17. Any request for making full payment over time under an installment plan should be sent to: Associate Managing Director—Financial Operations, Federal Communications Commission, 45 L Street NE, Washington, DC 20554.<sup>40</sup> Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201 (option #6), or by e-mail, [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov).

18. Any written response seeking reduction or cancellation of the proposed forfeiture must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.16 and 1.80(g)(3) of the Commission's rules.<sup>41</sup> The written response must be filed with the Office of the Secretary, Federal Communications Commission, 45 L Street NE, Washington DC 20554, ATTN: Barbara Kreisman, Chief, Video Division, Media Bureau, and **MUST INCLUDE** the NAL/Acct. No. referenced above. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.<sup>42</sup> A courtesy copy emailed to [jeremy.miller@fcc.gov](mailto:jeremy.miller@fcc.gov) will assist in processing the response.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- Postal Service First-Class, Express, and Priority Mail must be addressed to 45 L Street, NE, Washington, DC 20554.

19. The Commission will 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. Inability to pay, however, is only one of several factors that the Commission will consider in determining the appropriate forfeiture, and we have discretion to not reduce or cancel the forfeiture if other prongs of section 503(b)(2)(E) of the Communications Act of 1934, as amended, support that result.<sup>43</sup>

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<sup>40</sup> See 47 CFR § 1.1914.

<sup>41</sup> 47 CFR §§ 1.16 and 1.80(g)(3).

<sup>42</sup> Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Filing*, Public Notice, 35 FCC Rcd 2788 (2020).

<sup>43</sup> 47 U.S.C. § 503(b)(2)(E). See, e.g., *Adrian Abramovich*, Forfeiture Order, 33 FCC Rcd 4663, 4678-79, paras. 44-45 (2018).

20. **IT IS FURTHER ORDERED**, that copies of this Notice of Apparent Liability for Forfeiture shall be sent by First Class and Certified Mail, Return Receipt Requested, to Robert L. Folliard, III, Gray Television, Inc., 4370 Peachtree Road, Atlanta, GA 30319; and to its counsel, Joan Stewart, Wiley Rein LLP, 1776 K Street NW, Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary