

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

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

FORFEITURE ORDER

Adopted: October 28, 2022

Released: November 1, 2022

By the Commission: Commissioner Simington dissenting and issuing a statement.

I. INTRODUCTION

1. In this Forfeiture Order, we impose a penalty of \$518,283 against Gray Television, Inc. (Gray), the indirect parent of the licensee of Stations KYES-TV, Anchorage, Alaska, and KTUU-TV, Anchorage, Alaska, for willfully and repeatedly violating the Commission’s prohibition against owning two top-four television stations in the same Nielsen Designated Market Area (DMA). This Order follows a Notice of Apparent Liability for Forfeiture (NAL) released on July 7, 2021, in which we found that Gray acquired 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. After considering Gray’s response to the NAL, we find no reason to cancel, withdraw, or reduce the penalty proposed, and we hereby affirm the NAL and its proposed forfeiture.

II. BACKGROUND

2. The Local Television Ownership Rule prohibits an entity from owning 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. To provide more specific guidance and certainty to the application of this restriction and other aspects of its regulation of broadcast ownership, the Commission has adopted a series of amendments to section 73.3555 of the Commission’s rules. Of relevance here, in 2016 the Commission adopted Note 11 to section 73.3555, which bars the common ownership of two top-four stations with overlapping contours in the same DMA through the acquisition of a network affiliation:

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)

1 Gray Television, Inc., Parent of Gray Television Licensee, LLC, Licensee of Stations KYES-TV, Anchorage, AK and KTUU-TV, Anchorage, AK, Notice of Apparent Liability for Forfeiture, 36 FCC Rcd 10856 (2021) (NAL).

2 See 47 CFR § 73.3555, Note 11. The local television multiple ownership rule applies where the digital noise limited service contours of the stations overlap, which is the case with the combination at issue here. 47 CFR § 73.3555(b)(1).

3 Gray Request for Cancellation (filed Aug. 6, 2021) (Gray Response).

4 See 47 CFR § 73.3555(b)(1)(i).

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. Parties should also refer to the Second Report and Order in MB Docket No. 14-50, FCC 16-107 (released August 25, 2016).⁵

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 in the summer of 2020, Gray and DMH closed on a sale to Gray of most of the non-license assets of KTVA(TV) on July 31, 2020.⁶ Following the acquisition, Gray began broadcasting the same program schedule on KYES-TV that had previously appeared on DMH’s CBS station KTVA(TV).⁷ 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.⁸

⁵ 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 media ownership 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). The Commission has indicated that the ownership restriction does not apply “where a station organically becomes a top-four station through station improvement,” distinguishing such organic growth from “situations where a station actively transacts to become a top-four station via an ownership transfer or assignment.” See *Second Report and Order*, 31 FCC Rcd at 9883, para. 48; see also *infra* at paras. **Error! Reference source not found.**, 14.

⁶ See, e.g., Press Release, GCI, GCI Announces Sale of Broadcast Business (Jul. 30, 2020), <https://www.gci.com/about/news-releases-archive/denali-media-holdings-sale> (GCI Press Release); 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)).

⁷ On February 26, 2021, Gray changed the call sign from KYES-TV to KAUU, but to avoid complication, we refer to the station as KYES-TV throughout. See https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/call_hist.pl?Facility_id=21488&Callsign=KAUU.

⁸ 47 CFR § 73.3555(b). On September 4, 2020, the DMH licensee of KTVA(TV) filed a request for special temporary authority to go silent. See LMS File No. 0000121181. That licensee stated that it “recently sold and conveyed certain programming and related assets to a third party, including the station’s affiliation and programming agreements,” and that “[s]tation personnel have also been substantially reduced as a result of this change. As such, KTVA is without a source of programming at this time.” *Id.* The licensee of KTVA(TV) later notified the Commission that it has secured a programming source and resumed operation on September 2, 2021. See LMS File No. 0000158526.

4. 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. In response to inquiries from Commission staff, Gray subsequently informed the Commission that, effective March 3, 2021, it 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.

5. On July 7, 2021, we issued an *NAL* finding that Gray's conduct with regard to KTVA(TV) apparently violated the explicit prohibition in Note 11. Specifically, we found that by executing and consummating an agreement to 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.⁹ We further found 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.¹⁰

6. The *NAL* further stated that Gray's acquisition of the affiliation of another top-four station in the market was "conscious and deliberate," and thus willful, as evidenced by the fact that it consummated an agreement to acquire the affiliation without prior Commission approval.¹¹ We determined that Gray steadily failed to fulfill a continuing or persistent legal duty for 215 straight days.¹² Finding the base forfeiture of \$8,000 for "unauthorized substantial transfer of control" cases to be sufficiently analogous to the violation at hand in this case,¹³ we determined that the base forfeiture would reach the statutory maximum penalty of \$518,283.¹⁴ The *NAL* explains that the proposed fine we assessed was at the statutory cap but notes there would be a number of bases to upwardly adjust the forfeiture and no compelling grounds to downwardly adjust.¹⁵

7. On August 6, 2021, Gray filed its response asking that we cancel the *NAL* and proposed forfeiture. Gray contends that the *NAL* is unlawful and unenforceable for at least three reasons. First, Gray contends that because KYES-TV already had achieved top-four status prior to the transaction, the "plain language" of Note 11 was not implicated by the transaction.¹⁶ Second, Gray argues that it lacked notice that Note 11 prohibits purchases of network affiliations, rather than just affiliation swaps.¹⁷ Third, Gray asserts that the Commission's interpretation of Note 11 constitutes impermissible regulation of

⁹ *NAL* at 10858, para. 7. The *NAL* noted that 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, *Second Report and Order*, 31 FCC Rcd. at 9884-85, para. 51 n.41, and therefore, the relevant ratings ranking, for purposes of the rule, is that of KTVA(TV).

¹⁰ *NAL* at 10858, para. 7

¹¹ *Id.* at 10859-60, paras. 9-10 (citing 47 U.S.C. §§ 312(f), 503(b)(1)).

¹² *Id.* at 10861, para. 12.

¹³ *Id.* at 10861-62, para. 12 (citing 47 CFR § 1.80(b)(10), Table 1).

¹⁴ *Id.* at 10862, para. 13.

¹⁵ *Id.*; see 47 CFR § 1.80(b)(10), Table 3 (setting forth criteria for upward and downward adjustment).

¹⁶ Gray Response at 12-19.

¹⁷ *Id.* at 20-34.

Gray's content choices for KYES-TV.¹⁸ Gray also contends that the Commission's proposal of the maximum fine is contrary to law and that fining Gray would harm the public interest.¹⁹

III. DISCUSSION

8. We find that Gray willfully and repeatedly violated section 73.3555 of the Rules by acquiring the CBS affiliation for KYES-TV. Note 11 bars the acquisition, as it resulted in Gray's owning two of the top-four rated television stations in the Anchorage DMA without prior Commission approval. Moreover, having fully considered Gray's response to the *NAL*, we are not persuaded by its arguments for canceling the *NAL* or the proposed forfeiture amount. We proposed a forfeiture in accordance with section 503(b) of the Act,²⁰ section 1.80 of the Commission's rules,²¹ and the Commission's *Forfeiture Policy Statement*.²² As required when assessing forfeitures pursuant to section 503(b)(2)(E), we considered 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, and such other matters as justice may require."²³ Accordingly, we affirm the conclusions of the *NAL* and adopt the \$518,283 forfeiture penalty proposed therein.²⁴

A. Gray Violated the Commission's Rules By Acquiring a Network Affiliation That Resulted in Its Owning Two of the Top-Four Rated Television Stations in the Anchorage Market

9. *Text, History, and Purpose of the Rule.* We affirm the *NAL*'s finding that Note 11 prohibits the Anchorage transaction and reject Gray's contention that the affiliation sale did not "result in" impermissible ownership of two of the top-four rated television stations in Anchorage at the time of the agreement. Both KTUU-TV (Gray's station) and KTVA(TV) (DMH's CBS affiliate) were ranked among the top four full-power television stations in Anchorage at the time Gray acquired the Anchorage CBS affiliation from DMH. Gray's acquisition of KTVA(TV)'s programming, including the CBS affiliation, and its placement of that programming on the primary stream of KYES-TV resulted in a new top-four combination in violation of the Commission's rules.

10. According to Gray, the transaction was consistent with the plain language of Note 11 because Gray already owned two top-four stations at the time of the transaction, KYES-TV and KTUU-TV.²⁵ Gray claims it improved the ranking of KYES-TV, alleging that after it acquired the station in 2016

¹⁸ *Id.* at 34-38.

¹⁹ *Id.* at 38-43.

²⁰ 47 U.S.C. § 503(b).

²¹ 47 CFR § 1.80.

²² *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 (1997) (*Forfeiture Policy Statement*), recons. denied, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

²³ 47 U.S.C. § 503(b)(2)(E).

²⁴ Although we are exercising our discretion under section 503(b) in this proceeding to assess the forfeiture at the amount set forth in the *NAL*, licensees and other parties should be on notice that in future proceedings the Commission may exercise its authority to adjust penalty amounts to reflect the inflation-adjusted statutory maximum in effect at the time of a forfeiture order. See *DIRECTV, LLC and AT&T Services, Inc. v. Deerfield Media, Inc., et al.*, MB Docket No. 19-168, Forfeiture Order, 35 FCC Rcd 13098, 13111-12, para.33, n.151 (2021) (*DIRECTV*).

²⁵ Gray Response at 12. Gray purchased KYES(TV) pursuant to a failing station waiver in 2016. See *Fireweed Communications, LLC*, Letter Order, 31 FCC Rcd 6997 (VD MB 2016) (*Fireweed*). *Fireweed* granted the failing station waiver subject to the condition that "for a period of two years post-consummation, we will not allow KYES to enter into an agreement to obtain a network affiliation held by an existing affiliate in the market that, at the time such agreement is executed, would result in KYES becoming a top-four station in the market in terms of audience

(continued....)

(when it did not rank in the top four) Gray brought its ranking up to the fourth spot in the market by the time it entered into the agreements with GCI to purchase KTVA(TV)'s programming. Specifically Gray relies on July 2020 Comscore Audience Share Data for Anchorage, showing KYES-TV was ranked fourth. Gray recognizes that the Nielsen market share data ranked KYES-TV as fifth that month, although Gray states it only recently became aware of this, as it does not subscribe to Nielsen data for the Anchorage market.²⁶ In making its argument, Gray relies on language in the *Second Report and Order* stating that the Commission will not penalize a station whose operations improved to the point that it attained a top-four rating.²⁷ Under Gray's interpretation, Note 11 applies only if a station becomes a top-four station pursuant to the transaction in question.²⁸ Gray argues that the *NAL* must be cancelled because we did not consider KYES-TV's market rankings at the time of the CBS affiliation purchase or the Commission's policy against "punishing" stations that achieve top-four status through organic growth.²⁹

11. We find Gray's argument that it cannot be in violation of Note 11 because it already possessed a top-four combination – the top-ranked KTUU-TV and what Gray asserts was the fourth-ranked KYES-TV – lacks a factual predicate and is contrary to both the language and purpose of Note 11 and the *Second Report and Order*. As an initial matter, the *Second Report and Order* states that for purposes of making a determination under Note 11, the new affiliate's post-consummation ranking will be the ranking of the previous affiliate "at the time the agreement is executed," determined in accordance with Section 73.3555(b)(1)(i) of the Commission's rules.³⁰ Section 73.3555(b)(1)(i), in turn, bases rankings "on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service."³¹ When the governing asset purchase agreement was executed on July 24, 2020, the cumulative July 2020 ratings were still underway and could not have been compiled. Thus, July 2020 ratings were not the "most recent" ratings available at the time the agreement was "executed." Accordingly, ratings data for July 2020 are not relevant to our findings. Rather, the "most recent" ratings data available when the agreement was "executed" was the Nielsen data for June 2020, which show that Gray owned the top-ranked station in KTUU-TV and the fifth-ranked station in KYES-TV, on which it placed the CBS affiliation on the primary stream.³² This shows a violation of Note 11 by creating a new top-four combination where previously there was none.

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share." In imposing this condition, *Fireweed* cited the Commission's tentative finding in the then-pending *2014 Quadrennial Review* proceeding that transactions involving the sale or swap of network affiliations could be used to evade the top-four prohibition, and then concluded that the two-year prohibition might prevent this type of public interest harm. *Id.* at 7002 (citation omitted).

²⁶ Gray Response at 13 & n.22, Exh. 1, "July 2020 Comscore Audience Share Data for the Anchorage, Alaska Designated Market Area." Gray submits that these Comscore share data underlying the rankings include data related to the primary signals of each full-power television station in the Anchorage market. We also note that Gray relied on Nielsen ratings to make its failing station waiver showing in 2016. *See* Gray Response at 8; Gray FCC Section 314 Application, File No. BALCDT-20151009ADJ, Att. 18, "Failing Station Waiver" at 1.

²⁷ Gray Response at 15 (citing *Second Report and Order*, 9864 FCC Rcd at 9882, para. 47).

²⁸ *Id.* at 15-16.

²⁹ *Id.* at 17.

³⁰ *Second Report and Order*, 31 FCC Rcd at 9885, para. 52 n.141 (referring to Section 73.3555(b)(1)(i) of the Commission's rules, which, pursuant to the reinstatement and subsequent renumbering of Commission rules, is now memorialized at Section 73.3555(b)(1)(ii)).

³¹ *See* 47 CFR § 73.3555(b)(1)(ii). We note that Gray claims that KYES-TV improved its ratings 77% between the date Gray filed its application to acquire the station and July 2020, when the Anchorage transaction closed, but provides no support for this figure.

³² Staff analyzed Nielsen data available at the time of transaction execution.

12. But regardless of whether Gray already legally possessed a top-four combination through organic growth at the time of the transaction, acquisition of the CBS affiliation would still have “result[ed] in” ownership of a new top-four combination (transacted through a new series of agreements and constituting a new combination of assets) in violation of Note 11. This is due to the previous CBS affiliate’s rating, a station with an undisputed top-four ranking. Specifically, Gray’s common ownership of KTUU-TV and KYES-TV post-transaction would have resulted in a combination of the market’s first- and second-ranked stations, based on the rankings of KTUU-TV and KTVA(TV) at the time of the acquisition of the CBS affiliation. The resulting combination violates the rule because it is a combination that did not arise from any organic growth related to improved programming but rather from Gray’s acquisition of the CBS affiliation.

13. As the Commission explained in the *Second Report and Order*, the broader goal of the Note 11 restriction is to prevent transactions between licensees in the same DMA that circumvent the Local Television Ownership Rule and diminish competition, objectives that clearly would be undermined by Gray’s narrow reading of the rule.³³ Under Gray’s strained reading, once a broadcaster with two stations in a market grows the lower-ranked station to the fourth position in market ratings, it would have no barriers to maneuvering its stations through affiliation agreements into the first and second spots in the market, or indeed, from eventually acquiring all of the top-four network affiliations from other in-market stations through a similar combination of agreements. Such manipulation would reduce competition and intentionally circumvent Commission review of such transactions.

14. Gray’s argument regarding organic growth is misplaced. Gray is correct that the *Second Report and Order* makes clear that the Commission’s policy exempting “organic growth” distinguishes “instances where a station organically becomes a top-four station through station improvement from situations where a station actively transacts to become a top-four station via an ownership transfer or assignment.”³⁴ This policy is built into the rule, such that a station that has a top four-ranked station, and grows the ratings of a second station to become another top four, is not in violation of the rule. But Gray is completely wrong to suggest that the top-four combination in question—that of KTUU-TV and KYES-TV with the acquired CBS affiliation—resulted from organic growth and is therefore permissible. We similarly reject Gray’s suggestion that our action constitutes punishing Gray for organic growth.³⁵ Just as our Local Television Ownership Rule would not have permitted Gray to acquire KTVA(TV) without Commission approval – regardless of whether or not Gray had already grown KTUU-TV and KYES-TV into a top-four combination – Note 11 similarly does not permit Gray to acquire KTVA’s affiliation where the end result is ownership of a new two top-four station combination in the market. The argument that organic growth entitles a duopolist to execute a transaction without the need for Commission approval that allows it to vastly improve the rankings of its two stations whereas a licensee with only one top four station would not be permitted to execute the same transaction would also have the effect of turning the multiple ownership rules on their head.

15. *Network Offer Exemption.* Nor do we find merit to Gray’s argument that the transaction is exempt from Note 11 because the network’s involvement pursuant to an exemption for network-initiated affiliation shifts.³⁶ Gray points to an exception to Note 11 discussed in the *Second Report and Order*:

Moreover, the extension of the top-four prohibition we adopt today would not apply in situations where a network offers an existing duopoly owner (one top-four station and one station ranked outside the top four) a top-four-rated affiliation for the lower-rated

³³ See *Second Report and Order*, 31 FCC Rcd at 9878-79, para. 40.

³⁴ *Id.* at 9883, para. 48.

³⁵ See, e.g., Gray Response at 15.

³⁶ *Id.* at 12-13.

station, perhaps because the network is no longer satisfied with the existing affiliate station and the duopoly owner has demonstrated superior station operation (i.e., earned the affiliation on merit). Such a circumstance represents organic growth of the station and not a transaction that is the functional equivalent of an assignment or transfer of control.³⁷

16. In fact, Gray *declined* an offer from the CBS network to switch its local affiliation but rather acquired the affiliation directly from the former affiliate, thereby explicitly violating the Commission's rules.³⁸ Moreover, as described below, Gray went well beyond acquiring the network affiliation of KTVA(TV) in this case and acquired other substantial non-license assets as well. While CBS eventually agreed to move its affiliation to a Gray station,³⁹ nothing in the record indicates that CBS was a party to the original, larger affiliation acquisition. Gray overstates the limiting language and context of the network affiliation exemption by arguing that mere "network involvement" or even negotiation for network concurrence leading to an affiliation shift removes the Anchorage transaction from the Note 11 prohibition.⁴⁰ While the Commission designed the rule so as not to abrogate *network* decisions, Gray purposely adopted an approach that violated the prohibition on acquiring the affiliation directly from its local market competitor.⁴¹

17. In the *Second Report and Order*, the Commission explained that the ban on affiliation acquisitions set forth in Note 11 clarifies that the top-four prohibition applies to agreements that are the "functional equivalent" of a transfer of control or assignment of license from the standpoint of our Local Television Ownership Rule.⁴² Based on this language as well as the discussion of the Honolulu affiliation swap in the *Second Report and Order*, Gray interprets Note 11 as prohibiting only "transactions that are indistinguishable from a license transfer but for the fact that the parties did not seek Commission approval

³⁷ *Id.* at 12, 17-20 (citing *Second Report and Order*, 31 FCC Rcd at 9883 n.128 (citing *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, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4392, para. 50 n.126 (2014) (*FNPRM*)); *see also id.* at 9884, para. 51 n.138 ("We confirm that extension of the top-four prohibition to affiliation swaps would not prevent a station from obtaining an affiliation through negotiating with a national network outside the context of an affiliation swap."))

³⁸ Gray reports that the CBS Network reached out to Gray in October 2019 asking whether Gray was interested in affiliating with the network in Anchorage. Gray says it declined because of its policy not to "poach" top-four affiliations from other affiliates. Gray Response at 18. Gray informed CBS that Gray would negotiate with CBS if and only if it also could purchase some other non-license assets for KTVA(TV) from DMH. *Id.* The record is unclear as to whether CBS' reported inquiry into whether Gray would be interested in the Anchorage affiliation even constituted an "offer," and Gray does not use that term to describe the network's outreach. Gray does make clear, however, that it was interested in obtaining KTVA(TV) personnel, which needed to be done in a transaction with the local competitor, not the network. *See* Gray Response at 38 n.102 ("Gray would have been unable to hire any of KTVA(TV)'s talented journalists or other staff, and Gray would have been unable to ensure a smooth transition for MVPDs and viewers. Rather than take this path, Gray chose to compensate KTVA(TV) for the loss of the CBS affiliation and to secure its cooperation in the transition."))

³⁹ Gray Response at 19.

⁴⁰ *Id.* at 12-13, 19.

⁴¹ We reject Gray's argument that Note 11 does not promote competition and diversity because it permits a station to obtain another station's affiliation directly from a network. Gray Response at n.102. As explained in the *Second Report and Order*, the network offer exemption promotes organic growth of stations, that is, affiliation changes when the network believes "the duopoly owner has demonstrated superior station operation (i.e., earned the affiliation on merit)." *Second Report and Order*, 31 FCC Rcd at 9883 n.128.

⁴² *Id.* at 9884, para. 50.

for the transfer of the license.⁷⁴³ As an initial matter, we reject Gray’s interpretation of Note 11 as prohibiting only “transactions that are indistinguishable from a license transfer.”⁷⁴⁴ When the Commission in the *Second Report and Order* explained that Note 11 clarifies that the top-four prohibition applies to agreements that are the “functional equivalent” of a transfer of control or assignment, it qualified this statement as being “from the standpoint of our Local Television Ownership Rule.”⁷⁴⁵ In other words, regardless of whether an entity obtains a second Top 4 station from a license transfer or by acquiring the affiliation of another station in the market, the impact “from the standpoint of our Local Television Ownership Rule” is functionally the same: the entity now owns two Top 4 stations in the market. Allowing an affiliation acquisition in this context would “evade the top-four prohibition.”⁷⁴⁶ Neither the text of Note 11 nor *Second Report and Order* can be reasonably read to require evidence beyond the acquisition of an affiliation of a top-four rated station from another station in the market in order to violate Note 11.

18. On alternative and independent grounds, even assuming the validity of Gray’s interpretation that Note 11 is violated only when there is a transaction indistinguishable from a license transfer, we find that Gray violated Note 11 because the affiliation acquisition it engaged in was the functional equivalent of a station license transfer. Gray maintains throughout its Response that the transaction at issue is not the “functional equivalence” of a transfer of control similar to that in the Honolulu affiliation swap, where two stations traded nearly all non-license assets, including all programming agreements, call-signs, and branding.⁷⁴⁷ Gray asserts that the instant transaction involved only the transfer of programming assets and the right to hire some employees⁷⁴⁸ but none of KTVA(TV)’s branding, facilities, or other non-license assets.⁷⁴⁹ Gray concludes that the scope of its acquisition therefore falls far short of “functional equivalence.”

19. We reject Gray’s characterization and affirm our finding that the acquisition is the functional equivalent of a station license transfer. The *NAL* cited a press release that DMH issued on the date the transaction closed which states that DMH retained ownership of only the license and KTVA(TV) transmission facilities, while Gray acquired DMH’s intellectual property, local news, sales, creative, and engineering assets used by KTVA(TV).⁷⁵⁰ Gray did not refute this characterization of the acquisition, either at the time of the transaction, or in its *NAL* Response. Indeed, Gray states that it specifically *insisted* that non-license assets be included in any deal for the CBS affiliation.⁷⁵¹ Rather than minimally divesting the affiliation, GCI sold off to Gray all the assets that it could, short of impermissibly leaving itself with a bare license.⁷⁵²

⁷⁴³ Gray Response at 35.

⁷⁴⁴ *Id.*

⁷⁴⁵ *Second Report and Order*, 31 FCC Rcd at 9884, para. 50.

⁷⁴⁶ *Id.* at 9884-85, para. 51.

⁷⁴⁷ See Gray Response at 35 (citing *Second Report and Order*, 31 FCC Rcd at 9883, para. 48.)

⁷⁴⁸ See *id.* at 10.

⁷⁴⁹ See *id.* at 22, 26 n.67, 30, 35-36.

⁷⁵⁰ *NAL*, 36 FCC Rcd at 10858, para. 6 (citing GCI Press Release); see also GCI Application for Suspension of Operations, LMS File No. 0000121181 (filed Sep. 4, 2020), Exh. (stating that the sale and conveyance of assets included not just the affiliation agreement but other programming agreements and related assets).

⁷⁵¹ See Gray Response at 18.

⁷⁵² See, e.g., *Gresham Communications, Inc.*, 26 FCC Rcd. 11895, 11903, para. 15 (2011) (“In evaluating a bare license allegation, the Commission examines ‘the entirety of the proposed transaction’ and whether the assignee would have the ability to maintain broadcast operations.”) (citations omitted). In addition to mischaracterizing the scope of the asset acquisition, Gray unsuccessfully attempts to distinguish the asset acquisition here (where KYES-
(continued...))

20. *Notice.* We likewise reject Gray’s claim that the *NAL* is defective because the Commission did not provide Gray with adequate notice through the *Second Report and Order* or the text of Note 11 that the rule would apply to its CBS affiliation acquisition.⁵³ Gray’s unduly narrow reading of the restriction as being about “swaps” and not acquisitions is inconsistent with the language of Note 11, which does not contain the word swap or any similar limitation. Rather, it provides that “an entity will not be permitted to . . . own two television stations in the same DMA through the execution of any agreement . . . involving stations in the same DMA . . . in which a station . . . acquires the network affiliation of another station . . . if the change in network affiliations would result in the licensee of the new affiliate . . . owning . . . two of the top-four rated television stations in the DMA at the time of the agreement.” We find the language and purpose of Note 11 to be controlling and to provide sufficient and specific notice of the ban to Gray.⁵⁴

21. Language codified in the Commission’s rules governs any conflict with language in the text of an order.⁵⁵ In any event, there is no conflict between the rule and the discussion in the *Second Report and Order*, which repeats the language of the rule and states clearly that it is intended to prohibit sales of affiliations in addition to swaps.⁵⁶ Though Gray cites the frequency with which the *Second Report and Order* mentions affiliation swaps as compared to acquisitions, as well as the text’s focus on an affiliation swap in Hawaii,⁵⁷ the order also clearly uses the term “sale” in explaining that “transactions

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TV maintained its transmission facilities) from the scope of the asset transfer of the Honolulu swap recognized by the *Second Report and Order* as warranting Commission approval. Specifically, Gray insists that the Honolulu case established that transfer of “facilities” is necessary for a finding of functional equivalence, even though the two Honolulu stations did not transfer transmission facilities. *See* Gray Response at 22, 26 n.67, 35; *KHNL/KGMB License Subsidiary, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16087, 16091, para. 14 (MB 2011).

⁵³ Gray Response at 20; *see id.* at 3 (“It is well settled that the Commission must provide reasonable notice of the requirements of its rules before seeking to enforce them and that “[t]he Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules.”) (citing *Trinity Broadcasting v. FCC*, 211 F.3d 618 (2000); *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987)).

⁵⁴ 47 CFR § 73.3555, Note 11; *Second Report and Order*, 31 FCC Rcd at 9885, para. 52; *see also Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358 (D.C. Cir. 1997).

⁵⁵ *See, e.g., Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, 23 FCC Rcd 5992, 6010 para. 39 (2008) (“[I]n cases where the text of the rules is inconsistent with the text of an Order, the text of the rule controls.”).

⁵⁶ *See, e.g., Second Report and Order*, 31 FCC Rcd at 9883, para. 48 (distinguishing the sale or swap of network affiliation from a licensee’s ownership of two top-four stations in a market as a result of organic growth); *id.* at 9885, para. 50 (stating in the text the same language adopted in Note 11). Moreover, we note that the “network offer exemption,” which Gray attempts to avail itself of, contemplates a situation where an affiliation is moved from one station to another rather than a “swap” of affiliations. If, as Gray contends, Note 11 applies strictly to swaps, presumably there would have been no need in the *Second Report and Order* to exempt circumstances where a network offers to move its affiliation from one station to another, which is clearly not a swap.

⁵⁷ Gray Response at 22-25. Gray inaccurately characterizes the Commission’s discussion of the Hawaii affiliation swap as including a conclusive determination that there has only been a single affiliation transaction. *See* Gray Response at 21 (“The *Second Report and Order* makes perfectly clear that the rule against swaps was a special-purpose rule designed to protect against recurrence of a specific set of circumstances. The Commission said those circumstances had arisen only once in the past – in a Hawaii case where two broadcasters swapped their affiliations – and all other station assets – resulting in one company owning two of the Top 4 stations in the Honolulu DMA

(continued....)

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.”⁵⁸ The *Second Report and Order* clearly states that Note 11 is intended to eliminate rule circumvention and *potential* loopholes and accordingly banned affiliation acquisitions in certain circumstances.⁵⁹

22. In contrast to Gray’s claim, we do not find culpability based on Gray’s failure to seek Commission advice prior to entering into the non-license asset transaction. Rather, we find culpability based on the rule violation itself. We also find unpersuasive Gray’s suggestion that its prior communication with Commission staff in 2014 – with regard to a transaction with Hoak Media – established a safe harbor for the transaction at issue here.⁶⁰ Gray explains that in the Hoak transaction it acquired the NBC affiliation and moved it to a primary channel in the Lincoln & Hastings-Kearney, Nebraska DMA, where it already owned the CBS affiliate (aired on a separate channel). Gray reports that it extensively negotiated this restructuring after consultation with Commission staff.⁶¹ The Bureau-level *Hoak* decision, however, does not reference any affiliation changes.⁶² When the Commission in the *Second Report and Order* refers to a “single instance of an affiliation swap that would be subject to the rule we adopt herein,”⁶³ it was referring to published cases where the details of the swap transaction were analyzed and described, not unverified recountings of such transactions not reflected in a Commission decision.

23. *Regulation of Programming Content.* We reject Gray’s argument that the *NAL* exceeded our authority and violates Section 326 of the Act, which prohibits the Commission’s interference with the right to free speech by means of radio communications.⁶⁴ As the Commission explained in the *Second Report and Order*, parties can achieve the same result through an affiliation transfer that they could through a transfer of control or assignment of license, which would be subject to Commission review and required to comply with the Local Television Ownership Rule.⁶⁵ The Commission also explained that its

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without having to seek Commission approval.”) (citations omitted). The Commission extended the prohibition to protect against circumvention of its rules and to avoid potential loopholes.

⁵⁸ *Second Report and Order*, 31 FCC Rcd at 9883, para. 48.

⁵⁹ *Id.* at 9882-83, para. 47. We further reject Gray’s contention that the Commission deprived Gray of adequate notice because the *NAL* improperly redefined “swap” to include all acquisitions and thereby impermissibly attempted to expand the scope of prohibited conduct. Gray seizes upon an explanation in the *NAL* – that the *Second Report and Order* used “swap” as a shorthand description for a broader set of transactions – to mean that we retroactively sought to redefine the term. We reiterate that the language of Note 11 is controlling, which does not use the word “swap” but instead refers to a station that “acquires” the network affiliation of another station. Moreover, we find that the *NAL* did not seek to redefine the dictionary definition and somehow give retroactive effect to it, as Gray contends, but simply made the reference to use of the term “swap” to cover the most notable instance of a then larger loophole in the Commission’s rules. *NAL* at 10859, para. 8 n.17. Similarly, although the *FNPRM* provides additional context to clarify the discussion of “swaps,” because the language of the rule is controlling, we need not address Gray’s further argument that the *NAL* somehow sought to rely on the *FNPRM* to “salvage” the inadequate notice of the Commission’s rules regarding affiliation sales. Gray Response at 29-31.

⁶⁰ *Id.* at 31-32.

⁶¹ *Id.* at 2 n.3.

⁶² See *id.* (recognizing that the approval of the Hoak/Gray decision did not address the affiliation changes); *Applications for Transfer of Control of Television Licenses from Hoak Media, LLC to Gray Television Group, Inc.*, Letter Order, 29 FCC Rcd 3640 (VD MB 2014).

⁶³ See *Second Report and Order*, 31 FCC Rcd at 9884, para. 51 n.137.

⁶⁴ Gray Response at 34-37.

⁶⁵ See *Second Report and Order*, 31 FCC Rcd at 9882, para. 47 n.122.

statutory authority to extend the Local Television Ownership Rule to include affiliation swaps derives from the same general rulemaking authority that supports all of our broadcast ownership rules.⁶⁶ Gray is therefore incorrect when it contends that the Commission lacks authority to address affiliation shifts that result in a violation of the Local Television Ownership Rule.

24. Moreover, the *NAL*'s application of Note 11 does not, as Gray suggests, violate the First Amendment and Section 326, because the restriction is not content-based. As the Commission explained in adopting the rule in the *Second Report and Order*, the decision to prohibit affiliation acquisitions involving two top-four stations does not consider content but rather market concentration: "The rule is predicated entirely on content-neutral objectives, primarily the public interest goal of promoting competition in local markets. The rule does not limit a licensee's discretion to air the content of its choice but rather limits the number of stations in a single market that a licensee may own if common ownership would result in significantly reduced competition."⁶⁷ Accordingly, in no way does the rule intrude into programming content decisions.

25. Finally, contrary to Gray's assertion, we reiterate that Note 11 and the associated exception for network affiliation have a rational basis in advancing the goals of competition and diversity.⁶⁸ This application of the top-four prohibition is supported by the same constitutional analysis upheld by the *Prometheus II* court, in which the Commission's media ownership rules were found not to violate the First Amendment. Like the Commission's other ownership rules, Note 11 is rationally related to the substantial government interests in promoting competition and diversity.⁶⁹

B. The Proposed Forfeiture Amount is Appropriate

26. After considering the evidence in the record, the relevant statutory factors, the Commission's *Forfeiture Policy Statement*, the Commission's rules, and the arguments advanced by Gray in its Response, we find that a total forfeiture of \$518,283 is appropriate. We affirm the conclusion in the *NAL* and that such an amount is warranted based on Gray's willful and repeated violation of section

⁶⁶ See *id.* (citing 47 U.S.C. §§ 154(i), 303(r); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-94 (1978) (holding that Section 303(r) and Section 4(i) of the Communications Act, 47 CFR §§ 154(i), 303(r), provide authority for ownership rules restricting same-service ownership as well as newspaper-broadcast cross-ownership); *id.* at 796 ("[S]o long as the regulations are not an unreasonable means for seeking to achieve these [public interest] goals, they fall within the general rulemaking authority recognized in the *Storer Broadcasting* and *National Broadcasting* cases."); *United States v. Storer Broad. Co.*, 351 U.S. 192, 202-03 (1956) ("The challenged [multiple ownership] Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rulemaking authority. 47 U.S.C. § 154(i) and § 303(r), 47 U.S.C.A. §§ 154(i), 303(r), grant general rulemaking power not inconsistent with the Act or law."); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943) ("In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers.")).

⁶⁷ *Second Report and Order*, 31 FCC Rcd at 9884, paras. 49-50. See also *Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695, 718 (D.C. Cir. 2011) (Commission rule limiting cable operators from withholding their "regional sports networks" from competitors was "due to that programming's economic characteristics, not to its communicative impact" and therefore was a "content-neutral" regulation).

⁶⁸ See Gray Response at 37-38 n.102.

⁶⁹ See *Second Report and Order*, 31 FCC Rcd at 9884, para. 50 (citing *Prometheus Radio Project v. FCC*, 652 F.3d 431, 437 (3d Cir. 2011) (*Prometheus II*)). Gray misunderstands the purpose of Note 11 in asserting that "[t] here is no reason to think (and the Commission has no evidence) that regulating this process point would lead to fewer cases where a station loses its top-four network affiliation than if the Commission permitted the affiliation to be sold from one station to another." See Gray Response at 37-38 n.102. Our rule is intended to prohibit consolidation of top-four stations that evades the Local Television Ownership Rule.

73.3555 of the Commission rules, the duration of the violation, and other relevant criteria discussed below.⁷⁰

27. *Base Forfeiture.* We affirm our conclusions in the *NAL* regarding the base forfeiture amount.⁷¹ As explained in the *NAL*, there is no forfeiture precedent for the violation at issue here, but we found that the base forfeiture of \$8,000 for “unauthorized substantial transfer of control” cases is sufficiently analogous to the violation at hand. Further, we found that Gray failed to fulfill a continuing or persistent legal duty from consummation of the CBS affiliation acquisition on July 31, 2020 to March 3, 2021 – 215 straight days.⁷² Because the Act and our rules contemplate a separate \$8,000 forfeiture for each day of a continuing violation,⁷³ and 215 days x \$8,000 per day = \$1,720,000, we concluded that the base forfeiture reached the statutory maximum penalty of \$518,283. We continue to find this calculation to be appropriate.

28. Given the circumstances and the duration of the violation in this case, imposing a forfeiture penalty for each day of the continuing violation capped by the statutory maximum is appropriate and not excessive, and we reject Gray’s arguments to the contrary. As an initial matter, we find no merit to Gray’s repeated assertions that because it believed its interpretation of Note 11 to be reasonable, its behavior cannot be deemed “willful.”⁷⁴ Gray does not rebut or even address the *NAL*’s application of the statutory definition of “willful,” which, as explained in the *NAL*, is: “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁷⁵ We affirm our finding that Gray’s acquisition of the affiliation of another top-four station in the market was quite “conscious and deliberate,” and thus willful, as evidenced by the fact that Gray executed an agreement to acquire that affiliation.⁷⁶

29. *Application of Adjustment Factors.* We likewise affirm our analysis regarding the application of adjustment criteria to the proposed forfeiture. Accordingly, we conclude that the egregiousness of the misconduct, Gray’s ability to pay, and the substantial economic gain Gray stood to achieve warranted an upward adjustment and find that no countervailing downward adjustment was appropriate.⁷⁷ In particular, as we previously noted, Gray stood to achieve substantial economic gains by

⁷⁰ *NAL* at 10859-60, para. 9.

⁷¹ *Id.* (citing 47 U.S.C. § 503(b)(2)(E); 47 CFR § 1.80(b)(10), Note 2).

⁷² *Id.* at 10861-62, para. 12.

⁷³ *See id.* at 10862, para. 13 (citing *ENSERCH Corporation*, Forfeiture Order, 15 FCC Rcd 13551, 13554, para. 10 (2000); *DIRECTV*, 35 FCC Rcd 13098).

⁷⁴ *See* Gray Response at 5, 12, 41, 42.

⁷⁵ *NAL* at 10859-60, para. 9 (citing 47 U.S.C. § 312(f)(1)). The *NAL* further explained that the Commission previously established this definition of willful applies to section 503(b) of the Act. *Id.* (citations omitted).

⁷⁶ *Id.* at 10860, para. 10.

⁷⁷ *Id.* at 10860-62, paras. 11-13; *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.

(continued....)

affiliating with a top-four network during the run-up to the 2020 election.⁷⁸ In addition, Gray's significantly higher-than-usual ability to pay and the deterrent value of the penalty also justified an upward adjustment.⁷⁹ We emphasize that because any relevant downward adjustment factors are heavily counterbalanced by the upward adjustment factors and by the size of the forfeiture, the application of those downward adjustment factors do not result in any lessening of the forfeiture.

30. Consequently, we find inaccurate Gray's assertion that we determined there are no mitigating factors that would justify a smaller fine.⁸⁰ We did identify factors that would support both upward and downward adjustments.⁸¹ We affirm this aspect of the *NAL* and clarify that the upward adjustment factors simply outweigh any of the downward adjustment factors, while noting there is no upward adjustment to be made where the violator is at the statutory cap. Specifically, we affirm that all possible grounds for a downward adjustment, including Gray's past compliance with this rule, are outweighed by the egregiousness of Gray's misconduct, its ability to pay and the need for a relative disincentive, as well as the substantial economic gain created by the transaction. Accordingly, we find no reason to adjust the fine downward.

31. *Consistency with Precedent and the Public Interest.* Because we find the forfeiture we impose consistent with and fully authorized by the guiding statutory factors, we do not find persuasive Gray's attempts to compare the circumstances here with transfer-of-control precedent involving smaller fines. Gray asserts that in past cases involving an alleged unauthorized transfer of control or violation of Section 73.3555 of the rules, the Commission did not impose a forfeiture penalty for each day of the continuing violation capped by the statutory maximum, and that such cases tended to generate proposed fines or consent decrees in the low-to-mid five figures.⁸² Gray's analysis relies on a generalized comparison and does not address the specific considerations that guide the result we affirm today.⁸³ As

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- (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.

⁷⁸ *NAL* at 10862, para. 13 (citing 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); 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").

⁷⁹ *NAL* at 10862, para. 13 (citations omitted).

⁸⁰ Gray Response at 41-42 (citing *NAL* at 10862, para 13).

⁸¹ See *NAL* at 10862, para. 13. In the *NAL* we found no factors to warrant a downward adjustment.

⁸² Gray Response at 40 (citing *FoxFur Communications, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 6872 (2016) (\$20,000 proposed fine); *WVOZ(AM), San Juan, Puerto Rico and International Broadcasting Corporation, Inc.*, Order and Consent Decree, 30 FCC Rcd 11507 (2015) (\$61,500 consent decree); *Beartooth Communications Company*, Order and Consent Decree, 29 FCC Rcd 12011 (2014) (\$40,000 consent decree); *Christopher D. Imlay, Esq., Applications for Assignment of License*, Petition for Reconsideration, 27 FCC Rcd 13350 (2012) (admonishment only); *Hicks Broadcasting of Indiana, LLC*, Initial Decision, 14 FCC Rcd 8412 (ALJ 1999) (\$30,000 fine); *Macau Traders, Inc.*, Memorandum Opinion and Order and Forfeiture Order, 13 FCC Rcd 228 (1998) (\$15,000 fine)).

⁸³ 47 U.S.C. § 503(b)(2)(E); 47 CFR § 1.80(b)(10), Note 2.

required by the Act, we apply the enumerated statutory factors to determine a forfeiture based on our evaluation of each individual case on its own merits.⁸⁴ Gray does not acknowledge the dramatic difference in these cases with regard to ability to pay, the need for scaled deterrence, and the economic gain of acquiring the second-ranked station in a broadcast television market, especially during the months prior to a record-setting political advertising spend.⁸⁵

32. Gray contends that the Commission has not previously imposed a forfeiture penalty for each day of a continuing unauthorized transfer of control of a license or a violation of section 73.3555 rules and cannot lawfully do so here.⁸⁶ Gray asserts that the only case we rely on to support our finding of a continuing violation, *ENSERCH*, is irrelevant because, among other reasons, it involved a wireless licensee that failed to file transfer of control applications for multiple licenses.⁸⁷ The *NAL* cited *ENSERCH*, however, only for the proposition that an unauthorized transfer of control is a continuing violation that does not end until the Commission grants a transfer of control application, a holding that Gray does not dispute. Indeed, the legislative history of the 1989 amendment to Section 503 of the Act indicates that an unauthorized transfer of control of a broadcast license is a “continuing violation for each day that the parties fail to obtain the necessary authorization” and that the statutory cap for a continuing violation would apply.⁸⁸ Our decision in the present case to impose a forfeiture penalty for each day of the continuing violation, capped by the statutory maximum, is based on the nature, extent, and gravity of the violation. It reflects the brazen attempt by the owner of the top-rated broadcast station in a market to acquire the affiliation of the second-ranked station in order to create the common ownership of two top-four stations. Section 503(b)(1) of the Act explicitly authorizes us to assess a forfeiture penalty of up to \$51,827 for each day of a continuing violation, and we affirm doing so in this case to address the seriousness of the transgression at issue. Moreover, in doing so we recognize that like the licensee in *ENSERCH*, Gray has a substantial ability to pay. As the Commission stated in *ENSERCH*: “To ensure that *ENSERCH*’s presumed extraordinary ability to pay a forfeiture does not attenuate the remedial effect forfeitures are designed to impart, we are compelled to issue a forfeiture commensurate with the serious nature of the violation and this licensee’s ability to pay.”⁸⁹ Likewise, we seek here to impose a forfeiture commensurate with the gravity of Gray’s violation in this case. Accordingly, we find that the forfeiture we impose today appropriately reflects the egregiousness of the misconduct and the substantial economic gain it afforded, along with Gray’s ability to pay and the need to create a disincentive for such behavior.

33. Lastly, we find no merit in Gray’s contention that imposing the forfeiture is contrary to the public interest and good policy because it “rescued” a struggling station owner in control of a CBS affiliation that was downsizing its news operation and lacked the resources to improve its over-the-air signal distribution.⁹⁰ Among other options consistent with our rules, a station that is struggling financially can sell pursuant to a failing station waiver;⁹¹ a purchaser can seek a general waiver of the Commission’s

⁸⁴ 47 U.S.C. § 503(b).

⁸⁵ Gray applies similarly faulty reasoning in its comparison of this case to *Roy M. Speer*, a 1996 case in which the Commission imposed a \$150,000 fine for a violation that persisted for 42 months, arguing that the violation here was corrected in less than one-fifth the time of the violation in that case yet the proposed fine is three-and one-half times larger. Gray Response at 40-41 (citing *Roy M. Speer*, Memorandum Opinion and Order and Notice of Apparent Liability, 11 FCC Rcd. 18393 (1996)). Again, Gray not only does not address the statutory considerations, but also fails to mention the effects of inflation.

⁸⁶ *Id.* at 38-40.

⁸⁷ *Id.* at 39.

⁸⁸ Budget Reconciliation Act, House Conf. Rep. No. 101-386, 101st Cong., 1st Sess., at 435, reprinted in 1989 U.S.C.C.A.N. 3018, 3038.

⁸⁹ *Id.*

⁹⁰ Gray Response at 42-43.

⁹¹ See 47 CFR § 73.3555, note 7.

ownership rules to acquire the Station;⁹² or a purchasing broadcaster can accept an offer of affiliation directly from a network. What a broadcaster cannot do is to ignore the changes made to our rule, especially where the purpose of the change to the rule is to prohibit precisely the type of acquisition made here.

IV. ORDERING CLAUSES

34. 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,⁹³ that Gray Television, Inc., is **LIABLE FOR A MONETARY 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.⁹⁴

35. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within thirty (30) calendar days after the release of this Forfeiture Order.⁹⁵ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to section 504(a) of the Act. Gray Television, Inc. shall send electronic notification of payment to the Chief, Media Bureau, Video Division at Barbara.Kreisman@FCC.gov, and Jeremy Miller at Jeremy.Miller@FCC.gov on the date said payment is made. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using CORES (the Commission's online payment system),⁹⁶ or by wire transfer. Payments by check or money order to pay a forfeiture are no longer accepted. Below are instructions that payors should follow based on the form of payment selected:⁹⁷

- 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 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).⁹⁸ 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 Registration System (CORES) at <https://apps.fcc.gov/core/userLogin.do>. To pay by credit card, log-in using the FCC Username associated to the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Manage Existing FRNs | FRN Financial | Bills & Fees" from the CORES Menu, then select FRN Financial and the view/make payments option next to the FRN. Select the "Open Bills" tab and find the bill number associated with the NAL/Acct. No. The bill number is the NAL Acct. No. (e.g.,

⁹² See 47 CFR §§ 1.3, 73.3555(b)(2).

⁹³ 47 U.S.C. § 503(b); 47 CFR § 1.80.

⁹⁴ 47 CFR § 73.3555, Note 11.

⁹⁵ *Id.* § 1.80.

⁹⁶ Payments made using CORES do not require the submission of an FCC Form 159.

⁹⁷ 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.

⁹⁸ Instructions for completing the form may be obtained at <https://www.fcc.gov/Forms/Form159/159.pdf>.

NAL/Acct. No. 1912345678 would be associated with FCC Bill Number 1912345678). After selecting the bill for payment, choose the “Pay by Credit Card” option. Please note that there is a \$24,999.99 limit on credit card transactions.

- Payment by ACH must be made by using the Commission’s Registration System (CORES) at <https://apps.fcc.gov/cores/paymentFrnLogin.do>. 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 “Manage Existing FRNs | FRN Financial | Bills & Fees” on the CORES Menu, then select FRN Financial and the view/make payments option next to the FRN. Select the “Open Bills” tab and find the bill number associated with the NAL/Acct. No. The bill number is the NAL/Acct. No. (e.g., NAL/Acct. No. 1912345678 would be associated with FCC Bill Number 1912345678). Finally, choose the “Pay from Bank Account” option. Please contact the appropriate 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.

36. 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 20554.⁹⁹ 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.

37. **IT IS FURTHER ORDERED**, that copies of this Forfeiture Order 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

⁹⁹ See 47 CFR § 1.1914.

**STATEMENT OF
COMMISSIONER NATHAN SIMINGTON
DISSENTING**

Re: *Gray Television, Inc., Parent of Gray Television Licensee, LLC, Licensee of Stations KYES-TV, Anchorage, AK and KTUU-TV, Anchorage, AK, Facility ID Nos. 21488 and 10173, Forfeiture Order.*

I respectfully dissent from this Forfeiture Order (“Order”) for two reasons.

First: I believe that the Order misapplies the plain language of Section 73.3555, Note 11 of our rules (the “Rule”). Specifically, the Order denies that Gray’s argument is factually correct that it owned two of the top-four stations in the Anchorage DMA (“Anchorage”) prior to the transaction, and that, even if Gray *did* own two of the top-four stations in Anchorage, the transaction would *still* have been prohibited by our Rule.

Were it the case that Gray indeed lacked a factual predicate for its assertion that it owned two of the top-four Anchorage stations—and I do not purport here to analyze that question—and the Order were to restrict its analysis of a putative violation solely to that question, I may have been able to approve in part or in whole. However, the Order goes on to provide that “regardless of whether Gray already legally possessed a top-four combination through organic growth at the time of the transaction, acquisition of the CBS affiliation would still have ‘result[ed] in’ ownership of a new top four combination (transacted through a new series of agreements and constituting a new combination of assets) in violation of Note 11.” I disagree.

Our Rule was drafted to prevent broadcast licensees from gaining market share in individual DMAs through affiliate swaps. It provides that:

[A]n 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.

Stipulating, as the Order does, that it would not have mattered whether Gray previously owned two of the top-four stations in Anchorage to determine if Gray violated the Rule is, I believe, error. While I appreciate that the intent of the Rule is to prevent the acquisition of market share through a swap in network affiliation, and while I appreciate that the Bureau is satisfied that the transaction in question was such a swap, the language of the Rule prohibits such transactions “result[ing] in” an owner having two of the top-four rated television stations in a DMA. Whether Gray, at the time of the transaction, owned two of the top-four rated television stations in Anchorage *must* matter if the Rule provides that affiliation swaps “result[ing] in” a duopoly are prohibited.

Black’s Law Dictionary defines the verb form of ‘result’ as: “[t]o proceed, to spring, or arise, as a consequence, effect, or conclusion; to come out, or have an issue; to terminate; to end.” The operative clause here is the first, which accords with the plain meaning of the term—a ‘result’ is a causal relationship between an action and an outcome.

Suppose I put on a red tie for work. I come into the office, and for lunch I enjoy a sandwich with a side of French fries and ketchup. I, by accident, dribble some ketchup onto my tie. Fortunately for me, I have a blue tie in my office, into which I change for the balance of the afternoon. While it might be

argued that a maladroit nosh resulted in my wearing a *blue* tie that day, it did not result in my wearing a tie *simpliciter*. And without more, the formation a duopoly *simpliciter* through an affiliate swap is all that the plain language of the Rule prevents. If Gray previously *had* a duopoly in Anchorage, its behavior was not prohibited under a plain reading of the Rule.

Second: we should endeavor to read our own rules with an eye toward preventing unintended or absurd consequences. The purpose of the Rule is to protect competition, localism and ownership diversity in the broadcast market. And yet the Rule, as applied in the Order, would require broadcasters to seek a waiver from the Commission if, say, they consummate a network affiliation swap resulting in *diminished* market share in a DMA. Had Gray previously owned the top-ranked and second-ranked station in Anchorage, and then swapped the network affiliation of its top-ranked station for the fourth-ranked station, the result would be to *decrease* broadcast market ownership concentration and thus to *increase*, as our rules would have it, competition, localism, and ownership diversity. Yet to apply the Rule as the Order suggests would still have required Gray to seek a waiver from a rule designed to increase the very conditions that would be increased by such a transaction.

I believe this is straying from the position adopted by the majority in our most direct prior action, the August 10, 2016 2d Report & Order (the “2016 Report & Order”) in paragraphs 45 to 52. I read these paragraphs to address prohibitions on the formation of a duopoly, not affiliation swaps within an existing duopoly. Specifically, paragraph 47 states that “application of the top-four prohibition to affiliation swaps is consistent with previous Commission action and policy; we are merely *closing a potential loophole* and preventing circumvention of the Commission’s rules.” (Emphasis added.) The loophole in question is, of course, the acquisition of a second top-four station via an affiliation swap when it would have been otherwise prohibited to acquire such station by purchase. My position here is further buttressed by, for example, footnote 142 to paragraph 52 of the 2016 Report & Order, which specifies that parties who “*acquired* control over a *second* in-market top-four station by engaging in affiliation swaps” (emphasis added) prior to the Order date would not be subject to divestiture or enforcement action. In short, I believe the action contemplated today goes beyond precedent and against the text of our rules in a minor but potentially damaging way.

Stepping away from text for a moment to consider predictable effects of this austere regulatory bar: if we render growth, acquisitions, and swaps risky enough, there will be a regrettable *ad terrorem* effect. From the lengthy discussion prior, I obviously believe that a good faith reading of our rules and prior actions could lead a reasonable person to believe that the action punished today was permissible. If this is the case, prudent media businesses will have no choice but to be passive in small markets.

It may be that the Commission, through the Rule, intends to require broadcasters to seek a waiver for *any* network affiliation swap that involves, both prior to and after the transaction, two of the top-four stations in a DMA, even when the transaction clearly serves the Commission’s public interest mandates. That is within our power, of course—we may wish to perform a deeper-than-surface evaluation of the market dynamics implicated by any such transaction. But if our purpose upon adoption of the Rule were to freeze in time the network affiliation of every then-extant broadcast duopoly but for grant of a Commission waiver, that is neither clear from the plain language of the Rule nor the original 2016 Report & Order adopting it.

For these reasons, I respectfully dissent.