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 televisions stations in a DMA. Whether Gray, at the time of the transaction, owned two of the top-four rated televisions 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.