Failing Station Waiver

By this application Gray seeks consent from the Commission to the assignment of the license of KYES-TV, Anchorage, Alaska, (FID 21488). Gray requests that the Commission waive its local television ownership rule to permit this assignment, because KYES-DT, which is located in the Anchorage, Alaska DMA, is a "failing" station. This transaction meets the test for a "failing" station set forth in Note 7(2) to Section 73.3555 of the Commission's Rules.[1]

Section 73.3555(b) generally bars common ownership of television stations in the same television market with overlapping Grade B contours unless at least one of the stations in the proposed combination is not ranked among the top four stations in the market, and there would be at least eight independently owned and operated full-power stations in the market after an acquisition is consummated. In addition to KYES-TV, Gray is the proposed assignee of KTUU-TV, Anchorage, Alaska (FID 10173).[2] While KYES-TV is not among the top four rated stations in the market, there will not be eight independently-owned stations in the market after the transaction.

Gray, therefore, requests a waiver of the local television ownership rule, because KYES-TV is a "failing" station. The Commission will presume a "failing" station waiver request to be in the public interest if (1) the "failing" station has a low all-day audience share (*i.e.*, no more than four percent), (2) the station has had negative cash flow for three consecutive years prior to the application, (3) the parties demonstrate public interest benefits that will flow from the proposed transaction, and (4) there is no out-of-market buyer willing and able to acquire the station at other than an artificially depressed price.[3] As discussed below, the proposed transaction meets all four of these standards.

KYES-TV Has a Low All-Day Audience Share

KYES-TV consistently has failed to achieve an all-day audience shares in excess of four percent. Indeed, over the past four Nielsen "sweeps" periods, KYES-TV has consistently received a 1 percent share. In none of those ratings periods did KYES-TV's all-day audience share approach the four percent maximum threshold. With a consistent failure to achieve an audience share at the four percent share benchmark, KYES-TV satisfies the first criterion of the failing station exception.

Poor Financial Condition

This prong of the standard focuses on the three years immediately preceding the filing of the application. As the separately filed financial data demonstrates, KYES-TV has lost money each of the last three years, with the largest loss coming in 2014. Notably, in 2014 television stations in Alaska benefited from historically high political spending relating to an unusually competitive U.S. Senate race. Despite the unprecedented advertising revenue buoying all television stations in Alaska in 2014, KYES-TV actually suffered through its worst year. Thus,

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[1] 47 C.F.R. § 73.3555.

[2] See FCC File No. BALCDT-20150917ADQ.

[3] 47 C.F.R. § 73.35555, Note 7.

KYES-TV easily meets the second prong and, absent this waiver, is unlikely to be profitable in the foreseeable future.[4]

Public Interest Benefits

The Commission recognized when it adopted its "failing station" waiver policy in 1999 that "[a]llowing a 'failing' station to join with a stronger station in the market can greatly improve its ability to improve its facilities and programming operations, thus benefiting the public interest."[5] It understood that these waivers might be "of particular assistance to struggling stations in smaller markets that are not covered by the eight voice/top four ranked station test."[6]

Substantial programming and operational improvement would result from Gray's common ownership of KYES-TV and KTUU-TV and provide tangible public interest benefits:

- Today, KYES-TV is operating on a shoestring budget and, as demonstrated by the financial information referenced above, nevertheless operates at a consistent loss. Operated together with KTUU-TV, KYES-TV will have access to sufficient financial resources to modernize its operations and meet and expand its financial obligations.

- For example, Gray intends to relocate KYES-TV from its existing facilities to a state-of-the-art $25 Million studio constructed for KTUU-TV in 2014. This move will instantly upgrade the physical plant for the station with the latest workstations, equipment, and software necessary to compete in today's television environment.

- Maintaining broadcast facilities, including the full power station and its network of translators, in Alaska's rugged environment and extreme climate is a unique challenge. KYES-TV will have access to the full support of and resources from KTUU-TV's experienced engineering team.

- When events warrant, Gray will provide KYES-TV viewers with live, breaking weather coverage using resources from KTUU-TV and also will have the capability to provide non-weather emergency programming and information for viewers of KYES-TV as necessary.

- Gray operates a Washington, DC news bureau providing an important outlet for lawmakers in Washington to reach their constituents back home in Gray's markets. Gray will look for ways to allow its seasoned reporters in its Washington news bureau to bring content from Washington to KYES-TV in a way that is not possible under the station's current ownership.

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[4] Financial data from the previous three years is confidential financial data that will be filed separately with the Commission, together with a request for confidential treatment.

[5] *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12939 (1999).

[6] *Id.*

<u>No Rational Out-of-Market Buyer</u>

Buyers are not willing and able to acquire and operate a failing station such as KYES-TV without the ability to operate it in conjunction with a stronger, in-market station (such as KTUU-TV) and thereby taking advantage of the synergies that generate public interest benefits like those described above. Exhibit 1 hereto is the declaration of W. Lawrence Patrick describing the prospects of a sale of KYES-TV to an out-of-market buyer. Mr. Patrick states that no reasonable out-of-market buyer is likely to purchase KYES-TV on a standalone basis. He further explains that, on the basis of his evaluation of factors including KYES-TV's poor over-the-air coverage, low ratings, the significant challenges faced by My Network affiliates, and the competitive environment in the market, "no knowledgeable and experienced television operator could be found that would provide a viable full service operation with KYES-TV as a standalone station." Thus, the fourth prong of the failing station test is satisfied, because no reasonable out-of-market buyer would express interest in acquiring KYES-TV.

Gray respectfully submits that the public interest would be served by granting a failing station waiver in order to allow common ownership of KYES-TV and KTUU-TV. In adopting the failing station exception to the Duopoly Rule, the Commission stated that allowing failing stations to combine with a stronger station would "pose minimal harm to our diversity and competition goals, since their financial situation typically hampers their ability to be a viable 'voice' in the market."[7] That is the case here, where a waiver will allow KYES-TV to strengthen its "voice" in the market. A combination with KTUU-TV would made available new financial, operational, and programming resources that would provide improved service to viewers throughout the Anchorage DMA.

In light of the demonstrable benefits of common ownership, and given that KYES-TV is a "failing" station under the Commission's rules, the public interest would be served by waiver of the duopoly rule.

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[7] *Id.* at 12938-39.

Exhibit 1

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October 6, 2015

Mr. William Lake
Chief-Media Bureau
Federal Communications Commission
445 12th Street S.W.
Room 3-C740
Washington, D.C. 20554

Re: KYES-TV, Anchorage, AK
KTUU-TV, Kansas City, Missouri

Dear Mr. Lake:

I have been asked to opine on the operation of KYES-TV, based on a failing station analysis, with regard to the transfer application involving KYES-TV relating to the proposed purchase of the station by Gray Television Inc. ("Gray"). KYES-TV is the My network affiliate in the Anchorage, Alaska DMA. Gray h is the proposed assignee of KTUU-TV, the NBC affiliate in the market. This letter addresses the feasibility of operating and marketing KYES-TV as a full-service standalone operation versus the benefits of operating with KTUU-TV based on a failing station waiver.

I am Managing Partner of Patrick Communications, a leading media brokerage firm in the industry with over $7.5 billion in transactions. I have been involved in the broadcast industry for over forty years and my firm has sold 170 television stations in the past ten years, more than any other brokerage firm. In addition to Patrick Communications, I served from 2005 to 2008 as Chairman of the Board of ION Media Networks, the licensee of 60 television stations. I am also a past president of the National Association of Media Brokers and am the current chairman of the National Association of Broadcasters Educational Foundation, and past chairman of the National Association of Broadcaster's PAC. I also own a minority interest in television stations in New York, Los Angeles, Chicago, Boston, Philadelphia, San Francisco, San Diego, Houston and Harrisburg-York. In addition, I speak regularly to industry groups and have a long history of experience in both television operations and transactions.

I am very familiar with the Anchorage, Alaska market and the various television station signals, competition and market conditions there, as well as the current television economic environment and station transactional market. I have also provided numerous opinions to the FCC on failing station waivers. I believe that I am qualified to opine on the viability and marketability of KYES-TV as a standalone television station.

There are five owners of full power commercial television stations in the market. Six television networks are represented including ABC, NBC, CBS, FOX, ION and My. To date, no Spanish language networks have shown interest in the Anchorage DMA due to a low Hispanic population.

Ranked as the 148th largest DMA in the U.S., the Anchorage, Alaska market has an estimated population of 459,000. The population growth for the market was 1.8 percent for the past five years, and population growth of 1.3 percent is projected through 2019. Total DMA television advertising dollars increased 5.6 percent from 2009 to 2014. However, BIA Kelsey projects growth over the next five years of only 0.6 percent and almost all of that is attributable to the 2016 election cycle.

The competition among the major network affiliated stations in this DMA is very strong. The affiliates of the CBS, NBC, ABC and FOX networks collectively have a 69.1 percent share of the local TV ad revenue in the market. KYES-TV, the subject of this letter, has only a 3.6 percent share of local TV ad revenue, even after having been operated in the DMA since 1990. In fact, KYES-TV's revenue share has declined over the past few years and the station has still not rebounded to its pre-recession revenue levels, according to BIA Kelsey. Only one other full power station has a lower revenue share, the ION station, with a share of 1.1 percent.

In terms of actual audience share, KYES-TV has consistently had a viewing share that is barely measurable-- only 1 percent for the total day viewing-- for the past three ratings periods. Very low audience shares have been the case for many years.

Given the level of competition in the DMA, KYES-TV is unable to operate as a viable standalone full power station. KYES-TV cannot currently afford to offer the local programming and service to the community that it could if operated with KTUU-TV. KYES-TV has been a My network affiliate since 2006 and it has never achieved a competitive position in the market capable of generating a revenue base sufficient for a standalone operation. All of the major network affiliations, other than the CW, are already present on the primary streams of other television stations. However, the CW is available as a multicast channel for KYUR-TV. Even if KYES-TV were able to entice the CW to movie its affiliation from its established home to KYES-TV's primary stream, the CW would prove to be as marginal in terms of viability as is the My network. There are no viable primary network and little secondary television programming available to KYES-TV other than what it already carries.

KYES-TV will benefit from its operation with KYUU-TV in terms of shared expenses and facilities and KYES-TV's audience will enjoy a level of weather and public service programming that KYES-TV could never afford to provide as a standalone station with such a small and declining revenue base.

As a broker, I believe that the marketing of KYES-TV as a standalone station would be unsuccessful given the marginalized nature of the operation, and knowing that a buyer would be hard-pressed to find compelling programming sufficient to survive. The challenges of marketing KYES-TV are set forth below.

As noted, the costs of providing a full programming schedule given the My network affiliation and the number of other stations in the market competing for quality syndicated programming would be prohibitive. KYES-TV has the weakest coverage in the DMA. All of the other full power affiliates have population coverage in excess of 336,000 and several reach 380,000 people. In contrast, KYES-TV covers a population base of only 254,000—a significantly lower amount. KYES-TV has struggled to find an audience large enough to sustain a full service operation since going on the air in 1990. In addition, given that the My network is poorly rated amongst audiences nationally and locally in comparison to the other networks represented in this DMA, KYES-TV will continue to struggle to sustain a level of advertising revenue sufficient to cover its operational costs. Local market conditions remain poor here, particularly for KYES-TV which continues to lose market revenue share even as the overall market shows very modest increases.

The history of My network TV stations and sales supports this analysis. I reviewed My network affiliates in smaller markets comparable to Anchorage (DMA's 120 to 207). There is only one other full power My network affiliate operating in all of these markets. Most of the My network affiliates are in much larger markets. If they do operate in smaller markets they are on second or third digital channels or low power stations, not full powers. Given the lack of My affiliates in smaller markets, the demand for a station like KYES-TV will be very, very low. In fact, KYES-TV is the only full power My network station that has sold since 2009 in smaller markets of this size. Even amongst sales of all My network affiliates in the top 50 markets since 2009 there were no instances of an out-of-market buyer purchasing a standalone My network affiliate such as KYES-TV. The My network affiliates that were sold even in much larger markets were purchased by an in-market-buyer or by an entity with a Shared Services Agreement or Joint Sales Agreement in place with another station in the market.

An additional complicating factor to the success of KYES-TV as a standalone station and to the marketing of the station as such is the upcoming TV spectrum auction. It is very possible that in the largest markets of the US, where the spectrum auction needs the maximum number of stations to participate in the auction, the My network will lose affiliates that surrender their stations into the auction. This would result in there not being enough remaining stations to support a My network affiliate going forward. My network is already a significantly less-viewed network than most of the other national networks. If the network itself loses the ability to affiliate with stations in the largest of US markets, its national coverage of TV households could fall below the level of sustainability for the network overall. That would further impact KYES-

TV's survival as a standalone station as, without My network programming, it would have even more difficulty finding competitive programming sufficient to sustain its operations.

As a broker, if I were asked to market the station solely to out-of-market entities, I would be hard-pressed to identify any potential viable buyers. KYES-TV is not marketable as a standalone station as it is now operated, and the uncertainty of its primary programming source after the upcoming spectrum auction makes KYES-TV's future success even more speculative. Given the low chance of success in finding any buyer other than an in-market-buyer, I would decline to take the listing as I would have to invest in a widespread effort including personal and telephonic contact, direct mail, and possibly trade press advertising in order to try and find a qualified out-of-market buyer. The cost of these efforts would be prohibitive, and would take a significant investment of my time as well. It is my opinion that even if an out-of-market buyer was found after an exhaustive marketing effort that it would only be at a very depressed price.

Therefore, based on my twenty years of media brokerage experience and actual experience with the sale of My network affiliates, it is my opinion that no knowledgeable and experienced television operator could be found that would provide a viable full service operation with KYES-TV as a standalone station and that an effort to find a qualified out-of-market buyer would either be fruitless or at a very depressed price.

Sincerely,

W. Lawrence Patrick

W. Lawrence Patrick
Managing Partner