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August 29, 2007

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VIA HAND DELIVERY

Marlene H. Dortch, Esq., Secretary
Federal Communications Commission
236 Massachusetts Ave., NE
Suite 110
Washington, DC 20002

Re: Application for Assignment of License for
KSPR(TV), Springfield, Missouri, Facility ID No. 35630
FCC File No. BALCT-20061005ADY
DA 07-3476
Application for Review

Dear Ms. Dortch:

Transmitted herewith, on behalf of Koplar Communications International, Inc., are an original and four (4) copies of its Application for Review of the July 30, 2007 decision of the Media Bureau's Video Division granting the above-captioned application.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier.

Should you have any questions about this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

David A. O'Connor
Counsel for Koplar Communications International, Inc.

Enclosure
cc: Certificate of Service List

4763393_v1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of PIEDMONT TELEVISION OF SPRINGFIELD LICENSE LLC (Assignor) and PERKIN MEDIA, LLC (Assignee) For Consent to the Voluntary Assignment of the License for Station KSPR(TV), Springfield, MO	)))))))))))))))	File No. BALCT-20061005ADY Facility ID No. 35630

APPLICATION FOR REVIEW

Koplar Communications International, Inc.
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Its Counsel

August 29, 2007

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SUMMARY

On November 13, 2006, Koplar Communications International, Inc. ("Koplar") and EBC Harrison, Inc. filed separate Petitions to Deny the application to assign the license for KSPR(TV), Springfield, Missouri ("Application"). The pleadings set forth specific allegations of fact showing that the Application violates the Commission's multiple ownership rules because Perkin Media, LLC ("Perkin"), the purported Assignee, is a mere straw man and is not independent from KY3, Inc. ("KY3"), an in-market full-power television licensee. Thus, KY3 is using Perkin as a front to allow KY3 to control and operate two television stations in Springfield, in violation of the multiple ownership rules. KY3 and Perkin do not dispute that Mr. Perkin is a former employee of KY3 or that Perkin will hold nothing more than the bare FCC license and some intangible property.

The indicia of KY3's control of KSPR include:

- KY3 has paid for and owns 99% of KSPR, including all of the hard assets, such as the tower, studio and transmitter;
- KY3 provides all staffing of KSPR, except for a maximum of four full-time employees, and as a consequence, Perkin has slashed KSPR personnel by 94%, ceding all previous personnel functions over to KY3, including technical, ad sales and programming;
- KY3 places all programming and sells all KSPR advertising — indeed, Perkin is prohibited by contract from selling KSPR advertising; and
- KY3 guarantees the income and debt of Perkin, while Perkin is a passive investor in KSPR.

Thus, the petitioners showed that KY3 would control a "virtual duopoly" comprising the ABC and NBC network affiliates in Springfield, two of the top four stations in the market. And this is not the first duopoly in Springfield — Nexstar already controls the Fox and CBS affiliates in Springfield.

In a letter decision ("*Decision*"), the Media Bureau's Video Division ("Bureau") granted the Application by largely relying on a 2004 Bureau decision (the *Malara* decision) that remains subject to Commission review. In doing so, the Bureau failed to address critical issues raised by the petitioners. The *Decision* does not even mention the fact that Mr. Perkin is a former employee of KY3 or address Koplar's argument that he could be subject to undue influence from KY3 as a result and thus may not be an independent buyer. The Bureau also improperly assessed the *per se* and *de facto* control standards, and failed to address specific allegations of fact raised by the petitioners that KY3 will be in substantial control of the programming, personnel and finances of KSPR. The Bureau also ignored the compounding effects of the numerous interlocking agreements that cede control of the station to KY3.

Most egregiously, the Bureau failed to address the far-reaching policy implications of the *Decision*. The effects of the *Decision* are devastating — in the small market of Springfield, the top four network affiliates (ABC, CBS, Fox and NBC) are now controlled by two entities, KY3 and Nexstar. Together KY3 and Nexstar control 98.1% of the television advertising revenue in the Springfield, with KY3 alone controlling 50% of the television advertising revenue through its illegal combination of KSPR and KYTV(TV). The degree of market concentration permitted by the Bureau cannot be justified under any public interest or market competition standard. Nor should the loss of diversity resulting from this transaction be ignored as it was by the Bureau. In short, the Bureau failed to apply any public interest standard to its analysis of the Application.

The Commission should correct the Bureau's errors by vacating the *Decision* and requiring the parties to unwind the KSPR transaction. Alternatively, Koplar urges the Commission to rescind the Application grant and designate the Application for a hearing to determine the facts necessary for the Commission to act on the Application.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of PIEDMONT TELEVISION OF SPRINGFIELD LICENSE LLC (Assignor) and PERKIN MEDIA, LLC (Assignee) For Consent to the Voluntary Assignment of the License for Station KSPR(TV), Springfield, MO	)))))))))))))))	File No. BALCT-20061005ADY Facility ID No. 35630

To: Secretary, FCC
For: The Commission

APPLICATION FOR REVIEW

Koplar Communications International, Inc. ("Koplar"), by its counsel and pursuant to Section 1.115(a) of the Commission's Rules, 47 C.F.R. § 1.115(a), hereby requests that the Commission vacate the Decision of the Media Bureau's Video Division ("Bureau") dated July 30, 2007,[1] which granted the above-captioned application ("Application") to assign the license of KSPR(TV), Springfield, Missouri ("KSPR"). The pleadings in this case set forth specific allegations of fact that the Application violates the Commission's multiple ownership rules because KY3, Inc. ("KY3"), an in-market full-power television licensee, is the real party in

[1] Application for Assignment of License of (TV), Springfield, Missouri (Facility ID # 35630), Letter Decision, FCC File No. BALCT-20061005ADY, DA 07-3476 (Chief, Video Div., rel. July 30, 2007) ("Decision"); see also separate Petitions to Deny filed by Koplar and EBC Harrison, Inc. (filed Nov. 13, 2006); Opposition to Petitions to Deny (filed Nov. 28, 2006); separate Replies (filed Dec. 8, 2006).

interest, and that KY3 is using Perkin Media, LLC ("Perkin"), the purported Assignee whose principal, Mr. Perkin is a former employee of KY3, as a front to hold the license for KSPR. The pleadings show that KY3 will control and operate two of the top four network affiliated television stations in Springfield. Moreover, this is not the first illegal duopoly in Springfield — Nexstar and its alter ego, Mission Broadcasting, already control and operate two other network affiliates in Springfield.[2] Nonetheless, the Bureau granted the Application, effectively allowing two entities to control all four major network affiliated television stations in Springfield.

What the Bureau has authorized in Springfield is nothing short of a complete evisceration of the Commission's multiple ownership rules, in violation of Section 73.3555(b) of the Commission's rules and the conditions imposed by the court in *Prometheus Radio Project v. FCC*.[3] Taken to its logical conclusion, the *Decision* would support the combination of three, four or more television stations within the same market so long as the legalistic forms of agreements were observed, at least on paper. No Commission decision ever has allowed the level of consolidation proposed in the Application, particularly where, as here, a former employee is being used as a front for the real party in interest.[4] For these reasons, Koplar urges the Commission to vacate the *Decision* and require the parties to unwind the KSPR transaction.[5] Alternatively, the Commission should rescind the Application grant and designate the

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[2] *See* Koplar Petition at 3 & n.4; *see also* pleadings filed in FCC File No. BRCT-20051003ABA.

[3] 373 F.3d 372 (3rd Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

[4] *See Edwin L. Edwards, Sr. (Transferor) and Carolyn C. Smith (Transferee)*, Memorandum Opinion and Order and Notice of Apparent Liability, FCC 01-336, 16 FCC Rcd 22236, 22249-22251 (2001) (issuing a substantial forfeiture to Sinclair under similar facts that were arguably less egregious than those presented here). Notably, the Bureau's *Decision* does not cite to this case, relying instead on a Bureau level decision.

[5] The Commission's CDBS reflects that the parties consummated the transaction on August 24, 2007.

Application for a hearing to determine the facts necessary for the Commission to act on the Application.

QUESTIONS PRESENTED

1. Whether the *Decision* is in conflict with Section 0.283(c) of the Commission's rules and applicable case law because this case presents novel questions of law and policy that cannot be resolved based on existing Commission precedent, and because the *Decision* solely relies on a previous Bureau-level decision (the *Malara* decision) that remains subject to review by the Commission;[6]

2. Whether the Bureau's *Decision* was arbitrary and capricious because it failed to address important allegations of fact raised in the petitions, particularly the fact that a grant of the Application would harm the public interest by reducing competition for television services in the small geographic market of Springfield and allowing two entities to control 98.1% of the television advertising revenues in Springfield;[7]

3. Whether, as a policy matter, the Commission should allow a merger that would increase the applicable Herfindahl-Hirschman Index ("HHI") to more than 700 points higher than the HHI score of 1800 considered by the Justice Department and Federal Trade Commission to indicate a "highly concentrated" market;[8]

4. Whether the *Decision* misinterpreted Commission rules by concluding that commercial time aired by television stations is not "broadcast time" for purposes of attributing time brokerage agreements;[9] and

5. Whether the *Decision* is premised on erroneous findings as to material questions of fact raised by petitioners, in particular that the Assignee is incapable of exercising *de facto* control of the station.[10]

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[6] 47 C.F.R. § 1.115(b)(2)(i).

[7] *Id.* § 1.115(b)(2)(v).

[8] *Id.* § 1.115(b)(2)(ii).

[9] *Id.* § 1.115(b)(2)(i).

[10] *Id.* § 1.115(b)(2)(iv).

I. Introduction

A. The Application

KSPR is the ABC network affiliate serving Springfield. The Springfield Designated Market Area ("DMA") is the 78th ranked DMA according to Nielsen, with only five commercial and one noncommercial full power television stations. On October 5, 2007, Piedmont Television of Springfield License LLC ("Piedmont"), the Assignor, filed a joint application with Perkin and KY3 proposing to assign the license for KSPR to Perkin along with certain intangible property, and to assign all remaining KSPR assets to KY3, an in-market full-power television licensee (the "Application").[11]

Under the terms of the agreements, some of which were disclosed and some of which were withheld by the parties,[12] Perkin, whose principal Mr. Perkin is a former employee of KY3, would be the licensee in name of KSPR while KY3 would own all of the station's assets, including the tower, transmitter building and studio, and KY3 would program and operate the station pursuant to a Shared Service Agreement, an Advertising Representation Agreement, a loan guaranty, an Option Agreement and various lease agreements.[13] KY3 already is the licensee

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[11] FCC File No. BALCT-20061005ADY.

[12] By letter dated May 22, 2007, the Bureau's staff requested further information concerning the transaction proposed in the Application. The letter requested that the parties to the Application furnish missing financial information. The Application was amended on May 30, 2007. However, the Bureau did not request, and to date the parties have not supplied, copies of an executed Option agreement, various lease agreements, or a loan guaranty of Perkin's debt by KY3. Koplar continues to urge the Commission to require disclosure of all transactional documents among the parties to this transaction and, Koplar submits, issuance of the *Decision* without access to such relevant information was arbitrary and capricious.

[13] Seemingly to avoid possession of a bare license, Perkin also would hold certain intangible property, such as programming contracts and intellectual property.

of the NBC affiliate in Springfield, KYTV(TV) ("KYTV").[14] Through this combination of interlocking agreements, KY3 would control the NBC and ABC affiliates in the market, two of the top four stations in the market, with Perkin as the straw man for the KSPR license.

B. The Local Television Ownership Rule

The Commission's rules prohibit one entity from owning and controlling two television stations in a small market such as Springfield, if the Grade B signals of the stations overlap and fewer than eight independent television "voices" are present in the market.[15] No version of the Commission's ownership rules has ever permitted common ownership of two television stations in a six-station market such as Springfield, let alone two television stations ranked among the top four stations in the market. Because KY3 may not lawfully hold the licenses for both KYTV and KSPR, KY3 crafted a series of agreements that provide it with the means of controlling both KYTV and KSPR as a single economic or business unit while using Perkin as a front for its KSPR operations.

C. The Petitions to Deny

On November 13, 2006, Koplar filed a Petition to deny the Application.[16] A separate Petition to deny the Application was filed on the same day by EBC Harrison, Inc. ("EBC"), the licensee of the MyNetworkTV affiliate serving the Springfield DMA, KWBM(TV). Both petitioners argued that KY3 was using a former employee as a straw man and that KY3 would

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[14] KY3 is a subsidiary of Schurz Communications, which owns numerous media outlets throughout the country.

[15] 47 C.F.R. § 73.3555(b) (2002).

[16] Koplar holds a construction permit for a new television station that will be assigned to the Springfield DMA. *See* FCC File No. BNPCT-20060421ACD (granted Aug. 11, 2006). The Bureau correctly concluded that Koplar, as a permittee, has standing to petition to deny the Application. *Decision* n.9.

actually operate and control KSPR. By operating and controlling KSPR and KYTV as a consolidated business, petitioners argued, KY3 would be in violation of the multiple ownership rules. Petitioners also demonstrated that KY3 will control the programming, personnel and finances of KSPR and thus have *de facto* control over the station. In addition, Koplar showed that the transaction constitutes a *per se* violation of the multiple ownership rules, because KY3 necessarily will program more than 15% of the programming on KSPR. Koplar also calculated that the market concentration resulting from the transaction will raise the HHI score for the Springfield market far above the level considered to be a "highly concentrated" market. Finally, the petitioners showed that the transaction will be devastating to competition and diversity in the Springfield television market, and thus, should be denied on public interest grounds.

D. <u>The *Decision*</u>

In the *Decision*, the Bureau accepted at face value, without further inquiry, the statements of KY3 and Perkin, and the incomplete set of transaction documents purporting to support those statements, that Perkin would be in nominal control of KSPR. The Bureau gave no weight to the fact that Perkin is a former employee of KY3 by failing to even mention that undisputed fact in its *Decision*. Without credible explanation or Commission precedent, the *Decision* failed to find that KY3's obvious indicia of *de facto* control create an impermissible interest in KSPR. The *Decision* fails to acknowledge that Perkin affirmatively represented that it intends to employ no more than four full-time employees and fails to address the implausibility of running a major network affiliate with four or fewer employees.

The Bureau also relied on its own 2004 *Malara* decision, which remains subject to Commission review, to reach the erroneous conclusion that television commercials are not part of broadcast programming and thus cannot "count" toward the 15% programming limit.[17] As set forth below, the Bureau has misinterpreted the Commission's 15% attribution rule and the *Decision* should be reversed on that basis.

Most egregiously, the Bureau failed to address the far-reaching policy implications of its *Decision*. The *Decision* fails to acknowledge: (1) the undisputed fact that KY3 will control more than 50% of the television advertising revenues in the Springfield DMA and (2) that between KY3 and Nexstar they will control 98.1% of the television advertising revenues in the Springfield DMA. These uncontroverted facts demonstrate the harmful competitive aspects of the intended arrangements between KY3 and Perkin which were not addressed in the *Decision*.

Similarly, the Bureau dismissed without analysis the HHI calculations presented by Koplar[18] and failed to acknowledge the extreme consolidation of media taking place in the Springfield market. Finally, the Bureau failed to address petitioners' allegations that it was creating a precedent permitting any small market broadcaster to control and operate two (or more) television stations in contravention of the Commission's local ownership rules. The failure to address these critical aspects of the petitions constitutes reversible error, as further discussed below.[19]

II. The Bureau's *Decision* Is in Conflict with Commission Rules and the Conditions Imposed by the Court in *Prometheus.*

The *Decision* is in conflict with Section 0.283(c) of the Commission's rules because this case presents novel questions of law and policy that cannot be resolved based on existing

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[17] *Decision*, n.4 (citing *Malara Broadcast Group*, 19 FCC Rcd 24070 (2004), *pet. for recon. pending*).

[18] *Id.*; Joint Reply at 13 n.34.

[19] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Commission precedent, and because the *Decision* solely relies on a previous Bureau-level decision (the *Malara* decision) that remains subject to review by the full Commission. The *Decision* therefore represents an *ultra vires* act of the Bureau because it is an attempt to create new law in contravention of Section 0.283(c) of the Commission's rules. The Commission has never opined on whether a shell company run by a former employee of a competing television station may permissibly be the licensee of an in-market station, when the competing station's owner controls substantially all of the personnel, programming and finances of that station. Rather than relying on its own faulty precedent in *Malara*, the Bureau should have referred this case to the Commission for an *en banc* decision. On this basis alone, the *Decision* should be vacated so that the Commission may review the transaction *de novo*.

Koplar also submits that the *Decision* is inconsistent with the conditions imposed by the United States Court of Appeals for the Third Circuit ("Third Circuit") in the *Prometheus* case. In that case, the Third Circuit retained jurisdiction over the Commission's multiple ownership rulemaking proceeding and stayed any changes to the Commission's ownership rules until after court review.[20] The Bureau's *Decision* represents a new interpretation of multiple ownership rules contrary to the substantive holdings of *Prometheus* and in violation of the stay issued in that proceeding.

Koplar raised these issues before the Bureau, yet the *Decision* does not even mention *Prometheus,* acknowledge Koplar's reliance on it, or bother to discuss the mandatory guidance provided by the *Prometheus* court. These failures to consider important aspects of a petitioner's argument and binding court precedent constitute reversible error.[21]

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[20] *Prometheus*, 373 F.3d at 382.

[21] *State Farm*, 463 U.S. at 43.

III. The Commission Should Address the Public Interest Standard Ignored by the Bureau.

Koplar and EBC offered compelling arguments that the Application was dangerously inconsistent with the public interest, because it would result in reduced competition and a loss of diversity. These arguments largely were ignored by the Bureau and should be closely scrutinized on review.

The loss of competition in Springfield is not speculative — it is all too real. As a new television entrant in the market, Koplar has been unable to affiliate with any network because the Springfield television market has become a closed shop. Nexstar and KY3 are the only television game in town except for EBC's MyNetworkTV affiliation and a noncommercial PBS affiliate. Koplar attempted to affiliate with the CW network, but lost out to a Low Power TV station that is owned, unsurprisingly, by KY3.[22] All of these facts were detailed in the pleadings, yet the *Decision* makes no mention of them. The *Decision* ignores the reality that competition among stations simply cannot exist if two entities control 98.1% of the television advertising in a single market. And the *Decision* ignores the reality that a second virtual duopoly in one market is contrary to the public interest when even one *legal* duopoly in the market is prohibited.

The Bureau's *Decision* failed to address any of these arguments raised by EBC and Koplar, simply acknowledging in a footnote that EBC and Koplar raised competition arguments, and dismissing those arguments on the specious logic that such arguments should be addressed in a rulemaking proceeding. Dismissing important competition arguments in a footnote, and on largely procedural grounds, is not consistent with the Commission's statutory duty to consider

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[22] *See* Koplar Petition at 19; Koplar Reply n.9.

the public interest effects of its decisions. Therefore, Koplar urges the Commission to give due consideration to the competition arguments raised by Koplar and EBC.

The Bureau also failed to address the Application's adverse effects on diversity in the Springfield market. The Commission has recognized, yet the Bureau ignored, that

> same-market broadcasters and certain other same-market media entities may raise particular concerns because of [the Commission's] goal of protecting local diversity and competition. Firms with existing local media interests may have an incentive and means to use financing or contractual arrangements to obtain a degree of horizontal integration within a particular local market that should be subject to local multiple ownership limitations.[23]

That is clearly the case here. The interlocking arrangements crafted by KY3 to control Perkin represent a major setback to the Commission's goals of localism and diversity. Diversity requires a number of independent voices. In Springfield, as a result of the *Decision*, an independent voice (a major television network affiliate) is being removed from the market. Under KY3's control, any local programming added to KSPR will be provided by KY3 which already programs KYTV. The Commission must either presume that KSPR will cease to be an independent voice, or hold a factual inquiry to determine how Mr. Perkin and his three (at most) full-time employees can simultaneously "control" all KSPR operations, finances and produce local news and other programming.

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[23] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, Report and Order, 14 FCC Rcd 12559, para. 51 (1999).

Competition and diversity are at the heart of the communications industry, as the Commission has noted repeatedly.[24] The public interest requires that the Commission defend its fundamental broadcast industry policies by vacating the *Decision*.

IV. The Bureau's Misinterpreted the Plain Meaning of the Commission's Multiple Ownership Rules

Koplar demonstrated in its Petition that KY3's effort to acquire KSPR constituted a *per se* violation of the multiple ownership rules. The Bureau rejected this argument because, as shown below, it misinterpreted the applicable rules.

There is no dispute that the Springfield market contains only six television stations and that KSPR and KYTV are two of those stations. No version of the Commission's ownership rules has ever permitted common ownership of two commercial television stations in a six station market such as Springfield.[25] Note 2(j) to the ownership rule provides:

> (j) "Time brokerage" (also known as "local marketing") is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.
>
> ***
>
> (2) Where two television stations are both located in the same market, as defined in the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b) and (c) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.[26]

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[24] *Frontier Broadcasting Co.*, 1 RR 50 (rel. Aug. 1, 1963) (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940)).

[25] *Compare* 47 C.F.R. § 73.3555 (2003) *to* 47 C.F.R. § 73.3555 (2006) (stayed).

[26] 47 C.F.R. § 73.3555, Note 2(j).

Based upon the plain meaning of these provisions, Koplar demonstrated in its pleadings that KY3 would acquire an attributable ownership interest in KSPR because KY3 would have the right to program 15% of KSPR's programming pursuant to the Advertising Representation Agreement and, in addition to that 15%, KY3 would control and place all of KSPR's advertising, thus necessarily pushing the total amount of "broadcast time per week" brokered by KY3 beyond the 15% limit.[27] The 15% limitation applies regardless of the source of the programming, meaning that advertising, including paid programming advertising, is included in "broadcast time." Because application of the rule is without regard to the source, any material from advertisers, networks or independent programmers falls under programming included in broadcast time. Accordingly, KY3 would acquire a *per se* attributable ownership interest in KSPR, making its arrangements with Perkin an overt violation of the multiple ownership rules.

The *Decision* did not interpret the plain meaning of the rules, instead holding that advertisements are not part of a station's "broadcast time." In support of this novel interpretation, the Bureau cited to *Malara*, itself a Bureau decision on review before the Commission, and relegated the discussion to a footnote: "We have previously held that such advertising time is not to be counted in computing whether the 15% limit has been reached."[28] The *Malara* decision cites no relevant Commission precedent for its interpretation, contending merely that the Commission rule "suggests" such a view.[29] Neither the *Decision* nor *Malara*

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[27] See Koplar Petition at 10-11; Koplar Reply at 7-8.

[28] *Decision* at 2 n.4 (citing *Malara*).

[29] *Malara*, 19 FCC Rcd at 24074. The *Malara* decision improperly relied on the *Attribution Reconsideration* in support. *See id.* (citing *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 16 FCC Rcd 1097, 1117 (2001)). However, the Commission's statement in that case merely describes typical commercial arrangements between program brokers and licensees. It does not hold that advertising or other commercial material aired by a station is not part of broadcasting or broadcast time.

offers any rational explanation of why advertisements broadcast by a television station are not part of "broadcast time" but that other, undefined materials transmitted by a station constitute "broadcast time." Such an unexplained and novel interpretation of a rule by the Bureau should not be permitted to stand.

The Bureau's improper reliance on *Malara* and its interpretation of the Commission's rules lacks any direct Commission precedent and should be reversed.[30] The fundamental purpose of the attribution rule is to ensure that stations in the same market may not be commonly programmed to a substantial extent unless commonly owned and thus avoid circumvention of the Commission's local ownership and control restrictions. Destruction of this fundamental understanding would leave industry participants free to provide unlimited amounts of commercial advertising to stations in the same market without concern for the ownership rules, including, for example, "infomercials" and other program-length commercials.

The Bureau's unsupported interpretation also runs counter to Commission precedent which treats commercials as part of a station's broadcast time. The Commission's regulation of children's programming, indecency, obscenity, sponsorship identification, Video News Releases and political broadcasting all treat commercial time as part of broadcast time and hold broadcasters responsible for them. Reversal of these understandings would be unwarranted and might leave the Commission without jurisdiction to regulate the content of advertisements as not part of broadcasting. If such an extreme rewrite of the Commission's rules and the Communications Act is intended, it cannot lawfully be done by the Bureau under delegated

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[30] Koplar submits that the Bureau lacked delegated authority to address this question and instead should have referred the issue to the full Commission. *See* 47 C.F.R. § 1.115(b)(2)(ii).

authority. The *Decision* should be reversed in order to achieve a rational harmony for the Commission's regulation of advertising and programming.

V. The Bureau Misapplied the Commission's Standards for Station Control.

In making a case-by-case analysis of whether a purported licensee is in control of a station, the Commission examines control of personnel, programming and finances.[31] As shown below, the Bureau failed to consider material parts of the record before it and relied on no Commission precedent to reach the conclusion that KY3 would not obtain an impermissible concentration of control.[32]

A. Station Personnel and Programming Will Be Controlled by KY3

It is uncontested that Perkin will slash KSPR full-time employees from 65 to 4 or fewer persons, a reduction in force of approximately 94%, and will rely instead on KY3 employees. It is also uncontested that Perkin is a former employee of KY3. Yet the *Decision* did not even note Perkin's sworn representation to the Commission that it would employ "fewer than five" full time employees.[33] Nor did the Bureau's analysis even acknowledge the undisputed fact that Mr. Perkin is a former employee of KY3 or analyze whether, as a result, Perkin may be subject to undue influence from his former employer. This is a substantial and material question of fact that at the very least requires resolution in a hearing. The failure of record warrants reversal.

Rather than explaining or further examining how an ABC affiliate could operate with a maximum of four full-time employees, the *Decision* states that "[Perkin] will control its

[31] *Roy M. Speer*, 11 FCC Rcd 18398, 18414 (1996).

[32] *Decision* at 4.

[33] Application (Response to Question III(14)).

employees."[34] Such a finding is irrelevant because there was no question about Perkin's control of Mr. Perkin and his (at most) three employees. The issue that the Bureau avoided was: How is it possible for Mr. Perkin and his skeleton crew to control the programming, finances and operations of KSPR? It is not credible, or at least raises a substantial and material question of fact, that a maximum of four such employees is able to maintain "ultimate licensee control" over the essential KSPR functions handled by KY3 employees, including oversight of programming, program selection, finances, sales, operations, and engineering, when prior to now, KSPR required 65 full-time employees.[35] Nor is it credible to conclude that Perkin will control station programming when 85% of the programming comes from the ABC network and the other 15% comes from KY3. The Commission should require Mr. Perkin to demonstrate at a hearing how he and his three employees exercise control over KSPR's programming under these facts. In reality, Perkin does not generate or control any of KSPR's originated programming.

B. Perkin's Passive Investor Status Confirms That It Will Not Control KSPR's Finances

KY3 did not disclose the financial arrangements it has with Perkin until specifically requested to do so by the Bureau.[36] In light of the disclosure of some of the details of these financial arrangements, Perkin's passive investor status is all the more clear, yet the Bureau appears to have overlooked much of the financial details and offered only scant analysis of the arrangements in its *Decision*.

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[34] *Decision* at 4.

[35] *See* Koplar Petition at 8; Koplar Reply at 6.

[36] See Bureau Letter dated May 22, 2007 and the subsequent amendment to the Application.

It is undisputed that KY3 fronted the money for Perkin to buy the KSPR license.[37] The Bureau did not address that fact. It is also clear that KY3 is guaranteeing all of Perkin's expenditures to nominally run the station. Specifically, under the Shared Services Agreement, payment of an $8,333.33 "Services Fee" by Perkin to KY3 is contingent on payment by KY3 to Perkin of a "Sales Commission" under the Advertising Representation Agreement.[38] The "Sales Commission" guarantees Perkin 35% of all station advertising revenue regardless of station performance.[39] If total advertising revenue exceeds $5.8 million annually, Perkin receives a 7% bonus. If the Sales Commission is less than Perkin's actual expenditures in any given month, KY3 will pay Perkin the difference.[40] In other words, if KY3 does not pay Perkin, Perkin does not pay KY3. Perkin cannot lose because it has a guaranteed revenue stream, with no evident financial incentive to operate the station efficiently, or even at all, and thus no incentive to be responsive to the programming needs, concerns and interests of KSPR viewers. In short, the *Decision* blessed an arrangement that divorces a television station licensee from any economic incentive to serve the public interest.

The Bureau appears to have overlooked all these arrangements other than the 7% bonus, and concluded that the possibility of an additional 7% bonus "gives Perkin a vested interest in being active in running the station in order to improve station operations and programming and, thereby, attract more advertisers."[41] That statement is irrational given the clear allegations of fact that Perkin lacks legal authority or personnel to place programming or to sell advertising.

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[37] Koplar Reply at 9.

[38] *See* Shared Services Agreement, Section 5(c).

[39] Advertising Representation Agreement § 2.8.

[40] *Id.*

[41] *Decision* at 4.

KY3 alone controls station revenues because it is solely responsible for selling advertising. KY3 owns and controls all "station operations" and programs all local programming, with the network providing the bulk of programming. Indeed, Perkin employs far too few persons to even have the ability to operate the station, program it, oversee programming or sell advertising.

It is KY3 that will be in control of determining whether additional compensation may be given to Perkin. Perkin enjoys a set compensation even if actual station performance is poor or nonexistent. If the station performs financially better than a benchmark under KY3's control, then Perkin enjoys a little extra compensation.[42] Thus, there is no rational connection between the Bureau's conclusion that Perkin will control station finances and the fact that Perkin is forbidden by contract from selling the advertising that generates station revenue or placing programming that would attract local viewers.

KY3, not Perkin, is be responsible for paying for the technical and engineering support of KSPR.[43] Consistent with its technical control of KSPR, KY3 will own, and thus control, the KSPR tower, transmitter building, offices and studios.[44] Perkin will be a mere lessee of all the facilities necessary to operate the station, pursuant to an undisclosed lease agreement. Obviously, the Bureau could not have considered the terms of that undisclosed lease, even though the overall arrangements establish that Perkin should not be considered a true "lessee" because it is paid consideration by KY3, the "lessor." These arrangements are additional indicia of the substantial control of the station ceded to KY3, as are the fact that KY3 will control

[42] It is certainly a great deal for Perkin. It is not a great deal for the public, who are losing another independent voice in an already small and highly concentrated market with few voices.

[43] Shared Services Agreement, Section 5(a)(ii).

[44] *Id.* Section 5(b).

Perkin's debt obligations and that payment of Perkin's debt is guaranteed by KY3 with KY3's guaranteed revenues to Perkin.

In addition, as part of the overall transaction, KY3 has an option to buy the license for KSPR from Perkin for a Cash Purchase Price of $300,000 within three years and for $200,000 thereafter, for up to 15 years.[45] The *Decision* granted the Application under which Perkin was permitted to acquire the KSPR license for a "Base Purchase Price" of $20,629,239.[46] And as noted above, KY3 fronted the Base Purchase Price to Perkin. The *Decision* ignores that the Option price represents approximately one percent (1%) of the Base Purchase Price. The minuscule Cash Purchase Price for a network-affiliated full power television station establishes that the parties themselves believe that KY3 has already purchased 99% of the equity of KSPR, a stunning depth of control that the Bureau did not even acknowledge.

The *Decision* dismissed these indicia of financial control citing to a 1998 decision of the Chief of the Video Services Division.[47] The Bureau did not cite to any Commission-level decision on this point. In any event, the 1998 case did not include the multitude of additional arrangements involved in this transaction, as detailed below. Given KY3's commitment to front Perkin's purchase of the license, KY3's staffing of the station, Perkin's guaranteed receipt of cash flow regardless of station performance, KY3's complete control of station advertising, local programming and station equipment, KY3's guarantee of Perkin's debt obligations and KY3's Option to buy the station, which establishes KY3's 99% ownership of KSPR assets, the financial details of the transaction clearly demonstrate that Perkin will not control station finances.

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[45] Draft Option Agreement, § 2.1(b); § 1.2.

[46] Asset Purchase Agreement, § 2.4, Application, Exhibit 4.

[47] *Decision* at 4 (citing *US Broadcast Group Licensee*, 13 FCC Rcd 13963 (Chief, Video Services Division 1998)).

The Commission cannot rationally determine whether Perkin is sufficiently independent of KY3 under these arrangements unless the parties are required to submit the lease agreement. Indeed, the record clearly establishes that Perkin is utterly dependant upon KY3 for finances, operations and personnel.

C. <u>The Bureau's Piecemeal Approach is Contrary to Commission Precedent</u>

In determining station control, the Commission requires a case-by-case analysis of the totality of the circumstances.[48] In the *Decision*, however, the Bureau ignored the big picture and, instead, found that no one of the individual arrangements governing personnel, programming and finances leads to station control. The Bureau did so by viewing each arrangement in isolation without a reasoned analysis or explanation of the total effect of all of the circumstances of KY3's numerous connections to KSPR.

For at least fifteen years, KY3 will: originate all of KSPR's local programming, place all of its advertising, provide virtually all of the station's staff, produce all of its news, own all equipment necessary for KSPR to operate, guarantee Perkin's debt pursuant to a draft loan guaranty, and have an option to buy KSPR pursuant to a draft option agreement.[49] The *Decision* did not, and could not, rely on Commission precedent that all of these combined circumstances do not create an attributable interest and station control. The Commission should take this opportunity to find that KY3's arrangement, viewed in its totality and combined effect, constitutes *de facto* control of KSPR by KY3.

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[48] *Chase Broadcasting, Inc.*, 5 FCC Rcd 1642, 1643 (1990).

[49] The *Decision* did not require the parties to supply executed copies of the option agreement to loan guaranty, or require the parties to commit not to substantially alter the terms of those agreements.

VI. Conclusion

Based upon the foregoing, the Commission should vacate the Bureau's *Decision*, rescind the grant of authority for assignment of the license of KSPR and require the parties to unwind the transaction. In the alternative, the Commission should rescind the Application grant and designate the Application for a hearing to determine the facts necessary for the Commission to act on the Application.

Respectfully submitted,

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August 29, 2007

CERTIFICATE OF SERVICE

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