

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

In the Matter of	)	
	)	
Consent to Assign Certain Licenses from Red River	)	File No. BALCDT-20180516AAY
Broadcast Co., LLC to Gray Television Licensee,	)	
LLC	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 24, 2019**

**Released: September 24, 2019**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. The Media Bureau (Bureau) has before it an application for assignment of certain licenses from Red River Broadcast Co., LLC (Red River) to Gray Television Licensee, LLC (Gray) (jointly, the Applicants). In the application, among other proposed station acquisitions, Gray proposes to own two top-four rated stations in the Sioux Falls, South Dakota, Nielsen Designated Market Area (Sioux Falls DMA).<sup>1</sup> The Local Television Ownership Rule generally prohibits top-four combinations in a market (Top-Four Prohibition), though the Commission will consider, on a case-by-case basis, whether the public interest would be served by permitting a top-four combination based on the specific circumstances in the local market.<sup>2</sup> The American Television Alliance (ATVA) and NCTA—The Internet & Television Association (NCTA) oppose the Applicants' request to own two top-four rated stations in the Sioux Falls DMA. We have reviewed the Applicants' case-by-case showing and find that it would be in the public interest to permit Gray to acquire another top-four station in the Sioux Falls DMA, consistent with the standard articulated in the *2010/2014 Quadrennial Review Order on Reconsideration*.<sup>3</sup> Accordingly, we grant the Applicants' request that Gray be permitted to own these two stations in the same market and grant the application.<sup>4</sup> We also grant Gray continued authority to operate KDLV-TV, Mitchell, South Dakota, as a satellite of KDLT-TV, Sioux Falls, South Dakota.

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<sup>1</sup> In the Sioux Falls DMA, Gray presently owns KSFY-TV (Facility ID No. 58658), historically rated second in the market, and proposes to acquire KDLT-TV (Facility ID No. 55379), historically rated third in the market. Application, Attach. 18, Multiple Ownership Showing, at 1 (Multiple Ownership Showing).

<sup>2</sup> See 47 CFR § 73.3555(b); see also *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9836-39, paras. 78-82 (2017) (adopting case-by-case examination of the Top-Four Prohibition) (*2010/2014 Quadrennial Review Order on Reconsideration*). The Commission has previously acted upon such showings under 47 CFR § 73.3555(b)(2). See *Applications for Transfer of Control of Tribune Media Co. to Nexstar Media Group, Inc.*, MB Docket No. 19-30, Memorandum Opinion and Order, FCC 19-89, at 19-26, paras. 33-52 (Sept. 16, 2019) (*Nexstar-Tribune Order*) (approving two top-four requests); see also *Applications for Consent to Transfer Control of Certain License Subsidiaries of Raycom Media, Inc. to Gray Television, Inc.*, Memorandum Opinion and Order, 33 FCC Rcd 12349 (MB 2018) (approving two top-four requests).

<sup>3</sup> We also conclude, in the alternative, that Applicants would be entitled to a waiver of the local television ownership rule that was in effect prior to the Commission's *2010/2014 Quadrennial Review Order on Reconsideration*.

<sup>4</sup> See 47 CFR § 73.3564(b).

## II. BACKGROUND

### A. Transaction

2. Pursuant to an Agreement and Plan of Merger dated May 1, 2018, Gray seeks to acquire KDLT-TV, Sioux Falls, South Dakota, satellite station KDLV-TV, Mitchell, South Dakota, and related low-power stations in the Sioux Falls DMA from Red River.<sup>5</sup> Gray proposes to acquire these stations for \$32.5 million.<sup>6</sup> Gray, the licensee of KSFY-TV, Sioux Falls, South Dakota, would own two top-four stations in the Sioux Falls DMA if the proposed assignment were granted.

3. The Local Television Ownership Rule allows an entity to own two television stations licensed in the same DMA if: (1) the digital noise limited service contours of the stations (as determined by Section 73.622(e) of the Commission's rules) do not overlap; or (2) at the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top-four stations in the DMA, based 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.<sup>7</sup> With respect to the latter provision—the Top-Four Prohibition—an applicant may request that the Commission examine the facts and circumstances in a market regarding a particular transaction and, based on the showing made by the applicant, make a finding that permitting an entity to directly or indirectly own, operate, or control two top-four television stations licensed in the same DMA would serve the public interest, convenience, and necessity.<sup>8</sup> The Commission evaluates showings that the Top-Four Prohibition should not apply based on specific circumstances in a local market or with respect to a specific transaction on a case-by-case basis.<sup>9</sup>

4. The Applicants, in their case-by-case showing, assert that the Sioux Falls DMA is dominated by the number one rated station—KELO-TV—in terms of audience share, local advertising revenue, and various local news metrics.<sup>10</sup> The Applicants also claim to face significant competition from cable network programming.<sup>11</sup> In addition, the Applicants note that Sioux Falls is the second largest DMA in terms of geographic size, but is sparsely populated, which, according to the Applicants, “creates special challenges and additional costs” for stations serving the market.<sup>12</sup> The Applicants claim that the combination of KDLT-TV and KSFY-TV is necessary for the stations to compete effectively against “the dominance of KELO-TV” and to achieve the economies of scale necessary to serve the disparate population centers in the market.<sup>13</sup> The Applicants also state that the proposed combination would generate various public interest benefits, such as improved local news offerings and increased over-the-air coverage of local network affiliates via multicast.<sup>14</sup>

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<sup>5</sup> The complete station list is provided in the Appendix.

<sup>6</sup> Application, Attach. 13, Asset Purchase Agreement, at 13 (APA).

<sup>7</sup> 47 CFR § 73.3555(b)(1).

<sup>8</sup> *Id.* § 73.3555(b)(2).

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

<sup>10</sup> Multiple Ownership Showing at 2-6. The Applicants also provide an economic analysis prepared by BIA Advisory Services that provides data and analysis of advertising revenue in the Sioux Falls DMA. *Id.* at Exh. D.

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* at 6-7 (noting that Sioux Falls is the 110<sup>th</sup> ranked Nielsen DMA).

<sup>13</sup> *Id.* at 2, 7-8.

<sup>14</sup> *Id.* at 8-9 (stating Gray's plans to add ABC network-affiliated programming to KDLT-TV's satellite station and NBC network-affiliated programming to KSFY-TV's satellite station, thereby increasing over-the-air coverage by 80,000 households).

## B. Pleadings

5. Although no petitions to deny were filed in response to this transaction, the Commission received two comments—which we treat as informal objections—filed by ATVA and NCTA that express general concern about the proposed top-four combination, with specific emphasis on the impact the merger would have on the retransmission consent market in the Sioux Falls DMA. Both commenters assert that the Applicants have failed to demonstrate that the alleged benefits of the transaction outweigh the harms.<sup>15</sup>

6. In July 2018, December 2018, and April 2019, the Applicants supplemented their initial public interest showing.<sup>16</sup> In these filings, Gray committed to various programming investments within 18 months after closing of the transaction, and the Applicants provided additional data and arguments in an effort to demonstrate that the circumstances in this case are “unique” and thus warrant relief from the Top-Four Prohibition.<sup>17</sup> For example, the Applicants assert that the Sioux Falls DMA is geographically large and thinly populated, making it relatively costly to serve; the top rated station in the market—KELO-TV—receives a majority of the advertising revenue and local news viewers; and absent relief, KDLT-TV could be forced to reduce or eliminate its local news.<sup>18</sup>

## C. Standard of Review

7. Section 310(d) of the Act provides that no station license shall be transferred or assigned unless the Commission, on application, determines that the public interest, convenience, and necessity will be served thereby. In making this assessment, the Commission must first determine whether the proposed transaction would comply with the specific provisions of the Act,<sup>19</sup> other applicable statutes, and the Commission’s rules.<sup>20</sup> If the transaction would not violate a statute or rule, the Commission next considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.<sup>21</sup> If the Commission is unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact as to whether the transaction serves the public interest, section 309(e) of the Act requires that the applications be designated for hearing.<sup>22</sup>

8. The Commission applies a two-part test when evaluating an informal objection under the public interest standard. First, the Commission must determine whether the informal objection contains specific allegations of fact sufficient to show that granting the application would be *prima facie*

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<sup>15</sup> NCTA Comments at 1; ATVA Comments at 1. Gray filed a pleading styled “Reply to Comments” on July 24, 2018 (Gray Reply).

<sup>16</sup> In addition, in June and July 2019, the Applicants amended the application to include letters of support or interest from various politicians and officials representing South Dakota.

<sup>17</sup> Letter from Henry H. Wendel, Counsel for Gray Television, LLC, to Marlene H. Dortch, Secretary, FCC, File No. BALCDT-20180516AAY, Attach. (filed Dec. 31, 2018) (December 2018 Amendment).

<sup>18</sup> *Id.* at 1-4.

<sup>19</sup> Section 310(d) requires that the Commission consider an application as if the proposed assignee/transferee were applying for the license directly. 47 U.S.C. § 310(d); *see also SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18300, para. 16 (2005) (*SBC-AT&T Order*).

<sup>20</sup> *See, e.g., SBC-AT&T Order*, 20 FCC Rcd at 18300, para. 16.

<sup>21</sup> *Id.*

<sup>22</sup> 47 U.S.C. § 309(e); *see also General Motors Corporation and Hughes Electronics Corporation, Transferors, and the News Corporation Limited, Transferee*, 19 FCC Rcd 473, 483, para. 15 n.49 (2004); *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation and EchoStar Communications Corporation*, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 211 (2002).

inconsistent with the public interest.<sup>23</sup> The first step “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established.”<sup>24</sup> Second, the Commission must then determine whether, “on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” a substantial and material question of fact has been raised as to whether grant of the application would serve the public interest.<sup>25</sup> The United States Court of Appeals for the District of Columbia Circuit has made clear that the two steps of the statutory inquiry “are typically made concurrently.”<sup>26</sup> That is, the Commission ordinarily does not consider separately whether a petition makes out a *prima facie* case for denial of the application because “a negative resolution of the second question alone [whether the record presents a substantial and material question of fact that warrants further inquiry in a hearing] makes the first question moot.”<sup>27</sup> For the reasons discussed below, we find that ATVA and NCTA have failed to raise a substantial and material question of fact as to why grant of the application would not serve the public interest.<sup>28</sup>

### III. DISCUSSION

9. We reject ATVA’s and NCTA’s challenges to Gray’s request to own two top-four rated stations in the Sioux Falls DMA. As stated above, the Commission’s Local Television Ownership Rule provides that an entity may own up to two television stations in the same DMA if, at the time the application to acquire a second station is filed, at least one of the two stations is not rated among the top four stations in the DMA.<sup>29</sup> Upon request, however, we consider showings that application of the Top-Four Prohibition is not in the public interest due to specific circumstances in a local market or with respect to a specific transaction on a case-by-case basis.<sup>30</sup> Under this flexible, hybrid approach, the Commission requires an applicant seeking approval to create a top-four combination to demonstrate that “the benefits of the proposed transaction would outweigh the harms.”<sup>31</sup> In establishing this framework, the Commission outlined several categories of information it would consider, including “market characteristics” and “circumstances impacting the market, particularly any disparities primarily impacting small and mid-sized markets.”<sup>32</sup> Based on information provided by the Applicants in support of their request for case-by-case consideration, including information demonstrating the unique market characteristics, we conclude that the potential public interest benefits of the proposed combination outweigh the potential harms, and therefore application of the Top-Four Prohibition is not warranted in this instance.

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<sup>23</sup> 47 U.S.C. § 309(d)(1); *Astroline Commc’ns Co., Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (*Astroline*).

<sup>24</sup> *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

<sup>25</sup> *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

<sup>26</sup> *Mobile Commc’ns Corp. of Am. v FCC*, 77 F.3d 1399, 1410 (D.C. Cir. 1996) (quoting *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (*Citizens for Jazz*)).

<sup>27</sup> *Id.* (quoting *Citizens for Jazz*, 775 F.2d at 394).

<sup>28</sup> See, e.g., *Citadel Broadcasting Co.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 7083, 7101-02 (2007) (denying informal objection that failed to raise a substantial and material question of fact).

<sup>29</sup> 47 CFR § 73.3555(b)(1)(ii).

<sup>30</sup> *Id.* § 73.3555(b)(2).

<sup>31</sup> 2010/2014 *Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9838-39, para. 82.

<sup>32</sup> *Id.*

**A. Potential Public Interest Benefits**

10. The record demonstrates that permitting Gray to acquire KDLT-TV is likely to produce definite, verifiable, and transaction-specific public interest benefits. If the transaction is approved, Gray commits to take a number of steps to improve the service KSFY-TV and KDLT-TV offer to those living in the Sioux Falls market. First, it will add at least 28 hours per week of local news programming across KDLT-TV and KSFY-TV.<sup>33</sup> This is more local news programming than either station currently airs in an average week.<sup>34</sup> Second, Gray will open a news bureau in Pierre, the capital of South Dakota, to provide better coverage of state government.<sup>35</sup> Third, Gray will install a state-of-the-art weather radar that will enable it to provide more accurate information about severe weather in the Sioux Falls market.<sup>36</sup> Fourth, Gray states that it will add a multicast channel to one of its satellite stations, KPRY-TV, to expand over-the-air distribution of NBC programming.<sup>37</sup>

11. In light of these commitments, we conclude that this transaction will produce significant public interest benefits. While ATVA complains that the benefits claimed by Gray are vague, unverifiable, and not transaction-specific, Gray's subsequent filings in this proceeding adequately address these concerns. The commitments made by Gray and listed above are specific and verifiable. Moreover, Gray's December 31 filing adequately explains why these public interest benefits are not likely to occur in the absence of this transaction.<sup>38</sup>

**B. Potential Public Interest Harms**

12. As noted above, in evaluating a proposed top-four combination under case-by-case review, we consider information provided by the Applicants to establish that application of the Top-Four Prohibition is not in the public interest, such as ratings share data, revenue share data, market characteristics including population and the number and types of broadcast television stations serving the market, the likely effects on programming meeting the needs and interests of the community, and any other circumstances impacting the market, particularly any disparities primarily impacting small and mid-sized markets.<sup>39</sup> In this case, after consideration of information submitted by the Applicants, we find that the unique characteristics of the market and the stations at issue support relief from the Top-Four Prohibition. Moreover, we do not believe that the record sufficiently demonstrates that potential public interest harms to competition raised by commenters outweigh the significant benefits that Gray commits to implementing as a result of this transaction.

13. We make several observations about the unique structure of the Sioux Falls local television market that we find relevant to our assessment of the impact of the transaction on competition. To begin with, KELO-TV holds a very strong and steady number one position in the market.<sup>40</sup> It receives the majority of broadcast advertising revenue in the Sioux Falls market and has the substantial majority of

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<sup>33</sup> December 2018 Amendment at 4; Exh. 3 (detailing the amount of local news Gray intends to add and where, specifically, in the programming schedule of each station Gray will add it).

<sup>34</sup> *Id.* at 4.

<sup>35</sup> *Id.* at 6 (stating that the newly created bureau will "cover important stories regarding South Dakota's government and its political leaders").

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 8.

<sup>38</sup> *Id.* at 3-4 (noting that, despite heavy investment over the years, KDLT-TV has struggled to increase its share of local news viewers).

<sup>39</sup> 2010/2014 *Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9838-39, para. 82.

<sup>40</sup> Multiple Ownership Showing at 2-3; December 2018 Amendment at 9.

local news viewers.<sup>41</sup> As such, according to the Applicants, KELO-TV garners more advertising revenue than KSFY-TV and KDLT-TV combined.<sup>42</sup> Additionally, the Applicants note that Sioux Falls is the *only* television market in the United States smaller than DMA #100 that has four or more full-power stations where one of those stations earns a majority of advertising revenue and where the affiliates of ABC, CBS, NBC, and FOX are independently owned and operated.<sup>43</sup> Furthermore, the Sioux Falls market covers a large geographic area. According to the Applicants, it is the second largest market in the country from a geographic standpoint below DMA #100.<sup>44</sup>

14. As a market with a relatively small population and a large geographic area, Sioux Falls is costly for a broadcaster to serve. In addition to maintaining a full-power station, a broadcaster needs a satellite station and/or translators to serve the entire market. And given the market structure, one broadcast station, KELO-TV, has consistently earned a majority of advertising revenue, making it harder for the other stations in the market to effectively compete against it. The Applicants note that KDLT-TV is already struggling to maintain a profitable local news operation and that, without relief, “it is only a matter of time before KDLT-TV is forced to eliminate its local news.”<sup>45</sup> Thus, in the particular circumstances of this market, we are skeptical that requiring KSFY-TV and KDLT-TV to remain independently owned and operated is necessary to ensure competition in the Sioux Falls DMA. Rather, there is some evidence that permitting Gray to own both KSFY-TV and KDLT-TV would make these stations more likely to become stronger competitors to KELO-TV, thereby spurring improvement and innovation in the market as the Applicants commit to do, and that this will benefit viewers in the Sioux Falls market.<sup>46</sup>

15. In addition, we find no evidence in the record that this transaction will harm competition in the local advertising market. No advertisers have submitted comments opposing this transaction. Moreover, by replacing paid programming and nationally syndicated programming with local news, the transaction will increase the supply of local advertising spots in the Sioux Falls market, which is likely to have the impact of reducing local advertising rates. Specifically, by adding 28 hours of local news programming across KSFY-TV and KDLT-TV, the Applicants state that the supply of local advertising spots will increase by 285 on a weekly basis.<sup>47</sup>

16. Lastly, we are not persuaded by the arguments advanced by ATVA and NCTA regarding retransmission consent rates. ATVA and NCTA largely parrot generalized arguments they have made in prior rulemaking and adjudicative proceedings. And, as Gray points out, they fail to submit a meaningful economic study or analysis that is specific to the Sioux Falls market.<sup>48</sup> At most, NCTA purports to analyze what the HHI for retransmission consent fees would be for Sioux Falls before and after the transaction. But ATVA and NCTA have not demonstrated harm to consumers as a result of the

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<sup>41</sup> Multiple Ownership Showing at 5.

<sup>42</sup> *Id.*

<sup>43</sup> December 2018 Amendment at 10.

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 3-4; Exh. 4 (submitting a statement from Kathy Lau, COO of Red River Broadcast Co, LLC attesting that, absent the transaction, “it is likely that the amount or quality of the news programming offered by KDLT will decline in the coming years”).

<sup>46</sup> *See id.* at 6 (asserting that KELO-TV already has responded to Gray’s plans to increase investment in the Sioux Falls DMA and likely will continue to do so following the transaction).

<sup>47</sup> *Id.* at 6-7.

<sup>48</sup> Gray Reply at 4.

transaction.<sup>49</sup> Specifically, their analysis does not indicate whether, on balance, any increase in retransmission consent rates in Sioux Falls would reduce consumer welfare or rather just shift surplus between MVPDs and broadcast stations.<sup>50</sup> All in all, we conclude that the arguments made by ATVA and NCTA regarding the impact of the transaction on retransmission consent rates, and in turn, the impact of those rates on consumers, are speculative and unsubstantiated and therefore insufficient to outweigh the tangible public interest benefits outlined above.

### C. Waiver

17. We note that since Applicants and informal objectors have developed the record in this proceeding, the U.S. Court of Appeals for the Third Circuit has issued an opinion vacating the *2010/2014 Quadrennial Review Order on Reconsideration*.<sup>51</sup> However, the mandate in that case has not yet issued, so the *2010/2014 Quadrennial Review Order on Reconsideration* remains in effect. Furthermore, the Commission intends to seek review of that decision.<sup>52</sup> Nevertheless, we conclude that even if the rules in effect prior to the *2010/2014 Quadrennial Review Order on Reconsideration* applied here, the unique circumstances in this case would justify a waiver of such rules.

18. Section 1.3 of the Commission's rules provides that the Commission may waive its substantive rules for good cause shown.<sup>53</sup> In upholding long ago the Commission's authority to impose generally applicable broadcast ownership rules, the Supreme Court relied on the Commission's commitment to consider "adequate reasons why the Rules should be waived."<sup>54</sup> Indeed, the Court has upheld the use of bright line rules as a regulatory tool "in part because . . . a provision for an exception or variance helped assure the parties of due process."<sup>55</sup> Thus, the Commission's "discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."<sup>56</sup>

19. For the following reasons, and those outlined above in identifying the public interest benefits and harms of the transaction, we conclude that a waiver even under the Commission's pre-existing rules would be appropriate in the unique circumstances faced by Applicants in the Sioux Falls

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<sup>49</sup> See *Nexstar-Tribune Order*, at 16-17, para. 29 (concluding that an increase in retransmission consent rates, by itself, is not necessarily a public interest harm).

<sup>50</sup> See, e.g., Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferee), MB Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20637, para. 211 (2002) (finding that "any savings in programming costs that result from a change in bargaining power represent a shift in surplus between programming providers and DBS operators, but not necessarily an increase in total surplus").

<sup>51</sup> *Prometheus Radio Project v. FCC*, No. 17-1107 et al., slip op. (3rd Cir. Sept. 23, 2019). Among other things, the *2010/2014 Quadrennial Review Order on Reconsideration* revised the Local Television Ownership Rule to eliminate the Eight-Voices Test and modified the Top-Four Prohibition to better reflect the competitive conditions in local markets. *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9803, para. 2.

<sup>52</sup> See Press Release, Office of Chairman Pai, FCC, Chairman Pai Statement on the Third Circuit's Media Ownership Decision (Sept. 23, 2019).

<sup>53</sup> 47 CFR § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

<sup>54</sup> *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

<sup>55</sup> *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 132-33 & n.25 (1985) (rules may "fail to consider unique factors applicable to atypical plants during the categorical rulemaking process").

<sup>56</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); accord, *AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959 (D.C. Cir. 2001).

DMA. We note in this regard that, prior to the *2010/2014 Quadrennial Review Order on Reconsideration*, the Commission generally permitted common ownership of two stations if at least one was not a top four and at least eight independently-owned television stations remained in the DMA after the combination.<sup>57</sup> The rationale behind those restrictions was that “top-four combinations would generally result in a single firm obtaining a significantly larger market share than other firms in the market.”<sup>58</sup> That concern is not present here.

20. As noted above, Applicants have demonstrated significant rating share disparity between KELO-TV and other competitors in the market—including the stations that are proposing common ownership through this transaction.<sup>59</sup> Applicants have also submitted similar information regarding KELO-TV’s shares of advertising revenue and local news, which in this case exceed those of all other stations combined.<sup>60</sup> In addition, the Sioux Falls market is geographically expansive and sparsely populated—both factors that result in increased operating costs that could impose barriers to entry or effective competition with KELO-TV.<sup>61</sup> Because audience share is lopsided in favor of the top-ranked station, the proposed combination would not result in a single firm obtaining a significantly larger market share than other firms in the market. To the contrary, the combination approved in this Order should enhance competition with KELO-TV. Also, while the Sioux Falls DMA—which has five full-power television stations now—would not include eight independent voices following this combination, given the market structure set forth above, we believe that the combination approved in this Order will enhance competition in the market.

21. Finally, as set forth in detail above, the programming improvements that the Applicants commit to provide are exactly the type of tangible public interest benefits that the Commission seeks to obtain with its ownership rules; indeed, the Applicants note that the transaction will likely avoid the loss of certain local news programming in the DMA.<sup>62</sup> For all of these reasons, in these unique circumstances, we conclude that a waiver of the Commission’s Top-Four Prohibition would be appropriate even under the Commission’s pre-2017 rule—just as it is appropriate under the case-by-case approach adopted in the *2010/2014 Quadrennial Review Order on Reconsideration*.

#### IV. CONCLUSION

22. For the reasons described above, we find that the potential public interest benefits of the proposed combination outweigh the potential harms, and thus application of the Top-Four Prohibition would not be in the public interest in this case. In doing so, we emphasize that our decision herein is based on the specific facts and the record compiled in this proceeding.

23. After reviewing the record, we conclude that grant of the Applications will comply with section 310(d) of the Act. We conclude that the applicants are fully qualified and that grant of the applications will serve the public interest, convenience, and necessity.

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<sup>57</sup> See *2010/2014 Quadrennial Review*, Second Report and Order, 31 FCC Rcd 9864, 9870, para. 17 (2016) (*2010/2014 Quadrennial Review Second Report and Order*).

<sup>58</sup> *Id.*, 31 FCC Rcd at 9881, para. 44.

<sup>59</sup> See Exh. 18 at 2-3 (providing ratings data and noting “over the last three years, KELO-TV has been the top ranked station by a very wide margin in every single sweeps period,” exceeding the combined share of Applicants’ stations).

<sup>60</sup> See *id.* at 5.

<sup>61</sup> See *id.* at 6-7. The DMA is ranked 115 by size. It sprawls over 59 counties in portions of four states (South Dakota, Minnesota, Iowa, and Nebraska), and only has 231,540 television households. *Id.* at 6; December 2018 Amendment at 3.

<sup>62</sup> See December 2018 Amendment at 11, Exh. 4; *2010/2014 Quadrennial Review Report and Order*, 31 FCC Rcd at 9878, para. 38.



24. *Request for Continuing Satellite Exceptions.* The Applicants have submitted a copy of their most recent authorization to operate station KDLV-TV as a satellite of KDLT-TV, pursuant to the Note 5 exception to the Local Television Ownership Rule. They have also certified that there has been no material change in the underlying circumstances supporting the current satellite designation. Consequently, we grant continued authority to operate KDLV-TV, Mitchell, South Dakota, as a satellite of KDLT-TV, Sioux Falls, South Dakota, pursuant to Note 5 of section 73.3555 of the Commission's rules, and the streamlined standards set forth in the *Satellite Streamlining Order*.<sup>63</sup>

## V. ORDERING CLAUSES

25. **ACCORDINGLY, IT IS ORDERED** that the Comments filed by The American Television Alliance and NCTA—The Internet & Television Association, when treated as informal objections, **ARE DENIED**.

26. **IT IS FURTHER ORDERED** that the Applicants' request that Gray be permitted to own two top-four stations in the same market under section 73.3555(b)(2) of the Commission's rules, 47 CFR § 73.3555(b)(2), **IS GRANTED**.

27. **IT IS FURTHER ORDERED** that Applicants' request, pursuant to the satellite exception to the Local Television Ownership Rule set forth in Note 5 of Section 73.3555 of the Commission's rules, 47 CFC § 73.3555, Note 5, for continued authority to operate KDLV-TV, Mitchell, South Dakota, as a satellite of KDLT-TV, Sioux Falls, South Dakota, **IS GRANTED**.

28. **IT IS FURTHER ORDERED** that, pursuant to section 73.3564(b) of the Commission's rules, 47 CFR § 73.3564(b), the above-captioned assignment application (BALCDT-20180516AAY) **IS GRANTED**.

29. These actions are taken pursuant to Sections 0.61, 0.283, and 1.3 of the Commission's rules, 47 CFR §§ 0.61, 0.283, and 1.3 and Sections 4(i) and (j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d).

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey  
Chief, Media Bureau

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<sup>63</sup> 47 CFR § 73.3555, Note 5; *Streamlined Reauthorization Procedures for Assigned or Transferred Television Satellite Stations et al.*, Report and Order, 34 FCC Rcd 1539 (2019).

**APPENDIX**

<b>Call Sign/Community of License</b>	<b>Fac. ID</b>
KDLT-TV, Sioux Falls, SD	55379
KDLV-TV, Mitchell, SD	55375
K27HJ-D, Pierre, SD	128428
K33GX-D, Springfield, SD	128440
K33MI-D, Aberdeen, SD	182700
K35GR-D, Badger, SD	128436
K17NF-D, Brookings, SD	68032
K42FI-D, Watertown, SD	129133