

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

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

**REQUEST FOR CANCELLATION**

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## SUMMARY

Gray Television Inc. (“Gray”) requests that the Commission cancel the Notice of Apparent Liability (the “*NAL*”) and proposed forfeiture in this matter. This is a case of mistaken identity. Gray is not the willful and repeated violator of Commission rules that the *NAL* portrays. Gray’s activities in the Anchorage DMA have fully complied with the Commission’s announced rules and unquestionably have improved broadcast television service to Anchorage television viewers. The *NAL* seeks to enforce against Gray a rule that, quite literally, does not apply to the transaction under review and proposes an unprecedented penalty for a transaction that was completely lawful. Gray should be lauded, not punished, for the improvements it has made to high-quality television service in Anchorage. Accordingly, the *NAL* should be cancelled.

Gray’s purchase of the Anchorage CBS affiliation from KTVA(TV) complied with any reasonable reading of the rule against swaps as it was adopted by the Commission.

- Gray’s purchase of assets from KTVA(TV) did not involve any swap of affiliations and was not the “functional equivalent” of a license transfer; in fact, the transaction was structured in precisely the same manner as a prior Gray purchase of a Big Four affiliation for a MyNetworkTV-affiliated full power television station as part of a transaction that the Commission intensely reviewed and approved and never mentioned as violating the rule against swaps;
- The transaction did not result in Gray’s KYES-TV becoming a Top 4 station because *KYES-TV was already a Top 4 station* at the time of the transaction, and Gray acquired that station with the Commission’s approval subject only to the condition that KYES-TV not add a Big Four network affiliation to the station *before February 2018*;
- Gray purchased the Anchorage CBS affiliation after the network inquired about Gray’s interest and participated in moving the affiliation to KYES-TV, bringing the Anchorage transaction squarely within an exception to the rule that the Commission adopted; and
- Gray’s transaction advanced the public interest by saving jobs in an economy that was in recession long before the pandemic crippled local businesses, by expanding local news hours and resources in Anchorage (as well as Juneau), by providing more

and higher quality advertising opportunities for advertisers, and by permitting the state's dominant cable operator to enter into a novel retransmission arrangement to expand access to local broadcast stations to local households.

The *NAL* did not consider *any* of these facts. Nevertheless, considering any one of these facts, the *NAL* must be canceled, even if the Commission decides to announce a new rule against network affiliation moves prospectively.

The *NAL* relies on a novel and retroactive re-interpretation of the five-year-old rule against swaps to find a violation of that rule despite the fact that the Anchorage transaction followed a transaction structure the Commission had previously approved after intense scrutiny and had never suggested was within the scope of the rule against swaps. In adopting the rule against swaps, the Commission explained in great detail that the rule was written, designed, and adopted to prohibit two stations from *exchanging* substantially all of their assets other than their Commission licenses and thereby accomplishing the “functional equivalent” of a *transfer of stations* without seeking Commission approval. The Commission's concern was that if it permitted such transactions, broadcasters could use that tactic to acquire multiple Top 4 stations in a market, circumventing the duopoly rule. Here, however, the *NAL for the first time* claims that the rule against “swaps,” in which parties *exchange assets* other than or in addition to cash, now suddenly and somehow applies to “sales” that do not involve any asset *exchanges*. The *NAL* claims this despite the Commission's failure to previously mention that it viewed affiliation purchases, such as the Anchorage transaction and Gray's prior Lincoln affiliation move, as being prohibited by this rule. Thus, a rule that was supposed to be about policing evasion of the duopoly rule has morphed into a rule about policing local television station content acquisition choices. The Commission lacks authority to adopt such a rule via this *NAL*, and it certainly has no authority to impose such a rule without notice-and-comment rulemaking, apply this purported

new rule without any warning, or retroactively punish Gray for violating its re-interpretation of a rule that it never suggested applied to the transaction structure at issue here.

Enforcing the *NAL* would also significantly harm the public interest. Gray has spent the last two decades improving television service in its local markets and, in particular, expanding the availability of local news in small and rural markets across the country. In Anchorage, the transaction the Commission is seeking to punish resulted in increased local and regional news production as well as an upgrade in the over-the-air availability of CBS programming throughout the market. Moreover, Gray's decision to work cooperatively with the local cable operator who owned the former CBS affiliate, rather than simply poaching the affiliation unilaterally, is precisely how the Commission should encourage affiliation changes in local markets to take place in order to protect jobs, encourage local news investments, and avoid the significant disruptions to local viewers, MVPDs, and OTT providers that result from overnight, unilateral affiliation shifts (as the Fairbanks, Alaska market experienced after a surprise press release from another broadcaster announced that it was assuming Gray's Fox affiliation in a matter of days).

The Commission's purported adoption of a new rule against cooperative and voluntary affiliation changes will not hurt television viewers in markets like New York or Washington, D.C., who already enjoy the best that local television has to offer. But it surely will result in second-class citizenship for TV viewers in small markets like Anchorage, where smaller populations can't generate sufficient revenues to support many independently owned news-producing television stations. The new rule imposed by the *NAL* to prohibit voluntary and cooperative affiliation changes naturally will cause abrupt and involuntary network affiliation changes to become the norm, which will adversely impact station employees and viewers alike. In short, the *NAL* is contrary to the Commission's mandate to serve the public interest.

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**REQUEST FOR CANCELLATION**

Gray Television, Inc. (“Gray”), by its attorneys, hereby seeks cancellation of the above-captioned Notice of Apparent Liability issued by the Commission in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Gray denies any liability for violating Section 73.3555(b) of the Commission’s rules with respect to its July 2020 purchase of the CBS Network affiliation for the Anchorage, Alaska Designated Market Area (“DMA”). That transaction, and Gray’s placement of the CBS affiliation on the primary channel of KYES-TV, complied with any reasonable interpretation of Note 11’s rule against swaps that the Commission had adopted in a notice and comment rulemaking concluded in 2016.<sup>2</sup> Indeed, Gray’s Anchorage transaction was very carefully modeled after the nearly identical transaction in the Lincoln & Hastings-Kearney, Nebraska DMA that Gray completed with the Commission’s full knowledge, extensive involvement, and

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<sup>1</sup> See Gray Television, Inc., *Notice of Apparent Liability for Forfeiture*, FCC 21-81 (rel. July 7, 2021) (the “NAL”).

<sup>2</sup> The former KYES-TV (Facility ID 21488) is now assigned the callsign KAUU(TV). For time periods relevant to the *NAL*, the station’s callsign was KYES-TV, and, to avoid confusion, the station is referred to as KYES-TV throughout this document.

ultimate approval.<sup>3</sup> In short, the *NAL* purports to enforce a rule against Gray that quite literally did not exist before the *NAL* was released – and cannot exist now absent a formal notice and comment rulemaking and careful consideration of the policy impacts of such a new rule.

Moreover, the transaction did not even violate the Commission’s purported rewriting of the rule against swaps, because the transaction did not in fact create a new Top 4 duopoly. No finding of liability and no fine is appropriate in this case.

The *NAL* relies on multiple non-obvious and novel interpretations of Note 11 to find Gray liable and propose an unprecedented forfeiture. First, the Commission finds that the rule against swaps embodied in Note 11 applies to affiliation purchases that do not involve swaps at all. The Commission in its 2016 *Second Report and Order* dedicated a full **seven paragraphs** to adopting Note 11, describing in exhaustive detail why swaps should be prohibited.<sup>4</sup> Because Gray’s Anchorage transaction does not resemble in any meaningful way the swaps the Commission warned against in the *Second Report and Order*, Gray was fully justified in concluding that Note 11 did not apply to the Anchorage transaction.

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<sup>3</sup> In connection with its acquisition of fifteen television stations from Hoak Media, LLC, Gray acquired the NBC affiliation in the Lincoln & Hastings-Kearney DMA and moved it to the primary channel for its then-MyNetworkTV affiliate KSNB-TV. As a result, Gray owned the CBS affiliate for the market on KOLN-TV and the NBC affiliate on KSNB-TV. Gray extensively negotiated this restructuring of the assets in Hoak with the Commission’s staff, who closely consulted with the Commission’s then-Chairman on this and other restructuring requested by the Commission staff. Although the Hoak decision did not address the affiliation changes, the Commission staff was aware of them when it approved the transaction.

<sup>4</sup> 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., MB Docket No. 14-50 et al., *Second Report and Order*, 31 FCC Rcd 9864, 9883, para. 48 (2016) (“*Second Report and Order*”). As explained below, the long description of swaps included one ambiguous reference to non-swap acquisitions that, in context, cannot be read to nullify the more than 30 specific references to asset swaps.



The Commission’s unorthodox and previously unannounced re-interpretation of Note 11 renders the *NAL* unlawful and unenforceable for at least three reasons. First, even if Note 11 can be interpreted to ban transactions like Gray’s (and Gray does not concede that point), the plain language of the rule still does not apply in this case. Note 11 requires that the affiliation change “*result in* the licensee of the new affiliate . . . owning . . . two of the top-four rated television stations in the DMA at the time of the agreement.”<sup>5</sup> In fact, KYES-TV already had achieved Top 4 status before the transaction.<sup>6</sup> Specifically, in July 2021, **KYES-TV was the fourth ranked station** in the Anchorage DMA, without the benefit of the CBS affiliation. In other words, purchasing the CBS affiliation did not “result in” KYES-TV becoming a Top 4 station. It already was a Top 4 station. A transaction cannot “result in” a condition that already lawfully exists in the market. Therefore, the most important condition in Note 11 is not met here, and Note 11 does not apply even as re-interpreted by the *NAL*.

Second, the *NAL* is unlawful because Gray’s interpretation of Note 11 was wholly reasonable considering the rule’s text and the very detailed and precise interpretation provided by the Commission itself in the *Second Report and Order*. It is well settled that the Commission must provide reasonable notice of the requirements of its rules before seeking to enforce them,<sup>7</sup> and that “[t]he Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules.”<sup>8</sup> Here, the Commission failed to provide clear and adequate notice that the rule against swaps – which, by definition, means

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<sup>5</sup> 47 C.F.R. §73.3555(b), note 11 (emphasis added).

<sup>6</sup> See Exhibit 1.

<sup>7</sup> *Trinity Broadcasting v. FCC*, 211 F.3d 618 (2000) (“*Trinity Broadcasting*”).

<sup>8</sup> *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir.1987) (“*SBC*”).

that the parties each surrendered and each obtained similar station-related assets – will now suddenly apply also to outright purchases of programming assets for cash. The *NAL* relies on a single reference to affiliation sales buried in a seven-paragraph discussion of banning affiliation swaps. This single oblique reference – especially when read in the context of the surrounding seven paragraphs – was totally inadequate to advise Gray that the instant transaction was prohibited by Note 11.<sup>9</sup> This is especially true because the Commission expressly said it was aware of only a single transaction where the new rule would have been violated – a transaction in Hawaii where the parties each surrendered and each obtained similar station-related assets rather than one party simply purchasing the programming assets of another station.

Gray reasonably interpreted the Commission’s explanation that, other than Hawaii, no other known network affiliation moves violated the rule against swaps as meaning that Gray’s Lincoln, Nebraska purchase of the NBC affiliation for its full-power MyNetworkTV affiliate remained permissible under Commission rules. Given the Commission’s focus on swaps and preventing reoccurrence of situations like the Hawaii case throughout the seven-paragraph discussion in the *Second Report and Order*, the application of the rule against swaps to Gray’s non-swap purchase of the Anchorage CBS affiliation would nullify completely the Commission’s own careful, lengthy, and narrow application of the rule to Hawaii-like transactions. At worst, Gray may have reasonably yet incorrectly **presumed that the Commission meant what it said** when it adopted the rule against swaps after a full notice-and-comment rulemaking and specifically explained that the Hawaii case was the **lone example** of a

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<sup>9</sup> *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993) (“*McElroy Electronics*”).

prohibited affiliation swap. Quite simply, the Commission cannot fine Gray for its reasonable interpretation of an ambiguous (at best) rule.

Third, the *NAL* is unenforceable for the separate reason that the Commission's interpretation of Note 11 constitutes impermissible regulation of Gray's content choices for KYES-TV. The rule against swaps was a special purpose rule designed to punish station owners that effectively trade stations in a way designed to evade Commission oversight. Nothing like that happened in this case. Gray bought only limited non-license assets from KTVA(TV) as a means of upgrading the programming quality on its own station KYES-TV. KYES-TV and KTVA(TV) did not engage in any kind of swap of assets, and the transaction was not designed to evade Commission review. Although the Commission may be correct that it has the right to regulate affiliation swaps that are the "functional equivalent" of a license transfer, it has no authority at this time to regulate affiliation transactions that do not meet that criteria. Gray's purchase of the Anchorage CBS affiliation was not the "functional equivalent" of acquiring KTVA(TV), which the local cable operator still owns. Indeed, the Commission's attempt to discipline Gray for its programming choices is not lawful. The Commission has rejected this type of content regulation on countless occasions over the past several decades.

Even if Gray were guilty of a rule violation in this case, the forfeiture proposed by the Commission is a gross overreach. Again, at worst, Gray had a reasonable, good-faith belief that it was complying with the Commission's rules as written and as extensively explained by the Commission following a notice-and-comment rulemaking. By imposing the maximum forfeiture in this case for violating a new and novel re-interpretation of the formally adopted rule, the Commission is treating Gray as a willful and repeated wrongdoer, when the facts make clear that Gray is just the opposite. Gray carefully structured the Anchorage transaction to be virtually

identical to its purchase of the NBC affiliation agreement for its full-power MyNetworkTV affiliated station in Lincoln, Nebraska, a transaction that occurred with the Commission's full knowledge and that the Commission indicated did not violate the rule against swaps when it adopted that rule explicitly to prevent reoccurrence of the Hawaii case.

Moreover, when the Commission staff informed Gray that it thought the Anchorage transaction might violate the rule against swaps, Gray, while respectfully disagreeing with the Commission's interpretation of Note 11, immediately moved the CBS affiliation to a low power station and a full-power multicast channel to satisfy, it believed, the staff's concerns. Nor did Gray take any steps to hide this transaction. To the contrary, Gray's local stations and websites announced the transaction; Gray worked with local MVPDs, OTT providers, and program guide publishers to implement the affiliation move; and Gray openly disclosed the transaction on a public earnings call and in its public securities filings.

Nor was Gray a bad actor deserving of a maximum forfeiture in this case. It simply failed to anticipate that the Commission would purport to adopt an entirely new rule against network affiliation moves without any notice, comment, or even a Public Notice. Gray's conduct does not warrant any fine, let alone the statutory maximum fine proposed by the Commission.

Finally, assessing the proposed forfeiture against Gray in this case would harm the public interest, not promote it. Gray's purchase of the CBS affiliation in Anchorage unquestionably led to improved public service, including increased local news, weather, and informational programming. The Commission should not discourage innovative transactions that lead to improved public service. The Commission should not discourage innovative transactions that lead to improved public service. Anchorage is a geographically sprawling but thinly populated

market (DMA #147) in an economically depressed state still reeling from the 2015 collapse in energy prices and the 2020 virtual elimination of tourism to the state.<sup>10</sup> Gray's commitment to that market should be applauded, not the subject of a huge fine. If the Commission goes through with this enforcement action, it will severely inhibit broadcasters' efforts to find ways to continue providing important public services in revenue-challenged markets like Anchorage.

## II. BACKGROUND

### A. Gray Has Dedicated the Last Six Years to Improving TV Service to the Anchorage Market Despite Substantial Economic Headwinds.

In 2016, Gray entered the Anchorage market with its acquisition of NBC affiliate KTUU-TV. Shortly thereafter, Gray acquired a second full-power station in the market, MyNetworkTV-affiliated KYES-TV, pursuant to a failing station waiver. Prior to Gray's acquisition of KYES-TV, the station had operated on a shoestring budget with antiquated standard definition facilities that failed to serve many of the viewers spread across the Anchorage DMA and, not surprisingly, never turned a profit.<sup>11</sup>

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<sup>10</sup> The Anchorage DMA is comprised of three counties covering 51,954 square miles. By comparison, the Washington, D.C. DMA (DMA #9), which stretches from the Chesapeake Bay to the Appalachian Mountains and includes large rural areas, is only about a quarter of that area at 13,062 square miles. Despite its size, by available viewing population, the Anchorage DMA, with only 158,570 television households, is 94% smaller than the Washington DMA, which includes more than 2.5 million households.

<sup>11</sup> Prior to Gray's acquisition, KYES-TV operated with a patchwork transmitter using repurposed parts that stayed on the air only through the extraordinary efforts of the station's former owner. Nonetheless, with facilities on low VHF channel 5 and a subpar transmitter, the station's over-the-air signal was largely invisible to many viewers with over-the-air antennas. As shown in Exhibit 2, in the most highly populated areas of the Anchorage DMA, KYES-TV did not produce a signal that was strong enough to penetrate walls sufficiently to be received by indoor antennas that often are not large enough or oriented correctly to receive a station on channel 5. In Anchorage, which has among the highest penetration of over-the-air viewers in the country, KYES-TV's substandard facilities on channel 5 made the station uncompetitive.

Following the acquisition, Gray immediately invested in KYES-TV. Gray upgraded the station's channel from low VHF channel 5 to high VHF channel 7, added local and breaking news to the station's programming mix, and invested hundreds of thousands of dollars to modernize the station's broadcasting facilities. Today, KYES-TV transmits its signal in high definition, and that signal is rebroadcast across the Anchorage DMA using a network of television translators. The station provides a robust signal of at least 90 dBu to almost double the number of Anchorage television viewers as were able to receive such a signal with the former owner's facilities.<sup>12</sup> **These improvements helped KYES-TV improve its ratings 77% between the date Gray filed its application to acquire the station and July 2020, when the Anchorage transaction closed. This resulted in KYES-TV becoming the fourth-highest rated full-power television station in the Anchorage market in July 2020.**<sup>13</sup>

At the same time Gray was investing its time, energy, and acumen in the Anchorage market, Alaska experienced a severe economic downturn. Between 2014-2019, Alaska was one of only two states in the U.S. that experienced negative economic growth.<sup>14</sup> In 2019, *Forbes* cited the state's shrinking economy, shrinking population, high unemployment rate, and higher costs of doing business in rating Alaska the worst state in America for business.<sup>15</sup> Then the COVID-19 pandemic hit, further depressing economic activity in the state. Economists do not expect either the Alaska or Anchorage economies to return to even the pre-pandemic depressed

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<sup>12</sup> See Exhibit 2.

<sup>13</sup> See Exhibit 1.

<sup>14</sup> *Best States for Business 2019*, Forbes (last visited Aug. 5 2021), <https://www.forbes.com/places/ak/?sh=254c6efb6800>.

<sup>15</sup> See *id.*

levels until at least 2023.<sup>16</sup> It is unclear if or when Alaska’s economy will return to sustained growth.

Of course, these economic problems are reflected in the health of local television stations in Alaska. In 2019, BIA Advisory Services estimated that local television broadcast advertising revenue in Anchorage was \$21.9 million.<sup>17</sup> By comparison, two years earlier in 2017, BIA estimated that total broadcast advertising revenue was \$27.1 million – that translates to a whopping 19.19% drop in advertising revenue in just two years. The pandemic exacerbated this contraction in the Anchorage television advertising market. Meanwhile, the video advertising market continues to be increasingly dominated by broadcasters’ unregulated big tech competitors. By 2024, BIA forecasts that Google’s share of the local advertising market across the state of Alaska will grow to \$67 million, which is more than all of the television stations in the state combined.<sup>18</sup> Additionally, decreased retransmission consent revenue due to accelerated cord-cutting by consumers, coupled with the increasing costs of providing high-quality local news and entertainment programming, make for an extremely difficult economic environment in which to operate a television station.

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<sup>16</sup> Tim Bradner, *Economy Struggles Amid Pandemic*, Alaskanomics.com (July 17, 2020) (last visited Aug. 5, 2021), <https://www.alaskanomics.com/2020/07/economy-struggles-amid-pandemic.html>; *2020 3-Year Economic Outlook Report*, Anchorage Economic Development Corporation, (last visited Aug. 5, 2021), <https://aedcweb.com/project/2020-3-year-outlook-report/>.

<sup>17</sup> See BIA ADVantage, BIA ADVISORY SERVICES (last visited Aug. 6, 2021), [www.advantage.bia.com](http://www.advantage.bia.com).

<sup>18</sup> See *id.*

B. The Anchorage Purchase Created an Opportunity for Gray To Improve Service to Anchorage by Upgrading the Programming of Fourth-Ranked Station KYES-TV.

This is the bleak economic environment in which Gray's purchase of some of KTVA(TV)'s non-license assets took place in July 2020. Brutal budget realities had already forced KTVA(TV), long a news leader in Anchorage, to lay off a substantial portion of its newsroom staff in 2018. And those same realities led the station to explore a sale in 2019 and 2020. Unsurprisingly, out-of-market buyers were not interested in buying into an Anchorage market facing significant economic headwinds. At the same time, recognizing KTVA(TV)'s difficulties, the CBS Network reached out to Gray to explore shifting the CBS affiliation from KTVA(TV) to KYES-TV. Rather than poach the CBS affiliation from a struggling television station, Gray entered into an agreement with KTVA(TV) to purchase the affiliation and the right to hire many of KTVA(TV)'s employees. That agreement closed on July 31, 2020.

Over the past year, Gray has taken advantage of revenue and investment opportunities as well as efficiencies made possible by its purchase of the Anchorage CBS affiliation to greatly enhance KYES-TV's service to the Anchorage community. Gray added seven and a half hours per week of local news to the CBS programming stream. Gray also opened the first news bureau in Juneau with a full-time journalist that covers matters of state government, as well as other news from southeast Alaska. Gray's increased coverage of local and regional issues and expansion of local news in the market quite simply would not have been possible without Gray's purchase of the Anchorage CBS affiliation.



C. Gray Responded to the Commission Inquiry into the Anchorage Transaction by Promptly Adjusting Its Anchorage Operations to Accommodate the Commission's Concerns Without Compromising Service to Anchorage Viewers.

On January 25, 2021, Gray and its counsel met by telephone with Commission staff to discuss Gray's holdings in the Anchorage DMA.<sup>19</sup> In that meeting, staff made clear that they viewed the rule against swaps as prohibiting affiliation acquisitions like the one in Anchorage. While Gray did not agree that its conduct violated any rule, to avoid further dispute, Gray offered to reconfigure its Alaska operations to comply with the Commission's view of the rule. This involved Gray moving the CBS program stream to a low power station it owns in the market with a simulcast on a multicast channel of Gray's other full power station in the market, KTUU-TV.

Over the next several days, Gray shared with Commission staff its plan for addressing the Commission's concerns. This plan involved operational changes requiring internal technical changes, approval from CBS, coordination with various multichannel video providers and program guide publishers, and notice to viewers, among other things. Staff commented on the plan and requested minor changes. Gray agreed to those changes and informed staff that the plans would be implemented within approximately 30 days of February 1, 2021. Gray worked quickly, and, on March 2, 2021, Gray informed the Commission that the changes would be completed on March 3, 2021. On March 3, 2021, Gray moved the CBS-affiliated program stream to its low power station and completed all other necessary changes to its Anchorage stations' operations.

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<sup>19</sup> On December 1, 2020, the Media Bureau sent Gray a letter of inquiry regarding the Anchorage transaction to which Gray promptly responded.

Gray heard nothing more about this matter until the Commission issued the *NAL* on July 7, 2021. As described more fully below, the *NAL* is well out-of-proportion to the alleged wrongdoing in this case. Gray did not willfully or repeatedly violate the Commission’s rules. It reasonably interpreted Note 11 in the context of the Commission’s orders and previous transaction approvals, and it immediately made changes to its Anchorage stations to comply with the Commission’s unfairly expansive and retroactive interpretation of Note 11.

### **III. THE COMMISSION CANNOT LAWFULLY FINE GRAY FOR PURCHASING THE ANCHORAGE CBS AFFILIATION.**

#### **A. The Anchorage Transaction Is Permitted by the Plain Language of Both Note 11 and the *Second Report and Order*.**

The rule against swaps was never intended to apply generally to affiliation sales, but even if it were – as the *NAL* now asserts – the plain language of the rule would not apply to the Anchorage transaction for two reasons. First, the rule applies only if the relevant transaction causes a broadcaster to own two Top 4 stations in a market.<sup>20</sup> The Anchorage transaction did not result in KYES-TV becoming a Top 4 station because it was a Top 4 station prior to the transaction. Second, in the *Second Report and Order*, the Commission specifically exempted from Note 11 cases where, as here, network involvement led to the affiliation shift.<sup>21</sup> The CBS

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<sup>20</sup> Note 11 of the Commission’s rules reads as follows: “An entity will not be permitted to directly or indirectly own, operate, or control two television stations in the same DMA through the execution of any agreement (or series of agreements) involving stations in the same DMA, or any individual or entity with a cognizable interest in such stations, in which a station (the “new affiliate”) acquires the network affiliation of another station (the “previous affiliate”), if the change in network affiliations *would result in* the licensee of the new affiliate, or any individual or entity with a cognizable interest in the new affiliate, directly or indirectly owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement. Parties should also refer to the Second Report and Order in MB Docket No. 14-50, FCC 16-107 (released August 25, 2016)” (emphasis added).

<sup>21</sup> See *Second Report and Order*, 31 FCC Rcd at nn.128, 138.

Network's involvement in the affiliation shift from KTVA(TV) to KYES-TV removes the Anchorage transaction from the coverage of Note 11.

1. The Anchorage Transaction Does Not Violate the Plain Language of Note 11 Because KYES-TV was a Top 4 Ranked Station Before It Purchased the CBS Affiliation.

Note 11 as adopted by the Commission has two key elements. First, two stations must trade affiliations (or, as the *NAL* would have it, one station must acquire an affiliation from another). Second, the “result” of the swap (or purchase) must be that a non-Top 4 station becomes a Top 4 Station and a single licensee moves from owning one Top 4 rated station in the market to owning two. Setting aside for the moment whether the first condition of the rule is present in this case, the second clearly is not.

At the time Gray purchased the Anchorage CBS affiliation, both KTTU and KYES-TV were ranked among the Top 4 full-power television stations in the Anchorage DMA.<sup>22</sup> A transaction cannot “result in” a condition that existed before the transaction, and KYES-TV could not “become” what it already was. But to impose liability on Gray in this case, the Commission would need to conclude that both of those things occurred. Gray's ownership of two Top 4-stations in Anchorage did not result from its purchase of the CBS affiliation, and

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<sup>22</sup> See Exhibit 1. Gray does not subscribe to Nielsen data for the Anchorage market and therefore does not have access to that data. Recently, Gray learned that Comscore and Nielsen data differ on the ranking of KYES-TV in the Anchorage market in July 2020. Comscore, to which Gray does subscribe, ranked KYES-TV as the fourth rated full-power television station for that time period. Gray has been advised that Nielsen ranked KYES-TV as the fifth ranked station, a fact that Gray cannot verify due to Nielsen's strict terms of service. In any event, under Section 73.3555(b)(1)(ii) of the Commission's rules, Gray is entitled to rely on “audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service” when making a Top 4 showing. Comscore meets each of these criteria, so Gray is entitled to rely on its data showing KYES-TV as the fourth rated station in the market for the relevant time period.

KYES-TV did not become a Top 4-station as a result of the Anchorage transaction. Both of these conditions were the result of Gray’s steady improvement of KYES-TV during its four years of ownership and investment.

At every stage of adopting the rule against swaps, the Commission recognized that a prohibited swap would *result in* a station that was previously ranked outside the Top 4 *becoming* a Top 4 station. In the Further Notice of Proposed Rulemaking in the 2014 quadrennial review, the Commission justified the rule against swaps by stating that an affiliation swap circumvents Section 73.3555 because “an affiliation swap involving a top-four station and a non-top-four station will nearly always *result in* the non-top-four station *becoming* a top-four station after the swap.”<sup>23</sup>

In 2016, the Commission conditionally approved Gray’s acquisition of KYES-TV pursuant to a failing station waiver.<sup>24</sup> Anticipating the rule against swaps being adopted by the Commission, the Commission granted the failing station waiver subject to the condition that Gray was prohibited through June 16, 2018, from “entering into an agreement to obtain a network affiliation held by an existing affiliate in the market that, at the time such agreement is executed, *would result in KYES becoming* a top-four station in the market in terms of audience share.”<sup>25</sup>

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<sup>23</sup> 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, *Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd 4371, 4391, para. 47 (2014) (the “FNPRM”) (emphasis added).

<sup>24</sup> See *Fireweed Communications, LLC*, 31 FCC Rcd 6997, 7002 (2016) (“*Fireweed*”).

<sup>25</sup> See *id.* at 7002 (emphasis added). Notably, the condition adopted in *Fireweed* was broader in crucial respects than the rule the Commission adopted in the *Second Report and Order*. See *id.* at 7002 & n.45 (citing *FNPRM*, 29 FCC Rcd at 4392). For example, unlike the

Then, in the *Second Report and Order*, the Commission confirmed that the rule was intended to prohibit transactions that would “*result in* the non-top-four station *becoming* a top-four station after the swap.”<sup>26</sup> The Anchorage affiliation purchase did not *result in* KYES-TV *becoming* a Top 4 ranked station. Note 11 is therefore inapplicable.

2. The NAL Violates the Commission’s Policy of Permitting Failing Stations to Upgrade Programming and Improve Their Ratings Without Penalty.

Enforcement of Note 11 against Gray also would violate the longstanding Commission policy against punishing licensees who buy a failing station and then improve its ratings organically through investment and hard work to the point where it is Top 4 ranked. While the Commission in *Fireweed* granted Gray the opportunity to own KYES-TV, the improvement of that station to attain Top 4 status in the Anchorage market by July of 2020 was purely due to the work Gray put into rebuilding that station. In the *Second Report and Order*, the Commission reaffirmed its precedent that it would not “penaliz[e] a station whose operations improved to the point that it became a top-four station.”<sup>27</sup> Application of the rule against swaps to this transaction would do just that, however, by disregarding the fact that KYES-TV was a Top 4 station on its own strength, not through purchase of the CBS affiliation.

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*Second Report and Order*, the condition did not appear to permit Gray to obtain a Top 4 affiliation from any source, including the network itself.

<sup>26</sup> See *Second Report and Order*, 31 FCC Rcd at n.126 (permitting stations to request a waiver of the rule against swaps in cases where a non-Top 4 station becomes a Top 4 station for reasons other than an affiliation swap) (emphasis added).

<sup>27</sup> *Id.* at 9882, para. 47.

3. The Rule Against Swaps Cannot Be Read To Prohibit Purchases of a Top 4 Affiliation by a Station Already Ranked Among the Top 4 Stations in a Market.

The *NAL* appears to interpret the *Second Report and Order* as meaning that a violation of Note 11 occurs whenever a station owner that already owns a Top 4 rated station acquires the affiliation of another Top 4 rated station in the market, regardless of the pre-acquisition market ranking of the station acquiring the affiliation.<sup>28</sup> So, in this case, the *NAL* appears to take the position that Gray violated Note 11 when it purchased the Anchorage CBS affiliation regardless of what Gray station (or multicast) ended up hosting the affiliation, and that Gray separately violated Section 73.3555(b) for as long as Gray kept the affiliation on the primary channel of KYES-TV.<sup>29</sup>

That interpretation of the rules goes far beyond what Note 11 and the *Second Report and Order* proscribe. Note 11 applies only if a station becomes a Top 4 station by virtue of the transaction in question. The rule does not say that if an owner of a Top 4 station purchases the affiliation of another Top 4 station, that alone is enough to violate Note 11. The Commission decided that the rankings of the station that lost the affiliation determine whether the acquiring station is a Top 4 station,<sup>30</sup> but that doesn't mean the pre-transaction ranking of the station acquiring the affiliation is irrelevant to the analysis as the *NAL* suggests. Nor does the focus on the pre-transaction ratings of the station selling its affiliation mean that a violation occurs if the buyer puts the acquired affiliation on a multicast or low-power station, neither of which

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<sup>28</sup> See *NAL* at para. 7 & n.13.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* at 9884-85, para. 51 n.141.

implicate Section 73.3555(b) at all.<sup>31</sup> Because KYES-TV was a Top 4 station at the time of the transaction in question, the rules did not and do not prohibit Gray from further upgrading KYES-TV's programming by purchasing the CBS affiliation.

It is axiomatic that the Commission must follow its own rules and policies.<sup>32</sup> And it is black letter law that the Commission cannot adopt new rules without following the notice and comment procedures defined in the Administrative Procedures Act.<sup>33</sup> In this case, that means the Commission cannot enforce Note 11 against Gray because KYES-TV was a Top 4 rated station at the time it purchased the Anchorage CBS affiliation. The *NAL* does not explain how the Commission's proposed enforcement action is consistent with Note 11 considering KYES-TV's market rankings at the time of the CBS affiliation purchase or the Commission's policy against punishing stations that achieve Top 4 status through organic growth. For these reasons alone, the *NAL* must be cancelled.

4. The Anchorage Transaction Is Exempt from Note 11 Due to the CBS Network's Involvement in the Affiliation Shift.

The Anchorage transaction also is exempt from the rule against swaps under the exception the Commission adopted for affiliation shifts in which a Big 4 network participates. Note 11 specifically directs parties to consult the *Second Report and Order* to determine whether a particular transaction is covered by the rule. The *Second Report and Order* states that:

[T]he extension of the top-four prohibition we adopt today would not apply in situations where a network offers an existing duopoly owner (one top-four station and one station ranked outside the top four) a top-four affiliation for the lower ranked station, perhaps because the network is no longer satisfied with the existing affiliate station and the

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<sup>31</sup> The *NAL* tacitly acknowledges this point by finding that Gray's alleged violation of Note 11 ceased on the date that Gray moved the CBS affiliation to a low-power station. See *NAL* at para. 5.

<sup>32</sup> See, e.g., *Nat'l Cable Television Ass'n v. FCC*, 747 F.2d 1503, 1509 (D.C. Cir. 1984).

<sup>33</sup> See 5 U.S.C. §553.

duopoly owner has demonstrated superior station operation (*i.e.*, earned the affiliation on merit.). Such a circumstance represents organic growth of the station and not a transaction that is the functional equivalent of an assignment or transfer of control.<sup>34</sup>

This precise scenario played out in Anchorage. The CBS Network reached out to Gray in October 2019 asking whether Gray was interested in affiliating with the network in Anchorage, because in the words of the *Second Report and Order*, Gray had “earned the affiliation on merit.”<sup>35</sup> This was before Gray had any conversations with the owners of KTVA(TV). As the representative from CBS informed Kevin Latek at Gray, the affiliation renewal negotiations between CBS and KTVA(TV) were ongoing, and Gray had an excellent reputation for operating CBS affiliates.<sup>36</sup> With KYES-TV’s local profile improving over the years since Gray acquired it, it is not surprising that CBS would reach out to Gray – without Gray’s prompting – and inquire about Gray’s interest in the CBS affiliation in Anchorage.

Gray’s policy has been to decline any Big Four network’s invitation to “poach” an affiliation without the current affiliate’s knowledge and cooperation. Mr. Latek therefore informed CBS that it would be willing to negotiate with CBS to move the CBS affiliation from KTVA(TV) to KYES-TV if and only if Gray also could purchase some other non-license assets from KTVA(TV) in a voluntary arms-length agreement with the local cable operator who then held the affiliation for KTVA(TV). Just a few months later that is exactly what happened. As soon as Gray and KTVA(TV) had agreed upon terms for Gray to purchase certain non-license

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<sup>34</sup> *Second Report and Order*, 31 FCC Rcd at n.128.

<sup>35</sup> At that time, Gray was already the owner of the second largest number of CBS affiliated television stations in the industry, including the top-rated CBS affiliate in the country.

<sup>36</sup> In fact, because of Gray’s commitment to localism and operating high-quality news stations, CBS programming achieves significantly higher ratings when it airs on Gray-owned stations than it averages nationwide. Gray Television, Inc. Investor Presentation, at 10 (May 21, 2018), [https://gray.tv/uploads/documents/presentations/PRESENTATION\\_May\\_20183.pdf](https://gray.tv/uploads/documents/presentations/PRESENTATION_May_20183.pdf).



assets from KTVA(TV), Gray reached out to CBS to complete the negotiation for approval to move the CBS programming to KYES-TV.<sup>37</sup>

Undoubtedly, if Gray had taken the CBS affiliation without KTVA(TV)'s involvement and cooperation, the exemption in the rule against swaps would have been satisfied. Such an outcome, however, clearly would have disserved the public interest and, therefore, would have countermanded the Commission's statutory mandate.

Because Gray and KTVA(TV) entered into a voluntary transaction, the public and the public interest were far better served than if Gray had simply negotiated with CBS to pick up the affiliation for KYES-TV. In particular, through the Gray/KTVA(TV) transaction, Gray was able to move CBS programming to KYES-TV without viewer confusion or disruption and smooth the transition for KTVA(TV)'s news staff and local journalists, not to mention the cable, satellite, and OTT providers serving local audiences. In Gray's experience, taking an affiliation without the cooperation of the former affiliate creates tremendous unnecessary disruption and confusion in the marketplace and imposes unnecessary hardship on the lives of employees of the former affiliate as well as local viewers.

For these reasons, Gray's purchase of KTVA(TV)'s affiliation with the CBS Network's involvement satisfies the exemption for affiliation transfers in which a network participates under the *Second Report and Order*. Gray both complied with this exemption and structured its

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<sup>37</sup> Accordingly, the Anchorage transaction also complies with the requirements of n.138 of the *Second Report and Order*, which states: "We confirm that extension of the top-four prohibition to affiliation swaps would not prevent a station from obtaining an affiliation through negotiating with a national network outside the context of an affiliation swap." *See Second Report and Order*, 31 FCC Rcd at n.138. Ultimately, Gray was able to purchase the Anchorage CBS affiliation only through negotiation with the CBS network and the network's concurrence. And, of course, this negotiation came outside the context of any "swap" transaction, because Gray's agreement with KTVA(TV) did not involve any swap of assets.

transaction with KTVA(TV) to ensure fairness for all involved and to serve the public's interest in a smooth transition.

B. Gray Reasonably Interpreted the Rule Against Swaps to Permit Its Purchase of the Anchorage CBS Affiliation.

The *NAL* also is defective because the Commission did not provide Gray (or any other broadcaster) with adequate notice through the *Second Report and Order* or the text of Note 11 that the rule against swaps applies to transactions like the Anchorage purchase that are not swaps at all. “Traditional concepts of due process incorporated into administrative law preclude [the Commission] from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”<sup>38</sup> The test for determining whether agency notice is adequate is whether “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty the standards with which the agency expects parties to conform.”<sup>39</sup> “The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules.”<sup>40</sup> Gray’s interpretation that Note 11 and the *Second Report and Order* do not apply to the Anchorage transaction was entirely reasonable and appropriate given the text of the order and the rule and the context in which the rule was adopted. Accordingly, the *NAL* is unenforceable against Gray.

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<sup>38</sup> *SBC*, 824 F.2d 1, 3 (D.C. Cir.1987) (citing *Gates Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

<sup>39</sup> *Trinity Broadcasting*, 211 F.3d at 628 (D.C. Cir. 2000) (quoting *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (“*GEC*”)).

<sup>40</sup> *SBC*, 824 F.2d at 4.

1. Gray Properly Relied on the *Second Report and Order* When It Interpreted Note 11.

The *NAL* claims that the Anchorage transaction violates the “plain language” of Note 11 because the Note uses the phrase “acquires the network affiliation” to describe the conduct prohibited by the rule.<sup>41</sup> When read in the context of the *Second Report and Order* as Note 11 instructs, however, the “plain language” of Note 11 is much more reasonably read to use the term “acquires” to denote the types of swaps discussed by the Commission in the *Second Report and Order* than it is to refer more broadly to all affiliation purchases.

The *Second Report and Order* makes perfectly clear that the rule against swaps was a special-purpose rule designed to protect against recurrence of a specific set of circumstances.<sup>42</sup> The Commission said those circumstances had arisen only once in the past – in a Hawaii case where two broadcasters swapped their affiliations – and all other station assets – resulting in one company owning two of the Top 4 stations in the Honolulu DMA without having to seek Commission approval.<sup>43</sup> The rule was intended to “merely clarif[y] that the top-four prohibition applies to agreements that are the functional equivalent of a transfer of control or assignment of license from the standpoint of our Local Television Ownership Rule.”<sup>44</sup>

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<sup>41</sup> *NAL* at para. 8.

<sup>42</sup> See *Second Report and Order*, 31 FCC Rcd at para. 51 & n.137 (citing *FNPRM*, 29 FCC Rcd at 4391-92, para. 48 (recounting the facts in Honolulu, Hawaii swap case)).

<sup>43</sup> See *Second Report and Order*, 31 FCC Rcd at n. 137; *FNPRM*, 29 FCC Rcd at 4391-92, para. 48 (citing KHNL/KGMB License Subsidiary, LLC, *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 26 FCC Rcd 16087 (2011) (“KHNL/KGMB”). To make clear that it wasn’t prohibiting all affiliation shifts in a market, the Commission decided a broadcaster is not prohibited from obtaining another in-market station’s network affiliation by contracting directly with the network. See *Second Report and Order*, 31 FCC Rcd at nn.128, 138.

<sup>44</sup> *Second Report and Order*, 31 FCC Rcd at 9884, para. 50.

Given these statements, Gray was fully justified in interpreting the use of the phrase “acquires the network affiliation of another station” in Paragraph 52 of the *Second Report and Order* and the text of Note 11 to mean a swap transaction in which two stations trade affiliations and related station assets so that the transaction is the “functional equivalent” of a transfer of station licenses. In other words, Gray was entitled to conclude that the rule against swaps prohibited transactions that involved two station owners swapping most station assets but with each retaining its Commission-issued license – just as the Hawaii transaction did. Gray’s Anchorage transaction, which involved the transfer of programming assets and the right to hire some employees but none of KTVA(TV)’s branding, facilities, or other non-license assets, didn’t violate this “functional equivalence” standard identified by the Commission in the *Second Report and Order*. So, Gray had every reason to believe the Anchorage transaction complied with the rules.

The *NAL* argues that the *Second Report and Order* “clearly stated that the rule would prohibit sale transactions, as well as swaps.”<sup>45</sup> Gray agrees that the *Second Report and Order* “clearly stated” the prohibition on swaps, but it did not clearly state non-swap sales like the Anchorage transaction are likewise prohibited. The Commission’s seven-paragraph discussion of the new rule refers to the prohibited conduct as the *acquisition* or *sale* of a Top 4 network affiliation only once, without any elaboration. The same discussion uses the term “affiliation swap” **more than 30 times**, exhaustively describing the conduct Note 11 was meant to prohibit.

For example:

- In Paragraph 45, the Commission explains that several commenters “support application of the top-four prohibition to affiliation swaps” because without such a prohibition a broadcaster could “create a prohibited duopoly by swapping the

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<sup>45</sup> *NAL* at para. 8.

affiliation of its previously non-top-four ranked station for a top-four network affiliation, thus, turning the second station into a top-four station in a market without opportunity for Commission review.”<sup>46</sup> This paragraph very specifically defines what an affiliation swap is and why it should be prohibited. It says nothing about affiliation sales.

- Paragraph 46 describes the opposition in the record to applying “the top-four prohibition to affiliation swaps.”<sup>47</sup> In footnote 121 the Commission defends prohibiting “affiliation swaps in the circumstances proposed.”<sup>48</sup> Any reasonable reader would assume this reference referred to the specific conduct described in Paragraph 45 as prohibited by the *Second Report and Order*.
- In Paragraph 47, the Commission finds “that application of the top-four prohibition to affiliation swaps is consistent with previous Commission action and policy.”<sup>49</sup> Paragraph 47 does not discuss or extend the top-four prohibition to any other type of transaction, and the Commission concludes Paragraph 47 by describing only affiliation swaps: “Affiliation swaps, by their design, implicate the specific harms to public interest that led the Commission to adopt the top-four prohibition.”<sup>50</sup>
- The footnotes to Paragraph 47 also exclusively refer to affiliation swaps. In footnote 122, the Commission describes its authority to regulate “affiliation swaps” and finds that it has “statutory authority to extend the Local Television Ownership Rule to include affiliation swaps.”<sup>51</sup> Footnote 122 does not discuss whether the Commission’s statutory authority might extend to other types of affiliation transactions beyond swaps. Footnote 126 also only discusses affiliation swaps. “[A]n affiliation swap is essentially indistinguishable in its effect on the policy underlying our duopoly rule from a top-four merger described by the Commission in the *1999 Ownership Order*.”<sup>52</sup> Footnote 126 also discusses the potential to seek a waiver for an “affiliation swap” that would be unlikely to produce two top-four rated stations.<sup>53</sup>
- In Paragraph 48, the Commission describes the difference between “actively transact[ing] to become a top-four station” through a transfer or assignment of license

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<sup>46</sup> *Second Report and Order*, 31 FCC Rcd at 9881, para. 45 (emphasis added).

<sup>47</sup> *Id.* at 9881-82, para. 46 (emphasis added).

<sup>48</sup> *Id.* at n.121.

<sup>49</sup> *Id.* at 9882-83, para. 47 (emphasis added).

<sup>50</sup> *Id.* (emphasis added).

<sup>51</sup> *Id.* at n.122 (emphasis added).

<sup>52</sup> *Id.* at n.126 (emphasis added).

<sup>53</sup> *Id.*

and a station that “organically” becomes a top-four station.<sup>54</sup> Importantly, Footnote 128 explains that if a network approaches a station and offers it an affiliation because “the duopoly owner has demonstrated superior station operation (i.e., earned the affiliation on merit),” the Commission would deem such a transaction as organic growth and not a prohibited affiliation-swap transaction.<sup>55</sup> That is what happened with the Anchorage transaction.

- Paragraph 48 is the only paragraph between Paragraph 45 and 51 to mention other types of transactions involving affiliations. In Paragraph 48 the Commission briefly mentions that “the sale or swap of network affiliations” could serve as “the functional equivalent of a transfer of control or assignment of license.”<sup>56</sup> But while Paragraph 48 says that sales or swaps *could* be prohibited, the paragraph concludes by extending the top-four prohibition *only* to affiliation swaps: “Therefore, affiliation swaps undermine the purpose of the Top 4 prohibition and the Local Television Ownership Rule as a whole. Application of the top-four prohibition to affiliation swaps is necessary to prevent circumvention of the Local Television Ownership Rule.”<sup>57</sup>
- In Paragraph 49, the Commission explains why “extending the top-four prohibition to affiliation swaps” does not amount to impermissible content regulation that would be subject to strict scrutiny.<sup>58</sup> Paragraph 49 only discusses why rational basis review is appropriate for affiliation swap transactions. It does not discuss any other type of transaction involving a network affiliation.
- Paragraph 50 more broadly explains why the Commission’s media ownership rules in general do not violate the First Amendment. The Commission also states that it is “merely clarif[y]ing that the top-four prohibition applies to agreements that are the functional equivalent of a transfer of control or assignment of license.”<sup>59</sup> Given the exclusive focus on affiliation swap transactions and no other type of transaction in the previous five paragraphs, this single sentence is most reasonably read as referring only to swap transactions.
- In Paragraph 51, the Commission rejects the fears that its rule would prevent a station from acquiring popular programming from an in-market station, as KYES-TV did.<sup>60</sup> Instead, the Commission reassured broadcasters that the extension of the top-four prohibition will not “have a significant impact on the marketplace, as affiliation

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<sup>54</sup> *Id.* at 9883, para. 48.

<sup>55</sup> *Id.* at n.128.

<sup>56</sup> *Id.* at 9883, para. 48.

<sup>57</sup> *Id.* (emphasis added).

<sup>58</sup> *Id.* at 9884, para. 49.

<sup>59</sup> *Id.* at 9884, para. 50.

<sup>60</sup> *Id.* at 9884-85, para. 51.

swaps are, at this point, rare.”<sup>61</sup> The Commission then explained that it was aware of “only a single instance of an affiliation swap that would be subject to the rule we adopt herein” and it cited to Raycom Media’s transaction in Hawaii as the lone example.<sup>62</sup> Of course, in 2016 when the *Second Report and Order* was adopted, transactions involving affiliations and affiliations moving to different stations or multicast channels were common.<sup>63</sup> But, Paragraph 51 – like the six paragraphs that precede it – refers only to affiliation swaps and how the new rule will “restrain the future use of affiliation swaps to evade the top-four prohibition.”<sup>64</sup>

- Paragraph 52 concludes the “Affiliation Swap” section of the *Second Report and Order*, and this paragraph includes the broad wording now found in Note 11 – including the word “acquires” rather than “swaps.” But, in the first sentence of Paragraph 52 (which is the sentence immediately preceding the language in Note 11), the Commission described its new rule as follows: “Accordingly, in order to close this loophole, we find that affiliation swaps must comply with the top-four prohibition at the time the agreement is executed.”<sup>65</sup> Footnote 142 further confirms that the broad Note 11 language only applies to affiliation swaps: “Application of this rule to affiliation swaps is prospective” and that “[p]arties that acquired control over a second in-market top-four station by engaging in affiliation swaps prior to the release date of this Order will not be subject to divestiture or enforcement action.”<sup>66</sup>

Any reasonable party reading Note 11 in the context of (a) the specific adopting language in Paragraph 52; and (b) the preceding seven paragraphs (in a section of the adopting order titled “Affiliation Swaps”) that focus exclusively on swap transactions would conclude that, although Note 11 may have been written broadly, the Commission intended to apply it to one discrete type of transaction – affiliation swaps. At the very least, Gray was perfectly justified in reaching that

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<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> *Id.* at n.137.

<sup>63</sup> As just one high profile example, in 2014, Tribune Broadcasting acquired the CBS affiliation for the Indianapolis, Indiana market and moved it to its station WTTV(TV). In another example, in 2015, the CBS affiliation in Duluth, Minnesota moved to a multicast channel for KBJR-TV as part of Quincy Media’s acquisition of certain television stations from Granite Broadcasting. *See Quincy Newspapers, Inc*, Letter, 30 FCC Rcd 9987 (2015).

<sup>64</sup> *Second Report and Order*, 31 FCC Rcd at 9885, para. 51 (emphasis added).

<sup>65</sup> *Id.* at 9885, para. 52 (emphasis added).

<sup>66</sup> *Id.* at n.142 (emphasis added).

conclusion and presuming that the rule against swaps did not apply to the Anchorage transaction.<sup>67</sup>

2. Retroactively Redefining the Term “Swap” as “Shorthand” for Sales Transactions in 2021 Cannot Provide Gray with Adequate Notice That the Anchorage Transaction Violated the Rule Against Swaps in 2020.

The *NAL* dismisses the lengthy discussion of swaps in the *Second Report and Order* by saying that the Commission’s “use of the word ‘swap’ . . . was simply a shorthand description for the types of transactions (sale or swap) that the Commission found to be the functional equivalent of a transfer of control or assignment of license.”<sup>68</sup> The *Second Report and Order*, however, described one type of transaction – affiliation swaps. It said nothing about any other type of transaction, and it certainly said nothing about its use of the word “swap” as shorthand for other types of transactions. While the *Second Report and Order* does identify a “functional equivalence” standard, it elaborates on that standard only to the extent that it describes how swaps meet it.

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<sup>67</sup> In December 2018, the Commission finally resolved the Hawaii case that spawned the rule against swaps – the case that the Commission said in the *Second Report and Order* was the “single instance of an affiliation swap that would be subject to the rule [against swaps].” See *KHNL/KGMB*, 26 FCC Rcd 16087 (2011); see also *Second Report and Order*, 31 FCC Rcd at n. 137 (citing to the discussion in paragraph 48 of the *FNPRM* in the 2014 Quadrennial Review regarding the affiliation swap in Honolulu, Hawaii that ultimately led to the *Raycom Hawaii* decision). This decision again gave no hint that Note 11 would be applicable to anything other than affiliation swaps among stations that transform a non-Top 4 station into a Top 4 station so that an owner controls two Top 4 stations without seeking Commission approval. Since the Anchorage transaction (1) did not involve a swap; (2) did not result in Gray acquiring the callsigns, branding, facilities, or other non-license assets from KTVA(TV), and did not result in Gray owning a station that became a Top 4 station in the Anchorage DMA by virtue of the transaction, the Commission’s order gave Gray no reason to believe that the rule against swaps prohibited purchase of the Anchorage CBS affiliation.

<sup>68</sup> See *NAL* at para. 8.



The Commission’s retroactive definition of “swap” in the *NAL* as encompassing sale transactions did not provide Gray with notice that the Anchorage transaction violated Note 11. Indeed, this redefinition of the term “swap” is inconsistent with the word’s universally recognized definition and the Commission’s longstanding use of the term to describe exchanges of like assets rather than purchase of assets by one party in exchange for money.

Merriam-Webster defines the noun swap to mean “an act, instance, or process of exchanging one thing for another.”<sup>69</sup> Chambers defines “swap” as “an exchange or trading.”<sup>70</sup> Oxford University defines “swap” as “an act of exchanging one thing or person for another.”<sup>71</sup> None of these independent sources give any hint that the word “swap” refers to a purchase of assets in exchange for cash as occurred in the Anchorage transaction, let alone that the term swap should be understood as “shorthand” for such a transaction.

The Commission also has used the word “swap” in numerous, diverse regulatory contexts to refer to an exchange between parties of similar assets.<sup>72</sup> Indeed, because the meaning of

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<sup>69</sup> See <https://www.merriam-webster.com/dictionary/swap> (last visited Aug. 5, 2021).

<sup>70</sup> See <https://chambers.co.uk/search/?query=swap&title=21st> (last visited Aug. 5, 2021).

<sup>71</sup> See [https://www.oxfordlearnersdictionaries.com/us/definition/english/swap\\_2](https://www.oxfordlearnersdictionaries.com/us/definition/english/swap_2) (last visited Aug. 5, 2021).

<sup>72</sup> See, e.g., Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments Station WNLO(TV), Buffalo, New York, *Report and Order*, 34 FCC Rcd 4816 (2019) (“swap” of digital television channels between two Commission licensees); CoxCom, Inc. d/b/a Cox Communications Phoenix For Modification of the Phoenix, Arizona DMA, *Memorandum Opinion and Order*, 21 FCC Rcd 5170 (2006) (“swap” of digital television channels and broadcast facilities between two Commission licensees); Nevada MDS, Inc. For Authority to Construct and Operate a New High Power Signal Booster Station and Response Station Hub Associated with the Instructional Television Fixed Service Station KZH33, Las Vegas, Nevada, *Order on Reconsideration*, 19 FCC Rcd 7068 (2004) (“swap” of ITFS channels between two Commission licensees); Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations (Coal Run, Kentucky and Clinchco, Virginia), *Notice of Proposed Rulemaking and Order to Show Cause*, 19 FCC Rcd 15395 (2004) (“swap” of FM radio channels between Commission licensees); Amendment of Section 73.622(b), Table of Allotments, Digital

“swap” is so commonly understood to mean the trade of like assets, the Commission has used the word “swap” in public notices of Commission activity and licensee responsibilities without defining or otherwise elaborating on the meaning of the term.<sup>73</sup> For example, in October 2020, the Commission released a public notice lifting several types of filing freezes for full-power and Class A low-power television stations associated with the TV broadcast incentive auction.<sup>74</sup> One of the freezes lifted – without explanation or elaboration – was the freeze on “Petitions to swap in-core channels.”<sup>75</sup> The Commission knew that licensees would understand that phrase “Petitions to swap in-core channels” to mean an agreement between two station owners to exchange assigned television broadcast channels between Channels 2-37, even though the Commission had never used the phrase “Petitions to swap in-core channels” to refer to the freeze at issue in a previous reported decision or public release. In another public notice, the

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Television Broadcast Stations (Redding, California), *Report and Order*, 15 FCC Rcd 22363 (2000) (“swap” of digital television channels); Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Canton and Morristown, New York), *Report and Order*, 15 FCC Rcd 13319, (“swap” of FM radio channels between Commission licensees); Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Parris Island and Hampton, South Carolina, *Report and Order*, 12 FCC Rcd 17331 (1997) (“swap” of FM radio channels); Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Boca Raton and Lake Worth, Florida), *Report and Order*, 10 FCC Rcd 9254 (1995) (“swap” of analog television channels); Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations; and Section 73.622(b), Table of Allotments, Digital Broadcast Television Stations (Galveston, Texas), *Report and Order*, 17 FCC Rcd 18098 (2002) (“swap” of digital television stations).

<sup>73</sup> Media Bureau Lifts Freeze on the Filing of Television Station Minor Modification Applications and Rulemaking Petitions Effective Fifteen Days After Publication in the Federal Register, *Public Notice*, 35 FCC Rcd 11993 (2020) (“swap” of in-core digital television channels) (“*Freeze Notice*”); The Wireless Telecommunications Bureau Provides Guidance on How to File Applications to Exchange Channels Between the Broadband Radio Service and Educational Broadband Service, *Public Notice*, 21 FCC Rcd 8510 (2006) (“swap” of EBS channels) (“*BRS/EBS Swap Notice*”).

<sup>74</sup> See *Freeze Notice*, 35 FCC Rcd at 11994.

<sup>75</sup> See *id.*

Commission defined the practice of two BRS or EBS licensees trading or exchanging frequencies as a “channel swap.”<sup>76</sup> Again, the Commission had no reason to doubt that licensees would understand its meaning, because everyone knows what a swap is.

Given the universal understanding of the term “swap” to mean an exchange of similar assets between two parties rather than a sale of an asset from one party to another, Gray’s interpretation of the rule against swaps was reasonable. The Commission cannot redefine that term today and give that redefinition retroactive effect against Gray.

The *NAL* also contends that putting quotation marks around the term “affiliation swap” when the term was first used in the *FNPRM* and *Second Report and Order* was sufficient notice to regulated parties that the terms was being used as “shorthand” for a range of transactions, including affiliation sales.<sup>77</sup> The courts have often cautioned the Commission not to rely on footnotes or other “obscurely placed nugget[s]” to notify regulated parties of important aspects of their regulatory obligations.<sup>78</sup> If the Commission cannot rely on footnotes, which at least consist of text that might be understood by regulated parties, then it certainly cannot rely on its unexplained use of quotation marks in a passage that is 28 paragraphs removed from the actual discussion of Gray’s regulatory obligations.

3. The Commission Cannot Rely on Citations to the *FNPRM* To Supplement the Actions Taken in the *Second Report and Order*.

The Commission seeks to resolve the obvious ambiguities in the *Second Report and Order* by citing back to the discussion in the *FNPRM* of what the Commission was proposing to

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<sup>76</sup> See *BRS/EBS Swap Notice* at 8510.

<sup>77</sup> *NAL* at para. 8 & n.17.

<sup>78</sup> See *McElroy Electronics*, 990 F.2d at 1366 (D.C. Cir. 1993); *RCA Global Communications, Inc. v. Federal Communications Commission*, 758 F.2d 722, 730 (D.C. Cir. 1985).

prohibit.<sup>79</sup> This effort fails because the *FNPRM* consisted of nothing but non-binding tentative findings and proposals. The Commission was required in the *Second Report and Order* and Note 11 to inform Gray of its regulatory obligations, and it failed to do so. That should be the end of this case.

Even if the *FNPRM* could be used to clarify the rules the Commission ultimately adopted, the text *FNPRM* in this case only adds further confusion. First, the *FNPRM* opens its discussion of the rule against swaps by looking back even further to the 2011 Notice of Proposed Rulemaking in the 2010 Quadrennial Review proceeding.<sup>80</sup> The discussion of affiliation swaps in the *2010 NPRM* focuses exclusively on a transaction that involves two stations swapping both affiliations and callsigns.<sup>81</sup> In the *FNPRM*, the Commission says that it is those transactions identified in the *2010 NPRM* that it proposes to regulate.<sup>82</sup> KYES-TV and KTVA(TV) did not exchange affiliations and callsigns. KTVA(TV) maintained the station's callsign and branding. The Commission then engages in a 3-paragraph discussion of the positions of the parties on affiliation swaps, the Commission's concerns about affiliation swaps, and the Hawaii case.<sup>83</sup> Finally, the Commission states in its paragraph adopting its proposal that it tentatively concludes that the "sale or swap" of affiliations should be prohibited, without elaboration. While the discussion in the *FNPRM* is short and consequently has less discussion of swaps, it provides no

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<sup>79</sup> See *NAL* at 8 and nn.16, 17.

<sup>80</sup> *FNPRM*, 29 FCC Rcd at 4390, para. 45 (citing *2010 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*, MB Docket No. 09-182, *Notice of Proposed Rulemaking*, 26 FCC Rcd 17489, 17505, ¶ 45 (2011) ("*2010 NPRM*").

<sup>81</sup> See *2010 NPRM*, 26 FCC Rcd at 17505-06, para. 45.

<sup>82</sup> See *FNPRM*, 31 FCC Rcd at 9881, para. 45.

<sup>83</sup> See *id.* at 9881-83, paras. 45-47.

more suggestion than the *Second Report and Order* that the Commission intended to prohibit affiliation transfers like the Anchorage transaction.

The *NAL*'s citations to the *FNPRM* belie the Commission's recognition that the *Second Report and Order* and Note 11 did not make the Commission's intended policy clear. Gray, a sophisticated party that deals with Commission regulatory matters daily, reasonably read the order to apply to swaps, and not to transactions like the Anchorage purchase. Nothing in the *Second Report and Order* or the *FNPRM* renders that conclusion unreasonable.

4. The Fact That Gray Did Not Consult Commission Staff Prior To the Alaska Transaction Is Irrelevant to the Rule's Application.

The *NAL* also blames Gray for its alleged misunderstanding of the rule against swaps because Gray did not check with Commission staff about the applicability of the rule against swaps before entering into the Anchorage transaction.<sup>84</sup> In this case, however, Gray had a very good reason for not contacting Commission staff. No such contact should have been necessary because Gray had engaged in detailed discussions with Commission staff in 2014 about a nearly identical transaction that Gray executed with Hoak Media in the Lincoln, Nebraska DMA. In

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<sup>84</sup> See *NAL* at para. 5. As an initial matter, Gray should not have to check with staff to clarify ambiguous rules, and its having not done so cannot subject Gray to the enforcement of an at best ambiguous rule. Moreover, the Commission maintains the position that staff advice is non-binding and cannot be relied upon by licensees. See *Malkan FM Assocs. v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991); see also Lewis J. Paper, Esq. et al., *Letter*, 28 FCC Rcd 16553, 16557 n.34 (2013) (citing *Malkan*); *Kojo Worldwide Corp. San Diego, California, Memorandum Opinion and Order*, 24 FCC Rcd 14890, 14894, 14895-96 (2009) (same); *Communications Vending Corp. of Arizona, Inc. v. Citizens Communications Co., Memorandum Opinion and Order*, 17 FCC Rcd 24201, 24215, para. 34 n.106 (2002) (same); *Hinton Telephone Co., Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11625, 11637, para. 42 (1995) (same). See also *Caveat Lector: A Blog Post About Reliance on Agency Blog Posts*, <https://www.fcc.gov/news-events/blog/2019/04/04/caveat-lector-blog-post-about-reliance-agency-blog-posts> (Apr. 4, 2019) (last visited Aug. 5, 2021). It's unfair to find Gray more culpable because it did not ask for advice that the Commission itself asserts Gray couldn't rely on.

that case, Gray did not swap any assets with the former owner of KHAS-TV. Instead, Gray combined programming assets obtained from KHAS-TV with Gray's existing in-market station, and KHAS-TV was then spun off to a third party, which operated the station as an independent. Although the written decision approving the Hoak transaction did not mention the affiliation sale in Lincoln, the Commission staff was fully aware of it when it released that decision.<sup>85</sup>

The *FNPRM* proposing the rule against swaps was adopted prior to the Commission's approval of the Hoak transaction and released after it. In that release the Commission discussed the Hawaii case as having prompted the proposed rule.<sup>86</sup> Then, in the 2016 *Second Report and Order* adopting Note 11, the Commission stated that it was aware of only one prior instance of a prohibited swap taking place – the Hawaii case.<sup>87</sup> Since Gray had discussed the Hoak transaction in detail with Commission staff contemporaneously with the Commission's proposal of the rule against swaps, it reasonably presumed that if the Commission had an issue with transactions like that, it would have said so when proposing or adopting Note 11. Instead, the *Second Report and Order* did just the opposite. It clarified that Note 11 would have only applied to one transaction – the Hawaii case – and, by implication, not the Hoak transaction or the many other high-profile examples of an affiliation moving to another station.<sup>88</sup> In light of its past experience and the Commission's statements in the *Second Report and Order*, Gray had every reason to believe that the rule against swaps did not bar the Anchorage transaction.

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<sup>85</sup> See Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau to Hoak Media and Gray Television Group, Inc., DA 14-452 (Apr. 3, 2014).

<sup>86</sup> See *FNPRM*, 31 FCC Rcd at 9883, para. 48.

<sup>87</sup> See *Second Report and Order*, 31 FCC Rcd at n.137.

<sup>88</sup> See *id.*

For all these reasons, the Commission’s proposed enforcement of the rule against swaps in this case would be unlawful. Prior to release of the *NAL*, there was no reason for Gray or any other television broadcaster to conclude that the rule applied to transactions like Gray’s Anchorage transaction. No reasonable broadcaster could have predicted from the *Second Report and Order* that: (1) the rule against swaps applies to station owners that already own two Top 4 stations in a market; (2) the exemption for network-initiated affiliation transfers does not apply to Gray’s Anchorage transaction; or that (3) the rule against swaps applies to transactions that don’t involve a swap. Considering all the facts, Gray’s interpretation of the rule was and remains fair and reasonable. Given the ambiguities of Note 11 and the *Second Report and Order*, that is all that is required for Gray to be free of liability.

It is settled law that the Commission is not permitted to punish regulated parties for their reasonable interpretation of ambiguous rules.<sup>89</sup> In *Trinity Broadcasting*, the D.C. Circuit invalidated the Commission’s non-renewal of a broadcast license because the Commission sought to enforce a novel interpretation of Section 73.3555.<sup>90</sup> In that case, the Court admonished the Commission for its inconsistent application of arguably ambiguous parts of Section 73.3555 – sometimes allowing parties off the hook with warnings, other times trying to impose draconian penalties.<sup>91</sup> The court’s conclusion in *Trinity Broadcasting* should resolve this case as well: “Where, as here, the regulations and other policy statements are unclear, where the petitioner’s interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not ‘on notice’ of the agency’s ultimate

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<sup>89</sup> See *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3, 4 (D.C. Cir.1987).

<sup>90</sup> See *Trinity Broadcasting*, 211 F.3d at 631-32.

<sup>91</sup> See *id.*

interpretation of the regulations, and may not be punished.”<sup>92</sup> The *NAL* proposes to do just that and therefore must be cancelled.

C. The *NAL* Exceeds the Commission’s Authority and Violates Section 326 of the Communications Act and the First Amendment.

The Commission’s interpretation of the rule against swaps in the *NAL* and the proposed forfeiture in the *NAL* also are unlawful because they violate the Constitution and the Communications Act. The Anchorage transaction involved nothing more than Gray’s choice of programming for KYES-TV, which was already a Top 4 station in the market. The Commission’s authority over license transfers is not broad enough to encompass regulation of such decisions. Moreover, both the First Amendment and the Communications Act prohibit the Commission from regulating programming choices like the one Gray made in this case.

1. The Commission’s Authority Over License Transfers Does Not Encompass Station Affiliation Shifts.

In the *Second Report and Order*, the Commission adopted the rule against swaps because it deemed swap transactions to be “the functional equivalent” of an assignment or transfer of control of a Commission license.<sup>93</sup> The FCC reasoned that because it has authority under the Section 310(d) of the Communications Act to review assignment and transfer of Commission licenses, it has the authority to prohibit transactions that are the “functional equivalent” of such license transfers or assignments.<sup>94</sup> That proposition may or may not be correct. But assuming it is, the *NAL* seeks to expand the Commission’s authority beyond transactions that are the “functional equivalent” of a transfer of license to cases like the Gray Anchorage transaction that

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<sup>92</sup> *Id.* at 632.

<sup>93</sup> *See Second Report and Order*, 31 FCC Rcd at 9882-83, paras. 47-48 & n.130.

<sup>94</sup> *See id.*; *see also* 47 U.S.C. §310(d).



involve nothing more than the purchase of programming – a First Amendment protected activity – by a Commission licensee.

The *Second Report and Order* defines the “functional equivalent” standard in the context of the Hawaii case.<sup>95</sup> In that case, the two stations involved traded nearly all non-license assets, including all programming agreements, call-signs, and branding. It was fair to characterize that transaction as the “functional equivalent” of a license transfer because from a viewer’s perspective, both TV stations changed hands. To the limited extent that the rule against swaps applies to transactions that are indistinguishable from a license transfer but for the fact that the parties did not seek Commission approval for the transfer of the license, the Commission has a reasonable argument that such evasions should be within its jurisdiction. The *NAL* goes much further than that, however, seeking to prohibit (and punish) transactions that are far from the “functional equivalent” of a license transfer.

Gray’s Anchorage transaction was not the “functional equivalent” of a license transfer. KYES-TV maintained its existing facilities, callsign, and branding. It added its own news programming. The only thing that changed was that KYES-TV upgraded the quality of its programming by obtaining popular CBS Network and other programming from KTVA(TV). From the viewers’ perspective, Gray did not acquire KTVA; it simply improved KYES-TV.<sup>96</sup>

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<sup>95</sup> See *Second Report and Order*, 31 FCC Rcd at 9883, para. 48.

<sup>96</sup> At the time of the transaction, Gray understood that KTVA(TV)’s owners intended to sell the station to a third party or donate it to a non-profit entity. The terms of the transaction did not prohibit KTVA(TV) from taking any action with respect to operation or future sale of the station. While KTVA(TV) is currently silent, Gray was not involved in any way with the station licensee’s choice to take KTVA(TV) off the air, and the terms of the Anchorage transaction did not in any way encourage or require that result.

Because the Anchorage transaction bears no resemblance to a license transfer – let alone being the “functional equivalent” of one – the Commission cannot justify its proposed actions in the *NAL* as ancillary to its Section 310(d) authority over license transfers. To reach programming purchases like the one in this case, the Commission would need a jurisdictional theory other than its unrelated Section 310(d) authority. The *NAL* offers none, and Gray doubts any exist because the programming choice the Commission is asserting jurisdiction over in this case is in the heartland of Gray’s First Amendment rights.

2. Gray’s Programming Choices Are Immune From Commission Review Under the First Amendment and Section 326 of the Communications Act.

The Commission has long recognized that “Section 326 of the Act and the First Amendment to the Constitution prohibit any Commission actions that would improperly interfere with the programming decisions of licensees.”<sup>97</sup> Accordingly, “the Commission will not substitute its judgment for that of the station regarding programming matters.”<sup>98</sup> If the rule against swaps bans programming purchases like the one in this case that do not amount to station swaps, then this application of the rule clearly constitutes constitutionally impermissible content regulation that also violates Section 326 of the Act.

Both the First Amendment and Section 326 protect Gray from government intrusion into the content of the programming aired on its stations.<sup>99</sup> When the Commission adopted Note 11,

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<sup>97</sup> Univision Communications Inc. and Broadcasting Media Partners, Inc. (Transfer of Control of Univision Subsidiaries), *Memorandum Opinion and Order*, 22 FCC Rcd 5842, 5855-56, para. 28 (citing 47 USC §326; U.S. Const., amend. I).

<sup>98</sup> *Id.* at 5855-56, para. 28 (citing *Entertainment Formats*, 60 FCC 2d 858 (1976), *recon. denied*, 66 FCC 2d 78 (1977); *FCC v. WNCN Listeners Guild*, 450 US 582, 595-598 (1981)).

<sup>99</sup> *See* 47 U.S.C. §326 (“Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the

it concluded that the rule does not violate broadcasters' free speech rights because it is focused on ratings, not the content of the programming itself.<sup>100</sup> In this case, however, the Commission is clearly proposing to punish Gray for a programming choice it has made. Gray chose to upgrade the programming on KYES-TV by purchasing the CBS affiliation. That is the action the Commission is seeking to punish. And this is precisely the content that both the Constitution and the Communications Act say the Commission cannot regulate.

The Commission defends Note 11 as consistent with broadcasters' free speech rights because courts have found the Top 4 prohibition to be content neutral.<sup>101</sup> Those cases are irrelevant here because the Commission's proposed enforcement isn't about enforcing the Top 4 prohibition. Gray owned two Top 4 stations *before* the Anchorage transaction and Gray owned those two Top 4 stations completely consistent with applicable Commission policies and precedent. What the Commission is proposing to do in this case is to police the content choices of KYES-TV, which is something it plainly cannot do.<sup>102</sup>

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Commission which shall interfere with the right of free speech by means of radio communication.”).

<sup>100</sup> See *Second Report and Order*, 31 FCC Rcd at 9884, para. 49-50.

<sup>101</sup> See *id.* at para. 50.

<sup>102</sup> While the Commission leans heavily on previous cases upholding the Top 4 duopoly restriction, it is not at all clear that Note 11 itself is sustainable. This is because while the rule claims to further competition and diversity, it does not appear to be reasonably related to accomplishing either goal. The rule against swaps does not promote strong, diverse competitors in a market because it doesn't prohibit any station from acquiring a Top 4 station's network affiliation. The rule permits a station to obtain another station's affiliation directly from a network. Basically, the rule just requires affiliation changes to involve the network rather than occur solely through an acquisition by one broadcaster from another. There is no reason to think (and the Commission has no evidence) that regulating this process point would lead to fewer cases where a station loses its Top 4 network affiliation than if the Commission permitted the affiliation to be sold from one station to another. So, at the price of substantial intrusion into broadcasters' protected content choices, the Commission's rule produces nothing in the way of enhancing the public interest through competition or diversity. This case shows why Note 11

#### **IV. THE PROPOSED FORFEITURE IS UNLAWFUL AND DIRECTLY CONTRARY TO THE PUBLIC INTEREST.**

##### **A. The Commission's Proposal of the Maximum Fine in This Case Is Clearly Contrary to Law.**

Under the circumstances of this case, the NAL's proposal of the maximum fine for the Anchorage transaction is inappropriate. Given Gray's reasonable, good faith interpretation of the Commission's ambiguous (at best) Note 11, the Commission should cancel the *NAL*.<sup>103</sup> The Commission may clarify or interpret its rule as proposed in the *NAL* and may receive deference from a court for that interpretation, but it is not permitted to retroactively and punitively enforce that interpretation against Gray.

Even assuming that the Commission could fine Gray for its alleged violation of Note 11, the Commission's approach of imposing a separate fine for each day of the alleged continuing violation is unprecedented for cases involving unauthorized transfer of control of broadcast licenses or violations of Section 73.3555 of the Commission's rules. The single unauthorized transfer of control case the Commission cites as precedent for this approach, *Enserch*

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won't lead to stronger, more diverse local television stations. Gray was approached by CBS and could have taken the network programming for KYES-TV without violating the Commission's interpretation of the rule against swaps. In that scenario, the already struggling KTVA(TV) would have lost its affiliation, received no compensation, and most likely failed entirely. Moreover, Gray would have been unable to hire any of KTVA(TV)'s talented journalists or other staff, and Gray would have been unable to ensure a smooth transition for MVPDs and viewers. Rather than take this path, Gray chose to compensate KTVA(TV) for the loss of the CBS affiliation and to secure its cooperation in the transition. The station's owner could have reinvested the funds it got from the sale of the affiliation to rebuild the station. Taking the Commission's approach, by contrast, would have led to the inevitable failure of KTVA(TV). Given that Note 11 is highly suspect under even rational basis review, the Commission's proposed interpretation to expand the rule to govern non-swap transactions is unsustainable.

<sup>103</sup> See *SBC*, 824 F.2d at 3-4; *Trinity Broadcasting* 211 F.3d at 628, 631-32 (quoting *GEC* 53 F.3d at 1329; *McElroy Electronics*, 990 F.2d at 1366 (D.C. Cir. 1993); *RCA Global*, 758 F.2d at 730; see also Section III.B, *supra*.

*Corporation*, provides no support for the actions proposed in the *NAL*.<sup>104</sup> For starters, the *Enserch* case was not a broadcast matter. Enserch failed to file transfer of control applications for approximately 150 fixed microwave and land mobile radio licenses because it was unaware of any requirement to do so.<sup>105</sup> When the Commission asked Enserch about it, Enserch ignored Commission inquiries.<sup>106</sup> The unlawful transfers of control persisted for over a year until Enserch contacted counsel, who helped it file the necessary applications.<sup>107</sup> Even with these egregious violations, the Commission proposed far less than the statutory maximum fine.<sup>108</sup> In this case, Gray didn't ignore the rules; it reasonably interpreted them differently from the Commission's new retroactive interpretation. Gray didn't disregard Commission inquiries on this matter; it responded promptly and altered its behavior with great alacrity to address Commission concerns. *Enserch* bears no relation to this case and simply provides no precedent or analogy to support the Commission's approach.<sup>109</sup>

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<sup>104</sup> See *NAL* at para. 13 & n.32 (citing *Enserch Corporation*, Forfeiture Order, 15 FCC Rcd 13551, 13554, para. 10 (2000) ("*Enserch*")).

<sup>105</sup> See *id.* at 13552, para. 3.

<sup>106</sup> See *id.* at 13552-53, para. 5.

<sup>107</sup> See *id.* at 13556, para. 17.

<sup>108</sup> See *id.* at 13554, para. 12.

<sup>109</sup> The Commission's citation of an *NAL* for alleged violation of the Commission's good faith bargaining rules as precedent for the fine proposed in the *NAL* is even farther off point. *NAL* at para. 13 & n.32 (citing *DIRECTV, LLC et al v. Deerfield Media et al*, MB Docket No, 19-168, FCC 20-122, *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 2020 WL 5560945 (Sep. 15, 2020)). While that case did involve an alleged rule violation by several broadcasters, it did not involve any ownership or license issue. The Commission has a long history of meting out fines for violations of unauthorized transfer of broadcast licenses and Section 73.3555 of the rules as it proposes to do here. The fact that it can't find a single case in that area to cite as precedent shows how far outside precedent the Commission's actions are in this case.

Indeed, it does not appear that the Commission has ever before found it appropriate to fine a broadcaster for each day of an alleged unauthorized transfer of control or violation of Section 73.3555 of the rules. The Commission's past cases in this area have tended to generate proposed fines or consent decrees in the low-to-mid five figures.<sup>110</sup> Nor has the Commission ever apparently made a point of issuing the maximum permissible statutory forfeiture as it has in this case.<sup>111</sup>

The largest fine levied by the Commission in a previous broadcast unauthorized transfer of control case appears to be the \$150,000 fine assessed in *Roy M. Speer*, where the Commission fined Silver King Communications \$150,000 for a 42-month violation of the Commission's transfer of control and duopoly rules.<sup>112</sup> In that case, Silver King fought the allegations, prolonging its non-compliance, but there was no discussion of trying to sock the company with the maximum fine or discussion of compounding the fine daily. Here Gray immediately acted in good faith to address the Commission's concerns even as it objected to the Commission's claims that the rule against swaps prohibited the Anchorage transaction. Gray's alleged violation lasted

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<sup>110</sup> See, e.g., *FoxFur Communications, LLC, WOLF Radio, Inc., and Family Life Ministries, Inc., Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 31 FCC Rcd 6872 (2016) (\$20,000 proposed fine); *WVOZ(AM), San Juan, Puerto Rico and International Broadcasting Corporation, Inc. to Mr. Angel O. Roman Lopez as Legal Guardian, et al.*, Order and Consent Decree, 30 FCC Rcd 11507 (2015) (\$61,500 consent decree); *In the Matter of Beartooth Communications Company, KTVH-DT, Helena, Montana*, Order and Consent Decree, 29 FCC Rcd 12011 (2014) (\$40,000 consent decree); *Christopher D. Imlay, Esq.*, Applications for Assignment of License, Petition for Reconsideration, 27 FCC Rcd 13350 (2012) (admonishment only); *In re Hicks Broadcasting of Indiana, LLC*, Initial Decision of Chief Administrative Law Judge Joseph Chachkin, 14 FCC Rcd 8412 (ALJ 1999) (\$30,000 fine); *Macau Traders, Inc.*, *Memorandum Opinion and Order and Forfeiture Order*, 13 FCC Rcd 228 (1998) (\$15,000 fine).

<sup>111</sup> See *NAL* at para. 13.

<sup>112</sup> *Memorandum Opinion and Order and Notice of Apparent Liability*, 11 FCC Rcd 18393 (1996).

less than one-fifth the time of the violation in *Roy M. Speer*, yet the proposed fine is three-and-one-half times larger. Thus, the proposed fine is unsupported by any precedent.

Moreover, the Commission's claim that there are no mitigating factors that would justify a smaller fine is contrary to the facts of this case.<sup>113</sup> Gray's alleged violation of the Commission's new interpretation of Note 11 was not willful – if it was a violation at all, it was based on a reasonable construction of the rule the Commission adopted. Gray's conduct was not repeated. Upon notice from the Commission, Gray immediately moved to reconfigure its channels in Anchorage to comply with the Commission's construction of Note 11. Gray accomplished the necessary operational changes less than four months following the Commission's first contact to Gray on this issue.<sup>114</sup> Given Gray's cooperation with the Commission and its willingness to immediately adjust its conduct to address the Commission's concerns, the Commission's proposal to calculate the fine on a daily basis and refusal to recognize mitigating factors is unsupportable.

The *NAL* states that one justification for assessing the maximum fine in this case is that Gray reaped the substantial economic benefits from owning the CBS affiliation for several months while allegedly violating the rules.<sup>115</sup> That is not a valid basis for levying the maximum

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<sup>113</sup> See *NAL* at para. 13.

<sup>114</sup> For this reason, the Commission's insistence on compounding the fine on a daily basis from July 31, 2020 through March 3, 2021 is fundamentally unreasonable. Gray only became aware that the Commission had questions about the Anchorage transaction on December 1, 2020. As described in detail, prior to that date Gray viewed the transaction as unquestionably in compliance with the Commission's rules. After responding to the Commission's LOI and learning that the Commission had concluded that a violation took place, Gray immediately took steps necessary to address the Commission's (unfounded, in Gray's view) concerns. Treating this case as a continuing beginning on July 31, 2020 is not consistent with the facts of this case.

<sup>115</sup> See *NAL* at para. 13.

fine in this case for at least two reasons. First, Gray immediately began investing in improving service to Anchorage television viewers. Gray did not rest after this transaction; it immediately went about the task of investing substantial risk capital in expanding and improving news service to viewers in the Anchorage DMA. Second, as stated above, nothing in the Commission's rules prohibited Gray from purchasing the CBS affiliation directly from the CBS Network and thereby reaping the same economic benefits that the Commission now seeks to use to justify the maximum forfeiture. The *NAL* seeks to elevate what was at worst a short-lived, technical violation of the Commission rules into a willful violation for Gray's enrichment. If that were true, it might justify the maximum fine, but all the facts show otherwise.

The Commission's departure from its past practices and its effort to make an example of Gray are both unfair and bad policy. Gray's understandable interpretation of Note 11 and its immediate efforts to address the Commission's concerns should not generate any fine at all, let alone the maximum allowable fine. The Commission's action here will ensure that future broadcasters will have no incentive to cooperate with the Commission or make efforts to conform their conduct to the Commission's expectations in disputed cases. The result will be more litigation and waste of Commission and licensee resources.

B. Fining Gray for Its Conduct in This Matter Would Harm the Public Interest.

The irony of this case is that the Commission is going out on a limb to punish Gray for a transaction that unquestionably served the public interest. Prior to the transaction, the Anchorage CBS affiliation was in the hands of a struggling station owner that was downsizing its news operation and lacked the resources to improve its over-the-air signal distribution. In Gray's hands, the CBS affiliation has been and will continue to be an engine for growth for critical



content such as local news, weather, and vital information for KYES-TV and TV viewers in the Anchorage DMA.

Gray is not the appropriate target nor is this case the appropriate vehicle for making a statement about compliance with the Commission's rules. Gray has a long history of compliance with the Commission's rules and cooperation with the Commission's requests. In this case, it made every effort to follow the Commission's rules, including modifying behavior it believes was completely lawful. Gray has been a positive force in dozens of small and mid-sized television markets across the United States and a model citizen before the Commission. Affirming an *NAL* despite the pro-public interest benefits of the transaction and Gray's good faith efforts to abide by the Commission's rules and concerns will not serve the public's or the Commission's interests.

**V. CONCLUSION**

For the reasons set forth herein, Gray respectfully requests that the Commission cancel the *NAL*.

Respectfully submitted,



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**GRAY TELEVISION INC.**

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August 6, 2021

Its Attorneys

Exhibit 1

July 2020 Comscore Audience Share Data  
for the Anchorage, Alaska Designated Market Area<sup>1</sup>

<b>Station</b>	<b>Rating</b>	<b>Audience Share</b>	<b>Market Rank</b>
KTUU-TV	5.0467	16.1507	1
KTVA(TV)	1.3895	4.4466	2
KYUR(TV)	0.6151	1.9668	3
KYES-TV	0.5557	1.7777	4
KTBY(TV)	0.5469	1.7495	5
KAKM(TV)	0.4776	1.5283	6
KDMD(TV)	0.2579	0.8091	7

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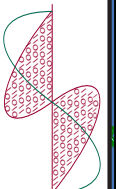
<sup>1</sup> The audience share data includes the data related to the primary signals of each full-power television station in the Anchorage market.

Exhibit 2

Comparison of KYES-TV Signal Strength  
Before and After Gray's Acquisition of the Station

**Former KYES-TV Ch. 5  
Facility ID 21488  
Anchorage, AK  
With Original Translators  
Predicted Longley-Rice Coverages  
Medium and Strong Signal Levels**

prepared for  
**Gray Television Licensee, LLC**  
August, 2021

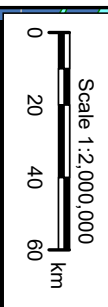
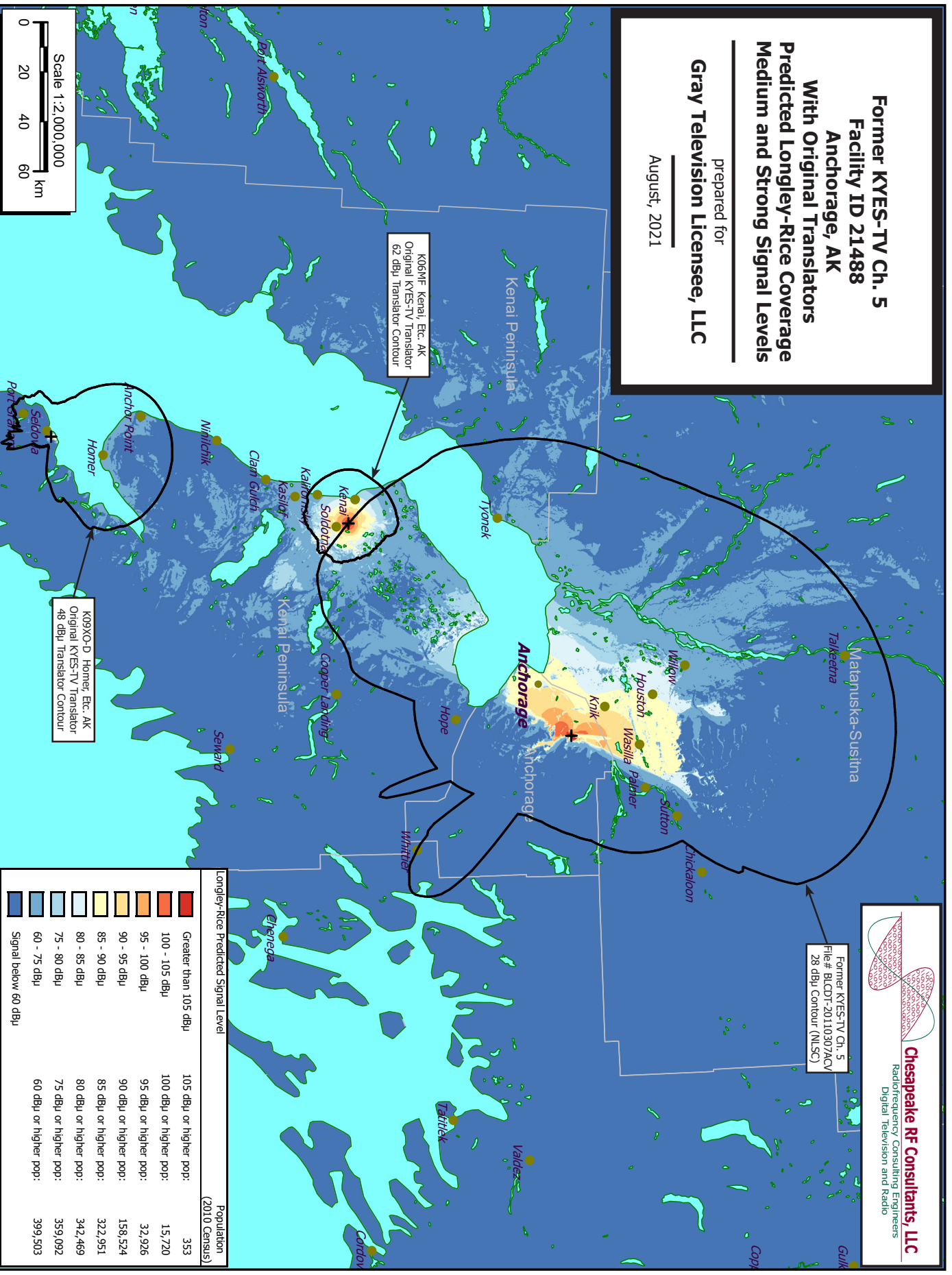


**Chesapeake RF Consultants, LLC**  
Radiofrequency Consulting Engineers  
Digital Television and Radio

Former KYES-TV Ch. 5  
File# BLCDT-20110307ACV  
28 dbu Contour (NLS)

K06MF Kenai, Etc. AK  
Original KYES-TV Translator  
62 dbu Translator Contour

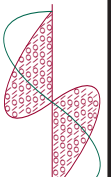
K09XO-D Homer, Etc. AK  
Original KYES-TV Translator  
48 dbu Translator Contour



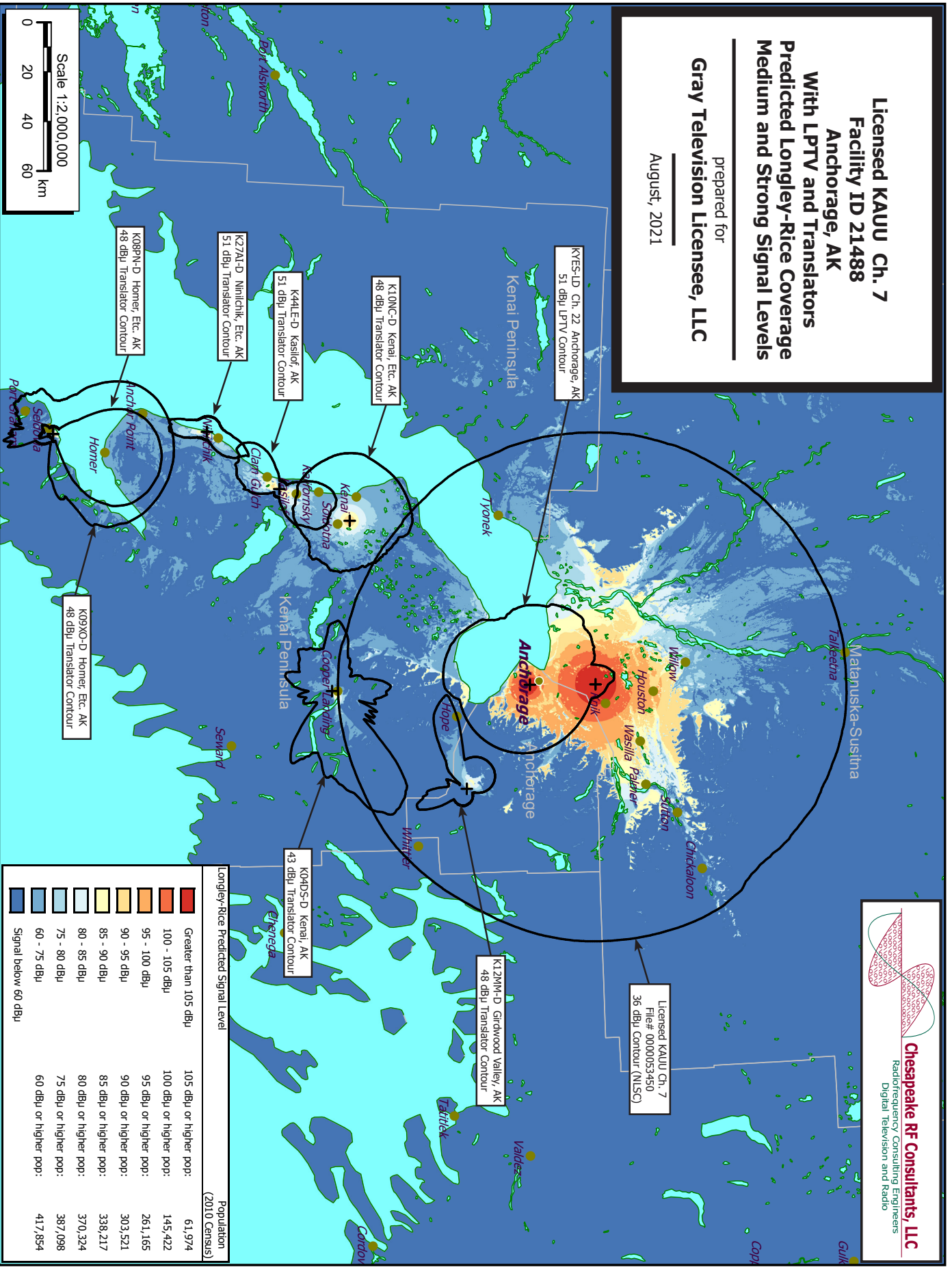
Longley-Rice Predicted Signal Level	Population (2010 Census)
Greater than 105 dbu	353
100 - 105 dbu	15,720
95 - 100 dbu	32,926
90 - 95 dbu	158,524
85 - 90 dbu	322,951
80 - 85 dbu	342,469
75 - 80 dbu	359,092
60 - 75 dbu	399,503
Signal below 60 dbu	

**Licensed KAUU Ch. 7**  
**Facility ID 21488**  
**Anchorage, AK**  
**With LPTV and Translators**  
**Predicted Longley-Rice Coverage**  
**Medium and Strong Signal Levels**

prepared for  
**Gray Television Licensee, LLC**  
 August, 2021



**Chesapeake RF Consultants, LLC**  
 Radiofrequency Consulting Engineers  
 Digital Television and Radio



## DECLARATION OF KEVIN P. LATEK

1. My name is Kevin P. Latek, and I am Executive Vice President and Chief Legal and Development Officer of Gray Television, Inc. Gray Television, Inc. is the ultimate parent of Gray Television Licensee, LLC, which is the FCC licensee of KTUU-TV, Anchorage, Alaska and KAUU(TV) (formerly KYES-TV), Anchorage, Alaska.
2. I have reviewed the Notice of Apparent Liability for Forfeiture released on July 7, 2021 (the "NAL") and am familiar with its contents. I have also reviewed the foregoing Request for Cancellation ("Request") and am familiar with the contents thereof. The facts contained in the Request are true and accurate to the best of my knowledge, information and belief formed after reasonable inquiry.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 6, 2021



---

Kevin P. Latek  
Executive Vice President and Chief  
Legal and Development Officer  
Gray Television, Inc.

### **DECLARATION OF ROBERT J. FOLLIARD, III**

1. My name is Robert J. Folliard, III, and I am Senior Vice President – Government Relations & Distribution of Gray Television, Inc. Gray Television, Inc. is the ultimate parent of Gray Television Licensee, LLC, which is the FCC licensee of KTUU-TV, Anchorage, Alaska and KAUU(TV) (formerly KYES-TV), Anchorage, Alaska.
2. I have reviewed the Notice of Apparent Liability for Forfeiture released on July 7, 2021 (the “NAL”) and am familiar with its contents. I have also reviewed the foregoing Request for Cancellation (“Request”) and am familiar with the contents thereof. The facts contained in the Request are true and accurate to the best of my knowledge, information and belief formed after reasonable inquiry.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 6, 2021



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Robert J. Folliard, III  
Senior Vice President – Government  
Relations & Distribution  
Gray Television, Inc.