

**ARTICLE VII**  
**ANNUAL REPORTS**

Section 1. **REPORT TO SHAREHOLDERS, DUE DATE.** The Board of Directors shall cause an annual report to be sent to the Shareholders not later than one hundred twenty (120) days after the close of the fiscal or calendar year adopted by the corporation. This report shall be sent at least fifteen (15) days before the annual meeting of Shareholders to be held during the next fiscal year and in the manner specified in Section 4 of Article IV of these By-Laws for giving notice to Shareholders of the corporation. The annual report shall contain a balance sheet as of the end of the fiscal year and an income statement and statement of changes in financial position for the fiscal year, accompanied by any report of independent accountants or, if there is no such report, the certificate of an authorized Officer of the corporation that the statements were prepared without audit from the books and records of the corporation.

Section 2. **WAIVER.** The annual report to Shareholders referred to in the General Business Corporation Law is expressly dispensed with so long as this corporation shall have less than one hundred (100) Shareholders. However, nothing herein shall be interpreted as prohibiting the Board of Directors from issuing annual or other periodic reports to the Shareholders of the corporation as they consider appropriate.

**ARTICLE VIII**  
**AMENDMENTS TO BY-LAWS**

Section 1. **AMENDMENT BY SHAREHOLDERS.** New By-Laws may be adopted or these By-Laws may be amended or repealed by the vote or written consent of holders of a majority of the outstanding shares entitled to vote; provided, however, that if the Articles of Incorporation of the corporation set forth the number of authorized Directors of the corporation, the authorized number of Directors may be changed only by an amendment of the Articles of Incorporation.

Section 2. **POWERS OF DIRECTORS.** Subject to the right of the Shareholders to adopt, amend or repeal By-Laws, as provided in Section 1 of this Article VIII, and the limitations of Hawaii Law, the Board of Directors may adopt, amend or repeal any of these By-Laws other than a By-Law or amendment thereof changing the authorized number of Directors.

Section 3. RECORD OF AMENDMENTS. Whenever an amendment or new By-Law is adopted, it shall be copied in the book of By-Laws with the original By-Laws, in the appropriate place. If any By-Law is repealed, the fact of repeal with the date of the meeting at which the repeal was enacted or written assent was filed shall be stated in said book.

**ARTICLE IX**  
**CORPORATE SEAL**

The corporate seal shall be circular in form, and shall have inscribed thereon the name of the corporation, the date of its incorporation, and the word " HAWAII ."

**ARTICLE X**  
**MISCELLANEOUS**

Section 1. REFERENCES TO CODE SECTIONS. References herein refer to the equivalent Sections of the Hawaii General Business Corporations Laws , as amended.

Section 2. REPRESENTATION OF SHARES IN OTHER CORPORATIONS. Shares of other corporations standing in the name of this corporation may be voted or represented and all incidents thereto may be exercised on behalf of the corporation by the Chairman of the Board, the President or any Vice President and the Secretary or an Assistant Secretary.

Section 3. SUBSIDIARY CORPORATIONS. Shares of this corporation owned by a subsidiary shall not be entitled to vote on any matter. A subsidiary for these purposes is defined as a corporation, the shares of which possessing more than 25% of the total combined voting power of all classes of shares entitled to vote, are owned directly or indirectly through one (1) or more subsidiaries.

Section 4. INDEMNITY. The corporation may indemnify any Director, Officer, agent or employee as to those liabilities and on those terms and conditions as are specified in Hawaiian law. In any event, the corporation shall have the right to purchase and maintain insurance on behalf of any such persons whether or not the corporation would have the power to indemnify such person against the liability insured against.

Section 5. ACCOUNTING YEAR. The accounting year of the corporation shall be fixed by resolution of the Board of Directors.

CERTIFICATE OF ADOPTION OF BY-LAWS

ADOPTION BY INCORPORATOR(S) OR FIRST DIRECTOR(S).

The undersigned person(s) named in the Articles of Incorporation as the Incorporator(s) or First Director(s) of the above named corporation hereby adopt the same as the By-Laws of said corporation.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

\_\_\_\_\_  
Name

CERTIFICATE BY SECRETARY

I DO HEREBY CERTIFY AS FOLLOWS:

That I am the duly elected, qualified and acting Secretary of the above named corporation, that the foregoing By-Laws were adopted as the By-Laws of said corporation on the date set forth above by the person(s) named in the Articles of Incorporation as the Incorporator(s) or First Director(s) of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

\_\_\_\_\_  
Secretary

CERTIFICATE BY SECRETARY OF ADOPTION BY SHAREHOLDERS' VOTE.

THIS IS TO CERTIFY:

That I am the duly elected, qualified and acting Secretary of the above named corporation and that the above and foregoing Code of By-Laws was submitted to the Shareholders at their first meeting and recorded in the minutes thereof, was ratified by the vote of Shareholders entitled to exercise the majority of the voting power of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

\_\_\_\_\_  
Secretary

**EXHIBIT No. 2**

**(Settlement Agreement Between KR, KES and Forbes)**

## SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (this "Agreement") is made by and between:

(i) KES COMMUNICATIONS, INC. ("KES"), a California Corporation, and KR PARTNERS ("KR"), a Hawaiian Partnership (hereinafter collectively "KES/KR"); and

(ii) LORI LYNNE FORBES, a resident of Colorado ("Forbes") (hereinafter each individually a "Party," or collectively the "Parties").

### W I T N E S S E T H :

WHEREAS, KES, KR and Forbes have pending before the Federal Communications Commission (the "FCC") applications (respectively, File Numbers BPH-911003MH, BPH-911001MB and BPH-911004MH) for a construction permit for a new FM broadcast station (the "Station") to operate on Channel 256C (99.1 MHz) at Waimea, Hawaii; and

WHEREAS, these three applications, proposing the same channel at the same place, are mutually exclusive such that only one of the applications may be granted; and

WHEREAS, in order to avoid litigation and promptly to construct an FM station on Channel 256C (99.1 MHz) in Waimea, Hawaii, KES and KR have agreed to merge into a new corporation with Karen E. Slade and Julie K. O'Connor each having a 50% ownership interest ("New Co"), and a construction permit can only be granted to New Co upon the FCC's grant of the KES and KR merger, along with the dismissal of the Forbes application; and

WHEREAS, the Parties recognize that it is in their best interests to avoid the time and expense of continued litigation and

thereby to conserve the time and resources of the FCC and the Parties, and that it is in the best interest of the public to avoid delay in implementation of the new broadcast service that would result from further prosecution of these mutually exclusive applications.

NOW THEREFORE, in consideration of their mutual representations and promises stated herein and intending to be bound, the Parties covenant and agree as follows:

I. FCC Consent. This Agreement is entered into subject to approval by the FCC or its delegatee, and it shall be void unless the FCC or its delegatee approves it. The Parties shall immediately make good faith efforts to resolve any and all objections in order to obtain prompt approval by the FCC. If the FCC or its delegatee has not approved this Agreement within six (6) months from the effective date hereof, then any Party, upon written notice to the other Parties, may terminate this Agreement.

II. Joint Request for Approval of Agreement. Within five (5) days from the date of this Agreement, following KES's and KR's satisfaction of their duties specified in Sections IV(A) and IV(D)(5) of this Agreement, the Parties agree to file with the FCC a Joint Request for Approval of this Agreement ("Joint Request") and an Agreement for the merger between KES and KR. The Joint Request shall be accompanied by a copy of this Agreement and other supporting documentation required by Section 311(c) of the Communications Act of 1934, as Amended, and §73.3525 of the Rules of the FCC (47 CFR §73.3525). KES/KR shall prepare, at its expense, the Joint Request. The Parties shall promptly request the

further suspension of all procedural dates pending FCC action on the Joint Request.

III. Dismissal of Forbes Application. Concurrently with the filing of the Joint Request, Forbes shall request dismissal of her pending application (BPH-911004MH), which shall be contingent upon approval of this Agreement.

IV. Consideration. KES/KR shall pay the sum of Thirty-Two Thousand Five Hundred and No/100 Dollars (\$32,500.00) or such lesser amount as the FCC may approve (the "Settlement Amount") to Forbes for the dismissal of her application, payable as follows:

A. Within five (5) days of the execution of this Agreement, the Parties shall enter into an Escrow Agreement in the form attached hereto as Exhibit A, and KES shall deposit with Michael J. Wilhelm, Esq. (the Escrow Agent) the sum of Eight Thousand Seven Hundred Fifty and No/100 Dollars (\$8,750.00), and KR shall deposit with the Escrow Agent the sum of Sixteen Thousand Six Hundred Twenty Five and No/100 Dollars (\$16,625.00), for an escrow deposit total of Twenty Five Thousand Three Hundred Seventy Five and No/100 Dollars (\$25,375.00) ("Partial Settlement Consideration") in trust for Forbes, the only condition for payment of which shall be the conditions listed herein. Once the Partial Settlement Consideration is forwarded to the Escrow Agent, the Escrow Agent shall deposit it in an escrow account.

B. The Escrow Agent shall thereafter immediately provide written documentation of the opening of the account to Forbes or her designated representative.

C. Payment of the Seventeen Thousand Five Hundred Dollars (\$17,500.00) -- Eight Thousand Seven Hundred Fifty No/100 Dollars (\$8,750.00) each from the funds deposited by KES and KR with the Escrow Agent -- shall be made by the Escrow Agent on or before the tenth (10th) business day after the date on which the Order or Orders issued by the FCC or its delegatee granting KES/KR's merged application, dismissing the application of Forbes, and granting a construction permit to KES/KR or New Co become a Final Order or Orders, as defined in paragraph VIII, below. Payment shall be made by Bank Cashier's check or by wired funds, to Dan J. Alpert, Esq., as agent for Forbes, in accordance with Paragraph 2(a) of the Escrow Agreement.

D. KES/KR further agree to pay, or cause the Escrow Agent to pay, as applicable, Dan J. Alpert, Esq. as agent for Forbes the balance of the Settlement Amount pursuant to the following schedule:

(1) KES and the Escrow Agent shall each pay Two Thousand Five Hundred Dollars (\$2,500.00) five months after the date on which the Order or Orders issued by the FCC with respect to this Settlement Agreement become Final;

(2) KES and the Escrow Agent shall each pay Two Thousand Five Hundred Dollars (\$2,500.00) ten months after the date on which the Order or Orders issued by the FCC with respect to this Settlement Agreement become Final;

(3) KES and the Escrow Agent shall each pay Two Thousand Five Hundred Dollars (\$2,500.00) plus accrued interest, as set forth herein, fifteen months after the date on which the

Order or Orders issued by the FCC with respect to this Settlement Agreement become Final. The accrued interest shall be calculated at a simple (not compounded) rate of six percent (6 %) on the unpaid balance of the Settlement Amount owed to Forbes commencing on the date the Order or Orders of the FCC or its delegatee granting the Joint Request and approving this Agreement become Final, provided that the Seventeen Thousand Five Hundred Dollar (\$17,500.00) payment to Forbes under Paragraph IV(C) shall be excluded in calculating any interest accruing to Forbes.

(4) Any funds remaining in the escrow account after final payment is made to Forbes, representing interest on the Partial Settlement Consideration, shall be distributed to KES and KR consistent with their respective pro rata allocations of interest under Paragraph IV(A).

(5) In order to secure payment of the settlement balance owed by KES, within five (5) days of the execution of this Agreement, KES shall deposit with the Escrow Agent one or more letters of credit in the amount of Seven Thousand Eight Hundred Seventy Five and No/100 Dollars (\$7,875.00), in a form acceptable to Forbes, to the benefit of Forbes, which shall be released to Forbes in the event KES fails to make any of the payments described in Subparagraphs D(1), D(2) and D(3), above. The letter or letters of credit shall be disbursed by the Escrow Agent pursuant to Paragraph 2(a) of the Escrow Agreement.

E. In the event the FCC approves a settlement payment to Forbes for an amount less than Thirty-Two Thousand Five

Hundred and No/100 Dollars (\$32,500.00), the instructions provided to the Escrow Agent under Paragraph IV(C) shall set forth the amount of the settlement payment which the FCC approved, and payment of the settlement balance to Forbes as otherwise provided in this Agreement will be adjusted as follows: the difference between the authorized payment and \$32,500.00 will be first subtracted from the payment due Forbes pursuant to Paragraph IV(D)(3), and if necessary then additionally subtracted from the payment due Forbes pursuant to Paragraph IV(D)(2), and if necessary last subtracted from the payment due Forbes pursuant to Paragraph IV(D)(1). Any such difference shall be allocated equally to the settlement balance to be paid by KES and the Escrow Agent, the latter from the funds deposited previously by KR under Paragraph IV(A). For any such difference allocated to the Escrow Agent, the Escrow Agent shall pay that amount to KR within five (5) days after receiving the instructions under Paragraph IV(C). In the event such a reduced settlement consideration is approved by the FCC, KES shall be entitled to substitute reduced valued letters of credit for those previously deposited with the Escrow Agent, so long as such substitute letters of credit shall satisfy the remaining settlement consideration plus interest due to Forbes.

**V. Unconditional Release.** Upon receipt of the consideration of the above sum, each Party and their agents, successors and assigns, hereby release and forever discharge all of the other Parties, their principals, agents, employees, successors and assigns, from any and all manner of claims, demands, damages, causes of action or suits that might now exist, or that might

subsequently accrue by reason of any matter or thing whatsoever, and particularly growing out of or in anywise connected with directly or indirectly, the prosecution of KES's, KR's and Forbes' applications in MM Docket No. 93-53.

VI. Conditions Precedent to Payment. KES/KR retains full and unrestricted authority to prosecute its application. KES/KR will take no action to impede or delay consideration and grant of its application and will take all reasonable steps promptly to obtain a grant of the application from the FCC or its delegatee. Forbes will take no steps to delay or oppose approval of the Joint Request by the FCC or its delegatee. There is no assurance of the approval by the FCC of the Joint Request; accordingly, there shall be no liability or obligation of any kind on the part of any Party if the Joint Request is not approved by the FCC.

VII. Conduct of the Parties. The parties shall cooperate with the other in good faith and with the FCC or its delegatee, by expeditiously furnishing to each other and to the FCC or its delegatee, as may be necessary, any additional information which reasonably may be required, and by the doing of all other acts reasonably necessary to effectuate the objectives of this Agreement.

VIII. Definition of Final Order. As used in this Agreement, the term "Final Order" means an Order of, or actions taken by the FCC, or its delegatee, for which no judicial or administrative reconsideration, review, appeal or rehearing is pending and for which the time for filing or seeking judicial or administrative reconsideration, review, appeal or rehearing has expired.

IX. Notices. Any notice required under this Agreement shall be in writing. Any payment, notice or other communication shall

be deemed made or given when it is delivered personally, or mailed by certified United States mail, postage prepaid, to the following addresses:

**To KES:**

Karen E. Slade  
1148 South Citrus  
Los Angeles, CA 90019

With a copy to:

Cary S. Tepper, Esq.  
Meyer, Faller, Weisman & Rosenberg, P.C.  
4400 Jenifer St., NW; Suite 380  
Washington, D.C. 20015

**To KR:**

Julie K. O'Connor  
P.O. Box 111333  
Suite 240  
Kamuela, HI 96743

With a copy to:

Mark Van Bergh, Esq.  
Waysdorf & Van Bergh  
Suite 504  
1000 Connecticut Ave., NW  
Washington, D.C. 20036

**To Forbes:**

Lori Lynne Forbes  
3053 Waterdale Drive  
Loveland, CO 80537

With a copy to:

Dan J. Alpert, Esq.  
1250 Connecticut Avenue, N.W.  
7th Floor  
Washington, D.C. 20036

**To Escrow Agent:**

Michael J. Wilhelm, Esquire  
1350 Connecticut Avenue, N.W.  
Suite 905  
Washington, D.C. 20036

X. Remedies Upon Default. KES and KR promise, in the event of default, to pay all reasonable costs of collection, whether or not suit is brought under this contract. Moreover, if either Party defaults under this Agreement, the other Party shall have available to it all remedies to which it is entitled, at law or in equity, including the reimbursement of reasonable attorneys fees.

XI. Personal Guarantees. Attached hereto as Attachment A are the personal guarantees of Karen Slade and Julie K. O'Connor.

XII. Waiver. Failure of any Party to complain of any act or omission on the part of any other Party in breach of this Agreement, no matter how long the same may continue, shall not be deemed to be a waiver by said Party of any rights hereunder. No waiver by any Party at any time, express or implied, or any breach of any provision of this Agreement shall be deemed a waiver of any other provision of this Agreement or a consent to any subsequent breach of the same or other provisions.

XIII. Governing Law. This Agreement shall be governed by and construed in accord with the laws of the State of Hawaii.

XIV. Benefit. This Agreement shall be binding upon, and shall inure to the benefit of the parties and their respective

successors, heirs, and permitted assigns.

XV. Entire Agreement. This Agreement embodies all the terms of the understandings between the Parties and contains all of the terms and conditions agreed upon with respect to its subject matter. There are no representations, agreements, arrangements or understandings, oral or written, between the Parties relating to the subject matter of this Agreement which are not fully expressed herein. By signing below, the Parties acknowledge that they have read this Agreement and are fully cognizant of these provisions.

XVI. Counterparts. This Agreement may be executed in one or more counterparts, and all so executed shall constitute one Agreement, binding on the Parties, notwithstanding that the Parties are not signatories to the original or the same counterpart.

XVII. Headings. The headings of the paragraphs of this Agreement are inserted and for reference purposes only. They in no way define, limit or describe the scope of this Agreement or the intent of any of its provisions.

XVIII. Early Payment. Nothing herein shall preclude KES or KR from paying any consideration owed to Forbes at a date earlier than that which is required under the terms of this Agreement.

IN WITNESS WHEREOF, the Parties have executed this  
Settlement Agreement as of the year and date indicated below.

Dated:

KES COMMUNICATIONS, INC.

8/16/93

By: Karen E. Slade  
Karen E. Slade  
President

Dated:

KR PARTNERS

\_\_\_\_\_

By: \_\_\_\_\_  
Julie K. O'Connor  
General Partner

Dated:

LORI LYNNE FORBES

\_\_\_\_\_

By: \_\_\_\_\_  
Lori Lynne Forbes

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement as of the year and date indicated below.

Dated:

KES COMMUNICATIONS, INC.

\_\_\_\_\_

By:

\_\_\_\_\_

Karen E. Slade  
President

Dated:

KR PARTNERS

8/16/93

By:

  
Julie K. O'Connor  
General Partner

Dated:

LORI LYNNE FORBES

\_\_\_\_\_

By:

\_\_\_\_\_

Lori Lynne Forbes

IN WITNESS WHEREOF, the Parties have executed this  
Settlement Agreement as of the year and date indicated below.

Dated:

KES COMMUNICATIONS, INC.

\_\_\_\_\_

By:

\_\_\_\_\_  
Karen E. Slade  
President

Dated:

KR PARTNERS

\_\_\_\_\_

By:

\_\_\_\_\_  
Julie K. O'Connor  
General Partner

Dated:

LORI LYNNE FORBES

August 13, 1993

By:

Lori Lynne Forbes  
Lori Lynne Forbes

PERSONAL GUARANTEES

Karen Slade hereby personally guarantees all of the financial obligations set forth in the Settlement Agreement with respect to KES Communications, Inc.; Julie K. O'Connor hereby personally guarantees all of the financial obligations set forth in the Settlement Agreement with respect to KR Partners.

AGREED TO AND ACKNOWLEDGED BY:

  
\_\_\_\_\_  
Karen E. Slade

AGREED TO AND ACKNOWLEDGED BY:

\_\_\_\_\_  
Julie K. O'Connor

**ATTACHMENT A****PERSONAL GUARANTEES**

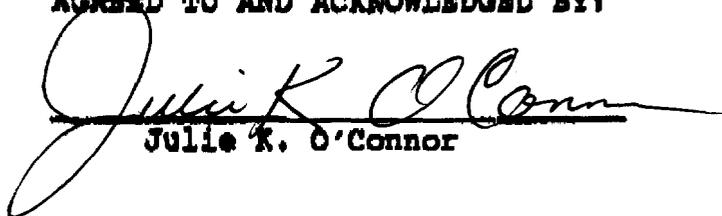
Karen Slade hereby personally guarantees all of the financial obligations set forth in the Settlement Agreement with respect to KES Communications, Inc.; Julie K. O'Connor hereby personally guarantees all of the financial obligations set forth in the Settlement Agreement with respect to KR Partners.

**AGREED TO AND ACKNOWLEDGED BY:**

---

Karen E. Slade

**AGREED TO AND ACKNOWLEDGED BY:**

  
Julie K. O'Connor

## ESCROW AGREEMENT

THIS ESCROW AGREEMENT has been made and entered into as of the \_\_\_\_\_ day of August, 1993, by and among **KES Communications, Inc.**, a California Corporation ("KES"), **KR Partners**, an Hawaiian General Partnership ("KR"), **Lori Lynne Forbes**, a Colorado resident ("Forbes") and **Michael J. Wilhelm, Esquire** ("Wilhelm"), a Washington, D.C. attorney, as escrow agent ("Escrow Agent").

### W I T N E S S E T H

WHEREAS, KES, KR and Forbes, in the context of a universal settlement of Federal Communications Commission ("FCC") proceeding MM Docket No. 93-53, have entered into a certain Settlement Agreement whereby KES and KR will reimburse Forbes for her legitimate and prudent expenses incurred in the preparation and prosecution of her application before the FCC for a new FM broadcast station at Waimea, Hawaii (FCC File No. BPH-911004MH) (A copy of Settlement Agreement is attached hereto as Exhibit No. 1); and

WHEREAS, KES, KR and Forbes desire Wilhelm to hold and Wilhelm is willing to hold certain monies in escrow until the FCC's approval of the universal settlement of MM Docket No. 93-53 becomes a Final Order, as defined by Paragraph VIII of the Settlement Agreement, and until certain funds are to be paid to Forbes in the future pursuant to the Settlement Agreement; and

WHEREAS, KES, KR and Forbes desire Wilhelm to hold and Wilhelm is willing to hold one or more letters of credit in favor of Forbes as guaranty of payment by KES of certain monies due in the future to Forbes pursuant to the Settlement Agreement.

NOW, THEREFORE, in consideration of the material covenants contained herein, the parties, intending to be legally bound, agree as follows:

1. **ESCROW DEPOSIT.** By its signature below, Wilhelm acknowledges receipt from KES of (a) funds totalling Eight Thousand Seven Hundred Fifty and No/100 Dollars (\$8,750.00) and (b) one or more letters of credit in favor of Forbes in satisfaction of Paragraph IV(D)(5) of the Settlement Agreement, copies of which are attached hereto as Exhibit No. 2. Wilhelm also acknowledges by his signature below receipt from KR of funds totalling Sixteen Thousand Six Hundred Twenty Five and No/100 Dollars (\$16,625). The monies received by Wilhelm from KES and KR, together with all interest accrued thereon, is referred to herein as the "Escrow Deposit." The Escrow Deposit constitutes the "Partial Settlement Consideration" pursuant to Paragraph IV(A) of the Settlement Agreement. The Escrow

Deposit (including all accrued interest) shall be held and released by the Escrow Agent in accordance with the terms of this Escrow Agreement.

**2. RELEASE FROM ESCROW.** (a) KES, KR and Forbes (the "Parties") agree to provide the Escrow Agent with either (1) joint written instructions (in the form attached hereto as Attachment A) within forty-one (41) days of the release date of the Order or Orders of the FCC or its delegatee approving the Settlement Agreement ("Order Date"), or (2) proposed instructions (also in the form attached hereto as Attachment A), for the distribution of the Escrow Deposit and letter or letters of credit, within forty-five (45) days of the Order Date. In the event the Parties submit joint written instructions, that schedule of distribution set forth in said written instructions will control the distribution of the Escrow Deposit and letter or letters of credit, unless the parties agree later to earlier distribution under Paragraph 2(c) of this Agreement. In the event the parties submit proposed instructions to the Escrow Agent, the Escrow Agent will determine the schedule for distribution of the Escrow Deposit consistent with the requirements of the Settlement Agreement, and shall send a written notification of that schedule (in the form attached hereto as Attachment A) to the Parties no later than the forty-eighth (48th) day after the Order Date, and that schedule will control for the distribution of the Escrow Deposit and letter or letters of credit, unless the parties agree to earlier distribution under Paragraph 2(c). In the event an event occurs which delays the Finality of the FCC Order or Orders beyond forty (40) days, then the Escrow Deposit and letter or letters of credit shall remain in escrow pending the Finality of the Order or Orders. Upon finality of the Order or Orders, the Parties shall submit to the Escrow Agent either (1) joint written instructions (in the form attached hereto as Attachment A), or (2) proposed instructions (also in the form attached hereto as Attachment A), for the distribution of the Escrow Deposit and letter or letters of credit. In the event the Parties submit joint written instructions, that schedule of distribution set forth in said written instructions will control the distribution of the Escrow Deposit and letter or letters of credit, unless the parties agree later to earlier distribution under Paragraph 2(c) of this Agreement. In the event the Parties submit proposed instructions to the Escrow Agent, the Escrow Agent will determine the schedule for distribution of the Escrow Deposit consistent with the requirements of the Settlement Agreement, and shall send a written notification of that schedule (in the form attached hereto as Attachment A) to the Parties, and that schedule will control for the distribution of the Escrow Deposit and letter or letters of credit, unless the Parties agree to earlier distribution under Paragraph 2(c).

(b) KES shall cause the Escrow Agent to receive on the same

date that KES makes a payment to Forbes under Section IV(D) (2), (3), and (4) of the Settlement Agreement, notice that KES has made said payment to Forbes, which notice shall include a copy of the payment if made by check, or a copy of the bank transfer order if payment is by wired funds.

(c) In the event KES and Forbes, and/or KR and Forbes agree to a prepayment of the amounts to be paid to Forbes, then KES and Forbes may provide joint written instructions to the Escrow Agent to release to KES the letter or letters of credit; or KR and Forbes may provide joint written instructions to the Escrow Agent to release the funds remaining in the Escrow Deposit to Forbes or KR, as the case may be.

(d) In the event of a dispute between KES, KR and Forbes with respect to the release of the Escrow Deposit or letters of credit, the Escrow Agent shall act in accord with a final order of an arbitration panel selected by KES, KR and Forbes (if the parties otherwise agree to arbitration) or of a court of competent jurisdiction. With respect to these matters, an order shall be deemed "final" when, by lapse of time or otherwise, it is no longer subject to review, reconsideration, appeal or stay. The Escrow Agent shall in no event be required to resolve any controversy concerning the Escrow Deposit or letters of credit, or be required to take any action concerning any such controversy. Upon termination of the escrow provided for herein, KES, KR and Forbes agree to execute and deliver to the Escrow Agent such further documents as it may reasonably request to evidence the termination of this Escrow Agreement and to cause the Escrow Agent to release the Escrow Deposit and/or the subject letters of credit.

### **3. CONCERNING THE ESCROW AGENT.**

**3.1. Resignation and Removal.** The Escrow Agent may resign and be discharged from its duties hereunder at any time by giving notice of such resignation to the other parties hereto specifying a date (not less than thirty (30) days after the giving of such notice) when such resignation shall take effect. Promptly after such notice, a successor Escrow Agent shall be appointed by joint agreement of KES, KR and Forbes, such successor to become the Escrow Agent hereunder upon the resignation date specified in such notice. If KES, KR and Forbes are unable to agree upon a successor Escrow Agent within twenty (20) days after such notice, the Escrow Agent shall be entitled to appoint its successor. The Escrow Agent shall continue to serve as Escrow Agent until its successor has assumed in writing the Escrow Agent's obligations hereunder and receives the

Escrow Deposit and letters of credit. KES, KR and Forbes may agree at any time to substitute a successor Escrow Agent by giving notice thereof to the Escrow Agent then acting.

**3.2. Performance.** The duties and responsibilities of the Escrow Agent are limited to those specifically set forth herein. The Escrow Agent shall not be liable for any mistake of fact or error of judgment made in good faith or for any acts or omissions by it of any kind other than willful misconduct or gross negligence. The Escrow Agent shall be entitled to rely, and shall be protected in doing so, upon (i) any written notice, instrument or signature believed by it to be genuine and to have been signed or presented by the proper party or parties duly authorized to do so, and (ii) the advice of counsel (which may be of the Escrow Agent's own choosing). The Escrow Agent shall have no responsibility for the contents of any writing submitted to it hereunder and shall be entitled in good faith to rely without any liability upon the contents thereof.

**3.3. Indemnification.** KES, KR and Forbes agree to indemnify the Escrow Agent and hold it harmless against any and all liabilities incurred by it hereunder, except for liabilities incurred by the Escrow Agent resulting from its own willful misconduct or gross negligence.

**3.4 Interpleader or Countersuit.** If, at any time prior to the termination of this Escrow Agreement by the Escrow Agent's delivery of the Escrow Deposit or letters of credit as provided herein, either KES, KR or Forbes should make demand upon or file suit against the Escrow Agent for the Escrow Deposit or letters of credit, the Escrow Agent shall be authorized to bring either an interpleader action in any court of competent jurisdiction or file suit for any cause of action that the Escrow Agent may deem appropriate against KES, KR and/or Forbes. If a suit is commenced against the Escrow Agent, it may answer by way of interpleader and name KES, KR and Forbes (or either of them) as additional parties to such action, and the Escrow Agent may tender the Escrow Deposit and letters of credit into such court for determination of the respective rights of KES, KR and Forbes thereto. Upon such tender, the Escrow Agent shall be entitled to receive from KES, KR and Forbes its reasonable attorney fees and expenses incurred in connection with said interpleader action. As between KES, KR and Forbes, such fees, expenses and other sums shall be paid by the party which fails to prevail in the proceedings brought to determine the appropriate distribution of the Escrow Deposit and/or letters of credit. If and when the Escrow Agent shall so interplead such parties, or either of them, and deliver the Escrow Deposit and/or letters of credit to the clerk of such court,

all of its duties shall cease and it shall have no further obligation hereunder. Nothing herein shall prejudice any other right or remedy of the Escrow Agent, including the right of the Escrow Agent to counter any such action by KES, KR and/or Forbes by its filing suit against KES, KR and/or Forbes.

**3.5. Discharge By Delivery.** After the Escrow Agent has delivered the Escrow Deposit and letters of credit pursuant to the terms of this Escrow Agreement, the Escrow Agent shall have discharged all of its obligations hereunder and neither KES, KR nor Forbes shall thereafter have any claim against the Escrow Agent on account of this Escrow Agreement. In the event that an Interpleader or other cause of action is filed by or against KES, KR, Forbes or the Escrow Agent with respect to matters relative to the discharge of the Escrow Deposit or letters of credit, and which question the Escrow Agent's obligation to comply with any written instructions it may have theretofore received by the parties with respect to the discharge of the Escrow Deposit or letters of credit, the Escrow Agent need not release the Escrow Deposit or letters of credit until such legal matters are resolved, irrespective of the possibility that said letters of credit may expire prior to the resolution of such legal matters.

**3.6. Conflict.** In the event of any conflict between the terms and provisions of this Escrow Agreement and those of the Settlement Agreement, the terms and provisions of this Escrow Agreement shall control as to the rights, duties, obligations and liabilities of the Escrow Agent, and the terms of the Settlement Agreement shall control as to the respective rights, duties, obligations and liabilities of KES, KR and Forbes.

#### **4. MISCELLANEOUS.**

**4.1 Assignment.** Except as provided in Paragraph XIII of the Settlement Agreement and in Section 3.1 of this Escrow Agreement, no party hereto may assign its rights and obligations hereunder without the prior written consent of the other parties hereto.

**4.2. Binding Effect.** This Escrow Agreement will be binding upon, inure to the benefit of, and be enforceable by the respective successors and assignees of the parties hereto.

**4.3. Entire Agreement: Amendments.** This Escrow Agreement, as read in conjunction with the Settlement Agreement, contains the entire understanding of the parties with respect to the subject matter hereof, and may be amended only by a written instrument duly executed by all the parties hereto.

**4.4. Notices.** All notices, requests, demands, and other communications required or permitted under this Escrow Agreement shall be in writing and shall be deemed to have been duly given when delivered personally (which shall include delivery by Federal Express or other recognized overnight courier service that issues a receipt or other confirmation of delivery) to the party for whom such communication is intended, or three (3) business days after the date mailed by certified mail, return receipt requested, postage prepaid, addressed as follows:

**To KES:**

Karen E. Slade  
1148 South Citrus  
Los Angeles, CA 90019

With a copy to:

Cary S. Tepper, Esq.  
Meyer, Faller, Weisman & Rosenberg, P.C.  
4400 Jenifer St., NW; Suite 380  
Washington, D.C. 20015

**To KR:**

Julie K. O'Connor  
P.O. Box 111333  
Suite 317  
Kamuela, HI 96743

With a copy to:

Mark Van Bergh, Esq.  
Waysdorf & Van Bergh  
Suite 504  
1000 Connecticut Ave., NW  
Washington, D.C. 20036

**To Forbes:**

Lori Lynne Forbes  
3053 Waterdale Drive  
Loveland, CO 80537