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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

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In the Matter of

Review of the Commission's	)	MM Docket No. 91-221
Regulations Governing Television	)	MM Docket No. 87-8
Broadcasting: Television Satellite	)	
Stations Review of Policy and Rules)		

TO: The Commission

Opposition of Donald Laidlaw  
To Request for Interim Relief

1. I am Donald Laidlaw, a resident of Hawaii, a director of a noncommercial broadcast licensee, a controlling member of a commercial television permittee, and a viewer of Stations KHON-TV and KGMB(TV), both in Honolulu. I am writing to express my opposition to, and my outrage at, the continuing efforts of Emmis Communications Corporation ("Emmis") to retain control of a total of six full-service television licenses (four of which operate as "satellites") in Hawaii, notwithstanding the Commission's duopoly rules and the order issued by the Mass Media Bureau two years ago requiring divestiture of three of those stations within six months.

2. This all started two years ago, when Emmis filed applications seeking permission to acquire a number of stations from LINT Co. Those stations included Stations KGMB(TV) in Honolulu, as well as two full-service TV stations operated as

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"satellites" of KGMB(TV), i.e., Stations KGMV(TV), Wailuku, and KGMD-TV, Hilo. But Emmis already owned Station KHON-TV, Honolulu, and its two satellites, KAIH-TV, Wailuku, and KHAW-TV, Hilo. And Stations KHON-TV and KGMB(TV) were both ranked in the top four in the DMA in terms of audience share. Common ownership of the two stations (and their associated satellites) was therefore barred by the Commission's duopoly rules.

3. Emmis knew that that was the case when it entered into its transaction with LINT, so Emmis included with its assignment applications a request for temporary waiver of the duopoly rule to permit the orderly divestiture of either Station KGMB(TV) or KHON-TV, along with their respective satellites. From the Mass Media Bureau's decision granting that waiver request, it looks like the only reason for the waiver offered by Emmis was to promote orderly divestiture, although Emmis apparently also suggested that there would still be plenty of other media voices in the marketplace.

4. The Bureau granted the LINT-Emmis assignment, subject to a divestiture requirement concerning, among others, the Hawaii stations. According to the Order, "within six months of consummation of this transaction, [Emmis] [must] file the application or applications necessary to bring it into compliance with the duopoly rule."

5. That initial waiver was granted in September, 2000, and was scheduled to expire in early 2001. However, Emmis asked for six more months in which to bring itself into compliance. I have not yet been able to obtain a copy of Emmis's request, but it was granted in March, 2001, with the new deadline set for October 1, 2001.

6. In August, 2001, Emmis returned to the Bureau asking for yet another six months. In that request Emmis complained that "a number of unique market and economic factors have made finding a buyer particularly challenging". Avoiding specifics, Emmis mentioned in passing the "particularly unprofitable advertising market", the fact that the Hawaii television market is "saturated", and the supposedly high cost of operation in Hawaii.

7. Emmis declined to provide any specifics about its efforts to find a buyer, but it did offer a declaration from a broker stating that his efforts to sell the station had "generated little or no interest". The broker did not, however, provide any detail concerning his search efforts or the nature of any results he had had.

8. Despite the general lack of information, the Bureau granted the requested extension of the waiver, giving Emmis until April 1, 2002 in which to divest. With that second

extension, the time for divestiture had been trebled, from the original six months to 18 months.

9. Lo and behold, in February, 2002, Emmis reappeared before the Commission, this time asking for a full one-year extension - which, if granted, would give Emmis a 30-month waiver (and still counting), five times longer than the six-month waiver originally granted. In support Emmis again referred to the supposedly "unattractive" nature of Hawaii's advertising market, the supposedly declining nature of Hawaii's economic climate, the supposedly higher costs of operating a television station in Hawaii, etc., etc. Emmis also sought to tug on patriotic heartstrings by invoking the terrorist tragedies of September 11 which, according to Emmis, exacerbated all the bad aspects of Hawaii's economy. But Emmis still declined to provide any detailed information about any efforts it had made to sell the stations.

10. In its February, 2002 request Emmis included a further non-specific declaration from its broker, describing in the vaguest possible terms his supposed efforts to sell the stations.

11. At that point I complained to the Bureau that it looked like Emmis really didn't want to sell its stations, and was at most going through the motions so that it could continue to hold two of the top four television stations in Hawaii

through a never-ending series of waiver extensions. Apparently because of my letter complaint, the Bureau sent Emmis a letter on March 28, 2002, directing Emmis to provide "specific, thorough information regarding its attempts to comply with the divestiture requirement." Emmis responded in a letter dated April 26, followed by its "Request for Interim Relief" in which Emmis ups the ante by asking for an indefinite extension of its waiver.

12. Emmis's April 26 letter includes yet another declaration from its broker, H.R. LaRue. This time Mr. LaRue provides at least an anonymous listing of contacts he has had concerning the possible sale of the station. But the thoroughness of Emmis's sales efforts cannot validly be determined from Mr. LaRue's declaration because that declaration fails to provide certain information which affects those efforts. For example, Mr. LaRue states that he did not advertise the station, but instead "develop[ed] lists of potential purchasers". It is not clear whether he then contacted everyone on those various "lists", and if so, how or when, or what he disclosed in any such contacts.

13. Mr. LaRue does state that he has "been in contact with 36 prospective purchasers", of whom 14 requested and were provided a "book" containing "detailed data on KGMB." The nature of that "detailed data", and the data themselves, are not

described or provided by Mr. LaRue. Of the 14 prospective purchasers who took a look at the "book", five (and possibly a sixth) expressed continuing interest and advanced what Mr. LaRue characterizes as "expressions of interest".

14. As described by Mr. LaRue, the parties making those "expressions of interest" all appear to have viewed the station to be worth approximately \$20 million. The offers, as described by Mr. LaRue, provided for total purchase prices of: (a) \$17.5 million and a construction permit ("Contact 35"); (b) \$18.9 million ("Contact 36"); (c) \$20 million ("Contact 34"); or (d) \$21 million ("Contact 32"). (A fifth offer involved a possible swap for an unidentified station in an unnamed market, and its likely value is thus not quantifiable.) Another of Mr. LaRue's "contacts" who signed the confidentiality agreement provided by Emmis and who, presumably, reviewed the "book" (although Mr. LaRue's declaration is unclear on that point), is said to have believed that the station had "a maximum value of \$16 million".

15. According to Mr. LaRue, the universe of his "contacts" was limited to "major broadcasting groups", "groups owning West Coast media properties", "investors with operations in the Honolulu market", "investors with a possible interest in media deals", and "major companies with hotel or real estate holdings in Hawaii". From this description, I think it is fair to conclude that all of Mr. LaRue's "contacts" were sophisticated

businesspeople who are familiar with the valuation of businesses they are considering for acquisition. The fact that all of the "contacts" who made offers viewed the station to be worth approximately \$18-20 million provides reasonable evidence that the station is in fact worth approximately \$18-20 million.

16. And yet, according to Mr. LaRue, a \$20 million purchase price was rejected by Emmis because, among other things, it "would have represented a significant loss" ("Contact 34").

17. What Mr. LaRue does not say in any of his declarations is what price Emmis would be willing to sell the station for. And that is because Emmis has apparently never told Mr. LaRue what that price might be.<sup>1</sup> One might well ask how a broker representing a seller could effectively attempt to sell a station when the seller has not provided the broker any indication of the price it would be willing to sell for. And one might then well ask how serious a seller is about trying to sell its station if it hasn't provided the sole broker an asking price.

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<sup>1</sup> Mr. LaRue has informally told me and acquaintances of mine that he was never provided with an asking price or financial information from the station sufficient to permit the calculation of a reasonable price consistent with station valuations in other similar transactions.

18. So Mr. LaRue's latest declaration supports my suspicion that Emmis never really wanted to sell its station and has not made a good faith effort to do so.

19. Emmis's repeated efforts to explain its failure to sell the station also smack of bad faith. Emmis complains about the declining state of the Hawaii economy throughout the 1990s, a period of time during which Emmis already owned and operated stations in Hawaii. So Emmis clearly had first-hand knowledge about the state of the Hawaiian economy when it agreed to buy LINT's stations in 2000. And armed with that knowledge Emmis agreed to pay whatever it agreed to pay to acquire those stations.<sup>2</sup> But if Emmis knew about the state of the Hawaiian economy and still agreed to pay what it paid, how bad could the economy really be? In other words, if Emmis's purchase price was in fact reasonably calculated in light of the Hawaiian economy - and there's no reason to believe that that was not the

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<sup>2</sup> As far as I can tell, Emmis has never advised the Commission exactly how much of the purchase price of the LINT deal was allocated to the Hawaii stations. But since, in its various extension requests, Emmis has repeatedly complained that offers of even \$20 million would result in a "significant loss" to Emmis, we can fairly assume that Emmis allotted "significantly" more than \$20 million to those stations. The value that Emmis chose to place on the stations was clearly a matter of Emmis's own private business judgment. But just because Emmis elected to place some arbitrary value on the stations does not mean that Emmis, having unilaterally chosen the value, is as a result absolutely entitled to require any purchaser of the stations to match or better that price. In other words, if the station really is worth only \$20 million, the mere fact that Emmis may have decided to pay "significantly" for it does not mean that Emmis is entitled to force a buyer to make a similar overpayment.

case - then Emmis's current complaints about the effect of the economy are really hogwash.

20. But let's just say, for the sake of argument, that Emmis's expressions of concern about the intensely competitive television advertising marketplace in Hawaii are accurate and valid. Let's just say that operating a stand-alone television station is financially difficult. How, then, could Emmis - which obviously knew those underlying factors when it entered into its deal with LINT - justify paying whatever it paid for the Hawaii stations? One possible explanation - and perhaps the only credible one - is that Emmis saw the obvious value of owning and operating two of the top four stations in the market, and it planned to hold onto both of those stations for as long as possible. Such a plan would have justified paying a premium for the stations, notwithstanding the supposedly poor state of the Hawaiian television market.

21. But if the Hawaiian market really is difficult, doesn't allowing Emmis the opportunity to run not one, but two stations among the top four in the market (along with a total of four full-power "satellite" stations) put the screws to the stand-alone operators who are complying with the Commission's rules? The more we may choose to believe Emmis's doom and gloom depiction of the TV market in Hawaii, the more outrageous is Emmis's request: in a market which it claims to be in serious

decline, Emmis wants the Commission to allow Emmis the luxury of owning, for an indefinite period of time, two top-four stations, when no other broadcaster is allowed to do so. In my view, granting the extension under any circumstance would make no sense; granting it on the assumption that Emmis's view of the Hawaiian economy is accurate would be howlingly unfair to other broadcasters in the market who (according to Emmis) are subject to a terrible competitive environment in which, if Emmis is allowed to continue its duopoly, they would be placed at an even greater competitive disadvantage.

22. My hunch is that, even though Emmis obtained the stations on the basis of a divestiture commitment, Emmis never really intended to divest the Hawaii stations. Why should it want to divest? With both KHON-TV and KGMB(TV) under its control, Emmis held two of the top four stations in the market. Under any circumstance that would be desirable, if only because no other licensee could do the same because of the constraints of the duopoly rule. So being the only duopolist in the confines of the Hawaii market obviously presents substantial upside to Emmis.

23. Sure, Emmis went through the motions of hiring Mr. LaRue, but again, how can Emmis say with a straight face that Mr. LaRue's efforts were bona fide? Emmis apparently didn't even give Mr. LaRue an asking price. Since Emmis seems to have

rejected anything resembling an offer on the basis that the offering price would represent a "loss" of some magnitude, it would appear that Emmis does have some price in mind - why not tell Mr. LaRue, and the Commission, what that price is, and how it was arrived at?

24. And assuming that Emmis does have a price in mind, exactly how has Emmis arrived at that price? Again, a number of presumably sophisticated businesspeople, presumably operating independently of one another, and presumably evaluating a common set of data made available to them by Emmis (and possibly from other sources as well) all concluded that the station is worth approximately \$20 million. But Emmis appears to be taking the position that that number is woefully low and would result in some kind of loss to Emmis. But the level of "loss" to Emmis is and should be immaterial here, because Emmis has never been guaranteed protection from any "loss" (however that term may be defined), and it would be contrary to the public interest even to contemplate any such guarantee. Emmis, fully aware of the duopoly rules and fully aware of the market conditions in Hawaii, chose to purchase KGMB(TV) and its satellites. That decision, and the amount of money allotted by Emmis for that purchase, were matters solely within Emmis's control. If Emmis, for whatever reason, overpaid for the station(s), that is

Emmis's problem, not the Commission's. Emmis cannot be heard to complain about some supposed loss under these circumstances.

25. In any event, I remain convinced that Emmis's original divestiture "commitment" was nothing but smoke and mirrors, designed to enable Emmis to hold two top-four stations in the market indefinitely.

26. Emmis's most recent submission - a 41-page extravaganza from Emmis's big-shot, well-connected Washington counsel - does nothing to dissuade me. To the contrary, Emmis's "Request for Interim Relief" seems to make plain what I believe has been Emmis's ultimate goal all along: Emmis is now asking for an indefinite waiver of the duopoly rules.

27. Emmis's Request is based mainly on a couple of court decisions concerning the Commission's television ownership rules. But as I read those decisions, they did not involve the limits on ownership of two of the top four stations in a market. So while Emmis may think that that provision is subject to the same criticisms as the provisions which the court did focus on, the fact is that the provision which precludes Emmis's continued ownership of KHON-TV and KGMB(TV) has not been invalidated and is still very much in effect. <sup>3</sup>

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<sup>3</sup> Of course, if Emmis really had thought that the "no two of the top four" duopoly rule was not valid, Emmis could have contested the divestiture condition, or it could have filed a petition for rule making looking to change the rule. It did neither, choosing instead to pay lip service to the  
(Footnote continued on next page)

28. And since that rule is still in effect, Emmis must ask for a stay of the effectiveness of that rule, which is what it is seeking in its Request. But Emmis's Request falls far short of the mark in a number of ways.

29. First, as I understand stay requests, the party seeking a stay is required to show that it will suffer "irreparable harm" if the stay isn't granted. And "irreparable harm" is not just some harm, but really "irreparable" harm. All that Emmis is losing is the economic opportunity afforded by its ability to hold two of the top four stations in the market when nobody else can. That can't be deemed "irreparable".

30. Emmis indicates that it does not want to have to sell its station at "fire sale" prices. Request at 15. But as noted above, Emmis has received offers in the \$20 million range, and has rejected those out-of-hand. That doesn't seem to me to be a "fire sale" price, especially since at least five or six apparently sophisticated prospective buyers all seem to believe that that's what the station's worth. If Emmis is inclined to press this "fire sale" argument, Emmis should present to the Commission, on the record and open to public inspection, the basis for Emmis's valuation of the station.

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rule (i.e., by appearing to accept the divestiture condition) while asking for repeated extensions of its "temporary" waiver.

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31. Emmis also runs on at some length about unique programming and the like, and how divestiture would prevent it from providing such programming. But Emmis fails to point out that, even if it is required to divest the LINT stations, it will still own three full-power television stations in Hawaii, two of which are merely serving as satellites of KHON-TV. It is hard to imagine that Emmis would not be able to figure out some way to use all of those stations to present its important and unique programming to its audience.<sup>4</sup>

32. And the fact that Emmis will continue to be able to operate television stations in Hawaii means that "the very existence of [Emmis's] business" is not really threatened. See Request at 16, n. 65, quoting from Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). Since Emmis is a very large corporation owning many television stations over and above its Hawaii operations, it is clear that divestiture of the LINT stations will not even come close to forcing Emmis out of business.

33. Emmis also claims that, if it is forced to divest one of its stations now, and if the duopoly rules are ultimately

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<sup>4</sup> Emmis also suggests that it has some Constitutionally-protected First Amendment right to continue to own two of the top four stations in the market. Request at 16. Since Emmis would continue to own three Hawaii television stations, it cannot seriously claim that divestiture would restrict the number of viewers it can reach - Emmis will in any event still have ample facilities with which to bring whatever message it wants to the viewing public in Hawaii.

relaxed to permit ownership of two of the top four stations in the market, then Emmis will be penalized because it is (in Emmis's view) unlikely that Emmis will be able to acquire another such station since "network-affiliated VHF television stations . . . do not frequently become available for acquisition." Request at 17-18. This, of course, is purely speculative and without any actual factual basis. And, as discussed below, even if the Commission were to accept the validity of Emmis's premise on this point, that does not help Emmis because that point establishes conclusively that other stations in the market would be seriously disadvantaged if Emmis were to retain both stations.

34. So Emmis can't legitimately claim that it will suffer irreparable harm here.

35. A party seeking a stay must also demonstrate that nobody else would be harmed by issuance of the requested stay. See Request at 37-38. While Emmis claims, self-servingly, that there would be nobody else harmed, that obviously is wrong. Let's look at Emmis's own claims.

36. As discussed above, Emmis is telling the Commission that the advertising market in Hawaii has been in decline for a decade or more, that television has reached a saturation point, and that the cost of operating a television station there are substantially higher than elsewhere. But if all those claims

are true for Emmis, they are equally true for all those other television broadcasters in Hawaii who don't happen to enjoy the unique distinction of owning two of the top four stations in the market. And the fact that Emmis owns two of the top four stations means that the adverse effects of those various factors it points to are likely to be substantially eased as far as Emmis is concerned. But what of the other broadcasters? They are forced to operate as stand-alone stations in the (according to Emmis) incredibly dog-eat-dog competitive environment.

37. Under these circumstances, it is clear that, by Emmis's own claims, all other television licensees in the market are being placed at an incredible disadvantage by the duopoly waiver which Emmis enjoys. And what's worse, if Emmis's claim (presented in its "irreparable harm" discussion) that stations such as Emmis's are generally not made available for sale is true, then what Emmis is proposing here is incredibly unfair to all other broadcasters who have complied with the rules. Emmis says that it should be permitted to keep Station KGMB(TV) because if it were to divest the station, it would not likely be able to acquire an equivalent station should the rules ever be changed to permit such ownership. Request at 17-18. But if that's true, that would mean that, even if the rules are relaxed, no other broadcaster in Hawaii would be likely to be able to acquire a second station. So if Emmis were permitted to

retain control of both KHON-TV and KGMB(TV), that would mean that Emmis would be the only one in the market with such dual ownership. In other words, Emmis is looking to get a permanent competitive advantage here simply by hanging onto a station which it had agreed to divest, and which it was ordered to divest, two years ago. How could that be fair?

38. So contrary to Emmis's self-serving assertion, grant of further extension of its waiver will harm others.

39. Emmis also claims that the public interest would benefit from extension of the waiver. But that claim is based on two erroneous assumptions. First, Emmis claims that the duopoly rule "has been found arbitrary and capricious". That's not really the case, at least as far as the two-of-the-top-four component of the rule is concerned. And second, Emmis claims that there would be no "off-setting harms" to anyone - and as discussed above, that is simply wrong.

40. Emmis also includes an extended discussion of how it's sure that it's going to prevail on the merits. Request at 18-37. I see several problems with that discussion. First, there are no "merits" because there is no proceeding as yet. Normally, a stay request is filed in connection with an on-going proceeding in which the party requesting the stay is a party and in which an issue with likely impact on the party has been focused. Here there is no such proceeding yet. At most the

court has ordered the Commission to review certain portions of the television ownership rules. As noted above, the prohibition against ownership of two-of-the-top-four stations in a market has not been the subject of any proceedings to date, and Emmis has never previously challenged that prohibition.

41. Second, even if the Commission were to undertake an inquiry into all aspects of the television ownership rule, there is no indication (other than Emmis's wishful thinking) that the Commission is inclined to eliminate or modify the duopoly rules in a way which would assist Emmis. Indeed, the fact (noted by Emmis) that the Commission has sought rehearing in the Fox case and, in so doing, has indicated at least a potential interest in attempting to preserve the rules, tends to belie Emmis's glib assertion.

42. Emmis's argument also includes little zingers like:

As the FCC itself has recognized, pending completion of the 2002 biennial review, it must be presumed that the Commission will not be able meet [sic] this burden and, therefore, that the agency will not be able to justify retention of the duopoly rule.

Request at 22. Emmis provides no citation to any Commission decision or statement in which the Commission has ever articulated any such "presumption", and I am not aware of any. So while Emmis may prefer to think that the Commission won't be able to justify retention of the rule, and while Emmis may prefer to think that the Commission has "recognized" such an

inability, I do not believe that the Commission's statements, decisions, etc., support such wishful thinking. To the extent that Emmis's argument is based on that kind of "reasoning", it can and should be ignored.

43. When all is said and done, what the Commission has here is a licensee which obtained a temporary waiver, has managed to extend that waiver some 200% already (from six months to a year and a half, and still counting), and is trying to extend it even more and maybe even make it permanent. The arguments Emmis has advanced previously are demonstrably inadequate and, in fact, tend to support rejection of any further extensions. The arguments Emmis is now relying on primarily arise from the serendipitous timing of two court of appeals decisions relating to other aspects of the duopoly rules. In other words, Emmis has managed to keep the ball in play long enough now to try to avail itself of two unrelated decisions in which Emmis itself was not even a party.

44. The Commission should consider whether Emmis is and has been candid and forthright with the Commission in connection with its duopoly waiver - there is certainly legitimate basis for concern in that regard. But most importantly, the Commission can and should terminate Emmis's duopoly as soon as possible. Otherwise, Emmis will have been permitted to flout

the original divestiture order, and the strong public policies underlying that order, for years.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Donald F. Laidlaw".

Donald F. Laidlaw

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CERTIFICATE OF SERVICE

I, Donald Laidlaw, hereby certify that on this 17th day of June, 2002, I caused copies of the foregoing Opposition to be placed in the United States mail, first class postage prepaid, addressed to the following individuals:

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