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

In the Matter of	)	
	)	
Broadcast Localism	)	MB Docket No. 04-233

To: The Commission.

COMMENTS OF FIREWEED COMMUNICATIONS LLC, LICENSEE OF KYES-TV ANCHORAGE ALASKA

Summary: KYES is the only locally owned and operated TV station in Anchorage. KYES is in financial distress, in large part due to policies and rules of the Federal Communications Commission favoring consolidation. It will be impossible for the station to comply with increased regulatory burden. In fact, if the purpose of the rules is to encourage localism, the result in this instance will be the exact opposite. In the case of KYES, presently operating on the margins, a financial failure would more likely result in the channel reverting to government, and remaining empty and unused for the foreseeable future. We ask that the Commission **reduce**, not increase regulatory burden for locally owned single station entities.

BACKGROUND INFORMATION ON KYES-TV

Fireweed Communications LLC is the licensee of KYES-TV, Anchorage, which is 100% owned by local Anchorage residents. The LLC also is licensee of some Alaskan Part 74 LPTV and TV translator facilities. These facilities are operated under contract by Fireweed Communications Corporation, a separate entity, owned by the same individuals. The Corporation administers the station day-to day-and, keeps it on the air.

Both the LLC and the Corporation are held, 100%, by myself, Jeremy Lansman and my wife Carol Schatz. We both reside in Anchorage. We have no broadcast properties outside of KYES-TV and its related LPTV-Translators[1]. We are one of very few remaining single station locally-owned commercial full service television stations left in the United States[2] KYES-TV, is a My Network (News Corp.) "network" affiliate. Anchorage, Alaska, is isolated from the other 49 United States. The Alaska land mass is twice the size of Texas, and the population is only 2.9% that of Texas.

Alaska has plentiful spectrum, and an abundance of broadcasting stations[3]. KYES-TV is experiencing severe financial distress[4]. Various factors have contributed to financial stress on the station, and that distress is attributable in large part to Commission rules and policies. As a virtual independent station[5], KYES relies on syndicated programs to fill most of its program day. In 1990, when KYES began broadcasting, the Financial Syndication and Interest Rules (Fin-Syn) were in effect.

> "The Federal Communications Commission (FCC) implemented the rules in 1970, attempting to increase programming diversity and limit the market control of the three broadcast television networks. The rules prohibited network participation in two related arenas: the financial interest of the television programs they aired beyond first-run exhibition, and the creation of in-house syndication arms, especially in the domestic market. Consent decrees executed by the Justice Department in 1977 solidified the rules, and limited the amount of prime-time programming the networks could produce themselves[6]."

Fin-Syn was abandoned by the Commission in 1995[7] in a general atmosphere encouraging government relaxation of anti-concentration law and policy. The result has been a vast reduction in the number of syndicators offering programs to television stations, including ours. Basic economics would suggest that loss of competition has an effect on program pricing[8]. But that is not all.

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1 Jeremy Lansman is a member of the board of Alaska Educational Radio System, which is a not-for-profit operating NCE radio stations.

2 There is no comprehensive listing

3 Anchorage hosts full service television stations, KTUU (NBC), KTBY (FOX), KYES (MNT), KAKM (PBS), KTVA (CBS), KIMO (ABC and CW+) and KDMD (ION and Telemundo). It also hosts KCFT-CA, and low power originating station KACN-LP. There are several non-originating LPTV facilities.

4 To add insult to injury, to receive relief required to protect the interest of the public, we are "required" to file waiver requests every year. See DA 05-2726 released Oct. 18, 2005.

5 My-Network supples only two hours a day.

6 Museum of Broadcasting at http://www.museum.tv/archives/etv/F/htmlF/financialint/financialint.htm

7 78 RR 2d 1468, 10 FCC Rcd 12165, 60 FR 48907

8 As must has been admitted by Time Warner executive Ken Werner. "One of the benefits of vertical integration is to deploy assets strategically to maximize profitability and reduce risk," says Ken Werner, president of Warner Bros. Domestic Television Distribution. He's quick to point out the downside: Stationscould end up absorbing the cost of failed shows. Broadcasting and Cable 17 Dec 2007

Congress, via the 1996 Telecommunications Act, soon followed by the Commission, relaxed television station ownership rules so that a single entity could own or control more than the previous cap of 12 television stations[9]. Ownership rules now have no numerical ownership limit.[10] Changes in ownership limits allowed outside companies to buy Anchorage television stations, making possible greater investment, or as we see it, intra-corporate subsidy to KYES's competitors. Syndicated programs are sold in a kind of auction in which stations offer cash and scheduling placement. Syndicators choose the most favorable offer.

Consolidation allows broadcast groups to "game" the price system in two ways. First, larger group owners can secure a favorable group buy from the syndicator. Then it can assign a below-market price to a smaller group-owned station, creating pressure on the competitors or even forcing them eventually to sell out to the chain. Or alternatively, where a program supply entity has its own local methods of distribution, whether owned broadcast or cable, a group owner can engage in predatory pricing, both subsidizing its internal firm cost and over-pricing the programs to outside competitors.[11] [12] The overall result, ultimately, will be lessened competition as local broadcasters are driven out of business. The principal effect as observed by Fireweed was that the artificial bidding war raised the price for programs KYES needed to acquire at the very time that consolidation of the syndicated television market was shrinking supply.

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9 "Specifically, the television ownership rules generally limit a single owner to 12 TV stations with an aggregate national audience reach [of] no more than 25 percent. A non-minority owner may take a non-controlling interest in an additional two TV stations that are minority-controlled if the aggregate audience reach of all its stations does not exceed 30 percent." MM Docket Nos. 94-149 and 91-140, Adopted:December 15, 1994 Paragraph 4.

10 47 CFR 73.3555 (e) (1) Multiple ownership

11 Predatory Purchasing was addressed in *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co. Inc.,* CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, No. 05–381. Argued November 28, 2006 —Decided February 20, *2007 "*Predatory bidding involves the exercise of market power on the market's buy, or input, side. To engage in predatory bidding, a purchaser bids up the market price of an input so high that rival buyers cannot survive, thus acquiring monopsony power, which is market power on the buy side of the market. Once a predatory bidder causes competing buyers to exit the market, it will attempt to drive down input prices to reap supracompetitive profits that will at least offset the losses it suffered in bidding up input prices."

12 Both CBS, Inc. and Time Warner Inc. are competing in the local market for syndicated programs via their co-owned CW Plus television station, dubbed KWBX, which broadcasts on local ABC affiliate KIMO-DT.

KYES became an affiliate of UPN, a start-up network operated by Viacom (Now CBS, Inc.), in January 1995. Warner Brothers (now Time Warner, Inc.) started another new network, called The WB, and KYES then drew programs from The WB. The agreement to use The WB programs ended when Time Warner started WB+ in markets smaller than the top 100. WB+ is broadcast from a computer directly into a cable TV head end. However, in spite of being a "station in a Box", it uses "looks-like-a-real-station" call sign and sells local advertising. In Anchorage the station is called KWBX. It never has, and cannot broadcast local programs. As it broadcasts 24 hours a day, Warner bought syndicated television programs for its WB+ system, thus locking KYES out of access to syndicated programs. It can be understood why Warner was compelled to create WB+. An entire generation has gone by since the Commission, in 1987, froze applications for new TV stations.[13] Due to the freeze, there were simply too few over the air distribution possibilities in smaller markets. It can also be understood why Warner made alliances with group broadcasters in an effort to sell local advertising (thus bypassing KYES in favor of group owner Smith), because making a deal with one multiple station owner saves time, transaction (negotiating) costs, and accounting costs.

The entry of The WB+ exacerbated KYES's syndicated TV program drought. Worse for KYES, in an act of further consolidation, on September 2006 CBS, Inc. was permitted to merge UPN with The WB, and left the resulting CW+ operation in the hands of our competitor. Although Rupert Murdoch's News Corp. started a new network, My Network, CW+ has much of the former KYES audience. CW +, today, continues to compete with KYES in acquisition of and local broadcast of syndicated programs.

13 See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Order, RM 5811, 76 Rad. Reg. 2d (P & F) 843 (rel. July 17, 1987) (1987 Freeze Order)

COMMENTS ON SPECIFIC LOCALISM PROPOSALS

1. **Enhanced Reporting**: The Commission has mandated we comply with a new mandate, a mandate that detracts from our time available to actually attempt to produce local material. *See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report and Order (adopted Nov. 27, 2007) ("*Enhanced Disclosure Order*"). The effect, as usual, is to penalize local stand-alone stations, because large chains can simply pass this chore off to a contractor, discharge the obligation for the chain as a whole, economically, and forget about it.
2. **Community Advisory Boards**: It is difficult to imagine that we could be much better informed than we are. We meet people in the community every day; in the supermarkets, in the tire store, in the malls, at political meetings, at lectures, at museums. We read the local daily every morning. We listen to local talk radio. We live here. In a small community. In any event, Carol and I believe there are plenty of community needs not properly addressed. Without money it is impossible to do much about it, other than accept programs produced by others, which we do[14]. And it is fair to ask: How much time will Rupert Murdoch or Les Moonvies be expected to or required to spend meeting with these entities?
3. **Remote Operation**: KYES is not automated. We wish we could buy an automation system or originate from a remote facility. Then we could place the money saved into local production. As it is, few of our operators are technically capable of entering scrolls, crawls, or doing emergency announcements. A requirement that a warm body be present will not cure the problem. A higher pay scale would. KYES operations staff is underpaid, especially considering

14 For example, KYES broadcasts Heartbeat Alaska, a weekly produced by Jeanie Green Productions. It had been on local PBS affiliate KAKM, but due to staff cutbacks, they were no longer able to air the program. We could. Why? Ingesting the program into their automation requires significant effort We cannot afford automation. We just pop her DD into a player.

the level of detail work and technical ability required.

4. **Public Trusteeship**: We agree with commenters, as it applies to our station, who...

> "feel that broadcasters are not complying with their obligation, as public trustees, to air sufficient programming that is responsive to local needs and interests.[15] These commenters question the validity of claims by broadcasters that they are providing substantial locally oriented programming, and maintain that financial considerations, exacerbated by the deregulation of broadcasting that began in the 1980s, have resulted in a critical decrease in the quality and quantity of programs offered by licensees that are responsive to the needs and interests of local communities that they serve."

We believe, that in our case, the Commission is largely responsible for our lack of content. Deregulation has so degraded the economics of community based non-consolidated operation, as well as programming availability for the few remaining stand-alone broadcasters, that providing additional services is simply not feasible. We disagree that proposed regulations will rectify the problem. We feel the best cure would be to reimpose the 12 station ownership limits, prohibitions on radio-television and television-newspaper cross ownership, breaking up media conglomerates, vigorously enforcing anti-trust law, and reimposing financial ownership and syndication rules. Many knowledgeable observers are justifiably suspicious that, far from implementing any such steps, many at the Commission are inclined to move further toward consolidation, while using this "localism" proceeding as tactical camouflage.

<u>However we do suggest remedies below</u>.

5. **Local Studio**: KYES has a local studio. However, we suggest that where a station's local studio is not located in the community of license, that broadcast license should become secondary to any new proposal for a station which would have a local studio. If the incumbent lacking a local studio can show there is other available spectrum that can accommodate the challenger, then the new applications frequency should be shifted to the available frequency, leaving the incumbent on the air.

15 *See, e.g.* Reply Comments of National Federation of Community Broadcasters (Jan. 3, 2005) ("NFCB Reply Comments") at 10.

6. **FM translators for AM stations**: Radio stations can find a home on DTV. AM Broadcasters should not be given automatic access to FM spectrum. Every AM station owner in Anchorage also owns an FM station. If they desire to have AM programming on an FM signal, all they need do is plug in a patch cord. AM broadcasters knew what they were getting when the purchased or filed for the AM facility. Should they get a free ride now? Will it add to media diversity? Unless they have owned the facility over many decades and can show that their coverage has been reduced due to circumstances beyond their control, they should not have the benefit of translators in the FM band. However, to promote diversity, an exception should be made in the case of a single station owner.

Audio on DTV is no technical problem at all. Assuming 128 kb/s per audio signal, a considerably higher bit rate than allowed under the digital radio standard, IBOC, one half of a DTV transport stream can accommodate 67 radio stations[16]. In addition to three standard definition television channels, KYES now carries, by permission, KUDO, a local AM station, and area NCE station KWMD-(FM). It could carry more than 35 additional audio only services at the 128 kb/s bit rate. KYES could relay local LPFM stations, if there were any in our area. However, the DTV licensee is held responsible for rebroadcast content. What DTV broadcasters need is immunity, such as that held by translator licensees, *from FCC responsibility,* for rebroadcast content. If for example KUDO runs an advertisement for a political candidate, KYES takes a risk that it will be held responsible for documenting that broadcast and for Lowest Unit Charge. Additional concerns are copyright liability, closed captioning and children's TV rules. As it stands, we continue the KUDO service only because we think it demonstrates the incredible

16 ATSC bit rate is greater than 19 megabits per second. If a DTV transmitter were devoted ONLY to 128 kb/s sound, (bit overhead puts that number to 140 kb/s) then 135 aural services can fit in one signal. If the DTV station devotes its signal to two standard definition aural/video programs, then 67 sound only programs could fit. As presently configured, KYES-DT does not use 5.8 Mb/s of its digital transmission capacity.

potential of DTV[17]. In addition, if the Commission makes it legally possible for DTV licensees to delegate DTV spectrum to others, the DTV broadcaster that does so needs to be compensated. If the station being rebroadcast is an AM or LPFM station, such compensation could be in the form of additional reduction of regulatory burden, and relief from regulatory and application fees. The FCC must act to reduce regulatory burdens for DTV broadcasters that choose to share their spectrum with other radio licensees, or a great deal of DTV spectrum will remain unused.

7. **Political Programming**: As we suggested earlier, on the main television channel, KYES can not afford to produce programming. Local news casts at KYES are out of the question. However we support local producers putting their material on the air.[18] We also produce one paid program that is political in nature. However, DTV offers expanded opportunity. I could set up a full time political channel and announce on the air that I would play whatever is given me. In our case I would have to do that from a DVD player in my garage (the DTV transmitter location). However, we have regulatory barriers. Additional reporting would be beyond our capability. There would be no logs, no PSIP listings, no closed captions, and because there is no must carry, except for DirectTV, few if any viewers. If the Commission were to pass regulations setting forth rules allowing for a "political DTV channel" to be offered free to all political parties, that would allow stations to air material so long as all candidates got reply opportunities then the forgoing could be possible. Enforcement of equal time and reply opportunities might be more difficult if political record keeping is not required, but after the fact enforcement would still be possible. We suggest relaxing rules when a DTV station offers free time on a DTV political channel to candidates for

17 KYES is not compensated for retransmission of KUDO. However, it cost nothing extra to give KUDO a free ride. KYES, having been impacted so much has little to lose. Few TV stations would be willing to take regulatory risk with the FCC or copyright by running programs from an unaffiliated radio station.

18 KYES analog broadcasts Democracy Now, an hour long live news program at 4 AM.. It is a non-commercial program, usually broadcast by PBS, NPR and community access channels. We put it on because no local facility would, and use of that time has no effect on our bottom line. It is interesting that Democracy Now gets more comment than almost any other television program we run.

public office.

8. **Leased Access**: DTV broadcasters should be allowed to lease their channel capacity while not incurring responsibility for leased access content. Leased DTV channels should qualify for must carry on cable and satellite.

9. **Disaster Warnings**: KYES would be delighted to make air time available to local organizations and officials for this purpose. If unfunded, however, it is not likely to happen at this station. The Commission could recognize this problem and suggest to Congress that Homeland Security funds be made available to smaller stations in rural areas for just this purpose.

10. **Network Affiliation Rules**: In the NOI, the Commission suggests that rules be revised to allow affiliates to review network content before broadcast. For KYES that is impractical. We already *physically* have that option since we take the east coast feed and record it to DVD. The feed is finished two hours ahead of local air time. We do not have the *financial* resources to pay some one to watch and listen to the feed before air time. Such a rule would be useless to us.

    This issue has great importance to KYES. KYES's license was not renewed due to a complaint arising from a 2005 broadcast on UPN of the Vibe awards. The same company that owned UPN, the provider of the "indecent" program, the same company that competes with us via CW+, the same company that provides us a significant proportion of our syndicated air product and to whom we owe a great deal of money, the same company that transmitted the Vibe awards, has greatly impaired any chance we might have to review air product before transmission. It is ironic that the Commission now quotes (at paragraph 93) comments by Disney about network affiliation contracts. Disney is one of those few remaining syndication providers.

OTHER ISSUES RAISED BY THE PROPOSAL

Fundamentally, the atmospherics of deregulation will need to change. In many ways a competitive, market place system has served the Nation well. But the past thirty years have begun to show that unbridled competition, and the move to greater and greater concentration, have passed some line whether their public benefit has been lost.

Emblematic of this is the history of one-to-a-market waivers, merging radio and TV. In 1989 the Commission signaled that it was prepared to start eviscerating the one-to-a-market rule, by granting waivers on a cursory showing, Second Report and Order in MM Docket No,. 87-7, 4 FCC Rcd 1741 (1989) (Second Report and Order, recon granted in part 4 FCC Rcd 6489). The first criterion for granting waiver was "(1) the potential public service benefits that will arise from a joint operation of the facilities involved, such as economies of scale, cost savings, and public and service benefits." Id. at 1753-4. The industry quickly took this invitation to mean that the consolidation of news staffs and layoffs of journalists would be considered by the Commission a public interest benefit. This outrageous position was adopted by the Agency in over 100 cases, see for example *United Broadcasting Company, Inc*., FCC 98-260, 13 FCC Rcd 21563 (1998) [permitted the perpetuation after assignment of a merged enterprise with the dominant radio station with the dominant TV station one smaller market. As Commissioner Gloria Tristani said in dissent:

> The issue, therefore, is not whether the proposed combination will provide more public interest benefits than if the stations ceased operations, but whether it will provide more public benefits than if the stations were operated independently.

As she noted, well over a hundred cases were processed with waivers granted, and only two denied. This was the pattern that continued through still more cases. To cite one example, Gaylord Entertainment Co., DA 99-1538 (MMB, Released August 3, 1999), involved the assignment of KTVT (TV), Fort Worth Texas, to CBS Corp., the licensee of several local radio stations. The Bureau found a public interest benefit in the unverified claim that CBS would save approximately $150,000 from consolidation of "radio and television programming, including the sharing of television new resources, such as reporters, talent, stringers, and wire services." (Id., para. 5). Let's be clear. The Commission held in this and many cases that it would be a public interest benefit if an applicant, a wealthy radio operator, were permitted to acquire a profitable same-market TV station, and in the process, fire "reporters, talent, stringers," cancel a wire service, and fold a separate local news organization.

With this history in view, the Commission's notice seeking comment on how to foster localism is a monument of "chutzpah." The few remaining small broadcasters are too busy to travel to FCC localism hearings, or to write comments in proceedings like this. You will have to listen with great care if you are going to pick up the very low power call for help, the SOS coming from the sinking ship of independent broadcasters.

Over the last thirty years, the Commission and Congress have changed rules, regulations, policies and laws that erode localism. Now the Commission comes forth with a NOI proposing to place a fresh layer of regulation and reporting requirements on small broadcasters, burdens that would we sure to drive smaller broadcasters more quickly into the arms of the mega-corporations, fatten the wallets of lawyers and brokers who feed off transactions, and reduce real local broadcasting. How ironic it is that the proposals embodied within this NOI will hasten the demise of local broadcasters.

It is too late to undo the damage wrought by decades of wrongheaded policy and rules fostering media concentration. But it is not too late to grant relief to the few remaining local independent local broadcasters. Some specific remedies are suggested above, but anything I can think of will be less than enough.

Finally, this submission itself detracts from our ability to get an acceptable DTV signal on the air[19]; I should be busy building transmitters. Filling out children's TV forms, filing FCC applications, etc. brings us ever closer to having no or little service at all. October is the end of construction season, so in a few weeks it is all going to be over, unless we get another year before analog turn off (see 47 USC 307 [f]).

Submitted April 28, 2008 by Jeremy Lansman
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April 28, 2008

19 KYES-DT operates at very low power, approximately 200 Watts ERP on UHF channel 22. In February the station filed for several STA authorizations, which have not been acted upon. Unless they are granted VERY SOON, the Alaskan summer construction season will have passed,, eliminating any probability of substantial replication of its analog signal reach. Just a few days ago three technicians perished in a helicopter trip to a transmitter site. Some KYES sites are also helicopter access. I will not risk flying in bad weather.