

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1274

KIDD COMMUNICATIONS,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

ON APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES:

(A) Parties and Amici:

All parties, intervenors, and amici appearing below and in this Court are listed in the Brief for Appellant.

(B) Ruling Before The Court:

In re Applications of Kidd Communications, 19 FCC Rcd 13854 (2004) (JA 195).

(C) Related Cases:

The order on review has not previously been before this Court. Counsel are not aware of any other related cases before this or any other court.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUE PRESENTED	1
STATUTES AND REGULATIONS	2
COUNTERSTATEMENT	2
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. STANDARD OF REVIEW	9
II. THE COMMISSION REASONABLY CONCLUDED THAT THE NEW NOTE DID NOT VIOLATE SECTION 73.1150 OF ITS RULES.....	9
CONCLUSION.....	14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Associated Builders & Contractors, Inc. v. Herman</i> , 166 F.3d 1248 (D.C. Cir. 1999).....	9, 14
* <i>San Luis Obispo Mothers for Peace v. NRC</i> , 789 F.2d 26 (D.C. Cir.), <i>cert. denied</i> , 479 U.S. 923 (1986).....	9, 14
 <u>Administrative Decisions</u>	
<i>Arecibo Radio Corp.</i> , 101 FCC 2d 545 (1985).....	7
<i>In re Applications of Kidd Communications</i> , 19 FCC Rcd 13854 (2004) (JA 195)	<i>passim</i>
<i>Kirk Merkley, Receiver</i> , 94 FCC 2d 829 (1983), <i>recon. denied</i> , 56 RR 2d 413 (1984), <i>aff'd</i> , 776 F.2d 365 (D.C. Cir. 1985).....	12
<i>Radio KDAN, Inc.</i> , 11 FCC 2d 934, <i>recon. denied</i> , 13 RR 2d 100 (1968), <i>aff'd on procedural grounds sub. nom, Hansen v. FCC</i> , 413 F.2d 374 (D.C. Cir. 1969).....	12
 <u>Statutes and Regulations</u>	
5 U.S.C. § 706(2)(A)	9
47 U.S.C. § 301.....	9
47 U.S.C. § 303.....	9
47 U.S.C. § 307.....	9
47 U.S.C. § 308.....	9
47 U.S.C. § 309.....	9
47 U.S.C. § 310.....	9
47 U.S.C. § 312(g).....	4
47 C.F.R. § 0.445(e).....	12

	<u>Page</u>
* 47 C.F.R. § 73.1150	10
* 47 C.F.R. § 73.1150(a).....	6, 10
* 47 C.F.R. § 73.1150(b).....	6, 10, 11
47 C.F.R. § 73.1740(c).....	4

**Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

Commission or FCC	Federal Communications Commission
Communications Act	Communications Act of 1934, as amended, 47 U.S.C. §§ 151 <i>et seq.</i>
Kidd	Kidd Communications
New Note	the promissory note executed in 1997
<i>Order on Review</i>	<i>In re Applications of Kidd Communications</i> , 19 FCC Rcd 13584 (2004) (JA 195)
Original Note	the promissory note executed in 1995
PBI or Paradise	Paradise Broadcasting, Inc.
Section 73.1150	47 C.F.R. § 73.1150
staff	Mass Media Bureau of the Federal Communications Commission
Staff's Decision	October 17, 2001 Letter from Peter H. Doyle, Chief, Audio Services Division to Dan J. Alpert and Erwin G. Krasnow (JA 91)
state court	State of California Superior Court, Orange County
station	KTHO(AM), South Lake Tahoe, California

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF ISSUE PRESENTED

In 1995, Kidd Communications (“Kidd”) executed a promissory note in connection with its purchase of an AM radio station from Paradise Broadcasting, Inc. (“PBI”). The Federal Communications Commission (“Commission”) consented to the assignment of the station’s license from PBI to Kidd. Two years later, in connection with the settlement of disputes arising after the license assignment, Kidd executed a new promissory note pursuant to which the parties agreed to cooperate in transferring the station back to PBI in the event of Kidd’s default on that new note.

Kidd defaulted and PBI ultimately prevailed in a California state court action it brought to enforce the terms of the new promissory note. The state court ordered Kidd to submit an

application to the Commission seeking its regulatory consent to assign the station's license to PBI. When Kidd refused to file a license-transfer application, the state court appointed its clerk to act on Kidd's behalf. The clerk then applied for Commission approval of the transfer back to PBI. Over Kidd's objection that assignment of the station's license to PBI would violate Section 73.1150 of the Commission's rules by effectuating a reversionary interest in the license, the Commission consented to the involuntary assignment of the license from Kidd to the clerk and the voluntary assignment of the license from the clerk to PBI. *In re Applications of Kidd Communications*, 19 FCC Rcd 13854 (2004) (the "Order on Review") (JA 195).

The question presented in this case is whether the Commission reasonably concluded that assignment of the station's license to PBI did not violate Section 73.1150 of the Commission's rules.

STATUTES AND REGULATIONS

The pertinent statutory provisions and regulations are set forth in an appendix to this brief.

COUNTERSTATEMENT

In 1995, Kidd entered into an agreement to purchase radio station KTHO(AM) in South Lake Tahoe, California, from PBI. As consideration for the sale, Kidd executed a promissory note (the "Original Note") pledging as security "all of the station assets," but expressly excluding "any FCC licenses."¹ On July 10, 1995, the Commission granted an application filed by PBI that sought approval of the assignment of the station's license to Kidd.²

¹ *Order on Review* ¶ 2 (JA 196).

² *Id.* (JA 196).

After Kidd failed to make payments to PBI in accordance with the terms of the Original Note, PBI sued Kidd in state court. To settle the state court litigation, in 1997, Kidd executed a new promissory note that contained the following language: “In the event of a default which is not cured, both parties agree to act reasonably and in good faith to effect an orderly turnover of the station to [PBI]” (the “New Note”).³

When Kidd defaulted on the New Note, PBI initiated foreclosure proceedings and a public auction was held to dispose of the station’s real property. PBI was the successful bidder at the public auction and acquired title to the station’s real property.⁴ Kidd refused to surrender the station’s real property, whereupon PBI brought an unlawful detainer action. While the unlawful detainer action relating to the station’s real property was pending, PBI commenced a breach of contract action in California state court seeking specific performance to recover the station’s personal property and to enforce the New Note.⁵

PBI prevailed in the unlawful detainer action and took possession of the station’s real property on October 16, 2000.⁶ As of October 17, 2000, radio station KTHO(AM) stopped broadcasting.⁷ Under Section 312(g) of the Communications Act and Commission rules, if a

³ *Order on Review* ¶ 2 (JA 196); *see also* Application for Review at 2 (JA 144) (“Two years later, on July 15, 1997, a new Promissory Note was signed in settlement of a lawsuit (the “New Note”).”

⁴ *Order on Review* ¶ 3 (JA 196). The station’s real property consisted of transmission facilities and towers, and the land on which they occupied. *Id.* (JA 196).

⁵ *Paradise Broadcasting, Inc. v. Chris Kidd d/b/a Kidd Communications*, No. 00 CC0 1383 (Cal. Super. Ct. Orange County) (JA 84). The station’s personal property included studio equipment and furnishings. *Order on Review* ¶ 3 (JA 196).

⁶ *Id.* ¶ 4 (JA 197).

⁷ *Id.* (JA 197).

broadcast station fails to transmit broadcasting signals for any consecutive 12-month period, then the station's license expires.⁸ Thus, radio station KTHO(AM) was required to resume broadcast operations no later than October 18, 2001, or else the station's license would have expired regardless of the licensee.⁹

In January 2001, PBI partially prevailed in its breach of contract action. The state court found Kidd in default and awarded the station's personal property to PBI.¹⁰ The state court, however, disagreed with PBI's contention that Kidd was contractually obligated to sign an application "requesting the FCC assign the station license" to it.¹¹ The state court initially agreed with Kidd's argument that Kidd had no such obligation because there was no right of reversion in the station's license and the parties' agreements did not create such a right.¹² But, after PBI successfully moved the state court to reopen the litigation to hear additional testimony, the court ordered Kidd to sign an application seeking the Commission's consent to assign the station's license to PBI.¹³ When Kidd refused, the court appointed its clerk, Alan Slater, as trustee for the purpose of executing the license-assignment application on Kidd's behalf.¹⁴

⁸ 47 U.S.C. § 312(g); *see also* 47 C.F.R. § 73.1740(c) ("The license of any broadcasting station that fails to transmit broadcasting signals for any consecutive 12-month period expires as a matter of law at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.").

⁹ *Order on Review* ¶ 13 (JA 201).

¹⁰ *Id.* ¶ 4 (JA 197).

¹¹ *Id.* (JA 197).

¹² *See id.* ¶ 12 (JA 200); *see also* October 17, 2001 Letter from Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau to Dan J. Alpert and Erwin G. Krasnow ("Staff's Decision") at 3 n.13 (JA 93).

¹³ *Id.* ¶¶ 4, 12 (JA 197, 200-01).

¹⁴ *Id.* ¶ 4 (JA 197). The state court also enjoined Kidd from assigning the station license to any entity other than PBI. *Id.* n.15 (JA 197).

On August 1, 2001, the Commission's staff granted the application for involuntary assignment of the station's license from Kidd to the state court's clerk as trustee.¹⁵ Kidd filed a petition for reconsideration asking the staff to set aside its grant of the involuntary assignment on the ground that, under the "[c]ourt's interpretation of the provision contained in the July 15, 1997 Promissory Note, [PBI] retained an impermissible reversionary interest in the KTHO license, which are provisions that the Commission strictly in the past have not honored."¹⁶ The trustee thereafter filed an application seeking Commission approval of the voluntary assignment of the station's license to PBI. Kidd filed a petition to deny the trustee's application, advancing the same arguments raised in its then-pending petition for reconsideration of the involuntary assignment.¹⁷

On October 17, 2001, the Commission's staff denied Kidd's petition for reconsideration and its petition to deny.¹⁸ The staff approved the voluntary assignment to PBI of the station's license, upon finding that PBI was qualified to be a Commission licensee and that the assignment would serve the public interest.¹⁹ The staff conditioned its approval on the station resuming broadcast operations by October 18, 2001; in fact, the trustee had returned station KTHO(AM) to

¹⁵ *Order on Review* ¶ 1 (JA 196).

¹⁶ *Petition for Reconsideration* at 4 (JA 8). The trustee filed an *Opposition to Petition for Reconsideration* (JA 48).

¹⁷ *Petition To Deny* (JA 59). The trustee and PBI filed a *Joint Opposition to Petition To Deny* (JA 35). Thereafter, Kidd filed a *Consolidated Reply to Joint Opposition to Petition To Deny and Opposition to Petition for Reconsideration* (JA 95).

¹⁸ *Staff's Decision* at 4 (JA 94).

¹⁹ *Id.* (JA 94).

the air on October 16, 2001.²⁰ Kidd filed an application for review, asking the Commission to reverse the staff's approval of the assignment of the station's license to PBI.²¹ Finding no error in the staff's action, the Commission denied review.²²

The Commission rejected Kidd's contention that the New Note gave PBI a prohibited reversionary interest in the station's license, in violation of Section 73.1150 of the Commission's rules. Sections 73.1150 (a) and (b) provide:

Transferring a station.

(a) In transferring a broadcast station, the licensee may retain no right of reversion of the license, no right to reassignment of the license in the future, and may not reserve the right to use the facilities of the station for any period whatsoever.

(b) No license, renewal of license, assignment of license or transfer of control of a corporate licensee will be granted or authorized if there is a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment or transfer, such rights, as stated in paragraph (a) of this section, are retained.

47 C.F.R. § 73.1150(a), (b). The Commission concluded, based on the "history, title and terms" of Section 73.1150, that this rule did not apply to a promissory note that was negotiated, not in connection with the sale of station KTHO(AM), but two years *after* the assignment of the license from PBI to Kidd in order to settle litigation arising from the parties' post-assignment conduct. *Order on Review* ¶ 8 (JA 198).

²⁰ October 19, 2001 Letter from Erwin G. Krasnow to Magalie Roman Salas (JA 139); *see also Order on Review* ¶ 4 n.12 (JA 197).

²¹ Application for Review (JA 141). The trustee and PBI filed a Joint Opposition to Application for Review (JA 168), and Kidd filed a Reply to Joint Opposition to Application for Review (JA 184).

²² *Order on Review* ¶ 1 (JA 196).

The Commission further concluded that it was appropriate to accommodate the State of California's interest in enforcing agreements and having PBI restored as the station's licensee. The Commission found "directly relevant" an earlier Commission decision granting an assignment application that came to the Commission under similar circumstances. *Order on Review* ¶¶ 10-11 (JA 199-200), discussing *Arecibo Radio Corp.*²³

The Commission recognized that the assignment applications at issue here were before the Commission as the result of a state court order to which the then-licensee (Kidd) did not consent. The Commission noted, however, that in directing Kidd to seek Commission approval of the license assignment to PBI, the state court had reserved to the Commission "the resolution of all public interest issues concerning the assignment applications" and had not attempted to deny Kidd the right to make before the Commission any arguments as to why, in Kidd's view, the applications should be denied. *Order on Review* ¶ 12 (JA 201). The Commission also noted the public interest in having the license in the hands of the party that, by virtue of its control of the station's physical assets, was in the best position quickly to resume service to the public. The Commission found that public interest of particular importance here because if radio station KTHO(AM) had not quickly resumed operation after being silent for nearly one year, that

²³ In *Arecibo Radio Corp.*, following the transfer of control of the corporate radio licensee, the new shareholders, who had agreed to make installment payments to the sellers, were sued by the former shareholders. Finding in favor of the former shareholders, the Puerto Rico court ordered the sale of the station's assets at public auction. In further proceedings, the court ordered the new shareholders, who held the licenses, to sign the necessary Commission application to afford the Commission the opportunity to consider whether the station's license should be assigned to the entity that had bought the station's physical assets at auction. The new shareholders refused to sign the Commission application and the court appointed its marshal to act on their behalf. The Commission approved the assignment application over the objections of the new shareholders, recognizing, among other things, the public interest benefit of granting assignment of the license to the party that was in a position to resume operations and provide service to the public. 101 FCC 2d 545 (1985).

license would have expired pursuant to Section 312(g) of the Communications Act and Section 73.1740(c) of the Commission's rules, and listeners would have been deprived of the station's broadcast service "possibly indefinitely." *Order on Review* ¶ 13 (JA 201). This appeal followed.

SUMMARY OF ARGUMENT

Kidd does not dispute that, if there is no violation of Section 73.1150 of the Commission's rules, the Commission permissibly concluded that grant of the assignment applications would serve the public interest by, among other things, reuniting KTHO(AM)'s license and the station's physical assets under PBI's control. Kidd challenges only the Commission's finding that the New Note did not confer on PBI a prohibited reversionary interest under Section 73.1150. Based on the language and history of its rule, the Commission found that the prohibition on the retention of reversionary rights in transfer proceedings did not extend to an interest, such as that contained in the New Note, which the former licensee did not acquire until two years after the transfer proceeding before the Commission was completed.

The Commission's interpretation of its rule is reasonable and entitled to deference. As the Commission explained, by its terms, the prohibition in Section 73.1150, applies exclusively to contracts executed in connection with the transfer of a station. In addition, as the rule's history makes clear, Section 73.1150 was intended to limit the retention by licensees of certain rights as consideration for a station transfer. Thus, the Commission concluded that the New Note, which was neither executed nor contemplated in connection with PBI's transfer of station KTHO(AM) to Kidd in 1995, fell beyond the scope of its rule. As such, Section 73.1150 of the Commission's rules presented no impediment to the Commission's accommodation of the State of California's interest in having PBI restored as the station's licensee, in order to cure PBI's

injury as a result of Kidd’s adjudicated breach of contract. The *Order on Review* should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The Court must affirm the *Order on Review* unless Kidd demonstrates that the challenged agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”²⁴ The Court must give the Commission’s interpretation of its own rules “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”²⁵ In upholding the Commission’s interpretation of its rules, the Court “need not find the agency’s construction is the only possible one, or even the one that the court would have adopted in the first instance.”²⁶ The degree of deference due is great because the Court may not set aside an agency’s reasonable interpretation of its own rules.²⁷

II. THE COMMISSION REASONABLY CONCLUDED THAT THE NEW NOTE DID NOT VIOLATE SECTION 73.1150 OF ITS RULES.

The Commission has exclusive jurisdiction to grant or deny applications for broadcast licenses.²⁸ Consequently, when a licensee sells or otherwise transfers ownership of a broadcast station, the licensee must apply to the Commission seeking its consent to assign the station’s

²⁴ 5 U.S.C. § 706(2)(A).

²⁵ *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1254 (D.C. Cir. 1999) (“*Associated Builders & Contractors*”) (citation and internal quotations omitted).

²⁶ *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 30 (D.C. Cir.), *cert. denied*, 479 U.S. 923 (1986) (“*San Luis Obispo*”).

²⁷ *Id.*

²⁸ *See* 47 U.S.C. §§ 301, 303, 307, 308, 309 and 310.

license to the new owner. Before approving such an assignment, the Commission must determine that the assignment will serve the public interest.²⁹ Assignment applications are evaluated under myriad Commission rules and policies, including Section 73.1150 of the Commission's rules, 47 C.F.R. § 73.1150. Section 73.1150(a) prohibits the licensee seeking to assign a station's license from retaining a right to reversion or reassignment of the license or the right to use the station's facilities.³⁰ Section 73.1150(b) provides that the Commission will not grant an assignment application if, as consideration for the assignment, the licensee retains a reversionary interest in the station's license.³¹

Kidd argues here that the Commission was required to “‘withhold its approval’ of the offending assignment applications” because the New Note conferred on PBI a reversionary interest in radio station KTHO(AM)'s license in violation of Section 73.1150. *See* Appellant's Initial Brief at 18. The Commission, however, concluded that “assignment of the license to the Trustee and then to PBI contravenes neither the Act nor our rules.” *Order on Review* ¶ 12 (JA 200).

In reaching its conclusion, the Commission first looked to the language of the rule. The Commission found that “on its face” the rule “applies exclusively to contracts executed in conjunction with the transfer of a station.” *Order on Review* ¶ 7 (JA 198). The Commission noted that the rule is titled “transferring a station,” and emphasized that subsection (a) begins

²⁹ Section 310 of the Communications Act provides: “No construction permit or station license, or any rights thereunder, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.” 47 U.S.C. § 310(d).

³⁰ 47 C.F.R. § 73.1150(a).

³¹ 47 C.F.R. § 73.1150(b).

with the words “[i]n transferring a broadcast station . . .” *Order on Review* ¶ 6 (JA 197). “Thus, to implicate Section 73.1150,” the Commission explained, “a licensee must retain or reserve one of the rule’s delineated rights in conjunction with the transfer of control of a station or an assignment of the license.” *Id.* ¶ 7 (JA 198). Under the Commission’s interpretation, Section 73.1150 does not prohibit reassignment of a station’s license to a former license-holder, as Kidd suggests. *See* Appellant’s Initial Brief at 15. It instead prohibits a current station licensee who enters into a transfer arrangement from *retaining* the right to reassignment of the license, “*as consideration or partial consideration for the assignment or transfer.*” *See* 47 C.F.R. § 73.1150(b) (emphasis added). Once “the parties have consummated a Commission-approved sale,” the Commission considers “the transfer completed and [the provisions of] Section 73.1150 no longer applicable.” *Id.* (JA 198).

The Commission also found “nothing in the history of the rule to indicate that the Commission ever intended Section 73.1150 to apply to a contract executed two years after the transfer of a station, in the context of litigation, as was the case with the New Note.” *Id.* ¶ 8 (JA 198). As the Commission noted, Sections 73.1150(a) and (b) grew out the Commission’s concern that radio station owners “as part of *the consideration for the transfer of such stations*” would seek “to reserve the right of use of radio time on the station being sold, to attempt to obtain a right of reverter of license, or to obtain other rights which under the Communications Act can be exercised only by licensees.” *Id.* (JA 198).³² Based on its examination of the rule’s history, the Commission concluded that Section 73.1150 was “clearly intended to apply to a sale,

³² Quoting *Promulgation of Sections 3.109, 3.241 and 3.641 Containing Special Rules Relating to Contracts Providing for Reservation of Time Upon Sale of A Station*, 43 FCC 405, 406 (1949) (emphasis added), the Commission order adopting the precursor to Section 73.1150.

and not to subsequent developments” after the associated license transfer was complete. *Order on Review* ¶ 8 (JA 198). The Commission similarly determined that Kidd’s reliance on the Commission’s *Radio KDAN*³³ and *Merkley*³⁴ decisions was misplaced because those “cases involved contracts executed in connection with the assignment of license or transfer of control of a station, either prior to or at closing.” *Id.* ¶ 9 (JA 199).³⁵

Kidd does not dispute that the Original Note, which was executed at the time PBI transferred the station to Kidd in 1995, was in compliance with Section 73.1150. Because the Original Note “explicitly excluded the license as a secured asset,” the Commission found that its staff “correctly determined that the assignment complied with Commission rules.” *Id.* (JA 199). To the extent that the state court appeared to conclude that the Original Note in 1995 included the station’s license within its scope (*see* Appellant’s Initial Brief at 4), the Commission observed that it was not bound by such a finding and it noted that Kidd “ha[d] not alleged [in the Commission’s proceedings] that the Original Note was problematic under our rules or the statute.” *Id.* (JA 199).

Kidd’s argument instead is based on the New Note. The New Note, however, “was neither executed nor filed in association with an assignment of the license of KTHO(AM) to

³³ *Radio KDAN, Inc.*, 11 FCC 2d 934, *recon. denied*, 13 RR 2d 100 (1968), *aff’d on procedural grounds sub. nom, Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969).

³⁴ *Kirk Merkley, Receiver*, 94 FCC 2d 829 (1983), *recon. denied*, 56 RR 2d 413 (1984), *aff’d*, 776 F.2d 365 (D.C. Cir. 1985).

³⁵ Kidd’s reliance on an unpublished staff decision, cited as “*WNYG(AM)*” in Kidd’s brief but referred to as “*Letter to Veronica D. McLaughlin, Esq. and David L. Hill, Esq.*” in the *Order on Review*, is similarly misplaced. *See* Appellant’s Initial Brief at 10-11. The Commission noted that the contract at issue in that case “had been executed at consummation of the sale.” *Order on Review* ¶ 9 n.30 (JA 199). Moreover, the unpublished staff decision has no precedential value for unrelated parties under the Commission’s rule. *See* 47 C.F.R. § 0.445(e).

Kidd.” *Order on Review* ¶ 9 (JA 199). It was executed two years after the transfer to Kidd was completed “to cure a breach of contract and resolve then-pending civil litigation” arising from developments after the transfer of the station’s license to Kidd was consummated. *Id.* (JA 199). Thus, “whatever consideration was conveyed to *former* licensee PBI by the New Note,” the Commission explained, “such consideration cannot implicate Section 73.1150.” *Id.* (JA 199) (emphasis in original). The Commission thus determined that the New Note “simply falls beyond the rule’s scope.” *Id.* (JA 199).

The Commission rejected Kidd’s apparent view that Section 73.1150 reaches agreements that “at any time” gave a former licensee an interest in its former station. *See* Appellant’s Initial Brief at 19. The Commission concluded for the reasons described above that Sections 73.1150(a) and (b) are “limited to arrangements made in connection with a station sale.” *Order on Review* ¶ 8 (JA 198). Thus, the Commission noted, “under current Commission rules, a former licensee would not be prohibited from entering into various contractual arrangements subsequent to the sale of the station, such as an option to purchase the station at a future time.” *Id.* n.27 (JA 198).

The Commission recognized the possibility of a prohibited reversionary interest that could go undetected by the Commission at the time it granted an assignment application. It thus stated that “if an agreement raising a reversionary interest issue were to come to [its] attention, having been executed either prior to or in connection with the sale’s consummation,” the Commission would evaluate the agreement under Section 73.1150. *Order on Review* ¶ 7 (JA 198). As the Commission determined, “[t]hat, however is not the case here,” because the New Note was not executed in connection with PBI’s transfer of radio station KTHO(AM) to Kidd and Kidd has not argued either to the Commission or the Court that the parties envisioned a

reversionary interest for PBI when the license was transferred from PBI to Kidd in 1995. *Order on Review* ¶¶ 7, 9 (JA 198, 199). The Commission's interpretation of Section 73.1150 was reasonable and fully consistent with the rule's language and Commission precedent. The Commission's interpretation is therefore entitled to the Court's deference. *See San Luis Obispo*, 789 F.2d at 30, *Associated Builders & Contractors*, 166 F.3d at 1254.

CONCLUSION

For the reasons above, the *Order on Review* should be affirmed.

Respectfully submitted,

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February 17, 2005

IN THE UNITED STATES COURT OF APPEALS
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KIDD COMMUNICATIONS,)
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 APPELLANT,)
)
 V.)
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 FEDERAL COMMUNICATIONS COMMISSION,) No. 04-1274
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 APPELLEE.)
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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Appellee” in the captioned case contains 4030 words.

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