

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

In the matter of Applications of)
CENTRAL DAKOTA TV, INC.)
Application for Consent to the Pro Forma)
Transfer of Negative Control in Northern Plains)
Electric Cooperative with Respect to Multipoint) File No. BALMD-19990930ABA
Distribution Service Stations WNTB718,
WLW751, WLW752, WNTB718
and WNTF478)
Application for Consent to the Pro Forma)
Transfer of Negative Control in Dakota)
Central Telecommunications Cooperative) File No. BALMD-19990930AAZ
with Respect to Multipoint Distribution Service
Stations WNTB718, WLW751, WLW752,
WNTB718 and WNTF478)
Application for Consent to the Pro Forma)
Assignment of the Licenses for Multipoint)
Distribution Service Stations WNTB718,) File No. BALMD-19990930AAY
WLW751, WLW752, WNTB718 and WNTF478
to Dakota Central Telecommunications
Cooperative)
Application for Request for Special Temporary)
Authority to Continue Operation of Multipoint)
Distribution Service Stations WNTB718,)
WLW751, WLW752, WNTB718 and WNTF478)
)

ORDER ON RECONSIDERATION

Adopted: October 25, 2004

Released: October 25, 2004

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Broadband Division of the Wireless Telecommunications Bureau (Division) has before it a petition for reconsideration filed by the Central Dakota TV, Incorporated (CDTV) on January 6, 2003.1 CDTV seeks reconsideration of an October 1, 2002 action by the Chief, Licensing and Technical Analysis Branch (Branch), of the former Public Safety and Private Wireless Division,

1 See Petition for Reconsideration (filed Jan. 6, 2003) (Petition).

Wireless Telecommunications Bureau dismissing the captioned applications as defective.² For the reasons set forth below, we grant the Petition in part and deny the Petition in part.

II. BACKGROUND

2. Prior to January 1, 1997, Tri-County Electric Cooperative (Tri-County) and Dakota Central Telecommunications Cooperative (Dakota Central) each owned fifty percent of Central Dakota Television (CDTV), an FCC licensee that operated Multichannel Multipoint Distribution Service (MMDS)³ stations WNTE464, WLW751, WNTB718, and WNTF478 (MMDS stations).⁴ On January 1, 1997, Tri-County merged with Baker Electric Cooperative to form Northern Plains Electric Cooperative (Northern Plains).⁵ Then, on December 31, 1997, Dakota Central redeemed Northern Plains' fifty percent interest in CDTV, which resulted in CDTV becoming a wholly-owned subsidiary of Dakota Central.⁶ Dakota Central is a rural telephone cooperative that is principally engaged in the provision of local exchange telephone service and is wholly-owned by its subscribers.

3. On September 30, 1999, almost two years after these transactions occurred, and after learning from counsel that prior Commission approval was necessary for these transactions with respect to CDTV, CDTV filed applications seeking the Commission's consent to the *pro forma* transfer of negative control of CDTV from Tri-County to Northern Plains,⁷ to the *pro forma* transfer of control of CDTV from Northern Plains and Dakota Central to Dakota Central,⁸ and to the *pro forma* transfer of the licenses for the MMDS stations from CDTV to Dakota Central.⁹ CDTV also requested Special Temporary Authority (STA) to permit CDTV to operate the MMDS stations pending action on the other applications.¹⁰

4. On October 1, 2002, the Branch dismissed the applications and STA Request as defective for failure to specify that each of the transactions was substantial in nature, and in the case of the Tri-County-Northern Plains application, for failure to obtain the signature of the transferor.¹¹ On January 6, 2003, CDTV filed the instant Petition.

² Letter from Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Federal Communications Commission to Central Dakota TV, Inc. (dated Oct. 1, 2002) (Branch Letter)

³ On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing MDS and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Once the new rules become effective, we will no longer refer to these services as MDS and ITFS.

⁴ Petition at ii and 7.

⁵ File No. BALMD-19990930ABA (Tri-County-Northern Plains application) at Exhibit 2 (filed Sep. 30, 1999).

⁶ File No. BALMD-19990930AAZ (Northern Plains-Dakota Central application) at Exhibit 2 (filed Sep. 30, 1999).

⁷ Tri-County-Northern Plains application.

⁸ Northern Plains-Dakota Central application.

⁹ File No. BALMD-19990930AAZ (filed Sep. 30, 1999) (Dakota Central-CDTV application).

¹⁰ Request for Special temporary Authority (filed Sep. 30, 1999) (STA Request).

¹¹ Branch Letter.

III. DISCUSSION

5. CDTV argues that the Branch's decision was in error because the applications were *pro forma* and not substantial in nature.¹² With regard to the Tri-County-Northern Plains transfer of control application, CDTV argues that Tri-County and Dakota Central were not equal partners with regard to CDTV because Dakota Central held both negative *de jure* control and affirmative *de facto* control over CDTV; thus, Dakota Central could exert affirmative control over CDTV on an ongoing basis.¹³ CDTV further argues that, Northern Plains, the successor-in-interest to Tri-County, became a fifty percent owner of CDTV as a result of the merger between Tri-County and Baker Electric.¹⁴ This change of ownership had little effect on CDTV, CDTV argues, because both before and after the Tri-County-Baker Electric merger and despite the ability of Tri-County to jointly elect officers and directors of CDTV with Dakota Central, day-to-day management rested with the officers and directors of CDTV, all of whom were employees of Dakota Central.¹⁵ CDTV concedes, however, that the Division may conclude that the Tri-County-Baker Electric merger was substantial in nature with respect to CDTV.¹⁶ In this event, CDTV indicates that the Division should place the application on public notice for 30 days in accordance with Section 309(d)(1) of the Communications Act of 1934,¹⁷ as amended and otherwise process the application to grant rather than dismissing the application.¹⁸ CDTV further maintains that the Tri-County-Northern Plains transfer of control application was properly executed when it was manually filed with the Commission on FCC Form 704.¹⁹ CDTV explains, however, that the signature of the transferor was inadvertently omitted when Division staff entered the Tri-County-Northern Plains application into electronic Form 306 on the Commission's Broadband Licensing System (BLS) database, thus making it appear as if it had not been properly executed.²⁰

6. With regard to the Northern Plains-Dakota Central application, CDTV argues that both before and after Dakota Central redeemed all of Northern Plains' stock in CDTV, Dakota Central had maintained actual managerial control over CDTV.²¹ CDTV further argues that before the redemption, Central Dakota held negative *de jure* control of CDTV.²² Moreover, all of the officers and directors of CDTV were employees of Dakota Central, although they were elected by both Dakota Central and Northern Plains.²³ Thus, CDTV argues that the redemption of Northern Plains stock resulted in a *pro forma* transfer of control of CDTV from Northern Plains and Dakota Central to Dakota Central.²⁴

¹² Petition at 2.

¹³ *Id.* at 8.

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.* at 8.

¹⁷ 47 U.S.C. § 309(d)(1).

¹⁸ Petition at 8..

¹⁹ *Id.* at 9.

²⁰ *Id.*

²¹ *Id.* at 11.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

7. With regard to the Dakota Central-CDTV application, CDTV argues that as a result of the transactions detailed above, CDTV became wholly-owned subsidiary of Dakota Central.²⁵ CDTV argues that because CDTV was proposing to assign its licenses for the MMDS stations to its parent company, there was no change in beneficial ownership.²⁶ Thus, CDTV argues that the transfer of the licenses for the MMDS stations from CDTV to Dakota Central is *pro forma* in nature.²⁷

8. As a preliminary matter, after reviewing the Tri-County-Northern Plains application submitted on FCC Form 704, we find that it was properly executed by Mr. Robert Spencer, General Manager/Chief Executive Officer of Tri-County, the transferor. We therefore conclude that the Tri-County-Northern Plains application should not have been dismissed on that basis.

9. We now turn to the question of whether the three applications filed by CDTV were *pro forma* or substantial in nature. Under Section 310(d) of the Communications Act of 1934, as amended (Act), the Commission must give its prior consent before any license or construction permit or any rights thereunder can be transferred, assigned, or disposed of.²⁸ Under Section 309(c)(2)(B) of the Act, an assignment or transfer “which does not involve a substantial change in ownership or control” is specifically exempted from the thirty-day waiting period provided for in Section 309(b) and the provisions of Section 309(d)(1) regarding petitions to deny.²⁹ Section 73.3540(f)³⁰ of the Commission’s Rules implements the provisions of Section 309(c)(2)(B) of the Act by providing for a “short-form” application for changes in control of a licensee or its controlling company which are not deemed to result in a substantial change in its ownership or control.³¹ Thus, in keeping with the express legislative intent of Section 309, the Commission has not restricted the application of Section 73.3540 of its Rules to “corporate reorganizations” in the strict legal sense as defined in Black’s Law

²⁵ *Id.* at 12.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 47 U.S.C. § 310(d).

²⁹ 47 U.S.C. § 309(c)(2)(B).

³⁰ 47 C.F.R. § 73.3540(f). Although Section 73.3540(f) of the Commission’s Rules only strictly applies to broadcast services, the Commission has used the standards contained in that rule to determine with respect to other services whether a transfer of control is *pro forma* or substantial. See Federal Communications Bar Association’s Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, 13 FCC Rcd 6293, 6298-99 ¶ 8 (1998).

³¹ Section 73.3540(f) permits licensees to file a short-form application in the following situations:

- (1) Assignment from an individual or individuals (including partnerships) to a corporation owned and controlled by such individuals or partnerships without any substantial change in their relative interests;
- (2) Assignment from a corporation to its individual stockholders without effecting any substantial change in the disposition of their interests;
- (3) Assignment or transfer by which certain stockholders retire and the interest transferred is not a controlling one;
- (4) Corporate reorganization which involves no substantial change in the beneficial ownership of the corporation;
- (5) Assignment or transfer from a corporation to a wholly owned subsidiary thereof or vice versa, or where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests; or
- (6) Assignment of less than a controlling interest in a partnership.

Dictionary, but rather has applied the section to any stock realignments or transactions which result in a change or relinquishment of control which is not “substantial.” Moreover, the Commission has held that the list enumerated in Section 73.3540 is not exhaustive.³² Through long administrative interpretation, the test for substantiality” has generally been (a) whether 50 percent or more of the stock is being transferred and (b) whether as a result of the transaction 50 percent or more of the outstanding stock will be held by a person or persons whose qualifications have not been approved of or “passed upon” in a “long form” application.³³

10. With respect assignments and the transfer of control involving cooperatives such as the transfer of negative control of CDTV from Tri-County to Northern Plains, however, the Commission has not developed a legal framework to assess when such a transfer constitutes a substantial change in ownership or control.³⁴ The Commission suggests that such a determination may depend, at least in part, on the number of subscribers, voting mechanisms, and the degree of power held by members.³⁵ The Tri-County-Northern Plains transfer of control application, however, does not contain sufficient information regarding these factors or other similar information to enable us to assess whether the merger between Tri-County and Baker Electric and subsequent transfer of control from Tri-County to Northern Plains constituted a substantial transfer of negative control of CDTV. In light of the ambiguity concerning the standards for transfers of control involving cooperatives, we will reinstate the Tri-County Northern Plains Application. Because of the lack of evidence in the record, however, prudence dictates that we find that the transfer of negative control from Tri-County to Northern Plains was substantial in nature. In this connection, in processing the application, the licensing staff of the Broadband Division shall place the Tri-County-Northern Plains application on public notice for thirty days as required by Section 309(b) of the Act.

11. We conclude that the Northern-Plains-Dakota Central application was *pro forma*. In this regard we note, as mentioned above, that Dakota Central owned fifty percent of CDTV before Dakota Central redeemed Northern Plains’ fifty percent interest in CDTV. Moreover, the managers and directors of CDTV, although jointly elected by Dakota Central and Northern Plains, were all employees of Dakota Central; thus Dakota Central maintained managerial over CDTV both before and after Dakota Central redeemed Northern Plains’ stock. Most importantly, however, Dakota Central as a fifty percent owner in CDTV was approved by the Commission in a long-form application and a review of Dakota Central’s qualifications in this transaction is unnecessary.³⁶ Since we find that the Northern-Plains–Dakota Central application is *pro forma*, we reinstate it to pending status. The Commission cannot act on the Northern Plains-Dakota Central application before it acts on the Tri-County-Northern Plains application. Thus, this application will be granted only after the Tri-County Northern Plains application has been placed on public notice for thirty days and the Division has acted on any petitions to deny.

12. We conclude that the Dakota Central-CDTV application is a pro forma transfer of control as it falls within Section 73.3540(f)(5) of the Commission’s Rules.³⁷ Consequently, we will reinstate

³² The Committee for Full Value of Storer Communications, Inc. for Consent to Transfer Control, *Memorandum Opinion and Order*, 101 FCC 2d 434 at ¶ 31 (1985).

³³ Barnes Enterprises, Inc. *Memorandum Opinion and Order*, 55 FCC 2d 721, 725 n.4 (1975) (transfer of control from one fifty percent stockholder to another fifty percent stockholder is *pro forma*).

³⁴ Transfers of Control of Certain Licensed Non-Stock Entities, MM Docket No. 89-77, *Notice of Inquiry*, 4 FCC Rcd 3403 at ¶ 17 (1989).

³⁵ *Id.* at ¶¶ 17-18.

³⁶ See Barnes Enterprises, Inc., *supra*.

³⁷ See 47 C.F.R. § 73.3540(f)(5).

this application to pending status. As described above, these three applications concern interrelated transactions. Thus, the Commission cannot act on the Dakota Central-CDTV application before it acts on the Tri-County-Northern Plains application and the Northern Plains-Dakota Central applications.

13. We affirm the dismissal of CDTV's request for Special Temporary Authority (STA) because the STA request was applied for in the wrong name. Because the transactions in question were transfers of control, the STA should have been applied for in the name of Dakota Central, the transferee, not CDTV. Dakota Central may reapply for an STA if it wishes to do so.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the petition for reconsideration submitted by the Central Dakota TV, Incorporated on January 6, 2003 IS GRANTED IN PART and DENIED IN PART.

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the application File Nos. BALMD-19990930ABA, BALMD-19990930AAZ, and BALMD-19990930AAY ARE REINSTATED.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 and Section 21.38 of the Commission's Rules, 47 C.F.R. § 21.38, that the licensing staff of the Broadband Division SHALL PROCESS File Nos. BALMD-19990930ABA, BALMD-19990930AAZ, and BALMD-19990930AAY in accordance with this *Order on Reconsideration* and the Commission's Rules.

17. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau