

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

In the Matter of
Beartooth Communications Company
KTVH-DT, Helena, Montana
Facility ID No. 5290
NAL/Acct. No. 201441420038
FRN: 000606866
File Nos. File Nos. BRCT-20051129AOL and
BRCDT-20131127AXE

ORDER

Adopted: October 9, 2014

Released: October 10, 2014

By the Chief, Media Bureau

1. In this Order, we adopt the attached Consent Decree entered into between the Media Bureau (the "Bureau") of the Federal Communications Commission (the "Commission") and Beartooth Communications Company (the "Licensee"), licensee of KTVH-DT, Helena, Montana ("KTVH" or Station). We also grant the above captioned pending license renewal applications for KTVH.

2. The Consent Decree adopted today resolves issues arising from potential violations of the Commission's Local TV ownership rule, 47 C.F.R. § 73.3555(b), resulting from Beartooth's continued operation of a non-grandfathered time brokerage agreement (TBA) with Rocky Mountain. The Bureau and Beartooth (the brokering station) have negotiated the terms of the attached Consent Decree that concludes the investigation into the above-referenced matter and provides that the Beartooth will make a Forty Thousand Dollar (\$40,000) voluntary contribution to the United States Treasury. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree. A copy of the Consent Decree is attached and incorporated by reference.

3. We also find that grant of the pending license renewal applications is consistent with Section 309(k) of the Communications of 1934 (the "Act")¹ and that the public interest favors the grant of these renewal applications in light of the unique facts and circumstances surrounding these proceedings. We find no evidence that KTVH-DT has failed to serve the public interest, convenience, and necessity during the subject license terms nor has it committed any "serious violations" or committed any violations that constitute a "pattern of abuse."

1 Section 309(k)(1) of the Act states that the Commission shall grant a license renewal application "if it finds, with respect to that station, during the preceding term of its license—(a) the station has served the public interest, convenience, and necessity; (b) there have been no serious violations by the licensee of the Act or Commission rules and regulations; and (c) there have been no other violations by the licensee of the Act or Commission rules or regulations which, taken together, would constitute a pattern of abuse." 47 U.S.C. §309(k)(1). Section 309(k) of the Act states, however, that if the licensee fails to meet this three part standard, the Commission may deny the application—after notice and comment, and opportunity for hearing under Section 309(e) of the Act—"or grant the application on terms and conditions as are appropriate...." 47 U.S.C. §§ 309(k)(2) and 309(k)(3).

4. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i), 4(j), and 503(b) of the Communications Act of 1934, as amended,² and Sections 0.111 and 0.311 of the Commission's Rules,³ the Consent Decree attached to this Order **IS ADOPTED**.

5. **IT IS FURTHER ORDERED** that, the license renewal applications of Station KTVH-DT, Helena, Montana, File Nos. BRCT-20051129AOL and BRCDT-20131127AXE, **ARE GRANTED**, subject to the terms and conditions set forth in paragraph 10 of the Consent Decree.

6. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by First Class mail and Certified Mail, Return Receipt Requested, to counsel for Beartooth Communications Company.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

² 47 U.S.C. §§ 154(i), 154(j), 503(b).

³ 47 C.F.R. §§ 0.111, 0.311.

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CONSENT DECREE

Adopted: October 9, 2014

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By the Chief, Media Bureau:

I. INTRODUCTION

7. This Consent Decree is entered into by: the Media Bureau of the Federal Communications Commission and Beartooth Communications Company, the licensee of KTVH-DT, Helena, Montana.

II. DEFINITIONS

- 8. For the purposes of this Consent Decree, the following definitions shall apply:
a) "Act" means the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq.
b) "Adopting Order" means the Order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
c) "Applications" means the following FCC Form 303-S license renewal applications filed by Beartooth Communications Company for KTVH-DT, Helena, Montana: File Nos. BRCT-20051129AOL and BRCDT020131127AXE.
d) "Beartooth" means Beartooth Communications Company, which is the licensee of KTVH-DT, Helena, Montana. Beartooth is a wholly owned subsidiary of Intermountain West Communications Company, which was formerly known as Sunbelt Communications Company.
e) "Bureau" means the Media Bureau of the Federal Communications Commission.
f) "Commission" and "FCC" mean the Federal Communications Commission and all of its bureaus and offices.
g) "Communications Laws" means, collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which the Party is subject by virtue of it being a Commission licensee, including but not limited to 47 C.F.R. 73.3555.

- h) “DMA” means a Nielsen Designated Market Area.
- i) “Effective Date” means the date on which the Bureau releases the Adopting Order.
- j) “Investigation” means the Bureau’s investigation of information contained in the Applications.
- k) “Local TV ownership rule” means Section 73.3555(b)(2) of the Commission’s rules, 47 C.F.R. § 73.3555(b)(2).
- l) “Party” means Beartooth Communications Company.
- m) “Rocky Mountain” means Rocky Mountain Broadcasting Company, which is the licensee of KMTF(TV), Helena Mountain. Uhlmann/Latshaw Broadcasting, LLC holds a 51 percent interest in Rocky Mountain and Meridian Communications of Montana, Inc. holds the remaining 49 percent interest.
- n) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.
- o) “TBA” means a Time Brokerage Agreement, which is a contract that involves sale by a licensee station (the “brokered station”) of blocks of time on its station to a brokering station that then supplies the programming and sells the commercials to support the programming. TBAs are also referred to as Local Marketing Agreements (“LMA”). In this item the term TBA and LMA (local marketing agreement) are used interchangeably.

III. BACKGROUND

9. On August 5, 1999, the Commission adopted a *Report and Order* that prohibited a party from having attributable ownership interests in two television stations in the same DMA with Grade B analog contour overlap unless there would remain eight or more independently owned and operating full-power television stations in the DMA post-merger and at least one of the stations is not ranked in the top four in the market in terms of audience share.⁴ In a companion rulemaking, the Commission concluded that any TBA for more than 15 percent of weekly programming would constitute an attributable interest to an in-market broadcaster providing such programming.⁵ TBAs entered into prior to November 5, 1996, were grandfathered. In those cases where attribution of a non-grandfathered TBA would have resulted in violation of the local TV ownership rule, station owners were required to comply with the new attribution standard by August 6, 2001.

10. From October 1, 1999 through August 15, 2005, KMTF(TV) (the brokered station) was operated pursuant to a TBA with KTVH-DT (the brokering station) that covered 100 percent of weekly

⁴ *Review of the Commission’s Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12958 (1999) (“1999 TV Ownership Report and Order”) *subseq. hist. omitted*. On April 15, 2014, the Commission tentatively concluded the digital noise-limited contour should replace the analog Grade B contour in determining whether the local TV ownership rule is implicated. *2014 Quadrennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 4371, 4385 (2014).

⁵ *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559, 12597 (1999).

programming. The TBA was thus both attributable under the new standard and not subject to grandfathering. On August 5, 2001, Beartooth and Rocky Mountain jointly filed a petition to stay the requirement to terminate non-grandfathered television TBAs.⁶ In that request, Beartooth and Rocky Mountain referred to Sinclair Broadcast Group's appeal of the new rules and the D.C. Court of Appeals' grant of a stay of the rules with respect to Sinclair's pending court review.⁷ Beartooth and Rocky Mountain acknowledged in their stay request that they had not appealed the rules, but claimed that they were in the same posture as Sinclair and that, absent the agreement's continuation, "there [was] no assurance that KMTF could continue to operate long-term or even through the time required for the Court to resolve the Sinclair appeal."⁸ Beartooth and Rocky Mountain thus requested that "the Commission grant them a stay of the requirement that they terminate their Time Brokerage Agreement...*pending the outcome of the Sinclair appeal of the Commission's television ownership rules.*"⁹ The Commission did not act on this request.

11. On April 2, 2002, Sinclair Broadcast Group's appeal concluded and the D.C. Court of Appeals held, in part, that the Commission's limited grandfathering of LMAs was permissible.¹⁰ Accordingly, the stay of the Commission's rules related to the grandfathering of LMAs was lifted. On November 4, 2003, Beartooth and Rocky Mountain once again filed a joint petition requesting continuation of its non-grandfathered TBA.¹¹ The Commission never acted on this request. KMTF(TV) and KTVH-DT continued operating under the attributable TBA until August 15, 2005, when it was terminated.¹²

IV. DISCUSSION

12. Section 73.3555(b) of the Commission's rules prohibits any party from acquiring an attributable interest in more than one television station in a single DMA unless (a) there is no Grade B contour overlap among the stations or (b) only one of two stations with common ownership is among the top four-ranked stations in the market as defined by audience share and there will be eight independently owned and operated television stations in the DMA following the event permitting common ownership. Beartooth's continued operation of KTVH-DT and KMTF(TV) between 2002 and 2005, pursuant to a non-grandfathered, represents a potential violation of the local TV ownership rule. Under the TBA, KTVH-DT, through licensee Beartooth, provided programming to KMTF(TV), which exceeded the 15 percent threshold. This made KMTF(TV) an attributable interest of Beartooth and subject to the

⁶ *Petition for Stay of Requirement to Terminate Non-Grandfathered Television Local Marketing Agreement* (Aug. 6, 2001).

⁷ *Id.*

⁸ *Id.* at 5.

⁹ *Id.* at 6 (emphasis added).

¹⁰ *Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 165-168 (DC Cir. 2002).

¹¹ *Request to Continue Operations under Non-Grandfathered LMA between Stations KTVH(TV), Helena, Montana and KMTF(TV), Helena, Montana* (Nov. 4, 2003). The parties state that this request was made, "to the extent necessary," pursuant to the Commission's 2002 Biennial Review Order. 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13812, ¶ 493 (2003). The parties inaccurately imply that its request may not be necessary because of a stay that was issued on September 3, 2003, by the United States Court of Appeals for the Third Circuit, which stayed the effective date of the Commission's new media ownership rules adopted in the 2002 Biennial Media Ownership Report and Order. This stay did not impact the Commission's rules concerning the limited grandfathering provision for TBAs that was adopted in the 1999 Report and Order and upheld by the D.C. Court of Appeals. See *supra* notes 4 and 10.

¹² See File No. BTCCT-20060915APG, Exhibit 21, Attachment 1 ("Family Media Interests") at p. 2.

numerical ownership/voice count restrictions of the local TV ownership rule. Because there were less than eight independently owned and operated full power television stations in the DMA during the term of the TBA, Beartooth's attributable interest in KMTF(TV) and KTVH-DT exceeded the numerical ownership limit of the local TV ownership rule.¹³ We note that while Beartooth should have been aware of the attribution rule the record does not contain evidence demonstrating that either Beartooth or Rocky Mountain acted with intent to deceive the Commission, a necessary predicate for a finding of misrepresentation or lack of candor.¹⁴

V. TERMS OF AGREEMENT

13. **Adopting Order.** The Party agrees that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order.

14. **Jurisdiction.** The Party agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and that the Bureau has the authority to enter into and adopt this Consent Decree.

15. **Effective Date; Violations.** The Party agrees that this Consent Decree shall become effective on the Effective Date as defined herein. As of the Effective Date, the Adopting Order and this Consent Decree shall have the same force and effect as any other order of the Commission. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

16. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate the Investigation. In consideration for the termination of the Investigation, the Party agrees to the terms and conditions contained herein. The Bureau further agrees that in the absence of new material evidence, the Bureau will not use the facts developed in this Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion any new proceeding, formal or informal, or take any action on its own motion against the Party concerning the matters that were the subject of the Investigation. The Bureau shall grant the Applications after the Effective Date, provided that the following conditions have been met: (1) the voluntary contribution referenced in Paragraph 13 below has been fully and timely satisfied; and (2) there are no issues that would preclude grant of the Applications. In the event that there are issues that would preclude the grant of any Application, it will remain pending.

17. **Subsequent Investigations.** Nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints or other adjudicatory pleadings filed against the Party or its affiliates for alleged violations of the Act or the Commission's rules or for any other type of alleged misconduct, regardless of when such misconduct took place. The Commission's adjudication of any such complaints will be based solely on the record developed in that proceeding. Except as expressly provided in this Consent Decree, this Consent Decree shall not prevent the

¹³ 47 CFR § 73.3555(b).

¹⁴ *Roy M. Speer*, Memorandum Opinion and Order and Notice of Apparent Liability, 11 FCC Rcd 18393, 18428 (1996) (finding unauthorized transfer of control and violation of local TV ownership rule but concluding violation did not call into question character qualifications to remain licensee); *2001 Glencairn Decision*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236, 22248 (2001) (finding unauthorized transfer of control but concluding hearing not appropriate and forfeiture was the appropriate remedy for the violation); *Iglesia Jesucristo Es Mi Refugio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 25 FCC Rcd 16310, 16317-18 (Aud. Div. 2010) (failure to report pertinent information did not call into question licensee's character absent evidence of intent to deceive or misrepresent).

Commission from investigating new evidence of noncompliance by the Party with Communications Laws.

18. **Liability.** Beartooth admits, solely for the purpose of this Consent Decree and for Commission civil enforcement purposes, and in express reliance on the provisions of paragraph 10 hereof, that the facts discussed in paragraphs 3-5 above constitute violations of Sections 73.3555(b), of the Rules. Notwithstanding any other provision of this Consent Decree, it is expressly agreed and understood that if this Consent Decree, or paragraph 9 hereof, or both, are breached by the Bureau, or are invalidated or modified to Beartooth Communications Company prejudice by the Commission, Bureau, or any court, then and in that event the provisions of the immediately-preceding sentence shall be of no force or effect whatever, and Beartooth Communications Company shall not, by virtue of that sentence or any other provision of this Consent Decree, be deemed to have made any admission concerning violations of Sections 73.3555(b) of the Rules.

19. **Voluntary Contribution.** The Party agrees that it will make a voluntary contribution to the United States Treasury in the amount of Forty Thousand Dollars (\$40,000) within thirty (30) calendar days after the Effective Date. The Party shall also send electronic notification of payment to Evan Morris at evan.morris@fcc.gov on the date said payment is made. A payment of Forty Thousand (\$40,000) must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account numbers and FRNs as captioned above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁵ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:¹⁶

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

20. **Waivers.** The Party waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues an Adopting Order as defined herein. The Party shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If the Commission (or the United States on behalf of the Commission) brings

¹⁵ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

¹⁶ Should the Party have questions regarding payment procedures, it should contact the Financial Operations Group Help Desk by phone at 1-877-480-3201, or by e-mail at ARINQUIRIES@fcc.gov.

a judicial action to enforce the terms of the Adopting Order, neither the Party nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and the Party shall waive any statutory right to a trial *de novo*. The Party hereby agree to waive any claims they may have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

21. **Invalidity**. In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

22. **Subsequent Rule or Order**. The Party agrees that if any provision of the Consent Decree conflicts with any subsequent rule or order adopted by the Commission (except an order specifically intended to revise the terms of this Consent Decree to which the Party does not expressly consent) that provision will be superseded by such rule or Commission order.

23. **Successors and Assigns**. The Party agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

24. **Final Settlement**. The Party agrees and acknowledges that this Consent Decree shall constitute a final settlement between the Party and Commission with respect to the Investigation.

25. **Modifications**. This Consent Decree cannot be modified without the advance written consent of both the Party and the Commission.

26. **Paragraph Headings**. The headings of the paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

27. **Authorized Representative**. The individual(s) signing this Consent Decree on behalf of the Party represents and warrants that they are authorized by the Party to execute this Consent Decree and to bind the Party to the obligations set forth herein. The FCC signatory represents that he is signing this Consent Decree in his official capacity and that he is authorized to execute this Consent Decree.

28. **Counterparts**. This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

**MEDIA BUREAU
FEDERAL COMMUNICATIONS COMMISSION**

By: William T. Lake, Chief

Date

BEARTOOTH COMMUNICATIONS COMPANY

By:

Date