

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of) File No.: EB-12-IH-0109
)
CHEROKEE BROADCASTING) Acct. No.: 201432080022
COMPANY)
) FRN: 0005056882
Applicant in Auction No. 91)

ORDER

Adopted: February 27, 2014

Released: February 28, 2014

By the Chief, Enforcement Bureau:

1. In this Order, we adopt a Consent Decree entered into between the Enforcement Bureau (Bureau) of the Federal Communications Commission (Commission) and Cherokee Broadcasting Company (CBC). The Consent Decree resolves and terminates the Bureau’s investigation into possible violations by CBC of Section 1.2105(c) of the Commission’s rules (Rules)¹ relating to prohibited contacts and communications in Commission auctions.

2. A copy of the Consent Decree negotiated by the Bureau and CBC is attached hereto and incorporated herein by reference.

3. After evaluating the facts before us and reviewing the terms of the Consent Decree, we find that the public interest would be served by adopting the Consent Decree and terminating the investigation.

4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether CBC possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.²

¹ 47 C.F.R. § 1.2105(c).

² We note that the amount of the voluntary contribution in this particular case represents a departure from the forfeiture amounts that have been imposed in other similarly situated cases involving compliance with Section 1.2105(c) of the Rules. See, e.g., Star Wireless, LLC & Ne. Commc’ns of Wis., Inc., Order on Review, 22 FCC Rcd 8943 (2007), review denied, Star Wireless, LLC v. FCC, 522 F.3d 469 (D.C. Cir. 2008) (imposing an initial forfeiture of \$100,000 for a violation of the Commission’s rule against prohibited communications in Commission auctions). The amount of the voluntary contribution in this particular case was predicated on the submission by CBC of specific, detailed financial documentation evidencing its inability to pay a more significant amount. We caution that the voluntary contribution contemplated herein does not imply that the Bureau has in any way modified its view on either the obligations of auction participants to adhere strictly to their obligations under Section 1.2105(c) of the Rules or the severity of sanctions that are appropriate for violations of Section 1.2105(c) of the Rules. But for the submission by CBC of specific, detailed financial documentation evidencing its inability to pay, the voluntary contribution in this case would have been significantly higher.

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

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED**.

7. **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: Harry Martin, Esq. and Raymond Quianzon, Esq., counsel for CBC, Fletcher, Heald & Hildreth, P.L.C., 1300 N. 17th Street, 11th Floor, Arlington, Virginia 22209.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

³ 47 U.S.C. §§ 154(i), 503(b).

⁴ 47 C.F.R. §§ 0.111, 0.311.

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CHEROKEE BROADCASTING COMPANY)	Acct. No.: 201432080022
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Applicant in Auction No. 91)	FRN: 0005056882

CONSENT DECREE

1. The Enforcement Bureau (Bureau) of the Federal Communications Commission (Commission or FCC) and Cherokee Broadcasting Company (CBC), by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Bureau’s investigation into possible violations by CBC of Section 1.2105(c) of the Commission’s rules (Rules)¹ relating to prohibited contacts and communications in Commission auctions.

I. DEFINITIONS

2. 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 an order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) “CBC” means Cherokee Broadcasting Company, applicant in Auction 91, and its predecessors-in-interest and successors-in-interest.
 - (d) “Bureau” means the Enforcement Bureau of the Federal Communications Commission.
 - (e) “Commission” and “FCC” mean the Federal Communications Commission and all of its bureaus and offices.
 - (f) “Communications Laws” means collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which CBC is subject by virtue of its business activities.
 - (g) “Effective Date” means the date on which the Bureau releases the Adopting Order.
 - (h) “Investigation” means the investigation commenced by the Bureau’s Investigations and Hearings Division in File No. EB-12-IH-0109 regarding CBC’s compliance with Section 1.2105(c) of the Rules, arising from CBC’s conduct in Auction 91.
 - (i) “Parties” means the Bureau and CBC, each of which is a “Party.”

¹ 47 C.F.R. § 1.2105(c).

- (j) “Radio WEBS” means Radio WEBS, Inc., an applicant in Auction 91.
- (k) “Rebecca Sovine” means Rebecca Sovine and Rebecca Smith (her married name), an applicant in Auction 91.
- (l) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.

II. BACKGROUND

3. Section 1.2105(c)(1) of the Rules prohibits auction applicants for licenses in any of the same geographic license areas from “cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies, or discussing or negotiating settlement agreements” beginning immediately after the short-form application filing deadline until after the down payment deadline “unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder’s short-form application”² In addition, Section 1.2105(c)(6) of the Rules requires that “[a]ny applicant that makes or receives a communication of bids or bidding strategies prohibited under [Section 1.2105(c)(1) of the Rules] shall report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs.”³

4. On September 21, 2010, the Commission announced its intention to auction 147 FM band construction permits in various markets across the country in Auction 91.⁴ Consistent with standard practice, the Commission issued public notices prior to the commencement of Auction 91 warning applicants of the need to strictly comply with all applicable Commission rules, including Section 1.2105(c).⁵ CBC, Radio WEBS, and Rebecca Sovine each filed a short-form application to participate in Auction 91.⁶ CBC and Radio WEBS represent that they are entities based in Calhoun, Georgia. Rebecca Sovine is an individual residing in Eatonton, Georgia. Each of the applicants sought eligibility to bid on the construction permit for a new FM broadcast station in Calhoun, Georgia (MM-FM787-A). None of these applicants identified the existence of any joint bidding consortium or agreement between or among them. As such, Section 1.2105(c)(1) of the Rules strictly prohibited them from communicating with each other about bids or bidding strategies pertaining to Auction 91 during the period extending from 6:00 p.m. ET on February 10, 2011 (the short-form application filing deadline), until 6:00 p.m. ET on June 7, 2011

² 47 C.F.R. § 1.2105(c)(1).

³ *Id.* § 1.2105(c)(6).

⁴ *Auction of FM Broadcast Construction Permits Scheduled for March 29, 2011; Comment Sought on Competitive Bidding Procedures For Auction 91*, Public Notice, 25 FCC Rcd 13034 (2010).

⁵ *See, e.g., Auction of FM Broadcast Construction Permits; Status of Short-Form Applications to Participate in Auction 91*, Public Notice, 26 FCC Rcd 3421 (2011). Specifically, the Commission reminded potential participants that Section 1.2105(c) “prohibit[s] applicants for any of the same geographic license areas from communicating with each other about bids, bidding strategies, or settlements . . . unless they have identified each other on their short-form applications as parties with which they have entered into agreements” *Id.* at 3426, para.16.

⁶ *See* FCC Form 175 of Cherokee Broadcasting Company, Application to Participate in an FCC Auction, submitted on February 10, 2011, 1:58 a.m. ET; FCC Form 175 of Radio WEBS, Inc., Application to Participate in an FCC Auction, submitted on February 9, 2011, 6:45 p.m. ET; FCC Form 175 of Rebecca Sovine, Application to Participate in an FCC Auction, submitted on February 10, 2011, 1:23 p.m. ET, resubmitted with modifications on March 16, 2011, 4:44 p.m. ET.

(the down payment deadline). Bidding in Auction 91 began on April 27, 2011, and concluded on May 11, 2011.

5. While bidding remained underway, CBC, through its counsel and authorized bidder, Dan J. Alpert, prepared and submitted to the Commission a report entitled “Notice of Prohibited Communication and Request for Investigation,” dated May 2, 2011.⁷ The May 2 Report indicated that it had been filed with the Office of the Secretary. Additionally, the May 2 Report included a “Certificate of Service” indicating that CBC had sent copies of the report to counsel for Radio WEBS, Inc., and Rebecca Sovine. In its May 2 Report, CBC reported that it had received an unsolicited communication in the form of an e-mail, dated April 30, 2011, from an anonymous individual identifying himself only as “Piforradio.”⁸ The e-mail, a copy of which CBC attached to its May 2 Report, alleged that Rebecca Sovine was participating in Auction 91 on behalf of an undisclosed real party – her husband, James (Scott) Smith, a manager of Cox Radio properties in Athens, Georgia.⁹ CBC did not simply forward the Piforradio e-mail to the Commission and allow the Commission to draw its own inferences from the document. Rather, the May 2 Report consisted of a four-page pleading in which CBC analyzed, explained, and expanded upon the significance of the allegations contained in the mysterious e-mail based upon its own independent inquiry, ultimately urging the Commission to temporarily stop all bidding on the Calhoun, Georgia construction permit.¹⁰

6. After being alerted by the staff of the Wireless Telecommunications Bureau that the May 2 Report itself might have constituted a prohibited communication because it was directed to the Office of the Secretary with copies to two other auction applicants, CBC submitted a second report on May 3, 2011.¹¹ The May 3 Report was identical in substance to the May 2 Report. However, unlike the initial report, CBC directed its May 3 Report only to the Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau.

7. Rebecca Sovine ceased bidding in Auction 91 after the first round of bidding on May 2, 2011. Thereafter, the Wireless Telecommunications Bureau referred this matter to the Bureau for investigation. The Bureau commenced its Investigation of CBC’s compliance with Section 1.2105(c) of the Rules by sending letters of inquiry to CBC, Radio WEBS, and Rebecca Sovine.¹² The Investigation confirmed, among other things, that Radio WEBS and Rebecca Sovine received copies of CBC’s May 2 Report from CBC. The Bureau and CBC thereafter entered into discussions aimed at resolving the

⁷ Notice of Prohibited Communication and Request for Investigation, submitted by Cherokee Broadcasting Company (May 2, 2011) (on file in EB-12-IH-0109) (May 2 Report).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Notice of Prohibited Communication and Request for Investigation, submitted by Cherokee Broadcasting Company (May 3, 2011) (on file in EB-12-IH-0109) (May 3 Report).

¹² See Letter from Gary Schonman, Special Counsel, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Dan J. Alpert, Counsel for Cherokee Broadcasting Company (Mar. 14, 2012) (on file in EB-12-IH-0109); Letter from Gary Schonman, Special Counsel, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Mark Lipp, Esq., counsel for Radio WEBS, Inc. (Mar. 14, 2012) (on file in EB-13-IH-0547); Letter from Gary Schonman, Special Counsel, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Rebecca Sovine (Mar. 14, 2012) (on file in EB-13-IH-1086).

Investigation. CBC provided financial information to the Bureau documenting its claimed inability to pay a large forfeiture or voluntary contribution.

III. TERMS OF AGREEMENT

8. **Adopting Order.** The Parties agree 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.

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

10. **Effective Date; Violations.** The Parties agree 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.

11. **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, CBC agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that in the absence of new material evidence, the Bureau will not use the facts developed in the 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 CBC concerning the matters that were the subject of the Investigation. The Bureau also agrees that in the absence of new material evidence, it will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against CBC with respect to CBC's basic qualifications, including its character qualifications to be a Commission licensee or hold Commission licenses or authorizations.

12. **Settlement Terms.** For purposes of settling the matters set forth herein, CBC agrees to the following:

- (a) CBC agrees that it will not participate in any future auctions conducted by the Commission.
- (b) The principals of CBC (Samuel D. Thomas, Richard Jones and Sidney Abernathy) agree that they: (i) will not participate in any future auctions conducted by the Commission in their own capacity; (ii) will not participate in any future auctions conducted by the Commission on behalf of any other person or entity; and (iii) will not hold a position or interest of any kind and to any extent whatsoever (financial or otherwise) in an entity that participates in any future auctions conducted by the Commission. Nothing in this subparagraph shall prevent the principals of CBC from holding a position or interest in an entity that is publicly traded on the New York Stock Exchange or the NASDAQ Stock Market and which participates in any future auctions conducted by the Commission.

13. **Compliance Reports.** CBC shall file a Compliance Report with the Commission ninety (90) calendar days after the Effective Date, twelve (12) months after the Effective Date, twenty-four (24) months after the Effective Date, and thirty-six (36) months after the Effective Date. CBC shall certify in its respective Compliance Reports to its compliance during the relative time period with the terms and conditions contained in this Consent Decree. If it is unable to provide the requisite certification, it shall provide a detailed explanation of the reason(s) why and describe fully (i) each instance of noncompliance; (ii) the steps that CBC has taken or will take to remedy such noncompliance, including the schedule on which proposed remedial actions will be taken; and (iii) the steps that the CBC has taken or will take to prevent the recurrence of any such noncompliance, including the schedule on which such preventive action will be taken. The certification shall be accompanied by a statement explaining the basis for such certification and shall comply with Section 1.16 of the Rules and be subscribed to as true under penalty of perjury in substantially the form set forth therein.¹³ All Compliance Reports shall be submitted to the Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, Room 4-C330, 445 12th Street, S.W., Washington, D.C. 20554, with copies submitted electronically to Theresa Z. Cavanaugh at Terry.Cavanaugh@fcc.gov and to Brian J. Carter at Brian.Carter@fcc.gov.

14. **Voluntary Contribution.** CBC agrees that it will make a voluntary contribution to the United States Treasury in the total amount of Fifteen Thousand Dollars (\$15,000.00) (Voluntary Contribution). This amount was arrived at after careful consideration of CBC's claimed inability to pay a large voluntary contribution and documentation submitted by CBC to the Bureau in support thereof. The total payment shall be made within thirty (30) calendar days after the Effective Date. CBC acknowledges and agrees that upon execution of this Consent Decree, the Voluntary Contribution shall become a "Claim" or "Debt" as defined in 31 U.S.C. § 3701(b)(1).¹⁴ In addition, CBC agrees that it will make the Voluntary Contribution in United States Dollars without further demand or notice by the date specified above. CBC shall also send electronic notification of payment to Theresa Z. Cavanaugh at Terry.Cavanaugh@fcc.gov and to Brian J. Carter at Brian.Carter@fcc.gov on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced 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 regarding the form of payment:

- 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

¹³ 47 C.F.R. § 1.16.

¹⁴ Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1358 (Apr. 26, 1996).

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

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.

Questions regarding payment procedures should be addressed to the Financial Operations Group Help Desk by phone at 1-877-480-3201, or by e-mail at ARINQUIRIES@fcc.gov.

15. **Waivers.** CBC 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. CBC shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If any Party (or the United States on behalf of the Commission), brings a judicial action to enforce the terms of the Adopting Order, neither CBC nor the Commission shall contest the validity of the Consent Decree or of the Adopting Order, and CBC shall waive any statutory right to a trial *de novo*. CBC hereby agrees to waive any claims they may otherwise have under the Equal Access to Justice Act¹⁶ relating to the matters addressed in this Consent Decree.

16. **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.

17. **Subsequent Rule or Order.** The Parties agree 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 the Consent Decree to which CBC does not expressly consent) that provision will be superseded by such Rule or Commission order.

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

19. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties with respect to the Investigation. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the Communications Laws.

21. **Modifications.** This Consent Decree cannot be modified without the advance written consent of all Parties.

22. **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.

23. **Authorized Representative.** Each Party represents and warrants to the other Party that it has full power and authority to enter into this Consent Decree. Each person signing this Consent Decree on behalf of a Party hereby represents and warrants that he or she is fully authorized by the Party to execute this Consent Decree and to bind the Party to its terms and conditions.

¹⁶ See 5 U.S.C. § 504; 47 C.F.R. Part 1, Subpart K.

24. **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.

By: _____
P. Michele Ellison, Chief
Enforcement Bureau
Federal Communications Commission

By: _____
Samuel D. Thomas
General Partner
Cherokee Broadcasting Company

Date: _____

Date: _____