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Re: Application for Assignment of Licenses

KOTA-TV, Rapid City, SD, Fac. Id. No. 17688
KHSD-TV, Lead, SD, Fac. Id. No. 17686
KSGW-TV, Sheridan, WY, Fac. Id. No. 17680
KDUH-TV, Scottsbluff, NE, Fac. Id. No. 17683
Lead File No. BALCDT-20131113BRS

Dear Counsel:

As set forth in greater detail below, we grant the above-captioned applications for assignment of television licenses from Duhamel Broadcasting Enterprises (“Duhamel”) to New Rushmore Radio, Inc. (“New Rushmore”), conditioned upon New Rushmore coming into compliance with the radio/television cross-ownership rule with 60 days of release of this letter.¹ We do not anticipate granting extensions of the limited period afforded herein. Consequently, we deny New Rushmore’s request for waiver of the cross-ownership rule conditioned upon the outcome of the *2010 Quadrennial Ownership NPRM*,² as well as deny its alternate request for a six-month temporary waiver of the rule. Finally, we grant New Rushmore authority to continue operating KHSD-TV, Lead, South Dakota, as a satellite station of KOTA-TV in the Rapid City, South Dakota Nielsen Designated Market Area (“DMA”), pursuant to Note 5 of Section 73.3555 of the Commission’s rules.³

New Rushmore is the licensee of six radio stations in the Rapid City, South Dakota, Arbitron Radio Metro Market. Duhamel is the licensee of KOTA-TV and its associated satellite stations, KHSD-TV and KSGW-TV, in the Rapid City DMA; KDUH-TV in the Cheyenne-Scottsbluff DMA; and four radio stations in the Rapid City Arbitron Radio Metro Market. The proposed transaction would transfer

¹ 47 C.F.R. § 73.3555(c).

² *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules; Promoting Diversification of Ownership in the Broadcasting Services*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011) (*2010 Quadrennial Ownership NPRM*).

³ 47 C.F.R. § 73.3555, Note 5.

KOTA-TV and the satellite and low-power stations that repeat its signal from Duhamel to New Rushmore.⁴

Waiver of the Radio-TV Cross Ownership Rule. As set forth in sections 73.3555(c)(1)(i) and (ii) of the Commission's rules, the radio/television cross-ownership rule is triggered when the analog Grade A contour of a television station encompasses the entire community of license of a commonly owned AM or FM radio station, or when the 2 mV/m contour of an AM radio station, or the 1 mV/m contour of an FM radio station, encompasses the entire community of license of a commonly owned television station.⁵ Though the Grade A contour no longer exists after the digital transition, Duhamel does not dispute that it holds a 2 television/6 radio station combination for purposes of this cross-ownership analysis.⁶

An entity may hold an attributable interest in one television station and up to six radio stations so triggered in any market where at least 20 independently owned media voices remain in the market after the proposed transaction.⁷ In markets where at least 10 but less than 20 independently owned media voices will exist after the transaction, an entity may hold attributable interests in one television station and up to four radio stations, or, if permitted by the Commission's local television ownership rule, two television stations and four radio stations. There would be 17 media voices following the consummation of the proposed transaction. One of the television stations would not be subject to the cross-ownership rule as an authorized satellite and, therefore, for purposes of this analysis, we would consider Duhamel as owning a 1 tv/6 radio station combination.⁸ Regardless, Duhamel would need to divest two radio stations to come into compliance with the cross-ownership limits.

Consequently, New Rushmore has requested a waiver of the radio-TV ownership rule pending the Commission's decision in the *2010 Ownership NPRM*, which proposed to repeal the rule. Alternatively, New Rushmore requests a six-month waiver of the rule to allow appropriate time to divest its interest in two of the radio stations.

⁴ File No. BALCDT-20131113BRS, Exh. 13.

⁵ 47 C.F.R. §73.3555(c)(1)(i) and (ii) (2002).

⁶ The Commission has developed the digital noise-limited service contour (NLSC) to approximate the same probability of service as the analog Grade B contour, and that it has stated that the two are roughly equivalent. See 47 C.F.R. § 73.622(e); *2010 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*, Notice of Inquiry, 25 FCC Rcd 6086, 6117 (2010). The staff has, in the past, recognized use of the NLSC as a substitute for the analog Grade A contour in determining which stations implicate the radio/television cross-ownership rule. *Nassau Broadcasting II, LLC*, Letter, 25 FCC Rcd 1851, 1856 (Aud. Div. 2010). See, also, *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules; Promoting Diversification of Ownership in the Broadcasting Services*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17538-17539 (2011).

⁷ The Commission counts as “voices” television stations within the DMA of the television station(s)' communitie(s) of license, and radio stations that are in the radio metro market as defined by Arbitron or another comparable ratings agency of the TV station(s)' communitie(s) of license, the commonly owned radio station(s) communitie(s) of license, as well as out-of-market broadcast radio stations with a reportable share in the relevant market. 47 C.F.R. § 73.3555(c)(3) (2002).

⁸ 47 C.F.R. § 73.3555, Note 5. As noted below, we re-authorize station KHSD-TV as a satellite of KOTA-TV based on the standards set forth in *Television Satellite Stations. Television Satellite Stations Review of Policies and Rules*, Report and Order, 6 FCC Rcd 4212, 4215 (1991)(subsequent history omitted)(*Television Satellite Stations*).

The Commission does not routinely waive rules merely because they could be modified in the future as a result of a pending rulemaking.⁹ Applicants have cited *Capital Cities/ABC, Inc.*¹⁰ as support for its proposal here. However, we find this case to be distinguishable because the instant proposal would permit the creation of a new prohibited combination, not postpone divestiture of a grandfathered combination, as was the case in *Capital Cities/ABC, Inc.*¹¹ We conclude, therefore, that a waiver pending resolution of the *2010 Ownership NPRM* would not be in the public interest.

We will grant a temporary waiver of our cross-ownership rules only if it “will not significantly frustrate the policies underlying the multiple ownership rules,” in this case competition, diversity, and localism.¹² We have stated that a temporary waiver’s effect on competition and diversity may be somewhat less consequential if the level of competition and diversity that exist is already sufficient.¹³ As noted in the applicants’ showing, seventeen broadcast media voices, including both radio and television stations, will remain within the Rapid City market post-transaction. This is a significantly smaller, and more concentrated, market than those for which we have granted temporary waivers in the past.¹⁴ Further, the transaction at issue here involves only four stations in two markets. Therefore, while we have found that large, multi-station transactions are “a compelling circumstance weighing in favor of a temporary waiver,”¹⁵ such circumstances do not apply in the instant case. Nevertheless, even though we do not believe that a full 6-month temporary waiver would be in the public interest in this case, we do believe providing 60 days to come into compliance with the radio/tv cross-ownership rule would be in the public interest, as there is a public interest benefit in allowing a limited time for an orderly divestiture. It is our understanding that the applicants have found buyers and that the applicants have already begun the divestiture process.

Continuing Satellite Waiver. New Rushmore also seeks a continuing waiver to operate KHSD-TV as a satellite of KOTA-TV. Duhamel constructed KHSD-TV as a satellite station of KOTA-TV in 1966 and it has been operated as a satellite at all times since then.¹⁶

In *Television Satellite Stations*,¹⁷ the Commission established the requirement that all applicants seeking to transfer or assign satellite stations justify continued satellite status by demonstrating

⁹ *RKO General, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5262, 5263 (1988); *Lauren A. Colby*, Letter Decision, 3 FCC Rcd 4476, 4476 (Aud. Div. 1988).

¹⁰ *Capital Cities/ABC, Inc.*, Letter Decision, 2 FCC Rcd 2539 (1987).

¹¹ See *RKO General, Inc.*, 3 FCC Rcd at 5263.

¹² *UTV of San Francisco, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 14975, 14985 (2001); *J.S. Kelly, L.L.C.*, Memorandum Opinion and Order, 13 FCC Rcd 23632, 23636 (1998)

¹³ *UTV of San Francisco, Inc.*, 16 FCC Rcd at 14984.

¹⁴ *Id.* (finding temporary waiver appropriate where there were 30 independent voices post-merger, with ten independent television voices); *Lint Co.*, Memorandum Opinion and Order, 15 FCC Rcd 18130, 18133 (2000)(granting temporary 6-month waiver where 13 independently owned and operating commercial and noncommercial television stations, and a total of 27 independently owned broadcast voices, remained during period of common ownership).

¹⁵ *Telemundo Communications Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 6958, 6978 (2002), citing, *Guy Gannet Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 6204 (1999).

¹⁶ File No. BALCDT-20131113BRS, Exh. 13. New Rushmore does not require a waiver to own KDUH-TV because it is located in the separate Cheyenne-Scottsbluff DMA and does not require a waiver to own KSGW-TV because the noise-limited contour of KSGW-TV does not overlap with any other station in the transaction. *Id.*

¹⁷ *Television Satellite Stations*, 6 FCC Rcd at 4215.

compliance with a three-part “presumptive” satellite exemption standard applicable to new satellite stations. The presumptive satellite exemption is met if the following three public interest criteria are satisfied: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station.¹⁸ If an applicant does not qualify for the presumption, the Commission will evaluate the proposal on an *ad hoc* basis and grant the application if there are compelling circumstances that warrant approval.¹⁹ In support of its waiver request, New Rushmore submits an analysis by Dr. Mark Fratrick of BIA Kelsey.

With regard to the first criterion, we note that, following the digital transition, full-power television stations have a digital Principal Community contour that serves a much larger area than their former analog City Grade contour. Thus, as we stated previously, the Principal Community contour is not an equivalent standard to use in determining whether a proposed satellite qualifies for the presumptive satellite exemption to the duopoly rule.²⁰ Fratrick notes that, although there is a significant overlap between the service areas of KOTA-TV and KHSD-TV, ridges to the west of the KOTA-TV transmitter block much of its signal to areas west of those ridges, and conversely those same ridges block much of the signal from the KHSD-TV transmitter in the area around Rapid City and to its east.²¹

Regarding the second criterion, New Rushmore relies on the Commission’s “transmission” test to demonstrate that KHSD-TV provides service to an underserved area. That test deems an area underserved if there are two or fewer full-power television stations (including commercial, noncommercial, and satellite stations) licensed to the proposed satellite’s community of license. Here, only KHSD-TV and KIVV-TV, a satellite of KEVN-TV, are licensed to serve Lead.

As for the third criterion, New Rushmore relies on Fratrick’s analysis to conclude that all of the major English-language television networks have existing affiliates serving the Rapid City DMA and there are an insufficient number of Hispanic-origin residents to support a television station. Thus, if KHSD-TV did not operate as a satellite, it would have to become an independent station and produce or acquire all of its programming, Fratrick contends.²² Moreover, Fratrick notes that advertising revenues in the Rapid City DMA, have shown only weak revenue growth and states “[t]his poor revenue growth would provide a substantial challenge for any television station that would enter the market.”²³ Fratrick states that it would therefore be difficult to support a full-service station, particularly since most similarly sized markets support fewer full service stations than are operating in Rapid City, which is the 173rd largest market in terms of households. Fratrick concludes that, based on the costs a new operator would incur to convert KHSD-TV to full-service, the absence of network affiliations, and the present economic conditions, it “is highly unlikely that KHSD-TV could become economically viable.”²⁴

Although the instant request does not satisfy the Commission’s presumptive satellite exemption standard, New Rushmore has provided information sufficient to warrant continued satellite operation for

¹⁸ *Id.* at 4213-14.

¹⁹ *Id.* at 4212.

²⁰ *New Young Broadcasting Holding Company, Inc.*, Letter Decision, 25 FCC Rcd 7518, 7519 (Vid. Div. 2010).

²¹ Mark A Fratrick, *The Economic Viability of KHSD-TV If Operated As A Full-Service Television Station*, Analysis (Nov. 12, 2013), File No. BALCDT-20131113BRS, Exh. 13, Attachment D (“Fratrick Report”) at 4 n.3.

²² *Id.* at 2-3.

²³ *Id.* at 6.

²⁴ *Id.* at

KHSD-TV under our *ad hoc* analysis. Given the station's long history as a satellite, the geographically challenging nature of its coverage area, and the economic position of the Rapid City DMA, it is unlikely that an alternative operator would be willing and able to operate the station as stand-alone facility. Accordingly, we find that the continued operation of KHSD-TV as a satellite of KOTA-TV would serve the public interest.

Furthermore, having carefully reviewed the applications, we find that the applicants are fully qualified and conclude that the grant of the applications would serve the public interest.

Current Renewals. The license renewal application for station KDUH-TV, Scottsbluff, Nebraska, is currently pending.²⁵ In cases involving the assignment, as opposed to the transfer of control, of a broadcast station's license during the time when the station's license is also being considered for renewal, all that is assignable is the right to continue operating during the license renewal proceeding.²⁶ New Rushmore has submitted a statement explicitly agreeing to stand in the stead of the assignor in any renewal application that is pending at the time of the consummation of the assignment.²⁷ The license renewal application for station KDUH-TV has not been petitioned, and there are no pending proceedings that present basic character qualification issues. Therefore, we will apply the policy set out in *Shareholders of CBS* to station KDUH-TV's pending assignment application, but our grant is limited to authorization to continue operating, pursuant to 47 U.S.C. § 307(c)(3), during the pendency of the license renewal application.

ACCORDINGLY, IT IS ORDERED, That the applications for assignment of the licenses of KOTA-TV, Rapid City, SD, Fac. Id. No. 17688, KHSD-TV, Lead, SD, Fac. Id. No. 17686, KSGW-TV, Sheridan, WY, Fac. Id. No. 17680, and KDUH-TV, Scottsbluff, NE, Fac. Id. No. 17683 (Lead File No. BALCDT-20131113BRS) ARE GRANTED. Furthermore, New Rushmore Radio, Inc., IS FURTHER ORDERED, to come into compliance with the radio/television cross-ownership rule, 47 C.F.R. § 73.3555(c), within 60 days of release of this letter. IT IS FURTHER ORDERED, That New Rushmore's request for a continuing waiver to operate KHSD-TV as a satellite of KOTA-TV IS GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

²⁵ File No. BALCDT-20131113BRS, Exh. 13

²⁶ *Existing Shareholders of Cumulus Media, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 12956, 12960 (MB 2011) (citing *See American Broadcasting Companies, Inc.*, Memorandum Opinion and Order, 7 FCC 2d 245, 261 (1966)).

²⁷ File No. BALCDT-20131113BRS, Exh. 13.