

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

In re Application of
Optima Communications, Inc., Assignor, and
Pikes Peak Television, Inc., Assignee
For Consent to Assignment of License of
Station KRDO-FM, Security, Colorado
NAL/Acct. No. MB-201541410033
FRN: 0009793696
Facility ID No. 50402
File No. BALH-20150423AAW

ORDER

Adopted: December 14, 2015

Released: December 15, 2015

By the Chief, Media Bureau:

1. In this Order, we adopt the attached Consent Decree entered into by the Media Bureau ("Bureau"), Optima Communications, Inc. ("Optima"), and Pikes Peak Television, Inc. ("Pikes Peak"). The Consent Decree resolves issues arising from the Bureau's review of the captioned application, as amended, for Commission consent to the proposed assignment of license of Station KRDO-FM, Security, Colorado (the "Station") from Optima to Pikes Peak ("Application"). In particular, the Consent Decree resolves the Bureau's investigation of the applicants' compliance with Section 73.3540 of the Commission's Rules ("Rules") and Section 310 of the Communications Act of 1934, as amended (the "Act").

2. The Consent Decree stipulates that Optima and Pikes Peak violated Section 310 of the Act and Section 73.3540 of the Rules. The Consent Decree also requires, among other things, that Optima and Pikes Peak will collectively make an eight thousand dollar (\$8,000) civil penalty payment to the United States Treasury. A copy of the Consent Decree is attached hereto and incorporated by reference.

3. After reviewing the terms of the Consent Decree, we find that the public interest will be served by its approval and by terminating all pending proceedings relating to the Bureau's investigation of potential violations of the Rules and the Act in connection with the Application.

4. Based on the record before us, we conclude that nothing in that record creates a substantial or material question of fact as to whether Optima or Pikes Peak possesses the basic qualifications to be a Commission licensee.

1 The Application was amended on June 11, 2015, to submit a copy of the Promissory Note to be executed at the parties' closing on the Station license.

2 47 C.F.R. § 73.3540.

3 47 U.S.C. §310.

5. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended,⁴ and by the authority delegated by Sections 0.61 and 0.283 of the Rules,⁵ the Consent Decree attached hereto IS ADOPTED without change, addition, or modification.

6. IT IS FURTHER ORDERED that the investigation by the Media Bureau of the matters noted above IS TERMINATED.

7. IT IS FURTHER ORDERED that copies of this Order shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Mr. Joseph B. McCoy, III, President, Optima Communications, Inc., 2165 Geronimo Way, Las Vegas, NV 89169, and to Optima's counsel, Marnie K. Sarver, Esq., Wiley Rein LLP, 1776 K Street, NW, Washington, DC 50402; and to Mr. J. Timothy Hannan, EVP and CFO of NPGCO, 825 Edmond Street, St. Joseph, MO 64501, and to Pikes Peak's counsel, Elizabeth E. Spainhour, Esq., Brooks Pierce McLendon, Humphrey & Leonard, LLP, 1600 Wells Fargo Capital Center, 150 Fayetteville Street, Raleigh, NC 27601.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

⁴ 47 U.S.C. § 4(i).

⁵ 47 C.F.R. §§ 0.61, 0.283.

CONSENT DECREE**I. Introduction**

1. This Consent Decree is entered into by and between the Media Bureau of the Federal Communications Commission, Optima Communications, Inc., licensee and proposed assignor of Station KRDO-FM, Security, Colorado (Facility ID No. 50402); and Pikes Peak Television, Inc., proposed assignee, for the purpose of terminating the Bureau's Investigation concerning compliance with Section 73.3540 of the Commission's Rules, 47 C.F.R. § 73.3540, and Section 310 of the Communication Act of 1934, as amended, 47 U.S.C. § 310.

II. Definitions

2. For 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 this Consent Decree;
- (c) "Application" means the FCC Form 314 application, as amended, for Commission consent to assign the Station license from Optima to Pikes Peak (File No. BALH-20150423AAW);
- (d) "Bureau" means the Media Bureau of the Commission;
- (e) "Commission" or "FCC" means the Federal Communications Commission;
- (f) "Effective Date" means the date on which the Bureau releases the Order;
- (g) "Investigation" means the Bureau's investigation of information contained in the Application;
- (h) "Licensee" or "Optima" refers to Optima Communications, Inc.;
- (i) "Parties" means Optima, Pikes Peak, and the Bureau;
- (j) "Pikes Peak" means Pikes Peak Television, Inc., proposed assignee of the Station;
- (k) "Rules" means the Commission's Rules, found in Title 47 of the Code of Federal Regulations;
- (l) "Station" means Station KRDO-FM, Security, Colorado (Facility ID. No. 50402);
- (m) "TBA" means the time brokerage agreement originally executed on July 30, 1992, between Optima and Pikes Peak Broadcasting Company, which on June 16, 2006, assigned its rights to Pikes Peak Radio, LLC, an affiliated corporate entity of Pikes Peak Television, Inc., and was thereafter amended on July 18, 2012; and

- (n) “Violations” means the failure of Optima to retain complete control of Station operations subsequent to the implementation of the TBA in violation of Section 73.3540 of the Rules and Section 310(d) of the Act.

III. Background

3. Time Brokerage Agreements are not precluded by any Commission rule or policy, so long as the ownership rules are not violated and the participating licensee maintains ultimate control over its facilities.⁶ The licensee maintains such control when it holds ultimate responsibility for essential station matters such as programming, personnel, and finances.⁷

4. Under the terms of the TBA as originally executed on July 30, 1992, and amended on July 18, 2012, the executed TBA effected an unauthorized transfer of control of the Station license in violation of Section 73.3540 of the Rules and Section 310 of the Act.⁸ In particular, pursuant to the TBA, Optima improperly delegated core licensee financial responsibilities by allowing an affiliated corporate entity of Pikes Peak to make direct payments of certain Station obligations and expenses, including a debt owed to a third party, its site lease, and the Station’s telephone line.⁹

5. On April 23, 2015, Optima and Pikes Peak jointly filed the Application which included the TBA. In response, the Commission staff commenced its Investigation of the TBA.

6. Because of the compliance issues raised by the TBA, the Parties have negotiated this Consent Decree to terminate the Bureau’s Investigation.

IV. Agreement

7. The Parties acknowledge that any proceedings that might result from the Violations would be time-consuming and require a substantial expenditure of public and private resources. In order to conserve such resources, resolve the matter, and promote the Station’s compliance with the Rules, the Parties are entering into this Consent Decree, in consideration of the mutual commitments made herein.

⁶ 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, Report and Order and Notice of Proposed Rule Making, 18 FCC Rcd 13620, 13743 (2003) (subsequent history omitted).

⁷ 47 U.S.C. § 310(d); 47 C.F.R. § 73.3540(a). See also *Solar Broadcasting Co., Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 5467, 5486 (2002) (“Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming and finances, is nondelegable.”); *Radio Moultrie, Inc.*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 24304, 24306-07 (2002) (stating that “the Commission looks not only to who executes the programming, personnel, and finance responsibilities, but also to who establishes the policies governing those three areas.”); *Choctaw Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC 8534, 8538-39 (1997) (“[A] licensee involved in an LMA is not relieved of its responsibility to retain ultimate control.”).

⁸ The TBA was originally executed between Optima and Pikes Peak Broadcasting Company, which assigned its rights under the TBA to Pikes Peak Radio, LLC, an affiliated corporate entity of Pikes Peak Television, Inc., on June 16, 2006. See Amendment to the Time Brokerage Agreement, Attachment 17; Application, as amended on June 11, 2015.

⁹ TBA at 3 ¶2, 6 ¶5, Attachment 17, *Id.*

8. The Parties agree to be legally bound by the terms and conditions of this Consent Decree. Optima and Pikes Peak further agree that the Bureau has jurisdiction over the matters contained in this Consent Decree and the authority to enter into and adopt this Consent Decree.

9. The Parties agree that this Consent Decree shall become effective on the Effective Date as defined herein. Upon the Effective Date, the Adopting Order and this Consent Decree shall have the same force and effect as any other order of the Commission. Optima and Pikes Peak agree that each is required to comply with each individual condition of this Consent Decree. Each specific condition is a separate condition of the Consent Decree as approved. To the extent that either Optima or Pikes Peak fails to satisfy any condition or Commission Rule, in the absence of Commission alteration of the condition or Rule, Optima or Pikes Peak will be deemed noncompliant and may be subject to possible enforcement action, including, but not limited to, revocation of the relief, designation of the matter for hearing, letters of admonishment and/or forfeitures. Any violation of the Adopting Order or 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 enforcement of a Commission order.

10. 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, Optima and Pikes Peak agree to the terms, conditions, and procedures contained herein. The Bureau further agrees that, in the absence of new material evidence, it will not use the Violations in any action against Optima and Pikes Peak, provided that Optima and Pikes Peak satisfy all of their obligations under this Consent Decree. In the event that either Optima or Pikes Peak fails to satisfy any of its obligations under this Consent Decree, the Bureau may take any enforcement action available pursuant to the Act and the Rules with respect to each Violation, and/or the violation of this Consent Decree.

11. Optima and Pikes Peak stipulate that each violated Section 310(d) of the Act and Section 73.3540 of the Rules by allowing Pikes Peak to assume control of the Station without prior Commission authorization.

12. Optima and Pikes Peak agree to collectively pay a civil penalty to the United States Treasury in the amount of Eight Thousand Dollars (\$8,000), within thirty (30) calendar days after the Effective Date. Licensee will also send electronic notification of payment to Kim Varner at Kim.Varner@fcc.gov and Michael Wagner at Michael.Wagner@fcc.gov on the date said payment is made. Such payment will be made, without further protest or recourse to a *trial de novo*, by a check or similar instrument, wire transfer or credit card and must include the Account Number and FRN referenced in the caption to the Order. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted. 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 that should be followed based on the form of payment selected:

- 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.

13. The Bureau finds that its Investigation raises no substantial and material questions of fact as to whether Optima or Pikes Peak possesses the basic qualifications, including those relating to character, to hold or obtain a Commission license or authorization. Accordingly, the Bureau agrees to grant the Application, after the Effective Date, provided that the following conditions have been met: 1) the civil penalty payment, referenced in paragraph 12 of this Decree, has been fully and timely satisfied; and 2) there are no issues other than the Violations that would preclude grant of the Application.

14. Optima and Pikes Peak each agree to waive any and all rights they may have to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge the validity of this Consent Decree and the Adopting Order, provided the Consent Decree is adopted without change, addition or modification. If any Party (or the United States on behalf of the Commission), brings a judicial action to enforce the terms of the Consent Decree or Adopting Order, no Party will contest the validity of the Consent Decree or Adopting Order, and Optima and Pikes Peak will waive any statutory right to a *trial de novo*. Optima and Pikes Peak each further agree to waive any claims they may otherwise 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 herein.

15. The Parties agree that if a court of competent jurisdiction renders any of the provisions of this Consent Decree invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the Consent Decree, but rather the entire Consent Decree shall be construed as if not containing the particular invalid or unenforceable provision or provisions, and the rights and obligations of the Parties shall be construed and enforced accordingly. In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it will become null and void and may not be used in any manner in any legal proceeding.

16. The Parties agree that if any provision of this 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 Licensee does not expressly consent), such provision will be superseded by such Commission rule or order.

17. Optima and Pikes Peak each agree that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

18. The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between Optima, Pikes Peak and the Bureau concerning the Violations discussed herein.

19. This Consent Decree cannot be modified or amended without the advance written consent of all Parties.

20. 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 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.

21. This Consent Decree may be signed in counterparts and/or by telecopy and, when so executed, the counterparts, taken together, will constitute a legally binding and enforceable instrument whether executed by telecopy or by original signatures.

**MEDIA BUREAU
FEDERAL COMMUNICATIONS COMMISSION**

By: _____
William T. Lake, Chief

Date: _____

OPTIMA COMMUNICATIONS, INC.

By: _____
Joseph B. McCoy, III, President, Optima
Communications, Inc.,

Date: _____

PIKES PEAK TELEVISION, INC.

By: _____
J. Timothy Hannan, EVP and CFO of NPGCO, on
behalf of Pikes Peak Television, Inc.

Date: _____