MB 04-75

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 25 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:	)
	)
Clarification of the Territorial Exclusivity Limits of Section 73.658(b) of the Commissions Rules as Applied to the Restrictions on Access to NBC Network Programming in the Great Falls, Montana Community in a Certain Arrangement Involving Television Broadcast Stations KBAO, Lewistown, Montana; KBBJ, Havre, Montana; KJWY, Jackson Hole, Wyoming; KSWY, Sheridan, Wyoming; KCWY, Casper, Wyoming; and KTVH, Helena, Montana	)

REQUEST FOR EXPEDITED DECLARATORY RULING

Julian L. Shepard
Williams Mullen
A Professional Corporation
1666 K Street, N.W., Suite 1200
Washington, DC 20006-1200
(202) 293-8111
Counsel for Max Media of Montana LLC

February 25, 2004

Table of Contents

		Page
I.	INTRODUCTION	1
II.	SUMMARY	3
III.	FACTUAL BACKGROUND	5
IV.	THE ARRANGEMENT VIOLATES SECTION 73.658(b) OF THE COMMISSION'S RULES	11
V.	CONCLUSION	17

EXHIBITS

A Declaration of Robert C. Allen
B Declaration of A. Eugene Loving
Ex. B-1 1999 NBC Letter
Ex. B-2 September 24, 2001 Damiano Letter
Ex. B-3 September 9, 2003 Dietze e-mail
Ex. B-4 October 22, 2003 Falco Letter
C Declaration of Steven Soldinger
D Exhibit 6 of Sweetwater Broadcasting Company Form 315 (File No. BTCCT-20031124AOH)
E Signature page of Sweetwater Broadcasting Company Form 323 (File No. BOA-20030603AEM)
F Listing of NBC Station Affiliations on Sunbelt Communications Company's Internet Worldwide Web Site
G Petition to Revoke and Deny the Licenses, Authorizations and Applications of Rocky Mountain Broadcasting Company and Beartooth Communications Company, filed 2/13/04
H Technical Statement concerning Predicted Grade B Coverage Map Prepared by du Treil, Lundin & Rackley, Inc., Consulting Engineers

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)
	)
Clarification of the Territorial Exclusivity	)
Limits of Section 73.658(b) of the	)
Commissions Rules as Applied to the	)
Restrictions on Access to NBC Network	)
Programming in the Great Falls, Montana	)
Community in a Certain Arrangement	)
Involving Television Broadcast Stations	)
KBAO, Lewistown, Montana; KBBJ,	)
Havre, Montana; KJWY, Jackson Hole,	)
Wyoming; KSWY, Sheridan, Wyoming;	)
KCWY, Casper, Wyoming; and KTVH,	)
Helena, Montana	)

REQUEST FOR EXPEDITED DECLARATORY RULING

I. INTRODUCTION

Max Media of Montana LLC ("Max"), the licensee of television broadcast station KTGF, Great Falls, Montana, by its attorneys, hereby requests an expedited declaratory ruling pursuant to Section 1.2 of the Commission Rules, 47 C.F.R. § 1.2, and Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), to terminate a controversy and to resolve a dispute regarding a violation of Section 73.658(b) of the Commission's rules, 47 C.F.R. § 73.658(b), governing the limits on territorial exclusivity in relationships between television broadcast stations and network organizations. Throughout this pleading, the above-referenced stations, KBAO, Lewistown, Montana; KBBJ, Havre, Montana; KSWY, Sheridan, Wyoming; KCWY, Casper, Wyoming; KJWY, Jackson Hole, Wyoming; and KTVH, Helena, Montana are referred to collectively as the "Rogers Stations" because on their behalf James E. Rogers ("Rogers") entered into a certain multi-station network affiliation and territorial exclusivity

arrangement (the "Arrangement") with the NBC Television Network ("NBC") in his capacity as the controlling owner and President of Sunbelt Communications Company ("Sunbelt").[1]

Expedited action on this request is necessary and in the public interest to avoid injury to competition in the community of Great Falls, Montana, and to resolve the dispute and controversy adversely affecting a multi-station sale with pending applications for Commission consent to the assignment of broadcast television licenses (the "Transaction").[2] The extensive and unlawful territorial exclusivity granted to KTVH under the Arrangement hinders KTGF's future access to NBC network programming in Great Falls. KTGF's current marketability has been impaired, thereby preventing its orderly divestiture to facilitate the Transaction. The Arrangement must be immediately declared a violation of Section 73.658(b) in order to prevent further injury to competition in Great Falls, Montana and to avoid irreparable harm to KTGF. Further harm to competition in Great Falls and to KTGF could be avoided if the Arrangement is declared a violation of Section 73.658(b) and further implementation of the Arrangement is required to cease before contractual notice of the termination of KTGF's network affiliation agreement is given in July 2004.

---

[1] Sunbelt now has the controlling interest-of-record in only five of these stations. A request for a formal inquiry into the apparent unauthorized transfer of control in station KCWY, Casper, Wyoming, was made by Max Media of Montana LLC in response to the recent FCC Form 315 application seeking to transfer control of KCWY indirectly to Rogers. *See* Application File No. BTCCT-20031124AOH. By letter dated Feb. 5, 2004, the Chief of the Video Division dismissed the application, " . . . without prejudice to the issues raised by Max Media in its Petition to Deny the application."

[2] *See* FCC File Nos. BALCT-20030930AUQ and BALCT-20030930AVI. Max's affiliate, MMM License II LLC, is a party to that transaction – the proposed assignee – and has sought a temporary 180-day waiver of the duopoly rule to permit the orderly divestiture of station KTGF.

II. SUMMARY

The Rogers Stations are participants in a network affiliation and territorial exclusivity arrangement, which began on or before April 26, 1999, and which apparently has not previously been brought to the attention of the Commission.[3] In part, the Arrangement has resulted in: (1) NBC's affiliation with all of the Rogers Stations (except KTVH and KJWY, which were NBC affiliates before the arrangement); (2) the cancellation of an NBC network affiliation with KTWO, Casper, Wyoming; (3) the possible transfer of the NBC satellite affiliation for station KJWY, Jackson Hole, Wyoming, from parent station KVPI, Pocatello-Idaho Falls, Idaho, to parent station KCWY, Casper, Wyoming;[4] and (4) the imminent cancellation of NBC's network affiliation with KTGF, Great Falls, Montana. The involvement of the Rogers Stations in NBC's decision to cancel station KTGF's current NBC network affiliation agreement represents an over-reaching territorial exclusivity scheme for the benefit of Sunbelt and three of the Rogers Stations, KBBJ, Havre, Montana, KTVH, Helena, Montana, and KBAO, Lewistown, Montana.[5] This misconduct is at the heart of this declaratory ruling request.

---

[3] Max attempted to obtain copies of the network affiliation agreements for each of the Rogers Stations, but, with the exception of KJWY's NBC network affiliation agreement, dated January 22, 1996, was unable to obtain them from the publicly-available files of the Commission. See Declaration of Robert C. Allen, of Allen Communications Research, Inc., attached hereto as Exhibit A. The KJWY agreement on file does not appear to be current, including all amendments, because it does not permit KJWY to function as a satellite station of KCWY, Casper, Wyoming, as it currently is functioning.

[4] Station KJWY currently has "CP Off Air" status in CDBS. *See* http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/sta_det.pl?Facility_id=1283.

[5] KBBJ and KBAO operate as satellite stations of KTVH; KTVH and KBAO have predicted coverage contour overlaps with station KTGF.

This Arrangement presents more than a situation involving changes in the designated NBC network affiliates within each affected community through a shifting of NBC affiliations among stations licensed to each respective community. Indeed, it is not the new NBC affiliations that are problematic under the Arrangement. It is the extensive expansion of territorial exclusivity granted to three existing NBC affiliates, KTVH, in Helena, Montana, KBBJ, Havre, Montana, and KBAO, Lewistown, Montana, that is problematic. Under the Arrangement, NBC will not provide its network programming to any full power station licensed to Great Falls after July 2005. Essentially, the Arrangement results in the withdrawal of NBC network programming from any full power station licensed to Great Falls after July 2005, unless that station is owned by Sunbelt.[6]

Viewed in the context of the territorial exclusivity rule, the Arrangement between the Rogers Stations and NBC prevents and hinders the NBC affiliate licensed to Great Falls, Montana, from continuing its affiliation with NBC, and, thereby, from obtaining the network's programming. The Arrangement impermissibly extends the territorial exclusivity of three of the Rogers Stations, two of which are licensed to adjacent communities, KTVH, Helena, Montana, and KBAO, Lewistown, Montana, with predicted signal contour overlaps with KTGF. NBC intends to cancel the *Great Falls, Montana* network affiliate, KTGF, at the end of the current affiliation term, in favor of expanding the territorial exclusivity of the *Havre, Helena and Lewistown, Montana* NBC affiliates. *See* Exhibit H for an illustration of the station contours.

---

[6] None of the Rogers Stations are licensed to Great Falls, Montana; and none of the licensees of the Rogers Stations, their subsidiaries, affiliates, or parent organizations, now owns or operates a full power television station capable of becoming an NBC affiliate licensed to the community of Great Falls in the future. See Loving Declaration attached hereto as Exhibit B.

These Rogers Stations, two in adjacent communities with predicted signal contours that overlap the predicted signal contour of station KTGF, are given expanded NBC network territorial exclusivity for Great Falls, Montana, under the Arrangement by the planned termination of the NBC affiliation agreement with the station licensed to the community of Great Falls, KTGF. This is precisely the harm that the territorial exclusivity limits in Section 73.658(b) were intended to prevent. The facts set forth below are supported by documentary evidence and declarations of persons with personal knowledge of the facts. Max requests that the Commission declare the Arrangement a violation of Section 73.658(b), and to consider on its own motion taking all steps necessary against the Rogers Stations to redress this violation under Section 1.91 of the Commission's Rules, 47 C.F.R. § 1.91.

III. FACTUAL BACKGROUND

In 1999, Rogers and NBC entered into a confidential network affiliation and territorial exclusivity arrangement regarding, among other things, future NBC network affiliations with five of the Rogers Stations: (1) KBAO, Lewistown, Montana; (2) KBBJ, Havre, Montana; (3) KSWY, Sheridan Wyoming; (4) KCWY, Casper, Wyoming; (5) KJWY, Jackson Hole, Wyoming,[7] and expanded territorial exclusivity for three of the Rogers Stations, KTVH, Helena, Montana, KBBJ, Havre, Montana, and KBAO, Lewistown, Montana.[8] Evidence of this

---

[7] The Rogers Stations in Havre, Montana, and Lewistown, Montana, are satellites of KTVH, Helena, Montana. Havre and Lewistown are both communities within the Great Falls DMA. KTVH was already the NBC affiliate in Helena, Montana on the date of the NBC Letter. Sweetwater Broadcasting Company is the licensee of KCWY, Casper, Wyoming.

[8] NBC and Rogers are hereinafter referred to each as a "Party" and collectively as the "Parties" to the NBC Letter.

Arrangement surfaced when Max obtained a copy of a letter dated April 26, 1999, from John Damiano, then the Senior Vice President for Affiliate Relations at NBC, to Rogers (the "NBC Letter"). Max received copies of this letter from two separate sources. First, Max received a copy of the letter from a broadcast station broker in connection with the proposed sale of station KTVH, Helena, Montana, to Max.[9] Second, Max received a copy from Mr. Steven Soldinger of Wyoming Channel 2 Inc., who discovered the NBC Letter in the course of due diligence related to the acquisition of television stations KTWO and KKTU located in Casper, Wyoming.[10]

The NBC Letter describes the terms and conditions of a multi-market network affiliation and territorial exclusivity arrangement in which NBC, among other things, promised network affiliations with several Sunbelt stations in certain communities, and proposed not to renew certain NBC network affiliation agreements with non-Sunbelt stations located in two communities. The Parties recognized this Arrangement may "take time to implement." NBC acknowledged the arrangement as "an ongoing commitment between our two companies. . ."

The various obligations in the NBC Letter clearly were negotiated as a package between Sunbelt/Rogers and NBC, and there is no basis to assume that any of the various obligations are, or were, severable. It appears that the Rogers Stations were engaged collectively in the Arrangement with NBC through the negotiations and strategy of Rogers. Hence all of the Rogers Stations are connected to the violation of Section 73.658(b).

While not all of the Rogers Stations are identified by call sign in the NBC Letter, the stations named in the caption to this pleading that are not specifically named in the letter

---

[9] *See* Declaration of A. Eugene Loving attached hereto as Exhibit B, hereinafter referred to as the "Loving Declaration." *See also* Note 10 *infra*.

[10] *See* Declaration of Steven Soldinger, attached hereto as Exhibit C, with a copy of the NBC Letter attached to the Declaration (hereafter the "Soldinger Declaration").

appear to be the only stations in which Rogers had an interest in the locations referred to in the letter. Rogers appears to have acquired a non-controlling interest in Sweetwater Broadcasting Company, the licensee of KCWY, sometime before the date of the NBC Letter, including an option to acquire a controlling stock interest.[11] The date of exercise of that option remains unknown, although an ownership report for station KCWY filed in 2003 was signed by Rogers.[12]

The implementation of the Arrangement by Sunbelt/Rogers and NBC is nearly complete. Sunbelt stations appear to have become NBC affiliates in Casper and Sheridan, Wyoming.[13] NBC kept its promise not to renew its affiliation with the NBC affiliate in Casper, Wyoming.[14] KTVH's satellite stations in Havre and Lewistown, Montana now carry the NBC network programming.[15] Rogers is pursuing his obligation to expand KTVH's coverage of Great Falls, Montana through a pending booster station application for KTVH in downtown Great Falls,[16] and by pursuing other applications for translators and Low Power Television stations within the Great Falls DMA.[17]

---

[11] *See* Exhibit 6 of FCC Form 315 Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, filed on behalf of Sweetwater Broadcasting Company on November 15, 2003 (FCC File No. BTCCT-20031124AOH) attached hereto as Exhibit D.

[12] *See* Signature page of FCC Form 323 Ownership Report for Sweetwater Broadcasting Company (File No. BOA-20030603AEM) attached hereto as Exhibit E.

[13] *See* NBC affiliations listed on Sunbelt's Internet Worldwide Web site, a printout of which is attached hereto as Exhibit F from http://www.kvbc.com/Global/category.asp?C=7906&nav=8GH3eEzlI. *See also* Note 3, *supra*.

[14] *See* Soldinger Declaration attached hereto as Exhibit C.

[15] *See also* Loving Declaration attached hereto as Exhibit B.

[16] Rogers is in control of Sunbelt, which in turn controls Beartooth Communications Company, the licensee of KTVH, Helena, Montana. Beartooth is the applicant for a booster station in *downtown* Great Falls (File No. BNPTVB-20030915ACY). Max has filed an Informal Objection

The final step in the implementation of the Arrangement involves the non-renewal of KTGF's NBC affiliation which is expressly conditioned on the performance of obligations by Sunbelt/Rogers as described in the NBC Letter. In the paragraph beginning "Sixth," the NBC Letter states:

> NBC had made a decision that it will not renew its affiliation agreement with Channel 16 in Great Falls, Montana. That agreement will not expire until July 2005. It is NBC's understanding that ***if NBC does not renew that agreement,*** Beartooth Communications Company, the NBC affiliate in Helena, Montana, will establish a news bureau in Great Falls that would make KTVH in Helena competitive with the present ABC and CBS stations in Great Falls. It is NBC's further understanding that the signal from Channel 12 in Helena is either now or will be adequate to cover the Great Falls area so there will be no substantial reduction in the viewership of NBC programming in the Great Falls DMA. Channel 12 in Helena, with this added coverage of Channel 9 in Havre and Channel 13 in Lewistown, will serve further to cover the Great Falls DMA presently covered by Channel 16 in Great Falls. [Emphasis added.]

The first sentence in the paragraph beginning "Sixth" seems to suggest that NBC had already made the decision not to renew the KTGF network affiliation. However, the following sentence clarifies that the decision to terminate the KTGF affiliation was made contingent on the performance of certain obligations by Rogers/Sunbelt under the Arrangement. Notably, NBC made no mention of its intention to terminate the KTGF affiliation agreement

---

and Further Informal Objection against that application. In light of the facts set forth herein, Max intends to file a Further Informal Objection on grounds that the booster station application is contrary to the public interest because it was filed in furtherance of a serious violation of the FCC's territorial exclusivity rule.

[17] *See* Petition to Revoke and Deny the Licenses, Authorizations and Applications of Rocky Mountain Broadcasting Company and Beartooth Communications Company, filed by MMM License LLC on February 13, 2004, attached hereto (without exhibits) as Exhibit G.

when it consented to the assignment of the KTGF affiliation agreement from Continental to Max before the closing in August 2000.[18]

Upon learning of the NBC Letter several months after closing on the purchase of KTGF, Max sought clarification from NBC. NBC's John Damiano, in correspondence to Max, indicated on September 24, 2001, that NBC would grant Sunbelt the affiliation covering Great Falls if certain performance and viewership criteria were satisfied. *See* 2001 Damiano Letter attached hereto as Exhibit B-2. The 2001 Damiano Letter further stated that if such criteria were not satisfied, Max would be able to compete to retain the affiliation.[19] The engineering analysis performed by Max's consulting engineers indicated that the coverage improvements for KTVH would always be inferior to the coverage of KTGF. *See* Loving Declaration, Exhibit B.

Notwithstanding the apparent "open mind" of NBC on the issue of KTGF's 2005 NBC affiliation renewal, Max witnessed Rogers' and Sunbelt's continued efforts to extend KTVH's coverage into the Great Falls community. Max grew increasingly concerned about NBC's intentions and sought clarification from NBC in September 2003. The facts regarding NBC's response are set forth and described in the Declaration of A. Eugene Loving, the Chairman and Chief Executive Officer of Max Media LLC, the ultimate parent company of Max, attached hereto as Exhibit B (the "Loving Declaration"). The Loving Declaration is supported by the documentary evidence attached. For example, Mr. Loving received a copy of an internal NBC e-mail message from Jean Dietze to John Damiano, dated September 9, 2003, which stated

---

[18] *See* Loving Declaration, Exhibit B.

[19] In reliance upon the 2001 Damiano Letter, Max subsequently entered into a letter agreement and general release with NBC on February 8, 2002, whereby Max released NBC from all claims related to its purchase of KTGF. In return, NBC agreed to amend the Affiliation Agreement to improve the network's relationship with KTGF through June 30, 2005. Max does not seek herein to assert a claim or action against NBC in connection with the Arrangement.

"... our plan remains not to renew the affiliation of KTGF when it expires. Official notice will be sent to Max Media a year out. However, if they prefer we can send documentation earlier."[20] In addition, NBC, responding to Mr. Loving's correspondence, later confirmed that NBC intended to affiliate with Sunbelt in Great Falls when Max's Affiliation Agreement ended in July 2005.[21]

Every fact indicates that NBC intends not to renew its current NBC affiliation agreement with station KTGF when it expires in July 2005. Max is not in breach or in default of any of its obligations under the KTGF NBC affiliation agreement. NBC has not based its decision on any breach or default by Max under the current network affiliation agreement or any other independent business justification.

In sum, the 1999 Arrangement described in the NBC Letter appears to remain in full force and effect. The Parties are acting in accordance with their respective obligations under the Arrangement. Indeed, all of the steps necessary to implement the Arrangement have occurred, or are in the process of occurring, with the exception of the final step, the actual termination of KTGF's NBC affiliation agreement. The KTGF NBC network affiliation agreement requires NBC to provide notice of termination 12 months in advance – in July 2004 – just four months from now.

---

[20] *See* e-mail messaged attached as Exhibit B-3 to Loving Declaration.

[21] *See* correspondence attached as Exhibit B-4 to Loving Declaration

IV. THE ARRANGEMENT VIOLATES SECTION 73.658(b) OF THE COMMISSION'S RULES

Section 73.658(b) of the FCC's rules, 47 CFR § 73.658(b), the territorial exclusivity rule, states in pertinent part that:

> No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another broadcast station located in the same community from broadcasting the network's programs not taken by the former station, *or which prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization* (emphasis added). . . As employed in this paragraph, the term "community" is defined as the community specified in the instrument of authorization as the location of the station.

Section 73.658(b), as originally adopted in 1945, permitted a station to contract with a network for the exclusive right to broadcast programming within its service contour, even if that service contour overlapped with the contour of a station licensed to another community. However, the Commission subsequently amended the rule in 1955 to prohibit certain arrangements, effectively limiting the geographic boundaries in which a television broadcast station may contract for territorial exclusivity. The 1955 Report and Order noted that the original rule was not "conducive to the rapid and effective development of television service to the public."[22] In adopting the amended rule, which is the rule in force today, the Commission stated:

> Section 3.568(b) of the Commission Rules presently permits a television station which renders coverage to a substantial portion of the service area of a station located in another community to contract with a network to prevent the station in the other

[22] *Report and Order*, Docket No. 10989, 12 R.R. 1537, 1542 (1955).

> community from carrying particular network programs; even though the sponsor of the program or the network may desire that the latter station also broadcast the programs. The proposed amendment would revise the above section so as to preclude a station in one community from depriving stations in other communities of the opportunity of securing and carrying the same network programs. Under the Commission's proposal, a station would be permitted to enter into agreements with networks whereby it would be granted the first call upon network programs only in the community in which it is located. [Footnote omitted.][23]

The circumstances and concerns that led the Commission to amend the rule in 1955 remain valid concerns today. The Commission described those circumstances and the importance of the 1955 amendment, as follows:

> At this stage in the development of the television industry, ***network programming is essential to the profitable operation of most stations; and, in many instances, its availability may be determinative of a station's ability to survive and furnish a needed television service to the public***. The obtaining of network programs is such a vital and valuable asset to stations that we believe maximum opportunity should be given to all stations to compete for network programming, and that any of our Rules which might operate to restrain competition among stations for network programming should be kept to the minimum required to protect the public interest and to insure good program service to the public.[24] [Emphasis added.]

There have been very few reported decisions under Section 73.658(b). The FCC has clarified that this rule was not adopted to guarantee a station the right to carry network programming.[25] Instead, the rule was adopted to ensure stations the maximum opportunity to

---

[23] *Id.* at ¶ 3.

[24] *Id.* at ¶ 9.

[25] *Letter to Eugene F. Mullin and Nathaniel F. Emmons,* 10 FCC Rcd 4416, 78 RR 2d 88 (1995).

compete for the network's programming. In cases applying this rule, the FCC has affirmed that networks have no obligation to affiliate with a particular station and that the FCC will not ordinarily interfere with the business judgments of networks.

In 1995, the Chief of the Video Services Division denied a Petition for Revocation of License filed by Media America Corporation ("MAC"), the owner of KTVK(TV), Phoenix, Arizona, against Scripps Howard Broadcasting Company ("Scripps"), alleging violations of Section 73.658(b).[26] The facts of that case involve a multi-market network affiliation agreement between Scripps and ABC in which MAC alleged ABC was forced to change its station affiliation in Phoenix to the Scripps station in order to retain its affiliations with Scripps' stations in Detroit and Cleveland. The result of the agreement was that ABC refused to renew MAC's Phoenix affiliation, and gave it to the Scripps Phoenix station.

The Mass Media Bureau framed the issue in the MAC case as follows: ". . . whether a multi-market agreement, which results in the shift of affiliates in a community of license because of concerns with other markets, also part of that agreement, violates our territorial exclusivity rule."[27] ABC contended that it was not forced to change the Phoenix station affiliation, but it did so as an exercise of its independent business judgment. Scripps and ABC made two arguments: (1) that Section 73.658(b) only prohibits agreements which hinder or prevent a station in an overlapping or neighboring area from carrying a network's programming; and (2) that Section 73.658(b) applies only where a community of license is being deprived of its own network affiliate – not where there is a shift of network affiliation in the same community of

---

[26] *Id.*

[27] *Id.*

license. These two factual distinctions are present in the facts of the Arrangement involving NBC and the Rogers Stations.

MAC's Petition was denied by the Bureau because there was simply a change of ABC affiliations among stations licensed to Phoenix, something that is beyond the scope of the rule's prohibitions. The FCC stated, "A network's decision to switch affiliates in a community of license, even if such as change arises as a result of a multi-market agreement, does not threaten the public's interest in market-based network service and is not the kind of agreement or understanding that fall within the intended scope of the rule."[28]

The facts of the Sunbelt/Rogers/NBC Arrangement are materially different from the facts in the MAC case. In MAC there was no territorial exclusivity expansion by out of market stations. In the Arrangement at issue here, there is an expansion of KTVH's, KBBJ's and KBAO's territorial exclusivity. While the Arrangement does involve the shifting of NBC affiliations among stations licensed to certain communities, there is no shifting of the NBC network affiliation in the Great Falls community because there is no full power station controlled by Sunbelt or Rogers licensed to Great Falls. In fact, the Arrangement involves exactly the conduct the Commission has said the rule is intended to prohibit – overreaching territorial exclusivity involving stations with signal contours overlapping the victim station.

Attached as Exhibit H is the Technical Statement Concerning Predicted Grade B Coverage Map prepared for Max by du Treil, Lundin & Rackley, Inc., Consulting Engineers. The exhibit illustrates the overlap of the predicted coverage contours of KTVH, Helena, Montana, and KBAO, Lewistown, Montana with the predicted coverage contour of KTVH, Great Falls, Montana. In addition, the exhibit illustrates that KTVH, KBBJ and KTGF are

licensed to communities in separate and distinct DMAs (KBBJ and KBAO are satellites of KTVH, the Helena station).

Max does not argue that NBC is required to have an NBC affiliate in Great Falls, Montana. NBC is free to terminate its affiliation with any of its affiliated stations in any market by not renewing such affiliations based on its *independent* business judgment. However, the facts of this case present a situation where there has been active interference with NBC's business judgment by the Rogers Stations in the form of an illegal arrangement for expanded territorial exclusivity. NBC's business judgment regarding KTGF's NBC affiliation agreement is *not independent*. It is driven by the Arrangement with Rogers and Sunbelt.

Accordingly, Max respectfully requests a Declaratory Ruling that the final step in the Arrangement – granting of expanded territorial exclusivity to three of the Rogers Stations, KTVH, Helena, Montana, KBBJ, Havre, Montana, and KBAO, Lewistown, Montana, by the non-renewal of the NBC affiliation agreement with KTGF in Great Falls – violates Section 73.658(b) of the Commission's rules. All of the Rogers Stations have violated Section 73.658(b) as they are each part of the Arrangement in violation of the prohibition against hindering another station located in a different community from broadcasting any program of the network organization. The NBC Letter, read in the light of the conduct of the Parties, constitutes an *express arrangement or understanding* between Sunbelt and NBC, which includes the cancellation of KTGF's NBC affiliation in 2005. Without the affiliation, practically speaking, Max cannot obtain the NBC programming on a first-call basis. Because neither Rogers nor Sunbelt have a full power station licensed to Great Falls, Montana (to become the new NBC

---

[28] *Id.* at 4417.

affiliate in Great Falls), the rule prohibits the Rogers Stations from having an *arrangement* with NBC that *hinders stations licensed to Great Falls from broadcasting the NBC network programs.*

Under the Arrangement, NBC is to terminate the NBC network affiliation of KTGF in July, 2005, without affiliating with any other station licensed to the community of Great Falls, thereby expanding the territorial exclusivity of two NBC affiliated stations with overlapping signal contours with KTGF. Before the 1955 amendment to the territorial exclusivity rule, this type of conduct was permissible. However, for the reasons set forth in the rulemaking and quoted above, the Commission deemed this very type of situation contrary to the public interest, and forbade it by amendment to the rule.

Sunbelt and the Rogers Stations may attempt to argue that there is no real injury to competition or the public interest by virtue of the territorial exclusivity rule violation on the theory that the Helena and the Great Falls communities should be treated one-in-the-same for purposes of Section 73.658(b). However, that position is patently inconsistent with the plain meaning of the rule, is not supported by the facts, and would harm the public interest. First, the rule plainly defines "community" as the "community specified in the instrument of authorization." The instruments of authorization reveal that KTGF is licensed to Great Falls; KTVH is licensed to Helena; KBBJ is licensed to Havre; and KBAO is licensed to Lewistown. Second, the Helena and Great Falls communities are <u>not</u> treated separately under current audience measurement definitions -- these communities fall into distinct DMAs, as illustrated in Exhibit H. Third, the contour overlaps of the two Rogers Stations, KTVH and KBAO, with KTGF do not result in Rogers Stations covering all of the areas served by KTGF. Much of the area now covered by KTGF's contour would <u>not</u> receive service from KTVH,

KBBJ, or KBAO. Fourth, there has been no Petition For Rule Making, and no Petition For Special or Extraordinary Relief, filed by the Rogers Stations and granted by the FCC to designate Helena and Great Falls as hyphenated markets for purposes of Section 73.658(b). Indeed, it would be a denial of due process to grant such extraordinary relief on an *ex post facto* basis. Moreover, the Commission announced its intention not to depart from formal procedures regarding redesignating television markets through rulemaking in the *Press Television Corp.* decision.[29]

V. CONCLUSION

The violation of the territorial exclusivity rule occurred when the Rogers Stations entered into the Arrangement with NBC. The very existence of the Arrangement violates Section 73.658(b). However, the harm to competition in the Great Falls community continues. If the Commission declares the Arrangement to be in violation of the territorial exclusivity rule and the Rogers Stations are required to take all necessary steps to cease further implementation of the Arrangement before contractual notice of the termination of KTGF's NBC affiliation agreement is given by NBC in July 2004, further harm could be mitigated.

For the reasons set forth above, Max respectfully requests that the Commission declare the Rogers/NBC Arrangement a per se violation of Section 73.658(b), and initiate all steps necessary to redress this violation under Section 1.91 of the Commission's Rules, 47 C.F.R. § 1.91, including the imposition of a cease and desist order.

---

[29] *Petition for Extraordinary Relief* filed by Press Television Corp., 71 RR 2d 1045; 7 FCC Rcd 7218; 1992 FCC LEXIS 6298; FCC 92-460 (Nov. 9, 1992).

Respectfully submitted,

MAX MEDIA OF MONTANA LLC

By:

Julian L. Shepard
Williams Mullen
A Professional Corporation
1666 K Street, N.W., Suite 1200
Washington, DC 20006-1200
(202) 293-8111
Its Attorneys

February 25, 2004

CERTIFICATE OF SERVICE

I, Angela C. Spencer, do hereby certify that on this 25th day of February, 2004, a copy of the foregoing "Request for Expedited Declaratory Ruling" was served by first class United States mail, postage prepaid, addressed to:

James E. Rogers
Jonathan Lichstein
Sunbelt Communications Company
1500 Foremaster Lane
Las Vegas, NV 89101

For:
Sunbelt Communications Company (KBAO (TV), KBBJ (TV) and KSWY (TV)
Two Ocean Broadcasting Company, (KJWY (TV))
Sweetwater Broadcasting Company, (KCWY (TV)) and
Beartooth Communications Company (KTVH (TV))

J. Dominic Monahan, Esq.
Ulvaas, Cobb, Richards & Fraser, PC
777 High Street, Suite 300
P.O. Box 10747
Eugene, OR 97440-2747

Mr. Frank Haynes
Beartooth Communications Company
1790 Vassar Street
Reno, NV 89502

Mr. Stanley P. Cyphers
Vice President-Operations
Sweetwater Broadcasting Company
1009 Central
P.O. Box 419410
Kansas City, MO 64141

Uhlmann/Latshaw Broadcasting LLC
c/o Thomas J. Hutton, Esq.
5823 Potomac Avenue, N.W.
Washington, DC

Lawrence Tu, Esquire
General Counsel
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, NY 10111

Mr. John F. Damiano
Senior Vice President – Affiliate Relations
NBC Television Network
30 Rockefeller Plaza
New York, NY 10112

Angela C. Spencer