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April 13, 2017

Federal Communications Commission
Consumer & Governmental Affairs Bureau
Disability Rights Office
Attn: Sherita Kennedy
445 12th Street, S.W.
Washington, D.C. 20554

Via First Class U.S. Mail

Re: Official Notice of Informal Complaint
FCC Ticket No. 1498459

Dear Ms. Kennedy:

This firm is counsel to Forum Communications Company, licensee of Television Station WDAY-TV, Fargo, North Dakota (“WDAY”). Forum Communications Company is also the parent company of KBMY-KMCY, LLC, which is the licensee of Television Station KBMY(TV), Bismarck, North Dakota (“KBMY” and, together with WDAY, the “Stations”).¹

This letter responds to the informal complaint submitted to the Federal Communications Commission (“FCC”) by Mr. Brian Billman, pursuant to Section 713 of the Communications Act, 47 U.S.C. § 613, and Section 79.2 of the FCC’s Rules, 47 C.F.R. § 79.1. This complaint has been assigned Ticket Number 1498459 by your office (the “Complaint”).²

¹ The Complaint refers in passing to KBMY as being affiliated with WDAY, and we believe that Mr. Billman, who lives in Bismarck, typically watches KBMY and not WDAY. In the Complaint, Mr. Billman identifies channel 1017 as the channel on which he was watching the Tournament on March 9. Channel 1017 on the BEK Communications cable system is KBMY’s primary program stream—affiliated with the ABC Television Network—which airs WDAY’s newscasts. On Thursday, March 9, neither WDAY nor KBMY carried any Tournament games on its primary program stream; Tournament games on March 9 were aired only on the Stations’ “WDAY’Z XTRA” multicast channels, which are the .3 channels on both Stations.

² By email dated April 3, 2017, you graciously granted a brief extension of time for the filing of this response to and including April 21, 2017. Thus, this response is timely.

Based on the Complaint, the Stations understand the issue to be that Mr. Billman desired, but was unable, to access closed captions in the Stations' broadcast of the North Dakota High School Basketball Tournament (the "Tournament") on the evening of March 9, 2017. On March 9, 2017, WDAY and KBMY both aired Tournament games from 2 p.m. until 10 p.m. central time, but only on their .3 multicast channels, which are generally branded as "WDAY'Z XTRA." The Stations' .3 multicast channel is carried on the BEK Communications cable system as channel 1016.³

The Stations' .3 WDAY'Z XTRA multicast channel has always grossed revenues of less than \$3,000,000. As such, the Stations' closed captioning obligations on the .3 multicast program stream have been limited to the passing through of existing closed captions. As a result, one of the Commission's exemptions is applicable to the instant case:

For purposes of determining compliance with this section, any video programming or video programming provider that meets one or more of the following criteria shall be exempt to the extent specified in this paragraph. . . .

No video programming provider shall be required to expend any money to caption any channel or stream of video programming producing annual gross revenues of less than \$3,000,000 during the previous calendar year other than the obligation to pass through video programming closed captioned when received pursuant to paragraph (c) of this section. For the purposes of this paragraph, each programming stream on a multicast digital television channel shall be considered separately for purposes of the \$3,000,000 revenue limit.

See 47 C.F.R. § 79.1(d)(12). The Tournament telecast that aired on WDAY's and KBMY's .3 multicast WDAY'Z XTRA channel on Thursday, March 9, 2017, did not contain any closed captioning for the Stations to pass through, and, pursuant to Section 79.1(d)(12), the Stations did not add any closed captioning to the programming.

In light of the information provided above, the Stations respectfully submit that, at all times relevant to the Complaint, the Stations were in compliance in all respects with the Commission's closed captioning rules and request that the Complaint be dismissed with no further action taken. Each year, the Stations go through a careful and deliberate budgeting process, which necessitates thoughtful consideration of the allocation of resources relating to a host of issues, including service to each Station's local community and regulatory compliance (including but not limited to video programming accessibility such as closed captioning). The Tournament telecast is one program that is typically considered as part of the annual budgeting process, and the Stations will consider the feasibility of providing closed captioning for the Tournament during the next iteration of that process.

³ A link to the channel lineup for BEK Communications is available at: https://www.bektel.com/image/cache/BEKTV_Channel_Lineup_1.3.17_Alpha_Small.pdf.

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This Response is supported by the attached Declaration and Certification of Forum Communications Company's Vice President and the Stations' General Manager, which indicates that she has reviewed this letter and that to the best of her knowledge the information is true and correct.

Should you have any further questions regarding the above-referenced Complaint, please do not hesitate to contact the undersigned.

Sincerely,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.



Stephen Hartzell
Counsel to Forum Communications Company

Enclosure

cc: Susan Kimmel, FCC (via Susan.Kimmel@fcc.gov)
Sherita Kennedy, FCC (via Sherita.Kennedy@fcc.gov)
Brian Billman, 6420 Tiffany Drive, Bismarck, ND (via USPS)

DECLARATION AND CERTIFICATION OF LICENSEE

I, Mari Ossenfort, hereby declare, under penalty of perjury, as follows:

1. I am greater than eighteen years of age and am competent to make this Declaration and Certification. I am General Manager of WDAY-TV and of KBMY(TV) and Vice President of Broadcasting of Forum Communications Company, which is the licensee of WDAY-TV, Fargo, North Dakota, and the parent company of the licensee of KBMY(TV), Bismarck, North Dakota. I have held these positions at all relevant times.

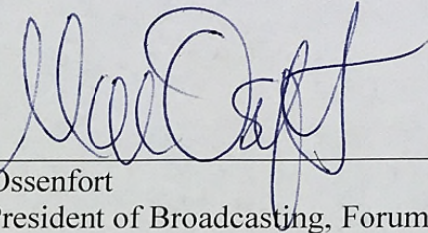
2. My signature below indicates, under penalty of perjury, that I have reviewed the Complaint and am familiar with its contents, I have reviewed the foregoing correspondence from Stephen Hartzell in response to the Complaint (the "Response"), and, except for those of which official notice may be taken or those that are supported by references to separate authority, I hereby verify, to the best of my knowledge, information, and belief, the truth and accuracy of the factual information contained therein.

[signature appears on following page]

The undersigned, under penalty of perjury, declares the foregoing to be true, complete, and correct to the best of her personal knowledge.

This, the 13th day of April, 2017.

By:

A handwritten signature in blue ink, appearing to read 'Mari Ossenfort', written over a horizontal line.

Mari Ossenfort
Vice President of Broadcasting, Forum Communications
Company
and General Manager of WDAY-TV and KBMY(TV)