

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

In the Matter of )  
 )  
Waiver of Digital Testing Pursuant )  
To the Satellite Home Viewer Extension ) MB Docket No. 05-317  
And Reauthorization Act of 2004 )

ORDER

Adopted: October 30, 2006

Released: October 31, 2006

By the Chief, Media Bureau:

1. In December 2004, Congress enacted the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”),<sup>1</sup> which amended the copyright laws and the Communications Act of 1934, as amended (the “Act”), to further aid the competitiveness of satellite carriers and expand program offerings for their subscribers. Specifically, SHVERA amended Section 339(a)(2)(D) of the Act to permit satellite subscribers to qualify for satellite retransmission of distant digital network signals under circumstances specified in the Act.<sup>2</sup> Of relevance here, a satellite subscriber whose household is predicted to be served<sup>3</sup> by the analog signal of a local network station, and who is seeking a distant digital signal of another station affiliated with the same network as that local network station, may attempt to demonstrate eligibility for reception of the distant digital signal via satellite based on a signal test to determine if its over-the-air digital signal of the local network station does not meet the digital signal intensity standard in Section 73.622(e)(1) of the Commission’s rules.<sup>4</sup>

2. SHVERA also amended Section 339(a)(2)(D)(viii) of the Act to provide for stations to request a waiver that would prohibit satellite subscribers from receiving or conducting a digital signal strength test.<sup>5</sup> The Commission is authorized to grant a waiver for up to six months, and to renew the waiver upon a proper showing that the station’s digital signal coverage continues to be limited due to the unremediable presence of one of the six statutory criteria.

<sup>1</sup> The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat 2809, 3393 (2004) (to be codified at 47 U.S.C. § 339), § 204(b). SHVERA was enacted as title IX of the “Consolidated Appropriations Act, 2005.”

<sup>2</sup> See 47 U.S.C. § 339(a)(2)(D)(i)(III), as amended by Section 204 of SHVERA.

<sup>3</sup> See 47 U.S.C. § 339(c)(3) (mandating the Individual Location Longley-Rice (ILLR) model to predict the ability of individual locations to receive analog signals of Grade B intensity).

<sup>4</sup> See 47 U.S.C. § 339(a)(2)(D)(i)(I), as amended by Section 204 of SHVERA.

<sup>5</sup> See 47 U.S.C. § 339(a)(2)(D)(viii), as amended by Section 204 of SHVERA. The statute provided that a subscriber could request such a test beginning April 30, 2006, if such local network station is within the top 100 television markets and has received a tentative channel designation on its allotted digital channel or has lost interference protection; or, beginning July 15, 2007, for any other full power local network station. See 47 U.S.C. § 339(a)(2)(D)(vii), as amended by Section 204 of SHVERA.

3. Sixty-one stations requested a waiver by the November 30, 2005 filing deadline.<sup>6</sup> By Order adopted April 28, 2006,<sup>7</sup> the Media Bureau granted six-month digital testing waivers for 23 stations, finding that their digital signal coverage was limited due to the need for international coordination or approvals, clear zoning or environmental legal impediments, or force majeure. The Bureau denied digital testing waivers for another 23 stations, concluding that their permittees or licensees failed to demonstrate, by clear and convincing evidence, that their digital signal coverage was limited due to force majeure or that there was a substantial decrease in their digital signal coverage area due to the necessity of using a side-mounted antenna. The Bureau also denied two untimely filed requests, and returned waiver requests for 12 stations that were not subject to the April 30, 2006 deadline.

4. In the *Digital Testing Waiver Order*, the Media Bureau reminded the permittees and licensees that SHVERA precludes the Commission from granting a waiver for a period beyond six months, and directed that any further extension requests be filed no later than 60 days prior to the expiration date.<sup>8</sup> By Public Notice released September 27, 2006,<sup>9</sup> the Media Bureau established a deadline for the filing of oppositions and responses. Fifteen of the 23 stations that were granted digital testing waivers have filed requests for extension of their waiver, which are unopposed.

5. We have carefully considered each digital testing waiver extension request, as directed by Congress. As before, we have considered all of the facts presented by the parties, as well as station filings and information contained in the Commission's Consolidated Database System, which are available to the public. We hereby grant all fifteen requests for extension for the reasons set forth below. Again, we emphasize that denial of a waiver request will not automatically result in the delivery of a distant digital signal to a subscriber, but merely permits a subscriber to request a digital signal test.<sup>10</sup> If further waiver extensions are needed, and in order to ensure action before the expiration date of the waiver extensions granted herein, permittees and licensees must file any further extension request by February 28, 2007. Any oppositions to such further extensions should be filed with the Commission and served on the relevant parties by March 15, 2007, and any replies to such oppositions should be filed and served no later than March 26, 2007.

**6. Need for International Coordination or Approvals.** Section 339(a)(2)(D)(viii)(I) of the Act acknowledges that a station's digital signal coverage may be limited due to the need for international coordination or approval of applications for a new or modified digital construction permit. The Bureau initially granted ten waiver requests under this criteria, and five of these stations have filed for an extension; Telefutera Los Angeles LLC ("Telefutera"), the permittee of KFTR-DT (TEL), Ontario, California; KVOA Communications,

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<sup>6</sup> One station later withdrew its waiver request.

<sup>7</sup> *In the Matter of Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 21 FCC Rcd 4813 (2006) ("*Digital Testing Waiver Order*").

<sup>8</sup> *Id.* at 4828.

<sup>9</sup> *Procedures for Filing Oppositions and Responses Regarding Requests for Digital Testing Waivers Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, MB Docket No. 05-317, DA 06-1919.

<sup>10</sup> See *Digital Testing Waiver Order*, 21 FCC Rcd at 4815.

Inc. (“KVOA”), the permittee of KVOA-DT (NBC), Tucson, Arizona; New York Television, Inc. (“NYT”), the licensee of WNYO-DT (MNT), Buffalo, New York; Winston Broadcasting Network, Inc. (“Winston”), the permittee of WBNX-TV (CW), Akron, Ohio; and WSMH Licensee LLC (“WSMH”), the permittee of WSMH-DT (FOX), Flint, Michigan. Telefutera, KVOA, and WSMH state that they are unable to complete construction of their authorized DTV facilities because international coordination is still on-going. Winston states that Industry Canada has approved the proposed digital facilities for WBNX-DT, and the Commission granted its pending application for a digital construction permit on April 21, 2006. Winston further states that while it is in the process of constructing its digital facilities, construction will not be completed by October 31, 2006, when its present waiver expires. NYT also states that the digital construction permit for WNYO-DT was granted on January 4, 2006, and that it is working to construct the facility by the January 2007 construction deadline. With respect to these five stations, their applications for DTV construction permits are either awaiting approval by the Canadian or Mexican governments, or were granted less than a year ago. Accordingly, we grant a six-month extension of the digital testing waivers for KFTR-DT, KVOA-DT, WNYO-DT, WSMH-DT, and WBNX-DT.

7. **Zoning or Environmental Legal Impediments.** Section 339(a)(2)(d)(vii)(II) of the Act permits a waiver based upon a showing that the station’s digital signal coverage is limited because of the “unremediable” presence of “clear zoning or environmental legal impediments.” The Bureau initially granted ten waiver requests under this criterion, and eight of these stations have filed for a six-month extension.

8. Lambert Broadcasting of Burlington, LLC, the permittee of WVNY-DT (ABC), Burlington, Vermont; Smith Media License Holdings, LLC, the permittee of WFFF-DT (FOX), Burlington, Vermont, and Hearst-Argyle Stations, Inc., the permittee of WPTZ-DT (NBC), North Pole, New York, are members of a coalition of television stations which propose to co-locate their DTV facilities on top of Mt. Mansfield in Vermont. While they received zoning approval from the State of Vermont in late spring 2005, and immediately began construction of the new tower, due to state permit constraints and weather conditions at Mt. Mansfield, the coalition was only able to complete the transmitter building and tower foundations by November 30, 2005.<sup>11</sup> In their extension requests, they state that the tower has now been constructed and believe that they will be able to commence on-air testing in the fall of 2006. Because they are unsure whether their facilities will be completed and on the air before their initial testing waivers’ expiration on October 31, 2006, however, they request an extension. In view of the forgoing, we grant a six-month extension of the digital testing waivers for WVNY-DT, WFFF-DT and WPTZ-DT.

9. Raycom National, Inc. (“Raycom”), the permittee of stations KHNL-DT (NBC), Honolulu, Hawaii and KOGG-DT (NBC), Wailuku, Hawaii, also request extensions based on zoning and environmental impediments. With respect to KHNL-DT,<sup>12</sup> the Honolulu City Council passed an ordinance in the 1980’s banning construction of any new television and radio

<sup>11</sup> See *Digital Testing Waiver Order*, 21 FCC Rcd at 4819.

<sup>12</sup> *Id.* at 4819-20.

towers. KHNL-DT is currently operating at reduced facilities pursuant to an STA.<sup>13</sup> While Raycom has located an existing site to construct its maximized DTV facilities for KHNL-DT, it cannot construct its maximized facility until an existing analog antenna is removed at the end of the DTV transition. With respect to KOGG-DT, Raycom has entered into an agreement for an acceptable site for its digital facilities, and filed the required applications for the right to subdivide the property. According to Raycom, construction is scheduled to start in September 2006, and it anticipates that, barring unforeseen delays, equipment testing should begin in May 2007. Because these stations' digital signals are limited due to clear zoning impediments, we grant a six-month extension of the digital testing waivers for KHNL-DT and KOGG-DT.

10. The Lake Cedar Group ("LCG"), a consortium of Denver television station authorization holders, has applied to Jefferson County, Colorado, for authority to construct a new multiple-use transmission tower on Lookout Mountain. Multimedia Holdings Corporation ("Multimedia"), the permittee of KUSA-DT (NBC) and KTVD-DT (UPN), and CBS Television Stations, Inc., the permittee of KCNC-DT (CBS), all of which are members of LCG with their stations licensed to Denver, have requested extensions of their digital testing waivers based upon the ongoing local zoning proceedings. Because these stations' digital signals are limited due to clear zoning impediments, we grant a six-month extension of the digital testing waivers for KUSA-DT, KCNC-DT and KUPN-DT.

11. **Force Majeure.** SHVERA further provides that a waiver request may be granted when the station's digital signal coverage is limited due to force majeure.<sup>14</sup> Force majeure is defined as "an unexpected and disruptive event which may operate to excuse a party from a contract."<sup>15</sup> The Media Bureau initially granted four waiver requests under this criterion, and two of these stations filed for a six-month extension.

12. The DTV transmitter for NBC Telemundo License Co., the permittee of WNBC-DT (NBC), New York, New York, was located on the World Trade Center, which was destroyed in the terrorist attack on September 11, 2001. The Freedom Tower, which is to be built at the site of the destroyed World Trade Center, has not yet been constructed. The terrorist attack in 2001 clearly constitutes force majeure and justifies grant of a six-month extension of the digital testing waiver for WNBC-DT.

13. The analog and digital facilities of New Orleans Hearst-Argyle Television Inc. ("Hearst-Argyle"), the permittee of WDSU-DT (NBC), New Orleans, Louisiana, were destroyed by Hurricane Katrina in September 2005. Hearst-Argyle recently restored its analog signal to the air, but has been unable to construct its digital facilities. Hurricane Katrina clearly constitutes force majeure and justifies the grant of a six-month extension of the digital testing waiver for WDSU-DT.

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<sup>13</sup> File No. BDSTA-20041012AKB, granted November 16, 2004. Raycom's application for an extension of the STA for KHNL-DT (File No. BEDSTA-20050629ABP) remains pending.

<sup>14</sup> See 47 U.S.C. § 339(a)(2)(D)(viii)(III).

<sup>15</sup> *Webster's Encyclopedic Unabridged Dictionary of the English Language* at 554 (1989). Force majeure is broader than "act of God," which is limited to natural forces. *Id.*

14. ACCORDINGLY, IT IS ORDERED that the requests for waiver extension from the television stations set forth in Appendix A of this Order ARE GRANTED and the first permissible date for digital testing for these stations IS EXTENDED to six months from October 31, 2006, to April 30, 2007. Any further waiver extension requests must follow the pleading schedule set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg  
Chief, Media Bureau