

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: April 28, 2006

Released: May 1, 2006

By the Chief, Media Bureau:

1. In December 2004, Congress enacted the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”),¹ 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.² Of relevance here, a satellite subscriber whose household is predicted to be served³ 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.⁴ A subscriber may 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.⁵

¹ 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. § 325), § 204(b). SHVERA was enacted as title IX of the “Consolidated Appropriations Act, 2005.”

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

³ 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).

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

⁵ See 47 U.S.C. § 339(a)(2)(D)(vii), as amended by Section 204 of SHVERA. The statute does not define the top 100 Markets. In the context of the digital transition and station build out requirements, the Commission’s schedule for construction and operation of broadcasters’ allotted digital broadcast facilities was based on market rank. See 47 C.F.R. § 73.624(d). The term “television market” is defined in this context as the Designated Market Area (“DMA”) as defined by Nielsen Media Research as of April 3, 1997. See 47 C.F.R. § 73.624(d)(ii). The Commission has continued to use this definition in connection with transition deadlines, including the “use-or-lose” build out deadlines in the Second DTV Periodic Review. See *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, at ¶ 12 and n.16, citing *Fifth Report and* (continued....)

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.⁶ The statute provides that such waiver requests must be filed no later than November 30, 2005, for local network stations subject to the April 30, 2006 testing implementation date (the “April Deadline”), and establishes an April 30, 2006 statutory deadline for Commission action on any such waiver requests. 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 statutory criteria.⁷

3. Section 339(a)(2)(D)(viii) of the Act sets forth the criteria and the standard for the Commission’s review of station requests for waiver of a digital signal strength test. To be grantable, a waiver request must provide clear and convincing evidence that the station's digital signal coverage is limited due to the unremediable presence of one or more of the following criteria:

- (I) the need for international coordination or approvals;
- (II) clear zoning or environmental legal impediments;
- (III) force majeure;
- (IV) the station experiences a substantial decrease in its digital signal coverage area due to the necessity of using a side-mounted antenna;
- (V) substantial technical problems that result in a station experiencing a substantial decrease in its coverage area solely due to actions to avoid interference with emergency response providers; or
- (VI) no satellite carrier is providing the retransmission of the analog signals of local network stations under section 338 in the local market.

The Act further provides that under no circumstances may such a waiver be based upon financial exigency. All waiver requests are required to be filed not less than five months from the pertinent implementation deadline.⁸

4. By Public Notice released November 17, 2005,⁹ the Commission set forth the procedures for network stations to request such a waiver. The Commission received waiver requests for 61 stations, one of which was subsequently withdrawn by the licensee.¹⁰ EchoStar

(...continued from previous page)

Order, 12 FCC Rcd at 12840-41, ¶ 76 (1997); 47 C.F.R. § 73.624(d). We apply the same definition for top 100 television markets here.

⁶ See 47 U.S.C. § 339(a)(2)(D)(viii), as amended by Section 204 of SHVERA.

⁷ *Id.*

⁸ *Id.*

⁹ *TV Station Requests for Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 to be Filed by November 30, 2005 or February 15, 2007*, Public Notice, DA 05-2979 (rel. November 17, 2005) (“*Waiver Public Notice*”).

¹⁰ The withdrawn waiver request was for KPHO-DT, Phoenix, Arizona, licensed to Meredith Corporation.

Satellite L.L.C. (“EchoStar”) filed a Consolidated Opposition on December 30, 2005 against the waiver requests of 36 stations.¹¹ DirecTV also filed comments, but did not oppose any specific waiver request. Twenty-five stations responded to EchoStar’s Opposition.

5. In its Opposition, EchoStar states, in general, that when Congress set forth the waiver process in SHVERA, it balanced preservation of the network system of territorial monopolies against the public interest benefit of providing a digital signal to consumers as soon as practicable, and the public interest standard should tip heavily in favor of consumers. EchoStar characterizes the hurdle for a waiver showing as “very high,” as evidenced by Congress’ adoption of the “clear and convincing evidence” standard for evaluating each waiver request, and the clearly delineated and narrowly stated waiver criteria. Both EchoStar and DirecTV urge that the Commission take a hard look at the justification for each waiver request, since grant of a waiver will result in some subscribers being unable to receive any digital signal from the network in question, either by over-the-air station or by satellite. EchoStar also points out that, even if one of the statutory criteria is present, the statute says only that the Commission “may” – not that it “shall” – grant a waiver.

6. We have carefully considered each waiver request, as directed by Congress. In doing so, 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 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. Under SHVERA, a subscriber may only request delivery via satellite of a distant digital signal if the test shows that the subscriber cannot receive an adequate local over-the-air digital signal. Section 339(a)(2)(D)(iii)(III) of the Act also requires that to be eligible for distant digital signals, subscribers must subscribe to the analog local-into-local package, where offered, and receive the network station affiliated with the same network, where available.¹² Section 339(a)(2)(D)(viii)(VI) of the Act further provides that a station may request a waiver of digital signal testing in a market in which no satellite carrier is providing analog local-into-local service.¹³

7. Our rulings on each of the 60 pending waiver requests follow below. For the reasons noted, we are granting digital testing waivers for 23 stations. With respect to 23 stations, we conclude that their permittees or licensees have failed to demonstrate, by clear and convincing evidence, that their digital signal coverage is limited due to the unremediable presence of one of the statutory criteria noted above. Finally, we deny two waiver requests as untimely filed, and return waiver requests filed for 12 stations that are not subject to the April Deadline.

¹¹ By letters dated February 17 and March 31, 2006, EchoStar notified the Commission that it was withdrawing its objection to the waiver requests of NBC Telemundo License Co. for WNBC-DT and WJAR-DT; KTRK, Inc. for KTRK-DT; Ruby Mountain Broadcasting Company for KENV-DT; and Valley Broadcasting Company for KVVN-DT. Accordingly, EchoStar’s objections to these stations’ waiver requests are dismissed.

¹² 47 U.S.C. § 339(a)(2)(c)(iii)(III).

¹³ See 47 U.S.C. § 339(a)(2)(D)(viii)(VI). No stations subject to the April Deadline sought a waiver under this last criterion, presumably because analog local-into-local service is offered in all of the Top 100 markets.

8. **Need for International Coordination or Approvals.** Because radio communication services have the potential to produce signal transmissions that go beyond national borders, international coordination is often required to protect existing television service and avoid interference.¹⁴ 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. We received, and grant, ten requests for a waiver under this criterion.

9. We have received unopposed waiver requests from Ace TV, Inc., the permittee of WACY-DT (UPN), Appleton, Wisconsin; Smith Media License Holdings, LLC, the permittee of WFFF-DT (FOX), Burlington, Vermont; and Telefutura Los Angeles LLC, the permittee of KFTR-DT (TEL), Ontario, California. Each permittee states that it is unable to complete construction of its authorized DTV facilities due to the need for international coordination. With respect to these stations, their applications for DTV construction permits are awaiting approval by the Canadian or Mexican governments,¹⁵ or were granted less than a year before the November 30, 2005 deadline for the filing of waiver requests.¹⁶ Accordingly, we grant a six-month digital testing waiver for WACY-DT, WFFF-DT¹⁷ and KFTR-DT.

10. In its Opposition, EchoStar objects to the waiver requests filed by KVOA Communications, Inc. ("KVOA"), the permittee of KVOA-DT (NBC), Tucson, Arizona; New York Television, Inc. ("NYT"), the licensee of WNYO-DT (WB), Buffalo, New York; Winston Broadcasting Network, Inc. ("Winston"), the permittee of WBNX-TV (WB), Akron, Ohio;¹⁸ WSMH Licensee LLC ("WSMH"), the permittee of WSMH-DT (FOX), Flint, Michigan; WTVH License, Inc. ("WTVH"), the permittee of WTVH-DT (CBS), Syracuse, New York; WUTV Licensee LLC ("WUTV"), the permittee of WUTV-DT (FOX), Buffalo, New York; and Tribune Television Company ("Tribune"), the permittee of WTIC-TV (FOX), Hartford, Connecticut. EchoStar does not dispute that international coordination or approvals are necessary for grant of each of the stations' DTV applications, or that such processes delayed the ability of the stations to maximize their digital signal coverage. Instead, EchoStar argues that these permittees and licensees failed to present "clear and convincing evidence" that their inability to secure the necessary international coordination or approval is or has been "unremediable." EchoStar further states that "though international coordination takes place between government agencies, the pace of such coordination is often determined by how actively the applicant or licensee pursues its application." Thus, EchoStar asserts that Section 339 of the Act requires a permittee or licensee to show what steps it has taken to facilitate coordination, and to demonstrate that

¹⁴ See, generally, *2001 Report on International Negotiations, Spectrum Policy & Notifications*, Planning and Negotiations Division, International Bureau, Federal Communications Commission (rel. September 1, 2001).

¹⁵ The application for KFTR-DT (BMPCDT-20021028ABV) has been referred to Mexico but the coordination process has not been completed.

¹⁶ The applications for WACY-DT (BMPCDT-20050428AAZ) and WFFF-DT (BPCDT-19991029ABX) were granted on January 25 and March 13, 2005, respectively.

¹⁷ Smith Media also requested a waiver based upon its need to obtain zoning approval from the State of Vermont before constructing a tower. We find that Smith Media is entitled to a waiver under both criteria.

¹⁸ EchoStar mistakenly refers to Winston's waiver request as having been made on behalf of "WBNX-DT, Syracuse, New York."

there are no additional steps that it could have taken to facilitate international approval or to avoid the need for that approval.

11. We deny EchoStar's objections to the extent they are based upon this argument. As several of the permittees and licensees point out in their responses, the International Bureau of the Commission directly coordinates with Industry Canada and the Secretaria de Comunicaciones y Transportes of Mexico ("SCT") on behalf of broadcast applicants. KVOA argues that SHVERA does not require that an applicant subject to international coordination or approval show that it has taken additional steps to "facilitate coordination." In this regard, WTVH states that "[l]icensees have little or no opportunity to become involved in this process, other than to correspond with the FCC to determine the status of a pending application that is subject to an international coordination request." In a consolidated response on behalf of their Buffalo, New York and Flint, Michigan, stations, the permittee and licensee also note that the Commission is well aware that the stations' representatives have corresponded, spoken and met with Media Bureau and International Bureau staff on numerous occasions "regarding the status of the coordination efforts and the actions that could be taken to facilitate resolution of the interference issues." Moreover, despite EchoStar's assertion that applicants can control the pace of the approval process, under our international coordination procedures, the only way an applicant can speed the coordination process is to promptly amend its application after the Media Bureau staff has informed it of concerns expressed by Industry Canada or SCT.

12. KVOA, the permittee of KVOA-DT, filed an application to maximize its DTV facilities in 2003.¹⁹ As KVOA states in its waiver request, under the operative bilateral agreements between the United States and Mexico, the Commission must obtain concurrence from the SCT before it can grant a DTV construction permit for any facility situated within 275 kilometers from the Mexican Border.²⁰ The International Bureau has referred KVOA's application to Mexico, and has not yet received a response. Accordingly, we grant a six-month digital testing waiver for KVOA-DT.

13. NYT, the licensee of WNYO-DT, filed an application to maximize its DTV facilities in 1999.²¹ EchoStar argues that the waiver request should be denied because NYT waited until March 2005 to amend its application to address interference concerns raised by Industry Canada. Commission records show, however, that NYT amended its application several times, beginning in 2001, to address these interference concerns, and retained Canadian engineering representation to work with Industry Canada.²² NYT's maximization application has since been granted, on January 4, 2006. Accordingly, we grant a six-month digital testing waiver for WNYO-DT.

¹⁹ File No. BMPCDT-20031010ADG.

²⁰ See Memorandum of Understanding Between the Federal Communications Commission of the United States of America and the Secretaria De Comunicaciones y Transportes of the United Mexican States Related to the Use of the 54-72 Mhz, 174-216 Mhz and 470-806 Mhz Bands for the Digital Television Broadcasting Service Along the Common Border, U.S.-Mex (Jul. 22, 1998).

²¹ File No. BPCDT-19991027ACW.

²² These efforts are also detailed in the response filed by NYT on behalf of the station.

14. Winston, the permittee of WBNX-TV, filed an application to maximize its DTV facilities in 1999.²³ The application was referred to Industry Canada in February 2002 and objected to in 2003, on the basis of more than 2% interference to a co-channel DTV allotment at Paris, Ontario. Upon notification that the application was objected to, Winston amended its application to reduce the predicted interference, and the amended application has been referred to Industry Canada. In addition, the application and additional materials were recently resubmitted to Industry Canada by the International Bureau to address additional interference concerns. Accordingly, we grant a six-month digital testing waiver for WBNX-DT.

15. WSMH, the permittee of WSMH-DT, filed an application to maximize its DTV facilities in 1999.²⁴ Industry Canada objected to the application in 2003. Rather than amend that application to address Industry Canada's interference concerns, WSMH filed an application for a construction permit for a "checklist" facility, which received international approval.²⁵ The International Bureau is continuing negotiations with Industry Canada, in an attempt to reach an agreement regarding WSMH's maximization application. Accordingly, we grant a six-month digital testing waiver for WSMH-DT.

16. WTVH received an initial construction permit for its maximized DTV facility on May 3, 2002. In August 2004, it filed a minor modification application, which required international coordination or approval.²⁶ EchoStar objects to the waiver because "WTVH does not explain why it waited until August 200[4] to file its minor modification to construct its full power facilities, which it must have known would require Canadian approval." In its response, WTVH explains that it filed the minor modification application to relocate and to reduce power at the request of the Canadian government. The minor modification application was granted on March 13, 2006. Thus, we grant a six-month digital testing waiver for WTVH-DT.

17. WUTV filed an application to maximize its DTV facilities in 1999.²⁷ EchoStar acknowledges that Industry Canada did not approve WUTV's application until September 2004, but argues that the limitation on WUTV's digital signal coverage must be attributed to a subsequent delay in grant of the application caused by potential interference with a new analog station in Bath, New York. As WUTV points out in its response, the Commission did not complete its processing of WUTV's application until after it had received Canadian approval, and notified WUTV of the predicted interference problem with the Bath station in October 2004. While WUTV did not amend its application to resolve the interference issue for almost nine months,²⁸ the fact remains that WUTV was unable to construct the DTV facilities it applied for in 1999 until September 2004 due to the need for international coordination. WUTV received a construction permit in September 2005, and states that it is presently constructing its maximized DTV facility. Accordingly, we grant a six-month waiver for WUTV-DT.

²³ File No. BPCDT-19991029AFM.

²⁴ File No. BPCDT-19991028ACK.

²⁵ File No. BPCDT-20051115ADO, granted December 12, 2005.

²⁶ File No. BMPCDT-20040810ABB.

²⁷ File No. BPCDT-19991101ACJ.

²⁸ During this nine month period, another station was challenging the underlying construction permit for the Bath station, and had petitioned to move the channel 14 allotment from Bath to Syracuse, New York.

18. Tribune, the permittee of WTIC-DT, Hartford, Connecticut, requests a waiver of the testing deadline based upon the need to obtain Canadian approval. Commission records show that Tribune was allotted NTSC channel 61 and DTV channel 5, and Tribune filed a petition for rulemaking to substitute DTV channel 31 for channel 5. The channel substitution was made in January 2003,²⁹ and Tribune filed an application for a construction permit for channel 31 shortly thereafter.³⁰ That application was referred to Industry Canada and granted in February 2004. Tribune then filed a minor modification application, which also required referral to Industry Canada.³¹ The Commission has received Canadian approval of the minor modification application, and the application remains pending for processing by the staff. Thus, we conclude that construction of the maximized DTV facilities for WTIC-DT has been delayed due to the need for international coordination or approval and accordingly, grant a six-month digital testing waiver for WTIC-DT.

19. **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." We received and granted ten waiver requests under this criterion.³²

20. 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,³³ 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. In their waiver requests, they state that 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 the fact that construction is generally limited to the months of May through October because of weather conditions at Mt. Mansfield, the coalition was only able to complete the transmitter building and tower foundations. They state, however, that they believe construction will be completed during the 2006 construction season and that the stations will be able to begin on-air testing in the fall. In view of the forgoing, we grant a six-month digital testing waiver for WVNY-DT, WFFT-DT and WPTZ-DT.³⁴

21. Raycom National, Inc. ("Raycom"), the permittee of stations KHNL-DT (NBC), Honolulu, Hawaii and KOGG-DT (NBC), Wailuku, Hawaii, also requests waivers based on

²⁹ *In the Matter of Amendment of Section 73.622(B), Table of Allotments, Digital Television Broadcast Stations (Hartford, Connecticut)*, Report and Order, 18 FCC Rcd 93 (2003).

³⁰ File No. BMPCDT-20030328ABZ.

³¹ File No. BMPCDT-20040616AAM.

³² KWGN, Inc., the permittee of KWGN-DT (WB), Denver, Colorado, also filed a request for waiver, which we dismiss as untimely. *See, infra*, ¶ 38.

³³ We have already concluded that Smith Media is entitled to a waiver for WFFF-DT, based upon its need for international coordination. *See, supra*, ¶ 9.

³⁴ EchoStar does not object to these stations' waiver requests, "on the understanding that their digital facilities will be built by Fall 2006."

zoning and environmental impediments. With respect to KHNL-DT, the Honolulu City Council passed an ordinance in the 1980's banning construction of any new television and radio towers. Raycom and the other Honolulu television stations initially explored sites for a community tower, but were unable to find a location acceptable to government and community groups. While Raycom has since located a site to construct its maximized DTV facilities, it cannot construct until an existing analog antenna is removed at the end of the DTV transition. With respect to KOGG-DT, Raycom and other broadcasters considered several sites, but abandoned them after negotiations with government officials and community representatives. Raycom and the other broadcasters entered into an agreement for another site in May 2005, and have filed applications to obtain government permits and the right to subdivide the property in order to construct a new tower. Because these stations' digital signals are limited due to clear zoning impediments, we grant a six-month digital testing waiver for KHNL-DT and KOGG-DT.

22. Sangre de Cristo Communications, Inc. ("SCC"), the permittee of KOAA-DT (NBC), Pueblo, Colorado, has requested a waiver based upon zoning. In support, it attached an exhibit to an application it filed for an extension of time to construct its digital facilities, stating that it expected to complete construction by its November 12, 2005 construction deadline. According to SCC, however, it was required to await final approval and permitting by local authorities. In its extension request, SCC stated that it had all the equipment necessary to construct the DTV facility and anticipated that it would have the necessary permits by spring, when construction in the Pueblo mountain region may resume. EchoStar objects to the waiver request, asserting that SCC failed to explain why it, unlike other stations in the market, was unable to promptly secure local approval to construct a tower. EchoStar also states that, while it recognizes that extreme weather could constitute a force majeure, SCC has failed to give a specific instance of extreme weather that may have delayed construction. In response, SCC explains that it did not receive a grant of its initial DTV construction permit until late 2004,³⁵ unlike the other local stations, which received initial grants in 2001. Upon receiving a grant, SCC filed a zoning application and now states that it expects to complete construction of its DTV facilities before the end of the requested six-month waiver. We find that SCC has met the statutory criteria and grant a six-month digital testing waiver for KOAA-DT.

23. 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); CBS Television Stations, Inc., the permittee of KCNC-DT (CBS); Channel 20 TV Company, the permittee of KUPN-DT (UPN); and Twenver Broadcast, Inc., the permittee of KTVD-DT (UPN), all of which are members of LCG with their stations licensed to Denver, have requested testing waivers based upon the ongoing local zoning proceedings. EchoStar opposes the request of Multimedia, stating that the fact that the zoning litigation was lengthy and unpredictable should have prompted Gannett Co., Inc. ("Gannett"), the parent of Multimedia, to explore alternative sites for KUSA-DT. EchoStar asserts that, because Gannett failed to demonstrate that it considered other alternative sites for its digital antenna, including the site at which it is operating pursuant to an STA, Gannett failed to demonstrate that the zoning impediment is unremediable. EchoStar further states that, while co-

³⁵ File No. BPCDT-19991029AGS. SCC's application was mutually exclusive with a maximization application for another DTV station.

location of the digital facility at the analog site might be more cost efficient, SHVERA bars the Commission from considering financial exigencies.

24. We deny EchoStar's objections. Lookout Mountain is an "antenna farm" that has been used for over 50 years by numerous radio and television stations licensed to Denver and its environs. The proposed LCG tower is the authorized location for the DTV facilities of six Denver television stations. In addition, some of the television stations propose to move their analog antennas to the tower. Under current plans, the other towers on Lookout Mountain would ultimately be consolidated on the LCG tower.³⁶ In its response, Gannett points out that, on August 23, 1999, LCG submitted to the Commission an extensive study by an engineering firm in which several alternative sites were analyzed. The report concluded that Lookout Mountain was the only site that could adequately support the stations' DTV facilities in full compliance with the Commission's rules. Moreover, in the local zoning proceeding, LCG was required to demonstrate that there were no other sites available.³⁷ Gannett further states that it has explained to the Commission previously that its temporary DTV facility cannot be upgraded to high power for a number of technical (RF radiation) and city code issues. With respect to EchoStar's argument that the cost-savings associated with co-locating the analog and digital stations cannot support grant of a waiver, Gannett did not argue financial or cost considerations in support of its waiver request. Based upon the foregoing, we believe that the Denver stations have each demonstrated that its digital signal is limited due to zoning, and thus, we grant six-month digital testing waivers for KUSA-DT, KCNC-DT, KPUN-DT and KTVD-DT.

25. **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.³⁸ Force majeure is defined as "an unexpected and disruptive event which may operate to excuse a party from a contract."³⁹ Six stations submitted waiver requests based on the force majeure criterion. As described below, we grant four and deny two of these requests.

26. NBC Telemundo License Co., the permittee of WNBC-DT (NBC), New York, New York, states that its DTV transmitter 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. NBC has moved its station operations to the Empire State Building, and states that, while the facility delivers a quality digital signal to much of the area, it is less than what would result from NBC's authorized parameters. The terrorist attack in 2001 clearly constitutes force majeure and justifies the grant of a six-month digital testing waiver for WNBC-DT.

27. The digital facilities of Knight Broadcasting of Baton Rouge License Corp. ("Knight"), the permittee of WVLA-DT (NBC), Baton Rouge, Louisiana, and the analog and

³⁶ See *Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152 (1999); *Letter to Edward W. Hummers, Jr., Esq.*, 18 FCC Rcd 22066 (Video Division 2003).

³⁷ See Waiver Request of CBS Television Stations Inc., licensee of KCNC-DT, Denver, Exhibit A, filed on November 22, 2005, in MM Docket No. 05-317.

³⁸ See 47 U.S.C. § 339(a)(2)(D)(viii)(III).

³⁹ *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.*

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. Knight gives a number of reasons why it has been unable to construct its digital facilities, including the significant backlog in scheduling tower crew work in the vicinity. Hearst-Argyle states that it 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 six-month digital testing waivers for WVLA-DT and WDSU-DT.

28. Fort Myers Broadcasting Company (“FMBC”), the permittee of WINK-DT (CBS), Fort Myers, Florida, requests a digital testing waiver on several grounds, including force majeure. FMBC was allotted DTV channel 53, and, at its request, the Commission substituted channel 9 at Fort Myers. Several stations filed petitions for reconsideration of the channel substitution and FMBC did not receive its DTV construction permit until October 29, 2004. In August 2004, Hurricane Charlie caused extensive damage in Charlotte County, Florida, resulting in significant construction delays in the area. FMBC details numerous steps it took to complete construction before its studio building and tower installations were damaged by Hurricane Wilma in October 2005. As in the case of the Louisiana television stations discussed above, Hurricanes Charlie and Wilma clearly constitute force majeure and justify the grant of a six-month digital testing waiver for WINK-DT.

29. Piedmont Television of Springfield License LLC (“Piedmont-Springfield”), the permittee of KSPR-DT (ABC), Springfield, Missouri, requested a waiver of the April Deadline, arguing that its pending application to extend the July 1, 2005 maximization/replication deadline, and its prior authorized extension to construct its DTV facilities, qualify as force majeure that excuses the station from the digital signal testing requirements of Section 339(a)(2)(D)(vii) of the Act. EchoStar argues that these events do not qualify as force majeure. We agree. Piedmont-Springfield’s “use or lose” extension request was based upon its inability to construct “because of severe financial constraints,”⁴⁰ a ground which the Commission is specifically forbidden, by statute, to consider in support of a digital testing waiver request.⁴¹ Piedmont-Springfield also requests a waiver on the ground that its digital antenna is “not mounted on its main tower, but is mounted on an auxiliary tower, which results in a substantial decrease in its coverage.” As EchoStar points out, however, the relevant prerequisite to a waiver is that the station experience “a substantial decrease in digital signal coverage due to the necessity of using side-mounted antenna,” not because the licensee decided to place its digital antenna on an auxiliary tower. Accordingly, Piedmont-Springfield’s waiver request is denied, and KSPR-DT is subject to the April Deadline.

30. Southern TV Corporation (“Southern”), the permittee of WGSA-DT (UPN), Baxley, Georgia, requests a waiver based on “three elements of force majeure beyond the licensee’s control.”⁴² It argues first, that it was unable to construct due to delay in the staff’s

⁴⁰ *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18279, 18318-9 (2002) (“*Second Periodic Review*”).

⁴¹ See 47 U.S.C. § 339(a)(2)(D)(viii).

⁴² Southern also asserts that construction was delayed by “environmental problems that were reported” in two applications for extension of time to construct its digital facilities. Those applications reveal, however, that the unidentified environmental problems, which Southern believed were handled by the tower owner, were resolved by

(continued....)

processing of its application for a digital construction permit. Without discussing whether processing delays may constitute force majeure, we note that Southern's application was granted in October 2004, over a year before it filed its instant waiver request. Southern next contends that the tower owner's failure to construct the tower constitutes force majeure. Southern, however, has presented no evidence indicating that this failure to construct was an unexpected and disruptive event, and it is not unusual for a permittee to consider additional sites, and file for modification of its construction permit, before constructing its DTV facilities. Finally, counsel for Southern states that "[t]he licensee's president has advised me that a nearby tower has been located. However, the owner recently passed away, and the heirs have not been willing to commit to a specific height on the tower, thus preventing the licensee from filing an application to move there." Assuming that the death of the owner of a replacement tower constitutes force majeure for the purpose of SHVERA, we believe that counsel's hearsay statement falls far short of the "clear and convincing evidence" required by the statute before a waiver can be granted. Accordingly, we deny Southern's waiver request and find that WGSB-DT is subject to the April Deadline.

31. **Substantial Decrease in Digital Signal Coverage Due to Necessity of Using Side-Mounted Antenna.** Section 339(a)(2)(D)(viii)(IV) of the Act provides for grant of a testing waiver upon a showing by clear and convincing evidence that the station's digital signal coverage area is substantially decreased due to the unremediable need to use a side-mounted antenna. The permittees and licensees of 20 stations filed waiver requests under this criterion, all of which are denied.

32. EchoStar argues that none of these stations has shown that the use of a side-mounted antenna is necessary and unremediable. EchoStar asserts that many stations should have explored alternative means of providing full digital service, such as utilizing a separate tower, changing orientation or increasing power. In addition, several of the stations state that they would have to expend considerable resources to move their NTSC antenna to a lower level on the tower to make room for their DTV antenna, and EchoStar argues that the statute clearly provides that financial exigency may not be used as the basis for digital testing waivers. We need not consider these arguments, however, which are fact-specific to each permittee and licensee, because we find that none has demonstrated by clear and convincing evidence that the use of a side-mounted antenna has resulted in a substantial decrease in its station's digital signal coverage area.

33. Telefutera Tampa LLC, the permittee of WFTT-DT (TLF), Tampa, Florida; Journal Broadcast Corporation, the permittee of WGBA-DT (NBC), Green Bay, Wisconsin; KATV, LLC, the permittee of KATV-DT (ABC), Little Rock, Arkansas; NBC Telemundo License Co., the permittee of WJAR-DT (NBC), Providence, Rhode Island; Univision Cleveland LLC, the licensee of WQHS-DT (UNV), Cleveland, Ohio; WUVC License Partnership, G.P., the permittee of WUVC-DT (UNV), Fayetteville, North Carolina; Louisiana Television Broadcasting, LLC, the licensee of WBRZ-DT (ABC), Baton Rouge, Louisiana; and Ramar Communications II, Ltd., the permittee of KUPT-DT (formerly KHFT-DT) (UPN), Hobbs, New

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early 2004. See File No. BEPCDT-20040227ABW. Given the passage of time since the issue was apparently resolved, we do not consider environmental delay as a basis for waiver here.

Mexico, have each failed to provide any information comparing its station's present digital coverage area to the digital coverage area of its maximized facilities. Because these parties have not satisfied the statutory requirement to provide clear and convincing evidence in support of their waiver requests, we cannot conclude, in the case of any of the stations, that the use of a side-mounted antenna has resulted in a substantial decrease or indeed any reduction of its coverage area.

34. We are also unable to determine whether use of a side-mounted antenna resulted in a substantial decrease in the digital signal coverage area of Emmis Television License, LLC ("Emmis"), the permittee of KMTV-DT (CBS), Omaha, Nebraska and WSAZ-DT (NBC), Huntington, West Virginia;⁴³ Ohio/Oklahoma Hearst-Argyle Television, Inc., the permittee of KOCO-DT (ABC), Oklahoma City, Oklahoma; WSIL-TV, Inc., the permittee of WSIL-DT (ABC), Harrisburg, Illinois; WAPT Hearst-Argyle Television, Inc., the permittee of WAPT-DT (ABC), Jackson, Mississippi; WPBF-TV Company, the permittee of WPBF-DT (ABC), Tequesta, Florida; Independence Television Company, the permittee of WDRB-DT (FOX), Louisville, Kentucky; and Hearst-Argyle Stations, Inc., the licensee of KCRA-DT (NBC), Sacramento, California. While each of these stations reported the difference in population within the contour of its side-mounted facilities and maximized facilities, it did not address the extent to which the use of a side-mounted antenna resulted in a substantial decrease in its digital signal coverage area, the standard adopted by Congress. Even if we consider the population figures submitted on behalf of these stations, for each, its side-mounted facilities are able to serve between 92.8 and 99.9 percent of viewers residing within the maximized service contour. We do not find this reduction in service to constitute the "substantial decrease" in coverage that is required to meet this criterion for waiver.

35. The remaining four stations in this waiver group, which are authorized to Scripps Howard Broadcasting Company or its subsidiaries ("Scripps"), did provide information about the reduction in digital coverage area. We find, however, that each claimed reduction in digital coverage area does not constitute a substantial decrease. Substantial is defined as "of ample or considerable amount, quantity, size, etc."⁴⁴ While SHVERA does not specify the magnitude of loss which may be considered substantial, the loss experienced by Channel 7 of Detroit, Inc., the permittee of WXYZ-DT (ABC), Detroit, Michigan (121 sq. kilometers or 0.75% of digital coverage area) and Scripps Howard Broadcasting Company, the licensee of WCPO-DT (ABC), Cincinnati, Ohio (0.86% of its digital signal coverage area), cannot be considered substantial. It is standard Commission policy to use a 0.5% rounding and calculation tolerance in making interference determinations, pursuant to which interference of 0.5% or less is treated as zero interference.⁴⁵ A reduction in service area only slightly more than the rounding and calculation tolerance of 0.5% used by the Commission clearly cannot be deemed substantial.

36. We also conclude that the reduction in service area reported by two other Scripps stations -- Tampa Bay Television, Inc., the permittee of WFTS-DT (ABC), Tampa, Florida

⁴³ Emmis assigned WSAZ-TV to Gray Television Licensee, Inc. on November 30, 2005 (File No. BALCT-20050824AAV).

⁴⁴ *Webster's Encyclopedic Unabridged Dictionary of the English Language* at 1418 (1989).

⁴⁵ See discussion of rounding down mathematical principles in *Additional Application Process Guidelines for Digital TV*, Public Notice, at 8 (rel. August 10, 1998).

(3.5% of digital signal coverage area), and Scripps Howard Broadcasting Company, the licensee of WEWS-DT (ABC), Cleveland, Ohio (5.25% of area) -- cannot be considered substantial. In this regard, in the Commission's DTV channel election proceeding, the four Scripps stations each requested a waiver of the July 1, 2005 deadline established for certain stations to construct and operate DTV facilities ("use or lose" deadline).⁴⁶ Stations subject to the July 1, 2005 deadline are required to serve at least 100 percent of the number of viewers served by the facility on which their replication coverage is based, and stations that fail to meet this requirement will lose interference protection to the unused portion of the associated area. In support of its request that the Commission waive the 100 percent requirement with respect to all four of these stations, Scripps argues that each of the stations' side-mounted DTV facilities "come close" to meeting the "use or lose" requirement that a station construct its fully-authorized facilities. We acknowledge that the Commission's "use or lose" policy involves consideration of whether a certain percentage of viewers are served by the constructed facilities, rather than a comparison of the constructed and authorized digital signal coverage area. Scripps, however, provided the population figures in response to EchoStar's Opposition, and the small number of viewers affected by use of a side-mounted antenna by these stations supports our conclusion that there is no substantial loss of service. Scripps appears to be arguing in the context of the "use or lose" deadline that the side-mounted service is close to 100% while in the context of the waivers of digital signal testing pursuant to SHVERA, it is contending this same decrease in service is substantial.⁴⁷

37. Scripps also argues that the percentage losses EchoStar characterizes as "insubstantial" are, in fact, within the level of loss that a station would expect to suffer from side-mounting an antenna. According to Scripps:

If Congress had intended to require the type of losses that EchoStar suggests would be required to be "substantial," including the "side-mounted antenna" ground for pursuing a waiver request would have served no purpose. More substantial losses are simply not likely to occur as a result of employing a side-mounted antenna, and Congress should not be presumed to have adopted a criterion it did not attend be applied.

It is well-settled that an agency must give effect to the unambiguously expressed intent of Congress.⁴⁸ Here, Congress clearly required that in order to obtain a waiver, a station must demonstrate a "substantial decrease in its digital signal coverage area." There is no ambiguity, and Scripps can point to nothing in the statute, or the legislative history, that suggests that Congress intended the Commission to construe the statute in such a way that would result in an automatic waiver for stations with side-mounted antenna. Accordingly, we deny these waiver requests and these twenty stations are each subject to the April Deadline.

38. **Requests Which Are Untimely Filed or Moot.** SHVERA requires that all requests for waiver of digital testing for stations in the top 100 television markets be filed by

⁴⁶ *Second Periodic Review*, 19 FCC Rcd at 18318-9.

⁴⁷ The decision here does not prejudice the determinations to be made in the context of the "use or lose" waivers in a separate proceeding.

⁴⁸ See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

November 30, 2005.⁴⁹ In its Opposition, EchoStar points out that Tribune Television Holdings, Inc., the licensee of KTWB-DT (WB), Seattle, Washington, and KWGN Inc., the permittee of KWGN-DT (WB), Denver, Colorado, electronically filed their waiver requests on December 2, 2005. It is well-settled that the Commission lacks authority to extend statutory filing deadlines.⁵⁰ Accordingly, the waiver requests filed by Tribune Television Holdings Inc. for KWTB-DT and by KWGN Inc. for KWGN-DT are dismissed, and the stations are subject to the April Deadline.

39. Young Broadcasting of Albany, Inc. (“Young”), requested a waiver for WTEN-DT (ABC), Albany, New York, stating that, due to the need for international coordination, it did not receive its DTV construction permit until August 9, 2005. It states that, while it expected to complete construction prior to the April Deadline, it filed for a waiver “out of an abundance of caution to protect against the event that unforeseen circumstances beyond its control cause a change in the anticipated installation schedule.” Commission records show that Young filed a application for a license to cover,⁵¹ which has been granted. Accordingly, at Young’s request, its waiver request is dismissed as moot, and its station is subject to the April Deadline.

40. With respect to the remaining twelve station waiver requests, we conclude, for varying reasons, that these stations were not subject to the April Deadline. Instead, these stations will be subject to the July 15, 2007 testing deadline. Accordingly, we will return their digital testing waiver requests.

41. Flint License Subsidiary Corp., the licensee of WJRT-DT (ABC), Flint, Michigan; WTVG, Inc., the permittee of WTVG-DT (ABC), Toledo, Ohio; KENS-TV, Inc., the permittee of KENS-DT (CBS), San Antonio, Texas; ABC, Inc., the permittee of WPVI-DT (ABC), Philadelphia, Pennsylvania; ABC Holding Company, Inc., the licensee of KABC-DT (ABC), Los Angeles, California; KTRK Television, Inc., the licensee of KTRK-DT (ABC), Houston, Texas; and the American Broadcasting Companies, Inc., the permittee of WABC-DT (ABC), New York, New York, each filed for a six-month testing waiver of the April Deadline. Each states its belief that its station is not subject to the April Deadline because it did not receive a tentative channel designation on its present digital channel,⁵² and had not lost interference protection at the time that it filed its waiver request. Because each has requested a waiver of the Commission’s July 1, 2005 replication deadline for DTV licensees affiliated with the top-four networks in markets 1-100,⁵³ it requests a testing waiver in the event the Commission rejects its replication waiver request. Their replication waiver requests remain pending, so they have not lost interference protection at this time. Accordingly, the digital testing waiver requests for

⁴⁹ See 47 U.S.C. § 339(a)(2)(D)(viii) (“Such a request shall be filed not less than 5 months prior to the implementation deadline. . . .”); see also *Waiver Public Notice*.

⁵⁰ Where the time period for filing waiver requests is prescribed by statute, the Commission may not ordinarily waive or extend the filing period. See *Reuters Limited v. FCC*, 781 F.2d 946 (D.C.Cir.1986); *Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (1988); *Metromedia, Inc.*, 56 FCC 2d 909 (1975).

⁵¹ File No. BLCDDT-20060104ACC.

⁵² The licensees of WJRT-DT, WTVG-DT, WPVI-DT and KABC-DT have received tentative channel designations on their present analog channels. The licensees of KENS-DT, KTRK-DT, and WPVI-DT have not yet received tentative channel designations for their stations.

⁵³ See *Second Periodic Review*, 19 FCC Rcd at 18318-9.

WJRT-DT, WTVG-DT, KENS-DT, WPVI-DT, KABC-DT, KTRK-DT and WABC-DT are returned.

42. We also return the digital testing waiver request by Piedmont Television of Savannah License LLC (“Piedmont-Savannah”), the permittee of WJCL-DT (ABC), Savannah, Georgia.⁵⁴ Piedmont-Savannah has received a tentative channel designation on its present analog channel. Accordingly, Piedmont-Savannah’s station is not subject to the April Deadline and its waiver request is returned.

43. Ruby Mountain Broadcasting Company (“Ruby”) and Valley Broadcasting Company (“Valley”), the permittees of KENV(TV) (NBC), Elko, Nevada, and KVVN(TV) (NBC), Ely, Nevada, respectively, each requested a waiver. Ruby, however, received a tentative channel designation on its present analog channel, and Valley did not receive a paired channel for DTV. Accordingly, these stations are not subject to the April Deadline and their waiver requests are returned.⁵⁵

44. Mountain Licenses, L.P. (“Mountain”), the licensee of KAYU-DT (FOX), Spokane, Washington, requested a digital testing waiver based upon the need for international coordination. According to Mountain, because it “elected to operate digitally on Channel 28 (current analog), not on its present digital Channel 30, at the end of the transition, KAYU-TV will have to go through the international coordination process for digital Channel 28 before it can operate on that channel.” Since Mountain received a tentative channel designation on its current analog channel, it is not subject to the April Deadline and its waiver request is returned.⁵⁶

45. Hoak Media of Colorado, LLC, the licensee of KREG-TV and the permittee of KREG-DT (CBS), Glenwood Springs, Colorado, is currently operating KREG-DT pursuant to a low-power STA. KREG-TV operates as a satellite of parent station KREX-TV/DT (CBS), Grand Junction, Colorado, which is assigned to the Grand Junction-Montrose DMA (189th market). Most satellite stations, such as KREG-TV, are licensed in small or sparsely populated areas, which were deemed to have an economic basis insufficient to support stand-alone, full-service operations.⁵⁷ Although KREG-TV does not provide service to Denver and its environs, and its community of license is separated from Denver by a mountain range and approximately 100 miles from Denver, KREG-TV is assigned to the Denver DMA (18th market). Satellite stations that chose to retain both their analog and digital signal channel during the transition period must comply with the applicable digital deadline, which is July 1, 2005, for stations in the top 100 markets. KREG-TV’s parent station, however, is not required to construct its fully-authorized DTV facilities until July 1, 2006. Due to the unique set of facts here, *i.e.*, the satellite

⁵⁴ A joint waiver request was filed for Piedmont-Savannah and for Piedmont Television of Springfield License, LLC, the permittee of KSPR-DT, Springfield, Missouri. As discussed below, we deny the waiver request for KSPR-DT.

⁵⁵ EchoStar’s objections to these two waiver requests are dismissed as moot.

⁵⁶ As EchoStar points out in its objection, the fact that Mountain’s digital operation on channel 28 may require international coordination at the end of the transition does not affect whether its digital coverage is currently being limited by the need for international coordination or approval. Because Mountain is not subject to the April Deadline, we dismiss EchoStar’s objection as moot.

⁵⁷ See *Second Periodic Review* at 18323-24.

station is assigned to a top 100 market while the parent station is not, for regulatory purposes, we will treat KREG-TV as part of the Grand Junction-Montrose DMA during the DTV transition period. To do otherwise would be inconsistent with the Commission's DTV policies for satellite stations. Because we consider a satellite station as sharing its parent's market in connection with the transition from analog to digital, we find that KREG-DT is not subject to the April Deadline and its waiver request is returned. Absent a waiver based upon the statutory criteria set forth in SHVERA, however, KREG-DT will be subject to the July 15, 2007, deadline.

46. ACCORDINGLY, IT IS ORDERED that the requests for the television stations set forth in Appendix A of this Order for waiver of the April Deadline ARE GRANTED and the first permissible date for digital testing for these stations IS EXTENDED to six months from April 30, 2006, to October 31, 2006. We remind the permittees and licensees of these stations that SHVERA precludes the Commission from granting a waiver for a period beyond six months. Thus, in order to ensure action before the statutory expiration date of the waivers granted herein, any further extension request should be filed no later than 60 days prior to this expiration date, by August 31, 2006.

47. IT IS FURTHER ORDERED that the requests for the television stations set forth in Appendix B of this Order for waiver of the April deadline ARE DISMISSED OR DENIED, and subscribers may initiate digital signal testing on or after April 30, 2006.

48. IT IS FURTHER ORDERED that the requests for the television stations set forth in Appendix C of this Order ARE RETURNED, and these stations will be subject to the July 15, 2007, digital testing deadline.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau