

**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: January 15, 2008

Released: January 16, 2008

By the Chief, Media Bureau:

I. INTRODUCTION

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”). SHVERA created an opportunity for subscribers to qualify, via signal strength tests, to receive distant digital television broadcast signals from satellite carriers. SHVERA also provided television stations with the ability to request a waiver that would prohibit satellite subscribers from receiving or conducting a digital signal strength test under certain circumstances.

2. 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 A satellite subscriber whose household is predicted “unserved” by the analog signal of any station affiliated with a particular network is eligible to receive, via satellite, the digital signal of a distant station affiliated with that network.³ A satellite subscriber whose household is predicted to be served⁴ by the analog signal of a 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 the over-the-air digital signal of local network stations does not meet the digital signal intensity standard in Section 73.622(e)(1) of the Commission’s rules.⁵ Subscribers were able to request such a test beginning April 30, 2006, if the local network station whose signal would be tested is within the top 100 television

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

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

³ 47 U.S.C. § 339(a)(2)(D)(i)(I).

⁴ 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).

⁵ In other words, the test would show that the household is unserved by over-the-air digital signals from any station affiliated with a particular network. See 47 U.S.C. § 339(a)(2)(D)(i)(I), as amended by Section 204 of SHVERA. See also *Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Notice of Proposed Rulemaking, ET Docket No. 06-94, 21 FCC Rcd 4735 (2006), which proposes rules governing the conduct of such tests.

markets and has received a tentative channel designation on its allotted digital channel or has lost interference protection. As of July 15, 2007, subscribers may request a signal strength test for any full power local network station.⁶

3. SHVERA also amended Section 339(a)(2)(D)(viii) of the Act to allow stations to request a waiver that would prohibit satellite subscribers from receiving or conducting a digital signal strength test.⁷ On May 1, 2006 the Commission granted 23 digital testing waivers for stations subject to the April 30, 2006 deadline.⁸ For a number of stations, these waivers were extended based on 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.⁹ On July 12, 2007, the Commission granted 18 waivers for stations subject to the July 15, 2007 deadline.¹⁰ Ten stations have requested extensions of the waivers granted in July and those requests are addressed herein.

II. BACKGROUND

4. 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;

⁶ 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 (2004), at ¶ 12 and n.16 (citing *Fifth Report and Order*, 12 FCC Rcd at 12840-41, ¶ 76 (1997)); 47 C.F.R. § 73.624(d).

⁷ See 47 U.S.C. § 339(a)(2)(D)(viii), as amended by Section 204 of SHVERA.

⁸ *Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("First Round Order")*, 21 FCC Rcd 4813 (MB 2006).

⁹ *Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 21 FCC Rcd 12894 (MB 2006)(15 extensions granted); *Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 22 FCC Rcd 8430 (MB 2007)(nine extensions granted). *Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, DA 07-4391 (MB released October 26, 2007) (seven extensions granted).

¹⁰ *Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 22 FCC Rcd 12918 ("July Order") (MB 2007).

- (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.¹¹

5. We have carefully considered each waiver extension request, based on the statutory criteria. Denial of a waiver extension request would not automatically result in the delivery of a distant digital signal to a subscriber, but would merely permit 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 analog signal of the network station affiliated with the same network, where available.¹² For new local-into-local markets, subscribers receiving a distant digital signal of a network station can continue to receive that signal after a satellite carrier begins offering local-into-local digital signals in the market only if the subscriber also subscribes to the digital signal of the local station affiliated with the same network.¹³

6. We grant all ten extension requests. We find that each permittee or licensee has demonstrated that its digital signal coverage continues to be limited due to the unremediable presence of one of the statutory criteria noted above.

III. DISCUSSION

7. **Force Majeure.** SHVERA provides that a waiver request may be granted when a station's digital signal coverage is limited due to force majeure.¹⁴ Force majeure may be defined as an event that can be neither anticipated nor controlled;¹⁵ may be broader than "act of God," which is limited to natural forces;¹⁶ and may include a terrorist attack as an extreme, unforeseeable occurrence.¹⁷

8. American Broadcasting Companies, Inc. ("ABC"), permittee of WABC-DT (ABC), New York, New York was granted a waiver in July 2007 due to the fact that its digital signal coverage is limited. The September 11, 2001 terrorist attacks destroyed its facilities at the World Trade Center and it has not yet been able to construct permanent replacement facilities.¹⁸ ABC states in its extension request

¹¹ 47 U.S.C. § 339(a)(2)(D)(viii).

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

¹³ 47 U.S.C. § 339(a)(2)(D)(v)(I).

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

¹⁵ *Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd 16333, 16347 at n. 97 (2003) citing Black's Law Dictionary 254 (Pocket Edition 1996).

¹⁶ *Webster's Encyclopedic Unabridged Dictionary of the English Language* at 554 (1989).

¹⁷ *Cf. OWBR, LLC v Clear Channel Communications, Inc.*, 266 F. Supp. 2d 1214, 1222 (D. Haw. 2003).

¹⁸ July Order at 12922.

that these circumstances remain unchanged.¹⁹ The terrorist attack in 2001 clearly constitutes force majeure and justifies grant of a six-month extension of the digital testing waiver for WABC-TV.

9. **No Satellite Carrier Providing Local-into-Local Analog Service.** Section 339 gives the Commission authority to grant a testing waiver where no satellite carrier is providing the retransmission of the analog signals of local network stations in the requesting station's local market.²⁰ Five stations were granted waivers based on this criterion in July 2007 and one, WNKY-DT(NBC), Bowling Green, Kentucky,²¹ has requested an extension. We grant an extension based on the station's showing that no satellite carrier is providing analog local-into-local broadcast television service in the relevant market.

10. **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 digital 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. As several stations indicate, mounting a digital antenna on the side of the tower at a lower location where the tower structure is wider often causes blockage and reduces the number of viewers that the signal can reach.²² In addition, some of the stations granted waivers and seeking extensions state that they have mounted their analog antenna at the top tower position and cannot move the digital antenna to the top without substantially affecting analog service.²³ In July 2007 we granted eight waiver requests based on the present necessity to use a side mounted antenna.²⁴ All eight stations have requested waiver extensions.

11. In the July Order, we noted that Congress, in passing SHVERA, did not give the Commission guidance on how extensive the loss occasioned by the use of a side mounted antenna should be to justify grant of a testing waiver.²⁵ In that order, we found that every station filing for a waiver pursuant to this criterion claimed a loss of well over 10 percent of coverage area because of the necessity to use a side mount antenna.²⁶ We believe that the percentages of coverage loss are not, by themselves, determinative of what is "substantial" under SHVERA. The focus of the statute is television service to viewers because the purpose of the signal test is to enable viewers who cannot receive a digital signal over the air to receive instead a distant network signal via satellite. If a station is serving close to 100 percent of its viewing population, it cannot be said to have suffered a substantial decrease in coverage even though it might not be reaching 10 percent or more of its geographical service area. Similarly, if most of the loss of geographic coverage is over water or unpopulated areas, it cannot be found to have incurred a substantial loss of coverage.²⁷ Using this interpretation of the term "substantial," we grant extensions to the eight stations that were previously granted waivers based on this criterion. All of these stations state that the circumstances necessitating a side mounted antenna and the resulting coverage losses that justified a waiver in July 2007 remain unchanged.

12. In its initial waiver request, West Virginia Media Holdings, LLC, licensee of WBOY-DT

¹⁹ ABC extension request at 2.

²⁰ 47 U.S.C. § 339(a)(2)(D)(viii)(VI).

²¹ This station is in the Bowling Green, Kentucky DMA.

²² See, e.g., WTGV, Inc. waiver request on behalf of WTVG-DT.

²³ See, e.g., West Virginia Media Holdings LLC waiver request on behalf of WBOY-DT.

²⁴ July Order at 12924-7.

²⁵ July Order at 12923.

²⁶ *Id.* at 12924.

²⁷ The opposite would hold true if a station were reaching 98 percent of its geographic service area but was only reaching 5 percent of its population. In that case, a digital testing waiver clearly would be appropriate.

(NBC), Clarksburg, West Virginia, stated that the station's analog antenna is mounted at the top of the tower and cannot be moved until after the transition when it will be replaced by the digital facility.²⁸ The licensee stated that its side mounted facilities serve only 37.3 percent of the area and 4.3 percent of the population predicted to be served by its post-transition VHF channel facilities.²⁹ In granting a waiver, we noted that although it appears that this request wrongly compares current service with post-transition service, Commission records indicate that the station is presently able to serve only 45.1 percent of its predicted pre-transition population. We found that West Virginia Media Holdings, LLC had presented credible evidence of a substantial loss of service due to use of a side mounted antenna.³⁰ In its request for extension, the licensee indicates that the conditions requiring a side mounted antenna persist³¹ and WBOY-DT is therefore granted a six-month extension of its digital testing waiver.³²

13. In its original waiver request, Fisher Broadcasting-Oregon TV, L.L.C., the permittee of station KCBY-DT (CBS), Coos Bay, Oregon, stated that it has constructed digital facilities that serve 80 percent of the 1997 population on which its replication facilities were based pursuant to the Commissions "use-or-lose" deadline, but that it is prevented from installing a top mounted antenna because its analog antenna is currently in that position.³³ It further stated that the use of a side mounted digital antenna with directionalized pattern at reduced power results in a substantial reduction in its digital coverage area and a loss of approximately 20 percent of the station's predicted service population.³⁴ The permittee asserts, in its extension request, that the conditions described in its initial request persist³⁵ and therefore we find that KCBY-DT is entitled to a six-month extension of its digital testing waiver.³⁶

14. Fisher Broadcasting-Oregon TV, L.L.C., the permittee of station KVAL-DT (CBS), Eugene, Oregon, stated in its initial request for waiver that it has met its obligation to construct facilities serving 80 percent of its replication population but it is prevented from installing a top mounted DTV antenna because its analog antenna is currently mounted at the top of its tower.³⁷ It further stated that using a side mounted digital antenna substantially reduces its predicted coverage area and that it is unable to serve 20 percent of its service population.³⁸ In its extension request, the permittee asserts that these

²⁸ WBOY-DT waiver request at 1-2.

²⁹ *Id.* at 2.

³⁰ July Order at 12925. The appropriate comparison should be current coverage with authorized coverage pre transition.

³¹ WBOY-DT extension request at 2.

³² WBOY-DT was also granted a use-or-lose waiver until February 17, 2009 due to the necessity to use a side mounted antenna. *DTV Build-out, Requests for Waiver of July 1, 2005 and July 1, 2006 "Use or Lose" Deadlines*, ("Use or Lose Order") 22 FCC Rcd 9750 (2007).

³³ Fisher Broadcasting-Oregon waiver request at 1-2.

³⁴ *Id.* at 2.

³⁵ KCBY-DT extension request at 2.

³⁶ KCBY-DT met its use-or-lose population coverage requirements but nonetheless has justified grant of a digital testing waiver and an extension.

³⁷ On December 31, 2007, the Commission released the *Third DTV Periodic Review Report and Order*, which established February 17, 2009 as the deadline by which stations such as KVAL-DT whose pre transition channel is different from their post transition channel must complete their post-transition facilities. See *Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, MB Docket No. 07-91, Report and Order, FCC 07-228, Section V.B.2., ¶¶ 42-46 (rel. Dec. 31, 2007) ("*Third DTV Periodic Review*").

³⁸ Fisher Broadcasting-Oregon waiver request at 2.

conditions persist³⁹ and therefore we find that Fisher Broadcasting-Oregon has presented sufficient evidence to justify a six-month extension of its digital testing waiver.

15. Hoak Media of Nebraska License, L.L.C., permittee of KHAS-DT (NBC), Hastings, Nebraska, stated in its initial waiver request that the station needs to use a side mounted antenna until the end of the transition when it will use its top mounted analog antenna for digital operations.⁴⁰ The station is unable to serve 69.3 percent of its predicted coverage area as a result.⁴¹ The Commission noted in the July Order that, although it appears that this request makes the wrong comparison of current service with post-transition service, Commission records indicate that KHAS-DT can only serve 46.9 percent of the population that it is authorized to serve by its pre-transition construction permit.⁴² We also note that the percentage loss of area coverage would be as great, or greater, than the population loss. Because these conditions will persist until after the transition in 2009,⁴³ we find that KHAS-DT is entitled to a six-month extension of its digital testing waiver.⁴⁴

16. In its initial waiver request, Hoak Media of Nebraska License, L.L.C., licensee of KNOP-DT (NBC), North Platte, Nebraska, stated that the station needs to use a side mounted antenna because it will use its top mounted analog antenna post transition but the antenna cannot be moved at this time.⁴⁵ As a result, the station claims it is unable to serve 70.6 percent of predicted DTV coverage area.⁴⁶ The Commission noted in the July Order that although it appears that this request wrongly compares current service with post-transition service, Commission records indicate that KNOP-DT can only serve 51.2 percent of the population that it is authorized to serve by its pre-transition construction permit.⁴⁷ We also noted that the percentage loss of area coverage would be as great, or greater, than the population loss.⁴⁸ The licensee asserts that these conditions remain unchanged⁴⁹ and therefore we find that KNOP-DT is entitled to a six-month extension of its digital testing waiver based on coverage losses occasioned by the necessity to use a side mounted antenna.⁵⁰

17. WTVG, Inc., licensee of WTVG-DT (ABC), Toledo, Ohio, stated in its initial request for waiver that the station needs to use a side mounted antenna because its analog antenna is installed at the top of its tower.⁵¹ The station states that it plans to use its analog channel post-transition so it must wait

³⁹ KVAL-DT extension request at 2.

⁴⁰ Hoak Media request at 1.

⁴¹ *Id.* at 2.

⁴² July Order at 12925. The appropriate comparison should be current coverage with authorized coverage pre-transition.

⁴³ KHAS-DT extension request at 2.

⁴⁴ KHAS-DT was also granted a use-or-lose waiver until February 17, 2009 due to the necessity to use a side mounted antenna. *See Use or Lose Order, supra*, n. 32.

⁴⁵ Hoak Media waiver request at 3.

⁴⁶ *Id.* at 2.

⁴⁷ July Order at 12926. The appropriate comparison should be current coverage with authorized coverage pre-transition.

⁴⁸ *Id.*

⁴⁹ KNOP-DT extension request at 2.

⁵⁰ KNOP-DT was also granted a use-or-lose waiver until February 17, 2009 due to the necessity to use a side mounted antenna. *See Use or Lose Order, supra*, n. 32.

⁵¹ On December 31, 2007, the Commission released the *Third DTV Periodic Review Report and Order*, which established February 17, 2009 as the deadline by which stations such as WTVG whose pre transition channel is

(continued....)

until it ceases analog broadcasting to use the top position for its digital antenna.⁵² The station is unable to serve 16.8 percent of the area predicted to be served by its initial DTV allotment and 33.6 percent of area within its analog grade B contour with side mounted antenna.⁵³ The licensee stated further that in its use-or-lose waiver request, it reported that it served 81.84 percent of population served by its initial DTV allotment.⁵⁴ The licensee indicates that these circumstances remain unchanged⁵⁵ and therefore we find that WTVG-DT is eligible for a six-month extension of its digital testing waiver because its coverage area is substantially reduced due to the necessity to use a side mounted antenna.

18. West Virginia Media Holdings, LLC, licensee of WTRF-DT (CBS), Wheeling, West Virginia, in its initial request, stated that the station needs to use a side mounted antenna because its analog antenna is on top of its tower and switching now would cause loss of service to analog viewers.⁵⁶ The station intends to use its analog channel 7 for digital service post transition but its pre-transition operation and construction permit are on UHF channel 32.⁵⁷ Its side mounted antenna serves only 24.9 percent of the area and 14 percent of the population predicted to be served by its post-transition facilities.⁵⁸ The Commission noted that although it appeared that the waiver request wrongly compares current service with post transition service, Commission records indicate that the station can serve only 16.3 percent of its predicted pre-transition population.⁵⁹ The licensee in its extension request indicates that side-mounted operation of the station's antenna is expected to continue until the transition takes place.⁶⁰ Therefore, we find that WTRF-DT is eligible for a six-month extension of its digital testing waiver due to its substantially reduced coverage area caused by the necessity to use a side mount antenna.⁶¹

19. Hoak Media of Wichita Falls License, LLC, licensee of KAUZ-DT (CBS), Wichita Falls, Texas, stated in its initial waiver request that the station needs to use a side mounted antenna because its analog antenna is at the top tower position and cannot be moved until after the transition.⁶² The station claims it is unable to serve 17.1 percent of the area predicted to be served by post transition facilities.⁶³ On July 2, 2007 the licensee filed a supplement to its waiver request explaining that it is currently operating reduced power facilities pursuant to special temporary authority. It further states that KAUZ-DT is presently unable to serve 17.1 percent of its pre-transition coverage area and 31.5 percent of its

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different from their post transition channel must complete their post-transition facilities. *See Third DTV Periodic Review, supra. note 37.*

⁵² WTVG Inc. waiver request at 2.

⁵³ *Id.*

⁵⁴ *Id.* at n. 4.

⁵⁵ WTVG-DT extension request at 2.

⁵⁶ West Virginia Media Holdings request at 1-2.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.*

⁵⁹ July Order at 12926-7. The appropriate comparison should be current coverage with authorized coverage pre-transition.

⁶⁰ WTRF-DT extension request at 2.

⁶¹ WTRF-DT was also granted a use-or-lose waiver until February 17, 2009 due to the necessity to use a side mounted antenna. Use or Lose Order, *supra* n. 32.

⁶² Hoak Media waiver request at 2.

⁶³ *Id.*

predicted population because of the side mounted position of its antenna. The licensee asserts that these conditions are unchanged⁶⁴ and therefore we find that KAUZ-DT is eligible for a six-month extension of its digital testing waiver.

IV. ORDERING CLAUSES

20. ACCORDINGLY, IT IS ORDERED that the requests of the television stations set forth in Appendix A of this Order for extension of the digital signal testing deadline waiver ARE GRANTED and the first permissible date for digital testing for these stations IS EXTENDED six months from January 15, 2008 to June 15, 2008. In order to ensure action before the statutory expiration date of the waivers granted herein, any further extension request must be filed no later than April 15, 2008, 60 days prior to this expiration date.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

⁶⁴ KAUZ-DT extension request at 2.

APPENDIX A**STATIONS GRANTED WAIVER EXTENSIONS**

WABC-DT	New York, New York
WNKY-DT	Bowling Green, Kentucky
WBOY-DT	Clarksburg, West Virginia
KCBY-DT	Coos Bay, Oregon
KVAL-DT	Eugene, Oregon
KHAS-DT	Hastings, Nebraska
KNOP-DT	North Platte, Nebraska
WTVG-DT	Toledo, Ohio
WTRF-DT	Wheeling, West Virginia
KAUZ-DT	Wichita Falls, Texas