

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

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| In the Matter of |) | |
| |) | |
| |) | |
| Amendment of Section 73.622(i), |) | MM Docket No. 09-115 |
| Final DTV Table of Allotments, |) | RM-11543 |
| Television Broadcast Stations. |) | |
| (Fond du Lac, Wisconsin) |) | |

NOTICE OF PROPOSED RULE MAKING

Adopted: June 29, 2009

Released: July 1, 2009

Comment Date: [15 days after date of publication in the Federal Register]

Reply Comment Date: [25 days after date of publication in the Federal Register]

By the Chief, Video Division, Media Bureau:

1. The Commission has before it a petition for rulemaking filed by WWAZ License, LLC (“WWAZ”), the licensee of station WWAZ-DT, DTV channel 44, Fond du Lac, Wisconsin. WWAZ requests the substitution of DTV channel 5 for channel 44 at Fond du Lac.¹

2. WWAZ states that the proposed channel substitution will serve the public interest because it “will eliminate the technical requirement that the Station co-locate with Station WWRS-DT, Mayville, Wisconsin, to avoid adjacent-channel interference between the two stations.”² WWAZ further notes that, as a Spanish-language station, the proposed channel substitution and other related changes in facility location will permit it to serve twice the number of Hispanic viewers.

3. The proposal, as originally submitted, would have resulted in a loss of service to viewers along the western and northwestern edge of both station WWAZ-DT’s Appendix B digital service area and station WWAZ-TV’s licensed analog service area. In response to a staff request for a public interest showing justifying the anticipated loss of service,³ WWAZ filed a supplement on February 23, 2009, proposing the use of two fill-in translators that would serve 99.8% of this loss area. Construction permit applications and associated requests for special temporary for these two translators were filed on March 6, 2009.⁴ On May 8, 2009, the Commission released its *Replacement Translator Order* creating a “new,

¹ On August 22, 2008, WWAZ requested that the post-substitution channel be modified from DTV channel 9, which it had requested in the original petition for rulemaking, to DTV channel 5.

² *WWAZ Petition for Rulemaking*, at 1-2.

³ Proposals that would result in a loss in TV service have been considered to be *prima facie* inconsistent with the public interest. See *West Michigan Telecasters, Inc.*, 22 FCC 2d 943 (1970), *recon. denied*, 26 FCC 2d 668 (1970), *aff’d*, *West Michigan Telecasters, Inc. v. FCC*, 460 F. 2d 883, 889 (D.C. Cir. 1972) (finding that losses in service are *prima facie* inconsistent with the public interest); *Triangle Publications, Inc.*, 37 FCC 307, 313 (1964) (finding that “once in operation, a station assumes an obligation to maintain service to its viewing audience and the withdrawal or downgrading of existing service is justifiable only if offsetting facts are shown which establish that the public generally will be benefited”).

⁴ See File Nos. BDRCT-20090223ABC and ABW; BLSTA-20090223ACA and ACB.

‘replacement’ digital television translator service to permit full-service television stations to continue to provide service to viewers within their coverage areas who have lost service as a result of those stations’ digital transition.”⁵ The Commission stated that “the purpose of replacement digital television translators is to provide service to analog loss areas, not to expand full-service post-transition stations’ service areas,” but that “it may be impossible for some post-transition full-service stations to site translators that replace analog loss areas without also slightly expanding their analog service areas.”⁶ Thus, the Commission determined that it would “allow full-service stations seeking replacement digital television translators to propose a *de minimis* expansion of their analog service areas upon a showing that it is necessary to replace service in their post-transition analog loss areas.”⁷ On June 16, 2009, WWAZ filed a further supplement to its petition for rulemaking amending its original proposal for replacement translators. Under the amended proposal, the replacement translators would expand the analog service area by approximately .1% of the population within the previously authorized analog service area. Under this new proposal, approximately 2,086 persons would lose service, all of whom would continue to be served by seven other television stations.

4. We believe that the proposed slight expansion of service beyond station WWAZ-TV’s authorized analog service area is consistent with the policy set forth in the *Replacement Translator Order* to permit use of translators to serve loss areas where doing so would result in, at most, a *de minimus* expansion of the analog service area, and that, as supplemented, WWAZ’s proposal warrants consideration. DTV channel 5 can be substituted for DTV channel 44 at Fond du Lac, Wisconsin as proposed, in compliance with the principal community coverage requirements of Section 73.625(a) of the Commission’s rules,⁸ at 43-05-46 N. and 87-54-15 W. In addition, we find that this channel change meets the technical requirements set forth in Sections 73.616, 73.622(f)(5) and 73.623 of the Commission’s rules.⁹ We propose to substitute DTV channel 5 for DTV channel 44 for station WWAZ-DT at Fond du Lac with the following specifications:

| State and City | DTV Channel | DTV Power (kW) | Antenna HAAT (m) |
|-----------------|-------------|----------------|------------------|
| Fond du Lac, WI | 5 | 25 | 354 |

5. Accordingly, we seek comments on the proposed amendment of the DTV Table of Allotments, Section 73.622(i) of the Commission’s rules,¹⁰ for the community listed below, to read as follows:

Channel No.

| <u>City and State</u> | <u>Present</u> | <u>Proposed</u> |
|------------------------|----------------|-----------------|
| Fond du Lac, Wisconsin | 44 | 5 |

⁵ *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations*, Report and Order, FCC 09-36 ¶ 1 (rel. May 8, 2009) (“*Replacement Translator Order*”).

⁶ *Id.*, at ¶ 18.

⁷ *Id.*

⁸ 47 C.F.R. § 73.625(a).

⁹ 47 C.F.R. §§ 73.616, 73.622(f)(5) and 73.623.

¹⁰ 47 C.F.R. § 73.622(i).

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. Pursuant to Section 73.623(h) of the rules, mutually-exclusive applicants will be provided a 90-day period of time, from the date of a public notice identifying mutually-exclusive proposals, to resolve their mutual-exclusivity via engineering amendment or settlement.¹¹ If we receive a maximization application on or before the date for filing initial comments in this proceeding, which proposes a facility which is mutually-exclusive with the proposal set forth herein, we will issue a public notice and the parties will have 90 days within which to resolve their mutual-exclusivity. If the parties resolve their mutual-exclusivity, we will complete the rulemaking process by issuing the appropriate order. If the parties are unable to resolve their mutual-exclusivity, we will terminate this proceeding and dismiss the maximization application.

7. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before [15 days after publication in the Federal Register] and reply comments on or before [25 days after publication in the Federal Register], and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 12th Street, S.W., Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Kathleen Victory, Esq.
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209

8. Parties must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, Maryland 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary. Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary.¹² Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the DTV Table of Allotments, Section 73.622(i). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees,"

¹¹ 47 C.F.R. §73.623(h)(3).

¹² See 47 C.F.R. § 1.7.

pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, § 3506(c)(4).

10. For further information concerning the proceeding listed above, contact David J. Brown, Media Bureau, (202) 418-1600. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision in the applicable docket is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or any summary of any new information shall be served by the person making the presentation upon the other parties to the proceeding in a particular docket unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

APPENDIX

1. Pursuant to authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the DTV Table of Allotments, 47 C.F.R. Section 73.622(i), as set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of the filings in this proceeding;

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) Because the Commission has not yet lifted its freeze on the filing of petitions for rulemaking to establish new DTV channel allotments and for changes in community of license,¹³ we will not consider counterproposals which propose new allotments or changes in community of license.

(b) With respect to petitions for rule making which conflict with the proposal in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; service. Pursuant to applicable procedures set out in 47 C.F.R. Sections 1.415 and 1.420, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. The person filing the comments shall serve comments on the petitioners. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. A certificate of service shall accompany such comments and reply comments (*see* 47 C.F.R. Section 1.420(a), (b) and (c)). Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be

¹³ See Public Notice, "Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes," 19 FCC Rcd 14810 (MB 2004).

furnished the Commission. An electronic copy should also be sent to david.brown@fcc.gov.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center, at its headquarters, 445 12th Street, S.W., Washington, D.C. 20554.