

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

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

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 11, 2009

Released: August 12, 2009

By the Chief, Video Division, Media Bureau:

1. The Commission has before it a Notice of Proposed Rulemaking issued in response to a petition for rulemaking filed by WWAZ License, LLC ("WWAZ"), the licensee of WWAZ-DT, channel 44, Fond du Lac, Wisconsin. WWAZ requests the substitution of channel 5 for channel 44 at Fond du Lac. Opposing comments were filed by Venture Technologies Group, LLC ("Venture"), the licensee of WLFM-LP, channel 6, Chicago, Illinois; WDJT-TV Limited Partnership ("WDJT"), the licensee of WDJT-TV, Milwaukee, Wisconsin; and Grand Valley State University ("GVSU"), the licensee of noncommercial educational station WGVK(TV), channel 5, Kalamazoo, Michigan. WWAZ filed comments reaffirming its interest in the proposed channel substitution, as well as three separate reply comments addressing the arguments raised by Venture, WDJT, and GVSU.

2. As stated in the Notice of Proposed Rulemaking, WWAZ's channel 5 proposal, as originally submitted, would have resulted in a loss of service to persons residing along the western and northwestern edge of the station's licensed analog service area and authorized Appendix B digital service area. It is well-established that proposals that would result in a loss of existing television service are considered prima facie inconsistent with the public interest. Accordingly, based upon discussions with the Video Division, WWAZ supplemented its petition for rulemaking on February 23 and June 16, 2009, to propose use of two replacement digital translator stations at Ripon and Columbus, Wisconsin, in order to restore WWAZ service to the proposed loss area. WWAZ demonstrated that the replacement translator stations would restore service to all but 2,086 of the 186,253 persons who would lose primary service from WWAZ's proposal, and that all 2,086 persons would continue to be well-served by other television stations. Having concluded that WWAZ's proposal complied with the principal community coverage requirements of Section 73.625(a) and the technical requirements of Sections 73.616, 73.622(f)(5) and 73.623 of the Commission's rules, we proposed to substitute channel 5 for channel 44 at Fond du Lac.

3. With respect to WWAZ's proposal to use two replacement digital television translator

1 Fond du Lac, Wisconsin, Notice of Proposed Rulemaking, DA 09-1490 (released July 1, 2009).

2 Id. at ¶ 3.

3 Id. at n.3.

4 See File Nos. BDRCT-20090223ABX and BDRCT-20090223ABW, granted July 21, 2009.

5 See June 16, 2009 Further Supplement to Petition for Rulemaking at 2.

stations to serve the loss area that would be created by the requested channel substitution, the Commission established the replacement digital 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.”⁶ WDJT and GVSU argue that WWAZ is not eligible to use the replacement digital translator service because its current digital construction permit – if constructed – is capable of providing service to the station’s entire analog service area.⁷ According to these commenters, any service loss is caused by WWAZ’s decision to move the facility closer to Milwaukee, and “the Commission did not intend the digital replacement translator service to operate as a form of justification and excuse for the affirmative creation of analog . . . primary service loss areas.”⁸

4. In response, WWAZ explains that the location of its operation on channel 44 is constrained by the adjacent allotment of channel 43 at Mayville, Wisconsin, which requires that the two stations operate from towers in the same area in order to avoid interference. According to WWAZ, it is unable to construct at its authorized digital site because “the tower on which the . . . DTV antenna was to be located would not support the additional weight, and thus, a new site and new DTV channel was necessary.”⁹ WWAZ asserts that the Commission created the digital replacement translator service in order to provide digital service to analog loss areas created as a result “of difficulties that full-power licensees would face with the DTV transition, including ‘technical complexities’.”¹⁰ WWAZ maintains that since the station’s authorized digital facility cannot be located at the authorized site due to technical difficulties, and the proposed digital replacement translators are designed to provide fill-in service to those areas which previously received analog service from the station, WWAZ’s proposal to use digital replacement translators is consistent with the Commission’s intent in adopting this new service.¹¹

5. In adopting the digital replacement translator service, the Commission stated that its intent was “[t]o assist full-service stations to replace service to any loss areas . . .”¹² The Commission specifically recognized that “[f]ull service television stations are continuing to make changes to their final, post-transition facilities” during the DTV transition because of technical complexities or the need to relocate station facilities, and that “[i]n some cases, a portion of the existing analog service area of a full-service station will no longer be able to receive service after the station transitions to digital broadcasting.”¹³ In this case, WWAZ is unable to construct its presently authorized digital facility on channel 44 due to technical issues and has designed digital replacement translators that will provide service to those areas of its analog service area that are not predicted to receive service from its proposed facility. Accordingly, WWAZ’s proposal to utilize digital replacement translators in conjunction with its channel substitution request falls within the circumstances specifically contemplated by the Commission when it created the digital

⁶ *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, 24 FCC Rcd 5931, ¶ 1 (2009) (*Replacement Translator Order*). Unlike other television translator licenses, the license for a replacement digital translator station is associated with the full-power station’s main license and may not be separately assigned or transferred. *Id.* at ¶ 23.

⁷ WDJT Comments at 2; GVSU Comments at 6.

⁸ WDJT Comments at 4. GVSU similarly argues that “[i]t is not the digital transition that results in the service loss from WWAZ’s proposal, but rather WWAZ’s desire to change channels and move WWAZ-[DT] to Milwaukee, greatly expanding its service areas.”

⁹ WWAZ Reply Comments to WDJT at 2; WWAZ Reply Comments to GVSU at 2-3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Replacement Translator Order* at ¶ 4.

¹³ *Id.* at ¶ 3.

replacement translator service.¹⁴

6. Venture, WDJT, and GVSU also argue that the requested channel substitution, along with the change in the location of the transmission facilities from Dodge County, Wisconsin to an existing tower in Milwaukee, would not serve the public interest because it will permit WWAZ-DT to abandon its more rural service area to serve the larger Milwaukee market. WWAZ's proposal, however, complies with the principal community coverage requirements with respect to Fond du Lac, and almost all viewers will continue to receive WWAZ-DT service from WWAZ-DT on channel 5, or the two replacement translator stations on channels 15 and 30. In this regard, we also note that WWAZ-TV ceased analog operations on channel 68 on July 17, 2008,¹⁵ and that WWAZ-DT has been silent since January 12, 2009 for financial reasons.¹⁶

7. GVSU and Venture further argue that the proposed facilities do not comply with Section 73.622(f)(6)(ii) of the Commission's rules,¹⁷ which limits the maximum ERP for stations operating in Zone 1. The rule, however, does not restrict power levels in excess of those specified in that section of the rule so long as the proposed facility does not exceed the largest station in the DMA.¹⁸ WWAZ is presently in the Green Bay-Appleton, Wisconsin DMA and our engineering analysis indicates that the proposed facilities do not exceed the facilities of WBAY-DT, channel 23, Green Bay, the largest station in the market.

8. GVSU and Venture also argue that the "highly directional antenna" proposed by WWAZ would violate Section 73.685(e) of the Commission's rules,¹⁹ which provides that stations operating on channels 2-13 "will not be permitted to employ a directional antenna having a ratio of maximum to minimum radiation in the horizontal plane in excess of 10 dB." According to GVSU, WWAZ proposes a 30 dB maximum to minimum ratio. As WWAZ points out, however, Section 73.685(e) only applies to analog directional proposals, not DTV directional proposals. Instead, Section 73.625(c) applies to DTV directional proposals, which contains "no constraint on maximum-to-minimum ratios for directional antennas used for DTV operations."²⁰

9. GVSU also asserts the petition should be denied because the proposed facility may cause interference to co-channel station WGVK(TV) due to "tropospheric ducting" across Lake Michigan.²¹ In

¹⁴ Venture also argues that the use of the two translators limits the availability of new channels in the upcoming low power television filing windows. Venture Comments at 2. The Commission rejected this argument in the *Replacement Translator Order*, when it "conclude[d] that the licensing of replacement digital television translators must take precedence over the licensing of new digital translators and low power television stations." *Replacement Translator Order*, 24 FCC Rcd at ¶ 6. We also note that Venture has provided no evidence that there are no available channels in the area in which WWAZ's replacement TV translators were granted.

¹⁵ File No. BLSTA-20080731ACA. On July 28, 2008, the Commission granted WWAZ's request to permanently cease analog operations. See *WWAZ License, LLC*, 23 FCC Rcd 10880 (Vid. Div. 2008)

¹⁶ File No. BLSTA-20090115AHW.

¹⁷ 47 C.F.R. § 73.622(f)(6)(ii).

¹⁸ See 47 C.F.R. § 73.622(f)(5).

¹⁹ 47 C.F.R. § 73.685(e).

²⁰ *Chattanooga, Tennessee*, Report and Order, 16 FCC Rcd 3121, 3122 n. 2 (Vid. Serv. 2001). See also 47 C.F.R. § 73.625(c); WWAZ Reply Comments to GVSU at 4.

²¹ GVSU Comments at 9-10 and Exhibit 2. Ducting is a phenomenon caused by atmospheric conditions that enhance the propagation of television signals over or near large bodies of water. See *Honolulu, Hawaii*, Report and Order, 19 FCC Rcd 23604, n.3 (Vid. Div. 2004).

response, WWAZ cites to cases where the Commission rejected claims of ducting as insufficient to form a basis for denying a requested channel substitution.²² In those cases, the Commission concluded that considering general allegations of potential ducting effect would undermine the Commission's allotment rules and standards with respect to all allotment proceedings involving communities around coastlines or large bodies of water.²³ Thus, absent specific technical information and support for an interference claim based on ducting, such a claim does not support denial of a requested allotment. While GVSU alleges that prior to the end of the DTV transition on June 12, 2009, its co-owned station WGUV-TV, analog channel 35, Grand Rapids, Michigan, experienced interference from WMVT-DT, digital channel 35, Milwaukee, Wisconsin, this does not establish that WGUV on digital channel 5 will experience interference within its protected contour from WWAZ-DT's proposed channel 5 digital operations.

10. We also find an additional reason why the public interest would be served by substituting channel 5 for channel 44 at Fond du Lac. WLS-TV, the ABC network affiliate in Chicago, Illinois, commenced operation on its post-transition digital channel 7 on June 12, 2009. Since then, the station and the Commission have received thousands of calls from persons who received the station's analog and pre-transition digital signals, but are unable to view WLS-TV on digital channel 7 due to reception problems. On July 24, 2009, WLS Television, Inc., the licensee of WLS-TV, filed a petition for rulemaking requesting the substitution of channel 44 for channel 7 at Chicago. That proposal, however, is predicted to cause impermissible interference to WWAZ-DT on channel 44. Substituting channel 5 for channel 44 at Fond du Lac will permit the substitution of channel 44 for channel 7 at Chicago, allowing WLS-TV to restore service to thousands of viewers who have come to rely on WLS-TV for local and ABC network programming.²⁴

11. DTV channel 5 can be substituted for DTV channel 44 at Fond du Lac as proposed, in compliance with the principal community coverage requirements of Section 73.625(a) of the Commission's rules, at the coordinates 45-05-46 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 with the following specifications:

City and State	DTV Channel	DTV Power (kW)	Antenna HAAT (meters)	DTV Service Pop. (thous.)
Fond du Lac, WI	5	25	354	4096

12. We also conclude that good cause exists to make this channel change effective immediately upon publication in the Federal Register, pursuant to Section 553(d)(3) of the Administrative Procedures Act.²⁵ An expedited effective date is necessary in this case to ensure that station WWAZ-DT, which has

²² WWAZ Reply to GVSU at 5-6.

²³ See *Honolulu, Hawaii*, 19 FCC Red at 23605 and cases cited therein.

²⁴ Concurrent with this *Report and Order*, we are releasing a *Notice of Proposed Rulemaking* proposing to substitute channel 44 for channel 7 at Chicago. As discussed therein, that station's reception problems are largely the result of the low ERP level allotted to WLS-TV on channel 7, and the large number of urban viewers who reside in tall buildings where indoor reception is impaired due to wall attenuation and viewers are unlikely to have the option of using rooftop antennas to receive over-the-air television signals.

²⁵ 5 U.S.C. § 553(d)(3).

been silent since January 2009 - can restore service to its viewers as quickly as possible.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's rules, IT IS ORDERED, That effective immediately upon the date of publication of this Report and Order in the Federal Register, the DTV Table of Allotments, Section 73.622(i) of the Commission's rules, IS AMENDED, with respect to the community listed below, to read as follows:

<u>City and State</u>	<u>Channel No.</u>
Fond du Lac, WI	5

14. IT IS FURTHER ORDERED, That within 45 days of the effective date of this Order, WWAZ License, LLC, shall submit to the Commission a minor change application for a construction permit (FCC Form 301) specifying DTV channel 5 in lieu of DTV channel 44.

15. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning the proceeding listed above, contact David J. Brown, Media Bureau, (202) 418-1600.

FEDERAL COMMUNICATIONS COMMISSION

Clay C. Pendarvis
Associate Chief, Video Division
Media Bureau