

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

In the Matter of
Service Electric Cablevision
Petition for Stay of Section 76.101 of the
Commission's Rules

ORDER ON PETITION FOR STAY

Adopted: November 20, 2013

Released: November 20, 2013

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. In this Order, we grant Service Electric Cablevision's ("Service Electric") petition for stay of Section 76.101 of the Commission's Syndicated Exclusivity Rules pending the Commission's findings on Service Electric's Petition for Waiver of those same rules.

II. BACKGROUND

2. Service Electric states that on September 19, 2013, New Age Media ("New Age") notified it pursuant to Section 76.105(b) that it was invoking the syndicated exclusivity rights of its licensed station, WOLF-TV for two programs - Dr. Phil and The Doctors, as carried on station WFMZ on Service Electric's cable system served by its Hazleton, PA headend. Such notice required Service Electric to delete within 60 days, or by November 18, 2013, the identified programming carried in Hazleton communities falling outside WFMZ's Grade B contour. On November 15, three days before it had to

1 Service Electric Petition for Stay of Section 76.101 of the Commission's rules, filed Nov. 15, 2013 ("Petition for Stay").

2 Service Electric Petition for Special Relief Requesting Waiver of Section 76.101 of the Commission's rules, filed Nov. 15, 2013 ("Petition for Waiver").

3 Petition for Stay at 2 & Exhibit 1, email from Linda Greenwald, Corp. Program Director, New Age Media to Donald Brandt and Tim Trently, Service Electric, Sept. 19, 2013.

4 See id. Section 76.106(a) of our rules provides that a broadcast signal is not required to be deleted from a cable community unit falling in whole or in part within a signal's Grade B contour. 47 C.F.R. § 76.106(a). We assume for purposes of this order that by Grade B contour Service Electric is referring to WFMZ's noise limited service contour. While the "Grade B" contour defined an analog television station's service area, see 47 C.F.R. § 73.683(a), with the completion of the full power digital television transition on June 12, 2009, there are no longer any full power analog stations. Instead, as set forth in Section 73.622(e), a station's DTV service area is defined as the area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited service level - which for VHF stations is 28 dBu. See 47 C.F.R. § 73.622(e). Accordingly, the Commission has treated a digital station's noise limited service contour as the functional equivalent of an analog station's Grade B contour. See Report To Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures, 20 FCC Rcd 19504, 19507 ¶ 3, 19554 ¶ 111 (2005); Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act, Report and Order, 20 FCC Rcd 17278, 17292 ¶ 31 (2005). See also Lenfest (continued...)

comply with New Age's notice, Service Electric filed a Petition to waive the syndicated exclusivity rules with respect to its Hazleton communities, as well as the instant Petition for Stay. As Service Electric concedes, without issuance of a stay, it remains in violation of the rules.<sup>5</sup> According to Service Electric, only four<sup>6</sup> of the thirty nine communities served by its Hazleton cable system, or approximately 1,200 of the 25,000 Hazleton headend subscribers (4.8 percent), fall outside WFMZ's grade B contour and are subject to deletion on exclusivity grounds.<sup>7</sup> Service Electric argues its Hazleton cable system is a stand-alone cable system and that the costs for reconfiguring the system to deliver a separate channel lineup to only a *de minimis* portion of its subscribers in the affected communities significantly outweighs any benefit WOLF-TV would obtain from enforcing its exclusivity rights.<sup>8</sup> In fact, Service Electric argues it could not have physically complied and blacked out WFMZ in the four communities prior to November 18, 2013, but would have had to black out WFMZ from its Hazleton system entirely.<sup>9</sup> Finally, it argues that blacking out the station would cause it irreparable harm given that subscribers lost due to the unavailability of WFMZ will be difficult to regain.<sup>10</sup>

### III. DISCUSSION

3. In determining whether to grant a petition for stay, the Commission analyzes a petitioner's request using a four-part test; it asks whether: (1) the waiver petition is likely to prevail on the merits; (2) the petitioner will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed by issuance of the stay; and, (4) grant of the stay is in the public interest.<sup>11</sup> First, with regard to the likelihood of prevailing on the merits, Commission precedent recognizes that waiving the application of the syndicated exclusivity rule for a *de minimis* number of subscribers does not serve the public interest,<sup>12</sup> and Service Electric declares it cannot easily isolate the four communities at issue without a plant redesign that would cost in excess of \$100,000.<sup>13</sup> Second, we find that Service Electric could suffer irreparable harm through the loss of subscribers frustrated with the blackout of WFMZ on the entire

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*Broadcasting, LLC*, 19 FCC Rcd 8970, 8974 ¶ 7 n.27 (2004) ("For digital stations operating on channels 14-69 [UHF stations], for market modification purposes the 41 dBu DTV service area contour is the digital equivalent of an analog station's Grade B contour.").

<sup>5</sup> *See id.* We note that although Service Electric had 60 days, or until November 18th, from its receipt of New Age's notice to seek relief from compliance, it waited until one business day before, November 15th, to file its Petitions. Accordingly, the fact that it is presently in violation of the syndicated exclusivity rule was entirely within its own control and cannot form the basis for issuance of a stay. We will address any possible enforcement action for Service Electric's violation of the syndicated exclusivity rules at a future time.

<sup>6</sup> These communities are Ashland, Barry, East Cameron and Gordon and contain 786, 191, 15 and 216 subscribers. Petition for Waiver at 4.

<sup>7</sup> Petition for Stay at 3.

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

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Auth. v. Holiday Tours, Inc.* 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Assn v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>12</sup> *See* Petition for Stay at 3 n.8 (citing *Continental Cablevision of Ohio, Inc.*, 7 FCC Rcd. 499, 499-500 ¶ 7 (1992) ("Continental has demonstrated that its system is configured and technically integrated in such a manner that the cost of segregating the relatively few affected subscribers is so prohibitive as not to be in the public interest.")).

<sup>13</sup> *See id.* at Exh. 2, Declaration of Don Brandt, Director of Programming, Service Electric.

Hazleton cable system. Third, although New Age could be harmed because it will not receive syndicated exclusivity protection for 4.8 percent of the Hazleton cable system during the pendency of Service Electric's Petition for Waiver, we believe that the irreparable harm to Service Electric factor significantly outweighs any harm to New Age. Further, we intend to mitigate to the greatest extent possible lingering injury to New Age by resolving Service Electric's Petition for Waiver promptly following the close of the pleading cycle in that proceeding. Finally, we find that grant of Service Electric's requested stay serves the public interest. WFMZ is a local station that carries news and community information of interest, such as weather alerts and school closings, to the subscribers to Service Electric's Hazleton cable system. Blacking out WFMZ to all Hazleton subscribers to afford New Age syndicated exclusivity protection to 4.8 percent of those subscribers does not serve the public interest. Although more evidence will be necessary during the waiver proceeding, the facts as averred by Service Electric are sufficient for our granting its Petition for Stay.

#### IV. CONCLUSION

4. For the reasons stated above, we grant Service Electric's Petition for Stay pending the resolution of its Petition for Waiver.

#### V. ORDERING CLAUSES

5. Accordingly, **IT IS ORDERED**, pursuant to sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 154(j), we **GRANT** that the Petition for Stay of Service Electric Cablevision, Inc. and the deletion of certain programming discussed above from four of its cable system communities **IS STAYED** pending further review of its Petition for Waiver, as described above.

6. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>14</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven Broecker  
Senior Deputy Chief  
Media Bureau, Policy Division

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<sup>14</sup> See 47 C.F.R. § 0.283.