

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

In the Matter of)
)
Amendment of Section 73.622(i),) MB Docket No. 19-118
Post-Transition Table of DTV Allotments) RM-11838
Station WNLO(TV), Buffalo, New York)
)
Amendment of Section 73.622(i))
Post Transition Table of DTV Allotments)
Station WUTV(TV), Buffalo, New York)

NOTICE OF PROPOSED RULEMAKING

Adopted: April 23, 2019

Released: April 23, 2019

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:

I. INTRODUCTION

1. The Commission has before it a petition for rulemaking filed by Nexstar Broadcasting, Inc. (Nexstar), licensee of television station WNLO(TV), channel 32, Buffalo, New York (WNLO), and WUTV Licensee, LLC (WUTV Licensee), licensee of television station WUTV(TV), channel 36, Buffalo, New York. The Joint Petitioners propose the substitution of channel 32 for channel 36 as WNLO's DTV allotment; and the substitution of channel 36 for channel 32 as WUTV's allotment. The Joint Petitioners also request a waiver of the Media Bureau's current freeze on the filing and processing of petitions for digital channel substitutions and minor modification applications for changes to existing television service areas that would increase a full power television station's noise limited contour.

II. BACKGROUND

2. Nexstar is the licensee of full power television stations WNLO (CW), and WIVB-TV, Buffalo, New York (CBS) (WIVB). As a result of the Commission's Incentive Auction, WNLO and WIVB entered into a channel sharing agreement whereby WIVB relinquished its facilities on channel 39 and began operating on a shared basis on WNLO's facilities on channel 32 on April 16, 2018. Under the new arrangement, certain viewers no longer receive WIVB over the air as they historically did, and

1 See Petition for Rulemaking of Nexstar Broadcasting, Inc. and WUTV Licensee, LLC, File No. 0000064127 (filed Dec. 19, 2018) and FCC File No. 00000064271 (filed Dec. 20, 2018) (Joint Petition). We also refer to Nexstar and WUTV Licensee as the Joint Petitioners.

2 Joint Petition at 5.

3 Joint Petition at 2; LMS File Nos. 00000035433 (Construction Permit) and 00000053321 (License to Cover).

Nexstar is unable to modify WNLO's channel 32 technical facilities, which were not changed in the incentive auction repacking process, to restore service to these WIVB viewers.⁴ Joint Petitioners also state that WUTV was repacked from channel 14 to channel 36, and that WUTV Licensee recently sought and received a construction permit to construct its post-auction channel 36 channel facility at the site previously occupied by WIVB.⁵

3. Joint Petitioners seek to exchange the channels of WNLO and WUTV so that after the swap, WNLO (and WIVB) would operate on channel 36 and WUTV would operate on channel 32. As proposed, WUTV would continue to operate from its existing pre-auction location and WNLO would move the Nexstar shared facilities to the site previously vacated by WIVB.⁶

4. The Joint Petitioners claim that the channel substitution serves the public interest because it would allow for a more efficient allocation of UHF television channels and resolve significant over-the-air reception problems in WIVB's prior service area.⁷ They further state that as a result of this substitution, WNLO will be able to relocate its transmission facilities to the former WIVB site, replicate WIVB's antenna pattern, and restore over-the-air service to WIVB's viewers.⁸ In addition, there will be no negative impact to WUTV's present viewers.⁹

5. The Commission instituted a freeze on the acceptance of rulemaking petitions by full power television stations requesting channel substitutions in May 2011,¹⁰ and a freeze on the filing of modification applications by full power and Class A television stations that would increase a station's noise-limited or protected contour beyond the station's currently licensed or authorized facility in April 2013.¹¹ The Media Bureau reimposed the freeze on channel substitutions because the Commission had released the National Broadband Plan recommending, among other things, initiating a rulemaking proceeding to reallocate spectrum from the broadcast television bands and consider methodologies for repacking television channels to make spectrum available for new mobile, fixed, and unlicensed broadband services. Thus, the Media Bureau deemed it appropriate to freeze acceptance of additional rulemaking petitions to change channels to permit the Commission to evaluate reallocation and repacking proposals. In the *April 2013 Freeze Public Notice*, the Bureau explained that the freeze was necessary to (1) create a stable database of full power and Class A facilities that would allow for the development and

⁴ *Id.* See also LMS File No. 00000064271, Statement of John E. Hidle, P.E. in Support of a Request to Exchange DTV Channels Between WUTV-Buffalo, New York . . . and WNLO, Buffalo, New York . . . , at 2 (Engineering Statement).

⁵ Joint Petition at 3; see also LMS File No. 00000034378.

⁶ *Id.* See also Engineering Statement at 1-2.

⁷ Joint Petition at 3-4.

⁸ *Id.* at 4. See also Engineering Statement at 2-3 (WIVB's sharing with WNLO resulted in a loss of population of 798,706 persons and the proposed channel change and relocation of the Nexstar stations will restore service to 364,172 persons). See also *id.* at 2 and Exh. 2 (The proposed relocation of WNLO will result in a net increase in population served and all of the loss area is over water or in Canada).

⁹ *Id.* at 4-5. See also Engineering Statement at 3 and Exhs. 1-2 (WUTV population would increase by 210,612 persons and the entire existing noise limited contour is encompassed by the proposal).

¹⁰ *Freeze on the Filing of Petitions for Digital Channel Substitutions, Effective Immediately*, Public Notice, 26 FCC Rcd 7721 (MB 2011) (*Channel Substitution Freeze Public Notice*).

¹¹ *Media Bureau Announces Limitations on the Filing and Processing of Full Power and Class A Television Station Modification Applications, Effective Immediately, and Reminds Stations of Spectrum Act Preservation Mandate*, Public Notice, 28 FCC Rcd 4364 (MB 2013) (*April 2013 Freeze Public Notice*).

analysis of potential repacking methodologies to be used in connection with the Incentive Auction authorized by the Spectrum Act; and (2) avoid further expansion of broadcast television stations' use of spectrum.¹² The Incentive Auction closed with the issuance of the *Closing and Channel Reassignment Public Notice* on April 13, 2017, and the transition is underway.¹³ The Joint Petitioners ask that the Bureau waive these freezes to grant the Joint Petition.¹⁴ Specifically, they argue now that since the auction is over and the repack is underway, grant of the Petition would have no impact on the Post-Transition Table of DTV Allotments or otherwise affect the analysis of repacking methodologies.¹⁵

III. DISCUSSION

6. Under the present circumstances presented by the Joint Petitioners, we believe that a waiver of the channel substitution freeze and contour extension freeze would serve the public interest because the underlying purpose of the freeze is not implicated. As they point out, the incentive auction and repacking have been completed. Moreover, in order to permit WIVB to restore CBS programming to 364,172 viewers, we are persuaded that the channel swap between the Joint Petitioners is necessary. We note that because WUTV Licensee is already required to construct a new facility on its reassigned channel, granting it a waiver will not adversely affect the post-auction transition period. We also believe that the Joint Petitioner's proposal warrants consideration. DTV channel 32 can be substituted for DTV channel 36 at Buffalo, New York, and DTV channel 36 can be substituted for DTV channel 32 at Buffalo, New York, as proposed, in compliance with the principle community coverage requirements of section 73.625(a) at coordinates (43-01-32.2 N. and 078-55-42.1 W.) for channel 32 and (42-39-33 N. and 078-37-32 W.) for channel 36.

7. We propose the substitutions for station WNLO and WUTV with the following specifications and seek comments on the proposed amendment of the DTV Table of Allotments, section 73.622(i) of the Commission's rules:

City and State	DTV Channel	DTV power (kW)	Antenna HAAT (m)
Buffalo, New York	32	1000.00	329.0
Buffalo, New York	36	800.00	415.0

IV. PROCEDURAL MATTERS

8. *Initial Regulatory Flexibility Act Analysis.* 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 Post-Transition Table of DTV Allotments, section 73.622(i).

¹² *Id.* at 4364-65.

¹³ See *Incentive Auction Closing and Channel Reassignment Public Notice: The Broadcast Television Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced*, Public Notice, 32 FCC Rcd 2786 (2017) (*Closing and Channel Reassignment Public Notice*).

¹⁴ Joint Petition at 5.

¹⁵ *Id.*

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

10. *Ex Parte Rules.* For purposes of this restricted notice and comment rulemaking proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rulemaking 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.

11. *Filing Requirements. Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). In addition to the filing procedures below, a copy of such comments should be served on the Joint Petitioners: Nexstar Broadcasting, Inc., c/o Elizabeth Ryder, 345 E. John Carpenter Freeway, Suite 700, Irving, Texas 75062 and WUTV Licensee, LLC, c/o Paul A. Cicelski, Esq., Lerman Senter PLLC, 2001 L Street, NW, Suite 400, Washington, D.C. 20036.

12. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.

13. Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

14. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

15. All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

16. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20743.

17. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

18. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

19. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal

Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

20. *Additional Information.* For additional information on this proceeding, contact Varsha Mangal, Varsha.Mangal@fcc.gov, or Joyce Bernstein, Joyce.Bernstein@fcc.gov, of the Media Bureau, Video Division.

V. ORDERING CLAUSE

21. 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 CFR sections 0.61, 0.204(b) and 0.283, **IT IS PROPOSED TO AMEND** the Post-Transition Table of DTV Allotments, 47 CFR section 73.622(i).

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
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Media Bureau