

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

In the Matter of)
)
Amendment of Section 73.622(i)) MB Docket No. 21-60
Post-Transition Table of DTV Allotments) RM-11884
Television Broadcast Stations)
(Superior and York, Nebraska))

REPORT AND ORDER

(Proceeding Terminated)

Adopted: August 23, 2021

Released: August 24, 2021

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. The Video Division, Media Bureau (Bureau) has before it a Notice of Proposed Rulemaking¹ issued in response to a Petition for Rulemaking filed by Gray Television Licensee, LLC (Gray or Licensee), the licensee of KSNB-TV, channel 4 (NBC/MyNetwork), Superior, Nebraska (Superior). Gray has requested that the Commission (1) delete channel 4 from Superior and allot it to York, Nebraska (York) in the DTV Table of Allotments² and (2) substitute channel 24 for channel 4 at York in the Table consistent with the technical parameters set forth in its Amended Petition.³ As discussed below, because Gray’s proposal that the Bureau allot channel 24 to York is not mutually exclusive with its existing channel 4 allotment at Superior, and would result in removal of Superior’s sole local transmission outlet, the NPRM sought comment on whether to waive section 1.420(i) of the Commission’s rules (rules) regarding mutual exclusivity,⁴ and the Commission’s allotment policy disfavoring the removal of a community’s sole first local service.

2. Gray filed comments in support of the petition, as required by the rules,⁵ reaffirming its commitment to file for channel 24 at York, Nebraska. Gray subsequently filed Amended Comments at the Bureau’s request to more fully justify Gray’s waiver requests.⁶ For the reasons set forth below we

¹ Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Superior and York, Nebraska), 36 FCC Rcd 4284 (Vid. Div. 2021) (NPRM).

² As noted in the NPRM, on April 13, 2017, the Commission completed the incentive auction and broadcast television spectrum repacking authorized by the Spectrum Act and the post-incentive auction transition period ended on July 13, 2020. The Commission will amend the rules to reflect all new full power channel assignments in a revised Table of Allotments, but because the Table has not yet been amended, the Division has continued to refer to the Post-Transition Table of DTV Allotments, 47 CFR § 73.622(i) (2018), for the purpose of this proceeding.

³ Gray Television Licensee, LLC Petition for Rulemaking (filed July 28, 2020), LMS File No. 0000118815. Gray amended its Petition on October 13, 2020 to reduce the proposed tower height for its proposal (Amended Petition).

⁴ 47 CFR § 1.420(i).

⁵ 47 CFR §§ 1.415, 1.419; see also Buffalo, Iola, Normangee, and Madisonville, Texas, MB Docket No. 07-729, Report and Order, 24 FCC Rcd 8192, 8194, para. 9 (Aud. Div. 2009). Comments of Gray Television Licensee, LLC (filed April 21, 2021) (Comments).

⁶ Amended Comments of Gray Television Licensee, LLC (filed May 18, 2021) (Amended Comments).

will grant the requested waivers and (1) delete channel 4 from Superior and allot it to York, Nebraska, in the DTV Table of Allotments and (2) substitute channel 24 for channel 4 at York in the Table consistent with the technical parameters set forth in the Amended Petition.

II. BACKGROUND

3. In addition to KSNB-TV, Gray is the licensee of KOLN, Lincoln, Nebraska (CBS) and explained that its rulemaking petition “is part of a coordinated effort by Gray to improve service to viewers in the Lincoln & Hastings-Kearney designated market area”⁷ KOLN’s tower collapsed in 2020 and according to Gray, given “the imminent failure of KSNB’s existing technical facility,” rebuilding KSNB-TV on channel 24 at the new KOLN tower would resolve VHF-related reception issues in certain areas of KSNB-TV’s current predicted service area, and save several hundred thousand dollars in construction costs.⁸

4. *Proposed Change of Community of License.* A change in community of license for KSNB-TV is necessary because Gray’s proposed operation on channel 24 at the authorized KOLN tower (a relocation of 23.5 km) cannot provide the required 48 dBu principal city signal to Superior.⁹ Gray states that York, which currently has no local television allotment, qualifies as a community for allotment purposes.¹⁰ Gray also asserted that its proposed change of community of license represented a preferential arrangement of allotments under the Commission’s second allotment priority because it would result in a first local television station for York, and that while Superior would lose its only local television station, York is more deserving of an allotment.¹¹ Finally, while Gray’s proposal to operate on channel 24 at York is not mutually exclusive with its current operations on channel 4 at Superior, which is required under section 1.420 of the rules in order for a proposed community of license change to be protected from competing expressions of interest, Gray demonstrated that there were numerous channels available for future allotments in and around Superior.¹²

5. In its Amended Comments, Gray asserts again that substituting channel 24 at York for channel 4 at Superior would serve the public interest in that it would resolve significant over the air reception problems in KSNB-TV’s current service area.¹³ Gray explains that given the known problems with low VHF channel reception and KSNB-TV’s current substandard facilities, it does not place a reliable over-the-air signal to the residents of Superior, who receive service from four other stations and will receive better service from KSNB-TV and KOLN as a result of the technical changes.¹⁴ In addition, Gray states that as the larger community York is more deserving of a first local channel.¹⁵ Finally, Gray

⁷ *NPRM*, 36 FCC Rcd at 4825, para. 2.

⁸ *Id.* Gray further stated that although it discovered after acquiring KSNB-TV in 2013 that the station’s digital facilities were “grossly inadequate,” it could not pursue any meaningful upgrades because of various broadcast freezes then in effect, and that “in recent years, Gray’s engineering resources have been devoted fully to the [incentive auction] repack.” *Id.* at n.11.

⁹ *Id.* at para. 3; 47 CFR § 73.625(a).

¹⁰ *NPRM*, 36 FCC Rcd at 4825-26, para. 3. *See also Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Willows and Dunnigan, California)*, MM Docket No. 94-29, Report and Order, 10 FCC Rcd 11522, 11523, paras. 7-10 (MMB 1995) (outlining test for community of license status under section 307(b) of the Communications Act, as amended, 47 U.S.C § 307(b)), *recon. denied on other grounds*, 15 FCC Rcd 23852 (MMB 2000).

¹¹ *NPRM*, 36 FCC Rcd at 4826, para. 4.

¹² *Id.* at 4828, para. 11 and n.40.

¹³ Amended Comments at 2.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 5-6.

noted again that there were numerous VHF and UHF channels available for future allotment in the Superior/York/Lincoln, Nebraska area.¹⁶

6. *Proposed Channel Substitution.* According to Gray, since acquiring KSNB-TV, Gray has determined that many viewers experience significant difficulty in receiving the station's signal, including in Superior.¹⁷ As a result, Gray concluded that moving from channel 4 to channel 24 will enable KSNB "to deliver a more reliable over-the-air signal to viewers throughout its coverage area."¹⁸

7. Gray's proposal to change channel and relocate to the KOLN tower would result in a predicted loss of service to 8,920 persons, including a loss of first television service to 14 persons and second television service to 523 persons.¹⁹ According to Gray, however, taking into account both KSNB-TV's proposal and KOLN's authorized expanded contours, most of the loss area will continue to receive four or more television services, and there will be an overall gain of 202,654 persons, including a first local service for 150 persons, an additional second service to 4,816 persons, and an additional third service to 5,860 persons.²⁰

8. In its Amended Comments, Gray once again reiterated that the channel change would greatly improve KSNB-TV's current reception problems on low VHF channel 4, create a new gain of 186,317 persons, and result in a substantial improvement in service in the Lincoln DMA with no negative effects.²¹

III. DISCUSSION

9. Section 1.420(i) of the rules provides that the Commission, during a rulemaking proceeding to amend the Table of Allotments, may modify a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.²² The Commission will apply this procedure in the limited circumstances in which: (1) the new allotment will be mutually exclusive with a station's existing allotment; (2) the new allotment will result in a preferential arrangement of the allotments according to the Commission's television allotment priorities; and (3) the new allotment will not deprive a community of its sole local transmission outlet.²³ Generally, the Commission believes that its prohibition on the removal of a community's first local service is justified because such removal is presumptively inconsistent with the public interest.²⁴ The Commission, however, will entertain a request to waive its general prohibition on the removal of a community's sole first local service in the rare circumstance where such a removal might serve the public interest, for example, providing a first reception service to a significantly sized population.²⁵

¹⁶ *Id.* at 5 and n.17.

¹⁷ *NPRM*, 36 FCC Rcd at 4826, para. 5.

¹⁸ *Id.*

¹⁹ *Id.* at para. 6.

²⁰ *Id.*; *see also id.* at n.25 ("Because so few viewers are able to receive KSNB with an over-the-air antenna, Gray has been broadcasting KSNB's programming on multicast channels for KOLN and satellite stations KGIN [CBS/NBC, Grand Island, Nebraska] and KNHL [MyNetwork/NBC/CW, Hastings, Nebraska.]").

²¹ *Id.* at 2.

²² 47 CFR § 1.420(i); *Modification of FM and TV Authorizations to Specify a New Community of License*, MM Docket No. 88-526, Report and Order, 4 FCC Rcd 4870, 4873, para. 22 (1989) (*Change in Community R&O*), *recon. granted in part*, 5 FCC Rcd 7094 (1990) (*Recon MO&O*).

²³ *Change in Community RO&O*, 4 FCC Rcd at 4874, para. 28.

²⁴ *Recon MO&O*, 5 FCC Rcd at 7096, para. 17.

²⁵ *Id.*

10. The Commission determines a preferential arrangement of allotments based on the following five priorities: (1) provide at least one television service to all parts of the United States; (2) provide each community with at least one television broadcast station; (3) provide a choice of at least two television services to all parts of the United States; (4) provide each community with at least two television broadcast stations; and (5) assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities.²⁶

11. *Waiver Standard.* The Commission may waive a rule for good cause shown.²⁷ The Commission may grant a request for waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²⁸ Waiver is appropriate where the particular facts make strict compliance inconsistent with the public interest. In making this determination, we may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁹ Waiver is therefore appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.³⁰

12. *Mutual Exclusivity Requirement Waiver.* The Commission adopted section 1.420 in 1989 to provide a procedure whereby a television station could request a new community of license in a rulemaking petition to amend the television table of allotments without subjecting the station to the risk of losing its license to competing applications.³¹ Because the Commission did not, however, wish to preclude future applicants from having an opportunity to apply for a new station to serve the area, it adopted the mutual exclusivity requirement – that a proposed change in community of license must be mutually exclusive with the station’s current allotment in order to be shielded from competing expressions of interest – so only petitions that did not “deprive potential [future] applicants of opportunities” would be accepted.³² In this case, Gray has demonstrated that if we grant a waiver and adopt its proposed amendments to the DTV Table of Allotments, multiple channels are currently available for future allotment in the Superior/York/Lincoln, Nebraska area.³³ Thus, because the underlying purpose of the rule would not be frustrated by the instant rulemaking petition to change KSNB-TV’s community of license without allowing competing expressions of interest, we will waive this requirement of section 1.420 of the rules.

13. *Removal of Sole Local Service From Superior.* We also waive the Commission’s policy disfavoring the removal of a sole local service allotted to a community. As Gray has demonstrated, York

²⁶ *Amendment of Section 3.606 of the Commission’s Rules and Regulations*, Sixth Report and Order, 41 F.C.C. 148, 167-173 (1952) (*Sixth Report and Order*).

²⁷ 47 CFR § 1.3.

²⁸ *Id.*

²⁹ *See Northeast Cellular Tel. Co., LP v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

³⁰ *Id.* at 1166. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *NetworkIP v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008).

³¹ *NPRM*, 36 FCC Rcd at 4828, para 11.

³² *Id.* at 4828, para. 11 and n.39; *Change in Community R&O*, 4 FCC Rcd at 4872-73, paras. 22, 24.

³³ Amended Petition, Engineering Exhibit (showing channels potentially available for allotment at Superior (Table 2 – five VHF and 13 UHF), York (Table 3 – four VHF and 10 UHF), and Lincoln, Nebraska (Table 4 – four VHF and five UHF)).

is significantly larger than Superior,³⁴ and grant of a waiver to allow KSNB-TV to co-locate with KOLN would result in the provision of first, second, and third television service to a substantial number of persons. Moreover, other important public interest benefits would accrue by permitting KSNB-TV to change its channel and community, and co-locate with KOLN, including operational and economic efficiencies and resolving low VHF reception problems for KSNB-TV. Finally, Gray has demonstrated that there are a number of channels that may be allotted to Superior if an interested party wishes to pursue acquiring a construction permit for a new station in the area. In addition, we find that Superior will receive improved service from KSNB-TV's operation on channel 24 on the KOLN tower.

14. As proposed, channel 24 can be allotted to York, Nebraska, in compliance with the principal community coverage requirements of section 73.625(a) of the rules,³⁵ at coordinates 40-48-11.0 N and 97-10-53.0 W. Although the Petitioner's proposal would result in a loss of service to a small number of persons, we find such a loss to be *de minimis*.³⁶ Furthermore, we find that this channel change meets the technical requirements set forth in sections 73.616 and 73.623 of the rules with the following specifications:³⁷

<u>City and State</u>	<u>DTV Channel</u>	<u>DTV Power (kW)</u>	<u>Antenna HAAT (m)</u>	<u>DTV Service Population</u>
York, Nebraska	24	260	429.7	664,078

15. 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 Procedure Act.³⁸ An expedited effective date is necessary in this case to ensure that KSNB-TV can operate with improved service to its viewers as quickly as possible.

IV. ORDERING CLAUSES.

16. **IT IS ORDERED** that, 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, 47 U.S.C. §§ 154(i), 155(c)(1), 303(g), (r), and 307(b), and sections 0.61, 0.204(b), and 0.283 of the rules, 47 CFR §§ 0.61, 0.204(b), and 0.283, the waivers of the Commission's rules under section 1.3 of the rules, 47 CFR § 1.3, and policies to Amend the Post-Transition Table of DTV Allotments, section 73.622(i) of the rules, 47 CFR § 73.622(i), **ARE GRANTED**, and this *Report and Order IS ADOPTED. IT IS FURTHER ORDERED, That effective immediately upon the date of publication in the Federal Register, the DTV Table of Allotments, section 73.622(i) of the Commission's rules, 47 CFR § 73.622(i), **IS AMENDED**, with respect to the communities listed below, to read as follows:*

<u>City and State</u>	<u>Channel</u>
York, Nebraska	24
Superior, Nebraska	-

17. **IT IS FURTHER ORDERED**, That effective immediately upon the date of publication in the Federal Register, channel 4 is deleted from Superior, Nebraska and channel 24 is allotted to York, Nebraska. **IT IS FURTHER ORDERED**, That Gray Television Licensee, LLC **SHALL FILE** an application requesting a modification of its license, and pending the grant of aforementioned application,

³⁴ See *Amendment of 73.622(i) Post-Transition Table of DTV Allotments, Television Broadcast Stations (Block Island and Newport, Rhode Island)*, MB Docket No. 18-133, Report and Order, 33 FCC Rcd 8773 (Vid. Div. 2018).

³⁵ 47 CFR § 73.625(a).

³⁶ See *WSET, Inc.*, 80 FCC 2d 233, 246 (1980) (finding that population loss of less than 500 persons is *de minimis*).

³⁷ 47 CFR §§ 73.616, 73.623.

³⁸ 5 U.S.C. § 553(d)(3).

KSNB-TV's community of license **SHALL BE MODIFIED** to York, Nebraska. **IT IS FURTHER ORDERED**, That within 30 days of the effective date of this Order, Gray Television Licensee, LLC **SHALL FILE** a minor change application for a construction permit (Form 2100, Schedule A) specifying channel 24 in lieu of channel 4 with the technical parameters adopted in this Order.

18. **IT IS FURTHER ORDERED**, That pursuant to section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), the Commission **SHALL SEND** a copy of the Order to Congress and to the Government Accountability Office.

19. **IT IS FURTHER ORDERED**, That should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 21-60 and RM-11884 **SHALL BE TERMINATED** and its docket closed.

20. *Additional Information.* For further information concerning the proceeding listed above, contact Joyce L. Bernstein, Video Division, Media Bureau, (202) 418-1647, Joyce.Bernstein@fcc.gov.

FEDERAL COMMUNICATIONS COMMISSION

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