

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

In the Matter of )
)
Amendment of Section 73.622(j), Table of ) MB Docket No. 22-112
Allotments, Television Broadcast ) RM-11919
Stations (Weston, West Virginia) )
)

NOTICE OF PROPOSED RULEMAKING

Adopted: March 9, 2022

Released: March 9, 2022

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. The Video Division, Media Bureau (Bureau), has before it a petition for rulemaking filed March 20, 2021, by Gray Television Licensee, LLC (Petitioner), the licensee of WDTV (CBS), channel 5, Weston, West Virginia.1 The Petitioner requests the substitution of channel 33 for channel 5 at Weston in the Table of Allotments.2

II. BACKGROUND

2. In support, the Petitioner states that the proposed channel substitution serves the public interest because it will resolve significant over-the-air reception problems in WDTV’s existing service area.3 The Petitioner further states that the Commission has recognized the deleterious effects manmade noise has on the reception of digital VHF signals, and that the propagation characteristics of these channels allow undesired signals and noise to be receivable at relatively farther distances compared to UHF channels, and nearby electrical devices can cause interference.4

3. A total of 388,223 persons are predicted to lose service using a contour analysis if the Bureau grants the channel 33 proposal. In evaluating the loss areas, Gray first considered to what extent the loss areas were served by other CBS affiliates, and concluded that all but 4,142 persons would continue to receive CBS service from other stations in the region, as well as continue to be well served by five or more television services.5 According to the Petitioner, a terrain-limited analysis using the

1 Petition of Gray Television Licensee, LLC for Rulemaking (filed March 19, 2021), LMS File No. 0000140471 (Petition). The Petitioner amended on January 6, 2022 to provide an additional analysis of the population that may lose predicted service as a result of the channel substitution (Amended Petition and Amended Engineering Statement).

2 47 CFR § 73.622(j).

3 Amended Petition at 2.

4 Id. at 2-3, citing Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF, ET Docket No. 10-235, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16511, para. 42 (2010).

5 Amended Petition at 4 (these stations are in the following Nielsen Designated Market Areas: Pittsburgh, Pennsylvania; Wheeling, West Virginia – Steubenville, Ohio; Parkersburg, West Virginia – Marietta, Ohio; and Huntington, West Virginia); Amended Engineering Statement at 3, Figure 2, and Table 1. In this regard, Gray also

(continued....)

Commission's *TVStudy* software demonstrates that only 498 persons would no longer receive CBS network programming, or receive service from five or more full power television services.<sup>6</sup>

### III. DISCUSSION

4. We believe that the Petitioner's channel substitution proposal warrants consideration. Channel 33 can be substituted for channel 5 at Weston, West Virginia, as proposed, in compliance with the principal community coverage requirements of section 73.625(a) of the Commission's rules (rules),<sup>7</sup> at coordinates 39° 18' 02.0" N and 08° 20' 36.0" W. In addition, we find that this channel change meets the technical requirements set forth in sections 73.616 and 73.623 of the rules.<sup>8</sup> Although the Petitioner's proposal would result in a loss of CBS service and access to five or more full power television stations for a limited number of viewers, we find that the overall benefits of the proposed channel change outweighs any possible harm to the public interest, given the fact that the loss of service is ultimately *de minimis* when taking into account the ability of viewers to access CBS and other major network and educational programming from other stations.<sup>9</sup> Thus, we propose to substitute channel 33 for channel 5 for WDTV with the following specifications:

<u>City and State</u>	<u>DTV Channel</u>	<u>DTV Power (kW)</u>	<u>Antenna HAAT (m)</u>
Weston, West Virginia	33	935	228.1

5. Accordingly, we seek comment on the proposed amendment of the Table of Allotments, section 73.622(j) of the rules,<sup>10</sup> for the community listed below, to read as follows:

<u>City and State</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Weston, West Virginia	5	33

### IV. PROCEDURAL MATTERS

6. *Showings Required.* Comments are invited on the proposal discussed in this Notice of Proposed Rulemaking (*NPRM*). The Petitioner or any proponent that expresses interest in the allotment will be expected to answer whatever questions are presented in initial comments. The petitioner of a proposed allotment is required to file comments even if it only resubmits or incorporates by reference its former pleadings. The petitioner must restate its present intention to apply for the channel if it is allotted

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took into account its licensed sister station WVFX (LMS File No. 0000179139, gr. Jan. 12, 2021), which is co-located with WDTV and carries CBS network programming on a multicast channel, Amended Petition at 4. In addition, Gray relies on CBS programming carried on commonly owned and operated station WIYE-LD, Parkersburg, West Virginia. Amended Petition at 4 and Amended Engineering Statement at 3 and Tables 2, 3. We note that while low power television (LPTV) stations are secondary and can be displaced by full power television stations, we believe it is unlikely that WIYE-LD will be displaced, and determined that there are multiple displacement channels available if it was displaced.

<sup>6</sup> Amended Petition at 5; Amended Engineering Statement at 4-5, Figure 3-4. *See WSET, Inc.*, 80 FCC 2d 233, 246 (1980) (finding that population loss of less than 500 persons is *de minimis*). The Commission has previously stated that it is "generally most concerned where there is a loss of an area's only network or NCE TV service, or where the loss results in an area becoming less than well-served, i.e., served by fewer than five full-power stations." *Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, Notice of Proposed Rulemaking, 22 FCC Rcd 9478, 9493, para. 38 (2007).

<sup>7</sup> 47 CFR § 73.625(a).

<sup>8</sup> 47 CFR §§ 73.616, 73.623.

<sup>9</sup> *See supra* para. 3 and n. 5.

<sup>10</sup> 47 CFR § 73.622(i).

and, if authorized, to build a station promptly.<sup>11</sup> Failure to file may lead to denial of the request. Any requests by a proponent for withdrawal or dismissal of an allotment request must be filed with the Commission in accordance with section 1.420(j) of the rules.<sup>12</sup>

7. *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.<sup>13</sup>
- (b) The filing of a counterproposal may lead the Commission to allot a different channel than was requested in the Petition.<sup>14</sup>

8. *Comments and Reply Comments.* Pursuant to sections 1.415, 1.419, and 1.420 of the rules,<sup>15</sup> 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).<sup>16</sup>

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>. Parties that choose to file electronically only need to submit one copy of each filing so long as the submission conforms to all procedural and filing requirements. Online filing is optional.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy 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. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Any paper 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. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington D.C. 20554.
  - Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.<sup>17</sup>
  - During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a

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<sup>11</sup> See, e.g., *Buffalo, Iola, Normangee, and Madisonville, Texas*, MB Docket No. 07-729, Report and Order, 24 FCC Rcd 8192, 8194, para. 9 (Aud. Div. 2009).

<sup>12</sup> 47 CFR § 1.420(j).

<sup>13</sup> 47 CFR § 1.420(d).

<sup>14</sup> 47 CFR § 1.420(g)(2).

<sup>15</sup> 47 CFR §§ 1.415, 1.419, and 1.420.

<sup>16</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

<sup>17</sup> See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020).

proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

9. *Service.* Pursuant to section 1.420 of the rules,<sup>18</sup> 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.<sup>19</sup> Additionally, a copy of such comments should be served on counsel for the Petitioner, as follows:

Joan Stewart, Esq.  
Wiley Rein LLP  
2050 M Street, NW  
Washington, D.C. 20036

10. *Ex Parte Notices– Restricted.* The proceeding this Notice initiates shall be treated as a “restricted” proceeding in accordance with the Commission’s *ex parte* rules.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> Any comment that 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. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection via ECFS (<http://apps.fcc.gov/ecfs/>). Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

12. *Paperwork Reduction and Regulatory Flexibility.* The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980, as amended,<sup>24</sup> do not apply to a rulemaking proceeding to amend the DTV Table of Allotments, section 73.622(i) of the rules.<sup>25</sup> This

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<sup>18</sup> 47 CFR § 1.420.

<sup>19</sup> See 47 CFR § 1.420(a), (b) and (c).

<sup>20</sup> 47 CFR §§ 1.1200 *et seq.*

<sup>21</sup> 47 CFR § 1.1208.

<sup>22</sup> 47 CFR § 1.1204(a)(10).

<sup>23</sup> 47 CFR § 1.1204(a)(10)(ii). In addition, an oral presentation in a restricted proceeding not designated for hearing requesting action by a particular date or giving reasons that a proceeding should be expedited other than the need to avoid administrative delay is permitted. A detailed summary of the presentation must be filed in the record and served by the person making the presentation on the other parties to the proceeding, who may respond in support or opposition to the request for expedition, including by oral *ex parte* presentation, subject to the same service requirement. 47 CFR § 1.1204(a)(11).

<sup>24</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995.<sup>26</sup> 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.<sup>27</sup>

13. *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](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

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

## V. ORDERING CLAUSES

15. **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, **IT IS PROPOSED TO AMEND** the Table of Allotments, section 73.622(j) of the rules, 47 CFR § 73.622(j), as set forth in this *NPRM*, and this *NPRM IS ADOPTED*.

16. **IT IS FURTHER ORDERED** that, pursuant to applicable procedures set forth in sections 1.415, 1.419, 1.420 of the rules, 47 CFR §§ 1.415, 1.419, and 1.420, interested parties may file comments, including counterproposals, on the *NPRM* in MB Docket No. 22-112 and RM-11919 on or before thirty (30) days after publication in the Federal Register and reply comments on or before forty five (45) days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau

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<sup>25</sup> 47 CFR § 73.622(i).

<sup>26</sup> See 44 U.S.C. §§ 3501-3520.

<sup>27</sup> See 44 U.S.C. § 3506(c)(4).