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

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

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 2011 **Released: September 8, 2011**

By the Chief, Video Division, Media Bureau:

1. The Commission has before it a petition filed by WDJT-TV Limited Partnership ("WDJT"), the licensee of station WDJT-TV, Milwaukee, Wisconsin, seeking reconsideration of an August 12, 2009, *Report and Order* changing the allotted channel for station WWAZ-TV, Fond du Lac, Wisconsin, from channel 44 to channel 5.[1] WWAZ License, LLC ("WWAZ"), the licensee of station WWAZ-TV, and WLS Television, Inc. ("WLS"), the licensee of station WLS-TV, Chicago, Illinois, filed oppositions to the petition for reconsideration, to which WDJT filed a consolidated reply. We will deny the petition for reconsideration as described in further detail below.

2. **Background.** In the August 12, 2009, *Report and Order*, we stated that "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."[2] On June 16, 2009, WWAZ filed a supplement to propose use of two replacement digital translator stations at Ripon and Columbus, Wisconsin,[3] which appeared to restore digital service to all but 2,086 of the 186,253 persons contained within the analog loss area and would not result in an unacceptable expansion of digital service beyond the authorized pre-transition analog service area.[4] The Video Division engineering staff agreed with WWAZ's technical analysis with respect to the loss area that would continue to exist following use of the replacement translators. The *Report and Order* also concluded that use of the digital replacement translators in this instance "fell within the circumstances specifically contemplated by the Commission when it created the digital

[1] *Fond du Lac, Wisconsin*, Report and Order, 24 FCC Rcd 10659 (Vid. Div. 2009).

[2] *Id.* at 10659, ¶ 2.

[3] *See* FCC File Nos. BDRTCT-20090223ABX and BDRTCT-20090223ABW, granted July 21, 2009.

[4] *See 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, 5935 (2009) ("*Replacement Translator Order*") (use of translators permitted where there would be a *de minimus* extension of analog service area).

replacement translator service."[5]

3. In addition to WDJT, the proposed channel change had been opposed by Venture Technologies Group, LLC ("Venture"), licensee of station WLFM-LP, Chicago, Illinois, and Grand Valley State University, licensee of noncommercial educational station WGVK(TV), Kalamazoo, Michigan. These parties both raised technical issues regarding the proposed channel substitution and also alleged that the proposed move of station WWAZ-TV's transmission facilities from Dodge County, Wisconsin, to an existing tower in Milwaukee would not serve the public interest because it would abandon the station's rural service area for the larger Milwaukee metropolitan market. The *Report and Order* concluded, however, that the proposal complied with the Commission's technical rules, that the station would continue to meet the community coverage requirements with respect to Fond du Lac, and that "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."[6]

4. The *Report and Order* also identified an additional important reason why the public interest would be served by substituting channel 5 for channel 44 at Fond du Lac. At the end of the DTV transition, when all full power television stations ceased analog operations, station WLS-TV, the ABC affiliate in Chicago, and the Commission "received thousands of calls from persons who received the station's analog and pre-transition digital signals, but [were] unable to view WLS-TV on digital channel 7 due to reception problems."[7] The *Report and Order* concluded that the channel change would serve the public interest by permitting the substitution of channel 44 for channel 7 for WLS-TV at Chicago, thus restoring "service to thousands of viewers who have come to rely on WLS-TV for local and ABC network programming."[8]

5. In the Petition for Reconsideration, WDJT argues that the August 12, 2009, *Report and Order* was "based on two factual premises," both of which are either "unsupported by the record" or "appear[] to be false."[9] First, WDJT claims that the loss figures cited in the *Report and Order* and WWAZ's June 16, 2009, supplement are wrong and that, in fact, 19,218 persons who received analog service from WWAZ-TV would not receive digital service from WWAZ-DT even with the two replacement translator stations. According to WDJT, 100 of those persons would be left with fewer than five other full power television services. WDJT further argues that WWAZ failed to mention its primary technical justification for creation of this loss area - that it cannot construct on its current tower due to loading issues – until the reply comment stage, and that the record further does not support this assertion. WDJT submits a statement from an engineering consultant, who describes the original tower proposed for the channel 44 facility and offers engineering solutions to address potential excessive loading issues. WDJT maintains that WWAZ

[5] *Fond du Lac, Wisconsin*, 24 FCC Rcd at 10660-10661, ¶ 5.

[6] *Id.* at 10661, ¶6.

[7] *Id.* at 10662, ¶10

[8] *Id.*

[9] WDJT Petition for Reconsideration at 1.

proposed to move its transmission facilities in order to serve a larger Spanish-language audience. Finally, WDJT argues that the allocation of channel 44 to WLS-TV in Chicago cannot justify approval of WWAZ's channel substitution proposal.

6. WWAZ responds that the technical parameters of the replacement translator stations were determined in discussion with staff so as to minimize the expansion of service beyond that area the station could serve if the facilities had not been modified. The more appropriate response to the potential loss area, according to WWAZ, would be to authorize an increase in the power of the fill-in translators, and not to "prevent the introduction of a new television service to over one million persons, and 200,000 Hispanic viewers."[10] With respect to the tower loading issue, WWAZ states that there were several other reasons supporting grant of the channel substitution and associated technical changes, including "(i) the adjacent channel allocation of Channel 43 at Mayville, (ii) the continued provisioning of service to the then-authorized service area of the [s]tation, (iii) all the while expanding service to more than one million persons, and (iv) the difficulties faced by WLS-TV in Chicago."[11] WWAZ also points out that WDJT's engineering consultant concedes that it is possible that there are structural issues that would prevent the installation of the WWAZ-DT antenna at its now specified tower.[12]

7. WLS responds that the channel substitution served the public interest by "advancing the Commission's long-standing policy goal of ensuring continuity of television service for all Americans throughout the DTV transition."[13] WLS states that many of its over-the-air viewers faced reception difficulties in the immediate aftermath of the digital transition. It concluded that it could operate on channel 44 without creating unacceptable interference to other stations in Chicago and therefore, grant of the station WWAZ-TV channel substitution was essential to restoring service to many of station WLS-TV's viewers. It also notes that the Commission has authorized a number of channel substitutions to permit the restoration of service to viewers who received an analog signal but were unable to view a station's post-transition digital signal.[14]

8. In reply, WDJT reiterates that WWAZ has not explained why the station could not operate from the originally authorized site, and has further not disputed the loss figures provided in WDJT's petition. WDJT maintains that the proposed allocation of Station WLS-TV on channel 44 to alleviate loss of service due to the digital transition does not provide a public interest justification for WWAZ's proposal because station WWAZ-TV can operate on channel 5 at a site that would not result in any loss of service.

9. **Discussion.** Proposed changes in channel allotments that would result in a loss in

[10] WWAZ Opposition to Petition for Reconsideration at 4.

[11] *Id*. at 5.

[12] *Id.*

[13] WLS Opposition to Petition for Reconsideration at 2.

[14] *Id*. at 3.

television service are generally considered *prima facie* inconsistent with the public interest, unless outweighed by countervailing factors.[15] On December 23, 2010, the staff issued a letter to the parties noting that, following further engineering review, the loss figures contained in the *Report and Order* were not accurate.[16] The staff requested that WWAZ re-engineer its June 16, 2009, proposal so that replacement translators would cover the projected analog loss area, and file the requisite license modification applications to reflect the necessary technical changes. On January 7, 2011, WWAZ filed a supplement proposing re-engineered translators, as well as the requested license modification applications.[17] The staff has studied WWAZ's new proposal and concludes that the replacement translator stations would provide service to 99.8% of the loss area. Thus, we conclude that the re-engineered translators sufficiently address any loss of service resulting from the move of station WWAZ-TV's transmission facilities proposed as part of the requested channel substitution.

10. We also believe that the use of replacement translator stations to eliminate loss areas is appropriate in this case. When the Commission established the replacement translator service in February 2009, it recognized that full service television stations were 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 these changes could result in a portion of the existing analog service area not receiving a digital signal.[18] Here, WWAZ identified a number of reasons why the public interest would be served by substituting channel 5 for channel 44 at Fond du Lac.[19] With respect to WDJT's argument that WWAZ has failed to provide any factual support – such as a sworn statement of an engineer, technician or WWAZ principal - for the assertion that it is unable to construct at its authorized channel 44 site because the tower will not support the additional weight, we do not require such evidentiary support for the representation made in WWAZ's reply comments regarding the tower. In this regard, we note that WDJT's engineering consultant admits that "While it may be that there are structural issues that would prevent the installation of the WWAZ-DT antenna as it is now specified on the existing WWAZ tower, it is very likely that the old WWAZ(TV) Channel 68 antenna could be removed and an antenna with no greater height and

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[15] *See West Michigan Telecasters, Inc.*, 22 FCC 2d 943 (1970), *recon. denied*, 26 FCC 2d 668 (1970), *aff'd*, *West Michigan Telecasters, Inc. v. FCC*, 460 F. 2d 883, 889 (D.C. Cir. 1972) (finding that losses in service are *prima facie* inconsistent with the public interest); *Triangle Publications, Inc.*, 37 FCC 307, 313 (1964) (finding that "once in operation, a station assumes an obligation to maintain service to its viewing audience and the withdrawal or downgrading of existing service is justifiable only if offsetting facts are shown which establish that the public generally will be benefited"); *Television Corporation of Michigan v. FCC*, 294 F.2d 730 (1961) (finding that deprivation of service to any group was undesirable, and can be justified only by offsetting factors); and *Hall v. FCC,* 237 F.2d 567 (D.C. Cir. 1956) (finding that a curtailment of service is not in the public interest unless outweighed by other factors).

[16] Letter from Clay C. Pendarvis, Associate Chief, Video Division, to Lee G. Petro, Esq., *et al* (rel. Dec. 23, 2010).

[17] See FCC File Nos. BMPCDT-20110104ABC and ABE, granted February 2, 2011. WDJT did not object to these applications, and their grant is now final.

[18] *See Fond du Lac, Wisconsin*, 24 FCC Rcd at 10660, ¶ 5.

[19] *See Fond du Lac, Wisconsin*, Notice of Proposed Rulemaking, 24 FCC Rcd 8931, 8931-8932, ¶ 3.

weight substituted for it on Channel 44 . . ."[20] He further states that WWAZ could also substitute a Channel 44 antenna of low gain which would be shorter in length and lighter than the currently specified antenna, with a change in polarization, and concludes that "there is reason to believe that there are engineering solutions to the WWAZ tower problem."[21] Thus, WDJT's own engineering consultant recognized that there were technical problems with constructing a digital facility on the tower as presently loaded.

11. Finally, we continue to believe that the public interest is served by substituting channel 5 for channel 44 at Fond du Lac because it permitted WLS-TV, an ABC network affiliate in Chicago, Illinois, to move from its post-transition channel 7 to channel 44. As stated in the *Report and Order*, the station and the Commission had received thousands of calls from individuals who were unable to receive station WLS-TV's signal after the transition when WLS-TV began digital-only operations on channel 7, and the substitution of channel 44 at Chicago resulted in the restoration of ABC network service to numerous viewers. While WDJT argues otherwise, this restoration of network service in Chicago on channel 44 does not result in the "disenfranchising [of[nearly two hundred thousand rural Wisconsin viewers,"[22] since effectively 100% of the loss area will receive service from WWAZ's authorized replacement translator stations.

12. Accordingly, IT IS ORDERED, That the Petition for Reconsideration of the August 12, 2009, *Report and Order*, amending the DTV Table of Allotments, Section 73.622(i) of the Commission's rules, to change station WWAZ-TV's channel from 44 to 5 at Fond du Lac, filed by WDJT-TV Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
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Media Bureau

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[20] Petition for Reconsideration, Technical Exhibit at 6.

[21] *Id.* at 7.

[22] Petition for Reconsideration at 9.