

## **REQUEST OF KAAL-TV, LLC FOR IMMEDIATE WAIVER OF DTV FILING FREEZE**

KAAL-TV, LLC, the licensee of KAAL(TV) and permittee of KAAL-DT, Austin, Minnesota ("KAAL") hereby requests an immediate waiver of the digital television filing freeze ("DTV filing freeze").<sup>1</sup> As demonstrated below, the filing freeze should be waived for the acceptance and processing of the instant application in order to permit KAAL to comply with the DTV transition deadline of February 17, 2009. Waiving the freeze based upon the unique circumstances of KAAL described here would serve the public interest in the timely, efficient and uninterrupted provision of digital television services to the public, including significant service to rural areas. In addition, waiving the freeze in this instance would cause no harm.

The only waiver sought by KAAL is entirely procedural in nature--simple acceptance of this application. The application itself is compliant with all substantive provisions of the Commission's rules, including service to community of license, replication of service population and interference criteria. This request for waiver is an exhibit to KAAL's Application for Construction Permit for Commercial Broadcast Station (FCC Form 301) (the "Application").

### **I. Background**

KAAL is one of only four full-power television stations serving the Rochester, Minnesota-Mason City, Iowa-Austin, Minnesota Designated Market Area ("DMA"), the 153<sup>rd</sup> ranked DMA (the "Southeast Minnesota-Northern Iowa DMA").<sup>2</sup> The Southeast Minnesota-Northern Iowa DMA is substantially rural. KAAL broadcasts its analog Channel 6 signal, and

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<sup>1</sup> *Freeze on the Filing of Certain TV and DTV Request for Allotment or Service Area Changes*, 19 FCC Rcd 14810; DA 04-2446 (MB rel. August 3, 2004) (the "DTV filing freeze PN").

<sup>2</sup> The DMA and rank are established by Nielsen Business Media. *See Television & Cable Factbook 2008*, p. A-1234 (Warren Communications News 2008).

its current digital service, which is a reduced power operation on Channel 33 under Special Temporary Authority, from a site near Myrtle, Minnesota.

The tower at the Myrtle site is structurally unable to host a full-power digital television antenna for KAAL. Attempting to correct that situation would require major construction which is estimated to cost as much as one million dollars. Such construction would force KAAL to cease broadcasting in analog and digital for at least several months, and possibly, could take years to accomplish due to local land-use and technical challenges. Consequently, KAAL has entered into arrangements to acquire and operate a permanent digital transmission operation at an existing tower near Grand Meadow, Minnesota, also within the Southeast Minnesota-Northern Iowa DMA. Operation from the Grand Meadow site would permit KAAL to co-locate with the permanent digital operation of KXLT-DT, Rochester Minnesota, and KSMQ-DT, Austin, Minnesota, other television stations operating in the Southeast Minnesota-Northern Iowa DMA, while still allowing KAAL to provide full coverage to its community of license. Indeed, KAAL will be able to acquire existing and installed digital transmission facilities from KTTC-DT, which has its DTV transition operation on the Grand Meadow tower, in order to complete KAAL's digital transition immediately at 12:01 a.m. on February 18, 2009.

The benefits of granting this Petition are enormous. First, there would be no service disruptions to KAAL analog and digital viewers. If KAAL is required to construct Channel 36 facilities at the location specified in the DTV Table, KAAL analog and digital viewers will experience substantial and long-term service disruptions. KAAL's analog facilities and current DTV facilities on Channel 33 are both located on the same tower. Each would need to be dismantled in advance of the February 17, 2009 deadline to allow construction of the post-transition Channel 36 facilities. Moreover, due to Minnesota's harsh winter weather, this would

need to begin well before October 2008, meaning a substantial loss of local, regional and network programming for KAAL's viewers for a significant period of time. Then in the future, if KAAL moved its Channel 36 operation to the new site, viewing would be disrupted again.

Second, by collocating KAAL with the permanent KXLT and KSMQ digital operations, new over-the-air antenna installations will be much less complex for viewers, and many will be able to reuse old antennas. Third, using existing facilities saves valuable resources, such as tower crew time, at a critical period when demand will likely exceed supply. Fourth, it allows existing facilities and equipment to be used fully and efficiently instead of being abandoned for parts, and it prevents the unnecessary building of duplicate facilities.

KAAL's analog and digital viewers would receive uninterrupted programming during the pre-transition period and thereafter, which especially would benefit over-the-air viewers. Maintaining easily accessible and uninterrupted service to over-the-air viewers is essential to the public interest because cable penetration rates in the Southeast Minnesota-Northern Iowa DMA are approximately 60% to 70%, meaning that as much as 40% of KAAL's viewers depend upon over-the-air reception in this predominantly rural DMA.

With these considerations in mind, KAAL and KTTC entered into a negotiated channel election agreement under which KAAL elected digital Channel 36 as its permanent channel post-transition.<sup>3</sup> The Commission approved that channel election and KAAL has been assigned Channel 36 as its final, post-transition digital channel.<sup>4</sup>

However, KAAL continued to have the problem of moving to the Grand Meadow site because the DTV filing freeze has prohibited it since August 2004 from filing an application to

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<sup>3</sup> See File No. BFRECT-20050210ATV, DTV Channel Election, filed February 10, 2005.

<sup>4</sup> See *Seventh Report and Order and Eighth Further Notice of Proposed Rule Making, In the Matter of Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service*, 22 FCC Rcd 15581, 15647, App. A (2007)

change sites. In response to comments filed with the Commission concerning the circumstances of KAAL, the FCC's staff orally suggested that KAAL file a petition for reconsideration of the DTV Table of Allotments.<sup>5</sup> KAAL accepted that advice and sought reconsideration of the DTV Table, describing the extensive public interest benefits of amending the DTV Table to show the Grand Meadow site instead of the Myrtle site, as had been suggested by the Commission's staff.<sup>6</sup>

Unfortunately, the Commission denied the Petition erroneously:

We deny the petition for reconsideration of Hubbard Broadcasting Inc. ("Hubbard"), licensee of station KAAL-TV, channel 6, and KAAL-DT, channel 33, Austin, MN. KAAL was allotted channel 36 for post-transition operations in the *Seventh Report and Order*. In its petition for reconsideration, Hubbard requests that it be permitted to operate post-transition using the existing channel 36 facilities of station KTTC-DT, Rochester, MN (analog channel 10, pre-transition digital channel 36, post-transition digital channel 10). Hubbard describes several benefits associated with its operation of the former KTTC facilities. However, we find that KTTC's facilities are roughly 30 miles from KAAL's current tower and that KTTC is licensed to a different community (Rochester, MN instead of Austin, MN). Both findings indicate that it would be difficult for KAAL to properly serve Austin. In addition, Hubbard forecast that its proposed changes would cause interference in excess of 0.1 percent to WLEF-DT, Park Falls, WI (analog channel 36, pre-transition digital channel 47, post-transition digital channel 36) and submitted evidence of WLEF's consent to this interference. However, the Commission's interference analysis based on recalculated Appendix B facilities shows no impermissible interference to WLEF, but rather that KAAL would cause 0.40 percent interference to KWSD, Sioux Falls, SD (analog channel 36, pre-transition digital channel 51, and post-transition digital channel 36).<sup>7</sup>

As demonstrated conclusively in the engineering portions of the Application, the grounds to deny the Petition were wrong in at least two significant respects. (1) Despite the

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<sup>5</sup> Counsel for KAAL received a telephone call from a member of the Commission's staff on October 19, 2007, who suggested that Hubbard (the parent company of KAAL) file a petition for reconsideration of the DTV Table due to the circumstances described in Hubbard's comments filed *In the Matter of Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television Notice of Proposed Rulemaking*, MB Docket No. 07-91, FCC 07-70 (rel. May 18, 2007) ("Third DTV Periodic NPRM").

<sup>6</sup> *Petition for Reconsideration of DTV Seventh Report and Order by Hubbard Broadcasting, Inc. for KAAL-DT*, MB Docket No. 87-268, filed October 26, 2007 (the "Petition").

<sup>7</sup> *Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order*, FCC 08-72, MB Docket No. 87-268, para. 71 (rel. March 6, 2008) (citations omitted).

Commission's unsupported opinion that it would be "difficult" for KAAL to serve Austin from the Grand Meadow site, in fact, KAAL would serve Austin fully from that site with coverage of 100% of the community. (Application, Figure 1, showing that the proposed KAAL city grade contour extends approximately 30 km beyond Austin, Minnesota). Indeed, as noted above, KSMQ-DT's facilities are on the same tower that KAAL proposes in this application, and KSMQ-DT clearly covers Austin from that location; **(2)** The Commission was incorrect about interference to KWSD, Sioux Falls, SD ("KWSD"). As noted in the Engineering Statement accompanying this application, there would be no impermissible interference caused to KWSD by the proposed KAAL digital operation from the Grand Meadow site. In fact, the Grand Meadow site is approximately 30 miles farther away from KWSD than the current Myrtle site.

In short, KAAL would not even need a waiver of the DTV filing freeze but for factual errors in denying KAAL's Petition.

However, with mere months remaining before the conclusion of the DTV transition, KAAL is forced to file the instant application in order to receive a construction permit timely for the permanent Channel 36 operation at the Grand Meadow site. Because KAAL is changing DTV channels, current Commission procedures require it to file an application for construction permit by June 2008. However, KAAL's application would be the same in June or August as the one filed now, supported by this request for waiver, so the Commission, the public and KAAL are served best by filing now without further delay because KAAL lacks any alternative but to file its application now or face the considerable risk that it will be unable to meet the transition deadline. That failure would cause months, perhaps years, of disruption to television viewers in the Southeast Minnesota-Northern Iowa DMA, especially over-the-air viewers, who would have no ability to receive KAAL and its important local, regional and national programming.

The primary reason that KAAL has not been able to complete the steps necessary to conclude its digital television transition has been shifting, or delayed, FCC decisions and the continuing DTV filing freeze. Indeed, the Commission's recent change in its processing standards (the "5-mile waiver policy"), adopted more than two months after KAAL filed its Petition, is additional proof that special relief in the form of this waiver is essential to KAAL and its viewers.<sup>8</sup> There is no suitable tower available to KAAL that would permit it to file this application in conformance with the 5-mile waiver policy.

The Commission has indicated its "intent" to lift the DTV filing freeze on August 18, 2008.<sup>9</sup> Obviously, the Commission did not, and due to the complexities of the DTV transition, cannot, commit to lifting the freeze then. If the DTV filing freeze is lifted then, it would be six months before the required conclusion of the transition, and there would be considerable doubt that the Commission would be able to process and grant the instant application in time for KAAL to comply with the deadline. There can be no doubt that once the DTV filing freeze is lifted, whenever that happens, the Commission will receive a flood of construction permit applications

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<sup>8</sup> See *Report and Order, Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, FCC 07-228 (rel. Dec. 31, 2007) ("*Third DTV Periodic Report and Order*"). Thus, more than two months after KAAL filed its Petition, the Commission announced its "5-mile waiver policy" under which it offered a blanket waiver of the DTV filing for construction permit applications that would extend DTV service areas by not more than 5-miles. KAAL's proposal, although fully compliant with all relevant rules, including interference criteria, does not comport with the 5-mile waiver policy. See Application, Exhibit 44.

<sup>9</sup> *Third DTV Period Report and Order*, para. 148. ("We announce our intent to lift the freeze on the filing of maximization applications on August 17, 2008, the date by which we expect to have completed processing stations' applications to build their post-transition facilities. Until this date, we will maintain the freeze and will not accept maximization applications to expand facilities. We will, nevertheless, consider requests to waive the freeze before August 17, 2008 in certain specified situations to provide for minimally expanded facilities where necessary to ensure that stations can serve their existing television viewers with their post-transition facilities, thereby meeting viewers' over-the-air reception expectations after the transition date.") (citation omitted).

due to the freeze having been in place for more than four years. Processing delays in excess of the small amount of time between the lifting of the freeze and the transition deadline would be likely.

That timing would be considerably worse if lifting of the freeze is delayed, which is a distinct possibility. If, as well may be the case, the DTV filing freeze remains in place into September or October, then it would be almost impossible for KAAL to file and receive a construction permit grant in time to meet the February 17, 2009 deadline.

## **II. Maintaining the DTV Filing Freeze is Unnecessary**

On August 3, 2004, when the Commission imposed the DTV filing freeze, which was "procedural in nature,"<sup>10</sup> the Commission explained:

This freeze is a necessary first step to ensure a stable television database prior to the commencement of the channel election process. Prohibiting the filing of new applications and petitions requesting new channels or service areas will allow broadcasters to evaluate stations' technical parameters and thereby facilitate channel elections and the creation of a new DTV Table of Allotments. Imposition of an immediate freeze will ensure that new applications and petitions are not filed in anticipation of future limitations, thus defeating the administrative purpose of the action herein, and will ensure that technical parameters do not continue to change while broadcasters make their channel election decisions.

The Bureau will consider, on a case-by-case basis, requests for waiver of this freeze when a modification application is necessary or otherwise in the public interest for technical or other reasons to maintain quality service to the public, such as when zoning restrictions preclude tower construction at a particular site or when unforeseen events, such as extreme weather events or other extraordinary circumstances, require relocation to a new tower site. As with any request for waiver of our rules, a request for waiver of the freeze imposed in the Public Notice will be granted only upon a showing of good cause and when grant of the waiver will serve the public interest.<sup>11</sup>

Shortly thereafter, the Commission further explained the DTV filing freeze:

A stable database is not only crucial to the channel election process, but is vital to the completion of the technically difficult task of developing a new DTV Table of

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<sup>10</sup> DTV filing freeze PN, p. 2.

<sup>11</sup> *Ibid.*

Allotments. To make the channel election process and the creation of the new DTV Table of Allotments as manageable as possible, the Media Bureau has temporarily suspended certain procedures for altering DTV and analog TV service areas and channels until after the new DTV Table of Allotments is complete.<sup>12</sup>

In addition, the Commission has stated several times that it would waive the DTV filing freeze on a case-by-case basis for good cause.<sup>13</sup>

The DTV Table of Allotments is now final, having gone into effect on March 21, 2008.<sup>14</sup> Therefore, the reasons for the DTV filing freeze are past and a stable database for DTV channel elections and formulation of the Table have been accomplished. The freeze, which was procedural and not substantive, has little or no continuing usefulness.

Indeed, the Commission already has authorized a large class of waivers. Hundreds of television stations around the country could take advantage of the 5-mile waiver policy. Thus, the DTV filing freeze has no articulated continuing usefulness because its purposes have been achieved.

### **III. Granting a Waiver for KAAL Has Great Public Interest Benefit**

The Commission may waive its rules when good cause is demonstrated.<sup>15</sup> As noted above, the Commission has stated several times that it would consider, on a case-by-case basis, requests for waiver of the DTV filing freeze when a modification application is necessary or

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<sup>12</sup> *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18308 (rel. August 7, 2004) (citation omitted).

<sup>13</sup> See DTV filing freeze PN, p. 2; *Third Periodic Review*, pp. 18293, 18309-18310; *Madison Halsted LLC*, 21 FCC Rcd 1049 (MB 2006).

<sup>14</sup> *Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order Published in Federal Register Today; Revised Final DTV Table of Allotments is Effective March 21, 2008*, DA 08-631 (rel. Mar. 21, 2008).

<sup>15</sup> See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

otherwise in the public interest.<sup>16</sup> KAAL submits that a waiver in this instance is necessary, and that good cause exists to grant a waiver for the following reasons.

1) The facts of this case are extremely unusual because KAAL's situation is not accommodated by any of the flexible approaches adopted by the Commission. KAAL requested a change to its digital channel allotment and the Commission granted that change. In order to effectuate the permanent operation underlying that channel change, the Commission's staff suggested to KAAL that it apply for the site move via a petition for reconsideration of the DTV Table. KAAL acted on that suggestion but the Commission denied the KAAL Petition. That denial was based upon factual errors and a retroactive application of the 5-mile waiver rule without notice and without an opportunity for KAAL to comment on the implicit assumption that the 5-mile waiver would accommodate all situations. The 5-mile rule is of little use in many areas, particularly in rural DMAs such as KAAL's where the potential for interference is typically less and the distances between communities are greater.

2) Because KAAL is in a unique position and because the DTV transition is a once-in-a-lifetime event, the circumstances of this case are unlikely to be repeated.

3) Months, possibly years, of disruption to KAAL's broadcast service to the viewers of the Southeast Minnesota-Northern Iowa DMA would be the result if Commission inaction forces KAAL to remain at the Myrtle site.

4) Such disruption to KAAL's broadcasting operations would be especially harmful to over-the-air viewers, many of whom reside in rural areas of the DMA.

5) Loss of service to those over-the-air viewers would make KAAL's already challenging economic circumstances considerably worse. KAAL faces severe economic constraints on its

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<sup>16</sup> *Freeze PN*, at 2.

ability to comply with the DTV transition timely, so that the economically efficient course of permanently moving to the Grand Meadow site, where facilities are in place, in effect is its only option. If the Commission wishes to have further information about these economic constraints, KAAL would be happy to provide it to Commission staff on a confidential basis. In light of the economic hardships facing stations in rural television markets today, it would be particularly ironic not to deem this waiver request to be in the public interest. Requiring a build-out at the present Myrtle site would be extraordinarily burdensome for KAAL with no corresponding benefit to the public.

6) The underlying purpose of the DTV filing freeze — to maintain a static database for the completion of the DTV Table of Allotments — would not be frustrated by a grant of this waiver request, because: a) the revised DTV Table is now final; b) the Commission already is allowing changes to the DTV Table under the 5-mile waiver policy; c) as shown in the engineering statement accompanying this application, KAAL's proposed site would not cause impermissible interference to any other station; and d) KAAL would provide complete service to Austin, Minnesota, its community of license.

7) In contrast, a strict application of the DTV filing freeze would require KAAL to wait until at least August 18, 2008 to file this application. Assuming that the freeze is lifted on time, which is far from certain, KAAL would have to file its application, then await processing and grant of it. Such processing easily could require months because after a filing freeze of at least four years, it is highly likely that the Commission will receive a flood of DTV facilities applications immediately after the freeze is lifted from full power television licensees and from Class A television licensees which have been subject to the same freeze. Therefore, failure to accept and process KAAL's application now would probably mean that KAAL would be unable

to meet the DTV transition deadline due to FCC inaction. If the date on which the freeze is lifted slips past August 2008, then the timing would be even shorter.

Therefore, considering the totality of the circumstances, KAAL submits that a waiver of the DTV filing freeze under these circumstances is warranted. The public interest in continued and timely digital television service would be advanced by accepting and processing KAAL's application now. The only detriment would be the waiver of a procedural decision that has outlived its usefulness. This waiver would be a once-in-a-lifetime action, never to be repeated, as is the case for the DTV transition itself.

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