

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Accepted / Filed

In the Matter of)
Application of)
Nelson TV, Inc.)
For Minor Modification of the Licensed Facility of)
WSPY-LD)

FEB 15 2017

Federal Communications Commission
Office of the Secretary

File No. 0000013459
Facility ID No. 187840

REPLY IN SUPPORT OF APPLICATION FOR REVIEW

Weigel Broadcasting Co. ("Weigel"), licensee of Class A television station WMEU-CD, Chicago, Illinois ("WMEU"), respectfully submits this Reply in support of Weigel's Application for Review¹ of the denial by the Media Bureau's Video Division ("Video Division")² of Weigel's petition for reconsideration³ of the Video Division's grant of the captioned application (the "Application").⁴

Nelson TV, Inc. ("Nelson") acknowledges that its station WSPY-LD ("WSPY")⁵ obtained its original construction permit in a "filing window restricted to new and major change

¹ Weigel Broadcasting Co., Application for Review, File No. 0000013459 (filed Jan. 19, 2017) ("AFR").

² See *Weigel Broadcasting Co.*, Letter, Pleading File No. 0000014025 (MB Vid. Div. Dec. 20, 2016) ("Division Denial").

³ See *Weigel Broadcasting Co.*, Petition for Reconsideration, File No. 0000013459 (filed Sept. 16, 2016) ("Weigel Petition").

⁴ This Reply to the Opposition to Application for Review of Nelson-TV, Inc. ("Opp."), which was served on Weigel by mail, is timely filed pursuant to 47 C.F.R. §§ 1.4(h) and 1.115(d).

⁵ WSPY-LD, Facility ID No. 187840, is the station for which the Application seeks a minor modification; this station, previously WAUR-LD, swapped call signs as of September 10, 2016, with the station licensed under Facility ID No. 187839. For ease of reference, this Reply refers to Facility ID 187840 as "WSPY," the station's current call sign, throughout.

rural LPTV service,”⁶ with the condition that the station would have to be located at least 121 kilometers away from any top-100 market, including Chicago. The Video Division nonetheless permitted WSPY to move its transmitter to a site only 81 kilometers from Chicago, on the apparent basis that WSPY satisfied its rural service obligation merely by momentarily licensing a facility compliant with the 121-kilometer separation requirement.⁷ In defending the *Division Denial*, Nelson essentially urges the Commission to ignore the irrational effect of the Video Division’s decision, which renders the rural service condition attached to WSPY’s original construction permit meaningless. The Commission should refuse to condone such an arbitrary licensing regime.

WSPY’s construction permit was subject to the 121 kilometer separation requirement, but Nelson contends that “the Commission specified no site restriction on subsequent minor changes of *licensed* LPTV facilities resulting from the rural filing window.”⁸ But this response merely begs the question. The *Digital LPTV Licensing PN* specifies that the purpose of the filing window in which WSPY obtained its construction permit was to ensure continuity of rural service,⁹ and the station’s resulting permit contained a condition — citing the public notice — that “any future modification will not result in a relocation within 121 km of the top 100 markets.”¹⁰ Neither the *Digital LPTV Licensing PN* nor the station’s construction permit

⁶ Opp. at 1.

⁷ *Division Denial* at 3.

⁸ Opp. at 2.

⁹ *Commencement of Rural, First-Come, First-Served Digital Licensing for Low Power Television and TV Translators Beginning August 25, 2009*, Public Notice, 24 FCC Rcd 8911, 8911 (MB 2009) (“*Digital LPTV Licensing PN*”).

¹⁰ Digital Low Power Television/Television Translator Broadcast Station Construction Permit, File No. BNPDTL-20100721DRF, at 2; Digital Low Power Television/Television Translator Broadcast Station Construction Permit, File No. BMPDTL-20131112CBH, at 2.

states that the geographic restrictions apply *only* to “future modifications” of the construction permit itself and expire as soon as the facility is licensed. Nor is such a myopic reading of the condition logically supportable.

If Nelson’s narrow view of the condition were correct, then the geographic restriction would serve no purpose, and certainly could not accomplish the stated goal of promoting “continued service” to viewers of rural stations by opening a rural-specific filing window for construction permit applications. Instead, an applicant could — as Nelson apparently has — obtain a construction permit in the rural filing window, momentarily license a compliant facility, then immediately seek to move the facility to a more urbanized area. In other words, the Commission can endorse Nelson’s reading only if it concludes that the Media Bureau intended to adopt a geographic restriction that would be incapable of advancing the rural filing window’s stated purpose — an outcome that is both completely illogical and the very definition of arbitrary and capricious decisionmaking.¹¹ The more natural, and rational, reading of the *Digital LPTV Licensing PN* and WSPY’s resulting construction permit is that the geographic restriction continues to apply to modifications of the *licensed* facility, as only licensed facilities are capable of providing “continued service for viewers.”

The Weigel Petition raised this precise point, explaining that “[i]t would be arbitrary and capricious for the Commission to permit [WSPY] to receive the benefit of having filed in a window reserved for applications ‘[t]o ensure continued service for viewers of low power television (LPTV) and TV translator stations in the rural portions of the United States’

¹¹ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (noting that agency satisfies the Administrative Procedure Act’s “arbitrary and capricious” standard only if agency “articulate[s] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))

without requiring the station to provide any actual service to a rural area,” and that doing so “would render the policy underlying the condition a nullity.”¹² Yet far from being “well-reasoned in denying Weigel’s Petition for Reconsideration,”¹³ the *Division Denial* states in conclusory fashion that “the condition that any future modification will not result in a relocation within 121 kilometers of the top 100 markets applied only to future modifications of the CP,” without addressing Weigel’s argument about the logical consequences of such a ruling.¹⁴ By failing to address Weigel’s key argument, the *Division Denial* is itself arbitrary and capricious, and accordingly cannot stand.¹⁵

Finally, Nelson appears to argue that the Commission should ignore the condition WSPY accepted on its construction permit by filing in the rural-only window because the *Digital LPTV Licensing PN* announced the Media Bureau’s intent to open a separate, subsequent filing window that would not be subject to the rural window’s geographic restrictions.¹⁶ This argument is, at best, a non-sequitur, given that WSPY did not obtain its construction permit through the nationwide window, which (as Nelson notes) the Media Bureau ultimately postponed indefinitely. Rather, WSPY chose to take advantage of the more limited, rural-only filing window. The very fact that the *Digital LPTV Licensing PN* established a separate rural filing window — and imposed a geographic restriction on the authorizations that would be issued to applicants filing in that window — refutes Nelson’s argument that “the Public Notice determined

¹² Weigel Petition at 4 (footnote omitted).

¹³ Opp. at 2.

¹⁴ *Division Denial* at 3.

¹⁵ See *Am. Tel. & Tel. Co. v. FCC*, 974 F.2d 1351, 1355 (D.C. Cir. 1992) (finding FCC order “arbitrary and capricious for want of an adequate explanation,” including failure to “answer the strong arguments raised by AT&T”).

¹⁶ Opp. at 2-3.

that it was in the public interest to permit *all interested parties* to make major changes to *licensed facilities without geographic restriction.*¹⁷ To the contrary, although the *Digital LPTV Licensing PN* contemplated that LPTV and TV translator stations in all areas would *eventually* have an opportunity to apply for new stations and major changes to existing stations, the Media Bureau determined it would be in the public interest to offer the benefit of the earlier filing window only to those applicants willing to accept a geographic restriction designed to “ensure continued service for viewers ... in the rural portions of the United States.” If the Media Bureau had believed it would be in the public interest to allow *all* applicants in *both* filing windows to relocate “without geographic restriction beyond those geographic restrictions contained within the routine LPTV minor change rules,”¹⁸ there would have been no purpose in establishing separate filing windows at all.

CONCLUSION

For the reasons set forth above and in Weigel’s Application for Review, the *Division Denial*’s nullification of WSPY’s rural service obligation is arbitrary and capricious, exceeds the Video Division’s authority, and disserves the public interest. Accordingly, the Commission should reverse the *Division Denial*, enforce the conditions under which WSPY was authorized, and deny WSPY’s Application.

Respectfully submitted,

WEIGEL BROADCASTING CO.

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¹⁷ *Id.*

¹⁸ *Id.*

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CERTIFICATE OF SERVICE

I, Michael Beder, an associate at Covington & Burling LLP, hereby certify that on this 15th day of February, 2017, I caused a copy of this Reply in Support of Application for Review to be served by U.S. First Class mail, postage prepaid, and by electronic mail upon the following:

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