

REQUEST FOR WAIVER

Pursuant to Section 1.3 of the Commission's rules,¹ CNZ Communications SE, LLC ("CNZ") respectfully requests a waiver of Section 73.626(f)(1) of the Commission's rules² to permit full power television station WLGA(TV), Opelika, Alabama (Fac. ID 11113) ("WLGA") to implement the distributed transmission system ("DTS") proposed in the instant application (LMS File No. 0000030376) (the "WLGA DTS Application"). The proposed DTS facility would restore service to many of WLGA's viewers who would otherwise lose access to WLGA's free, over-the-air signal as part of the post-auction repack. It would also allow WLGA to continue to provide a 48 dBu signal over Opelika, Alabama, providing a first local service to that community without causing interference to any other full power or Class A television station. As such, CNZ's proposal is fully permissible under the FCC's Rules. However, under Section 73.626(f)(1), CNZ would first need to establish new reference coordinates for WLGA in a "single-stick" application for DTS Site #1 and then convert its permitted facility to a DTS in a separate application. In the interest of efficiently utilizing resources during the post-auction transition period, CNZ hereby requests a waiver of Section 73.626(f)(1) to approve the proposed DTS facility in a single application. Grant of the WLGA DTS Application will serve the public interest by restoring a major portion of the loss area created through the post-auction repack, expanding WLGA's service, and strengthening its ability to provide a first local service to Opelika and the surrounding communities once the post-auction transition is complete.

I. BACKGROUND

WLGA is a full power television station serving Opelika, Alabama, and currently authorized to operate on UHF channel 30. In connection with the post-incentive auction transition, the FCC reassigned WLGA to operate on UHF channel 17 and placed WLGA in the first phase of the post-auction transition. As the Commission has recognized, WLGA's baseline technical facilities for the post-auction transition will result in a population loss of more than one percent.³ In particular, through no fault of CNZ's, nearly 25,000 (around 2.6%) of WLGA's existing viewers will be unable to watch WLGA's free, over-the-air signal once the post-auction transition is complete.

Consistent with the processes proscribed by the Media Bureau and the Incentive Auction Task Force, on July 12, 2017, CNZ filed an application for a minor modification to WLGA's licensed facility to construct a facility using the technical parameters included in the CCRPN.⁴ The Commission granted that application on July 27, 2017. If CNZ proceeds to construct its permitted facility, however, WLGA will lose nearly 25,000 over-the-air viewers.

¹ 47 C.F.R. § 1.3

² *Id.* § 73.626(f)(1).

³ *Incentive Auction Closing & Channel Reassignment Pub. Notice the Broad. Television Incentive Auction Closes; Reverse Auction & Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced*, Public Notice, 32 FCC Rcd. 2786 (2017) ("CCRPN").

⁴ See LMS File No. 0000028626.

CNZ has worked diligently to identify an alternate channel assignment or technical facilities that will enable it to continue serving all of WLGA's existing viewers. Although CNZ could not find a way to serve all of its existing viewers, the WLGA DTS Application will restore service to more than 70% of the viewers who would otherwise lose WLGA's signal under the FCC's baseline post-auction technical parameters. Additionally, through the use of a DTS, CNZ can expand the total number of viewers that WLGA serves—with 3.6 million viewers receiving WLGA's interference free signal—while maintaining a first local service to Opelika, Alabama, thereby serving the public interest.

II. ARGUMENT

CNZ seeks a waiver of the requirement that broadcasters preserve coverage over their entire authorized service area when changing reference coordinates during conversion to a DTS.⁵ The FCC may grant a waiver for good cause shown.⁶ The Commission typically grants a waiver where the specific facts make strict compliance inconsistent with the public interest.⁷ In determining whether a waiver is appropriate, the Commission may take into account considerations of hardship, equity, or the effective implementation of overall policy on an individual basis.⁸ Waiver is therefore appropriate if special circumstances warrant a deviation from the general rule, and such a deviation will benefit the public interest.

In this case, a waiver would clearly benefit the public interest. First, a waiver would promote efficiency and expedite the post-auction transition by allowing CNZ to accomplish in one application what otherwise would require two separate applications and concomitant delays while its transition date quickly approaches. Second, a waiver is appropriate because the WLGA DTS Application is consistent with the spirit of the DTS rules and will help to restore service to some viewers who otherwise would be lost as a result of the post-auction transition. Finally, grant of the instant application will allow WLGA to reach additional viewers and, at the same time, strengthen its ability to provide a first local service to Opelika.

A. The DTS Application Merely Seeks to Expedite a Process That Would Otherwise Require Two Separate Applications.

The only obstacle to grant of the WLGA DTS Application is that it proposes to strengthen WLGA's service in the northern portion of its viewing area in single step, when the FCC's rules otherwise would require a two-step process. CNZ unquestionably could file a "single-stick" application to license the facility identified as DTS Site #1 in the WLGA DTS Application. The

⁵ *Digital Television Distributed Transmission Systems Technologies*, MB Docket No. 05-312, Report and Order, 23 FCC Rcd 16731 (2008) ("*DTS Order*").

⁶ 47 C.F.R. § 1.3.

⁷ *N.E. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

single-stick application would fully comply with Section 73.623 of the FCC's Rules, which governs DTV applications and changes to DTV allotments, because DTS Site #1 complies with the principal community coverage requirement for Opelika and does not cause interference to any other station.⁹ The single-stick application also would fully comply with Section 73.3700 of the FCC's Rules, which governs the post-incentive auction transition, because the proposed facility would be considered a minor change and would not cause new interference to any proposed facility other than a rounding tolerance of 0.5%.¹⁰ Accordingly, there would be no basis for the Commission to deny a standalone application for DTS Site #1. Once that application was granted, it would establish a new reference point for WLGA, and CNZ could then file an application to convert the single-stick facility to a DTS.

Rather than requiring an unnecessary two-step process, as a matter of processing efficiency, the Commission should permit CNZ to combine the two aforementioned applications into a single application. The FCC routinely has permitted applicants to combine into a single application what otherwise would require a two-step process. *See, e.g.*, CDBS File No. BMPCDT-20120504ADE (allowing applicant to apply for hypothetically maximized service distance and DTS in single application). Permitting CNZ to avoid an unnecessary two-step process is particularly in the public interest because it will help to expedite the post-auction transition, where WLGA is assigned to Phase One and needs to purchase its equipment and begin the construction process as soon as possible to avoid any unnecessary delay or temporary service loss should it be unable to timely construct its post-auction facility.

The Commission has already permitted at least one station to change its reference point and propose a new facility in a single application for a post-auction facility. In its first priority window application, station WUNF-TV proposed to move its DTS reference site by 29.4 km (18.3 miles). *See* LMS File No. 0000029742. By the licensee's admission, the proposed facility would result in "some unavoidable NLSC loss area." *See id.*, Engineering Exhibit at 4. Nevertheless, the Commission granted WUNF-TV's application, and it should do the same here.

B. Section 73.626(f)(1) Should Not Preclude Grant of the WLGA DTS Application.

The WLGA DTS Application is consistent with the spirit, if not the letter, of Section 73.626(f)(1). Under this section, a party may propose a DTS as long as, among other things, "[t]he combined coverage from all of the DTS transmitters covers all of the applicant's authorized service area."¹¹ The rule defines a station's authorized service area as "the area within its predicted noise-limited service contour determined using the facilities authorized for the station in a license or construction permit for non-DTS, single-transmitter-location operation."¹² Accordingly, the relevant authorized service area is *either*: (1) the predicted noise-limited service contour for WLGA's licensed pre-auction facility; or (2) the predicted noise-limited service

⁹ 47 C.F.R. § 623

¹⁰ *Id.* § 73.3700(b).

¹¹ *Id.* § 73.626(f)(1).

¹² *Id.* § 73.626(b).

contour authorized in a construction permit for a post-auction, non-DTS facility for WLGA. As explained above, nothing would prohibit WLGA from obtaining a single-stick construction permit for the facility proposed as DTS Site #1. Accordingly, when analyzing service loss under the WLGA DTS Application, the Commission should consider the contour of WLGA's hypothetical single-stick facility from DTS Site #1 as WLGA's authorized service area, in which case the WLGA DTS Application would fully comply with Section 73.626(f)(1).

While the Commission is understandably concerned with preservation of service, the prospect of a limited loss area generally should not impede the grant of an otherwise permissible application for post-incentive auction facilities. Indeed, the Commission has explicitly acknowledged that "loss of service might be a potential outcome of the reverse auction."¹³ For example, channel sharing stations are permitted to share with any other station that would not result in a change to the sharing station's designated market area, without regard to service loss or a change in the station's service area (including whether or not the station provides service to its existing community of license, which WLGA will do).¹⁴ In short, some service loss is an inevitable consequence of the post-incentive auction process and should not negatively reflect on an otherwise meritorious application for post-auction facilities.

Concerns about loss of service are particularly misplaced as they relate to WLGA. Through no fault of CNZ's, approximately 2.6% of WLGA's existing viewers will be unable to receive WLGA's over-the-air signal based on the FCC's post-auction baseline facilities for the station. The WLGA DTS Application will restore service to a substantial number of those viewers who live in the northern part of WLGA's service area, reducing the transition related interference to 0.7%. While the WLGA DTS Application will result in some additional service loss to the south, it will result in a net service gain, as discussed below, while allowing WLGA to continue providing a 48 dBu signal and a first local service to Opelika. Given the many benefits of this proposal, including the restoration of many viewers who otherwise would be lost through no fault of CNZ's, the loss of service to some pre-transition viewers should not be disqualifying, and the Commission should grant the WLGA DTS Application.

C. Grant of the WLGA DTS Application Is In the Public Interest.

Finally, grant of the WLGA DTS Application will serve the public interest by allowing CNZ to expand access to WLGA's signal and strengthen WLGA's ability to provide a first local service to Opelika.

The Media Bureau has routinely recognized the public interest in expanding the over-the-air viewership of a television station even if it results in service loss to some viewers.¹⁵ Although

¹³ *Incentive Auction R&O*, 29 FCC Rcd at 6724, para. 367.

¹⁴ *See* 47 C.F.R. § 1.2204(c)(5).

¹⁵ *See, e.g.,* KTNC License Inc., 19 FCC Rcd. 15479, 15485 (2004) (loss of service to a million viewers offset by replacement services and gains to 400,000 viewers); *In Re Application of KTVO, Inc. (KTVO-TV) Kirksville, Missouri for Modification of Television Constr. Permit*, 96

the WLGA DTS Application will result in a loss of service to approximately 125,000 pre-auction viewers, some of these viewers would already lose service due to interference caused by other transitioning stations, and a large number of the remaining viewers already receive Cozi TV service from WIYC(TV), Troy, Alabama (Fac. ID No. 62207). Meanwhile, the WLGA DTS Application will expand WLGA's service to approximately three million additional viewers, including the restoration of service to many viewers who otherwise would lose service under WLGA's baseline facility. This nearly 25:1 ratio of viewer gains to viewer losses demonstrates the strong public interest benefits of the WLGA DTS Application.

More important than viewer statistics alone, the WLGA DTS Application will improve WLGA's ability to serve its existing viewers, including through a continued first local service to Opelika. The Commission has recognized that the public interest is served where "anticipated audience gains are sufficiently large to ensure a significantly expanded revenue base from which the station might greatly upgrade its existing service."¹⁶ Such is the case here. The WLGA DTS Application will quadruple WLGA's potential viewership, providing a much wider financial base to support its operations. This, in turn, will allow the station to better serve viewers in its principal community of Opelika as well as neighboring communities. Given the strong benefits resulting from the WLGA DTS Application, the Commission should find that, taken as a whole, grant of the application is in the public interest.

III. CONCLUSION

For the foregoing reasons, grant of the instant application is consistent with the Commission's Rules and in the public interest. Accordingly, the Commission should grant the instant waiver request and grant the WLGA DTS Application.

F.C.C.2d 472, 479 (1983) ("*KTVO, Inc.*") (net loss of 1,116 viewers offset by new service to tens of thousands of viewers).

¹⁶ See *KTVO, Inc.* ¶ 9.