

On-Air Viewer Notification Waiver Request

NPG of Idaho, Inc. (“NPG”) is licensee of K49ND-D and permittee of K34NC-D, Fish Creek, Etc., Idaho (Fac. ID No. 66257) (“K49ND-D” or the “Station”). K49ND-D has been assigned to Phase 7 of the nationwide repack transition and, as of this filing, anticipates that the Station will be ready to transition in a timely fashion (subject to weather and climate concerns that affect the transmission site).

In connection with K49ND-D’s transition to its new channel as a reassigned station (*see* LMS File Nos. [0000024534](#) as modified by [0000054295](#)), NPG is required to engage in a series of on-air viewer notifications beginning at least 30 days prior to the Station’s channel change date. *See* 47 C.F.R. § 73.3700(c)(3). Unfortunately, however, the Station was recently the victim of a lightning strike on June 6, 2019, which destroyed the transmitter and rendered the Station silent. In the wake of the unanticipated and uncontrollable damage to K49ND-D, NPG timely filed a request for silent STA. *See* LMS File No. [0000074722](#) (filed June 14, 2019, and still pending as of July 1, 2019). Consequently, NPG seeks, pursuant to Section 1.3 of the Commission’s Rules,¹ waiver of the applicable on-air viewer notification requirements set forth in Section 73.3700(c) of the Commission’s rules. *See* 47 C.F.R. § 73.3700(c).

Pursuant to the Commission’s waiver standard, the applicant must show “good cause” for granting this request.² Further, the

Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission’s rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *See id.*³

Consistent with these standards and in support of its waiver request, NPG shows as follows:

On June 6, 2019, K49ND-D’s facilities suffered damage as a result of a storm. *See* LMS File No. [0000074722](#), STA Exhibit. As reported by NPG in its silent STA request, repair of the damage to the Station is economically unreasonable because K49ND-D is required to terminate its pre-auction channel operations in a few months. *See* LMS File No. [0000074722](#), STA Exhibit

¹ 47 C.F.R. § 1.3.

² *See* 47 C.F.R. § 1.3. *See also, e.g., Broadcast Transition Procedures Public Notice*, 32 FCC Rcd 858, n.36.

³ *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd 858, n.36.

(“Because the Station’s Phase 7 transition window will open in a mere four months (with a transition deadline in only seven months), it would be manifestly unreasonable for the licensee to dedicate resources to the acquisition, delivery, and installation of a new (or used) pre-transition replacement transmitter.”). Any investment by NPG to replace K49ND-D’s pre-transition transmission system would be lost as a sunk cost for a facility that, by law, cannot continue to operate beyond January 17, 2020. As a result, the prospects for K49ND-D’s over-the-air operation between now and the January 17, 2019, pre-transition channel termination date are essentially non-existent. It is important to reiterate, however, that this circumstance was created by a force majeure event, namely the June 6, 2019, lightning strike that destroyed K49ND-D’s transmitter and caused the Station to go silent.

Under Section 73.3700 of the Commission’s rules, K49ND-D is required to engage in viewer education efforts in order to notify the public that the Station’s programming will no longer be available on the R.F. channel where consumers historically have received it. More specifically, absent a grant of the instant waiver request, K49ND-D would be required to air a series of crawls and PSAs to inform viewers about its involuntary channel change from 49 to 34.

Each crawl and PSA⁴ is required to contain information about (i) the date the station will terminate operations on its pre-transition channel, (ii) the need for consumers to rescan their tuners, and (iii) how to obtain more information. *See* 47 C.F.R. § 73.3700(c). NPG respectfully submits that strict compliance with these viewer notification requirements is not only impracticable in light of K49ND-D’s current silent status, but also that it would potentially create viewer confusion since the station has already been silent (as a result of circumstances beyond NPG’s control) since June 6, 2019. Nonetheless, NPG understands and appreciates the importance of the Commission’s consumer notification requirements for stations changing channels in the post-Auction environment, and NPG proposes to meet the spirit (because it can’t meet the letter) of the rule by providing information to consumers through alternate notification efforts.

In addition to K49ND-D, NPG owns and operates full power KIFI-TV, Idaho Falls, Idaho (Fac. ID No. 66258) and low power KXPI-LD, Pocatello, Idaho (Fac. ID No. 28231). Both KIFI-TV and KXPI-LD air Big Four network programming and local news and operate in the same DMA (the Idaho Falls-Pocatello DMA) as K49ND-D. In addition, NPG has secured a commitment from KIDK, Idaho Falls, Idaho (Fac. ID No. 56028), which is also a Big Four network affiliate with local news in the Idaho Falls-Pocatello DMA, to allow NPG to air some repack consumer education messaging on KIDK’s broadcast platform. Thus, NPG will have multiple broadcast television platforms available to it over which to provide repack consumer education for K49ND-D’s channel change to viewers in the Station’s market. In light of the silent status of K49ND-D, NPG proposes to use these other in-market broadcast platforms to educate the public about K49ND-D’s channel change and the need to rescan; NPG would provide at least as much consumer education across these other broadcast stations as it would have been required to provide on K49ND-D if the Station hadn’t suffered damage rendering it silent (i.e., a total of at least 60 seconds per day in the aggregate).

⁴ In addition to the substantive content requirements, PSAs must meet the additional requirements of being closed captioned and in the language of the majority of programming aired on the station.

In addition, NPG operates a website with local news, information, promotional content, and other features targeting the local population in the Idaho Falls-Pocatello market. In light of the fact that K49ND-D will be unable to provide on-air consumer education relating to the Station's repack transition, NPG proposes to provide—as part of its alternate viewer education campaign—relevant messaging on its website for a period of at least 30 days prior to the Station's channel change and for a period of approximately a couple of weeks following the completion of the Station's channel change repack project. The content of the website message will cover the same territory and points as the on-air PSAs and/or crawls required by Section 73.3700(c).

Finally, NPG will consider whether/how to use its multiple social media platforms—including Facebook and Twitter—to educate the Station's viewers about the channel change that will occur. NPG recognizes that these digital communication resources might have the potential to be effective to engage viewers in an effective manner to supplement the on-air broadcast efforts that will be carried out on the broadcast platforms referenced above and especially if viewers ask questions about a loss of over-the-air signal of K49ND-D.

Grant of this waiver is in the public interest, and will not undermine any Commission rule or policy, because (i) K49ND-D has been off the air since June 6, 2019, as a result of a force majeure event, (ii) K49ND-D will remain silent until the Station is put back on the air on its post-transition channel, (iii) the alternate notification proposals set forth above are reasonably calculated to reach the Station's viewers at least as well as the Commission's mandatory consumer education rules, and (iv) without a grant of this waiver request, NPG would be irreparably harmed by having to invest significant “sunk costs” to procure a new pre-transition transmitter that would not be used by the Station after its quickly-approaching Phase 7 transition.

For these reasons, the licensee respectfully requests a grant of this waiver request and approval of the alternate viewer notification elements proposed herein. This proposal and the force majeure circumstances that created the need for this request are substantially similar to those of WPCT and WAGV, two stations that filed—and were granted—requests to waive the Section 73.3700(c) on-air consumer education requirements in LMS File Nos. [0000062871](#) and [0000036679](#) respectively.⁵

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⁵ Of course, NPG will comply with its requirements to notify medical facilities of the channel change as set forth in the K49ND-D/K34NC-D repack construction permit (*see* LMS File Nos. [0000024534](#) as modified by [0000054295](#)) and to notify MVPDs of certain information relating to the channel change (*see* 47 C.F.R. § 73.3700(d)). NPG is manifestly not seeking relief from those requirements in this waiver application.