

Statement In Further Support of Application

This Statement is filed by South Central Communications Corporation (the "Applicant"), in support of the Application for Minor Modification of Station WAZE-DT, DTV Channel 20, Madisonville, Kentucky (the "Station"), filed with the Commission on March 29, 2004 (BMPCDT-20040329AKL) (the "Application"). The Application was accepted for filing on April 5, 2004. On May 24, 2004, the Media Bureau issued a letter, stating that the proposed modifications to the Station would cause impermissible interference to Station WAZE-TV, operating on the adjacent NTSC Channel 19.¹ The Letter requested that an amendment to the Application be filed within 30 days to bring the proposed facilities into compliance with Section 73.632(c)(2) of the Commission's Rules.

However, as discussed below, the Letter failed to address the showing initially provided by the Applicant in compliance with Section 73.632(g) of the Commission's rules. Specifically, the Application contained a statement by the Applicant that, as the licensee of Station WAZE-TV, any interference caused by the operation of Station WAZE-DT above the 2% *de minimis* standard established in the rules would be accepted. Moreover, the Letter also failed to decisionally acknowledge that the Application is identical in material respects to the application of Station KTAQ-DT (BPCDT-19991027ABP), cited in the Application, which also contained a consent by the licensee to accept interference to its NTSC station by its DTV facility. Finally, the Letter failed to address the request for waiver of Section 73.623(c)(2) contained in the Application. In view of the foregoing, the Applicant requests that the Application now be processed and granted as filed.

DISCUSSION

A. The Application Complies with the Commission's Rules & Prior Precedent

Section 73.623(g) of the Commission's rules was adopted so as to permit licensees the flexibility in constructing their digital facilities. Specifically, the Commission will permit licensees to reach negotiated understandings with other DTV licensees that will result in one station receiving "additional interference" beyond that which is authorized in the Commission's rules, so long such grant "is consistent with the public interest."² The practical limitation to this rule is contained in Section 73.622(f)(5), which prohibits a station from increasing its geographic coverage area beyond the area served by the largest station within its market.

¹ Letter to South Central Communications Corporation, dated May 24, 2004, Mail Stop 1800E1-SSA, regarding BMPCDT-20040329AKL (the "Letter").

² 47 C.F.R. § 73.632(g) (2003).

The rules were proposed by participants in the underlying proceeding that had been concerned about the competitive impact of the Commission's adoption of maximum power and height restrictions. Such concerns were expressed by many parties, due mostly to the impact of the maximum facility rules on stations that had been previously authorized with lower operating power.³ The Commission agreed with these parties, and adopted rules that would permit stations to maximize their facilities.⁴

Accordingly, the Commission has subsequently authorized at least one station to construct and license a digital facility that will cause interference to its adjacent channel NTSC facility. Specifically, Station KTAQ-DT filed an application to modify its digital facility authorized in the DTV Table of Allotments to specify a facility that would cause interference to its analog facility in excess of the Commission's 2%/10% *de minimis* interference limit.⁵ The Commission issued a letter dated February 5, 2001, noting this fact, and requesting that a corrective amendment be filed. The licensee filed an Amendment, and, on behalf of its NTSC facility, accepted the interference to be caused by the DTV facility, and sought a waiver of the Commission's rules to authorize the proposed facilities. The Commission granted the KTAQ Application on January 25, 2002. Subsequently, the Commission has granted a further modification of the construction permit for KTAQ-DT, which would maintain a level of interference far beyond the 2%/10% *de minimis* limit.⁶

Grant of the instant Application would comply with the Commission's rules, and would be in line with prior decisions by the Commission's staff in materially comparable circumstances. The proposed facility would not provide service to an area greater than the largest station in the market, and the grant of the Application would not impact any other licensee in the market.⁷ Moreover, the specific language contained in Section 73.623(g) permits licensees to accept interference beyond the 2%/10% *de minimis* limit when reaching a negotiated agreement. The modification proposed in the Application proposes less interference to the NTSC

³ *Advanced Television Systems And Their Impact Upon The Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14,588 (1997). ¶¶ 14-28, nt. 35.

⁴ *Id.* at ¶ 31, nt. 70.

⁵ See *Application for Broadcast Construction Permit*, BPCDT-19991027ABP, relating to Station KTAQ-DT, Greenville, Texas ("KTAQ Application") (proposing facilities that would cause a reduction in service of the NTSC facility by 325% due to interference caused by the DTV facility).

⁶ See *Application for Broadcast Construction Permit*, BMPCDT-20030519ACR, relating to Station KTAQ-DT, Greenville, Texas.

⁷ See *Application*, Exhibit 43.

facility than that in the KTAQ Application, and consistent with the Commission's grant of the KTAQ Application, the licensee has agreed to accept any interference caused to the NTSC facility. *Id.* As in the KTAQ Application, it is clear that the public interest would be served by the grant of the Application.

B. Grant of a Waiver of Section 73.632(c)(2) Is In The Public Interest

As shown above, the Application warrants grant as initially filed. Even were that not the case, the overall circumstances provide a rational and compelling basis for waiver and, if deemed necessary to a grant of the Application, waiver of Sections 73.623(c)(2) and 73.623(g) is specifically requested.

The Commission will grant waiver requests upon a showing of good cause.⁸ To support a waiver request, the Applicant must demonstrate that "the particular facts make strict compliance inconsistent with the public interest if applied to petitioner and when the relief requested would not undermine the policy objective of the rule in question."⁹ Moreover, the Commission's staff must give all waiver requests the requisite "hard look" required by the federal courts.¹⁰

As noted above, Section 73.623(g) was adopted by the Commission to permit a coordinated approach to the upgrade of DTV facilities in excess of the 2%/10% *de minimis* interference standard contained in Section 73.623(c)(2). Specifically, the Commission stated that:

It is our intention to provide licensees the maximum flexibility to negotiate changes in their DTV allotments where such changes do not cause interference to other stations or where all affected stations agree to accept any additional interference that may result.¹¹

Moreover, the application of this rule is limited by the "largest station" standard under Section 73.622(f)(5) of the Commission's rules. The combined effect of these rules is to permit the upgrade of smaller DTV facilities so long as no interference is caused to parties not involved in the coordinated efforts, and so long

⁸ 47 C.F.R. § 1.3 (2003).

⁹ *Pacific Broadcasting Of Missouri, LLC*, FCC 04-140 (rel. June 16, 2004); See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *aff'd*, 459 F.2d 1203 (1972) cert. denied, 409 U.S. 1027 (1972) citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968); *Birach Broadcasting Corporation*, 18 FCC Rcd 1414 (2003); *Family Stations, Inc. v. DirecTV, Inc.*, 17 FCC Rcd 25333 ¶ 7 (2002).

¹⁰ See *WAIT Radio*, *supra*.

¹¹ *Advanced Television Systems And Their Impact Upon The Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of Sixth Report and Order, 13 FCC Rcd 7418, ¶ 145 (1998).

as the proposed facility's service will not exceed that of the largest station in the market.

The grant of the instant Application will not undermine these goals. Instead, the grant of the Application is exactly the type situation that was contemplated in the Commission's development of the DTV rules. The proposed facility will serve a substantially greater area and population than the facility authorized in the DTV Table of Allotments.¹² In light of the fact that no interference will be caused to any other facility, this increased service area also represents a more efficient use of the DTV spectrum, and will provide a greater level of service to the public.

CONCLUSION

The grant of the Application will permit the Station to substantially increase its service to the Evansville DMA, and will not cause any interference to any other facility other than the co-owned NTSC facility. The impact on WAZE-TV will be temporary, and it will permit WAZE-DT to finalize the construction of its maximum DTV facility at an earlier time.

Therefore, the grant of the Application will serve the public interest, and South Central Communications Corporation respectfully requests the processing and grant of the Application.

¹² The DTV Table of Allotments would permit WAZE-DT to serve an area of 14,290 square kilometers and 551,000 persons. The proposed facility would increase the area served to 26,085 square kilometers, and 799,462 persons. See *Application*, Exhibit 43.