



Federal Communications Commission
Washington, D.C. 20554

January 15, 2020

Donald E. Martin, Esq.
P.O. Box 8433
Falls Church, Virginia 22041

Re: Western New Life, Inc.
WQHA, Aguada, Puerto Rico
Fac Id No. 3255

Dear Counsel:

Western New Life, Inc. (Western), licensee of WQHA, Aguada, Puerto Rico (RF channel 25, virtual channel 50), requests a waiver of section 73.682(d) of the Commission's rules¹ to operate with virtual channel 25 in lieu of virtual channel 50 (Waiver Request).² For the reasons set forth below, the Waiver Request is denied.

Background. Radio frequency (RF) analog channel 50 was initially allotted to Aguada in 1987,³ and WQHA began analog operations in 1993.⁴ WQHA commenced digital operations on RF channel 62 in 2006,⁵ using channel 50 as its virtual channel, consistent with section 73.682(d) of the Commission's rules and ATSC A/65C, Annex B, dated May 9, 2006 (the PSIP Standard or Standard).⁶ When the Commission adopted the PSIP Standard into its broadcast transmission rules in 2004, it explained that the Standard allowed viewers to receive a station's digital signal, which was on an RF channel differing from its analog channel number, even if viewers did not know the digital channel number, simply by tuning to

¹ 47 CFR § 73.682(d).

² Letter from Donald E. Martin to Hossein Hashemzadeh, Deputy Chief, Video Division (filed Mar. 19, 2019).

³ See *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Aguada, Puerto Rico)*, 2 FCC Rcd 5241 (MMB 1987).

⁴ FCC File No. BLCT-19930715KE. In analog broadcasting, if a viewer selected to view channel 50, its television receiver knew to tune to the standardized frequency of channel 50 (686-692 MHz band).

⁵ FCC File No. BLCDDT-20060622ABN.

⁶ The Commission amended section 73.682(d) of the rules to adopt the ATSC PSIP Standard, which sets forth mandatory requirements for assigning "virtual" or "major" channel numbers. See, generally, *Request for Declaratory Ruling by Meredith Corporation and "Alternative PSIP Proposal" By PMCM TV, LLC for WJLP (Formerly KVVN(TV)), Middletown Township, New Jersey*, MB Docket No. 14-150, Declaratory Ruling, 30 FCC Rcd 6078 (MB 2015) (*Declaratory Ruling*); *aff'd*, 32 FCC Rcd 7229 (2017) (*PSIP Order*), *aff'd*, *PMCM TV, LLC v. FCC, et al.*, United States Court of Appeals for the District of Columbia Circuit, Case No. 17-1209 (filed June 20, 2018), unpublished opinion. The majority of currently operating stations, like WQHA, use their analog channel number as their major channel number under the PSIP Standard. *Declaratory Ruling*, 30 FCC Rcd at 6080-81, para. 7, citing ATSC A/65C, Annex B.1.1.

the analog channel number.⁷ WQHA eventually returned to RF channel 50 for its post-DTV transition digital operations in 2009.⁸ Thus, the viewing public has viewed and identified WQHA on analog and virtual channel 50 for over 25 years.

WQHA was reassigned to RF channel 25 in connection with the broadcast incentive auction⁹ and began operation on its new RF channel in January 2019.¹⁰ In support of its Waiver Request to use virtual channel 25 in lieu of its current virtual channel 50, Western states that “many members of the public have learned of the removal of broadcasting from above channel 36,” may find it “unlikely and unnatural to expect to find incoming signals on their television receivers on spots on the tuner above channel 36,” and accordingly, “just won’t venture up to the higher channels.”¹¹ According to Western, “[t]his negative phenomenon can be mitigated by moving WQHA to virtual channel 25.”¹² Western also states that in considering the public interest benefits that would accrue from granting a waiver, the Commission must evaluate the harm that could result and argues that “it is difficult to envision that the requested waiver would cause harm to the public interest.”¹³

In addition, Western argues that because its use of virtual channel 25 would not overlap with the virtual channel of any other station, grant of the Waiver Request is consistent with other Commission decisions denying the use of a requested virtual channel because of contour overlap.¹⁴ It also asserts that that Commission is generally willing to grant a waiver “where negative consequences result if those negative consequences are outweighed by the benefits,” citing a *Report and Order* amending the DTV Table of Allotments to reallocate channel 17 from Block Island, Rhode Island to Newport, Rhode Island,¹⁵ and that the waiver requested by Western “would cause no discernable public interest harm and yet would result in the benefit of WQHA being more accessible to the public.”¹⁶ And, as Western points out, Annex B of the PSIP Standard lists a number of circumstances that would require or justify an exception to the general rule that a station’s virtual channel should coincide with its original analog channel number, but that “[n]one of the circumstances identified in Annex B pertains to the facts at hand.”¹⁷ Nevertheless, Western argues that it presents “a unique situation [requiring an alternate virtual channel] that is not provided for in PSIP [for] which the Commission may grant exceptions on a case-by-case basis.”¹⁸

⁷ *Declaratory Ruling*, 30 FCC Rcd at 6080, para. 6.

⁸ FCC File No. BLCDDT-20090612AEJ.

⁹ *Incentive Auction Closing and Channel Reassignment Public Notice*, AU Docket No. 14-252, 32 FCC Rcd 2786 (IATF/MB/WTB 2017) and https://data.fcc.gov/download/incentive-auctions/Transition_Files (*Closing and Channel Reassignment Public Notice*).

¹⁰ See LMS File Nos. 0000067181 and 0000065599.

¹¹ Waiver Request at 2. Western also argues that it would be “perverse to require [Western] to brand WQHA as channel 50 when the public knows that broadcasting on channel 50 is now illegal.” *Id.* at 3.

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.* at 2-3.

¹⁵ *Amendment of Section 73.622(i) Digital Television Broadcast Stations (Block Island and Newport, Rhode Island)*, Report and Order, 33 FCC Rcd 8773 (Vid. Div. 2018) (*Rhode Island Report and Order*).

¹⁶ Waiver Request at 3.

¹⁷ *Id.* at 2.

¹⁸ *Id.*, citing *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 03-15, Report and Order, 19 FCC Rcd 18279, 18346, para. 153 (2004).

Discussion. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁰ 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.²¹

We disagree that Western has presented special circumstances that warrant a deviation from the mandatory virtual channel assignment requirements set forth in Annex B of the PSIP Standard, which provides that (1) full power stations that were transmitting an analog signal prior to the end of the DTV transition in June 2009 use their analog channel number as their virtual channel number for digital transmission, and (2) the assigned virtual channel stays the same even if a station's RF channel changes.²² Western's situation is hardly "unique" or "special." When the Commission reassigned spectrum recovered from television broadcasting to be licensed to other services as required by the Balanced Budget Act of 1997, all spectrum outside the core (television channels 52 through 69) was vacated by television stations by the end of the DTV transition.²³ Stations that had operated on television channels 52 through 69, however, continued to use the virtual channel assigned pursuant to the PSIP Standard, even if that virtual channel number corresponded with an out-of-core RF channel number. Similarly, in connection with the incentive auction, the Commission has reallocated RF channels 38 through 51 from television broadcasting and all television stations on those channels will be required to cease operations on these newly out-of-core channels by July 3, 2020, and commence operations on in-core channels assigned pursuant to the incentive auction repacking.²⁴ Accordingly, because a station's virtual channel does not change in the event its RF channel changes, over 30% of full power broadcasters are using a virtual channel between 38 and 69,²⁵ and viewers continue to find stations on the channel to which they are accustomed.²⁶

¹⁹ See 47 CFR § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

²⁰ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²¹ See *WAIT Radio v. FCC*, 418 F.2d at 1159.

²² ATSC A/65C, Annex B.1.1 and B.1.3. Because WQHA was transmitting a licensed analog signal at the time of the DTV transition, the PSIP Standard's exceptions to the assignment of analog channel numbers as the virtual channel number do not apply. These include assignment principles for stations that did not have an analog license at the time they commenced digital operations (ATSC A/65C, Annex B. 1.2), that commenced operating digital channels allocated to the DTV Table of Allotments after the transition under certain circumstances (ATSC A/65, Annex B.1.4), and commonly owned stations with overlapping DTV service areas (ATSC A/65, Annex B.1.5).

²³ See *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, ET Docket No. 97-157, Report and Order, 2 FCC Rcd 22953 (1998); *In the Matter of Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, Report and Order, 7 FCC Rcd 1022 (2002).

²⁴ See, generally, *Closing and Channel Reassignment Public Notice*.

²⁵ In this regard, we also note that over 980 television stations were assigned new RF channels in connection with the incentive auction. *Id.* As explained further below, if we were to waive the assignment principles of ATSC A/65C, Annex B.1.1 and B.1.3 for stations such as WQHA that operate with virtual channel numbers that correspond to reallocated RF channel numbers, it would be difficult to distinguish waiver requests by other repacked stations that wish to change their virtual channel number because they find their new RF channel number more desirable than the virtual channel number assigned pursuant to the PSIP Standard.

²⁶ We reject Western's unsupported assertion that viewers may find it "unlikely and unnatural to expect to find incoming signals on their television receivers on spots on the tuner above channel 36," and accordingly "just won't venture up to the higher channels." As noted above, the viewing public has viewed and identified WQHA on analog and virtual channel 50 for over 25 years. And, as noted above, over 700 full power and Class A television stations are also using, and will continue to use, virtual channels above channel 36.

We also conclude that the public interest would be harmed by granting a waiver of the PSIP Standard. As noted above, viewers have tuned to channel 50 to watch WQHA for over 25 years and would be required to rescan their television receivers in order to receive the station on virtual channel 25. Moreover, WQHA is similarly situated to hundreds of other stations with virtual channels that correspond with out-of-core RF channels or have been reassigned a new RF channel in the incentive auction, and Western has not demonstrated why it would be deserving of waiver while these other stations are not.

The fact that Western's proposed use of virtual channel 25 would not violate the Annex B prohibition against contour overlap does not warrant waiver of another assignment principle – that a station's virtual channel does not change if the RF channel changes. If this were a valid basis for a waiver, then any station could find and propose a virtual channel different from the virtual channel assigned pursuant to the PSIP Standard, frustrating the design of Annex B, which allows viewers to tune to a station's historic analog channel number even if they do not know a station's current digital channel number. In addition, waiver of the PSIP Standard for similarly situated television stations could lead to widespread disruption of channel placements on cable systems since stations are entitled to elect must-carry on their virtual channel number, further harming the public interest.²⁷

We also find the *Rhode Island Report and Order* inapposite. That decision did not involve a waiver of the PSIP Standard but instead, concluded that reallocating Block Island's first local service to Newport, as its first local service, a much larger and vibrant year-round community, constituted a preferential arrangement of allotments pursuant to the Commission's television allotment policies.²⁸ And the Video Division did not, as Western alleges, base its ruling on a conclusion that the negative consequences of its decision were outweighed by the benefits.²⁹ Instead, the Division found that not only would the reallocation result in a preferential arrangement of allotments, the petitioner in the proceeding had also committed to continue to provide the same 41 dBu principal community signal over all of Block Island.³⁰

In view of the forgoing, the request for waiver of section 73.682(d) of the Commission's rules filed by Western New Life, Inc. for WQHA, Aguada, Puerto Rico, IS DENIED.

Sincerely,



David J. Brown
Deputy Chief, Video Division
Media Bureau

²⁷ See, generally, *PMCM TV, LLC, License of WJLP, Middletown Township, New Jersey v. RCN Telecom Services, LLC, et al.*, 32 FCC Rcd 7200 (2017), *aff'd*, *PMCM TV, LLC v. FCC, et al.*, United States Court of Appeals for the District of Columbia Circuit, Case No. 17-1209 (filed June 20, 2018), unpublished opinion. See also *Declaratory Ruling and PSIP Order*, *supra* n.7.

²⁸ *Rhode Island Report and Order*, 33 FCC Rcd at 8775-76, paras. 6-7.

²⁹ Waiver Request at 3.

³⁰ *Rhode Island Report and Order*, 33 FCC Rcd at 8776, para. 8 & n.32.