

In re Application of)
)
WEIGEL BROADCASTING CO.)
)
Licensee of Class A Station WFBT-CA (Fac. ID #71425))
Chicago, Illinois)
)
For Minor Changes in Licensed Facilities)

To: Associate Chief Hossein Hashemzadeh
Video Division, Media Bureau

**PETITION FOR ACCEPTANCE AND CONDITIONAL GRANT OF
MINOR CHANGE APPLICATION TO ALLOW GREATER DISTRIBUTION
OF MINORITY AND ETHNIC PROGRAMMING THROUGH INTERFERENCE-
FREE AND PRECLUSION-FREE WAIVER OF 150 kW ERP LIMIT**

Joel H. Levy
Jerold L. Jacobs

COHN AND MARKS LLP
1920 N Street, NW, Suite 300
Washington, DC 20036-1622
(202) 293-3860

Attorneys for Weigel Broadcasting Co.

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SUMMARY

Grant of Weigel Broadcasting Co.'s Form 301-CA minor modification application and its request for waiver of the 150 kW ERP power limitations in Sections 73.6007 and 74.735(a) of the Commission's Rules will allow Class A TV Station WFBT-CA, Chicago, Illinois, to improve delivery of its unique minority and ethnic program service in the Chicago DMA without interfering with, or precluding, any existing or proposed analog or digital stations, applications or allotments. The only barrier to grant is the necessary waiver of the 150 kW ERP limitations. However, WFBT-CA proposes an ERP of only 47.5 kW toward the radio horizon. Thus, its proposal is consistent with the general 150 kW ERP limitation.

In 1982, when the LPTV Service was created, the Commission recognized that where "extraordinary circumstances" exist, waiver of the new service's power limitation was available and appropriate. Weigel fully meets that standard by virtue of WFBT-CA's significant local minority and ethnic programming. In light of the *Community Broadcasters Protection Act of 1999*'s "bill of rights" for Class A stations and the "safety valve" concerns of the U.S. Court of Appeals in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), acceptance for filing of Weigel's application, grant of the requested waivers, and conditional grant of the application are fully consistent with the paramount public interest.

Weigel emphasizes that it is not seeking any special status for WFBT-CA in this proceeding. It is simply requesting the additional power to provide more than 500,000 persons with new service and to provide a better quality picture to its existing viewers. These affirmative goals can be obtained without any negative effects, and would not otherwise be available by any other use of the spectrum except by Weigel operating with a waiver of the 150 kilowatt limitation.

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WEIGEL BROADCASTING CO. ("Weigel"), licensee of Class A Station WFBT-CA, Chicago, Illinois, by its attorneys, hereby requests waiver of Sections 73.6007 and 74.735(a)(1) of the Commission's Rules to allow acceptance and conditional grant -- which will fully protect the public interest -- of WFBT-CA's attached FCC Form 301-CA application for minor changes in its licensed facilities. With a grant, WFBT-CA can use its existing Channel 23 spectrum to provide a vast amount of minority and ethnic programming to more than 500,000 additional viewers in the Chicago metropolitan area.

1. Sound spectrum allocation policy, the unique facts of this case, and the public interest favor waiving the Rules so that WFBT-CA can operate with an effective radiated power ("ERP") in excess of 150 kW without having interference or preclusion effects upon existing or proposed analog or digital TV applications or facilities. To assure that all of the public interest

benefits of the proposal can be achieved without any negative effects, Weigel is willing to accept a grant subject to the following two conditions:

- 1) No interference may be caused to the operation of any authorized or operating analog or digital full-power television broadcast station or LPTV station; and
- 2) Operation in excess of 150 kW ERP under this authorization shall be cancellable by the Commission upon 30 days' notice in order to authorize operation of any analog or digital full-power television broadcast station or LPTV station which without waiver of any FCC rule could not provide new or additional service solely by reason of WFBT-CA's operation in excess of 150 kW ERP under this authorization.

I. Introduction

2. WFBT-CA became licensed as a Class A station on April 29, 2002^{1/} with a maximum ERP of 19.6 kW toward the radio horizon and 150 kW "in any Horizontal and Vertical Angle" (Tech Box, Form 346, File No. BPTTL-20010116AJH). Nevertheless, WFBT-CA continues to have weak signal pockets in its coverage of the Chicago metropolitan area, and its signal simply does not reach certain Chicago suburbs. In addition, by abandoning certain breach of contract claims against the Sears Tower in Chicago, Weigel has voluntarily acquiesced in a DTV implementation plan for up to eight of Chicago's DTV stations on that Tower (on which WFBT-CA's antenna is located). Weigel's acquiescence in that DTV plan is key to making it work and requires relocating WFBT-CA's antenna on the Sears Tower to alleviate concern that the placement of the DTV facilities would diminish or distort WFBT-CA's coverage area.

3. Hence, in the accompanying application, in order to eliminate existing and potential signal coverage problems and, at the same time, to maximize its use of the Channel 23

^{1/} License File No. BLTTA-20011105ACC. WFBT-CA was previously licensed as LPTV Station W23AT.

spectrum to provide broader availability of unique minority and ethnic programming, Weigel proposes to move WFBT-CA's transmitter site and to increase its maximum ERP to 47.5 kW toward the radio horizon and 363 kW in any horizontal and vertical angle. Grant of the necessary waivers of Sections 73.6007 and 74.735(a)(1) of the Rules to accomplish this result is fully warranted.

II. No Interference to Analog and Digital Applications and Facilities and No Preclusive Effect Upon Future Proposals

4. The centerpiece of this Petition and waiver request is the attached Engineering Statement prepared by Weigel's consulting engineer, Louis R. du Treil Sr. of du Treil, Lundin & Rackley, Inc. (Exhibit A). In that Statement (p. 3), Mr. du Treil concludes that use of higher power than the 150 kW ERP limit in Section 74.735(a) of the Rules "will not result in interference to any full service analog stations, Class A television stations, translator stations or to any existing DTV allotments, DTV stations or DTV applications". He also concludes (p. 7) that "the increase in peak power of WFBT-CA would not limit the operation of or prejudice modification of existing or proposed analog full power TV station facilities because they are otherwise precluded from making such changes because of other technical or legal restrictions or can maximize their power without regard to the WFBT-CA proposed operation". Finally, Mr. du Treil concludes (p. 7) that "Since WFBT-CA is a protected Class A station, no new LPTV station proposing to operate on Channel 23 could be established to serve the area which will be served by WFBT-CA with its proposed power".

5. In other words, the unique quality of Weigel's proposal is that **WFBT-CA will not have any interference or preclusive effect upon any existing or proposed analog or digital**

applications or facilities, except what is otherwise permitted by the Commission's rules.^{2/}

Moreover, no other station can operate on Channel 23 to serve the additional audiences that WFBT-CA's proposal will reach. Thus, only WFBT-CA's proposal, with its ERP waivers, will allow for maximization of the use of the Channel 23 spectrum in a uniquely positive way. Unless this proposal is permitted to be implemented, useful spectrum will be unnecessarily wasted with no offsetting benefit, private or public. Weigel's willingness to accept a grant with the conditional terms stated in Paragraph 1 above guarantees that the proposal is not dependant upon a prediction of no future negative effects but cures any such possibilities, should they arise.

6. Even without such conditions, and recognizing that the principal concern of both the *Community Broadcasters Protection Act of 1999* ("CBPA"), codified at 47 U.S.C. §336(f), and the Commission's Class A rules is that no prohibited interference be caused by LPTV stations, WFBT-CA's application demonstrates in its Section III (Engineering)/Question 11 certifications and in Mr. du Treil's Engineering Statement and exhibits that WFBT-CA's proposal fully complies with the interference protection requirements of Sections 73.6011, 73.6012, 73.6013, 73.6014, and 73.6020 of the Rules. Moreover, Mr. du Treil shows that the proposal has no preclusive effect upon any eligible full power stations in the region. As a result, WFBT-CA can achieve improved signal strength in its existing service area and adjacent segments of the Chicago television market without adversely affecting any existing or potential new full power stations.

^{2/} In addition, attached as Exhibit B is a supplemental Engineering Statement showing that Weigel's proposal will not result in any intermodulation interference to taboo-related Chicago Stations WYCC(TV), Ch. 20, and WCIU-TV, Ch. 26 (owned and operated by Weigel).

7. Improved signal strength and coverage have important public interest implications which the Commission needs to weigh and credit. Because WFBT-CA has no cable television must-carry rights in the Chicago television market (DMA #3) in which it is located, it is carried only by cable systems with which it has retransmission consent agreements and is more dependent than full-power stations upon over-the-air reception to reach its viewing audience. The increased ERP that Weigel proposes will yield a better signal to its existing audiences and will permit more than 500,000 additional inhabitants of the Chicago metropolitan area to benefit from its extraordinary program offerings. Furthermore, the 74 dBu coverage of WFBT-CA increases within the city limits of its principal community of license (Chicago) from 79.3 to 83.3%. *See* Engineering Statement (p. 3 and Figure 1).

III. WFBT-CA's Unique Program Offerings in the Chicago Market Warrant a Power Limit Waiver to Permit Broader Viewership

8. Apart from the above reasons for granting the requested waivers, the extensive minority and ethnic programming offered by WFBT-CA on a daily basis provides a unique contribution to the Chicago DMA.

9. Simply stated, when the Commission established the Low Power Television Service in 1982 in the *LPTV Report and Order*,^{3/} it emphasized (51 RR 2d at 484-85) that the

^{3/} The ERP limits in Section 74.735(a)(1) of the Rules have their genesis in the *Report and Order in BC No. 78-253 ("LPTV Report and Order")*, 51 RR 2d 476 (1982), in which the Commission created the Low Power Television Service. At that time, the Commission stated (51 RR 2d at 491-92 ¶31) that the total power output ("TPO") limit for LPTV stations would be 1 kilowatt (as with TV translator broadcast stations), and Section 74.735(a) was appropriately modified. That maximum power was later raised to 150 kilowatts (see Paragraph 16 below) without modifying the Commission's proclamation in Paragraph 31 of the *LPTV Report and Order* that waivers of the power limit are available albeit with a compelling showing ("We currently anticipate that we only would find it in the public interest to waive the power limits in extraordinary circumstances").

"public need for program diversity" and fostering "diverse or local program service" were fundamental reasons and goals for LPTV stations. The *CBPA's* similar emphasis on local program originations demonstrates the continued public interest importance of making minority and ethnic programming plentifully available over-the-air. WFBT-CA's minority and ethnic programming and Weigel's proposal to make that programming available to 500,000 more persons in the Chicago DMA is a further "extraordinary circumstance" within the meaning of the *LPTV Report and Order* (51 RR 2d at 492), warranting grant of the necessary ERP waivers.

10. By way of illustration, during the week of February 10, 2003, WFBT-CA had the following minority, ethnic, and foreign language programming scheduled (number of hours per entry is approximate):

- Filipino -- 6 hours
- Hindi -- 7 hours
- Greek -- 6 1/2 hours
- Chinese -- 13 1/2 hours
- Ukrainian -- 1 1/2 hours
- Assyrian -- 1/2 hour
- Serbian -- 1 hour
- Polish -- 24 hours
- Korean -- 1/2 hour
- African-American -- 1 1/2 hours
- Albanian -- 1/2 hour
- Lithuanian -- 2 hours
- Hispanic -- 10 hours
- Romanian -- 1/2 hour
- Bulgarian -- 2 hours
- Russian -- 2 hours

Many of these shows have a local and/or ethnic news component. The technical discussion above about weak signal pockets has additional relevance here. There are Polish communities throughout the Chicago service area; many of them (including, for example, Buffalo Grove) have difficulty receiving WFBT-CA's signal at the present time; and Polish viewers' reception would be helped by grant of the subject application.

11. In addition, WFBT-CA also produces, in cooperation with the Chicago Public Schools, the Homework Show and the Chicago Public School Sports Show (the former is live every weekday, and the latter is taped for broadcast on Saturday nights). Weigel produces both shows on a *gratis* basis -- with the Homework Show going into its fifth year and the Sports Show, into its third year. Both programs were applauded by David Finney, Director of TV Services for Chicago Public Schools, in a nationally-syndicated feature article about the independent, minority, and ethnic programming of WCIU-TV and WFBT-CA, which appeared in the *Los Angeles Times* and the *Chicago Tribune* on May 29, 2003.

12. Weigel, a family-owned business, has had a tradition of serving the needs of Chicago's minority and underserved communities for almost 40 years, initially with WCIU-TV and continuing today with WFBT-CA. WFBT-CA's dissemination of an abundance and variety of minority and ethnic programming in the Chicago DMA has important public interest value that supports grant of the subject ERP waivers to allow that programming to reach its intended audiences and carry out the Commission's original purposes in establishing the LPTV Service.

IV. The Proposal is Fully Compliant with the 150 kW ERP Limit Toward the Radio Horizon; the ERP Limit is Waivable in Other Directions

13. Weigel emphasizes that its proposal provides a maximum ERP of only 47.5 kW toward the radio horizon, which is *well below the 150 kW maximum* specified in Section 74.735(a) of the Rules. It is only when other angles are considered that the ERP rises to as much as 363 kW. Thus, WFBT-CA's proposal is fully compliant with the normal 150 kW power limitation toward the radio horizon.

14. This fact is especially relevant to Weigel's request for waiver of Sections 73.6007 and 74.735 because, historically, ERP toward the radio horizon was the Commission's *only* concern in LPTV applications. Until the June 2000 edition of FCC Form 346 and the June 2000 edition of Form 301-CA, the Commission simply asked for the proposed "ERP" of a proposal --

without specifying the angle. The double inquiry ("toward the radio horizon" and "in any Horizontal and Vertical Angle") was added in June 2000 -- after adoption of the *Report and Order in MM Docket No. 00-10* ("*Class A Report and Order*"), 15 FCC Rcd 6355 (2000), and the current Class A technical rules. Thus, prior to June 2000, Weigel's subject application would have been treated simply as a 47.5 kW proposal and would have been deemed fully compliant with Sections 73.6007 and 74.735(a) of the Rules, without need for waiver. Weigel urges that this fact strongly supports granting WFBT-CA's application, which represents only a technical departure from current application processing standards for LPTV and Class A applications.

15. Moreover, Weigel urges that the ERP power limitations in Sections 73.6007 and 74.735(a) have never been specified by the Commission as absolute prohibitions that cannot be waived. Weigel has demonstrated that no interference or impermissible preclusion will be caused by grant of the requested waivers, that WFBT-CA's proposal is fully consistent with the Rules toward the radio horizon, and that the additional ERP is necessary to improve the quality of its signal in WFBT-CA's existing service area, to increase WFBT-CA's service area, and to significantly increase the number of viewers served. Weigel submits that these factors, in conjunction with the other waiver grounds set forth in this Petition, should be treated as "extraordinary circumstances" envisioned by the *LPTV Report and Order* (see footnote 3 above) and warranting waiver of Section 74.735.

**V. General Statutory and FCC Policy and Case Precedent
Fully Support Waiver of the ERP Limit for WFBT-CA**

16. Given the unique facts of this case, general statutory and Commission policy and case precedent fully support favorable action on its ERP waiver requests. In the *Sixth Report and Order in MM Docket No. 87-268 (DTV Service)* ("*Sixth Report and Order*"), 7 CR 994 (1997), the Commission expressed great concern about the survival and growth of LPTV stations in the face of emerging DTV stations and adopted certain more lenient policies to assist LPTV

stations. For instance, it ruled (7 CR at 1035 ¶146) that it would "entertain requests to waive the LPTV protection standards where it can be demonstrated that proposed LPTV...stations would not cause any new interference to the reception of TV broadcast analog stations". Likewise, it held (*id.* at ¶147) that "the actual ERP of the [LPTV] station is a more appropriate factor for determining coverage and interference and that the existing TPO limit may be unnecessarily restrictive". Therefore, the Commission amended Section 74.735(a) to specify 150 kW as the maximum peak ERP of an analog UHF LPTV station, instead of the 1 kilowatt TPO limit.

17. Read together, Paragraphs 146 and 147 of the *Sixth Report and Order* unambiguously express the Commission's desire to enhance LPTV station coverage as much as possible in the face of DTV's emergence. There is absolutely no indication that a no-waiver policy -- even if such a strict policy could escape a judicial finding of being arbitrary and capricious -- was attached to the 150 kilowatt power limit or that the openness of the Commission to a waiver of the power limitation rule has diminished.

18. Likewise, when the Commission created the Class A Television Service pursuant to the *CBPA*, the general flavor of the rules adopted in the *Class A Report and Order* was to recognize that the Class A Service was not temporary or secondary. Rather, the Commission stressed that (15 FCC Rcd at 6357 ¶1): "Class A licensees will have 'primary' status as television broadcasters, thereby gaining a measure of protection from full-service television stations, even as those stations convert to digital format".

19. While, in Paragraph 29 of the *Class A Report and Order* (15 FCC Rcd at 6367), the Commission ruled that it would "maintain for now the current LPTV maximum power levels [of 150 kW] for Class A stations," the purpose of this policy decision is not undermined by Weigel's proposal. As expressed by the Commission on reconsideration of the power limitation, it was retained because "We do not wish to risk hindering the implementation of digital

television". See *Class A Television Service*, 16 FCC Rcd 8244, 8256 ¶32 (2001). As set out in Exhibit A, no such "risk" is present with respect to Weigel's application, and the possibility of any such "risk" is otherwise eliminated by attaching conditions to a Weigel grant (see ¶1 above).

20. The U.S. Court of Appeals recognized in the leading case of *WAIT Radio v. FCC* ("*WAIT*"), 418 F.2d 1153, 1157 (D.C. Cir. 1969), that, while "[a]n applicant for waiver faces a high hurdle even at the starting gate...[t]he agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances". Grant of Weigel's requested waivers would fully satisfy the *WAIT* case's "high hurdle" and "safety valve" standards without opening the flood gates to other proposals that do not present all of the unique features of Weigel's application. Therefore, Weigel's application should be accepted for filing and granted on the basis of its waiver showings. It meets both the "special circumstances" test of the *WAIT* case and the "extraordinary circumstances" test of the *LPTV Report and Order*.^{4/}

^{4/} The Commission has previously applied the *WAIT* "special circumstances" waiver test where "strict adherence to the letter of the rules is not necessary to achieve the purpose of the rules" (*ARTEC*, 70 FCC 2d 2291, 2305 ¶23 (1979). Moreover, in frequency allocation matters, the Commission has stated that it has traditionally granted waivers to use frequencies for purposes other than those for which they are allocated where an applicant demonstrated that (1) the existing frequency allocation is not suited or insufficient to accommodate the applicant's requirements; (2) the frequencies requested are under-utilized; (3) the proposed use of the frequencies will not be detrimental to their assigned users; and (4) the public interest will be served by a grant of the waiver (*Hye Crest Management, Inc.*, 6 FCC Rcd 332, 334 ¶20 (1991). Finally, in *Amendment of Part 74 - Use of Frequencies*, 8 FCC Rcd 2828, 2830 ¶9 (1993), the Commission most recently stated that "a general rule, deemed valid because its overall objectives are in the public interest, may not be in the public interest if extended to an applicant which proposes a new service that will not undermine the policy served by the rule," citing *WAIT*. Weigel urges that these three policy statements illustrate the Commission's current receptivity for granting the type of waiver Weigel proposes. Applying *Hye Crest*'s four-prong test, grant of a waiver is necessary to allow WFBT-CA to serve 500,000 additional viewers, no one else can utilize Channel 23 in the spectrum-efficient manner that WFBT-CA proposes, waiver will not adversely affect any other frequency users, and waiver is in the public interest.

VI. Weigel's Pivotal Role in Fostering the DTV Rollout in the Chicago Market Had a Potentially Detrimental Effect Upon WFBT-CA Cured by This Proposal

21. Finally, Weigel's pivotal role in fostering the DTV rollout in the Chicago DMA had a potentially detrimental effect upon WFBT-CA's coverage area, which the subject minor modification application remedies.

22. Weigel has been a very important and public-spirited lessee on Chicago's Sears Tower for a number of years, where WFBT-CA's antenna is located. By abandoning certain breach of contract claims against the Sears Tower, Weigel has voluntarily acquiesced in a DTV implementation plan for up to eight of Chicago's DTV stations on the Sears Tower and has allowed a DTV site solution using the Tower to proceed with potential detriment to WFBT-CA, which requires WFBT-CA to relocate its own antenna on the Sears Tower.

23. To foster the Chicago DTV solution, instead of impeding it, Weigel is proposing, in the accompanying minor modification application, to eliminate the possible negative effect by relocating WFBT-CA's antenna on the Sears Tower. At the same time, increasing WFBT-CA's power to 363 kW will significantly increase its audience for minority and ethnic programming (see Section III above) and also eliminate weak signal pockets in WFBT-CA's coverage area. Attached hereto as Exhibit C is a letter from Mr. Stephen E. Budorick, Senior Vice President of Trizec Holdings, Inc., building management for TH Tower Leasing LLC, Landlord at Sears Tower, who describes Weigel's pivotal role in the DTV implementation project on the Sears Tower and fully supports Weigel's power increase proposal.

24. In sum, as a response to its Sears Tower "Good Samaritan" predicament, Weigel's application serves the public interest in three important ways: (1) it fosters the DTV rollout in Chicago; (2) it mitigates WFBT-CA's potential coverage diminution problem created by the DTV rollout plan; and (3) the proposed power increase permits WFBT-CA to better serve and

increase its audiences in the Chicago DMA. While the power increase requires rule waivers, the DTV benefits to other users of the Tower and the general public are additional important public interest justifications for granting those waivers and WFBT-CA's application.

WHEREFORE, in light of the foregoing, Weigel Broadcasting Co. respectfully requests that the Commission should waive Sections 73.6007 and 74.735(a) of the Rules, and should accept for filing and conditionally grant Weigel's subject minor modification application for WFBT-CA.

Respectfully submitted,

WEIGEL BROADCASTING CO.

By *Joel H. Levy*

Jerold L. Jacobs

Joel H. Levy

Jerold L. Jacobs

Cohn and Marks LLP
1920 N Street, NW, Suite 300
Washington, DC 20036-1622
(202) 293-3860

Its Attorneys

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