

## **REQUEST FOR WAIVER**

This application proposes to construct digital facilities at WMEI's current NTSC coordinates on Channel 14, WMEI's tentative digital channel assignment. The filing of this application now, before the Channel 14 DTV channel assignment is final, is necessary to bring to the Commission's attention a problem resulting from an error in the Commission's broadcast television engineering database, in need of urgent correction before the Commission's DTV Table of Allotments is finalized in an upcoming rulemaking proceeding. CMCG Puerto Rico License LLC ("CMCG"), the permittee of broadcast station WMEI(TV) ("WMEI"), hereby requests a temporary waiver of Section 73.622 of the Commission's Rules, 47 C.F.R. § 73.622, only to the extent necessary to permit this application to be accepted for filing.

Section 73.622(c)(1), 47 C.F.R. § 73.622(c)(1), limits applications for DTV construction permits only to those applications proposing service on channels designated in the DTV Table of Allotments set forth in Section 73.622(b) of the Commission's Rules, 47 C.F.R. § 73.622(b), and only in the communities listed therein. On May 23, 2006, the Commission issued a Public Notice granting 1,789 licensees tentative DTV channel assignments resulting from their first and second round channel elections, including Channel 14 for WMEI.<sup>1</sup> While these channel assignments arguably are not yet final, Section 73.622(c)(1) provides that applications specifying channels that are in accord with publicly announced FCC orders changing the DTV Table of Allotments will be accepted for filing even if such applications are tendered before the effective dates of such channel change.

WMEI's NTSC Channel 60 was initially paired with DTV Channel 61 at coordinates (N.L. 18-27-21, W.L. 66-52-59). Those coordinates did not match the coordinates

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<sup>1</sup> *Tentative Digital Channel Designations for Stations Participating in the First and Second Rounds of the DTV Channel Election Process*, DA 06-1082, released May 23, 2006.

for this station's analog allotment (N.L. 18-10-09, W.L. 66-34-30).<sup>2</sup> The specification of such coordinates appears to be an error in the initial DTV Table that was not corrected in advance of Round One of the DTV channel election process. At the time such corrections were required to have been brought to the attention of the Commission by television licensees (November 5, 2004), the WMEI construction permit had lapsed because of an initial FCC decision not to toll the construction deadline for WMEI. On subsequent review, the WMEI construction permit was reinstated due to construction delays beyond the permittee's control (a hurricane). The order reinstating the WMEI construction permit is dated May 18, 2005, well after the deadline for filing corrections to the broadcast television database had passed.

The Commission has the authority to waive its rules "where particular facts would make strict compliance inconsistent with the public interest."<sup>3</sup> A waiver is appropriate where it would not undermine the policy objectives of the rule, and "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."<sup>4</sup> This request satisfies these conditions and temporary waiver of Section 73.622 is in the public interest.

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<sup>2</sup> The instant 301 application specifies the current WMEI CH 60 analog CP coordinates (N.L.18-09-17.1, W.L. 66-33-16.4) which are 2.7 km from the analog reference coordinates described herein.

<sup>3</sup> *Northeast Cellular Telephone, Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (hereinafter "*Northeast*") (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *rehearing denied*, 459 F.2d 1203 (D.C. Cir. 1972), *cert denied*, 409 U.S. 1027 (hereinafter "*WAIT*")).

<sup>4</sup> *Northeast*, 897 F.2d at 1166. *See also*, *Dominion Video Satellite, Inc., Order & Authorization*, 14 FCC Rcd 8182, 8185 (1999); *WAIT*, 418 F.2d at 1157.

**I. TEMPORARY WAIVER OF SECTIONS 73.622 WILL FURTHER THE COMMISSION'S POLICY OBJECTIVES**

The Commission intended to base its initial DTV allotments on the NTSC transmitter sites in order to facilitate replication of each station's NTSC service area.<sup>5</sup> This policy helps ensure uninterrupted service to viewers during the transition, and allow stations to "realize cost savings both in converting to DTV service and in operating dual facilities during the transition."<sup>6</sup> Unless this waiver is granted, this application will not be acceptable for filing until after the DTV Table of Allotments is finalized. At the present time, there are no known interference issues with this application, thereby presenting a clear path to correction of the coordinates discrepancy without harm to any other licensee, permittee, or applicant. If the coordinates are not amended to reflect the current WMEI NTSC transmitter site, over 1.7 million people who are currently encompassed in WMEI's 64 dBu analog contour area will be unable to receive the WMEI DTV signal.<sup>7</sup> Further, CMCG will incur substantially higher costs to construct digital facilities that will reach barely half of WMEI's current NTSC viewer population.<sup>8</sup>

**II. THIS APPLICATION SERVES THE PUBLIC INTEREST**

Grant of this temporary waiver request will serve the public interest by ensuring the continued availability of new broadcast service to those viewers encompassed in WMEI's NTSC service area. WMEI is a new broadcast station that will only broadcast in analog for a short period of time, as the DTV transition date is fast approaching. At the coordinates currently

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<sup>5</sup> *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Report & Order*, 12 FCC Rcd 14588, para. 102 (1997).

<sup>6</sup> *Id.* at para. 98.

<sup>7</sup> Engineering Report, Attachment 1, Exhibit 1.

<sup>8</sup> *Id.*

referenced in the DTV Table of Allotments, WMEI will lose the ability to serve more than 1.7 million members of its current analog coverage area, post transition.<sup>9</sup> A staggering figure in its own right, but in the highly competitive and financially strained broadcast market of Puerto Rico, a loss in service of such magnitude could cripple WMEI's DTV broadcast operations.

Additionally, use of this application to correct the coordinates discrepancy in the DTV Table of Allotments promotes judicious use of the Commission's administrative resources. Acceptance of this application will allow the Commission to correct the DTV Table of Allotments before the new version is finalized, thereby avoiding the need to address these same issues in the far more procedurally cumbersome context of a rule making. Further, the Commission's own rules acknowledge the administrative benefit of the traditional Part 73 application procedures as a means to amend the DTV Table of Allotments in certain circumstances.<sup>10</sup>

Public policy is best served in this instance by using this application as a vehicle to expeditiously amend the DTV Table of Allotments, ensuring maximum coverage by the WMEI DTV facility and efficient use of the Commission's scarce administrative resources.

### **III. CONCLUSION**

Strict adherence to Section 73.622(c)(1) will simply compound an error in the DTV Table of Allotments that could potentially prevent over 1.7 million people from receiving the WMEI DTV broadcast signal. By accepting this application, the Commission will be able to correct an inaccuracy in the DTV Table of Allotments in an efficient manner without causing injury to any foreseeable parties. For the foregoing reasons, CMCG respectfully submits that

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<sup>9</sup> Engineering Report, *supra*, note 7.

<sup>10</sup> 47 C.F.R. § 73.622(c)(2). *See also Service Rules for the 746-764 and 776-794 MHz Bands, Third Report & Order*, 16 FCC Rcd 2703, para. 32 (2001).

this temporary waiver request and underlying application will not only serve the public interest, but will provide the Commission with an effective mechanism for implementing its own policy concerns. In light of the special circumstances and policy objectives set forth above, the application should be granted.