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West Virginia Educational Broadcasting Authority (“WVEBA”), permittee of a construction permit for non-commercial educational (“NCE”) FM radio station WVDM(FM), Bluefield, West Virginia, Facility Identification Number: 173309 (“WVDM”)¹ files the instant application requesting the consent of the Media Bureau of the Federal Communications Commission (“Commission” or “FCC”) to relocate WVDM’s transmitter site.

1. Background.

In 2009, WVEBA was awarded a construction permit for radio station WVDM in Bluefield, West Virginia based on a Section 307(b) preference (“WVDM CP Facilities”).² At the time that WVEBA applied for the WVDM construction permit, WVEBA had negotiated a verbal lease agreement with the owner of the tower where WVEBA proposed to construct and operate the WVDM CP Facilities. Since the time that the FCC awarded the WVDM construction permit, the tower was sold and the current tower owner has refused to enter into a written lease agreement with WVEBA, even though WVEBA has repeatedly tried to reach a mutually acceptable arrangement with the new tower owner. Consequently, WVEBA can no longer construct and operate the WVDM CP Facilities at its originally proposed tower location. Therefore, WVEBA proposes moving the WVDM transmitter site to the next nearest available mountaintop, which is only 1.23 kilometers to the north of its currently authorized site (the facilities proposed at the new site are hereafter referred to as the “Proposed WVDM Facilities.”)

As set forth herein and in the attached engineering statement (“Engineering Statement”), the Proposed WVDM Facilities are substantially similar to the WVPM CP Facilities and do not downgrade service to the area on which the Section 307(b) preference is based. As a result, WVEBA believes that the Proposed WVDM Facilities comply with Sections 73.7002(c) and 73.7005(b) of the FCC’s rules. Alternatively, to the extent the FCC concludes that the WVDM Proposed Facilities would downgrade service to the area on which the Section 307(b) preference is based, WVEBA respectfully requests a waiver of Sections 73.3002(c) and 73.3005(b) of the FCC’s rules. WVEBA also requests a waiver of the FCC’s “main studio rule,” Section 73.1125(a) of the Commission’s rules, to enable WVEBA to operate WVDM as part of its centralized network of NCE radio stations operating throughout West Virginia.

¹ FCC File No.: BNPED-20071019ADN.

² See Threshold Fair Distribution Analysis of 28 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in October 2007 Window, Memorandum Opinion and Order, MX Group 446, DA 09-2172, ¶20 (rel. Oct. 6, 2009) (“WVDM Order”).

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2. The Proposed WVDM Facilities Comply with Sections 73.7002(c) and 73.7005(b) of the FCC's Rules Because WVEBA Would Construct and Operate the Facilities Substantially as Proposed in its Application for the WVDM CP Facilities and Because the Proposed WVDM Facilities Do Not Downgrade Service to the Area on Which the Section 307(b) Was Based.

Sections 73.7002(c) and 73.7005(b) of the FCC's rules require NCE applicants receiving a decisive Section 307(b) preference to "construct and operate technical facilities substantially as proposed."³ The rules also prevent Section 307(b) applicants from "downgrad[ing] service to the area on which the preference was based for a period of four years of on-air operations."⁴ The Proposed WVDM Facilities comply with Sections 73.7002(c) and 73.7005(b) of the FCC's rules for two reasons.

First, WVEBA intends to construct and operate the Proposed WVDM Facilities "substantially as proposed" in its original application for the WVDM CP Facilities. Indeed, WVEBA would still provide first and second NCE service to at least 5,000 more people than the next highest scoring Section 307(b) applicant. By way of background, when the FCC awarded the dispositive Section 307(b) preference for station WVDM, it did so because WVEBA proposed aggregated first and second NCE aural service to more than 5,000 potential listeners than the next highest scoring Section 307(b) applicant, the Syner Foundation, Inc. ("Syner").⁵ Specifically, WVEBA proposed service to 100,227 total people with aggregated first and second NCE service to 16,862 people.⁶ By contrast, Syner proposed service to 87,584 people with an aggregated proposed first and second NCE service to 10,186 people.⁷ The FCC selected WVEBA as the tentative awardee for station WVDM(FM) because WVEBA proposed first and second new NCE service to 5,000 more people than Syner. As set forth in the Engineering Statement, the WVDM Proposed Facilities would provide aggregated first and second new NCE service to 16,449 people, with service to 6,263 more aggregated first and second NCE listeners than originally proposed by Syner.⁸ Thus, WVEBA would still provide first and second NCE service to 5,000 more people than Syner originally proposed in its Section 307(b) application. Therefore, the Proposed WVDM Facilities maintain the 5,000 person threshold set forth in Section 73.7002(b) of the FCC's rules. Consequently, the variance between the first and second NCE aural service originally proposed in the WVDM CP Facilities application and the first and second NCE service proposed herein is de minimis. As a result, the WVDM CP Facilities comply with Sections 73.7002(c) and 73.7005(b) of the FCC's rules because WVEBA intends to construct and operate technical facilities substantially as proposed in its initial Section 307(b) application.

³ 47 C.F.R. §§73.7002(c) and 73.7005(b).

⁴ *Id.*

⁵ *See* 47 C.F.R. § 73.7002(b).

⁶ *WVDM Order* at ¶21 and fn 32.

⁷ *Id.*

⁸ *See Engineering Statement* at 5-6.

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Second, the Proposed WVDM Facilities comply with Sections 73.7002(c) and 73.7005(b) of the FCC's rules because the proposed facilities will not "downgrade service to the area on which the preference was based."⁹ The Media Bureau has determined that Section 307(b) applicants downgrade service when they "abandon areas on which the preference is based."¹⁰ The Proposed WVDM Facilities would not downgrade service because WVEBA would not abandon geographic areas on which the preference is based. To the contrary, WVEBA has tried to replicate as closely as technically possible the service originally proposed in the WVDM CP Facilities application so that the listening area is "substantially similar" to the area that was originally proposed. As explained herein, WVEBA has undertaken all steps within its control to replicate the service of the WVDM CP Facilities. However, given circumstances beyond WVEBA's control, it is not technically feasible for WVEBA to entirely replicate service. . Importantly, WVEBA is not proposing to "abandon" geographic areas on which the preference is based, but rather is proposing to provide service to substantially the same geographic area covered by the WVDM CP Facilities. Therefore, WVEBA complies with Sections 73.7002(c) and 73.7005(b) of the FCC's rules.

3. Alternatively, To the Extent the Commission Determines that the Proposed WVDM Facilities Downgrade Service to the Area on Which the Section 307(b) Was Based, WVEBA seeks a Waiver of Sections 73.7002(c) and 73.7005(b) of the FCC's rules.

As explained herein WVEBA believes that the Proposed WVDM Facilities do not downgrade service to the geographic area on which the Section 307(b) preference was based. However, to the extent the FCC determines that the Proposed WVDM Facilities do downgrade service to the area, WVEBA alternatively seeks a waiver of Sections 73.7002(c) and 73.7005(b) of the Commission's rules. The Commission grants rule waivers for good cause where special circumstances exist and where the waiver will serve the public interest.¹¹ Grant of the instant waiver request is in the public interest for several reasons.

First, WVEBA cannot construct the WVDM CP Facilities at the original tower location because of circumstances beyond its control. As explained above, at the time WVEBA filed its initial application WVEBA had negotiated a verbal lease agreement with the owner of the tower where WVEBA originally proposed to locate the WVDM CP Facilities. Subsequently, the tower was sold and the new tower owner has refused to cooperate with WVEBA despite WVEBA's numerous good faith attempts to reach agreement on the terms of a tower lease agreement.

⁹ 47 C.F.R. §§73.7002(c) and 73.7005(b).

¹⁰ See *In re: KALD(FM), Caldwell, TX, Facility ID No. 9121682, Application for Minor Modification Petition for Reconsideration*, 24 FCC Rcd 5672, DA 09-1084 (MB May 18, 2009) (denying the Section 307(b) applicant's request to modify its construction permit because the applicant abandoned a service area in the west to shift 15 miles to the east).

¹¹ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir 1969)); see also 47 C.F.R. § 1.3 (stating that rule provisions may be waived "for good cause shown").

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Second, with the loss of its original tower site, WVEBA has undertaken extensive efforts to select an alternative site which replicates the service coverage of the WVDM CP Facilities. West Virginia's mountainous and rough terrain severely limits the potential sites for WVEBA to relocate the WVDM CP Facilities. WVEBA cannot construct and operate WVDM's facilities in a valley because service coverage would be poor. Consequently, WVEBA must operate the WVDM CP Facilities from a mountaintop. The closest mountaintop to the mountaintop of the authorized site is located 1.23 kilometers away from the original mountaintop. Thus, WVEBA proposes constructing and operating the WVDM transmitter at this next nearest mountaintop, which is only located 1.23 kilometers from its originally proposed site. Unfortunately, given West Virginia's excessively rough terrain, any change in tower location (no matter how slight) will result in some shift in overall coverage area despite the use of all available engineering solutions to attempt to completely replicate service.

Third, grant of the waiver request is in the public interest because it would allow WVEBA to provide second NCE aural service to 16,449 persons in West Virginia who would otherwise have only one choice for NCE radio service. If the Media Bureau does not grant the instant request, over 15,000 people will continue to lack second NCE aural service in the Bluefield, West Virginia region. For all of these reasons, granting the request is in the public interest.

4. WVEBA Seeks a Waiver of the FCC's Main Studio Rule.

WVEBA also hereby requests a waiver of Section 73.1125(a)¹² of the Commission's rules to permit station WVDM to operate without a main studio in its proposed community of license, Bluefield, West Virginia. Specifically, WVEBA requests the instant waiver to enable WVDM to be operated as a satellite station as part of a centralized network of NCE radio stations operated in West Virginia by WVEBA. Each of the satellite stations that comprise this centralized network share the main studio facilities of WVPN(FM), Charleston, West Virginia, Facility ID No. 70604 ("WVPN") and WVEBA proposes for WVDM also to share the WVPN main studio.

Section 73.1125(a) requires each broadcast station to maintain a main studio located (i) within the station's community of license; (ii) within the principal community contour of any other broadcast station licensed to the station's community of license; or (iii) within 25 miles of the reference coordinates of the center of the station's community of license. However, pursuant to Section 73.1125(b)(2), a broadcast station may locate its main studio in a location other than that described in Section 73.1125(a) if "good cause" exists to do so and the proposed main studio location "would be consistent with the operation of the station in the public interest." Further, Section 73.1125(d) requires an FM licensee to obtain prior authority from the Audio Division of the Media Bureau to locate an FM station's main studio outside the locations specified in Section 73.1125(a).

¹² 47 C.F.R. § 73.1125(a).

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It is the Commission's longstanding policy to grant "waivers to state and regional public television and radio networks to operate satellite stations that do not necessarily meet the requirements of a main studio" because the satellite stations are operated as part of a network of NCE stations that share a centralized main studio.¹³ The Commission has recognized "the realities of public broadcasting funding and the ongoing problems of educational licensees in raising the necessary funds to expand and provide noncommercial programming," which requires such NCE licensees "necessarily [to] find ways to get cost-efficient programming to as many viewers as possible."¹⁴ The Commission has determined that such centralized NCE broadcast networks can enable their licensees to realize savings "from not having to construct a main studio" and that such savings can be used "in expanding quality programming to a greater number of viewers."¹⁵ As a result, the Commission generally has found that "'good cause' exists to waive the main studio location requirement where satellite operations are proposed."¹⁶

WVEBA is committed to providing high-quality educational programming to residents in the Bluefield area and throughout West Virginia. To fulfill its local service obligations to the residents of Bluefield, WVDM will provide a local news and public affairs representative to respond to the interests, concerns, and needs of the local community. The local public affairs representative will serve as a liaison between the Bluefield residents and WVEBA programming personnel and will conduct frequent interviews of local community leaders and residents on more than a quarterly basis. These activities will enable WVEBA to ensure that it broadcasts public affairs programming that addresses the interests, concerns, and needs of Bluefield listeners. WVEBA also will maintain a toll-free telephone number as required by Section 73.1125(d)¹⁷ of the Commission's rules to enable Bluefield residents to contact the WVPN main studio, which also will serve as the WVDM's main studio. In addition, WVEBA will maintain a public inspection file at the main studio as required by Section 73.3527 of the Commission's rules.

Thus, WVEBA submits that the requested main studio waiver is supported by the public interest. Therefore, WVEBA respectfully requests the Media Bureau to grant the instant waiver

¹³ The President and Board of Trustees of the Miami University, *Hearing Designation Order*, 7 FCC Rcd 2902, ¶ 6 (AD/MB 1992) (internal quotations and citations omitted); *see also* Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, *Memorandum Opinion and Order*, 3 FCC Rcd 5024, ¶¶ 25-31 (1988) (citing Nebraska Educational Television Commission, *Memorandum Opinion and Order*, 4 Rad. Reg. 2d 771, ¶ 2 (1965)) ("Main Studio Order"); Sound of Life, Inc., *Hearing Designation Order*, 4 FCC Rcd 8273, ¶¶ 3-4 (AD/MB 1989); The Cedarville College, *Hearing Designation Order*, 6 FCC Rcd 538, ¶¶ 5-6 (1990); John Griffith Johnson, Esq., *Letter*, 20 FCC Rcd 10903 (VD/MB 2005).

¹⁴ Lift Him Up Outreach Ministries, Inc., *Hearing Designation Order*, 3 FCC Rcd 5571, ¶¶ 8-9 (AD/MB 1988).

¹⁵ *Id.*

¹⁶ Jeffrey D. Southmayd, Esq., *Letter*, 2002 FCC Lexis 6524, 1800B3-RAB (AD/MB rel. Dec. 10, 2002); *see also* Main Studio Order, at ¶ 30 (permitting NCE stations to seek "good cause" waivers of the main studio rule to permit the NCE stations to "recognize[] the benefits of centralized operations").

¹⁷ 47 C.F.R. § 73.1125(d).

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request to enable WBDM to provide cost-effective, quality educational programming consistent with the needs of the Bluefield community and its surrounding rural areas.

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For the reasons set forth above, WVEBA requests that the FCC grant its request to relocate the site of the WVDM transmitter to enable WVEBA to bring the benefits of second NCE aural service to over 15,000 people.