

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20534**

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In the Matter of)

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Amendment of Section 73.622(i))
Post-Transition Table of DTV Allotments)
(Bridgeport and Stamford, Connecticut))

MB Docket No. 18-126
RM-11800

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MAY 17 2019

**Federal Communications Commission
Office of the Secretary**

APPLICATION FOR REVIEW

PMCM TV, LLC (PMCM) hereby applies to the full Commission for review of the Video Division's April 8, 2019 Report and Order (DA 19-264) reallocating the community of license for Channel *49 from Bridgeport, CT to Stamford, CT.

QUESTIONS PRESENTED FOR REVIEW

1. Where an licensee filed a petition for rulemaking to change its community of license without simultaneously seeking a change in its technical facilities, but the subsequently applied for and was granted a change in technical facilities that would result in a significant loss of service to its original service recipients, should the Commission have ignored the change in technical facilities (i) for purposes of determining whether the freeze on community of license changes precluded the petition, and (ii) for determining whether the community change was in the public interest?
2. Did the Division improperly credit the station changing its community of license with service provided by its sister stations in determining whether there would be a loss of service to the public?

FACTORS WARRANTING COMMISSION REVIEW

The following factors warrant Commission review of the Division's Order:

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1. The action taken conflicts with the Bureau's own statement of the narrow circumstances in which the 2004 freeze on the filing of petitions to change community of license has been lifted. It also conflicts with the Commission's policy regarding community changes that cause a loss of service to the public.
2. The Division's Order is predicated on the mistaken fact that WEDW is maintaining its Bridgeport facility rather than relocating the situs of its operations to Stamford. The relocation, if ever effected, will cause a substantial loss of service to WEDW's Connecticut viewers.

This case concerns a petition filed by Connecticut Public Broadcasting, Inc. (CPB) to change the allotted community of license of station WEDW from Bridgeport, CT to Stamford, CT. What might have been a garden-variety community change petition is complicated by the fact that CPB did not propose to change the technical facilities of the station in its petition, representing that its service to its viewing audience would remain unchanged and thereby qualifying for an exemption from the freeze on community change petitions which involve changes in technical facilities. However, while the petition was being processed, the CPB did apply to change its technical facilities to Stamford, the locus of its proposed new community. That change, which was separately granted by the Video Division, results in a significant loss of service to over a million people in Connecticut, a loss which would normally have been factored in to the community change analysis under Section 307(b) of the Act. Unaccountably, the Division blessed this maneuver and evaluated the subject petition without regard to the loss of service and the freeze. That error should be corrected.

A. The Division Mis-stated the Order Lifting the Freeze on Change of Community of License Petitions

PMCM argued that CPB's Petition was not covered by the Division's January 12, 2018 Public notice partially lifting the freeze on petitions to change a broadcast station's community of license. (*Media Bureau Partially Lifts the Freeze of Petitions for Rulemaking to Change Full Power Television Stations' Community of License*, DA 18-40). It was this PN that permitted some, but not all, petitions for changes in community of license to be filed. The two page Notice seems clear enough on its face. It says:

We note that we do not at this time lift the freeze on filing of petitions for rulemaking ...to change community of license which include changes in authorized technical facilities.

Id. at p.2. As will be set forth below, the petition at issue here indisputably "includes changes in authorized technical facilities." While WEDW did not include such a change in its original petition, it subsequently applied for and was granted a change in its technical facilities to relocate its station from Bridgeport to Stamford. This change was sought while the instant petition was pending. It would seem obvious that a station could not avoid the freeze on petitions including a change in technical facilities by simply filing the petition without the change and then seeking the change separately a few weeks later. This maneuver would gut the intent of the freeze policy. And as will be explained below, the change in location from Bridgeport to Stamford was not trivial. It effects a dramatic and substantial loss of service to more than a million people.

For reasons which are unclear, instead of heeding the direct, explicit and unequivocal statement in the PN about what kinds of changes are *not* exempted from the freeze, the Division's Order focused on a prefatory sentence in the PN that indicates that the lifting of the

freeze will allow change petitions to be filed “where no technical facility change is *required* to comply with our principal community coverage requirements.” Here the technical change authorizing the relocation to Stamford was not required to accomplish the community of license change, but it is nevertheless an integral part of the evaluation that the Commission must conduct to determine how many people are going to be affected -- positively or negatively -- by the proposed community change. There is no apparent reason why a change in technical facilities required to meet community coverage requirements should be treated any differently from a technical facilities change which does not affect community coverage requirements, and as we have indicated, the penultimate paragraph in the PN makes no such distinction. Nor has the Division articulated the significance, if any, of this distinction. Accordingly, the petition filed by CPB continued to be subject to the freeze on the filing of such petitions and should not have been accepted absent a waiver.

B. The Division Improperly Ignored the Effect of the Stamford Change

Because the Division took the curious course of simply pretending that the relocation to Stamford had not been sought and approved, it was able to ignore the serious adverse effects of the community change on the population currently served by WEDW from Bridgeport. As shown by PMCM in its filings in the rulemaking, none of which are disputed by CPB, the Stamford move will eliminate service by WEDW to 1,361,193 people, 586,049 housing units, and 14,420 sq. km. of land area. This represents almost 50% of the station's service to the people of Connecticut – the people whom CPB is specifically chartered to serve. Such a drastic diminution in service to a station's current service area – particularly when the service area is the one that theoretically is the station's primary area of concern – would never have been countenanced¹ if the Commission had considered the Stamford move in conjunction with the community of license change rather than pretending that the two elements of the proposal were somehow distinct.

It is axiomatic that losses in service area are prima facie inconsistent with the public interest. *West Michigan Telecasters, Inc.* 22 FCC 2d 943 (1970). The Commission's declaration at the time of the digital transition that it "is a priority of the Commission that all Americans continue to receive the television broadcast service that they are accustomed to receiving"² is as true now for the post-Incentive Auction repacking process as it was in 2008. Thousands of residents of Connecticut should not be allowed to lose the service that has long been rendered to

¹ It is axiomatic that "once in operation, a station assumes an obligation to maintain service to its viewing audience and the withdrawal of downgrading of existing service is justifiable only if offsetting facts are shown that the public will be benefited." *Triangle Publications, Inc.* 37 FCC 307, 313 (1964). No showing has been made here that the public of Connecticut will benefit by this serious loss of service.

² Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations, 23 FCC Rcd 18534, 18535 (2008).

the central part of the state by WEDW. CPB did not make any showing at all regarding this substantial loss of service to its current viewing audience. And while there is significant overlap of WEDW's existing service contours from other stations CPB holds in Connecticut, as will be explained below, each station's service must be judged on its own merits. Under a normal 307(b) analysis, the grant of this petition would be unthinkable. *Hall v. FCC*, 237 F. 2d 567 (DC Cir. 1956). By nevertheless granting it, the Division has provided a useful road map for licensees who want to abandon service to their current, smaller communities of license and creep over to serve much larger communities (here, New York City) without regard to the normal Section 307(b) population loss/gain analysis. If this precedent is allowed to stand, other "me too" applications will surely follow. This error by the Division should be corrected if the integrity of the 307(b) community service allotment standards is to be preserved.

CPB's decision to cut off service to over a million Connecticut viewers who fund its operations by their contributions and depend on it for Connecticut-based public affairs programming is only explicable in the context of the DTS application which it filed in December. That application proposes to move the station's chief transmission site to New York City where the vast majority of the station's viewing audience would then be situated. So much for community-based service to Connecticut. And so much for prioritizing the delivery of non-commercial programming to a local community, since CPB's programming from New York will largely duplicate the public broadcasting delivered by the New York PBS station to its viewing audience. CPB's game plan here seems to be driven less by any desire to actually serve the people of Connecticut than by a desire to maximize the commercial reach of WZME, which is now sharing the WEDW frequency with CPB. WZME has been trying for years to effect a de facto reallocation of its Bridgeport, CT station to New York, a ploy which the Video Division

has correctly and consistently seen through and rejected.³ Here the commercial tail is plainly wagging the non-commercial dog. The Division has yet to act on that DTS application given the anti-307(b) implications of the proposal.⁴

C. The Division Improperly Credited WEDW with Service Provided by Its Sister Stations Rather Than Evaluating the Change on the Station's Own Service Area

Finally, while pretending that the relocation from Bridgeport to Stamford was not integral to the 307(b) analysis since it had been contrived to occur outside the bounds of the change of community of license petition, the Division noted that the loss of service to large swathes of Connecticut would be compensated by service provided to those people by other CPB stations whose contours overlap the original Bridgeport station's contours. *Division Order* at footnote 30. But the Commission does not allow stations to rely on programming service provided by other stations, even when co-owned, to make up for loss of service from the station at issue. Each station's service or lack thereof must be evaluated on the basis of the station's own service, not overlapping or complementary service offered by other nearby stations.

That consistent policy makes perfect sense since there is no guarantee that the stations involved will continue to duplicate each other's programming. CPB has made no commitment to that effect, nor could it without tying its own programming discretion. Moreover, the former Bridgeport station presumably focuses its public affairs lens on Bridgeport rather than the

³ *Letter to MTB-Bridgeport-NY Licensee LLC*, Letter Order (Vid. Div. 2009) (Copy attached)

⁴ PMCM does not here address the particulars of the CPB DTS application which, if granted, would radically transform the station's audience into a primarily New York market. The Division is still reviewing that proposal. It may behoove the full Commission to review the Division's action here in conjunction with its review of the DTS application since the instant application is simply step one in the incremental move to New York.

should therefore not be identical even if there is some duplication. Of course, CPB could at any moment choose to "share" one of its other channels with a commercial operator and relocate the station to Providence or elsewhere where the commercial dollars are greener. The Commission can and should adjudge 307(b) community allocations only on the ability of the station involved to deliver programming to the audience it purports to serve without leaning on other stations to make up for their deficiencies.

D. Conclusion

For the reasons set forth above, the Commission should review and reverse the Division's action and require that the Division consider the community of license change in the broader context of how the people of Connecticut will suffer very significant service losses with no corresponding benefits.

Respectfully submitted,

PMCM TV, LLC

By: 

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May 17, 2019



Federal Communications Commission
Washington, D.C. 20554

November 5, 2009

MTB Bridgeport-NY Licensee LLC
c/o Howard A. Topel, Esq.
Leventhal Senter & Lerman, PLLC
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Re: WSAH-DT, Bridgeport, Connecticut
File No. BPCDT-20080620ALT
Facility ID No. 70493

Dear Licensee:

This is with respect to the above-referenced application for a minor change in the licensed facility of station WSAH-DT, Bridgeport, Connecticut, filed by MTB Bridgeport-NY Licensee LLC ("MTB Bridgeport").¹ WSAH-DT is currently licensed and operating on channel 42, its post-transition DTV channel, at a site in Seymour, Connecticut, approximately 10 miles north of Bridgeport. In the application, MTB Bridgeport proposes to move the station's transmitter site 62 miles to the Empire State Building in New York, New York, increase effective radiated power and change the station's antenna from non-directional to directional. The proposed move would result in the loss of service to approximately 2.2 million persons who currently receive an over-the-air signal from WSAH-DT.²

It is well-settled that the Commission does not favor reductions in television service. Proposals that would result in a loss of TV service have been considered to be *prima facie* inconsistent with the public interest, and must be supported by a strong showing of countervailing public interest benefits.³

¹ Nave Broadcasting, LLC and Ventana Television, Inc., the licensees of low power television stations in or near New York City, separately objected to grant of the above-referenced application, but subsequently withdrew their objections pursuant to settlement agreements with MTB Bridgeport. WHDH-TV, the licensee of WHDH-DT, Boston, Massachusetts, filed a letter supporting grant of the WSAH-DT application, stating that grant of the application would eliminate any interference between WSAH-DT and WHDH-DT's post-transition digital operation on channel 42.

² WSAH-DT's signal presently serves most of the state of Connecticut and MTB Bridgeport's proposal would eliminate service to the majority of its existing service area in Connecticut. The proposal would result in new service to Westchester County, New York City, western Long Island, and a number of counties in New Jersey that are part of the New York City metropolitan area.

³ See *West Michigan Telecasters, Inc. v. FCC*, 22 FCC 2d 943 (1970), *recon. denied*, 26 FCC 2d 668 (1970), *aff'd*, *West Michigan Telecasters, Inc. v. FCC*, 460 F. 2d 883, 889 (D.C. Cir. 1972) (finding that losses in service are *prima facie* inconsistent with the public interest); *Triangle Publications, Inc.*, 37 FCC 307, 313 (1964) (finding that "once in operation, a station assumes an obligation to maintain service to its viewing audience and the withdrawal or downgrading of existing service is justifiable only if offsetting facts are shown which establish that the public generally will be benefited"); *Television Corporation of Michigan v. FCC*, 294 F.2d 730 (1961) (finding that deprivation of service to any group was undesirable, and can be justified only by offsetting factors); *Hall v. FCC*,

"[O]nce a station begins operations, it is obligated to maintain service to its viewing audience absent offsetting public benefits to discontinuing service."⁴ The Commission recently reiterated, in connection with the full-power television industry's transition to digital television, that "[i]t is a priority of the Commission that all Americans continue to receive the television broadcast service that they are accustomed to receiving following the digital transition."⁵ MTB Bridgeport acknowledged in its application, and in a supplemental filing on October 2, 2008, the Commission's traditional concern with granting applications that will result in loss of existing service, but asserts that special circumstances in this case warrants grant of its application.

MTB Bridgeport argues first that no real loss of service will occur because it has entered into a "Multicast Channel Agreement" with LIN Television Corporation, the parent of the licensee of WTNH-DT, New Haven, Connecticut, providing for the broadcast of WSAH-DT's programming on WTNH-DT.⁶ We conclude, however, that a channel lease agreement does not offset the loss of licensed service which would occur if WSAH-DT moved to the Empire State Building. While the channel lease agreement has a sixteen-year term, the agreement may be terminated by the mutual written agreement of the parties or by either party upon twelve months advance written notice.⁷ In addition, the agreement does not require that MTB Bridgeport use the leased channel capacity to rebroadcast WSAH-DT programming; it may also choose to use the channel capacity for "such other lawful purpose as MTB shall elect."⁸ Moreover, in order to avoid an unauthorized transfer of *de facto* control, in violation of section 310(d) of the Communications Act,⁹ the licensee of WTNH-DT must retain control of the station's programming policies, including the right to reject programming.¹⁰

MTB Bridgeport also asserts that the operation of WSAH-DT from the Empire State Building would result in enhanced programming in the region. MTB Bridgeport states that it intends to provide a minimum of six hours daily of Chinese language programming to the substantial and growing Chinese American population within New York City.¹¹ MTB Bridgeport further states that its proposal "will further increase program diversity in the New York City metropolitan area through additional programming directed to Hispanic and/or other ethnic communities, as well as programming for the

237 F.2d 567 (D.C. Cir. 1956) (finding that a curtailment of service is not in the public interest unless outweighed by other factors).

⁴ *KNTV License, Inc.*, 19 FCC Rcd 15479, n.11 (MB 2004).

⁵ *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations, Notice of Proposed Rulemaking*, 23 FCC Rcd 18534, 18535 (2008).

⁶ MTB Bridgeport states that WTNH-DT's 41 dBu contour completely encompasses WSAH-DT present 38 dBu contour. October 2, 2008 Supplement at 5.

⁷ *Id.* at Exhibit 1, Section 7.

⁸ *Id.* at Section 1(a).

⁹ 47 U.S.C. § 310(d).

¹⁰ See *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981); *WGPR, Inc.*, 10 FCC Rcd 8140 (1995). In this regard, the agreement specifically provides that the licensee of WTNH-DT retains the absolute right to reject any programming that it deems in its sole discretion to be contrary to the public interest and to preempt programming in order to broadcast a program deemed by the licensee to be of greater national, regional or local interest. October 2, 2008 Supplement, Exhibit 1, Section 4.

¹¹ MTB states that the U.S. Census Bureau estimates that there are 434,617 Chinese living in New York City, and cites to a 2004 Census Profile by the Asian American Federation of New York Census Information Center indicating that more than 60% of Chinese Americans living in New York City have limited proficiency in English. Application, Exhibit 1 at 3. MTB also states that its proposal to bring new Chinese-language programming is supported by a number of organizations in New York City and provides letters of support from these organizations. *Id.* at Exhibit 1, Attachment 3.

majority English-speaking population in Bridgeport and within the station's service area."¹² In determining whether grant of an application would serve the public interest, convenience and necessity, however, "[t]he Commission does not scrutinize or regulate programming formats, nor does it take programming formats into consideration in making its licensing decisions."¹³ In addition, there is no indication that other television broadcast services are inadequate to meet the needs of the Chinese and other foreign language speaking viewers in the New York metropolitan area.¹⁴

MTB also asserts in the application that grant will improve ownership diversity by increasing the overall population served by WSAH-DT from approximately 6 million people to more than 18 million people. MTB Bridgeport is controlled by Multicultural Television Broadcasting, LLC ("MTBL"), a minority and women owned broadcaster controlled by Arthur and Yvonne Liu.¹⁵ MTB Bridgeport explains that minority small-business owners, such as the Lius, experience difficulties in acquiring broadcast properties in large metropolitan areas, and "all too frequently are relegated to operating stations in smaller, outlying communities that often are unable to serve these more populated metropolitan areas due to signal deficiencies and intervening terrain."¹⁶ MTB Bridgeport continues that by filing its application to move to the Empire State Building, it now seeks "the equality denied to minorities, women and the disadvantaged throughout the television industry's history" and the ability "to compete in its television market on a more level playing field."¹⁷

In its October 2, 2008 supplement, MTB Bridgeport further asserts that absent a grant of the application, "the Lius will be forced to divest MTBL's television stations . . ."¹⁸ MTB-Bridgeport explained that in April 2007, MTBL acquired WSAH(TV); KCNS(TV), San Francisco, California; WMFP(TV), Lawrence, Massachusetts; WOAC(TV), Canton, Ohio; and WRAY-TV, Wilson, North Carolina from Scripps Howard Broadcasting Co. for \$170 million, financed in part through loans of over \$100 million from financial institutions. Due to the downturn in the economy, the stations were unable to comply with the covenants or service the interest payments due under the loan agreements, and were negotiating with the lenders in order to avoid a receivership action against the Lius and MTBL. According to MTB-Bridgeport, "the increased equity value of WSAH-DT operating from the Empire State Building would, standing alone (and in combination with the other stations), be sufficient to enable the Lius to refinance the current debt."¹⁹ Commission records show that shortly after MTB Bridgeport made its supplemental filing, MTBL and its television subsidiaries entered into forbearance agreements with their lenders which required MTBL to transfer KCNS(TV), WMFP(TV), WOAC(TV) and WRAY-TV to an irrevocable trust with the lenders as beneficiaries, and that transfer has been completed.²⁰ With respect to WSAH-DT, the forbearance agreement provides that the station be transferred to the trust in the event the Commission does not grant the application to move to the Empire State Building; in the event

¹² *Id.* at Exhibit 1, p. 4.

¹³ *Mayor Maurice A. Brown*, 24 FCC Rcd 7632, 7634 (AD 2009); *see also Oro Spanish Broadcasting, Inc.*, 6 FCC Rcd 4411, 4412 (1991).

¹⁴ WMBC-TV, Newton, New Jersey airs Chinese language programming within New York City. With respect to Spanish language viewers, WXTV-DT, Paterson, New Jersey (UND), WFUT-DT, Newark, New Jersey (TLF) and WNJU-DT, Linden, New Jersey (TEL) all air significant amounts of Spanish language programming.

¹⁵ *See* Application at Exhibit 1; FCC File No. BALCT-20061117AEC. The Lius also control companies which are the licensees of approximately 40 radio stations. *Id.*

¹⁶ Application, Exhibit 1 at 2.

¹⁷ *Id.*

¹⁸ October 2, 2008 Supplement at 17.

¹⁹ *Id.*

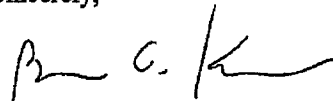
²⁰ *See* File Nos. BTCCT-20081104AEN/AEP/AER/AES, granted January 14, 2009. The stated purpose of the trust is to sell the ownership interests or assets of the stations and apply the sales proceeds to pay the loans.

the Commission were to grant the application, MBT-Bridgeport is required to engage a broker to market the station until such time as the station is sold.

While we are sympathetic to the financial difficulties faced by MBT-Bridgeport, MTBL and the Lius, those difficulties do not justify the effective reallocation of WSAH-DT to New York City and withdrawal of licensed television service to over 2.2 million persons. Stations are allotted to communities, not Nielsen Designated Market Areas, and the fact that WSAH-DT is assigned to the New York City DMA for ratings purposes provides no legal or equitable basis for moving the Bridgeport, Connecticut station 62 miles to a site occupied by stations allotted to New York City or close-in suburbs. Moreover, the Commission "does not guarantee a licensee economic success, nor will it abrogate all of its rules and policies so that a licensee may, at will, move to a market that might be more profitable than the one it originally, voluntarily, applied to serve."²¹

In view of the foregoing, the above-referenced application filed by MTB Bridgeport-NY Licensee LLC for a construction permit for station WSAH-DT is **HEREBY DENIED**.

Sincerely,



Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc: Charles R. Naftalin, Esq.
Amy S. Mushahwar, Esq.
Lee J. Peltzman, Esq.

²¹ *MS Communications, Inc.*, 22 FCC RCD 2167, 2168 (VD 2007). In those instances when the Commission does take financial hardship into consideration, such as failing station waivers of the Commission's television duopoly rules and authorizing satellite stations, the Commission still requires that the same area be served. *Id.*

CERTIFICATE OF SERVICE

I, Richard Morena, hereby certify that on May 17, 2019, I caused a copy of the foregoing Application for Review to be served by email upon the following:

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