



Federal Communications Commission  
Washington, D.C. 20554  
NOV 23 2004

FCC MAIL ROOM  
Nov 24 12:30 PM '04  
D13000

DOCKET FILE COPY ORIGINAL

DA 04-3646  
1800E3-JLB  
Released: November 23, 2004

Fort Myers Broadcasting Company  
c/o Joseph A. Belisle, Esq.  
Leibowitz & Associates, P.A.  
One S.E. Third Avenue, Suite 1450  
Miami, Florida 33131-1715

Post-Newsweek Stations, Florida, Inc.  
c/o Jonathan Blake, Esq.  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2401

Caloosa Television Corporation  
c/o Dennis J. Kelly, Esq.  
Post Office Box 6648  
Annapolis, Maryland 21401-0648

Cox Broadcasting, Inc.  
c/o Kevin F. Reed, Esq.  
Dow, Lohnes & Albertson, PLC  
1200 New Hampshire Avenue, N.W.  
Suite 800  
Washington, D.C. 20036

Montclair Communications, Inc.  
c/o Roy R. Russo, Esq.  
Cohn and Marks LLP  
1920 N Street  
Suite 300  
Washington, D.C. 20036-1622

Re: MM Docket No. 00-180  
RM-9956  
File No. BPCDT-19991029ADW  
Facility ID 22093

Dear Counsel:

This is in response to a petition for rulemaking filed by Fort Myers Broadcasting Company (FMBC), the licensee of WINK-TV, Fort Myers, Florida. FMBC requested that the Commission amend the DTV Table of Allotments to substitute DTV Channel 9 for WINK-TV's assigned Channel 53, and the Commission did so on November 20, 2002.<sup>1</sup> Caloosa Television Corporation, the licensee of WBSP-CA, Channel 9, Naples, Florida, Post-Newsweek Station, Florida, Inc., the licensee of several television stations in Florida, and Cox Broadcasting, Inc., the licensee of WFTV(TV), Orlando, Florida, all filed timely petitions for reconsideration. In addition, Montclair Communications, Inc., the licensee of WZVN-TV, Channel 26, Naples, Florida, filed an informal objection to FMBC's pending application for a construction permit for DTV Channel 9.

Petitioners argue that reconsideration should be granted, based on the preclusive effect of FMBC's proposed full service operations on DTV Channel 9 on WBSP-CA, which also operates on

<sup>1</sup> Report and Order, 17 FCC Rcd 23492 (2002).

Channel 9. However, by letter decision released October 6, 2004, the Chief of the Video Division of the Media Bureau found that WBSP-CA had failed to air a broadcast signal for a contiguous period exceeding twelve months and therefore, its license had expired as a matter of law pursuant to Section 312(g) of the Communications Act of 1934, as amended.<sup>2</sup> Thus, we no longer need to consider this argument.<sup>3</sup>

Cox and Post-Newsweek also argue that while FMBC's proposed operation on DTV Channel 9 complies with the Commission's technical rules, they believe that due to unique propagation factors in Florida, FMBC's proposed facility will, in fact, cause actual interference that exceeds the predicted levels. Thus, they ask that the Commission condition the grant of the channel change to require FMBC to take action to reduce actual interference from WINK-DT's operation on Channel 9 if it exceeds the predicted levels. We see no reason to do so, however, given the fact the FMBC's proposal fully complies with the city-grade service and interference protection requirements, and is otherwise consistent with the Commission's technical standards for modification of a DTV allotment, and that the petitioner's allegations of increased interference are speculative.

We also disagree with Post-Newsweek that FMBC's proposal fails to advance the public interest to any significant effect. In its *Report and Order* in GN Docket No. 01-74, the Commission adopted the reallocation of the 598-746 MHz Spectrum Band (television channels 52-59) from use by television broadcasters to new use on a flexible basis.<sup>4</sup> The Commission also stated that it would consider requests by incumbent broadcasters on channels 52-59 to voluntarily vacate their NTSC channels prior to the end of the DTV transition on a case-by-case basis, considering all relevant public interest factors.<sup>5</sup> Thus, FMBC's proposal to change from Channel 52 to Channel 9, clearly advances Commission policy with respect to this spectrum.<sup>6</sup>

Finally, Cox argues that FMBC's operation of WINK-DT on Channel 9 would have a preclusive effect on WFTV(TV)'s ability to serve existing viewers after the DTV transition period ends, and asks the Commission to condition WINK-DT's authorization on the surrender of Channel 9 at the close of the DTV transition. In response, FMBC has stated that "absent some unforeseen event," it ultimately will operate WINK-DT on Channel 11 and surrender Channel 9. We will not condition WINK-DT's

<sup>2</sup> Section 312(g) provides that "if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary."

<sup>3</sup> Monclair filed an informal objection because grant of FMBC's application was predicated on a pending Joint Request for Approval of Settlement Agreement between Caloosa and FMBC, which Montclair opposed. Because we also denied the Joint Settlement Agreement, Montclair's informal objection will be denied.

<sup>4</sup> *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, 17 FCC Rcd 1022 (2002).

<sup>5</sup> *Id.* at 1096. The Commission identified a number of relevant factors, including whether grant of the request would make new or expanded wireless services available to consumers or deploy wireless service to underserved areas, or whether grant would result in the loss of any of the four stations in the DMA with the largest audience share, the loss of sole service licensed to the local community, or the loss of a community's sole noncommercial educational television service. The Commission will also consider whether a grant would have a negative effect on the pace of DTV transition in that market. *Id.* at n.549.

<sup>6</sup> The Commission recently reiterated the importance it attaches to rapid band clearing. In the *Report and Order, Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television* (FCC 04-192, released September 7, 2004) (*Second Periodic Review*), the Commission observed that "[i]n furtherance of the significant public interest in rapid band clearing, and in recognition of the fact that all out-of-core DTV facilities will have to move at the end of the transition, we will permit stations with an in-core NTSC channel paired with an out-of-core DTV channel . . . to surrender their out-of-core DTV and operate in analog on their analog channels." *Id.* at ¶ 95.

authorization as Cox requests. In the *Second Periodic Review*, the Commission adopted a channel selection process, and any issues regarding the use of DTV Channel 9 will be addressed in accordance with the selection process adopted by the Commission.

In view of the foregoing, the petitions for reconsideration filed by Caloosa Television Corporation, Cox Broadcasting, Inc. and Post-Newsweek Stations, Florida, Inc. ARE DENIED; the informal objection filed by Montclair Communications, Inc. IS DENIED and the application for a construction permit for DTV Channel 9 (File No. BPCDT-19991029ADW) IS GRANTED.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. A. Kreisman', with a long horizontal flourish extending to the right.

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau