

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of: )  
)  
)  
Negotiated Channel Election ) MB Docket No. 03-15  
Arrangement proposed by WKMG-TV, ) FCC File No. BFRECT-20050210ABK  
Orlando, Florida (Facility ID No. 71293) )  
)  
Second Periodic Review of the )  
Commission’s Rules and Policies )  
Affecting the Conversion to Digital )  
Television )

To: The Secretary  
Attn: Chief, Media Bureau

**OBJECTION TO NEGOTIATED CHANNEL EXCHANGE ARRANGEMENT**

Waterman Broadcasting Corporation of Florida, Inc. (“Waterman”), licensee of WBBH-DT, channel 15, Fort Myers, Florida, hereby objects to the above-referenced negotiated channel arrangement (“NCA”) submitted by WKMG-TV, Orlando, Florida. Under the FCC’s clearly established policies applicable to negotiated channel agreements, the proposed WKMG NCA must be dismissed because WKMG-DT’s co-channel operation on channel 15 will cause more than 0.1 percent interference to WBBH-DT’s licensed facility. WKMG’s failure to enter into an interference agreement with WBBH-DT or otherwise reduce the facilities of its proposed channel 15 operation requires the dismissal of the instant NCA.

**Background:** The facts in this dispute are straightforward. In the NCA at issue, WKMG elected to use channel 15 for its post-transition DTV channel after apparently completing a negotiated channel arrangement with the Daytona Beach Community College,

licensee of WCEU(TV), New Smyrna Beach, Florida. WCEU operates on NTSC channel 15 and DTV channel 33. Pursuant to the NCA, WCEU apparently agreed to elect channel 33 as its post-transition DTV channel and to assign its right to elect channel 15 to WKMG. *See* FCC File No. BFRECT-20050210ABK. In WKMG's 382 relying on this NCA to elect channel 15, no other stations were identified on Schedule A as parties to the NCA.

WBBH-DT is licensed to operate on channel 15 using a directional antenna with a maximum effective radiated power ("ERP") of 1,000 kW and an HAAT of 453.9 meters. *See* FCC File No. BLCDDT-20030620AAA. Waterman certified that WBBH-DT would operate with these licensed parameters on its post-transition DTV channel, *see* FCC File No. BCERCT-20041103ABG (Form 381), and elected channel 15 for WBBH-DT's post-transition channel on FCC Form 382. *See* FCC File No. BFRECT-20050114AAQ. The election of WBBH's DTV channel 15 as its post-transition channel entitles WBBH-DT to "receive the highest priority in the [DTV repacking] allotment process," including an interference conflict priority over stations like WKMG-DT that have elected a post-transition channel that they have never utilized previously.<sup>1</sup>

WKMG-DT is licensed to operate on channel 58 with a maximum ERP of 1,000 kW and an HAAT of 516 meters. *See* FCC File No. BLCDDT-20010515ABB. WKMG-DT certified that it would operate with these licensed parameters on its post transition DTV channel. *See* FCC File No. BCERCT-20041104AQX. By operation of the negotiated channel

---

<sup>1</sup> *See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report & Order*, MB Docket No. 03-15, FCC 04-192, ¶ 46, released September 7, 2004 (hereinafter "*Second Periodic R&O*").

arrangement policies established by the Commission, the DTV facility certified to in WKMG's Form 381 must be carried over to its proposed DTV operation on channel 15.

As demonstrated in the attached engineering statement, the carryover of WKMG's channel 58 operation with a maximum ERP of 1,000 kW translates to a maximum ERP of 422.7 kW on channel 15. The engineering statement also includes the results of an interference study assuming that WKMG-DT was operating on channel 15 with a 422.7 kW ERP using the same directional antenna and azimuth patterns specified in its DTV license from the same site with the same HAAT. This proposed WKMG-DT operation is predicted to cause 1.35 percent new interference to WBBH-DT, an interference level that significantly exceeds the 0.1 percent interference threshold adopted by the FCC during the repacking process.<sup>2</sup>

Moreover, WKMG cannot seriously dispute that its proposed DTV operation on channel 15 causes excess interference to WBBH-DT. Prior to the due date for Form 382, representatives of WKMG acknowledged that the proposed DTV operation on channel 15 caused excess interference to WBBH-DT and attempted to secure WBBH-DT's agreement to accept this excess interference. These efforts ultimately proved unsuccessful. Remarkably, despite the fact that WKMG itself acknowledged that its proposed DTV operations on channel 15 would cause excess interference to WBBH-DT under the FCC's 0.1 percent interference standard, WKMG did not reduce its proposed facilities on channel 15 to eliminate the interference conflict with WBBH-DT.

---

<sup>2</sup> See *Second Periodic R&O*, ¶ 56 (“An interference conflict exists when it is determined that more than tolerable new interference exists (*i.e.*, in this context 0.1 percent in addition to existing interference).”)

**Argument:** In a recent public notice that included guidance on the preparation and processing of NCAs, the Commission articulated a simple standard that it would use to evaluate them: “[i]f, after review of the record, including but not limited to oppositions and replies, we find that the NCA reasonably could be construed to have an adverse impact on the interests of a station not a party to the NCA, or is otherwise not in the public interest, the NCA will be rejected.”<sup>3</sup> Indeed, in its order initially allowing the use of NCAs during the DTV repacking process, the Commission clearly indicated that “[s]tations involved in the negotiated channel election arrangement must satisfy our DTV interference rules with regard to their relationship to other stations not involved in the negotiated arrangement.”<sup>4</sup>

A straightforward application of these clear, unambiguous policies in this instance requires the dismissal of WKMG’s proposed NCA. As demonstrated above, WKMG’s proposed carryover DTV operation on channel 15 will cause 1.35 percent new interference to WBBH-DT’s existing operations on channel 15. WKMG itself recognized that this incremental interference to WBBH-DT exceeded the Commission’s determination of what constitutes “tolerable new interference” during the repacking process. *See infra* n.2. However, because no interference agreement is in place with WBBH-DT, WKMG’s proposed NCA must be rejected. As noted above, the Commission plainly articulated the strict policy it would utilize when evaluating NCAs and went on to remind stations contemplating NCAs that “[t]here will be no

---

<sup>3</sup> See “DTV Channel Election Issues – Negotiated Channel Arrangements, Establishment of Form 382 Mailbox, Revisions to FCC Form 381 Certificates and Notification to FCC of Flash Cut Decisions,” Public Notice, DA 05-273, ¶ 1, released February 1, 2005 (hereinafter “*February PN*”). The same public notice went on to remind licensees that “[t]here will be no separate conflict round for NCAs.” *Id.*

<sup>4</sup> See *Second Periodic R&O*, ¶ 45 n.92.

separate conflict round for NCAs” – a clear admonition that stations would not be permitted to correct interference conflicts after the fact.<sup>5</sup>

To the extent WKMG is relying on a separate Commission policy that allows greater than 0.1 percent incremental interference to be caused when a station with an out-of-core DTV channel elects to operate post-transition on its in-core analog channel, this reliance is misplaced.<sup>6</sup> First, such a result would be extremely unfair to WBBH-DT. WBBH-DT has been operating with maximized facilities on its DTV channel 15 for almost two years. The election of DTV channel 15 on Form 382 entitles WBBH-DT to the highest processing priority in the repacking process. The instant interference conflict, on the other hand, has been created by WKMG’s refusal to reduce its maximized DTV facilities and service area on channel 15 after it was carried over from channel 58. WKMG has no rights of any kind on channel 15. Any decision to allow WKMG to somehow elevate its rights to exceed those of a station operating a maximized DTV facility on its assigned DTV channel would stand the Commission’s entire repacking plan on its head.

Second, the Commission never announced that it would extend this policy to stations with out-of-core DTV assignments electing new channels pursuant to an NCA. Any decision to announce such a policy after channel election forms have been filed would unfairly prejudice other stations similarly situated to WKMG who may have abandoned a proposed NCA when they could not resolve interference conflicts under the FCC’s rigorous 0.1 percent standard. Third, any decision to elevate WKMG’s interference protection rights in these circumstances would also unfairly prejudice any nearby stations with two out-of-core channels. Given that WCEU’s Form 382 elections clearly indicate that it intends to relinquish channel 15

---

<sup>5</sup> See *February PN*, ¶ 1.

regardless of whether the instant NCA is approved, an after-the-fact upgrade of WKMG's processing priorities will clearly remove a channel that would otherwise have been available for stations with two out-of-core channels in the second round.

**Conclusion:** For all these reasons, the Commission should apply its clearly articulated policies and dismiss WKMG's NCA for failing to reduce facilities or reach an interference agreement with WBBH-DT.

Respectfully submitted,

WATERMAN BROADCASTING  
CORPORATION OF FLORIDA, INC.

By:     //s// Thomas Van Wazer //s//      
Thomas P. Van Wazer

SIDLEY AUSTIN BROWN & WOOD LLP  
1501 K Street, NW  
Washington, DC 20005  
(202) 736-8119

Its Attorney

March 15, 2005

---

<sup>6</sup> See *Second Periodic R&O*, ¶ 56.

**Certificate of Service**

I, Thomas Van Wazer, hereby certify that on this 15<sup>th</sup> day of March, 2005, I caused true and correct copies of the forgoing Opposition to Negotiated Channel Arrangement to be sent via United States Express Mail and e-mail to:

Mark Prak  
Brooks Pierce McLendon Humphrey & Leonard  
P.O. Box 1800  
Raleigh, NC 27602  
[mprak@brookspierce.com]

Sandra Session-Robertson  
WCEU-TV  
1200 W. International Speedway Blvd.  
Daytona Beach, FL 32114  
[sessios@dbcc.edu]

//s// Thomas Van Wazer //s//