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September 19, 2005

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Washington D.C. 20554

**Re: MB Docket No. 03-15
West Virginia Media Holdings, LLC (FRN 0005921689)
WOWK-DT, Huntington, WV (Fac. ID. 23342)
Request for Waiver of Replication/Interference Protection Deadline
Nunc Pro Tunc Acceptance Requested**

Dear Ms. Dortch:

This is submitted in response to an informal discussion with the Video Division (“the Division”) of the FCC’s Media Bureau (“the Bureau”) on behalf of West Virginia Media Holdings, LLC (“WVMH”), the licensee of WOWK-TV, Channel 13, Huntington, West Virginia, and permittee of WOWK-DT, Channel 47, Huntington, West Virginia. This submission (i) states the reasons why the July 1, 2005 “use-it-or-lose-it” maximization/replication/interference protection deadline (“July 1, 2005 deadline”) announced in the Commission’s *Second Periodic Review*¹ should be deemed inapplicable to WOWK-DT; and (ii) in the event the Division disagrees that the July 1, 2005 deadline should be deemed inapplicable to WOWK-DT, requests waiver of that deadline *nunc pro tunc* as of July 1, 2005.

In support hereof, the following is respectfully shown:

Background:

WOWK-TV has operated on Channel 13, Huntington, West Virginia, since 1955. The station is affiliated with the CBS television network. The Charleston-Huntington, West Virginia DMA is currently DMA No. 62.

DTV construction history: WOWK-TV was issued its DTV construction permit for Channel 47 on September 6, 2002 (“the CP”)². WOWK-DT commenced operation pursuant to Special Temporary Authority (“STA”)³ on February 27, 2003.⁴ The current

¹*Second DTV Periodic Review*, MB Docket 03-15, 19 FCC Rcd 18 at para. 78 (2004).

²FCC File No. BPCDT-19991029ABZ.

³In the *First DTV Periodic MO&O*, 16 FCC Rcd 20594 (2001), the Commission announced that it would allow stations to construct initial DTV facilities designed to serve at least their communities of license, and

WOWK-TV STA was granted on July 11, 2005 and is scheduled to expire on December 30, 2005.⁵ On September 2, 2005, WOWK-DT notified the FCC of commencement of program tests pursuant to the CP.

Channel election history: On November 5, 2004, WOWK-DT timely certified its intention to replicate its 1997 NTSC coverage.⁶ On February 10, 2005, WOWK-DT timely elected Channel 13 for final DTV operation.⁷ By a June 7, 2005 conflict letter (“Conflict Letter”),⁸ the Division rejected that channel election based on potential interference concerns, and afforded WOWK-DT an opportunity to respond. On August 15, 2005, WOWK-DT submitted a conflict decision (“Conflict Decision”) to maintain its Channel 13 election by using technical means to resolve the Division’s interference concerns,⁹ along with a modification application reducing proposed replication facilities.¹⁰ WOWK-DT’s Conflict Decision and contemporaneously-filed modification application remain pending at this time.

Inapplicability of July 1, 2005 deadline:

By its *Second Periodic Review*, the Commission established maximization/replication/interference protection deadlines (“use-it-or-lose it deadlines”) for certain DTV stations. For certain television licensees in the Top 100 markets affiliated with the Top 4 networks (“Top 100 market network affiliates”), the Commission announced certain construction obligations required to be completed by July 1, 2005:

- **July 1, 2005 Use-it-or-lose-it deadline for DTV licensees affiliated with the top-four networks.** Those licensees that receive a *tentative DTV channel designation* in the channel election process *on their current digital channel* must construct full, authorized facilities. Those licensees that receive a *tentative DTV channel designation* on a channel that is *not their current DTV channel* must serve at least 80 percent of the number of viewers served

continue to provide interference protection to the CP facilities and the allotment “until such time as the Commission determines otherwise (for example, by requiring that licensees either construct full replication or maximization facilities or relinquish interference protection).”

⁴FCC File No. BDSTA-20030221ACF, extended by BEDSTA-20030909AEY, BEDSTA-20040325AIK, BEDSTA-20041004AEM and BEDSTA-20050425ADE.

⁵BEDSTA-20050425ADE.

⁶FCC File No. BCERCT-20041105AIA.

⁷FCC File No. BFRECT-20050210ACW.

⁸Ref. 2-A726-NS.

⁹FCC File No. BFRCT-2005815ABI.

¹⁰FCC File No. BMPCDT-20050815ADW.

by the 1997 facility on which their replication coverage was based.¹¹

In other words, two separate July 1, 2005 construction obligations were established for Top 100 market network affiliates that had received a tentative DTV channel designation:

- **On-channel.** Stations receiving a tentative DTV channel designation on the station's current DTV channel ("on-channel") were required to construct full, authorized facilities by July 1, 2005.

- **Off-channel.** Stations receiving a tentative DTV channel designation on a channel not the station's current DTV channel ("off-channel") were only required to serve at least 80% of the station's 1997 NTSC population.

In order to determine which (if any) requirement applied, a station would of course have needed to know whether the station's tentative DTV channel designation was on-channel or off-channel.

The *Second Periodic Review* defined a "tentative DTV channel designation" as the DTV channel assigned to a station "[u]pon completion of the first round and subsequent interference conflict analysis."¹²

WOWK-DT has not received a tentative DTV channel designation. Not on-channel. Not off-channel. WOWK-DT is still awaiting a response to its Conflict Decision.

Nowhere in the *Second Periodic Review* was a July 1, 2005 DTV construction obligation established for stations under such circumstances.

On that basis, it is respectfully submitted that WOWK-DT was not subject to the July 1, 2005 deadline. Indeed, if deemed applicable, how would WOWK-DT have known whether it was obligated to proceed under the on-channel or off-channel requirement? Under the circumstances, no waiver of the July 1, 2005 deadline should be required.

However, in the event that the Division concludes otherwise, for the reasons set forth in the next section, it is respectfully submitted that the July 1, 2005 deadline be waived *nunc pro tunc* as of July 1, 2005.

¹¹*Second Periodic Review, supra* at para. 78 (*italics added*).

¹²*Second Periodic Review, supra* at para. 44.

Good faith belief in construction permit deadline extending beyond July 1, 2005:

At paragraph 83 of the *Second DTV Periodic Review, supra*, the Commission stated:

Stations on any channel that have received construction permits with construction deadlines that extend beyond these replication/maximization/interference protection dates must meet their replication/maximization requirements at the expiration date specified by their construction permit.

WOWK-DT reasonably believed, in good faith, that its CP extended beyond the July 1, 2005 deadline.

The section of the Commission's rules ostensibly governing the deadlines to complete construction of DTV facilities is Section 73.624(d). WOWK-DT is in a market below the Top 30, and the sub-section applicable to such stations, Section 73.624(d)(1)(iii), would appear to require such stations to complete construction by May 1, 2002. However, WOWK-DT's CP was not even *granted* until that date had passed. WOWK-DT's CP was not granted until September 6, 2002.

Prior to the grant of WOWK-DT's CP, the Commission had announced that it would apply a blanket extension to the construction permits of DTV stations operating pursuant to STA. In the *First DTV Periodic MO&O*, the Commission stated that the permits of such stations would be

extended automatically until such time as the Commission determines otherwise (for example, by requiring that licensees either construct full replication or maximization facilities or relinquish interference protection)

and that in the interim, protection would continue to be accorded to

the facilities specified in outstanding DTV construction permits issued to permittees operating pursuant to a DTV STA as of their applicable construction deadlines, in addition to protection to the allotted facilities.¹³

Therefore, the blanket construction permit extension under the *First Periodic DTV MO&O* would appear to be applicable to WOWK-DT. WOWK-DT was operating pursuant to an STA and, as discussed above, no maximization/replication/interference protection deadline had been announced for stations, such as WOWK-DT, which had not

¹³ *First Periodic DTV MO&O, supra* at para. 36.

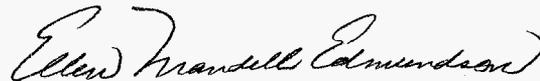
yet received a tentative DTV channel designation. It was therefore reasonably believed that the WOWK-DT CP extended beyond July 1, 2005.

Nevertheless, out of an abundance of caution, WOWK-DT sought to complete construction by no later than the deadline that would be applicable under Section 73.3598, the rule generally applicable to construction of broadcast facilities. Pursuant to Section 73.3598, there is a three-year construction period for all new television stations. Nowhere within Section 73.3598 are DTV stations excluded from the applicability of the rule's three-year television station construction period. A three-year construction period for WOWK-DT would have ended September 6, 2005.

On September 2, 2005, WOWK-DT notified the FCC that it had commenced program tests pursuant to the CP.¹⁴ Thereafter, in informal telephone discussions with the Video Division, the Division indicated that a request for waiver of the July 1, 2005 deadline should be filed, which led to the instant submission.

Based on the foregoing, if a waiver of the July 1, 2005 deadline is determined to be required, it is respectfully submitted that good cause to grant the waiver has been demonstrated herein. *Nunc pro tunc* acceptance of the instant waiver request as of July 1, 2005 is respectfully requested, in view of the good faith belief that the July 1, 2005 deadline was inapplicable to WOWK-DT. Grant of the waiver request on a *nunc pro tunc* basis will serve the public interest in continued availability of the station's service throughout the area where it has been received by the public for half a century.

Respectfully submitted,



Ellen Mandell Edmundson

Cc (via e-mail): Clay Pendarvis, Esq.
Shaun Maher, Esq.
Joyce Bernstein, Esq.

Cc (LPF copy): WOWK-TV

¹⁴It was subsequently determined that, although WOWK-DT is operating with replication facilities, the transmitter installed results in an ERP that is less than that authorized in the CP. Further details will be provided in the covering license application.