

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Television Station
Section 339(a)(2)(D)(vii)
Waiver Requests

MB Docket No. 05-317

COMMENTS OF DIRECTV, INC.

The purpose of SHVERA’s digital testing provisions is to ensure that all satellite viewers have the opportunity to receive digital signals from each network – preferably from their local broadcaster, but from another market if necessary.¹ Congress also recognized, however, that many local stations do not yet provide full digital service. It thus created a waiver mechanism allowing some such broadcasters to temporarily prevent eligibility testing for distant digital signals.²

To the extent such waivers are granted, at least some subscribers will be able to receive *no* digital signals from the network in question – they will be unable to receive the broadcaster’s digital signal (because the broadcaster doesn’t yet provide full digital coverage), and will be unable to receive a distant digital signal (because testing isn’t allowed). DIRECTV, Inc. (“DIRECTV”) urges the Commission to keep such viewers in mind in this proceeding. It is no small thing for a broadcaster to deny a viewer high-definition network programming – even if it has the best intentions in doing so.

¹ 47 U.S.C. § 339(a)(2)(D)(vii); Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”), Pub. L. No. 108-447, 118 Stat. 2809, 3428-29 (2004).

² 47 U.S.C. § 339(a)(2)(D)(viii).

In particular, DIRECTV asks that, in reviewing the waiver requests,³ the Commission take a hard look at the justifications for such waivers, and in particular, any claims of *force majeure*. Without discussing any specific requests, at least some instances of *force majeure* proffered to justify waivers appear to be foreseeable events within the control of the station.⁴ Certainly, DIRECTV is unaware that the Commission has ever concluded that circumstances such as Nielsen market reassignments,⁵ decisions to “flash-cut” to digital service,⁶ or the high price of construction materials⁷ would constitute *force majeure*. The DTV proceeding suggests quite the opposite.⁸ Waiver

³ Public Notice: TV Station Requests for Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 to be Filed by November 30, 2005 or February 15, 2007, DA-2979 (Med Bur., Nov. 17, 2005) (“Notice”).

⁴ *Cable Television Assoc. of Georgia, et al. v. Georgia Power Co.*, 18 FCC Rcd. 16333, 16347 (2003) (“By definition, a force majeure is an event that can be neither anticipated nor controlled.”).

⁵ Letter from Tom W. Davidson to Marlene Dortch (Nov. 30, 2005) (“KREG Letter”).

⁶ Letter from Jonathan S. Lichstein to Nazifa Sawez (Nov. 30, 2005) (“KENV Letter”).

⁷ Letter from Joseph Belisle to the Federal Communications Commission (Nov. 30, 2005) (“WINK Letter”).

⁸ *See, e.g., Request for Extension of Time to Construct Digital Facilities KGAN-DT, Cedar Rapids, Iowa*, 17 FCC Rcd. 17151, 17152 (2002) (reaffirming denial of request for extension of time and noting that “KGAN reasonably should have anticipated that there would be heavy demand on engineers due to the nationwide DTV conversion and should have allowed for possible delays based on that workload. Therefore, KGAN’s delays either arose from its own actions or from a situation which it easily could have foreseen”); *Request for Extension of Time to Construct Digital Facilities KNMT-DT, Portland, Oregon*, 17 FCC Rcd. 17162, 17163 (2002) (delays based on negotiations with tower operators/and availability of engineers are foreseeable and do not justify a request for extension of construction deadline); *Request for Extension of Time to Construct Digital Facilities KBSI-DT, Cape Girardeau, Missouri*, 17 FCC Rcd. 16261, 16262 (2002) (inability to obtain tower study due to heavy workload of tower manufacturer foreseeable); *DTV Build-out; Requests for Extension of the Digital Television Construction Deadline; Noncommercial Educational Television Stations With May 1, 2003 Deadline*, 20 FCC Rcd. 5783, 5789 (2005) (denying request for unqualified construction deadline extension to stations claiming that third-party installation companies caused delays); *Request for Extension of Time to Construct Digital Facilities KQCA-DT, Stockton, California*, 17 FCC Rcd. 20342 (2002) (negotiations with third-party to perform tower modifications did not justify extension of time to construct DTV facilities); *DTV Build-out; Requests for Extension of the Digital Television Construction Deadline; Commercial Television Stations With May 1, 2002 Deadline*, 19 FCC Rcd. 10790, 10796 (2004) (general claim of “construction delays” insufficient to demonstrate that inability to meet deadline was due to circumstances unforeseeable or beyond station’s control); *Request for Extension of Time to Construct Digital Facilities for Station KXXV-DT, Waco, Texas*, 19 FCC Rcd. 15262 (2004) (discovery that station could not use its existing antenna plate to bolt its new antenna to its

requests in this proceeding – where viewers’ ability to receive digital network signals is also at stake – should receive equally exacting scrutiny.

DIRECTV would also note that at least one WB affiliate, KFTR-TV, suggests that the testing deadline does not apply with respect to networks that DIRECTV does not yet carry in digital format.⁹ If KFTR is making a factual argument that DIRECTV cannot deliver a distant digital WB signal until it has such a signal to deliver, DIRECTV agrees. But if KFTR is making a legal argument that DIRECTV is *ineligible* to test whether subscribers can receive a particular WB station until such time, it is simply wrong. SHVERA makes testing dependent on the *station’s* status, not DIRECTV’s status.¹⁰ So long as a station fulfills the statutory criteria, DIRECTV can test whether subscribers can receive that station’s over-the-air digital signal, even if DIRECTV does not yet have a distant digital signal alternative for such viewers.

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tower was not an obstacle beyond a permittee’s control that would justify an extension of a DTV construction deadline); DTV Build-out; Requests for Extension of the Digital Television Construction Deadline; Commercial Television Stations With May 1, 2002 Deadline, 18 FCC Rcd. 22705 (2003) (rejecting various justifications for extending DTV construction permits, including mere assertion that antenna arrived late, failure to file modified application, and general assertions of construction delays).

⁹ Letter from Thomas Van Wazer to Marlene Dortch (Nov. 30, 2005) (“KFTR Letter”) (arguing that “under SHVERA, no subscriber can be eligible to receive a distant digital signal of a WB station by ordering a signal strength test because there are no distant digital WB signals on either satellite carrier”).

¹⁰ 47 U.S.C. § 339(a)(2)(D)(vii) (“Trigger Events for use of testing. A subscriber shall not be eligible for a distant digital signal under clause (i)(III) pursuant to a test conducted under clause (vii) until – (I) in the case of a subscriber whose household is located within the area predicted to be served (by the predictive model for analog signals under subsection (b)(3) of this section) by the signal of a local network station and who is seeking a distant digital signal of a station affiliated with the same network as that local network station – (aa) April 30, 2006, if such local network station is within the top 100 television markets and – (AA) has received a tentative digital television service channel designation that is the same as such station’s current digital television service channel; or (BB) has been found by the Commission to have lost interference protection; or (bb) July 15, 2007, for any other local network station, other than translator stations licensed to broadcast on the date of enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004”).

In short, DIRECTV simply requests that the Commission review each waiver request thoroughly in order to minimize the consumer disruption and disenfranchisement that grant of such requests will invariably cause.

Respectfully Submitted,

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December 30, 2005

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