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Federal Communications Commission
Office of the Secretary

November 19, 2007

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: MB Docket No. 03-15
Request for Waiver of Replication/Maximization Interference Protection Deadline
Sunbelt Multimedia Co.
Television Station KTLM, Rio Grande City, Texas

Dear Ms. Dortch:

Sunbelt Multimedia Co. ("Sunbelt"), by its counsel, hereby requests a waiver of the current deadline to complete construction of replicated or maximized DTV facilities, at the risk of losing protection of such facilities, with respect to television station KTLM at Rio Grande City, Texas. In an Order, FCC 07-90, rel. May 18, 2007 ("*Order*"), the Commission granted Sunbelt an extension of the prior deadline, and noted that additional extensions could be requested based on, inter alia, financial hardship.

A waiver request based on financial hardship must include "documentation and other evidence similar to the information required to obtain an extension of DTV construction deadlines on financial hardship grounds," id. at 2, as set forth in *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279 (2004) ("*Periodic Review Order*"). That decision relies, *inter alia*, on the familiar waiver standard articulated by the court in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). There, the Court explained that waiver, in appropriate cases, allows the agency to take into account certain factors that will produce a "*more effective* implementation *of overall policy* on an individualized basis." Id. at 11_ (emphasis added). Where deviation from the general rule "will better serve the public interest," a waiver is warranted. However, in order

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for the Commission to act on more than merely a notional sense of the public interest, it is critical that the regulatory context of the matter be made explicit.

I. THE DTV REGULATORY BACKGROUND INFORMS THE MEANING OF THE 'PUBLIC INTEREST' FOR PURPOSES OF EVALUATING THIS WAIVER REQUEST.

1. The FCC's overriding goal throughout the DTV proceedings has been "to promote broadcasters' ability to build digital businesses so that their valuable free programming service will continue." *Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service* (Fifth Report and Order), 12 FCC Rcd 12809 (1997) at ¶ 60 ("*Fifth Report & Order*"). Because of the severe "logistical and resource issues" that broadcasters confront – including "the construction and modification of television towers" and "the cost of conversion of station facilities," the Commission resolved to give operators "maximum flexibility in developing viable business plans during the transition period." *Service Rules for the 746-764 and 776-794 MHz Bands* (First Report and Order), 15 FCC Rcd 476 (2000), at ¶ 143 (citing *Fifth Report & Order, supra*).

The FCC has been forthright in acknowledging instances in which its DTV decisions have had effects that were contrary to the goal of facilitating broadcasters' build-out efforts, and therefore required correction. For example, the Commission has candidly observed that "some of the requirements we adopted . . . may be having the unintended consequence of hindering, rather than furthering, the DTV transition, . . . may be imposing substantial burdens on broadcasters without substantial countervailing public benefits, and may in fact be contributing to difficulties faced by a substantial number of stations in meeting their DTV construction deadlines." *Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television (Memorandum Opinion and Order On Reconsideration),* 16 FCC Rcd 20594 (2001), at ¶ 6 (hereafter, "*2001 Reconsideration Order*"). This circumspect approach is well-suited to the uncharted regulatory territory represented by the still-novel world of digital television.

Accordingly, a linchpin of the FCC's DTV philosophy has been to allow a station to extend its DTV build-out deadline when this is required by circumstances that the broadcaster could not have foreseen or that have been beyond the station's control. *Fifth Report and Order*, 12 FCC Rcd at 12841. Recognizing the need for flexibility, the Commission would "take into account problems encountered that are unique to DTV conversion" – for instance, the added financial burden that broadcasters will necessarily assume. *2001 Reconsideration Order* at¶ 45. The FCC therefore determined that a station's adverse financial condition would be a permissible ground for extending a construction deadline. *Id.*, at ¶¶ 45 – 46. This policy reflects the commercial reality that, when "the cost of meeting the minimum build-out requirements exceeds the station's financial resources," then "a broadcaster should be afforded additional time to construct its DTV facilities." *Id.* at ¶ 46.

The FCC's decision to countenance financial hardship showings was not based on guesswork. It was a function of the FCC's deep knowledge both of DTV economics and of the economics of the television industry generally. This agency expertise has been in play continually in the various stages of the DTV proceedings. For example, the Commission's knowledge of DTV construction costs in relation to television station revenues was a key factor in its decision to impose a more stringent DTV construction deadline on network affiliates in the largest TV markets. *Fifth Report and Order, supra* at ¶¶ 76 – 86. The FCC's formulation on this score resulted from arithmetizing construction costs as part of a complex assessment that also included the "percentage of audience share" garnered by network affiliates, the magnitude of large station revenues and extent of liquidity, the economic implications of affiliates' market strength because they obtain programming from their networks, and the extent of "economic, technical, and other support" that networks would provide their affiliates in their transition to DTV service. *Id.*

The FCC's expertise likewise includes the numerous technical matters that have figured in the development of its DTV policies. For example, the view that "[o]ne of the most significant issues in converting to digital broadcasting is the construction of new towers or the upgrade of existing towers," *Fifth Report & Order, supra*, at ¶ 92, obviously derives from the Commission's technical knowledge of broadcast engineering, market-specific characteristics, and industry experience.

For these reasons, the FCC has been careful to ensure that the ramifications of its actions do not compromise the marketplace dynamics the agency is counting on to energize the efficient deployment of DTV. In particular, FCC actions that prejudice a broadcaster's ability to secure (or retain) financing for a DTV build-out would be contrary to the Commission's decision to "give broadcasters flexibility in structuring business arrangements" in order to "attract[ ] capital." *Fifth Report & Order, supra* at ¶ 60. In the particular case of minority broadcasters, the risk of public interest harm resulting from Commission actions that prejudice an operator's ability to acquire funding is distinctly greater. For over two decades, as well as during the recent period of policy evolution in the DTV arena, the Commission has quantified the fact that minority owners face greater hurdles in capital markets. *See, e.g., Reallocation and Service Rules for 698 – 746 MHz Spectrum Band (Television Channels 52 – 59)*, 17 FCC Rcd 1022 (2002), n. 523 and copious citations therein. This empirical reality is one more vital dimension to be accounted for as the FCC attempts to render the waiver standard in a way that is consistent with its other DTV policies.

The foregoing review of the FCC's DTV policies demonstrates (1) that the FCC has significant expertise with respect to both the economic and technical aspects of DTV implementation, on the basis of which reliable, common sense conclusions can be drawn from basic facts in individual cases; and (2) the Commission's recognition that the public interest implications of its policies can vary greatly depending on individual broadcasters' circumstances. These premises are essential to the FCC's rendering fair and sensible judgments with respect to requests for waiver of the July 1 deadline.

II. THE PUBLIC INTEREST WARRANTS WAIVER OF THE CURRENT DEAD LINE WITH RESPECT TO SUNBELT.

Sunbelt is the licensee of television station KTLM, Rio Grande City, Texas, operating with NTSC facilities on Channel 40. KTLM first signed on the air in 1999. Thus, it is one of the nation's newest full power television stations. The station provides Spanish-language programming to residents of the Harlingen-Weslaco-Brownsville-McAllen television market. KTLM is not affiliated with any of the four major television networks. Sunbelt holds a permit for construction of DTV facilities on Channel 20.

A. Unique Financial Constraints Support a Waiver.

1. KTLM is a Comparatively New NTSC Facility.

i. *Initial Cost of Building KTLM.* First, it is important to understand that Sunbelt does not stand in the shoes of the typical television operator. The vast majority of television stations broadcast from NTSC facilities that were constructed many years ago. Such licensees have had ample time to recoup their investments in their NTSC facilities and to develop reserves necessary to pay for construction of digital facilities.

In contrast, Sunbelt's existing NTSC operation was constructed in the summer of 1999. Owing to construction problems beyond its control KTLM first went on the air with a less-than-optimum facility. Within four months, KTLM completed construction of its full NTSC facility and submitted the application for its permanent television broadcast license. The market served by KTLM consists of a chain of communities extending for over a hundred miles along the Rio Grande River. Because KTLM's city of license is at the western end of this market, the station's tower had to be constructed well to the west of the market's center in order to deliver a city grade signal there. That meant that e station's facilities had to include a new broadcast tower over 1800 feet high in order to provide an acceptable signal level to the core of the market (the McAllen – Harlingen corridor).

The inauguration of KTLM's full power facility represented the culmination of an investment of **over nine million dollars** in the station's NTSC facility. This includes the station's 1800 foot antenna tower (including the road to the tower site), transmitter, antenna, studio build out, studio equipment and other broadcasting hardware. An additional sum of almost three million dollars has been devoted to other expenses attendant to putting KTLM on the air, including the cost of acquiring the Channel 40 permit, and covering operating losses and debt service.

As the result of these expenses, Sunbelt is operating under an unusually onerous financial burden. Because of the extremely high cost of construction and development of KTLM, and the economic circumstances of its market, the station does not yet generate net revenue sufficient to offset payments on the debt incurred to construct the current facility. Thus, the massive investment in the NTSC facility of KTLM has not yet been discharged.

As the Commission is well aware, it is rare for a new television station to become profitable in its first few years of operation. However, the exceptionally high level of capital expenditures required to build KTLM as a full-market station, coupled with the unique nature of the border economy in which KTLM operates (as discussed below), put KTLM in a different class even from the typical new television station.

ii. *Unusually High Cost of Building DTV Facility*. KTLM's DTV allotment is for Channel 20. At considerable sacrifice, KTLM constructed an interim low power digital operation at its main tower site in a timely fashion. However, the full power DTV facility must be constructed at a completely different site from the tower used for KTLM's NTSC operations. For that reason and many others, the cost to build KTLM's full power DTV facility will be extremely high, running to at least 3.8 million dollars. Allowing for unknown cost overruns, the total expense to build the DTV facility will likely end up close to four million dollars. These additional funds (to say nothing of the costs of operating what amounts to an additional station) are simply not available to Sunbelt.

Sunbelt will not gain a material number of additional viewers or revenue merely by increasing the power of its digital operation. Consequently, construction of higher power DTV facilities represents, in the near term, purely an extra financial burden on this already-strapped station. It is one thing to require that a licensee expend an additional sum of as much as four million dollars in capital expenditures in order to build out a full DTV facility, without the possibility of realizing a return on the investment, when that licensee has already had time to recoup the expense of building its NTSC installation. It is quite another to impose such a burden on KTLM, which has not yet reaped any return on its massive initial investment in NTSC facilities.

Sunbelt cannot realistically afford the financial investment in a full power digital setup at this time. A failure to allow a substantial postponement of the DTV deadline for Sunbelt would effectively require the licensee to construct a second station while the astronomical debt obtained to build the original facility remains unpaid. Such a regulatory burden would prove contrary to the public interest in preserving KTLM as a viable broadcaster.

Separately, Sunbelt is seeking confidential treatment of the detailed financial information to support the instant waiver request. Once the Commission has granted the request for confidentiality, Sunbelt will supplement the instant request with documentation demonstrating that the problems standing between Sunbelt and the completion of the full power DTV facility.

Even in advance of such submission, Sunbelt would point out that since KTLM signed on the air in July of 1999, Sunbelt has not yet operated at a profit. Its owners have received no compensation for their efforts on behalf of the company. Rather, they have had to supply personal funds to keep KTLM on the air and preserve service to the public. KTLM is a stand-alone facility. Thus, Sunbelt has no profits from other stations that can be used to offset the losses incurred by KTLM.

iii. *KTLM's Position in the Market.* As noted above, a key element supporting the requested waiver is the difference between KTLM and the vast majority of television broadcasters. This difference applies locally as well as nationally. Almost all other stations in the market initiated NTSC operations decades ago.[1] Thus, their physical plants have been fully depreciated by now. Moreover, their operations have reached sufficient maturity that they are generating positive cash flow that can be tapped to fund capital projects such as a DTV facility. That is not the case with a relatively new station like KTLM. Certainly Sunbelt should not be punished as compared with its competitors for having recently brought a new source of broadcast diversity to the Rio Grande Valley. KLTM should have at least as much time as the newest of them has had to recover the cost of its NTSC facility before building out a full power DTV facility. A further extension of time is therefore appropriate in order to provide KTLM with the additional time required for this struggling new broadcaster to discharge the financial strain imposed by its NTSC start-up costs.

Sunbelt is the only locally and minority-owned television broadcaster in the market. Yet it shares the market with television stations that are financed and operated by large tele-

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[1] In the Rio Grande Valley, the newest station other than KTLM is KNVO (Channel 48, Univision), which began broadcasting in 1992. Of the remaining stations, KGBT-TV (Channel 4, CBS) went on the air in 1953. KVEO (Channel 23, NBC) began broadcasting in 1981, KRGV (Channel 5, ABC) went on the air in 1954, KLUJ (Channel 44, educational) in 1984 and KMBH (Channel 60, educational) in 1985.

vision group owners. KLTM is one of only two full-service television stations in the market operating primarily in the Spanish language. If DTV station construction so cripples Sunbelt that it cannot survive in the market, television viewers in the Rio Grande Valley will lose the important choice that is currently provided by this local, minority-owned small business.

B. Demographic Circumstances Beyond Sunbelt's Control Support a Waiver.

An equally compelling reason supporting the extension is the unique nature of the market served by KTLM. Sunbelt should not be subject to the same DTV Deadline required in the areas of the country where population and financial resources are much greater due t more affluent populations.[2]

The main metropolitan area in KTLM's market is the McAllen-Edinburg-Brownsville MSA. Per capita income in this area is the lowest of any of the 318 Metropolitan Statistical Areas in the nation, according to the United States Department of Commerce. The McAllen-Edinburg-Brownsville MSA also ranks **last** in worker pay among all U.S. metropolitan areas.

KTLM's market is extremely depressed in terms of income levels and household wealth. The service area consists of four counties where the median household incomes in the year 2000 ranged from $16,688 to $24,313, with a median of $22,782 for the market as a whole. The vast majority of residents therefore cannot afford expensive DTV receivers.

Levels of educational attainment in the area augur poorly for a near term change in this situation. Innumerable studies have tied average lifetime earning power to educational accomplishment. Unfortunately, Starr County, the home of KTLM's city of license, ranks lowest in the entire state of Texas. Only 32% of Starr County residents than a high school diploma – less than half the Texas average of 72%.[3] The other three counties in the market served by KTLM were also in the lowest ten Texas counties for educational attainment; the best being Cameron County where only 50% of the population graduated from high school. Comparable figures for Hidalgo County and Willacy County are 47% and 43%, respectively.[4]

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[2] Unlike broadcasters in the larger and wealthier markets, Sunbelt may not expect to generate additional revenue via the creative use of its allocated DTV spectrum for non-broadcasting purposes. In the Harlingen-Weslaco-McAllen-Brownsville market served by KTLM, there is minimal demand for new technologies that would use part of KTLM's DTV spectrum.

[3] 2000 Population Estimates, Texas State Data Center (Univ. Of Texas Pan American Data and Information Systems Center); 1990 census of Population and Housing, U.S. Bureau of Census.

[4] *Id.*

Not surprisingly, these low levels of educational achievement result in greater poverty among the DMA residents. In 1989, fully 60% of Starr County, 45% of Willacy County, 42% of Hidalgo and 40% of Cameron County lived below the poverty level. By contrast, the Texas average was only 18%.[5]

The above numbers represent a mere fraction of the national norms in terms of educational attainment, disposable incomes and household wealth. Nationally, in contrast, some 75% of the population has graduated from high school. These market demographics differentiate KTLM's market from the typical DMA. It is not anticipated that most residents of this area will be able to afford to purchase DTV sets in the near term, regardless of what KTLM can do. Without a substantial number of receivers in the hands of KTLM's public, the task of justifying the expense of inaugurating a full power DTV plant for KTLM becomes not just a daunting task but a suicidal one.

Due to the economic factors at work in the Harlingen-Weslaco-McAllen-Brownsville market, Sunbelt anticipates that the residents of its service area will endure an unusually long DTV transition period. Indeed, this market likely will be the last market in the country to convert to digital, with or without KTLM.

The economic conditions described above, coupled with Mexican competition (discussed below), make it improbable that most viewers of Sunbelt's Spanish-language service will have DTV reception capability before 2010. There is no reasonable basis for imposing the existing deadline for beginning the DTV transition with respect to this, the newest station in the market.

C. Further Considerations Supporting a Waiver.

1. Lack of DTV Reception Equipment.

The FCC historically has acknowledged "particularly . . . in smaller markets, the existing reality of modest DTV receiver penetration, which affected the financial decisions of broadcasters and those who fund them." Periodic Review Order at para. 80. However, the Commission's belief in the "the emerging reality" that "increased penetration of digital televisions with off-air reception capability will dramatically increase in the coming years," was a ground for concluding that it was not "appropriate to further postpone replication and maximization deadlines" beyond July 1, 2006. Id. This factor still applies to KTLM's market, albeit to a somewhat lesser extent than in 2006.

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[5] *Id.*

Whatever may be the status of other markets on this question, among the population served by KTLM, only a modest fraction have the disposable income level sufficient to support purchases of DTV reception equipment. Viewers of KTLM, by and large, lack the financial resources to purchase a DTV television receiver until the cost of DTV reception equipment declines substantially more. Such equipment is significantly less marketable in the Harlingen-Weslaco-McAllen-Brownsville service area than it may be elsewhere. Because of the relative absence of DTV receiving equipment in the Valley – and thus the absence of "the emerging reality" that was a factor in the FCC's establishing the July 1, 2006 deadline – requiring KTLM to broaden its existing DTV broadcasts to reach a tiny additional DTV public would be unreasonable.

2. The Threat of Loss of Audience by Imposition of an Unrealistic Deadline.

Moreover, most of the inhabitants of the Valley enjoy no first-language- programming alternatives to the analog signals provided by KTLM except for stations broadcasting from adjacent portions of Mexico. The Mexican stations, several of which have transmitting towers within ten miles of the U.S. border, have no duty to convert to digital operation in the foreseeable future. Once KTLM can no longer broadcast in the analog mode, those who do not have digital receivers will be forced to turn to Mexican stations for their viewing. Faced with the choice of replacing current NTSC receivers with DTV receivers, or keeping NTSC receivers and receiving programming from Mexico, economics suggest that the residents of this market will make the latter choice. This result would plainly be an unintended consequence utterly at odds with the purpose of the FCC's DTV transition policies. Better policy would be to encourage KTLM to develop within its abilities so as to promote viewership by the Spanish-language audience in the Valley of a station that is at least on the air with a digital signal, and moving in due course to full digital operation, as opposed to the Mexican stations that have no such plans.

3. Detriment to Portions of KTLM's Audience.

In addition to the other handicaps under which KTLM labors, KTLM's transmitters (both NTSC and digital) are located far to the west of the transmitting facilities of the other television stations in the market. Accordingly, a substantial area would lose its only off-air television service if the financial burden of DTV transition should eventually force KTLM to suspend all of its operation. Free, over-the-air television is the only television that much of the KTLM market receives. Cable is not a viable option for those living on remote ranches and colonias. Thus, to put KTLM in financial jeopardy is to jeopardize the receipt of emergency information and other programming that has only recently become available to the western portion of this market. Note also that the Mexican stations to which KTLM's audience will otherwise gravitate, does not have the same obligations under any Emergency Alert System to advise residents of impending weather emergencies or other potential disasters.

III. CONCLUSION

The public interest will be disserved if strict enforcement of the DTV Deadline results in KTLM forfeiting its digital authorization, or losing significant protection for it. That outcome would only serve to make the overall transition to DTV in the market even more awkward that it is already. Moreover, it would actually serve to remove an incentive for Valley residents to purchase digital sets if KTLM is not available to serve the needs of the residents of the Lower Rio Grande Valley. Those who prefer to watch KTLM will not need a DTV set if KTLM, through denial of the waiver request, is stripped of part of its eventual digital service potential.

In view of the foregoing, the regulatory burden that compliance with the existing DTV deadline would impose on Sunbelt, in light of the unique characteristics of the population of the KTLM service area, is enough to jeopardize the very viability of the station. Because KTLM provides Spanish-language programming to an area where a majority of residents speak Spanish as their first language, and cannot afford digital sets at this time, the public interest is consistent with an extension of the deadline for KTLM to complete its conversion to digital operation.

The confluence of factors described herein demonstrates that Sunbelt is not realistically able to meet the instant deadline. Not only is Sunbelt severely financially constrained, but a unique aggregation of other circumstances beyond Sunbelt's control make compliance with the deadline impossible at this juncture. This has already been recognized in the grant of STA to continue with its present facility through next February, but in the meantime Sunbelt also needs to be assured that it will not lose interference protection for its full DTV authorization.

Accordingly, the grant of this request for waiver is warranted.

Respectfully submitted,

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