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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations	)))))	MB Docket No. 03-185

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ORDER

Adopted: August 10, 2011 **Released: August 11, 2011**

By the Chief, Media Bureau:

1. In this Order we deny a Motion for Stay ("Stay Request") filed by the National Translator Association ("NTA") of the effectiveness of paragraphs 23 through 35 of the *Second Report and Order* adopted in the above-captioned proceeding,[1]

2. In the *Second Report and Order*, the Commission required low power television and TV translator stations (collectively, "low power television stations") on the "out-of-core" channels in the 700 MHz band (former television channels 52-69) to transition to an "in-core" digital channel (television channels 2-51 excluding channel 37) by December 31, 2011.[2] The Commission found that low power television stations have had sufficient notice that they would be required to clear the 700 MHz band and that the continued successful development of new commercial wireless and public safety facilities in the 700 MHz band will be greatly facilitated by requiring that all remaining analog and digital low power television stations be cleared from these channels by that date.[3] In addition, the Commission required that all low power television stations with facilities on channels 52-69, that have not already done so, to submit a digital displacement application proposing an in-core channel no later than September 1, 2011.[4] Stations that failed to submit the required displacement application by the September 1, 2011 deadline would be required to cease operation of their out-of-core facility by December 31, 2011 and would lose their authorization.[5] The Commission provided that stations could seek a waiver of the September 1, 2011application filing deadline; however, all out-of-core operations must cease by December 31, 2011.[6]

3. In its Stay Request, NTA maintains that the transition date deadlines of September 1, 2011 for the filing of displacement applications proposing in-core channels by out-of-core stations, and

[1] Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations, *Second Report and Order*, FCC 11-110 (rel. July 15, 2011)("*Second Report and Order*").

[2] *Id.* at ¶ 23.

[3] *Id.* at ¶¶ 24-27.

[4] *Id.* at ¶ 33.

[5] *Id.* at ¶ 34.

[6] *Id.* at n. 101.

December 31, 2011 as the date by which all out-of-core operations must cease, are unreasonably abrupt and unworkable. NTA also contends that these deadlines are unnecessary given that an effective procedure is already in place that enables the full deployment of new commercial wireless and public safety facilities in the 700 Mhz band in a timely manner.[7]

4. Verizon Wireless ("Verizon") filed an Opposition to Motion for Stay ("Opposition") in which it argues that low power television stations have been on notice for more than five years that they needed to vacate the 700 MHz band, and that stations' failure to timely seek a new channel does not justify a stay. Verizon also asserts that a stay of the September 1 and December 31, 2011 deadlines would harm wireless carriers and public safety operators, which need a date certain by which the 700 MHz band will be cleared.[8]

5. To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted: and (4) the public interest would favor grant of the stay.[9] NTA asserts that the Commission may grant a stay even if it has not met all four criteria of the standard, if there is a particularly overwhelming showing with respect to at least one of the criteria.[10] Here, however, we find that NTA has not met any of the four prongs. We therefore do not find any basis upon which to grant a stay of the September 1, 201 and December 31, 2011 deadlines set forth at paragraphs 23 through 35 of the *Second Report and Order*, and we deny the Stay Request.

6. **Likelihood of Success on the Merits**. In the *Second Report and Order*, the Commission noted that there were over 1,000 low power television stations operating on out-of-core channels in 2004, but that number had since decreased to less than 600. Of those remaining on out-of-core channels, over 300 had already filed displacement applications for an in-core channel.[11] In its Stay Request, NTA outlines the steps that the remaining stations must take in order to apply for a construction permit for an in-core digital facility and claims that "there is not sufficient time to meet the deadline . . . "[12] In support, NTA argues that if the *Second Report and Order* was published in the Federal Register at the end of July, the effective date of the requirements set forth in paragraphs 23 through 35 would be the end of August, which "leaves 2 days to the deadline."[13]

7. The deadlines established in the *Second Report and Order* are not arbitrary and capricious as NTA contends. First, NTA's suggestion that out-of-core licensees are somehow precluded from filing for an in-core channel until the effective date of the requirement for which it seeks a stay is simply wrong.[14] Low power television licensees on out-of-core channels have been authorized to file

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[7] Stay Request at 1. NTA states that it "is dedicated to the provision of free over-the-air television service to all areas that do not receive adequate coverage from a full complement of primary broadcast stations" and that its membership includes owners and operators of TV translator stations that rebroadcast the signals of full-service television stations. *Id.* at 2.

[8] Opposition at 2-3.

[9] *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[10] Stay Request at 2, *citing In the Matter of Review of Part 87 of the Commission's Rules Concerning the Aviation Radio Service*, Order, 26 FCC Rcd 685, n.16 (2011).

[11] *Second Report and Order* at ¶ 25.

[12] Stay Request at 3.

[13] *Id.*

[14] The effective date of the provisions for which NTA seeks a stay is August 26, 2011. 76 FR 44821 (July 27, 2011).

displacement applications for over ten years.[15] As the Commission noted in the *Second Report and Order*, hundreds of out-of-core licensees already have applied for in-core displacement facilities. In fact, the Commission has received displacement applications from almost 20 out-of-core licensees since the release of the July 15, 2011 *Second Report and Order,* which gave NTA and out-of-core licensees notice that displacement applications must be filed by September 1, 2011 and out-of-core operations ceased by December 31, 2011. We also believe that the established deadlines are reasonable given the abundant notice given to out-of-core licensees of the need to vacate the 700 MHz band.[16]

8. NTA also argues that even if a station were to meet the September 1 filing deadline, since applications must be placed on public notice for 30 days prior to grant, it is unlikely that construction could be completed by the end of the year because "a licensee would be foolhardy to order equipment before its application is granted" and construction at many sites "becomes difficult due to inclement weather after October."[17] To address this concern, however, the Commission directed the Media Bureau to give priority to displacement applications filed by out-of-core licensees and further provided that stations may obtain an emergency STA to begin operating on their proposed in-core channel while they await processing of their displacement application.[18] We thus conclude that the Stay Request does not provide any basis for finding that NTA has a substantial likelihood of prevailing in an appeal of the transition deadlines.

9. **Irreparable Harm**. NTA asserts that absent a stay, irreparable harm will result to its members "when hundreds of translator stations do not – because they cannot – meet the December 31, 2011, deadline" and will be forced to cease broadcasting.[19] In order to demonstrate "irreparable harm," a party must show that the alleged harm is "both certain and great; . . . actual and not theoretical. . . . Bare allegations of what is likely to occur" are not sufficient, because the test is whether the harm "will in fact occur."[20] Therefore, to demonstrate irreparable harm, NTA must provide "proof indicating that the harm is certain to occur in the near future."[21]

10. We conclude that NTA has not shown that its members would suffer irreparable harm in the absence of a stay. First, the harm that is alleged – that "hundreds of translator stations" will be forced to cease operations on December 31, 2011 – is wholly speculative. Since the *Second Report and Order* was released on July 15, 2011, the number of low power television stations operating on out-of-core channels has decreased to approximately 560, and of those stations, almost 300 have been granted a construction permit for an in-core channel or should receive a grant within the next ten to forty-five days. NTA has offered no evidence that these stations will be unable to construct their in-core facilities by the December 31, 2011 deadline, or that the remaining out-of-core licensees that intend to convert to in-core digital facilities will be unable to obtain a construction permit or STA prior to the December 31, 2011 out-of-core transition deadline.

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[15] *See* Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Report and Order*, 12 FCC Rcd 22953, 22967 (1997); Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, 1044 (2001). When the Commission imposed a freeze on the filing of applications for new digital low power television stations in 2010, it specifically exempted displacement applications filed by out-of-core stations from that freeze. Public Notice, Freeze on the Filing of Applications for New Digital Low Power Television and TV Translator Stations, 25 FCC Rcd 15120 (MB 2010).

[16] *See Second Report and Order* at ¶¶ 23-24.

[17] Stay Request at 3-4.

[18] *Second Report and Order* at ¶ 32.

[19] Stay Request at 4.

[20] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[21] *Id.*

11. We also conclude that NTA has failed to demonstrate that the alleged harm is "great."[22] The only harm NTA identifies is that which would result from a temporary disruption of television service from any stations that intend to convert to digital but were unable to complete construction of in-core digital facilities by December 31, 2011. We find that this alleged temporary loss of service from a small percentage of the over 7,000 licensed Class A, low power and television translator stations is not great.

12. **Harm to Others and Public Interest Considerations**. NTA argues that there is no harm to other prospective operators in the 700 MHz band or to the public interest because under existing notification and termination provisions set forth in the Commission's Rules, low power television stations are required to cease operations within 120 days of notification from a primary wireless licensee in the 700 MHz band that it intends to initiate or change service.[23] The Commission, however, rejected that argument, and concluded, based upon the record in this proceeding, that since adopting the notification process, "the balance of interest has now changed [and] the rapid deployment of new commercial wireless and public safety facilities in the 700 MHz band now must take priority and will be best facilitated by clearing all remaining low power television stations from the 700 MHz band by December 31, 2011."[24]

13. Thus, we find that NTA has not met any of the four prongs necessary to qualify for a stay. Accordingly, IT IS ORDERED that, pursuant to the authority of sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended,[25] and section 1.43 of the Commission's Rules,[26] the Motion for Stay of the National Translator Association IS DENIED.

14. This action is taken under delegated authority pursuant to sections 0.61 and 0.283 of the Commission's Rules.[27]

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief
Media Bureau

[22] *Washington Gas*, 758 F.2d at 674.

[23] Stay Request at 5.

[24] *Second Report and Order* at ¶ 29.

[25] 47 U.S.C. §§ 151, 154(k), 1.54(j).

[26] 47 C.F.R. § 1.43.

[27] 47 C.F.R. §§ 0.61, 0.283.