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March 15, 2007

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, NE, Suite 110
Washington, DC 20002

FILED/ACCEPTED

MAR 15 2007

Federal Communications Commission
Office of the Secretary

Re: Lehigh Valley Community Broadcasters Association, Inc.
Application for Review
File No. BPED-19990823IA

Dear Ms. Dortch:

Transmitted herewith, on behalf of Lehigh Valley Community Broadcasters Association, Inc. are an original and four copies of its "Application for Review" in connection with the above-referenced proceeding.

Additional copies of the pleading are also being delivered, either by hand or by U.S. first-class mail, to each of those listed on the attached Certificate of Service.

If there are any questions concerning this matter, kindly communicate directly with this office

Sincerely yours,


James E. Dunstan

Enclosures
JED:cl

2007 MAR 16 P 2:22

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED

MAR 15 2007

Federal Communications Commission
Office of the Secretary

In the Matter of Application of)	
)	
LEHIGH VALLEY COMMUNITY)	File No. BPED-19990823IA
BROADCASTERS ASSOCIATION, INC.)	
)	
For a Minor Change to WDIY(FM))	
Allentown, Pennsylvania)	
Facility ID No. 36992)	

To: The Commission

APPLICATION FOR REVIEW

Lehigh Valley Community Broadcasters Association, Inc. ("Lehigh"), by its attorneys and pursuant to Section 1.115(a) of the FCC's rules,¹ hereby files its Application for Review of the Media Bureau's letter of February 13, 2007,² denying Lehigh's Petition for Reconsideration of a February 16, 2005 dismissal of the above-referenced application for a minor modification of the facilities of noncommercial station WDIY(FM). In support of its Application for Review, Lehigh submits:

I. INTRODUCTION

Lehigh is the licensee of noncommercial station WDIY(FM), Allentown, Pennsylvania. When Lehigh filed the above-captioned application in 1999, it recognized that the facilities proposed would result in predicted interference to analog Channel 6 television station WPVI, Philadelphia, Pennsylvania. It also recognized that the television industry was in flux, and that the transition to a digital mode of transmission (DTV) would potentially reconfigure the existing

¹ 47 C.F.R. § 1.115(a).

² This Application for Review is being filed within 30 days of the Bureau's letter, and therefore is timely.

scheme for allotting television channels. By letter dated February 16, 2005 (“2005 Deficiency Letter”), the Media Bureau staff dismissed the application based on grounds that the applicant had not amended its Channel 6 interference showing as requested by staff, and had therefore violated Section 73.3568(a)(1) of the Commission’s rules by failing to prosecute the application. Lehigh filed a Petition for Reconsideration on March 24, 2005, arguing that the application should be granted based on the fact that WPVI’s signal was available both on analog Channel 6, and digital Channel 64. Lehigh argued that, in the same manner Section 73.525(e)(3)(i)-(iii) permits an NCE-FM station to subtract or “back out” the number of viewers able to receive a television station’s programming by alternative means such as translators or satellite stations, in this case, Lehigh should be allowed to back out the viewers who currently reside within WPVI-DT’s contour.

By letter dated February 13, 2007 (the “2007 Letter”), the Media Bureau denied the Petition for Reconsideration, finding again that Lehigh had failed to amend its TV Channel 6 interference showing. The 2007 Letter failed to address Lehigh’s substantive arguments contained therein.

II. QUESTIONS PRESENTED

1. Whether the Media Bureau (“Bureau”) committed prejudicial procedural error in denying the Petition for Reconsideration on procedural grounds without considering the underlying substantive grounds of Lehigh’s argument, given the changing factual landscape;³
2. Whether the Commission should allow WDIY to protect itself from the interference it will receive from WPVI-DT by granting the pending application and accepting Lehigh’s study treating the population served by companion digital stations in the

³ See 47 C.F.R. § 1.115(b)(2)(v) (Bureau decision subject to review and reversal if “prejudicial procedural error occurred”).

same way it considers overlapping translator and satellite station coverage under a Section 73.525 analysis;⁴ and

3. Whether, given the short time remaining for the analog operation of WPVI on Channel 6 before its operations on digital Channel 6, grant of the pending application would be in the public interest in order to allow WDIY to avoid interference from WPVI-DT.⁵

III. ARGUMENT

A. The Bureau Committed Prejudicial Procedural Error in Denying the Petition for Reconsideration on Procedural Grounds Alone.

The Bureau's one page and one paragraph letter gives short-shrift to Lehigh's arguments for grant of the instant application. The letter ruling merely cites the same basis for dismissal of the application as stated in the 2005 Deficiency Letter. Throughout this proceeding, however, the Bureau has failed to recognize or consider the shifting landscape of the digital television transition, and Lehigh's arguments that the requirements for an analog TV Channel 6 interference study are becoming more and more outdated as the day approaches when all television stations will operate only in digital mode. It was error for the Bureau to deny the Petition for Reconsideration without fully analyzing the changing landscape before it.

When Lehigh first filed its application in 1999, the digital landscape and digital transition was far from clear, especially in this case. Television station WPVI, Philadelphia, operated on analog Channel 6, and was initially assigned digital channel 64. Prior to the filing of the WDIY application, the FCC had noted that digital Channel 6 allocations were being made only as a last resort.⁶ The FCC also recognized that in the event that analog stations chose to operate on

⁴ See 47 C.F.R. § 1.115(b)(2)(ii) (action involves a question of law or policy which has not previously been resolved by the Commission).

⁵ See 47 C.F.R. § 1.115(b)(2)(iii) (action involves a policy which should be overturned or revised).

⁶ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Sixth Report and Order, 12 FCC Rcd. 14588, ¶ 151 (1997) ("*Sixth Report and Order*") ("DTV operation on channel 6 could pose potential conflicts with FM radio service on adjacent

Channel 6 in digital mode, the fact that they would be operating at far less power would make coexistence with adjacent educational FM channels possible, so long as the FM station was operating with sufficient power.⁷ Further, the Commission found that new television stations operating on digital Channel 6 would be required to protect incumbent adjacent FM stations.⁸

It now has become clear that WPVI's ultimate home for digital operations will be Channel 6.⁹ In light of this fact, the need for grant of the pending application is even greater, some six years after filing WDIY's application to modestly increase power, so that when WPVI cuts over from analog to digital operations on Channel 6, WDIY's signal is not utterly decimated.

Given this changing factual landscape, the Bureau erred in denying the Petition for Reconsideration on procedural grounds alone.

frequencies. Accordingly, we have developed the DTV Table to avoid any instances where channels 3 and 4 would both be used in the same area and have minimized the use of channel 6, so that the new DTV Table contains only two allotments on channel 6").

⁷ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, 13 FCC Rcd. 7418, ¶ 46 (1998) ("*DTV Sixth Memorandum Opinion and Order*") ("Our staff analysis also indicates that a DTV station operating on a new channel 6 allotment would not cause interference to an existing FM radio service in most cases, particularly where the FM station is operating at or near its maximum allowed power. In other cases, particularly where the FM station operates significantly below 3 kW, some interference may occur"). WDIY's authorized power currently is 100 Watts, the pending application seeks authority to increase that power up to 400 Watts, still nearly ten times below the threshold where WDIY may experience interference from a digital Channel 6 operation.

⁸ *Id.* ("it will be the initial responsibility of a DTV licensee to protect against or eliminate harmful interference to any FM radio stations that are in operation at the time the DTV station commences operation").

⁹ Public Notice, "Tentative Digital Channel Designations for Stations Participating in the First Round of DTV Channel Elections and Second Round Election Filing Deadline," 20 FCC Rcd. 15735 (MB 2005) ("*First Round TCD PN*").

B. The Commission Should Protect WDIY From Digital Interference By Accepting Lehigh's Interference Study based on WPVI's Digital Coverage.

Despite its many findings that educational FM stations may be harmed by digital Channel 6 operations, some as recently as only a few months ago,¹⁰ the present situation provides a case of true first impression for the Commission. Given WDIY's current operating power (.1 kW), and the finding that digital operations of Channel 6 may well "significantly" interfere with adjacent FM operations operating below 3 kW, WDIY faces a major interference crisis from WPVI-DT. Yet because WPVI currently operates on analog channel 6, WDIY can do nothing to mitigate that interference in preparation of the cut-over date.¹¹ Were WPVI's analog signal on any other channel, WDIY would be able to prepare for the impending wave of digital interference now by increasing power. However, because WPVI currently operates on Channel 6 in analog mode, and because the Bureau's current reading of Section 73.525 disallows the "backing out" of viewers within the digital footprint, WDIY has no means to protect itself from interference that is inevitable. In this rare case,¹² the Commission should consider arguments raised in Lehigh's Petition for Reconsideration, that WPVI's digital coverage should be considered and "backed out" of the Section 73.525 analysis. This is the only way that WDIY

¹⁰ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Seventh Notice of Proposed Rulemaking for Digital Television, 21 FCC Rcd. 12100, ¶ 46 (2006) ("As noted above, the Commission has long disfavored the use of channel 6 as a DTV allotment").

¹¹ Currently, the last day for analog operations is set as February 17, 2009. Because WPVI's current digital channel, 64, is located outside the core spectrum, and that spectrum is desperately needed for public safety communications, it is quite likely that WPVI will "flash cut" to operations on Channel 6 in advance of the 2009 deadline. In that event, WDIY's interference-free days are even more shortly numbered.

¹² Lehigh believes that WPVI is one of only two or three stations that currently operate on analog Channel 6 and will return to Channel 6 for digital operations post-transition. And it certainly is the station involving the highest population potentially impacted by digital Channel 6 operations.

can be treated fairly during the transition period, and the only way that substantial numbers of WDIY listeners will not be disenfranchised sometime between now and February 17, 2009.

C. The Commission Should Grant the Pending Application and Allow WDIY to Construct Facilities to Protect Itself from Digital Channel 6 Operations.

The road to digital television has been a twisting and rocky one. Once dead-set against allowing digital Channel 6 operations, the Commission has authorized at least nine stations to operate on digital Channel 6 post-transition. WDIY is in the very rare situation of being unable to mitigate the imminent effects of interference from WPVI operating in digital mode because WPVI currently operates Channel 6 in analog mode. The only way to rectify this problem is to allow WDIY to increase its power, by accepting its argument that WPVI's current digital footprint should be considered. The public interest therefore would be served by the grant of the instant application.¹³

Until WPVI begins to operate solely in a digital mode, WPVI will operate on both NTSC Channel 6 and DTV Channel 64. Section 73.525 of the Commission's Rules pre-dates the advent of digital television, and does not deal specifically with the issue of what protection a TV station may claim when operating in both analog and digital transmission modes. Section 73.525 does, however, deal with analogous situations, such as TV translators or satellite stations whose service areas overlap with those of the primary or parent station. The rule also makes provisions for interference areas served by another television station that offers the same network programming on the Channel 6 station. In these situations, Section 73.525(e)(3)(i) - (iii) permits an NCE-FM station to subtract the number of persons who receive television service by alternative means from the population within the Channel 6 interference area. By analogy, the

¹³ Lehigh would be willing to coordinate the construction and operation of its upgraded facility with WPVI such that it would not increase its power until such time as WPVI was ready to flash-cut its operations over to digital Channel 6.

population within the interference area created by the WDIY application should be reduced by the number of people within the area served by WPVI operating on a DTV channel. As demonstrated in Lehigh's original application, "The population contained within the Channel 6 interference area ... lies entirely inside the new WPVI-DT (Channel 64) coverage area."

IV. Conclusion

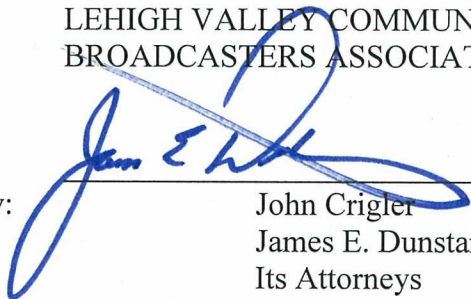
WDIY has not "failed to prosecute" the captioned application. Instead, until recently, substantial uncertainty concerning television allocations has made it impossible to determine whether WPVI would continue to operate on Channel 6 or not. Now that it is clear that WPVI will operate on digital Channel 6 post-transition, the need for the pending power increase is all the more important. The Commission should reinstate and grant the WDIY application on grounds that the facilities proposed satisfy the adjustment criteria set forth in Section 73.525(e)(3)(i-iii). The modified WDIY facilities will provide protection analogous to that provided to Channel 6 stations whose service area is overlapped by a television translator, satellite station, or full-service station affiliated with the same network.

Respectfully submitted

LEHIGH VALLEY COMMUNITY
BROADCASTERS ASSOCIATION, INC.

March 15, 2007

By:



John Crigler
James E. Dunstan
Its Attorneys

CERTIFICATE OF SERVICE

I, Cindy Lloyd, hereby certify that on this 15th day of March, 2007, copies of the foregoing "Application for Review" have been served by U.S. first-class mail, postage prepaid, or by hand delivery*, upon the following:

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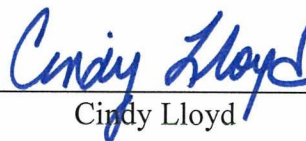
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