

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

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Federal Communications Commission
Office of the Secretary

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ORIGINAL

In re

Application of

Lehigh Valley Community Broadcasters
Association, Inc. for a Minor Change to Station
WDIY(FM), Allentown, PA, Fac. ID No.
36992

FCC File No. BPED-19990823IA

To: Secretary, Federal Communications Commission

OPPOSITION OF ABC, INC. TO APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the rules of the Federal Communications Commission ("FCC" or "Commission"),¹ ABC, Inc. ("ABC"), licensee of full-power commercial television station WPVI-TV, Philadelphia, Pennsylvania ("WPVI"), by its attorneys, submits this opposition to the application for review ("AFR") filed by Lehigh Valley Community Broadcasters Association, Inc. ("Lehigh"), licensee of non-commercial FM ("NCE FM") station WDIY(FM), Allentown, Pennsylvania ("WDIY"). In its AFR, Lehigh seeks review of the Media Bureau ("Bureau") decision dismissing its petition for reconsideration of the Bureau's dismissal of the above-referenced application for minor modification of WDIY ("Application"). As further shown herein and in the attached engineering statement ("Engineering Statement"), the Federal Communications Commission ("Commission") should dismiss or deny the AFR because Lehigh fails to demonstrate that the Bureau's decision was defective in any way.

¹ 47 C.F.R. § 1.115.

I. BACKGROUND

NCE FM stations that operate on channels 200-220 within a certain distance from a television station operating on TV channel 6 must demonstrate that they adequately protect the TV station from prohibited interference. These detailed interference protections and calculation methods are set forth in Section 73.525 of the Commission's rules.² WDIY is an NCE FM station on channel 201 in Allentown, Pennsylvania. WPVI is a TV station operating on channel 6 in nearby Philadelphia, Pennsylvania. WPVI also plans to operate its permanent digital television facilities on channel 6.³ Because the distance between WDIY and WPVI is less than 265 km, the protections of Section 73.525 apply to any WDIY modification application.⁴ The AFR is Lehigh's latest attempt to circumvent Section 73.525's protections.

On August 23, 1999, WDIY filed the Application seeking to increase its effective radiated power ("ERP") from 100 to 400 watts. As an NCE FM station, WDIY was required to show that it did not cause interference to more than 3,000 viewers of WPVI, a channel 6 TV station, pursuant to the detailed procedures set forth in Section 73.525. Instead of making this showing, Lehigh argued that whatever interference it caused to WPVI's analog operations was acceptable because it could "deduct" or "back out" from this interference persons covered by WPVI's digital television operations.⁵ In a July 22, 2003 letter ("Deficiency Letter"), the Bureau rejected Lehigh's argument because there was no provision in Section 73.525 that would permit such a deduction, there was no prior case in which an applicant was permitted to make such an

² 47 C.F.R. § 73.525.

³ See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Seventh Further Notice of Proposed Rulemaking*, FCC 06-150, at Appendix B (rel. Oct. 20, 2006) ("Appendix B").

⁴ See Engineering Statement, at 2.

⁵ See Letter from Dale E. Bickel, Senior Engineer, Audio Division, Media Bureau, to John Crigler, Esq. (July 22, 2003) ("Deficiency Letter"), at 2 (summarizing and rejecting Lehigh's argument).

adjustment, and there were four sound reasons for not permitting such an allowance in the instant case.⁶ Thus, the Bureau provided Lehigh with thirty days to file a curative amendment or face dismissal of the Application for violation of Section 73.525. Lehigh failed to file a curative amendment. Accordingly, more than one and a half years later, on February 16, 2005, the Bureau dismissed the Application for failure to prosecute (“Letter Dismissal”).⁷ Lehigh filed a petition for reconsideration of the Letter Dismissal (“Petition”) on March 24, 2005, seeking reinstatement of its application on the ground that WPVI allegedly would not operate permanent DTV facilities on channel 6.⁸ In a February 13, 2007 decision (“Petition Dismissal”), the Bureau dismissed the Petition.⁹ Lehigh filed the AFR on March 15, 2007.

II. THE COMMISSION SHOULD DISMISS OR DENY THE AFR BECAUSE THE BUREAU’S PETITION DISMISSAL WAS PROPER

Lehigh presents three questions for review based on two arguments. First, Lehigh submits that the Petition Dismissal was faulty because it allegedly did not address Lehigh’s substantive arguments.¹⁰ Second, Lehigh asserts that it need not comply with Section 73.525 because WPVI’s digital coverage on channel 64 adequately offsets the loss of coverage on analog channel 6.¹¹ Specifically, Lehigh argues that it should be able to subtract the number of viewers who reside within WPVI’s DTV contour from the number of analog channel 6 viewers

⁶ Deficiency Letter, at 2.

⁷ See Letter from George H. Gwinn, Supervisory Engineer, Audio Division, Media Bureau, to John Crigler, Esq. (Feb. 16, 2005) (“Letter Dismissal”).

⁸ WPVI does not, as Lehigh asserted, have any present plan or intention to cease analog operations and operate only in digital prior to the end of the DTV transition. See AFR, at 5, n. 11.

⁹ See Letter from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, to Lehigh Valley Community Broadcasters Assoc., Inc. (Feb. 13, 2007) (“Petition Dismissal”).

¹⁰ AFR, at 3-4.

¹¹ AFR, at 5-7.

predicted to receive interference from WDIY. It also claims that it should receive special consideration because of its “rare” situation.¹² ABC addresses each of these arguments below.

A. The Bureau Did Not Err by Denying the Petition on Procedural Grounds

The Bureau initially rejected the Application in the July 22, 2003 Deficiency Letter because Lehigh failed to show compliance with Section 73.525; however, the Bureau also provided Lehigh with the opportunity to file a curative amendment within thirty days.¹³ The curative amendment needed to show that WDIY’s proposal would not cause interference to more than 3,000 persons within the WPVI channel 6 analog contour. Lehigh did not respond to the Deficiency Letter. Thus, on February 16, 2005, the Bureau justifiably dismissed the Application for failure to file a timely curative amendment. Following the Application dismissal, WDIY filed its Petition without the required channel 6 interference showing. Accordingly, the Bureau dismissed WDIY’s Petition for, among other reasons, WDIY’s failure to file a timely curative amendment.¹⁴ And now, over three and a half years after the initial deadline, WDIY still has not filed a curative amendment (or any engineering support at all) in its AFR. In sum, Lehigh repeatedly and willfully has failed to provide adequate information regarding WDIY’s channel 6 interference required by Section 73.525. Therefore, the Bureau did not err by denying the Petition for Lehigh’s failure to submit the required curative amendment and Lehigh’s failure to submit the curative amendment provides sufficient reason to dismiss or deny the AFR.

¹² *Id.*

¹³ Deficiency Letter, at 1-2. The Application showed the interference area on a map but did not state the number of persons affected. Section 73.525(c) limits the number of persons interfered with to 3,000 or 4,000 if filters are provided.

¹⁴ Petition Dismissal, at 2.

Further, because the Bureau previously addressed Lehigh's substantive arguments in the Deficiency Letter, it was not "prejudicial procedural error"¹⁵ for the Bureau to not engage in a detailed discussion of these same arguments again in the Petition Dismissal. Specifically, in the Deficiency Letter, the Bureau provided a seven-paragraph analysis of Lehigh's DTV "back out" argument and concluded that it was unacceptable for four specific reasons.¹⁶ Because Lehigh's Petition essentially repeated the same arguments set forth in its Application and rejected in the Deficiency Letter, there was no need for the Bureau to address them again in its Petition Dismissal.¹⁷ Because the Bureau adequately addressed Lehigh's substantive arguments, the Commission should dismiss or deny the AFR.

B. The Commission Should Not Permit WDIY to Increase Power Based on its Strained Reading of Section 73.525

In the remainder of the AFR, Lehigh essentially argues that WPVI's digital coverage should be "backed out" of the Section 73.525 analysis and that the Bureau's refusal to do so was in error. Section 73.525 generally requires NCE FM stations to protect TV channel 6 stations but provides NCE FM stations with some flexibility in calculating their predicted interference. Specifically, under Section 73.525(e)(3), the Commission permits NCE FM stations to reduce the population within the channel 6 interference area by not counting those who receive the same or similar service from an analog satellite station, translator station or, in some cases, full power, station affiliated with the same network. Lehigh asked the Bureau to, and now asks the Commission to, treat a station's digital coverage the same way that the FCC treats these other

¹⁵ See 47 C.F.R. § 1.115(b)(2)(v).

¹⁶ Deficiency Letter, at 1-2.

¹⁷ Petition Dismissal, at 1 ("The petition stated that the applicant had not amended its TV Channel 6 interference...showing because it was unsure at the time if WPVI would continue to operate on channel 6 after the DTV conversion. Furthermore, Lehigh reiterates the same argument it presented in the original application that resulted in the deficiency letter.")

overlapping coverage sources because digital coverage allegedly is “analogous” to analog coverage.¹⁸ Specifically, WDIY wants to “back out” or subtract the population within WPVI’s DTV contour from its calculation of interference to WPVI’s analog population coverage. In other words, if an analog WPVI viewer would receive interference from WDIY, that viewer should not “count” as being interfered with if the viewer also lives within the relevant WPVI-DT contour.

The Commission must reject WDIY’s strained “backing out” theory and dismiss the AFR for two primary reasons. First, as a procedural matter, the Commission should reject WDIY’s argument because it effectively is requesting a change to Section 73.525 through an adjudicatory proceeding instead of through a rulemaking.¹⁹ Second, the Commission should not extend the “backing out” flexibility in Section 73.525 to a station’s digital coverage because the relationship between a station’s analog service and digital service is fundamentally different than the relationship between a TV station’s analog service and an analog satellite, translator or same-network station for which “backing out” is permitted. Specifically, analog satellite, translator and same-network stations, by definition, generally serve substantially *different* areas and populations than a primary analog station; digital television stations, by definition, generally serve the *same* area and population as the primary analog station. Consequently, the overlap

¹⁸ AFR, at 6.

¹⁹ The text of Section 73.525(e), as Lehigh concedes, pre-dates DTV service and thus contains no mention of digital stations. The Commission simply cannot add DTV stations to the rule through the instant proceeding. Instead, if Lehigh wants the Commission to permit NCE FM applicants to deduct persons covered by digital television operations, in addition to those covered by translator, satellite and same-network stations, then it must seek an amendment of 73.525(e)(3). See, e.g., *In re Application of Pine Bluff Radio, Inc.*, 14 FCC Rcd 6594, 6599 (1999) (requested changes in methodology for determining “radio markets” are best addressed in the context of a rulemaking); *Great Empire Broadcasting, Inc.* 14 FCC Rcd 11145, 11148 (1999) (finding it inappropriate to address arguments for a change in rules “where third parties, including those with substantial stakes in the outcome, have had no opportunity to participate, and in which we, as a result, have not had the benefit of a full and well-counseled record”).

between an analog TV station versus a translator, satellite or same-network station typically is small; in contrast, the overlap between an analog station and DTV station is extensive, if not completely duplicative. In fact, the Commission allotted, and stations built, DTV facilities whose contours would replicate their analog contours.²⁰ Were the Commission to adopt Lehigh's "interpretation," and "back out" populations within a station's DTV contour, it would "back out" virtually everyone and render the protections set forth in Section 73.525 meaningless.²¹

In addition, a digital station, unlike an analog satellite, translator or same network station, is not an adequate replacement for loss of analog service from a full power analog station. To obtain replacement programming from the sources presently listed in Section 73.525, a viewer need only "turn the channel" from its old programming source, the channel 6 analog TV station, to the new analog station, available on a different analog channel. In contrast, a viewer would need a DTV tuner and possibly a different TV receiver altogether to access the digital station. Although some viewers may have access to a digital station, many likely do not. Thus, a digital station cannot serve as a replacement service comparable to the replacement services already listed in Section 73.525. Accordingly, the Commission should reject WDIY's suggested reading of Section 73.525 and dismiss or deny the AFR.

²⁰ See Deficiency Letter, at 2 ("Digital television allotments were chosen to permit the digital TV signal to duplicate, as nearly [as] possible, existing analog television coverage.")

²¹ *Id.*

C. WDIY Has Not Shown Any Special Circumstances that Would Warrant Extraordinary Relief

In addition to its “backing out” theory, WDIY also argues that it should be able to increase power in violation of Section 73.525 because that is the only way not to “disenfranchise” listeners after the DTV transition in this “rare case” in which it cannot protect itself from interference.²² Specifically, Lehigh posits that it should be able to violate Section 73.525 so that WDIY’s signal is not “utterly decimated” when WPVI transitions to digital operation.²³ Not only is this claim untimely but Lehigh offers no engineering support or technical data to substantiate its claims regarding its signal post-DTV transition.²⁴ Thus, neither the Commission nor ABC can evaluate the merits of Lehigh’s interference claims. Further, it is unlikely that Lehigh’s interference claims are accurate given that the ERP of channel 6 TV stations is decreasing significantly post-DTV transition while the power of NCE FM stations remains the same.²⁵ Thus, interference from a channel 6 station to an NCE FM station, if any actually occurred, likely would decrease post-DTV transition rather than increase. At the very least, the lower power levels for digital channel 6 TV stations like WPVI increase the importance of applying the protections set forth in Section 73.525.²⁶

²² AFR, at 4-6.

²³ AFR, at 4.

²⁴ Nor does Lehigh cite any rule section that would be violated if WPVI did in fact interfere with WDIY post-DTV transition.

²⁵ See Engineering Statement, at 2. For example, WPVI’s analog ERP is 74.1 kW and its post-transition ERP presently is shown as 2.5 kW.

²⁶ Lehigh also argues that its violation of Section 73.525 would be proper in this “rare case” in which a TV station is operating on channel 6 now and after the DTV transition. AFR, at 4. However, of the eight stations planning to operate on channel 6 post-transition, five already are operating on channel 6 now. See Appendix B, *supra* note 3.

Further, it is WPVI, not WDIY, that has faced difficult and relatively unique circumstances that bear on the present dispute. WPVI's analog channel is 6 and its allotted DTV channel is 64. WPVI has been on the air with a digital signal on channel 64 since November 1998. WPVI-DT could not operate permanently on channel 64, however, because channel 64 was outside the "core," and thus unavailable for post-transition DTV operation. Because of the well-known issues surrounding the suitability of channel 6 and other low-VHF channels for DTV operations,²⁷ ABC was compelled to forego making a channel election for WPVI-DT in round one of the Commission's channel election procedure and instead elected to participate in the second round of DTV channel elections (in lieu of selecting channel 6). After completing tests showing that DTV operations on channel 6 could be technically feasible, WPVI amended its channel election and chose channel 6.²⁸ This was a difficult decision reached only after a careful balancing of interests—WPVI's interest in certainty and a speedy resolution, the interests of WPVI's viewers (including continuity), the interest of other stations in the nation's fourth largest television market and throughout the northeast corridor, a negotiated channel arrangement that effectively removed the only suitable replacement channel from the pool of available channels (which WPVI initially opposed), and the general public interest. Now, WDIY's strained interpretation of Section 73.525 and associated interference to channel 6 threatens to upset this delicate balance and negate the one clear benefit to WPVI of selecting channel 6—certainty. The Commission should restore this certainty so that WPVI may move on with the DTV transition by promptly dismissing the AFR.

²⁷ See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Report and Order*, 19 FCC Rcd 18279, n.129 (2004).

²⁸ The Commission approved this amendment and awarded WPVI a tentative channel designation on channel 6. See Tentative Channel Designations for Stations Participating in the First Round of DTV Channel Elections and Second Round Election Filing Deadline, *Public Notice*, 20 FCC Rcd 15735 (2005).

III. CONCLUSION

As demonstrated above, Lehigh has failed to show that the Bureau erred in any way. It was not error for the Bureau to dismiss WDIY's Application on procedural grounds. Further, even if the Bureau was required to address Lehigh's "substantive" arguments, it did so adequately in the Deficiency Letter and Petition Dismissal. Lehigh's arguments are without merit and lead to nonsensical results. Ultimately, as the Bureau stated in its Deficiency Letter, WPVI "should be permitted [to operate DTV facilities on Channel 6] without undue interference from FM noncommercial educational stations."²⁹ For these reasons, ABC urges the Commission to dismiss or deny the AFR.

Respectfully submitted,

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March 30, 2007

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²⁹ Deficiency Letter, at 2.

ENGINEERING EXHIBIT

ABC, INC.,

**TELEVISION STATION WPVI, FACILITY ID 8616
CHANNEL 6 – 74.1 KW (NTSC) – 332 METERS HAAT**

PHILADELPHIA, PENNSYLVANIA

ENGINEERING STATEMENT

ENGINEERING EXHIBIT

**ABC, INC.,
TELEVISION STATION WPVI, FACILITY ID 8616
CHANNEL 6 – 74.1 KW (NTSC) – 332 METERS HAAT
PHILADELPHIA, PENNSYLVANIA**

ENGINEERING STATEMENT

Introduction

ABC Inc. is the licensee of WPVI (TV), Philadelphia, Pennsylvania. WPVI operates NTSC analog facilities on channel 6 with an effective radiated power of 74.1 KW at a height above average terrain of 332 meters as described in its license which bears FCC File Number BLCT-2282. This license also describes the facilities that were used as the basis for DTV replication facilities.

WPVI began operation on September 13, 1947 and has been serving Philadelphia continuously since that date.

WDIY Power Increase Application

WDIY operates on FM Channel 201, which is 88.1 MHz with 0.10 KW ERP and a directional antenna with an HAAT of 257 meters. The License which describes the WDIY presently licensed operation is described in BLED-19941214KA.

In BPED-19990823IA, WDIY proposes to increase its ERP by a factor of four and specifies a directional antenna with a different directional pattern, at the presently licensed site. This application bears FCC File Number BPED-19990823IA.

Channel 6 occupies the band of frequencies between 82 and 88 MHz. The FM Broadcast band begins at 82 MHz and continues to 108 MHz. There is no guard band to provide additional protection from interference. Television stations that operate on channel 6 noticed increasing interference from FM stations as these facilities became more numerous in the 1970's and early 1980's. Studies were performed to learn the criteria under which interference could be expected. As a result of these studies, in December of 1984, the FCC formalized the protection to channel 6 television stations by incorporating Section 73.525, and the associated graphs in Section 73.599 into the Rules.

**ABC, Inc., Facility ID 8616
Television Station WPVI
Philadelphia, Pennsylvania
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The WDIY application for Construction Permit that is captioned above specifies a transmitter location that is 60.2 kilometers (37.4 miles) distant from the WPVI transmitter.

Table A in Section 73.525(a)(1) specifies that FM stations that are less distant than 265 kilometers from a channel 6 television station must afford protection from interference to the channel 6 television station. In the instant case, the distance between sites of 60.2 KM is considerably less than the 265 kilometers that is stated in the Commission's Rules.

The present protection to channel 6 television stations is based on operation in Zone I with a maximum channel 6 ERP of 100KW. Because of the WPVI antenna height, WPVI operates with an ERP of 74.1 KW.

The Commission has proposed much lower operating powers for VHF stations post transition operation. The maximum ERP of 100 KW that is allowed for NTSC operation is reduced by 10 dB or more for subsequent operation of DTV facilities. WPVI will reduce its ERP by at least 11.9 dB when DTV operation on channel 6 is first inaugurated, and could be constrained by as much as 14.7 dB

Clearly, without proper study of the interference mechanism that causes FM broadcast stations that operate at low FM frequencies to interfere with television stations operating on channel 6, no reduction in protection from interference to channel 6 television stations is warranted. The required reduction of ERP for DTV operation without an equal reduction of ERP from a nearby FM station that is operating on low FM frequencies will afford less protection from interference to DTV stations.

Although the WDIY transmitter site is located just beyond the present WPVI Grade A contour, the post transition DTV signal, although a much weaker value will be above the level that the Commission has defined as sufficient to provide coverage of the city of license. Within that contour, it is a realistic expectation that interference-free reception should be possible.

It has been shown historically that the low VHF channels are less than an optimum place in the spectrum for DTV operation. In spite of this fact, several television stations have found that, because of congested conditions in the remaining television spectrum, unique conditions in their particular market, or as in the case of WPVI, a combination of these situations, no other channel could accommodate the post-transition operation of WPVI except channel 6.

**ABC, Inc., Facility ID 8616
Television Station WPVI
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Conclusion

The protection provided from Section 73.525 must remain in place to provide some assurance to stations that find they must operate on channel 6 as their post-transition channel. This is particularly evident when proper consideration is given to the fact that television stations will be required to substantially reduce their ERP when DTV operations replace former NTSC operations, but no reduction of FM station ERP will be required.

Certification

This statement, and the associated calculations, the results of which are contained in this statement, were prepared by me and are believed to be true and correct to the best of my knowledge and belief.

A handwritten signature in dark ink, appearing to read "Alfred E. Resnick". The signature is stylized with a large, looped initial "A" and a cursive-style name.

Alfred E. Resnick, P. E.

Dated: March 30, 2007
Writer's Telephone: 703 569-7704

CERTIFICATE OF SERVICE

I, Dayle Jones, of Akin Gump Strauss Hauer & Feld, LLP, certify that a copy of the foregoing Opposition to Application for Review, filed on behalf of ABC, Inc., was served via first-class mail on this 30th day of March 2007, upon the following:

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