

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

In the Matter of)

Application of)

Nelson TV, Inc.)

For Minor Modification of the Licensed Facility of)
WSPY-LD)
)
)

Accepted / Filed

OCT - 6 2016

Federal Communications Commission
Office of the Secretary

File No. 0000013459

Facility ID No. 187840

REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION

Weigel Broadcasting Co. ("Weigel"), licensee of Class A television station WMEU-CD, Chicago, Illinois ("WMEU"), respectfully submits this Reply in support of Weigel's Petition for Reconsideration¹ of the Media Bureau's grant of the captioned application (the "Application"), which authorizes LPTV station WSPY-LD ("WSPY," formerly WAUR-LD) to move to a new transmitter site located only 81 kilometers from Chicago despite having obtained its original construction permit in a rural filing window that required WSPY to maintain at least a 121 kilometer separation from Chicago.² Nelson's only defense of its actions on the merits is its assertion that WSPY's relocation did not violate any Commission rules or policies,

¹ Weigel Broadcasting Co., Petition for Reconsideration, File No. 0000013459 (filed Sept. 16, 2016) ("Petition").

² This Reply to the Opposition of Nelson-TV, Inc. ("Nelson"), which was served on Weigel by mail, is timely filed pursuant to 47 C.F.R. §§ 1.4(h) and 1.106(h).

and that in the absence of such a violation, grant of the Application cannot be challenged on public interest grounds.³ Nelson is mistaken on both counts.

First, as Weigel explained in its Petition, the relocation proposed in the Application violates the key condition under which Nelson's predecessor, DTV America Corporation ("DTV America"), was granted WSPY's construction permit. Specifically, the Commission granted DTV America a construction permit for WSPY in a filing window intended "[t]o ensure continued service for viewers of low power television (LPTV) and TV translator stations *in the rural portions of the United States* and to assist stations *in these areas* with their transition to digital."⁴ Accordingly, applications could be filed in the rural filing window only if their proposed transmitting antenna site coordinates were located more than 121 kilometers from the reference coordinates of the top 100 Nielsen DMAs, including Chicago.⁵ WSPY's permit contained the explicit condition "that *any future modification* will not result in a relocation within 121 km of the top 100 markets as described in" the *Digital LPTV Licensing PN*.⁶ The Video Division in 2013 correctly rejected WSPY's previous attempt to evade this condition.⁷ Yet Nelson contends that the restriction on future relocations applied only to WSPY's construction permit, not to any resulting license, and that Nelson therefore may nullify the

³ See Nelson-TV, Inc., Opposition to Petition for Reconsideration, File No. 0000013459, at 2, 3-4 (filed Sept. 29, 2016) ("Opposition").

⁴ *Commencement of Rural, First-Come, First-Served Digital Licensing for Low Power Television and TV Translators Beginning August 25, 2009*, Public Notice, 24 FCC Rcd 8911, 8911 (MB 2009) ("*Digital LPTV Licensing PN*") (emphasis added).

⁵ *Id.* at 8912, 8915.

⁶ See File No. BNPDTL-20100721DRE (emphasis supplied). The permit was issued under prior call sign W29EI-D.

⁷ See *LPTV Application of DTV America Corporation*, Letter, File No. BMPDTL-20130618AAH (MB Vid. Div. Aug. 12, 2013).

restriction simply by momentarily licensing a facility that complies with the rural window's conditions and then immediately moving WSPY to a non-rural site.⁸

The Commission should reject Nelson's irrationally narrow reading of the *Digital LPTV Licensing PN* and of the construction permit WSPY obtained pursuant to that Public Notice. Nelson's argument elevates form over substance and would render meaningless the fundamental distinction established in the *Digital LPTV Licensing PN* between the rural filing window and the anticipated general filing window. Having explicitly established a special filing window for applications "[t]o ensure continued service for viewers of low power television (LPTV) and TV translator stations in the rural portions of the United States," it would be arbitrary and capricious for the Commission to endorse Nelson's effort to obtain the benefit of having filed in the rural filing window while providing minimal — if any — service to rural areas,⁹ particularly without any explanation from the Commission of this sudden policy reversal.¹⁰ The more logical reading of *Digital LPTV Licensing PN* and WSPY's construction permit is that a station built under a construction permit obtained in the rural filing window must continue to serve rural areas (meaning areas at least 121 km away from the top 100 markets), both before and after licensing. The Application violates this restriction and thus should be denied.

⁸ Opposition at 3-4.

⁹ See *Am. Tel. & Tel. Co. v. FCC*, 836 F.2d 1386, 1388, 1390 (D.C. Cir. 1988) (rule requiring "carriers to refund earnings they receive in excess of the expected rate of return on capital factored into their rates" was arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce"). As the Petition noted, it is unclear whether WSPY has provided even temporary service to its current community of license. See Petition at 4 n.11.

¹⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

Even if the Application technically complied with the Commission's rules and policies — which it does not — Nelson is incorrect that such compliance places the Application beyond challenge. To the contrary, Section 309(a) of the Communications Act requires the Commission to determine with respect to each license application “whether the public interest, convenience, and necessity will be served by the granting of such application.”¹¹ In the related context of transaction reviews, the Commission has made clear that its public interest analysis is not limited to verifying that an application technically complies with existing rules. Rather, even if an application “would not violate a statute or rule, we consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.”¹² The Commission then “employ[s] a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.”¹³

Here, Nelson's Application harms the public interest both by frustrating the explicit goal of the rural filing window in which WSPY obtained its construction permit and by causing new interference to more than 39,000 viewers of WMEU. Nelson asserts that the new interference caused by WSPY's proposed modification is permitted under the Commission's rules.¹⁴ But the fact that the Commission has determined that, on balance, the public interest *in most cases* is served by permitting a certain level of interference does not preclude a public interest determination that such interference disserves the public interest in a particular case.

¹¹ 47 U.S.C. § 309(a).

¹² *Applications of Charter Commc'ns, Inc., Time Warner Cable Inc., & Advance/Newhouse P'ship*, Mem. Op. & Order, 31 FCC Rcd 6327, 6336 (2016)

¹³ *Id.*

¹⁴ Opposition at 2-3.

Such is the case with Nelson’s Application. Although Nelson argues that the “public interest benefits [of its Application] are irrefutable,”¹⁵ Nelson in fact has never identified any affirmative public interest benefit that would be achieved by granting the Application, either in the Application itself or in Nelson’s Opposition. Rather, both the Application and the Opposition appear to take for granted that the relocation proposed in the Application serves the public interest so long as it violates no rules. That may be so in a typical case with respect to applications presenting no unusual public interest harms. But Nelson’s Application is not typical. In this case, granting the Application would cause concrete public interest harms without any identified offsetting benefits.

Finally, Nelson challenges Weigel’s standing to file the Petition by erroneously claiming that Weigel failed to “show good reason why it was not possible for [it] to participate in the earlier stages of the proceeding,” as required by Section 1.106(b)(1) of the Commission’s rules.¹⁶ In fact, however, the Petition explained that Weigel could not have participated in the proceeding at an earlier stage because the Commission granted the Application only two days after placing the Application on public notice.¹⁷ The Commission has stated that it will “accord[] standing to petitioners for reconsideration who failed to file pre-grant objections when prompt staff action ‘effectively precludes participation during the initial consideration of an application’ — such as when an application is granted four or five days after Public Notice of its

¹⁵ Opposition at 3.

¹⁶ Opposition at 1-2 (citing 47 C.F.R. § 1.106(b)(1)).

¹⁷ See Petition at 1 n.1 and 2 n.2; Broadcast Applications Report No. 28795, at 11 (Aug. 10, 2016).

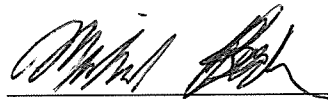
acceptance.”¹⁸ For the same reason, Weigel has standing to seek reconsideration of the staff’s grant of Nelson’s Application.¹⁹

CONCLUSION

For the reasons set forth above and in the Petition, the Media Bureau should enforce the conditions under which WSPY was authorized and deny WSPY’s Application.

Respectfully submitted,

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October 6, 2016

¹⁸ *Association for Community Education*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12684 (2004) (citing *Aspen FM, Inc.*, 12 FCC Rcd 17852, 17854 (1997), and *Ted and Jana Tucker*, 4 FCC Rcd 2816 (1989)).

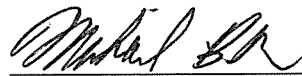
¹⁹ As Weigel noted in the Petition, although the Commission’s Licensing and Management System indicates that the Application was granted on August 12, 2016, there apparently has been no public notice of the grant of the Application. Nonetheless, out of an abundance of caution, Weigel has assumed *arguendo* that the Commission’s subsequent August 17, 2016, public notice — which again identified the Application as having been accepted for filing — constitutes “the date of public notice of the final Commission action” on the Application for purposes of Section 1.106(f). See Broadcast Applications Report No. 28800, at 6 (Aug. 17, 2016).

CERTIFICATE OF SERVICE

I, Michael Beder, an associate at Covington & Burling LLP, hereby certify that on this 6th day of October, 2016, I caused a copy of this Reply in Support of Petition for Reconsideration to be served by U.S. First Class mail, postage prepaid, and by electronic mail upon the following:

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