

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

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In the Matter of)	
)	
Amendment of Section 73.622(i),)	MB Docket No. 08-204
Final DTV Table of Allotments,)	RM-11492
Television Broadcast Stations.)	
(Vanderbilt, Michigan))	

**MEMORANDUM OPINION AND ORDER
AND
ORDER
(Proceeding Terminated)**

Adopted: September 30, 2008

Released: September 30, 2008

By the Chief, Video Division, Media Bureau:

I. Introduction

1. The Bureau, upon delegated authority, has before it for consideration a petition for reconsideration of the Video Division's letter of July 10, 2008 returning the petition for rulemaking filed by Cadillac Telecasting, Co. (CTC) licensee of television station WFUP(TV), analog channel 45 and pre-transition digital channel 59, Vanderbilt, Michigan, which requested the addition of channel 45 as its post-transition DTV channel. For the reasons set forth below, we grant CTC's petition for reconsideration, reinstate and grant its petition for rulemaking, and add channel 45 as WFUP(TV)'s post-transition DTV channel.

II. Background

2. In its petition for rulemaking, CTC noted that the previous owner of WFUP(TV) represented to the Commission that it did not wish to incur the expense of digital conversion and that it would cease analog operations on February 17, 2009, and surrender the license for WFUP(TV).¹ Based on this representation, WFUP(TV) was not assigned a digital allotment in the post-transition DTV Table of Allotments.² CTC indicated that it had recently acquired WFUP(TV) and desired to continue operating the station in digital and requested that its analog channel 45 be allocated as the station's post-transition digital channel.³

3. In its July 10, 2008 letter returning CTC's petition for rulemaking, the Video Division indicated that, when the Commission lifted the freeze with respect to certain DTV filings, it stated that the

¹ See Petition for Rulemaking at 1-2.

² See *Seventh Report and Order*, MB Docket No. 88-268, 22 FCC Rcd 15581, 15630 ¶117 (2007).

³ See Petition for Rulemaking at 2.

freeze was only lifted with respect to “channel substitutions to the DTV Table” and that “we will not, at this time, accept petitions for allotment of DTV channels for new stations . . .”⁴ Because WFUP(TV) did not have a post-transition DTV channel, the Video Division found that CTC’s request was for a new channel and not for a channel substitution.⁵ Because the filing of petitions seeking the allotment of new DTV channels is not yet permitted, the Video Division found that it could not accept CTC’s petition for rulemaking. The Video Division noted that, at such time as petitions for new channels are permitted, CTC may again seek the allotment of a new digital channel at Vanderbilt, Michigan, and, if such channel is allotted, submit an application for a new digital station.

4. In its petition for reconsideration, CTC argued that the Video Division mischaracterized its petition for rulemaking.⁶ CTC maintains that the station has been providing service on its existing analog channel 45 since 1992, and CTC is seeking to preserve the station’s existing service by the assignment of channel 45 as its post-transition channel. For these reasons, CTC argued its proposal should not have been characterized as applying for a “new station.” CTC stated that it acquired WFUP(TV) and assumed responsibility for its digital transition on October 31, 2007. CTC described the previous owner’s decision not to build a pre-transition digital facility as “unwise and not in keeping with the FCC’s and Congress’ intent that station viewers should not lose service but rather should enjoy a smooth transition to digital over-the-air reception.”⁷ CTC concluded that “WFUP(TV) has provided service already for many years and merely seeks to be accorded the same treatment as nearly all other existing television stations. . . .”⁸ To rule otherwise, CTC contended, would create a large loss of service inconsistent with Commission intent and precedent.

III. Memorandum Opinion and Order

5. Based upon the petition for reconsideration, we conclude that the unique facts of this case justify reinstating the rulemaking petition for our consideration. WFUP(TV) is currently providing analog FOX network service to approximately 140,000 viewers residing within its Grade B contour, as well as to cable systems. Unlike the previous licensee of WFUP(TV), CTC is willing to construct a post-transition digital facility to continue to provide service to its viewers. Congress has mandated that after February 17, 2009, full-power broadcast stations may no longer transmit analog signals. Thus, without the digital facility CTC seeks to construct, viewers in seven Michigan counties in the north and east portions of the current analog station’s service area will lose local service from a major network affiliate.⁹ We believe the public interest is best served by considering CTC’s petition for rulemaking at

⁴ See Letter to Gregg P. Skall, Esq., from Clay C. Pendarvis, Associate Division Chief, July 10, 2008 (July 10, 2008 Video Letter). See also “Commission Lifts Freeze On the Filing of Maximization Applications and Petitions for Digital Channel Substitutions, Effective Immediately,” *Public Notice*, DA 08-1213, released May 30, 2008.

⁵ See July 10, 2008 Video Letter at 1.

⁶ See Petition for Reconsideration at 2.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ The remainder of the station’s service area would continue to receive Fox programming from co-owned station WFQX-DT, Cadillac, Michigan.

this time. CTC's petition for rulemaking is therefore reinstated.

IV. Order

6. We believe the public interest would be served by adding channel 45 as the post-transition DTV channel for WFUP(TV) and there is good cause to allot channel 45 without first providing notice and comment of this action. In the *Third DTV Periodic Review Report and Order*, the Commission provided:

“Therefore, in light of the urgent need to finalize post-transition facilities so that all full power stations can complete the transition by February 17, 2009, we delegate to the Media Bureau the authority to amend the DTV Table of Allotments and Appendix B to the DTV Table of Allotments as needed up to the full power transition deadline. Such proceedings at the Bureau level may be expedited as necessary, including being conducted without notice and comment where good cause is found because the requested change does not adversely affect any other station's post-transition operations.”¹⁰

7. CTC's request to add channel 45 as the post-transition DTV channel for WFUP(TV) is the type of proceeding that the Commission intended to be expedited on delegated authority pursuant to the special procedures set forth in the *Third DTV Periodic Review Report and Order*. The addition of channel 45 as the post-transition DTV channel for WFUP(TV) will not adversely affect any other station's post-transition operations. Our action today simply preserves the status quo. WFUP(TV) is currently using channel 45 for its analog operations and its post-transition digital use has obtained international clearance and would not interfere with the existing or permitted digital operations of any other station. More importantly, allotting WFUP(TV), a Fox affiliate, a post-transition digital channel will serve the public interest by preserving service to approximately 140,000 viewers within WFUP(TV)'s analog Grade B contour. Households within the television market served by WFUP(TV) are more likely to depend on over-the-air reception than the average U.S. household. Nationally, according to the Nielsen Company, as of September 2008, approximately 11.9% of U.S. television households rely exclusively on over-the-air reception.¹¹ Within the Traverse City-Cadillac, MI DMA, approximately 16.1% of television households rely exclusively on over-the-air reception.¹² Furthermore, because of winter weather concerns and the time needed to construct a digital facility, we must act now to add channel 45. CTC maintains that “in light of the harsh weather that characterizes Michigan winters, unless construction can begin imminently, the requested facility could not possibly be fully built, tested and operational by mid-February.”¹³ Therefore,

¹⁰ See Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Report and Order*, 23 FCC Rcd 2994, 3002 (2007), citing 5 U.S.C. § 553(b)(3)(B) (allowing for implementation without notice and comment if good cause exists where “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

¹¹ Staff estimates are based on data provided by the Nielsen Company. Media usage household estimates are as of July 2008; television household estimates are projected for January 2009.

¹² *Id.*

¹³ See Petition for Reconsideration at 6.

were we to follow the more lengthy Table of Allotments rulemaking procedures, including first issuing a notice of proposed rulemaking and allowing a period for public comment, that process would take several months and we could not ensure that WFUP(TV) is awarded a post-transition channel in time to complete construction prior to the onset of winter conditions, and begin operating by the February 17, 2009 transition date.

8. DTV channel 45 can be added at Vanderbilt, Michigan as proposed, in compliance with the principle community coverage requirements of Section 73.625(a) of the Commission’s rules, at coordinates 45-10-12 N. and 84-45-04 W. In addition, we find that this channel meets the technical requirements set forth in Sections 73.616 and 73.623 of the Commission’s rules for station WFUP(TV) with the following specifications:

City and State	DTV Channel	DTV Power (kw)	Antenna HAAT (m)	DTV Service Pop. (thous.)
Vanderbilt, Michigan	45	108	324	215

9. For the reasons stated above, pursuant to Section 553(d)(3) of the Administrative Procedure Act,¹⁴ we find good cause exists to make this channel change effective 14 days from publication in the Federal Register. An expedited effective date is necessary in this case in order to expedite processing of the station’s post-transition DTV application and to ensure that it is able to complete construction prior to the DTV transition.

10. Accordingly, IT IS ORDERED, That the petition for reconsideration of Cadillac Telecasting Co. IS GRANTED.

11. IT IS FURTHER ORDERED, That pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 155(c)(1), 303(g), 303(r), and 307(b), and Sections 0.61, 0.204(b) and 0.283 of the Commission’s rules, 47 C.F.R. §§ 0.61, 0.204(b), and 0.283, IT IS ORDERED, That effective (14 days from publication in the Federal Register) the DTV Table of Allotments, Section 73.622(i) of the Commission’s rules, 47 C.F.R. § 73.622(i), IS AMENDED, with respect to the community listed below, to read as follows:

<u>City and State</u>	<u>Channel No.</u>
Vanderbilt, Michigan	45

12. IT IS FURTHER ORDERED, That not later than 45 days of the effective date of this Order, Cadillac Telecasting Co. shall submit to the Commission a minor change application for a construction permit (FCC Form 301-DT) specifying DTV channel 45 for station WFUP(TV).

13. The Commission will send a copy of this Memorandum Opinion and Order and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional

¹⁴ 5 U.S.C. § 553(d)(3).

Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Shaun Maher, Video Division, Media Bureau, (202) 418-2324.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau