



Federal Communications Commission
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Re: KVLY-TV, Fargo, North Dakota
Facility ID No. 61961
KRDK-TV, Valley City, North Dakota
Facility ID No. 49134
Petition for Waiver of Section 73.682(d)

Dear Counsel:

This is in reference to Gray Television Licensee, LLC's ("Gray") Petition for Waiver and Request for Reassignment of PSIP Channels ("Petition"). Gray requests a waiver of section 73.682(d), which requires digital broadcast television signals to comply with ATSC A/65C ("ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1 dated May 9, 2006") ("PSIP Standard").¹ Specifically, Gray requests that virtual channel 4 be reassigned from station KRDK-TV, Valley City, North Dakota to KX4, which operates on the .2 stream of station KVLY-TV, Fargo, North Dakota, RF channel 44, virtual channel 11. Gray submits that KRDK-TV be assigned to virtual channel 38, or other available virtual channel. Parker Broadcasting of Dakota Licensee, LLC (Parker),² licensee of station KRDK-TV, Valley City, North Dakota opposes the Petition. We deny Gray's Petition.

The PSIP Standard explains, "For broadcasters with existing NTSC licenses, the major channel number for the existing NTSC channels, as well as the digital virtual channels, controlled by the

¹ 47 C.F.R. §73.682(d) (incorporated by reference, see §73.8000).

² Parker Broadcasting Licensee, LLC is owned by Major Market Broadcasting of North Dakota, Inc. (Major Market Broadcasting).

broadcaster, shall be set to the current NTSC RF channel number.”³ Here, pursuant to the PSIP Standard, KRDK-TV should operate on virtual channel 4, as the station’s former NTSC license was for operation on NTSC RF channel 4.⁴

In the *Second Periodic Review*, the Commission states, “To the extent broadcasters have a unique situation that is not provided for in PSIP, the Commission may grant exceptions on a case-by-case basis.”⁵ Petitioners assert that they have “unique situation,” as contemplated by the *Second Periodic Review*,⁶ that warrants waiver of the PSIP Standard. Gray states that waiver of the PSIP Standard and reassignment of virtual channel 4 from KRDK-TV, Valley City, North Dakota to KX4, which operates on the .2 stream of KVLY-TV, Fargo, North Dakota, is necessary to avoid viewer confusion among cable customers in the Fargo-Valley City, North Dakota Designated Market Area (“DMA”).⁷ Gray explains that the reassignment of virtual channel 4 is needed to ensure multichannel video programming distributors (MPVD) position KX4’s CBS affiliated programming on channel 4.⁸

As background to its reassignment request, Gray states that in 2014 it acquired the Fargo CBS affiliation previously aired on KRDK-TV⁹ through a series of related transactions, which included (i) Gray acquiring of KVLY-TV; (ii) Gray terminating the shared service and joint sales agreement for station KRDK-TV (CBS affiliation); and (iii) Gray orchestrating the transfer of control of station KRDK-TV to Major Market Broadcasting.¹⁰ Gray states that it then launched the CBS affiliation, previously aired on KRDK-TV, virtual channel 4, on KX4, virtual channel 11.2, a digital multicast channel of

³ PSIP Standard, Annex B at 1.1. The terms “virtual channel” and “major channel” are often used interchangeably. Pursuant to the PSP Standard, however, the “two-part” channel number navigational concept is called a virtual or PSIP channel. The first part of the two-part number is called the “major” channel number and the second part of the channel number is called the “minor” channel number. The minor channel number identifies one program service within the group of services defined by the major number. *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, FCC 04-192, 19 FCC Rcd 18279, 18346, para.153 (2004) (“*Second Periodic Review*”).

⁴ *Id.* Gray submits as one its arguments that KRDK-TV is a new station entering the market given that since acquiring its new ownership, FCC File No. BTCCDT - 20140925ACK (granted Dec. 4, 2014), Parker has changed its call sign twice, acquired new affiliations, and was silent from November 30, 2014 until May 20, 2015. Petition at 4. If treated as new station entering the market, which did not previously hold an NTSC license, KRDK-TV would be assigned its RF channel, channel 38, as its virtual channel, so long as that virtual channel is not currently in use in the market. Annex B at 1.2, 1.4. We reject this argument, KRDK-TV is not a new station entering the market; KRDK-TV previously held an NTSC license in the market; the facility has been licensed for decades to Valley City, North Dakota. FCC File No. BLCT-1564. Furthermore, as also stated by Parker, the following have no bearing on a station’s status as an existing station which previously held an NTSC license for PSIP Standard purposes: (1) switching network affiliations; (2) a brief period of silence in compliance with section 312(g), 47 U.S.C. § 312(g) (1996); or (3) switching call signs. Opposition at 2- 3, 5. Therefore pursuant to the PSIP Standard KRDK-TV is treated as a broadcaster with an existing NTSC license and should operate on virtual channel 4.

⁵ *Second Periodic Review* at 18346, para.153 (2004).

⁶ *Id.*

⁷ Petition at 2.

⁸ *Id.* at 4.

⁹ The call sign at the time was KXJB(TV).

¹⁰ Petition at 3 (citing *Hoak Media, LLC*, 29 FCC Rcd 3640 (2014); *see also* File Nos. BTCCDT-2013220GUG *et al.*).

KVLY-TV.¹¹ MVPD providers, however, continued to carry KX4's CBS programming on channel 4.¹² Gray explains that Parker is now seeking MVDP mandatory carriage rights on channel 4 for station KRDK-TV.¹³

Gray claims that this waiver of the PSIP Standard and request for virtual channel reassignment is warranted as the Division has previously approved the swap of virtual channel numbers when two stations voluntarily swapped network affiliations.¹⁴ Gray explains viewers are accustomed to finding CBS affiliated programming on channel 4 and are not "familiar with KRDK's programming on any particular channel."¹⁵ Gray concludes that the reassignment of virtual channel 4 supports the Bureau's recognition that the PSIP Standard permits digital broadcasters to retain their existing brand identity as a result of years of marketing and advertising.¹⁶ Gray also notes that the request is technically feasible.¹⁷

In opposition to Gray's Petition, Parker asserts that Gray is attempting to "suppress competition" by depriving KRDK-TV of "its commercially valuable, VHF-range major channel number."¹⁸ Parker states that neither the PSIP Standard, Commission Rules, nor precedent allows for "one television licensee to seize for its own use another, unwilling licensee's major channel number."¹⁹ Parker also explains that CBS programming has been aired on KVLY-TV's virtual channel 11.2 since December 2014, therefore, it will in fact cause over-the-air viewer confusion to change channels yet again and go back to finding CBS programming on virtual channel 4.1.²⁰ Parker states that while precedent allows for virtual channels to be swapped with network affiliations when parties mutually agree; there is no precedent for an "involuntary PSIP change simply because a network affiliation went from one party to another."²¹ Finally, Parker states that Gray profited through positive press that it orchestrated the transfer of control

¹¹ *Id.* at 3.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.* at 7 (citing Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau, to Weigel Broadcasting Co., c/o Mace Rosenstein at 2 (Aug. 16, 2012) (*Weigel Broadcasting*)). Gray asserts that its waiver request is similar to the "unique situation," which warranted waiver of the PSIP Standard for Weigel Broadcasting Company in South Bend, Indiana. *Id.* at 9.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 9 (citing *Request for Declaratory Ruling by Meredith Corporation and "Alternative PSIP Proposal" by PMCM TV, LLC for WJLP (formerly KVNV(TV)), Middletown Township, New Jersey*, Declaratory Ruling, 30 FCC Rcd 6078, 6104, para.159 (MB 2015) (One reason Bureau rejected PMCM's proposal to use the same major channel number, but different minor channel numbers as stations with overlapping contours, was because it would dilute the incumbent stations local brand identification on the virtual channel) (*PMCM*). Gray also notes and distinguishes its Petition from PMCM's waiver request as it is seeking to remove station KRDK-TV from virtual channel 4, not share the channel. Petition at 9, n.22.

¹⁷ *Id.* at 8-9.

¹⁸ Opposition at 2.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 6.

²¹ *Id.* at 7.

of KRDK-TV to a minority broadcaster, but now seeks to remove one of the station's most valuable assets – its low channel positioning.²²

In Reply, Gray states that it has diligently attempted to resolve and work out a solution with Parker over the use of virtual channel 4 and that Parker has rejected supporting the virtual channel reassignment, absent a substantial compensation.²³ Gray rejects Parker's claim that Gray is attempting to devalue or suppress KRDK-TV's commercial viability; Gray notes for example the low price that Gray arranged for Major Market Broadcasting to purchase Parker and the assistance it offered Major Market Broadcasting when it began operating KRDK-TV.²⁴ Gray also reiterates that Fargo viewers are accustomed to viewing CBS programming on channel 4²⁵ and offers that KRDK-TV seek another available low virtual channel number in the market.²⁶ Gray concludes that it is proud that it ensured that a minority broadcaster acquired KRDK-TV.²⁷

Based on the record before us, we find that Gray's petition for waiver of the PSIP Standard and reassignment of virtual channel 4 is denied. The *Second Periodic Review* provides that waiver of the PSIP Standard is to be evaluated on a case-by-case basis for those unique situations that are not accounted for by the PSIP Standard.²⁸ Gray's assertion that its waiver request is similar to the "unique situation," which warranted waiver of the PSIP Standard for Weigel Broadcasting Company in South Bend, Indiana is inapposite. In *Weigel Broadcasting*, the Video Division granted the PSIP Standard waiver request so that a programming swap, performed to facilitate superior signal strength for network programming, between two commonly owned stations could be accomplished transparently for over-the-air viewers.²⁹ Here, the fact pattern is very different. Most importantly, KVLV-TV and KRDK-TV are not commonly owned and KRDK-TV objects to the virtual channel reassignment. Furthermore, KVLV-TV does not have a virtual channel to swap with KRDK-TV. Gray is suggesting that KRDK-TV somehow find a new virtual channel outside of the PSIP Standard. We understand that Gray is attempting to preserve its CBS affiliation on channel 4; however, Gray must have mutual agreement from KRDK-TV for this waiver request to be considered.

Furthermore, as stated by Gray, Gray is requesting this waiver and virtual channel reassignment to avoid viewer confusion among cable customers in the Fargo-Valley City, North Dakota DMA.³⁰ In adopting the PSIP Standard, the Commission recognized that use of major channel numbers would allow "broadcasters to maintain their local brand identification."³¹ However, this statement is to be taken in context of over-the-air television; not MPVD carriage. Therefore, Gray's request for virtual channel 4 to

²² *Id.* at 8.

²³ Reply at 2.

²⁴ *Id.*

²⁵ *Id.* at 4.

²⁶ *Id.* at 3.

²⁷ *Id.* at 4.

²⁸ *Second Periodic Review* at 18344, para. 153.

²⁹ *Weigel Broadcasting Co* at 2.

³⁰ Petition at 2.

³¹ *Id.*

ensure its CBS programming is carried on channel 4 by MVPD systems is not relevant to the intent of the PSIP Standard, as adopted by the Commission.³²

Accordingly, based on our review of the facts and circumstances as set forth above, Gray Television Licensee, LLC's request for waiver of section 73.682(d) to reassign virtual channel 4 from station KRDK-TV, Valley City, North Dakota to KX4, which operates on the .2 stream of station KVLV-TV, Fargo, North Dakota, IS DENIED. Parker Broadcasting of Dakota Licensee, LLC is directed to continue operating station KRDK-TV on virtual channel 4. Gray Television Licensee, LLC is directed to use virtual channel 11 for all KVLV-TV, Faculty ID No. 61961, broadcasts.³³

Sincerely,

Hossein Hashemzadeh
Deputy Chief, Video Division
Media Bureau

³² *PMCM* at 6083, para. 13 (cable carriage and channel position rights is beyond scope of virtual channel designation proceeding for over-the-air-viewers).

³³ Gray's KX4 CBS programming is authorized only to broadcast on major channel 11. Gray may choose any of its available minor channel numbers for KX4's operation on major channel 11.