

### **THIRD AMENDMENT TO CORE PROGRAMMING PROCESSING GUIDELINES CERTIFICATION**

Upon further review of the children's programming reports for WXAX-CD (the Station), it was determined that the Station was in compliance with the core children's programming processing guidelines in Q1 2019. Specifically:

- In Q1 2019, the station's children's programming report lists the average number of hours of Core Programming per week broadcast by the station on its main program stream as 6 hours, meaning that the station aired twice the required amount of Core Programming on its primary stream during the quarter. Additionally, the report indicates that the average number of hours per week of free over-the-air digital video programming broadcast by the station on other than its main program stream was 336.0 hours, representing two 24/7 multicast channels, and the average number of hours per week of core programming broadcast by the multicast channels was 0 hours. Although the 3 additional hours of children's programming that aired on the primary channel could be attributed to one of the multicast channels, this left a shortfall of 3 hours of core programming on the other multicast channel.
- However, under the Commission's processing guidelines, broadcast stations may demonstrate compliance by airing three hours per week of Core Programming *averaged over a six-month period*. In Q4 2018, the Station aired 6 hours of Core Programming on its primary program stream and had no multicast channels. Accordingly, the excess 3 hours from Q4 2018 may be applied to Q1 2019, thus making up for the apparent 3-hour shortfall in Q1 2019.

**Waiver Request.** Although the Station is now able to demonstrate compliance in Q1 2019, the Station did not have sufficient Core Programming in Q2 2019 and Q3 2019 (through September 15, 2019).

Specifically, in Q2 2019, the Station aired an average of 6.0 hours of Core Programming on its primary program stream per week, and an average of 0.5 hours of Core Programming on its two multicast channels. Thus, under the applicable rules at the time, the Station should have aired an average of 9.0 hours of Core Programming per week, leaving a shortfall of 2.5 hours.

In Q3 2019 (an 11-week period due to the rule changes effective September 16, 2019), the Station aired an average of 4.0 hours of Core Programming on its primary program stream per week,<sup>1</sup> and an average of 3.0 hours of Core Programming on its two multicast channels. Thus, under the applicable rules at the time, the Station should have aired an average of 9.0 hours of Core Programming per week, leaving a shortfall of 2.0 hours.

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<sup>1</sup> As noted in a previous amendment, the children's programming report inadvertently indicated that only 3.0 hours were broadcast on the primary program stream. The correct number is 4.0 hours.

However, as demonstrated in a previous amendment, when measured cumulatively, the station aired 28.23 hours of core children's programming on its primary program stream over the 5-quarter period from the Third Quarter of 2018 to the Third Quarter of 2019, when only 15 hours of such programming was required.

Licensee respectfully requests a limited waiver to apply a portion of this additional 13.23 hours of unique Spanish-language Core Programming airing on the main program stream to cover the 2.5 hours shortfall on the multicast channel in Q2 2019, and the 2.0 hour shortfall on the multicast channel in Q3 2019.

A Commission rule may be waived for good cause shown.<sup>2</sup> In particular, waiver of a rule is appropriate where the particular facts make strict enforcement of a rule inconsistent with the public interest.<sup>3</sup> Waiver of a Commission rule is appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest and will not undermine the policy underlying the rule.<sup>4</sup> In addition, the Commission may take into account considerations of equity or more effective implementation of overall policy on an individual basis.<sup>5</sup>

Importantly, licensee is not seeking a waiver of a statutory requirement. Rather, the Children's Television Act of 1990 ("CTA") tasked the Commission with establishing appropriate implementing rules, including CTA-related license renewal processing guidelines.<sup>6</sup> Licensee submits that a limited waiver of the multicast-related aspects of the Commission's processing guidelines in place in the Second and a portion of the Third Quarters of 2019<sup>7</sup> is justified in the limited special circumstances presented here, and that strict enforcement of the rule would be inconsistent with the public interest of renewing the license of a station that has demonstrated its commitment to airing Core Programming.

Specifically, since acquiring the Station in November 2017, licensee has demonstrated its dedication to serving the educational and informational needs of children by airing far more than the minimum amount of required Core Programming in the quarters prior to 2Q 2019. As shown from the summary above, the Station aired 13.23 hours of excess Core Programming for all quarters from Fourth Quarter of 2017 through the Fourth Quarter of 2018. It would be inappropriate not to recognize the Station's dedication to Core Programming and provide a limited waiver for the Second Quarter of 2019, and a limited period in the Third Quarter of 2019,

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<sup>2</sup> 47 C.F.R. § 1.3 (providing for suspension, amendment, or waiver of Commission rules, in whole or in part, for good cause shown).

<sup>3</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>4</sup> *Northeast Cellular*, 897 F.2d at 1166; *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127-128 (D.C. Cir. 2008).

<sup>5</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

<sup>6</sup> 47 U.S.C. § 303b.

<sup>7</sup> 47 C.F.R. § 73.671(e)(2)(i). Notably, this processing guideline changed substantially in the Third Quarter of 2019, and a waiver would have been unnecessary under the new processing guidelines implemented as of September 16, 2019. 84 Fed. Reg. 41917 (Aug. 16, 2019).

by attributing some of this excess Core Programming to make up the minor shortfall of Core Programming on the multicast channels in those quarters.

In sum, as required by the CTA, the Station has “served the educational and informational needs of children through the licensee's *overall programming*, including programming specifically designed to serve such needs.”<sup>8</sup>

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<sup>8</sup> 47 U.S.C. § 303b(a)(2) (emphasis added).