

**Explanation of WUNF-TV’s Circumstances Rendering It
“Unable to Construct” the Reassigned Facility Specified in the
Incentive Auction Closing and Channel Reassignment Public Notice**

Pursuant to Sections 1.3 and 73.3700(b)(1)(iv) of the Commission’s Rules¹ and Section III.A.5 of the Media Bureau’s *Broadcast Transition Procedures Public Notice*,² this “unable to construct” waiver request respectfully requests waiver of the Commission’s July 12, 2017, filing deadline for (i) submission of WUNF-TV’s initial minor change construction permit application on FCC Form 2100 (Schedule A) and (ii) submission of WUNF-TV’s estimated reimbursement expenses³ on FCC Form 399.⁴

As observed by the Media Bureau in the *Broadcast Transition Procedures Public Notice*, WUNF-TV must show “good cause” for granting this request.⁵ Further, the

Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission’s rules is appropriate only if both (i)

¹ 47 C.F.R. § 1.3; 47 C.F.R. § 73.3700(b)(1)(iv).

² Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broadcast Transition, Public Notice, 32 FCC Rcd 858 (MB 2017), ¶¶ 24-26 (“Broadcast Transition Procedures Public Notice”); see also Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Report and Order, 29 FCC Rcd 6567 (2014), *aff’d*, Nat’l Assoc. of Broadcasters, et al. v. FCC, 789 F.3d 165 (D.C. Cir. 2015) (“Incentive Auction R&O”), ¶ 554 & n.1571 (finding that “unable to construct” “stations would include those that cannot submit a construction permit application for their assigned channel because they are unable to construct at their current tower site due to technical or legal issues”).

³ *See Broadcast Transition Procedures Public Notice* 32 FCC Rcd 858, nn.41, 180 (noting that “unable to construct” stations that are granted a waiver of the July 12 construction permit filing deadline will also be granted a waiver of the July 12 deadline for submission of estimated reimbursement expenses on Form 399).

⁴ The deadline for filing the instant waiver request is June 12, 2017, which means this request is being timely filed. *See Incentive Auction Closing and Channel Reassignment Public Notice; Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced*, Public Notice, DA 17-314 (WTB Apr. 13, 2017), ¶ 70.

⁵ *See Broadcast Transition Procedures Public Notice*, 32 FCC Rcd 858, n.36.

special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *See id.*⁶

For the reasons discussed below relating to WUNF-TV’s involuntary channel relocation circumstances, the public interest counsels strongly in favor of grant of this waiver request. Indeed, without a finding that the licensee is “unable to construct” WUNF-TV’s reassigned Site 1 facility and without a grant of this waiver request, it is unclear how and when WUNF-TV’s channel reassignment could be effectuated.

WUNF-TV is licensed to operate from two sites using a distributed transmission system (“DTS”) facility. *See* BLEDT-20120615ACE (specifying two licensed sites). This “unable to construct” waiver request applies only to Site 1 of WUNF-TV.

WUNF-TV’s Site 1 is located on Mount Pisgah, on a tower (ASR #1035173) owned by Sinclair Broadcast Group (“SBG”), which is sited on land owned by the U.S. Government and controlled by the U.S. Forest Service. SBG’s full power television station WLOS broadcasts from the same site, but WLOS has not been reassigned to a new channel. *See Incentive Auction Closing and Channel Reassignment*, Public Notice, DA 17-314 (Apr. 13, 2017), ¶ 69, Technical Parameters File.

Mount Pisgah is a mountain in the Blue Ridge Mountains of North Carolina with an elevation of 5,721 feet with the closest access point located off the Blue Ridge Parkway.⁷ The WLOS broadcast antenna from the Mount Pisgah tower is reportedly the highest television antenna east of the Mississippi River.⁸ The maintenance of the tower in a pristine mountain range has been somewhat controversial, as the transition to digital broadcasting resulted in an eight-year struggle with conservation groups and the Blue Ridge Parkway over whether a new tower would be permitted.⁹

Transporting of equipment up the mountain to the SBG tower site has historically been accomplished by a funicular (cable car) that runs up the side of the mountain. There is a pedestrian access point to the site from the Blue Ridge Highway, but the pedestrian path is only for pedestrians

⁶ *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd 858, n.36.

⁷ *See* Danny Bernstein, *Hike to the Top of Asheville’s Most Recognizable Peak*, available at <https://www.exploreasheville.com/stories/post/mount-pisgah-trail/>.

⁸ *See* Wikipedia, *Mount Pisgah (North Carolina)*, available at [https://en.wikipedia.org/wiki/Mount_Pisgah_\(North_Carolina\)](https://en.wikipedia.org/wiki/Mount_Pisgah_(North_Carolina)); Jeff Clark, *Mt. Pisgah, Pisgah National Forest and Blue Ridge Parkway*, Meanderthals Hiking Blog (Sept. 1, 2012 / Aug. 4, 2015), available at <http://internetbrothers.org/2012/09/01/mt-pisgah-pisgah-national-forest-and-blue-ridge-parkway/>.

⁹ *See* Wikipedia, *Mount Pisgah (North Carolina)*, available at [https://en.wikipedia.org/wiki/Mount_Pisgah_\(North_Carolina\)](https://en.wikipedia.org/wiki/Mount_Pisgah_(North_Carolina)).

(it is approximately 1½ miles long and is a rigorous uphill hike¹⁰), and it cannot be used for heavy equipment transportation such as the transmitter, antenna, and other equipment that will be required to effectuate WUNF-TV’s reassignment to its new channel.

On January 30, 2015, the North Carolina Department of Labor ordered that the funicular be shut down, until the facility is either repaired or replaced to meet certain state standards. **To date, the funicular remains out of service, and no definitive date has been provided to WUNF-TV as to an estimated repair/replacement date or a restoration of service date.** And, in addition to the uncertainty surrounding the *timing* of the restoration of service, as of this date WUNF-TV has not been provided with information relating to the *capacity* that a new/repaired funicular system would be able to accommodate; thus, even if funicular service were to be restored in time for WUNF-TV to theoretically complete its Site 1 channel reassignment construction in a timely fashion, it is unknown whether the funicular service would actually be able to accommodate the transport of the heavy equipment required for the channel reassignment. Without the use of the funicular, it is not possible to reasonably deliver WUNF-TV’s new, necessary equipment to the site (or to remove WUNF-TV’s existing equipment from the site). The licensee referenced these challenges nearly two years ago in its Form 381 filing, excerpted below:

WUNF-TV’s DTS site #1 is located on Mount Pisgah. This site has always been a difficult environment in which to work but has recently become even more difficult. There is no road access to WUNF-TV’s transmitter building or tower on Mount Pisgah. Instead, there is a cable-drawn rail car system that has historically provided access to the site. Recently, the rail car system failed a safety inspection and was condemned. Major repairs are required to reinstate the use of the rail car system. Significantly, the rail car system is not owned by the station licensee, which means that its safety, operations, and very existence are beyond the control of the license of WUNF-TV. (The rail car system is owned by the tower owner, Sinclair Broadcast Group.)

As of the time this Certification is being filed, the only access to the WUNF-TV site is on foot using a 1½ mile hiking trail that winds up the opposite side of Mount Pisgah from the transmitter site and rail car system. As a result, the only way currently to get heavy equipment to the site is by helicopter. Under these circumstances—which are beyond the control of the licensee of WUNF-TV—antenna replacement in a repacking scenario would be extremely difficult because the WUNF-TV antenna is side-mounted on the tower about 100 feet below the top of the tower structure. Similarly, performing a channel change on the transmitter would be challenging as a result of the extraordinary logistics of getting the materials to the site. Finally, if WUNF-TV were to be repacked to a lower channel, the licensee would face the separate and additional challenge of attempting to fit the necessary RF filters into the transmitter building due to the extremely limited space in the building. Even if permission could be obtained to expand the building, that whole process would be beyond the control of WUNF-TV’s licensee.

See WUNF-TV, FCC Form 2100, Schedule 381 (LMS File No. 0000003321, filed July 7, 2015).¹¹

¹⁰ See Danny Bernstein, *Hike to the Top of Asheville’s Most Recognizable Peak*, available at <https://www.exploreasheville.com/stories/post/mount-pisgah-trail/>.

¹¹ The legal circumstances surrounding the Mount Pisgah funicular have been covered by the local press as well. See, e.g., Mike Cronin, *State: Tram to Pisgah Tower Operating Without Permit*, ASHEVILLE CITIZEN-TIMES (Feb. 18 / 19, 2016), available at <http://avlne.ws/1XAcMlt>; Mike Cronin, *NC: WLOS tram “Likely to Cause Death,”* ASHEVILLE CITIZEN-TIMES (Aug. 31 / Sept. 1, 2016), available at <http://www.citizen-times.com/story/news/local/2016/08/31/nc-wlos-tram-likely-cause-death/89542566/>.

Moreover, the site’s climactic zone renders construction difficult—if not impossible—for several months of the year between late autumn and spring when snowfall and ice hazards are common on Mount Pisgah. The relevance of the climate in this particular case is obvious: because the licensee has no information as to when the funicular will be reconstructed and pass inspection by the N.C. Department of Labor for use, it is impossible to make reasonable or adequate plans for procurement and delivery of necessary components for use at the site. In normal times—i.e., with an operational equipment transportation and delivery system—the licensee would need to schedule delivery and construction around the late autumn/winter months, but here it isn’t possible to take weather into account until the licensee knows for certain when the funicular operations will be legally restored.

Furthermore, helicopter transport of the equipment necessary to effectuate WUNF-TV’s channel change is neither possible nor safe. While a helicopter has been used in the past to install an antenna on the tower—the current WLOS top-mounted antenna was installed using a helicopter—it is not possible to use a helicopter to (i) transport materials such as WUNF-TV’s new transmitter, RF systems, etc. to the site, (ii) remove existing broadcast equipment from the site, or (iii) install WUNF-TV’s side-mounted antenna approximately 100-plus feet below the top of the tower. Critically, the site lacks an appropriate area on which a helicopter could land (or onto which a helicopter could lower equipment to the ground from the air). In addition, even if there were an appropriate location, it would then be impossible to transport large equipment such as a new transmitter from the landing area into the transmitter building because there are no vehicles at the site (and without a functioning funicular there is no way to bring up the mountain a vehicle or other equipment necessary to move heavy loads around the site). Moreover, before the new transmitter could be installed, the old transmitter would have to be removed from the building, and there is no area at the site to use as a staging area for temporary storage of equipment that is either awaiting removal from the site or awaiting installation into the building. Finally, installation of WUNF-TV’s antenna would be extremely difficult and dangerous because it is a side-mount antenna, which means that during the pick and installation, a helicopter would have to steer clear at all times of the 100-plus feet of tower that rises above the location of WUNF-TV’s side mount slot.

For the reasons described above, as of the date of this filing, the circumstances compel the licensee to treat WUNF-TV’s Site 1 reassignment as “unable to construct,” and the licensee, for good cause shown, respectfully requests a waiver of the July 12 filing deadline for its construction permit application and its Form 399.

Should the Commission Staff seek additional information or documentation relating to the status of the funicular, the licensee will provide it upon request.

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