



Federal Communications Commission
Washington, D.C. 20554

April 9, 2018

KTV Media, LLC
Larry Mortin
P.O. Box 23808
Little Rock, AR 72221

Re: Request for Modification and
Waiver of Phase Assignment
KKAF-CD, Siloam Springs, AR
Facility ID No. 52432
LMS File No. 0000048960

Dear Licensee,

On March 23, 2018, KTV Media, LLC (KTV Media), the licensee of Class A Station KKAF-CD, Siloam Springs, Arkansas (KKAF-CD or Station), filed a *Request for Modification and Waiver of Phase Assignment*, requesting to modify the post-incentive auction transition phase assigned to the Station in the *Closing and Channel Reassignment Public Notice* from Phase 2, and instead transition on April 15, 2018, with a testing period to commence immediately prior.¹ For the reasons below, we grant KTV Media's request for waiver and modify KKAF-CD's phase assignment to permit it to transition to its post-auction channel on April 15, 2018 and commence testing immediately prior, subject to completion of applicable consumer education requirements and any required notice to multichannel video programming distributors (MVPDs).²

Background. Pursuant to the *Transition Scheduling Adoption Public Notice*, individual stations may request waiver and modification of their phase assignment.³ A waiver is appropriate where the particular facts would make strict compliance inconsistent with the public interest and deviation from the general rule would relieve hardship, promote equity, or produce a more effective implementation of overall policy on an individual basis.⁴ The Media Bureau (Bureau) has stated it will evaluate such

¹ See *Incentive Auction Closing and Channel Reassignment Public Notice: The Broadcast Television Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced*, Public Notice, 32 FCC Rcd 2786 (WTB & MB 2017) (*Closing and Channel Reassignment Public Notice*). See LMS File No. 0000048960, Extraordinary Excuse KKAF-CD Waiver of Phase Assignment (Waiver Request).

² Repacked stations are required to conduct consumer outreach efforts including providing on-air viewer notifications in the form of public service announcements as well as on-screen crawls at least thirty (30) days prior to transitioning to their post-auction channels. See 47 CFR § 73.3700(c). To the extent applicable, repack stations are also required to provide MVPDs with notice ninety (90) days prior to transitioning. See 47 CFR 73.3700(d). As discussed in greater detail below, KTV Media has also committed to additional consumer education efforts beyond those required by the Commission's rules. See Waiver Request at 2.

³ See *Incentive Auction Task Force and Media Bureau Adopt a Post-Incentive Auction Transition Scheduling Plan*, MB Docket No. 16-306 and GN Docket No. 12-268, 32 FCC Rcd 890, 912-14, paras. 47-52 (MB 2017) (*Transition Scheduling Adoption Public Notice*).

⁴ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); 47 CFR § 1.3 (waiver for good cause shown). See also *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 913-14, para. 51 and n.171.

requests on a case-by-case basis to assess the impact on the transition schedule, including the impact on other broadcasters as well as viewers, in order to facilitate a timely and orderly transition.⁵ The Bureau determined that it would view favorably requests that are compliant with the Commission's rules and have little or no impact on the transition schedule.⁶ Requests that the staff determines would be likely to delay or disrupt the transition schedule will be viewed unfavorably.⁷

KKAF-CD is currently licensed to operate on channel 33. It was reassigned to channel 24 in the *Closing and Channel Reassignment Public Notice* and assigned to transition Phase 2, which has a testing period start date of December 1, 2018, and phase completion date of April 12, 2019. KKAF-CD is located in the Ft. Smith-Fayetteville-Springdale-Rogers, Arkansas, Designated Market Area (Ft. Smith DMA). A total of six stations, including KKAF-CD, were repacked in the Ft. Smith DMA, with five, including KKAF-CD assigned to Phase 2, and one, KWOG, Springdale, Arkansas, permitted to transition on or before April 1, 2018.⁸ KTV Media requests permission to begin testing and commence operation on KKAF-CD's post-auction channel on April 15, 2018, with a testing period immediately prior.

KTV Media mistakenly believed that it was permitted to commence operations on its post-auction channel as soon as it completed construction and it commenced its required over-the-air viewer notifications on March 15, 2018.⁹ KTV Media informed staff that it sought to transition immediately following completion of construction to avoid additional costs for space at tower sites for both its pre-auction facility and its post-auction facility. Upon realizing its mistake, KTV Media immediately contacted staff to discuss how it could receive authority to transition early and subsequently filed the instant request. KTV Media contends that despite its misunderstanding as to when it was permitted to commence operation on its post-auction channel, a waiver is justified.

First KTV Media asserts that its early transition would reduce the number of stations in its linked-station set. While KKAF-CD is part of a linked-station set with four other stations,¹⁰ it is "a blocking station" that must move before one of these stations is permitted to move.¹¹ KKAF-CD itself

⁵ See *id.* at 912-14, paras. 49-52. See also *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Broadcast Transition*, 32 FCC Rcd 858, 881-82, para 73 (MB 2017) (*Broadcast Transition Procedures Public Notice*).

⁶ *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 912-13, para. 49 and n.163.

⁷ *Id.*

⁸ KWOG filed a license to cover for its post-auction channel on March 26, 2018. See LMS File No. 0000034581. On October 6, 2017, the Video Division granted authority to KWOG to transition to its post auction channel on or before April 1, 2018. See LMS File No. 0000029867.

⁹ In particular, KTV Media states that its mistaken belief was caused by the fact that its granted construction permit for channel 24 did not have language restricting [its] start date." This is directly counter to what the Bureau stated in the *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 910-11, para. 44, and what reassigned stations were told in letters that were sent to each station following release of the *Closing and Channel Reassignment Public Notice*.

¹⁰ KKAF-CD is part of linked-station set number 9. Additional information on linked-station set is available at http://data.fcc.gov/download/incentive-auctions/Current_Transition_Files/.

¹¹ KNWA-TV, Rogers, Arkansas, was reassigned to channel 33 in the *Closing and Channel Reassignment Public Notice*. Because KKAF-CD currently operates on channel 33 it is preventing KNWA-TV from commencing operation until KKAF-CD relocates to channel 24. While KNWA-TV would no longer have to coordinate with KKAF-CD, it will continue to be part of a linked-station set with KXNW, Eureka Springs, Arkansas.

has no dependencies preventing it from moving to its post-auction channel. If KKAF-CD were to transition early, it would remove itself from the linked-station set and the other stations would no longer need to coordinate their transition with KKAF-CD. Second, KTV Media states that its early transition will not negatively impact other stations' ability to access resources because KKAF-CD has already completed construction and the consulting engineer needed to conduct a final inspection prior to operation is already scheduled to visit the site in order for it to commence testing immediately prior to April 15, 2018. Third, KTV Media contends that its transition will not increase the burden on viewers as it will not result in any additional rescan periods. KTV Media notes that because KWOG-TV and KKAF-CD are transitioning within approximately 15 days of one another, they should be considered as transitioning in the same rescan period.¹² KTV Media points out that the rescan period for Phase 2 is actually over four months in duration.¹³ As a result, KTV Media argues that the Ft. Smith DMA would continue to only have two rescan periods, which is within the two rescan periods per DMA limitation used in the tool adopted by the Bureau in the *Transition Scheduling Adoption Public Notice* to assign stations to transition phases.¹⁴ Finally, KTV Media commits to conducting viewer outreach beyond that required under the Commission's rules through the use of its Facebook page and KKAF-CD's website.¹⁵

Discussion. Upon review of the facts and circumstances presented, we find KTV Media's request to modify its phase assignment to permit KKAF-CD to transition to its post-auction channel on April 15, 2018, satisfies the requirements for a waiver. A staff analysis confirms that the phase change does not create any new linked-station sets and will not result in new interference above the two percent permitted during the transition.¹⁶ In fact, this early transition removes KKAF-CD from linked-station set number nine. Given that construction of KKAF-CD's facility is complete and the only remaining resource required is a consulting engineer to conduct final testing, we find that an early transition will not delay other transitioning stations' access to resources.¹⁷ We also conclude that KKAF-CD's transition does not create a new rescan period and the total number of rescans periods in the Ft. Smith DMA remain at two.

¹² *Id.* at 2.

¹³ *Id.* Stations are permitted to commence testing and operation on their post-auction channel at any time after the testing period start date, subject to any required coordination. The testing period start date for Phase 2 is December 1, 2018.

¹⁴ *Id.*; see *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 898-99, paras. 20-21.

¹⁵ KTV Media also claims that waiver is justified because of the \$150,000 in cost savings that resulted from it relocating its tower site and because without the instant relief the station would have to go dark as it would not be able to financially support maintaining a tower lease on both its pre-auction and post-auction facility through the start of Phase 2. Waiver Requests at 1. While we are appreciative of its cost savings efforts, KTV Media does not fully explain how these costs savings directly necessitate an early transition. Furthermore, although KTV Media believes it would be forced to go dark without the instant waiver, we find this claim to be unsupported, especially without further information about the station's financial health and whether other sources of funds may be available to support the duplicative tower arrangements.

¹⁶ *Id.* at 897, para. 16 (allowing temporary increased pairwise (station-to-station) interference of up to two percent during the transition period).

¹⁷ For purposes of the Phase Scheduling tool, which was adopted by the Bureau in the *Transition Scheduling Adoption Public Notice* to help establish phase completion dates for each transition phase, the Bureau considered antenna delivery time and tower crew availability to be constrained resources and one of the primary factors in evaluating a station's ability to complete the transition by the deadline assigned to each phase. All other resources were considered to be "unconstrained" and while also important and factored into how long it would take a station to complete its transition, the use of an unconstrained resources is unlikely to impact other station's ability to complete their transition. See *id.* at 937-44, paras. 25-44.

Although KWOG's transition to its post-auction channel occurred on March 26, 2018, both KWOG and KKAF-CD were running their over-the-air announcements at the same time thereby notifying viewers that within a finite period of time (in this case 19-days), they would be required to rescan. Requiring KKAF-CD to cease its announcements could also result in more viewer confusion than just allowing the station to complete its transition in a same timeframe as KWOG. In order to ensure that viewers will be well-informed and can manage the additional rescan, KTV Media has committed to put in place viewer outreach programs beyond those required by the Commission rules through social media and its website. For these reasons we find that grant of the instant waiver request is in the public interest.¹⁸

Accordingly, we **GRANT** KTV Media's *Request for Modification and Waiver of Phase Assignment* and modify the transition phase assignment for KKAF-CD **from Phase 2 and permit the Station to transition to its post-auction channel on April 15, 2018, with a testing period immediately prior, subject to completion of all applicable consumer education and MVPD notice requirements under the Rules,¹⁹ and additional consumer education commitments made in the waiver request.** Furthermore, the KKAF-CD must cease operation on its pre-auction channel on April 15, 2018, upon commencement of operation pursuant to program test authority, or upon the filing of an application for license to cover, whichever occurs first.

Sincerely,

A handwritten signature in blue ink that reads "David Brown / for". The signature is fluid and cursive.

Barbara A. Kreisman
Chief, Video Division
Media Bureau

Cc:
Lori Withrow, Esq.

¹⁸ Our decision should not be considered to be rewarding the failure of KKAF-CD to abide by the requirements of the transition phase schedule, but a decision that takes into the consideration the totality of the facts and circumstances of the case before us.

¹⁹ See 47 CFR §§ 73.3700(c), (d).