

Marquee Broadcasting, Inc.
WDMY-LP
Request for Special Temporary Authority

Request for Special Temporary Authority

By this application, Marquee Broadcasting, Inc. (“Marquee”) requests special temporary authority to operate on the channel proposed in an application requesting displacement from Channel 38 to analog channel 6 (LMS File No. 0000054740, the “Displacement Application”). As explained in the attached Petition for Reinstatement and Waiver, which was filed with the Commission on February 8, 2018, Marquee has been, and remains, unable to return to operation on the Station’s currently licensed analog channel 38, which will in any event will soon be repurposed for non-broadcast use. Although the station holds a construction permit for operation on digital channel 23, that facility is subject to displacement by full-power station WNWO-TV by no later than November 30, 2018. To allow WDMY-LP to resume operations as quickly as possible, and to do so on a channel that will not be subject to imminent displacement, Marquee hereby requests special temporary authority to operate the facilities specified in the Displacement Application during processing of that application.

PLEASE STAMP
AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
MARQUEE BROADCASTING, INC.)	WDMY-LP, Toledo, Ohio,
)	
Petition for Waiver of Section 312(g) of the Communications Act of 1934, as amended)	Facility ID No. 49188
)	

ACCEPTED/FILED

FEB - 8 2018

PETITION FOR REINSTATEMENT AND WAIVER

Federal Communications Commission
Office of the Secretary

Marquee Broadcasting, Inc. ("Marquee"), licensee of low power television station WDMY-LP, Toledo, Ohio (Facility ID No. 49188) ("WDMY," or the "Station"), pursuant to Section 1.3 of the Commission's rules, hereby petitions for reinstatement of the Station's license and requests waiver of Section 312(g) of the Communications Act of 1934, as amended (the "Act") and Section 73.1740(c) of the Commission's rules pertaining to the automatic cancellation of licenses for facilities that have remained silent for a period of twelve consecutive months. As further detailed below, grant of the requested waiver is warranted and is in the public interest.

I. BACKGROUND

A. History of WDMY

Marquee acquired the license of WDMY (then operating under call sign W38DH) on March 27, 2017 from Ventana Television, Inc. ("Ventana")¹ The Station was first licensed in 1992, and except for a brief time during 2002, the station had operated continuously until late December 2016. Immediately prior to suspending operations, Ventana had broadcast Home Shopping Network programming to the Toledo area on the Station. On December 28, 2016, Ventana was forced to suspend operations, and seek STA to remain silent, due to an inability to

¹ See FCC File No. BALTTL-20170131AAF.

obtain an extension of the station's tower lease.² At that time, Ventana was also forced to remove and relocate all of the Station's broadcasting equipment, which had been located at the tower site. Shortly thereafter, Marquee entered into an agreement with Ventana to purchase the authorizations of WDMY and another LPTV station owned by Ventana in Springfield, Illinois. Because of the circumstances surrounding WDMY's suspension of operation, Marquee acquired the authorizations for that station without a tower lease or equipment. Because of the lack of a tower lease or analog equipment, Marquee has never reasonably had the option of rebuilding the station's previously licensed analog facilities.

When it closed on the acquisition of WDMY on March 30, 2017, Marquee believed that it might be able to construct the facilities authorized in the Station's outstanding displacement construction permit, which specified operation on Channel 23,³ or in a permit obtained in the displacement window to be opened after the assignment of channels to full-power stations being repacked as part of the post-auction transition.

Less than a month after Marquee closed on its acquisition of the WDMY licenses, the Commission released the Closing and Channel Reassignment Notice, bringing to a close the incentive auction and assigning post-auction channels to various full-power and Class A television stations.⁴ As part of that repacking of full-power stations, WDMY's outstanding displacement construction permit unfortunately became, for all intents and purposes, worthless. Full-power station WNWO-TV was assigned to operate on Channel 23 at Toledo, Ohio, and to do so in "Phase 1" of the post-auction transition, with a deadline to commence operations on Channel 23 by

² See LMS File No. 0000019610, granted January 4, 2017.

³ FCC File No. BDISDTL-20100303AAB.

⁴ Incentive Auction Closing and Reassignment Public Notice, DA 17-314 (rel. April 13, 2017).

November 30, 2018. As a result, any facility Marquee might have built on Channel 23 could only have been operated for less than two years. In addition, the end of the incentive auction provided confirmation that WDMY's former analog channel – 38 – would be repurposed for non-broadcast use and would no longer be available. In short, there was no circumstance in which WDMY could have resumed operations that would not have led to Marquee being forced to complete a “double-build,” and absorb the expense of constructing two broadcast facilities in short succession for the Station.

In light of these circumstances, as well as the reasonable flexibility the Commission has afforded LPTV stations impacted by the post-auction transition (*e.g.*, extended construction deadlines for outstanding digital LPTV construction permits), Marquee perhaps erroneously expected that the Commission would do the same with LPTV stations in situations such as its own, where strict compliance with Section 312(g) would have required a “double-build.” As a result of this misunderstanding regarding application of Section 312(g) to the Station, Marquee mistakenly failed to request waiver of Section 312(g) prior to the automatic termination of the Station's license on December 29, 2017. Therefore, for the reasons stated below, Marquee is requesting that the Commission waive the application of Section 312(g) to the Station, reinstate the Station's license, and grant an extension of its STA to remain silent until the date that is 90 days after the Station is assigned a new channel on which it will operate after the post-auction transition.

B. Section 312(g) of the Act

Section 312(g) of the Act provides that “[i]f a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period . . . except that the Commission may extend or reinstate such station license . . . to promote equity and fairness.” The FCC resolves

“[q]uestions of equity and fairness” by “conducting a case-by-case analysis of the relevant facts.”⁵ While Marquee recognizes that the Commission’s authority under Section 312(g) is “exercised sparingly,”⁶ Marquee believes that the particular difficulties faced by WDMY as a result of the ongoing repacking of television stations and displacement of low power television stations warrant reinstatement and extension of the WDMY license. Very few, if any stations, may be in the precise situation in which WDMY finds itself, having lost its analog transmission site and being assured of displacement on the digital channel on which it currently holds an authorization, and awaiting the opening of a window in which it can apply for a new channel on which to operate the Station. As a result, equity and fairness require that Marquee be treated similarly to a license holding a new digital LPTV construction permit.

II. DISCUSSION

A. Standard for Extension or Reinstatement

In essence, the extension or reinstatement of the license of a silent station by the FCC pursuant to the authority granted in Section 312(g) of the Act is akin to grant of a waiver. And, the Commission’s may grant a waiver for good cause shown.⁷ A waiver is appropriate where the particular facts make strict compliance inconsistent with the public interest.⁸ In addition, the FCC may take into account considerations of hardship, equity, or more effective implementation of

⁵ *Eagle Broadcasting Group, Ltd.*, 23 FCC Rcd. 588, 600-01, ¶ 25 (2008) (“The Commission and its staff will determine on a case-by-case basis whether any purported equities associated with individual circumstances warrant reinstatement of a license forfeited pursuant to Section 312(g).”), *aff’d sub nom. Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543 (D.C. Cir. 2009).

⁶ *Ernest T. Sanchez, Esq.*, 31 FCC Rcd. 7087, 7089 (2016).

⁷ 47 C.F.R. § 1.3.

⁸ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

overall policy on an individual basis.⁹ Such a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.¹⁰ As demonstrated below, these requirements are met for Marquee’s requested waiver.

B. There is Good Cause for the FCC to Grant the Requested Extension

There is good cause for the Commission to grant Marquee’s request as Marquee’s inability to resume operations within twelve months was due in part of circumstances beyond its control, and any construction undertaken to meet that deadline, if it could have been accomplished at all, would have subjected Marquee to the “double-build” scenario that led the Commission to adopt a “blanket” extension of digital LPTV construction permits. In anticipation of the then-upcoming broadcast television incentive auction, and in recognition of the extreme impact this process would have on LPTV stations, the Commission in December 2015 adopted a number of proposals to mitigate this impact.¹¹ In particular, the Commission extended the digital transition deadlines for analog LPTV stations, as well as the expiration dates for new digital LPTV station construction permits.¹² The Commission recognized that requiring such stations to complete construction of digital facilities where those facilities were subject to further displacement by repacked full-power stations would not be consistent with the public interest. Such stations could be forced to build new facilities twice in rapid succession (the “feared ‘double-build’”), or even construct new facilities only to have that investment be entirely lost if they were unable to find a new channel for

⁹ *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.

¹⁰ *Northeast Cellular*, 897 F.2d at 1166.

¹¹ Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television and Television Translator Stations, *Third Report and Order and Fourth Notice of Proposed Rulemaking*, FCC 15-175 (2015) (the “LPTV Transition Order”).

¹² *Id.*

operation after the transition.¹³ The Commission has also directed the Media Bureau to open, after repacked full power television stations have applied for construction permits for post-transition facilities, a special displacement filing window for displaced LPTV and TV translator stations.¹⁴ While the specific dates of that window have not yet been announced, it is anticipated that it will open within the next few months.

Marquee's WDMY is in essentially the same situation as a station holding a construction permit for a new digital LPTV station. Through no fault of its own, the Station cannot rebuild the facilities authorized in its analog license. Its digital construction permit specifies operation on a Channel that will be unavailable for continued operation in less than one year. In this situation, the same public interest considerations that drove the Commission's conclusions in the LPTV Transition Order – preventing significant expenditures on construction of a facility that could be lost due to repacking – would dictate that WMDY be afforded the same flexibility as a holder of a new digital LPTV construction permit.

C. Grant of Relief is in the Public Interest

Grant of Marquee's requested waiver is in the public interest because it would allow Marquee, or a potential purchaser of the Station's license, to continue the Station's long history of service to the public. WDMY is not a Station that has pushed the boundaries of the Commission's rules by repeatedly suspending operations, but rather has operated almost continuously from its authorization to the time in late 2016 when it lost its tower site. The Commission in 2015 determined that it would serve the public interest to protect LPTV licensees from the burden of facing "double builds" as a result of the post-auction repack. Marquee submits that grant of the

¹³ *Id.* at para. 8-9.

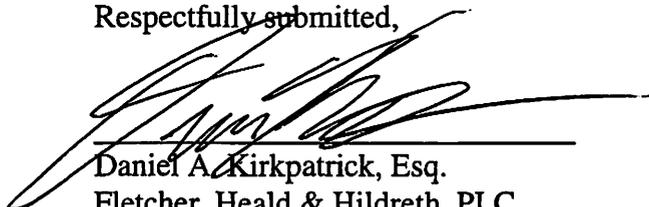
¹⁴ *Incentive Auction Report and Order*, 29 FCC Rcd 6567, at para. 659.

waiver requested here would serve precisely the same public interest. Marquee does not believe that grant of the requested waiver would lead to any significant number of similar waiver requests as there are likely few, if any, stations in the precise situation in which WDMY finds itself – having lost its analog tower site, which was in any event on Channel 38, which will no longer be available for broadcasting, and holding a digital authorization on a channel to which a full-power station has been reassigned in Phase 1 of the repack. Marquee has every desire to return the Station to operation, but the realities of the financial situation of LPTV stations make it difficult to build two station facilities in rapid succession.

CONCLUSION

For the reasons set forth above, Marquee respectfully requests that the Commission reinstate the license of WDMY and grant an extension of special temporary authority to allow the Station to remain silent until 90 days after it has been assigned a new channel in the upcoming LPTV displacement window.¹⁵

Respectfully submitted,



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Date: February 8, 2018

¹⁵ In the alternative, Marquee requests that the Commission grant extension of the silent STA for a period of at least 180 days from its grant to allow Marquee to obtain special temporary authority authorizing analog or digital operation of the Station at temporary facilities. Although this would potentially force Marquee into a “double-build” situation, Marquee would be willing to accept these costs to preserve the Station’s license and the ability for it to provide broadcast service to Toledo in the future.

APPENDIX A

Declaration of Brian Lane

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

MARQUEE BROADCASTING, INC.)

Petition for Waiver of Section 312(g) of the)
Communications Act of 1934, as amended)

WDMY-LP, Toledo, Ohio,

Facility ID No. 49188

DECLARATION OF BRIAN LANE

I, Brian Lane, hereby attest to the following:

1. I am Vice President of Marquee Broadcasting, Inc., licensee of low power television station WDMY-LP, Toledo, Ohio.
2. I have read the accompanying Petition for Reinstatement and Waiver and I am familiar with its contents.
3. To the best of my knowledge, information and belief formed after reasonable inquiry, the factual statements in the Petition are true and correct. To the best of my knowledge, information and belief formed after reasonable inquiry, the Petition is well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and is not interposed for any improper purpose.
4. I declare under penalty of perjury that the foregoing is true and correct.



Brian Lane
Vice President
Marquee Broadcasting, Inc.

Dated: February 8, 2018