

Request for Waiver of 2013 “Maximization” Filing Freeze

Introduction

Pursuant to the instant application, Hearst Properties Inc. (“Hearst”), licensee of WPXT, Portland, Maine (Fac. ID No. 53065) (“WPXT” or the “Station”), proposes to modify the existing repack construction permit granted in LMS File No. 0000034514 (the “Former Licensee’s Repack CP”) by moving the transmit coordinates 34.9 km and increasing WPXT’s maximum effective radiated power (“ERP”) from 190 kW to 500 kW and antenna HAAT from 267 meters to 590 meters. Because this proposal would cause WPXT’s authorized contour—as specified in the Former Licensee’s Repack CP—to expand, this application is a “maximization” application that may be precluded by the contour expansion freeze imposed more than five-and-a-half years ago (the “2013 Pre-Auction Expansion Freeze”). Accordingly, Hearst respectfully requests waiver of the 2013 Pre-Auction Freeze so that this application may be processed in time for Hearst to construct—by the end of Transition Phase 8—WPXT’s post-Auction facility with the parameters and specifications described herein.

Background

While the Station was under prior ownership, WPXT was reassigned from channel 43 to channel 34.¹ Accordingly, the former licensee timely filed its initial minor change application in LMS File No. 0000034514, which the Media Bureau promptly granted. Contemporaneous with the filing of its initial minor change application, the former licensee also filed its (i) initial Form 399 for WPXT (*see* LMS File No. 0000028283, filed July 12, 2017), (ii) initial minor change application in LMS File No. 0000026108 for then-co-owned WPME, Lewiston, Maine, Fac. ID No. 48408 (currently known as “WIPL” and referred to herein as “WPME/WIPL”),² and (iii) initial Form 399 for WPME/WIPL (*see* LMS File No. 0000028284, filed July 12, 2017). At the time, the same entity owned and operated both WPXT and WPME/WIPL, and the two stations were co-located on a tower owned by American Tower Company in Gray, Maine (the “ATC Gray Site”). In October 2017, the former licensee of WPXT filed a modest “maximization” application to slightly increase WPXT’s post-transition ERP from 103 kW to 190 kW, which was granted January 29, 2018. *See* LMS File No. 0000034514 (Former Licensee’s Repack CP).

As referenced in the former licensee’s transition plan filings for WPXT and WPME/WIPL, the former licensee’s transition plan for the two stations contemplated a joined-at-the-hip approach, whereby the two stations would remain at their current location (the ATC Gray Site) and share post-transition transmission equipment. *See* WPXT Form 399, LMS File No. 0000028283 (filed July 12, 2017) (specifying that “A single, top-mounted antenna will be installed to handle both D24 (WPME) and D34 (WPXT), along with a side mounted antenna to initially serve as a temporary antenna for the

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) (“CCR Public Notice”).

² WPME/WIPL has been reassigned from channel 35 to channel 24. *See* CCR Public Notice.

existing D35 (WPME) and D43 (WPXT) during the transition.”); WPME/WIPL Form 399, LMS File No. 0000028284 (filed July 12, 2017) (specifying that “A single, top-mounted antenna will be installed to handle both D24 (WPME) and D34 (WPXT), along with a side mounted antenna to initially serve as a temporary antenna for the existing D35 (WPME) and D43 (WPXT) during the transition.”). Indeed, the initial and second allocations made by the Commission to the former licensee for WPXT and WPME/WIPL were based on estimated repack expenses for the former licensee’s combined transition plan.

While such an approach may have proven to be challenging since the two co-owned, co-located stations were assigned to different Transition Phases (WPXT is assigned to Phase 8; WPME/WIPL is assigned to Phase 3), the former licensee effectively avoided ever having to execute its combo-repack plan by selling WPME/WIPL to an unrelated third party (Ion Media License Company, LLC). The WPME/WIPL transaction was filed with the FCC on December 11, 2017, was granted on January 22, 2018, and was consummated on March 29, 2018. *See* CDBS File No. BALCDT-20171211ACI.

In the meantime, the Commission had already opened and closed the “Second Priority Window” in which repacked full power and Class A stations were permitted to file construction permit applications that would expand their contours beyond then-currently authorized parameters³ and the additional window in which non-repacked full power and Class A stations were permitted to file construction permit applications that would expand their contours beyond then-currently authorized parameters.⁴ Both of these windows required a temporary lifting of the 2013 Pre-Auction Expansion Freeze. During the Second Priority Window, the former licensee of WPXT and WPME/WIPL only filed for a modest expansion of the coverage area of WPXT (and no maximization application was filed for WPME/WIPL).

In July 2018, Hearst and WPXT’s former licensee executed an asset purchase agreement for the acquisition of WPXT by Hearst, and following the September 12, 2018, grant of the assignment application, Hearst acquired WPXT on September 21, 2018. *See* CDBS File No. BALCDT-20180730AAP. Because WPME/WIPL had been sold to an unrelated third party several months prior, the former licensee’s (short-sighted) combined transition plan at the stations’ current site (the ATC Gray Site) was already stale and irrelevant as a practical, operational, and regulatory matter; thus, a new transition plan for WPXT became necessary. Accordingly, by the time of the consummation of the WPXT transaction, Hearst had already conceived of a better plan for WPXT, a plan that will better serve the public interest, bring more service to more consumers, and result in certain efficiencies and

³ *See Incentive Auction Task Force and Media Bureau Announce the Opening of the Second Filing Window for Eligible Full Power and Class A Television Station—October 3 Through November 2, 2017*, Public Notice, 32 FCC Rcd 6989 (MB & IATF Sept. 20, 2017).

⁴ *Freeze on the Filing of Modification Applications to Be Lifted Temporarily to Permit Filing of Applications to Expand the Contours of Full Power and Class A Television Stations That Are Not Part of the Post Incentive Auction Repack Process*, Public Notice, 32 FCC Rcd 7643 (MB Oct. 19, 2017); *Media Bureau Temporarily Lifts the Freeze on the Filing of Minor Modification Applications that Expand the Contour of Full Power and Class A Television Stations from November 28 Through December 7, 2017*, Public Notice, 32 FCC Rcd 9328 (MB Nov. 6, 2017).

greater certainty during the Station's repack construction. Hearst's plan—as embodied in the instant application and in WPXT's updated Form 399 filed November 5, 2018, in LMS File No. 0000028283—is to move WPXT from its current tower site (the ATC Gray Site) to a tower owned by Hearst and already shared by Hearst's co-owned station WMTW, Poland Spring, Maine (Fac. ID No. 73288) (the "Baldwin Site").⁵ As noted above and in the Engineering Exhibit of Chesapeake RF Consultants, LLC, the contour extension that results from Hearst's superior transition plan has necessitated the filing of this waiver request.

Request for Waiver of 2013 Pre-Auction Expansion Freeze

Pursuant to the Commission's waiver standard, the applicant must show "good cause" for granting this request.⁶ 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) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *See id.*⁷

Hearst submits that, with respect to WPXT, such special circumstances are present here.

First, the purposes of the 2013 Pre-Auction Expansion Freeze imposed in April 2013 have been fully served, are no longer critical, and the instant application does not implicate any of the concerns that animated the freeze in the first instance. The purposes of the freeze as described by the Media Bureau when it was imposed five-and-a-half years ago were as follows:

We find that the imposition of limits on the filing and processing of modification applications is now appropriate to *facilitate analysis of repacking*

⁵ Hearst also anticipates that the WPME/WIPL repack facility will be constructed at the Baldwin Site, though WPME/WIPL's current licensee does not appear to have filed an updated Form 399 or minor change application yet. *See* WPXT Form 399, LMS File No. 0000028283 (filed November 5, 2018) (identifying WIPL, Fac. ID No. 48408 as one of the stations that will be sharing Hearst's tower at the Baldwin Site). At the Baldwin Site, WPXT's post-transition facility will *not* share an antenna with the repacked WPME/WIPL facility, and Hearst's transition plan for WPXT is in no way contingent or dependent upon the plans for WPME/WIPL's repack transition.

⁶ *See* 47 C.F.R. § 1.3. *See also, e.g., Broadcast Transition Procedures Public Notice*, 32 FCC Rcd 858, n.36.

⁷ *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd 858, n.36.

methodologies and to assure that the objectives of the broadcast television incentive auction are not frustrated. The repacking methodology the Commission ultimately adopts will be a critical tool in reorganizing the broadcast TV spectrum pursuant to the statutory mandate. Additional development and analysis of potential repacking methodologies is required in light of the technical, policy, and auction design issues raised in the rulemaking proceeding. *This work requires a stable database of full power and Class A broadcast facilities.* In addition, to avoid frustrating the central goal of “repurpos[ing] the maximum amount of UHF band spectrum for flexible licensed and unlicensed use,” we believe it is now necessary to limit the filing and processing of modification applications that would expand broadcast television stations’ use of spectrum.⁸

While no reasonable stakeholder could have debated the paramount importance of a stable database of full power and Class A stations both prior to and immediately following the Incentive Auction, Hearst respectfully submits that the continued need for immutable, rigid stability is now in decline because (i) the Commission has already successfully determined its repacking methodology and implemented the ten-phase nationwide transition plan;⁹ (ii) the Media Bureau has opened and closed the Special Displacement Window for low power television facilities;¹⁰ and (iii) the maximum amount of UHF spectrum has already been identified for repurposing because the Incentive Auction ended more than a year-and-a-half ago.¹¹ Recognizing that the principal purposes of the freeze have been served, the FCC has already *twice* lifted the 2013 Pre-Auction Expansion Freeze *en masse* to allow all full power and Class A television stations—both repacked and non-repacked alike—to file applications to expand their contours. Thus, processing of the instant application for WPXT would not undermine any of the rationales that underpinned the imposition of the 2013 Pre-Auction Expansion Freeze.

Second, ***exactly the same application that Hearst seeks now to file for WPXT could have been filed during the Second Priority Window.*** For whatever reason, the former licensee of WPXT did not see fit to file during the Second Priority Window for authority to provide greater service to a larger number of viewers and only filed for a modest increase in power from the existing ATC Gray Site. It is precisely this short-sighted approach by WPXT’s former licensee that has led to Hearst’s instant request for a waiver of the 2013 Pre-Auction Expansion Freeze; a waiver would not have been necessary had this application been filed during the Second Priority Window. Of course, Hearst was

⁸ Freeze PN, pp. 1-2 (internal footnotes and citations omitted) (emphases added).

⁹ See *Incentive Auction Task Force and Media Bureau Adopt Post-Incentive Auction Transition Scheduling Plan*, Public Notice, 32 FCC Rcd 890 (MB & IATF Jan. 27, 2017).

¹⁰ See *Incentive Auction Task Force and Media Bureau Announce Post Incentive Auction Special Displacement Window April 10, 2018 Through May 15, 2018, and Make Location and Channel Data Available*, Public Notice, 33 FCC Rcd 1234 (MB & IATF Feb. 9, 2018); *Incentive Auction Task Force and Media Bureau Extend Post Incentive Auction Special Displacement Window Through June 1, 2018*, Public Notice, 33 FCC Rcd 3794 (MB & IATF Apr. 18, 2018).

¹¹ See generally CCR Public Notice.

neither the licensee of WPXT during the Second Priority Window nor even in a position to attempt to influence the former licensee to make a better filing during the Second Priority Window.

Third, Hearst's proposal will result in additional television service to more than 400,000 consumers, *see* Engineering Exhibit p. 3, which is *prima facie* in the public interest. Moreover, such expanded service includes the provision of a first over-the-air CW network service—which includes regularly-scheduled and breaking/emergency local news programming produced by Hearst's award-winning news team¹²—to more than 130,000 consumers.¹³ *See* Engineering Exhibit p. 4. A grant of this waiver request will clearly benefit a significant number of consumers who will have access to a new programming service including local news.¹⁴

Fourth, Hearst's proposal is predicted to cause no prohibited interference to any full power, Class A, or low power domestic or Canadian facility. *See* Engineering Exhibit *passim*. As such, as noted above, this application could have been filed during the Second Priority Window without a waiver. In this regard, grant of the waiver request would not compromise any other facility's operations or reception by any consumer of any existing or predicted television service.

Fifth, certain efficiencies—including repack transition efficiencies—will flow from the move of WPXT from the ATC Gray Site to the Baldwin Site. As observed in the Engineering Exhibit, moving WPXT to the Baldwin Site will result in future cost savings. *See* Engineering Exhibit p. 3. More significantly, however, the move to the Baldwin Site will better facilitate WPXT's repack construction project. WPXT is a Phase 8 station, which means that its repack construction schedule may be prone to becoming victim of delays caused by an overscheduled tower services industry.¹⁵ This risk would be materially more likely to come to fruition if WPXT were to remain at the ATC Gray Site because Hearst would have little or no control over the tower services vendor hired to perform repack construction work at the site; in Hearst's experience, ATC controls tower vendor decisions at ATC sites. While it may be reasonable for ATC to make such decisions at the ATC Gray Site, ATC is not the licensee of the stations being repacked and, as such, would be an additional party involved in WPXT's repack project at the ATC Gray Site. In contradistinction, Hearst's control over the tower vendor hiring decision at the Baldwin Site would dramatically increase the likelihood of WPXT's tower services being performed in a timely fashion and consistent with the Station's Phase 8

¹² *See* “WMTW-TV Adds 10 p.m. Newscast on Maine's CW,” *available at* <https://www.wmtw.com/article/wmtw-tv-adds-10-pm-newscast-on-maines-cw/23365464>.

¹³ To Hearst's knowledge, the former licensee of WPXT did not air regularly scheduled news.

¹⁴ As explained in the Engineering Exhibit, WPXT's proposed CP modification will result in a small loss area covering fewer than 6,000 consumers. *See* Engineering Exhibit p. 3. All viewers in the loss area will continue to be served by *at least seven primary facilities*, and Hearst believes that the public interest equities favor the provision of additional service to more than 400,000 consumers over the result of this relatively small loss area.

¹⁵ *See, e.g.,* Broadcast Tower Representatives, *Notice of October 31, 2018, Ex Parte Presentation*, MB Docket No. 16-306; GN Docket No. 12-268 (filed Nov. 12, 2018) (discussing strains on limited resources of tower services industry and potential impacts on repack projects in later phases of nationwide transition).

transition deadline because Hearst—whose station is being repacked—would control the process and already has a strong relationship with a tower services vendor who is committed to taking all necessary steps to ensure timely transitions for all of Hearst’s repacked stations. Moreover, WPXT’s repack reimbursement process would be more efficient at the Baldwin Site because the repacking of WPXT at the Baldwin Site would obviate the need for ATC to play any reimbursable role in WPXT’s transition plans.¹⁶

Finally, WPXT’s proposed expanded operation has been designed to replicate as tightly as possible the existing contour but without a material loss of service. In other words, WPXT’s application is not intended to simply be as-big-an-expansion-as-possible maximization play. Instead, Hearst has sought to replicate the existing contour—albeit from the superior Baldwin site—with a less expensive, directionalized antenna. The power reduction that would be necessary for Hearst to fit the modified WPXT operation from the Baldwin Site into the current contour would result in significant loss areas, which would be contrary to the public interest.

Hearst respectfully submits that the instant request satisfies the Commission’s waiver standard. Hearst’s repack plan to move WPXT to the Baldwin Site is an objective improvement over the former licensee’s former repack plan, and the former licensee’s repack plan was riven asunder in any event when the former licensee sold WPME/WIPL to an unrelated third party licensee and subsequently sold WPXT to Hearst. In addition, Hearst’s plan would result in no interference issues, would not undermine the original purpose of the 2013 Pre-Auction Expansion Freeze, and would bring greater certainty to the execution of WPXT’s repack construction project. For the foregoing reasons, Hearst respectfully requests that the Media Bureau waive the 2013 Pre-Auction Expansion Freeze, accept this application for filing, and process this application as quickly as practicable.¹⁷

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¹⁶ For clarity, and out of an abundance of caution, Hearst acknowledges that its transition plan for WPXT is subject to the Commission’s rules and policies relating to repack reimbursement and that it is not entitled to reimbursement for any expenses that are considered to be “upgrades” or that are attributable solely to the “maximization” of WPXT.

¹⁷ Hearst recognizes that even though the parameters specified in the application would not result in any new interference to any Canadian facilities, *see* Engineering Exhibit p. 2, Canadian consent may be required before the Media Bureau can grant the modified CP. To the extent required, Hearst respectfully requests that this application be promptly submitted to ISED Canada (formerly Industry Canada) for evaluation and concurrence.