



Federal Communications Commission
Washington, D.C. 20554

January 16, 2019

Michael A. Sleezer
D/B/A CMS Broadcasting Company
P.O. Box 746
Gloversville, NY 12078

Re: Request for Modification and
Waiver of Phase Assignment
WFNY-CD, Gloversville, NY
Facility ID No. 167948
LMS File No. 0000064133

Dear Licensee,

On December 12, 2018, Michael A. Sleezer (Sleezer), the licensee of Station WFNY-CD, Gloversville, New York (WFNY-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 4 to Phase 2.¹ For the reasons below, we grant Sleezer's request for waiver and modify WFNY-CD's phase assignment to Phase 2, as conditioned herein.

Background. Pursuant to the *Transition Scheduling Adoption Public Notice*, individual stations may request waiver and modification of their phase assignment.² 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.³ The Media Bureau (Bureau) has stated it will evaluate such 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.⁴ The Bureau determined that it would view favorably requests that are compliant with the Commission's rules and

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. 0000064133 (as amended), Request for Waiver of Repack Phase Assignment and Advancement of Channel Testing Period (Waiver Request).

² 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*).

³ 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.

⁴ 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).

have little or no impact on the transition schedule.⁵ Requests that the staff determines would be likely to delay or disrupt the transition schedule will be viewed unfavorably.⁶

WFNY-CD is currently licensed to operate on channel 48. It was reassigned to channel 16 in the *Closing and Channel Reassignment Public Notice* and assigned to transition Phase 4, which has a testing period start date of June 22, 2019, and phase completion date of August 2, 2019. WFNY-CD is located in the Albany-Schenectady-Troy, NY Designated Market Area (Albany DMA). A total of seven stations, including WFNY-CD, were repacked in the Albany DMA, with five stations being assigned to transition Phase 4 and two to Phase 10. In addition to moving WFNY-CD's main facility, Sleezer states that as a result of the reassignment of the 600 MHz band for wireless use, it must also separately move WFNY-CD's studio-transmitter link (STL) off of channel 46. The deadline for that transition is determined by the wireless licensee's notice of intent to commence wireless services and is not dictated by the full power station's phase transition date under the transition scheduling plan.⁷ T-Mobile initially notified Mr. Sleezer on March 5, 2018, that WFNY-CD's STL would need to cease operations in thirty days and subsequently extended that deadline to July 2, 2018. No further extension has been granted.⁸ Sleezer states that although T-Mobile has not yet required that the Station cease operation of the STL, T-Mobile is entitled to require that the STL cease operation at any time.⁹ According to Sleezer, this would leave WFNY-CD without any way to deliver its programming to the its transmitter site.¹⁰ Sleezer has applied for and been granted an authorization to move WFNY-CD's STL to a new channel.¹¹ Construction of the new STL will require that the existing STL antenna be removed from the WFNY-CD tower and a new antenna be mounted. The same tower crew that would be used to conduct the Station's STL work has also be contracted to perform the necessary construction to facilitate WFNY-CD's transition from channel 48 to channel 16.¹² Sleezer contends that "efficiency and cost reduction concerns demand that...installation of both the new STL and the new station transmission facilities be done at the same time instead of piecemeal."¹³ As a result, Sleezer requests that WFNY-CD's phase assignment be modified to Phase 2, which has a testing period start date of December 1, 2018, and a phase completion date of April 12, 2019.

Sleezer has provided an engineering analysis with the waiver request demonstrating that the Station's early transition will not create any new linked-station sets or result in increased pairwise interference greater than two percent during the transition period.¹⁴ Sleezer states that WFNY-CD is not

⁵ *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 912-13, para. 49 and n.163.

⁶ *Id.*; see *Incentive Auction Task Force and Media Bureau Remind Repacked Stations of Certain Post-Auction Transition Requirements and Deadlines*, Public Notice, MB Docket No. 16-306 and GN Docket No. 12-268, DA 18-884 (IATF & MB, rel. Aug. 27, 2018) (*Transition Reminder Public Notice*).

⁷ See 47 CFR § 73.3700(g)(4).

⁸ Waiver Request at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See ULS File Nos. 0008362395 (Call Sign WRCR706) and 0008358504 (Call sign WRCR662) (both granted Dec. 14, 2018).

¹² Waiver Request at 2-4.

¹³ *Id.* at 3.

¹⁴ *Id.*, Amendment and Declaration of Michael A. Sleezer.

part of a linked-station set and modifying WFNY-CD's transition phase will not create any new linked-station set or result in increased pairwise interference greater than two percent during the transition period.¹⁵ Sleezer states that all necessary equipment has been ordered and "has been assured of delivery in sufficient time to complete construction of WFNY-CD's new facilities during Phase 2."¹⁶ Sleezer also provides a letter from WFNY-CD's tower company supporting Sleezer's plan to conduct all work at the Station's tower site at same time.¹⁷

Discussion. Upon review of the facts and circumstances presented, we find Sleezer's request to modify WFNY-CD's phase assignment to transition to its post-auction channel in Phase 2 satisfies the requirements for a waiver and is in the public interest. We agree that the change to WFNY-CD's transition phase should not have an adverse impact on the overall transition schedule or a negative impact on other stations or viewers. 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.¹⁸ Sleezer has also affirmed that the resources necessary to support its early transition are available and will not delay other transitioning stations' access to resources. Viewers in the Albany DMA will be subject to a third rescan period, which is one more than 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.¹⁹ Although Sleezer's request for a phase change did not commit to additional viewer outreach beyond what is required by the Commission rules, consistent with prior phase change approvals that imposed the burden of a third rescan period on a single DMA and in order to ensure that viewers will be well-informed and can manage the additional rescan period, we condition this grant on the requirement that Sleezer provide at least double the amount of viewer notifications required under Section 73.3700(c)(3).²⁰ As a result, we find on balance the benefits of ensuring uninterrupted service to viewers, ability to vendors to support WFNY-CD's early transition and additional consumer education and outreach efforts, outweigh the burden of an additional rescan period in this case.

We caution Sleezer that any additional expenses incurred as a result of the grant of WFNY-CD's voluntary phase change may not be reimbursable from the TV Broadcasters Relocation Fund. Such additional costs might include, but may not be limited to, additional legal or engineering expenses, filing fees, and interim or additional equipment that was not contemplated when the station filed its initial estimated expenses but was subsequently necessitated to complete the transition to its post-auction channel due to its phase change. We also note that pursuant to the Commission's decision in the *Incentive Auction Report and Order*, expenses related to the displacement of fixed broadcast auxiliary services such as WFNY-CD's STL are not eligible for reimbursement from the TV Broadcasters Relocation Fund.²¹

¹⁵ *Id.* at 1-2. See *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 897, para. 16.

¹⁶ *Id.* at 4-5.

¹⁷ *Id.*, Declaration of Michael A. Sleezer (Letter from Northeast Site and Tower Inc.)

¹⁸ See *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 897, para. 16 (allowing temporary increased pairwise (station-to-station) interference of up to two percent during the transition period).

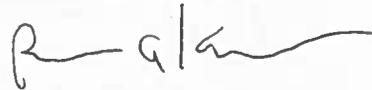
¹⁹ See *id.* at 898-99, paras. 20-21.

²⁰ 47 CFR § 73.3700(c).

²¹ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6695-96, paras. 297-98 (2014) (citing Spectrum Act § 6403(b)(4)(A)).

Accordingly, we **GRANT** Sleezer's *Request for Modification and Waiver of Phase Assignment* and modify the transition phase assignment for WFNY-CD **from Phase 4 to Phase 2**, subject to compliance with all Commission rules applicable to transitioning stations²² and the condition that WFNY-CD air at least 120 seconds per day of on air consumer education PSAs or crawls (as defined under 47 CFR § 73.3700(c)(4) and (5)) for the 30 days prior to the Station's termination of operations on its pre-auction channel. Testing on the Station's post-auction channel **may begin immediately**, and the Station is required to cease operating on its pre-auction channel **no later than 11:59 pm (local time) on April 12, 2019.**²³ The Station's construction permit expiration date will also be modified to correspond to its new phase completion date.²⁴

Sincerely,



Barbara A. Kreisman
Chief, Video Division
Media Bureau

Cc: (via electronic mail):
Matthew H. McCormick, Esq.

²² See generally 47 CFR § 73.3700; *Transition Reminder Public Notice*.

²³ Each transition phase has a designated testing period on which a station in that phase may begin testing equipment on its new channel and a designated phase completion date when a station must cease operation on its pre-auction channel. The phase completion date is the date that will be listed in that station's construction permit as its construction deadline and is the date the station must cease operation on its pre-auction channel. See *Closing and Channel Reassignment Public Notice*, 32 FCC Rcd 2806, para. 64. A station that commences testing on its post-auction channel before the beginning of its assigned testing period will be operating in violation of Commission rules.

²⁴ *Id.* ("The phase completion date is...[also] the date listed in each station's construction permit as its construction deadline."). If a station must commence operations on its post-auction channel at variance from the parameters authorized in its construction permit, it must file for and be granted special temporary authority prior to commencing operations. See 47 CFR § 73.1635. A station that needs additional time to complete construction of its post-auction facility beyond its construction permit expiration date must file for a 180-day extension of its construction permit in accordance with Section 73.3700(b)(5)(iv). Stations needing additional time to construct after a 180-day extension is granted, will be subject to the Commission's tolling provisions. 47 CFR § 73.3700(b)(5)(iv). Grant of an extension of time to construct does not relieve a station of the requirement that it ceases operation on its pre-auction channel by its assigned phase completion date.