



Federal Communications Commission
Washington, D.C. 20554

June 21, 2019

Mitts Telecasting Company, LLC
Thomas Mitts, MD
609 West Acequia Avenue, Suite B
Visalia, CA 92291

Re: Request for Modification and
Waiver of Phase Assignment
KXVO(TV), Omaha, NE
Facility ID No. 23277
LMS File No. 0000074812

Dear Licensee,

On June 19, 2019, Mitts Telecasting Company, LLC (Mitts) the licensee of KXVO(TV), Omaha, Nebraska (KXVO 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 3 to Phase 4.¹ For the reasons below, we grant Mitts' request for waiver and modify the Station's phase assignment to Phase 4, 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. 0000074812, KXVO Phase Change (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, Public Notice, 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*, MB Docket No. 16-306 and GN Docket No. 12-268, Public Notice, 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

KXVO is currently licensed to operate on channel 38. It was reassigned to channel 29 in the *Closing and Channel Reassignment Public Notice* and is currently assigned to transition Phase 3, which has a phase testing period start date of April 13, 2019, and a phase completion date of June 21, 2019. The Station is located in the Omaha, Nebraska, Designated Market Area (Omaha DMA). A total of three stations, including KXVO, were repacked in the Omaha DMA. All three stations were assigned to transition Phase 3. Mitts states that while all equipment is on site, KXVO has experienced unexpected delays related to installation of its transmitter.⁷ In addition, the need for repairs to the transmission line were discovered after the transmission line was swept.⁸ Mitts states that because KXVO is currently operating in the 600 MHz band, a phase change will not create any new linked-station sets or result in increased pairwise interference greater than two percent during the transition period.⁹ As a result, Mitts requests that KXVO's transition phase assignment be modified from Phase 3 to Phase 4, which has a testing period start date of June 22, 2019, and a phase completion date of August 2, 2019. KXVO is co-located on the same tower with KPTM(TV), Omaha, Nebraska,¹⁰ which was also assigned to Phase 3 and has requested and is being simultaneously granted a phase change to Phase 4.¹¹

Discussion. Upon review of the facts and circumstances presented, we find that Mitts' request to modify the phase assignment for KXVO to transition to its post-auction channel satisfies the requirement for a waiver and is in the public interest. We agree that changing the Station's transition phase to Phase 4 should not have an adverse impact on the overall transition schedule or a negative impact on other stations or viewers. Staff has confirmed that the phase change will not create any new linked station sets or direct dependencies. The total number of rescan periods in the Omaha DMA will increase from one to two, which is still 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.¹² Nevertheless, in order to minimize viewer confusion about the change in phase we require that Mitts, at minimum, double the amount of on-air consumer education notifications required by the Rules once the Station announces its new transition date and until the Station completes its transition. We note that another station in the Omaha DMA, KPTM has also requested and is being simultaneously granted a phase change from Phase 3 to Phase 4. Having another station in the Omaha DMA transitioning in Phase 4 will augment the notices available to viewers of the need to rescan their over-the-air TVs during that phase. In the absence of a phase change, the Station would have to go dark. Modifying KXVO's transition phase will ensure that the Station is able to continue to serve its viewers without interruption.

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, 33 FCC Rcd 8240, 8244-45, para. 14 (IATF & MB 2018) (*Transition Reminder Public Notice*).

⁷ Waiver Request at 1.

⁸ *Id.*

⁹ *Id.* at 2. 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).

¹⁰ Waiver Request at 1.

¹¹ LMS File No. 0000074813.

¹² *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 898-99, paras. 20-21.

As a result, we find the facts and circumstances discussed above outweigh any viewer burden caused by an additional rescan period in the Omaha DMA or a short delay in access by wireless licensees to the Station's pre-auction channel.

We remind Mitts that pursuant to the Spectrum Act, the Station is eligible for reimbursement from the TV Broadcast Relocation Fund (Fund) of costs "reasonably incurred . . . in order for the licensee to relocate its television service from one channel to the other."¹³ Additional expenses incurred such as expenses resulting from changes in a Station's transition plan that are not related to the post-incentive auction channel change, may not be reimbursable from the Fund.

Accordingly, we **GRANT** Mitts' *Request for Modification and Waiver of Phase Assignment* and modify the transition phase assignment for KXVO **from Phase 3 to Phase 4**, subject to all the commitments made in its waiver request and compliance with all Commission rules applicable to transitioning stations.¹⁴ Furthermore, **KXVO IS REQUIRED** to air, at minimum, double the amount of consumer education notifications required by Section 73.3700(c)(3) as set forth above.¹⁵ Testing on the Station's post-auction channel **may not begin until 12:01 am local time on June 22, 2019**, and KXVO is required to cease operating on its pre-auction channel **no later than 11:59 pm local time on August 2, 2019**.¹⁶ The Station's construction permit expiration date will also be modified to correspond to its new phase completion date.¹⁷

¹³ *Media Bureau Finalizes Reimbursement Form for Submission to OMB and Adopts Catalog of Expenses*, GN Docket No. 12-268, Public Notice, 30 FCC Rcd 11701, 11701-02 (MB 2015). See also *Incentive Auction R&O*, 29 FCC Rcd at 6821, para. 622 ("The appropriate scope of 'costs reasonably incurred' necessarily will have to be decided on a case-by-case basis.").

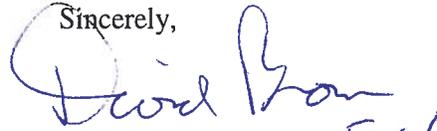
¹⁴ See generally 47 CFR § 73.3700 and *Transition Reminder Public Notice*, 33 FCC Rcd 8240.

¹⁵ 47 CFR § 73.3700(c)(3) (repacked stations must air sixty (60) seconds per day of on-air crawls or public service announcements (PSAs) beginning 30 days prior to discontinuing operations on their pre-auction channel)

¹⁶ 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.

¹⁷ *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.

Sincerely,

A handwritten signature in blue ink, appearing to read "Barbara A. Kreisman". The signature is fluid and cursive, with a large initial "B".

Barbara A. Kreisman
Chief, Video Division
Media Bureau

FBI

Cc: (via electronic mail):
Christina Burrow, Esq.
Paul Cicelski, Esq.