

### **Request for Extension of Time for Submission of WIVN-LD's Eligible Invoices for Reimbursement**

Image Video Teleproductions, Inc. ("licensee"), licensee of WIVN-LD, Newcomerstown, Ohio (Facility ID 131008) ("WIVN"), hereby seeks an extension to and including March 6, 2023, of its current September 6, 2022, deadline by which to submit all remaining invoices for reimbursement of eligible repack expenses from the TV Broadcaster Relocation Fund ("Fund").<sup>1</sup> As discussed in greater detail below, an extension in this case would serve the public interest by addressing the fact-specific, unavoidable circumstances that have rendered it impossible for all reimbursable repack work for WIVN-LD to be completed and final invoices paid by the current September 6, 2022, deadline.

As the Incentive Auction Task Force and Media Bureau ("IATF/MB") have observed, limited extension of the September 6, 2022, invoice submission deadline for LPTV (and other) stations may be appropriate where there is "evidence that circumstances requiring the extension were outside of [the station's] control . . . ."<sup>2</sup> As detailed at length in WIVN's various communications with the Fund Administrator (the latest of which is attached to this request as **Exhibit B** and incorporated here by reference), WIVN has experienced multiple circumstances beyond its control that have rendered it impossible to meet the September 6th deadline for completion of all necessary work and invoicing for WIVN's displacement facility. In particular: (1) due to circumstances beyond the licensee's control, including required international coordination, the construction of WIVN-LD's final displacement facilities have been delayed and interim facilities had to be constructed for WIVN-LD; and (2) WIVN has been engaged in an ongoing dialogue with the Fund Administrator regarding the reimbursement status of WIVN's final displacement facilities that has not yet been resolved. As a result of the foregoing, WIVN will not be able to submit all eligible invoices by the September 6, 2022, filing deadline, thus necessitating this request for an extension through March 6, 2023.

First, to be clear, WIVN timely terminated operations on its pre-transition channel and commenced operations on its post-transition channel.<sup>3</sup> Indeed, as outlined more fully in the attached **Exhibit B**, WIVN made maintaining service to its community of license via the construction of interim facilities a top priority. Thus, an extension of time for submission of invoices will in no way affect the Station's service on its post-transition channel.

---

<sup>1</sup> The licensee respectfully submits that a modified March 6, 2023, deadline would not materially impact the Commission Staff's need for sufficient processing time to complete close-out procedures for all remaining stations in the post-Auction reimbursement program. *See Incentive Auction Task Force and Media Bureau Remind Reimbursement Program Participants that the Third and Final Filing Deadline Approaches in 30 Days*, Public Notice, DA 22-817, n.5 (IATF/MB Aug. 4, 2022). An LMS search conducted August 31, 2022, indicates that few more than a couple of dozen Legal STA applications have been filed for TV translator / LPTV stations since July 1, 2022, meaning that only a small universe of reimbursement invoice submission extension requests have the potential to affect the processing time for close-out procedures. *See the attached Exhibit A*. To the extent FCC Staff disagrees with that assessment, the licensee respectfully requests an extension through whatever date would provide Commission Staff with sufficient processing time.

<sup>2</sup> *E.g., id.* at n.5.

<sup>3</sup> *See, e.g.,* LMS File No. 0000054240.

Second, as noted above, circumstances beyond the licensee’s control required WIVN to construct interim facilities prior to (re)permitting and constructing its final displacement facilities. As explained in WIVN’s prior, March 2021 request to extend its Displacement CP, “restricted access to capital and lack of availability of tower crews to implement the CP as a result of the COVID-19 pandemic . . . significantly impacted [WIVN]’s ability to move forward to complete implementation.”<sup>4</sup> As a result of those unforeseeable and uncontrollable circumstances—and as set forth more fully in the attached **Exhibit B**—WIVN ultimately had to apply for and construct interim facilities, the licensing of which resulted in the need for an additional, subsequent CP to be issued for WIVN’s final displacement facilities (which are substantially similar in all relevant ways to the displacement facilities specified in WIVN’s Special Displacement Window CP application).<sup>5</sup> And, due to WIVN’s close proximity to the United States-Canadian border, international frequency coordination was required before that construction permit for WIVN’s final displacement facilities could be issued.<sup>6</sup> After WIVN applied for that construction permit it took nearly five months for a grant to issue due to delays required for international frequency coordination that were beyond WIVN’s control. Ultimately, those uncontrollable delays caused the CP to be granted on August 11, 2022—less than four weeks prior to the current September 6, 2022, reimbursement submission deadline. Such a short period of time is insufficient for all reimbursable repack work for WIVN-LD to be completed and final invoices paid.

Third, WIVN has consistently and regularly submitted invoices for eligible WIVN-LD repack services throughout the reimbursement period, as demonstrated by the approximately fourteen Form 399 filings currently reflected in LMS. WIVN’s diligence in completing and filing those Forms 399 show both that (1) WIVN has not been a displacement or reimbursement laggard, but instead has consistently endeavored to move its repack project forward as expeditiously as reasonably practicable under the circumstances, and (2) WIVN is not requesting this extension of time with the intent of filing numerous Forms 399 covering reimbursement

---

<sup>4</sup> See LMS File No. 0000139327. This CP extension request was filed without the benefit of advice from WIVN’s current counsel, and it was dismissed on procedural grounds. However, WIVN’s current counsel respectfully notes that it is not entirely clear that the procedural rationale provided in the dismissal was, in fact, procedurally correct. Compare LMS File No. 0000139327 (Apr. 27, 2021, Letter Decision stating that: “Applications for extension may not be filed to extend construction permits to modify already licensed digital LPTV/translator stations . . .”), with, e.g., *Incentive Auction Task Force & Media Bureau Announce Procs. for Low Power Television, Television Translator & Replacement Translator Stations During the Post-Incentive Auction Transition*, Public Notice, 32 FCC Rcd. 3860, 3867 (2017) (explaining that “until March 13, 2021, any displaced LPTV/translator station (either analog or digital) that is unable to complete construction of its displacement facility by its deadline may seek an extension of time to construct of up to 180 days” (internal emphases added)). Notably, the extension request filed by WIVN’s prior counsel spoke in terms of an extension to the “displacement construction permit,” and, even if the dismissal letter believed WIVN’s extension request was to cover a digital transition CP, the standard governing displacement and digital transition extensions is substantively identical. Compare *id.* (displacement extension standard), with, e.g., *Media Bureau Reminds Low Power Television & Television Translator Stations of July 13, 2021, Digital Transition Date*, 35 FCC Rcd 6977, 6977 (2020) (digital transition extension standard). Regardless, the *substance* of the extension request was never rejected.

<sup>5</sup> See LMS File No. 0000186814

<sup>6</sup> See *id.* (technical exhibit noting that “[p]roposal crosses Canadian border, coordination required”).

expenses that have already been incurred. To the contrary, this extension request primarily relates to invoices for work that has not yet been performed and could not have been performed earlier given the circumstances and timing constraints noted above.

Fourth, WIVN has been engaged in an ongoing dialogue with the Fund Administrator regarding the reimbursement status of WIVN's final displacement facilities that has not yet been resolved. As noted above and set forth more fully in the attached **Exhibit B**, due to circumstances beyond the licensee's control post-displacement WIVN was required to construct interim facilities with a maximum ERP of only 0.015 kW—a power output less than one percent of the 3 kW ERP the FCC initially authorized for WIVN's displacement facilities. Although the Fund Administrator had previously approved reimbursement for WIVN's final displacement facilities (i.e., the equipment necessary for the 3 kW ERP facility), confusion arose after WIVN constructed its interim facilities such that the Fund Administrator mistakenly believed that WIVN's 0.015 kW facilities were intended to be its "final" displacement facilities. As a result, the construction of WIVN's 3 kW facilities has been unforeseeably slowed during the pendency of the ongoing dialogue with the Fund Administrator regarding the interim nature of the 0.015 kW facilities. Because, as noted above, that reimbursement dialogue currently remains ongoing, WIVN respectfully requests that (to the extent Commission Staff is not inclined to grant this extension request outright) this extension request be held for disposition until such time as the ongoing dialogue with the Fund Administrator is resolved.<sup>7</sup> Of course, if the current confusion regarding WIVN's facilities is resolved such that the Fund Administrator determines that WIVN's final displacement facilities continue to be reimbursable, then WIVN will almost certainly be left without the ability to actually file for and obtain reimbursement for those facilities absent an extension of the current September 6, 2022, deadline.

Finally, the facts and circumstances here relating to WIVN's inability to incur all reimbursement-related expenses prior to the September 6th deadline are similar to many of the factors IATF/MB routinely considered relevant to repack construction permit extension requests. *See, e.g., Incentive Auction Task Force and Media Bureau Remind Repacked Stations of Certain Post-Auction Transition Requirements and Deadlines*, Public Notice, 33 FCC Rcd 8240, at ¶ 12 (IATF/MB Aug. 2018) (citing among circumstances relevant to consideration of construction permit extension requests "delays in construction due to the unavailability of equipment or a

---

<sup>7</sup> In this sense, WIVN's extension request may be somewhat akin to a contingent application. If the Fund Administrator ultimately determines that WIVN's final displacement facilities remain eligible for reimbursement then this extension request is especially apt given that any final reimbursement eligibility determination is extremely likely to occur on a date that would afford too little time for WIVN to incur by September 6th the reimbursable expenses necessary to construct WIVN's final displacement facilities. Accordingly, to the extent applicable and/or necessary, WIVN respectfully requests a waiver of the contingent applications rule, 47 C.F.R. § 73.3517. The Commission may grant a waiver for good cause shown. 47 C.F.R. § 1.3. A waiver is appropriate where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In considering a waiver, the FCC may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *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. Such a waiver is appropriate if circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166. WIVN respectfully submits that both the timing and substance of this extension request satisfy these various waiver standards.

Image Video Teleproductions, Inc.  
WIVN-LD, Newcomerstown, OH (Facility ID 131008)  
Request for Extension of Time for  
Submission of Repack Reimbursement Invoices

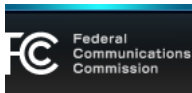
tower crew,” “unusual technical challenges,” or “delays caused by the need to obtain government approvals” for the work to be performed).

Because of these unusual and exceptional circumstances—each of which has been beyond WIVN’s control—a grant of a limited extension to March 6, 2023, of the deadline for WIVN to submit its final repack-related invoices for reimbursement is warranted, does not contravene the public interest, and should not result in an additional burden to any other party, including the Fund Administrator, the Commission, and other stations seeking reimbursement for eligible transition-related costs.

\* \* \* \* \*

## **EXHIBIT A**

*LPTV/TV Translator Legal STA Requests Filed After June 30, 2022,  
as of August 31, 2022*



## Licensing and Management System

[Search](#) | [Log In](#)

## Search Results - Application

[FAQ](#)
[Refine Search Results](#) | [Clear Search Results](#)
**Date Range:** From: 07/01/2022 To: 08/31/2022 **Purpose:** Legal STA Request **Service:** Analog TV Translator,Digital Replacement Translator,Digital TV Translator,Low Power Analog TV,Low Power Digital TV

 Showing 1 to 29 of 29 | **Display:** 100 per page

 Download Results: [Excel](#) | [CSV](#)

PDF	File Number	Submit Date	Call Sign	Facility ID	FRN	State	City	Service	Purpose	Status	Status Date	Expiration Date
	0000198698	08/30/2022	K22JW-D	181610	0019055854	TX	BAY CITY	Low Power Digital TV	Legal STA	Submitted	08/30/2022	08/01/2022
	0000198477	08/26/2022	KSOY-LD	16230	0022119663	TX	MCALLEN	Low Power Digital TV	Legal STA	Pending	08/29/2022	08/01/2022
	0000198602	08/29/2022	W25FC-D	166986	0011406899	AL	JASPER	Low Power Digital TV	Legal STA	Pending	08/29/2022	04/02/2029
	0000198405	08/26/2022	K22GE	125926	0009961889	NM	DULCE	Analog TV Translator	Legal STA	Pending	08/26/2022	10/01/2022
	0000198395	08/25/2022	WVUX-LD	129306	0023594419	WV	FAIRMONT	Low Power Digital TV	Legal STA	Pending	08/25/2022	10/01/2020
	0000198011	08/22/2022	K29NL-D	61044	0006159552	KS	WICHITA	Low Power Digital TV	Legal STA	Pending	08/22/2022	06/01/2022
	0000198012	08/22/2022	W17EB-D	49182	0006159552	OH	COLUMBUS	Low Power Digital TV	Legal STA	Pending	08/22/2022	10/01/2021
	0000198013	08/22/2022	W18ET-D	61208	0006159552	AL	BIRMINGHAM	Low Power Digital TV	Legal STA	Pending	08/22/2022	04/01/2021
	0000198014	08/22/2022	W26EV-D	49409	0006159552	VA	PORTSMOUTH	Low Power Digital TV	Legal STA	Pending	08/22/2022	10/01/2020
	0000198015	08/22/2022	W33EI-D	61209	0006159552	NC	RALEIGH	Low Power Digital TV	Legal STA	Pending	08/22/2022	12/01/2020
	0000198016	08/22/2022	K07AAF-D	42342	0006159552	TX	CORSICANA	Low Power Digital TV	Legal STA	Pending	08/22/2022	08/01/2022
	0000198017	08/22/2022	W32FH-D	61201	0006159552	FL	ST. PETERSBURG	Low Power Digital TV	Legal STA	Pending	08/22/2022	02/01/2021
	0000198020	08/22/2022	W30EG-D	167727	0006159552	TN	KNOXVILLE	Low Power Digital TV	Legal STA	Pending	08/22/2022	08/02/2021
	0000198021	08/22/2022	K32NM-D	64174	0006159552	IA	DES MOINES	Low Power Digital TV	Legal STA	Pending	08/22/2022	02/01/2022
	0000198022	08/22/2022	W30EE-D	61205	0006159552	FL	JACKSONVILLE	Low Power Digital TV	Legal STA	Pending	08/22/2022	02/01/2021

PDF	File Number	Submit Date	Call Sign	Facility ID	FRN	State	City	Service	Purpose	Status	Status Date	Expiration Date
	0000198023	08/22/2022	K29NM-D	71624	0006159552	WA	SPOKANE	Low Power Digital TV	Legal STA	Pending	08/22/2022	02/01/2023
	0000198024	08/22/2022	K30OK-D	61018	0006159552	OK	TULSA	Low Power Digital TV	Legal STA	Pending	08/22/2022	06/01/2022
	0000198025	08/22/2022	K30QB-D	61056	0006159552	LA	SHREVEPORT	Low Power Digital TV	Legal STA	Pending	08/22/2022	06/01/2021
	0000198026	08/22/2022	W26EW-D	49407	0006159552	WV	HUNTINGTON	Low Power Digital TV	Legal STA	Pending	08/22/2022	10/01/2020
	0000198027	08/22/2022	W27EL-D	49185	0006159552	IL	CHAMPAIGN	Low Power Digital TV	Legal STA	Pending	08/22/2022	12/01/2021
	0000198028	08/22/2022	W32EW-D	49408	0006159552	VA	ROANOKE	Low Power Digital TV	Legal STA	Pending	08/22/2022	10/01/2020
	0000198029	08/22/2022	K35OU-D	71623	0006159552	AZ	TUCSON	Low Power Digital TV	Legal STA	Pending	08/22/2022	10/03/2022
	0000197694	08/15/2022	WFG-LD	167606	0028024982	PA	PHILADELPHIA	Low Power Digital TV	Legal STA	Pending	08/22/2022	08/01/2023
	0000198002	08/22/2022	W13DQ-D	61199	0006159552	GA	ATLANTA	Low Power Digital TV	Legal STA	Pending	08/22/2022	04/01/2021
	0000198006	08/22/2022	K15KP-D	49175	0006159552	MO	ST. LOUIS	Low Power Digital TV	Legal STA	Pending	08/22/2022	02/01/2022
	0000198009	08/22/2022	K15MB-D	49176	0006159552	MO	KANSAS CITY	Low Power Digital TV	Legal STA	Pending	08/22/2022	02/01/2022
	0000198010	08/22/2022	K20MM-D	61030	0006159552	LA	NEW ORLEANS	Low Power Digital TV	Legal STA	Pending	08/22/2022	06/01/2021
	0000194892	07/12/2022	KNIK-LP	21492	0019001536	AK	ANCHORAGE	Low Power Analog TV	Legal STA	Superseded	07/20/2022	02/01/2015
	0000004493	08/26/2015	DK12QV	125257	0013086228	CA	SAN BERNARDINO	Low Power Analog TV	Legal STA	Cancelled	07/08/2022	

« First ‹ Prev 1 Next › Last »

Technical problems or trouble accessing the system? Submit a help request for assistance or contact (877) 480-3201 or TTY: (717) 338-2824

Federal Communications Commission  
45 L Street NE  
Washington, DC 20554

Phone: 1-888-225-5322  
TTY: 1-888-835-5322  
Fax: 1-866-418-0232  
Contact Us  
Website Policies & Notices  
Privacy Policy  
FOIA

No Fear Act Data  
FCC Digital Strategy  
Open Government Directive  
Plain Writing Act  
RSS Feeds & Email Updates  
Accessibility  
About the FCC  
Proceedings & Actions  
Licensing & Databases  
Reports & Research  
News & Events  
For Consumers  
Consumer  
Enforcement  
Inspector General  
International  
Media  
Public Safety  
Wireless  
Wireline  
Offices



## **EXHIBIT B**

*WIVN-LD's Latest Repack Reimbursement Correspondence*

**IMAGE VIDEO TELEPRODUCTIONS, INC.**  
**REIMBURSEMENT JUSTIFICATIONS FOR DISPLACEMENT FACILITIES OF**  
**WIVN-LD, NEWCOMERSTOWN, OHIO**  
**FCC FACILITY ID # 131008**

**I. Introduction**

Image Video Teleproductions, Inc. (“licensee”), licensee of WIVN-LD, Newcomerstown, Ohio (Facility ID 131008) (“WIVN”) respectfully requests reimbursement for its displacement facilities as initially applied for and authorized during the Special Displacement Window.<sup>1</sup> WIVN provides unique community-responsive informational, emergency, and entertainment programming to its community of license, including over 40 hours per week of locally produced shows designed to “highlight[] the region” in and surrounding WIVN’s community of license.<sup>2</sup> However, due to displacement, WIVN is currently without the ability to serve even a fraction of the community it served pre-displacement. Although displacement was always anticipated to render WIVN’s post-displacement facilities at least somewhat inferior to WIVN’s pre-displacement facilities due to WIVN’s forced transition from a UHF to a low VHF channel, the inability for WIVN to obtain reimbursement thus far for its sought-after and FCC-approved, authorized displacement facilities leaves WIVN currently operating with a maximum ERP of only 0.015 kW—a power level that is *less than one percent* of the 3 kW ERP the FCC initially authorized for WIVN’s displacement facilities.

The facts are crystal clear that WIVN’s reimbursement request is not an instance of a licensee seeking to “upgrade” its facilities or otherwise manipulate reimbursement funding. Instead, WIVN’s reimbursement request only seeks access to reimbursement funding for which the FCC previously determined WIVN to be eligible as a Special Displacement Window permittee and for which WIVN continues to qualify under the Commission’s commitment to examine such reimbursement situations on a “case-by-case” basis. Reimbursement will permit WIVN to restore at least a meaningful portion of WIVN’s pre-displacement service throughout its community of license. For the reasons discussed herein, WIVN respectfully submits that the law, the facts, equity, and the public interest all favor a grant of WIVN’s reimbursement request.

---

<sup>1</sup> On August 11, 2022, following an elongated Canadian coordination process, WIVN was granted a CP for 3 kW operations in File No. [0000186814](#) (“August 2022 CP”). The 3 kW ERP is the same ERP that was originally granted to WIVN in its Displacement CP in File No. 0000054240. Although other aspects (including the antenna pattern) of the August 2022 CP vary from the Displacement CP, the cost of the equipment needed to construct the August 2022 CP facility is substantially similar to the equipment needed to construct the Displacement CP.

<sup>2</sup> See Image Video Teleproductions, Inc., Homepage (last visited Aug. 23, 2022), <http://www.wivmtv.com/>. WIVN’s locally produced programming is designed to include something for all Ohio residents in WIVN’s community of license and beyond, such as: *In Ohio Country*, a nationally recognized weekly show featuring Ohio agriculture life and business; *The Royle Touch*, an educational painting program by a local artist; local high school and college sports; and religious programming from various religious denominations. See *id.* at <http://www.wivmtv.com/local%20programs.htm>.

## II. Background

**A. 2010 UHF On-Channel Digital Conversion, 2018 Displacement to VHF.** In mid-2018, WIVN was involuntarily displaced as part of the recently concluded spectrum repack. *See* LMS File No. 0000054240 (the “Displacement CP”). Prior to displacement, WIVN operated on digital UHF channel 29 with an authorized ERP of 7.4 kW.<sup>3</sup> It bears noting—indeed, it is highly relevant to this situation—that WIVN was, in the LPTV community, an early adopter of digital facilities. In fact, WIVN filed its original digital flash-cut CP application all the way back in June 2009<sup>4</sup>—immediately following completion of the original DTV transition for full-power stations—for which construction was completed in late 2010, merely halfway into the lifespan of the flash-cut construction permit!<sup>5</sup> However, in 2018 at the time of the Special Displacement Window, there were no viable UHF displacement channels to which WIVN could move, which meant that WIVN was effectively forced to apply to transition to Low VHF Channel 5 (with an authorized ERP of 3 kW). WIVN knew—just like the Commission Staff knows (and knew since long before the 2018 Special Displacement Window opened)—that such an (involuntary) transition from a UHF to a VHF channel would likely result in lower quality coverage and service to its community as a result of the differing propagation characteristics attendant to UHF and VHF spectrum. Indeed, the VHF reception difficulties experienced by viewers and television operators in the age of digital TV transmissions have been well-known throughout the industry and documented at every level of the Commission since at least the completion of the original DTV transition in 2009.<sup>6</sup>

---

<sup>3</sup> *See* CDBS File No. BLDLTL-20101222AAZ.

<sup>4</sup> *See* CDBS File No. BDFCDL-20090629ADK.

<sup>5</sup> *See* CDBS File No. BLDLTL-20101222AAZ. To further contextualize the history of WIVN’s operations, the facility was first licensed, as an analog station, in 2004. Only 5 years later, the licensee applied to convert to digital. Thus, at the time of its 2018 displacement filing in the FCC’s Special Displacement Window, WIVN had been engaged in digital operations for *nearly a decade*—twice as long as it had operated as an analog facility. In other words, WIVN’s record demonstrates unequivocally that it was not a laggard in the transition to digital, did not take anywhere near the entire time to construct the digital facility granted in its original 2009 digital flash-cut CP, and has never exhibited conduct as a licensee that could be fairly described as providing “the bare minimum” for service. Yet the Fund Administrator’s denial of reimbursement for the transmitter that would allow Channel 5 operations to reach 3 kW treats the licensee in precisely that manner.

<sup>6</sup> *See, e.g., Innovation in the Broad. Television Bands: Allocations, Channel Sharing & Improvements to VHF*, 25 FCC Rcd 16498, 16511 (2010) (“VHF channels have certain characteristics that have posed challenges for their use in providing digital television service. . . . We recognize that television broadcasters have had some difficulty in ensuring consistent reception of VHF signals . . . .”); *Amendment of Section 73.3555(e) of the Commission’s Rules, Nat’l Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 28 FCC Rcd 14324, 14328–29 (2013) (“[T]he [digital] transition has posed more challenges for VHF channels than UHF channels, because VHF spectrum has proven to have characteristics that make it less desirable for providing digital television service. For instance, nearby electrical devices tend to emit noise that can cause interference to DTV signals within the VHF band, creating reception difficulties in urban areas even a short distance from the TV transmitter.” (internal footnotes omitted)); *Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auction*, Report and Order, FCC 21-111, ¶ 7 (rel. Oct. 25, 2021) (explaining “pent-up demand” for DTV channel change

Caught between the Scylla (being forcibly displaced from its existing digital operations on channel 29) and Charybdis (moving to the less-desirable channel 5), WIVN timely filed during the Special Displacement Window for a Channel 5 Displacement CP with technical specifications calculated to provide it with the best possible Low VHF coverage to its community.<sup>7</sup> Moreover, WIVN subsequently submitted timely Form 399 reimbursement eligibility filings that specified the facilities authorized by the Displacement CP, including the expenses for a 1 kW transmitter, mask filter, and surge suppressor, as well as the soft costs associated with the construction of a digital station on the new channel. *See, e.g.*, FCC Forms 399, LMS File Nos. 0000088705, 0000088702 (eligibility). With its July 2018 CP grant in hand and aware of the July 2021 construction deadline, WIVN began diligent pursuit of construction of those facilities thereafter.

***B. The Pandemic, (Unsuccessful) Effort to Extend CP, 15-Watt Interim Micro-Operations to Save CP.*** Despite WIVN's efforts to construct its displacement facilities, the COVID-19 pandemic blanketed the United States a little more than halfway through the construction period permitted by WIVN's Channel 5 CP, rendering timely construction of WIVN's authorized displacement facilities impossible due to a lack of available tower crews, erosion of the licensee's capital, supply-chain issues that caused equipment delays, and general worker shortages and unavailability. *See* LMS File No. 0000139327. Indeed, due to pandemic-related supply chain issues GatesAir was delayed in constructing the transmitter for WIVN's authorized displacement facilities past the Displacement CP's expiration date. According to GatesAir, those supply-chain issues were compounded by the fact that WIVN was displaced to Channel 5, as there were hardly any orders (and therefore a lack of readily available equipment) for Channel 5 facilities. Notably, GatesAir further explained to WIVN that had WIVN requested UHF (rather than Channel 5) equipment, that equipment would have been available "off the shelf" such that WIVN could have timely constructed the facilities specified in the Displacement CP. Moreover, the licensee had also

---

petitions, "primarily to substitute a UHF channel for a VHF channel," of which the Media Bureau had received nearly 50 by late 2021, and which the Bureau continues to receive); *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broad. Stations (Quincy, Illinois)*, Report and Order, 36 FCC Rcd 11178 (2021); *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broad. Stations (Toledo, Ohio)*, Report and Order, DA 21-179 (rel. Feb 22, 2022); Bill Durdach, *The UHF Discount and the National Television Ownership Rule: "This I Tell You, Brother: You Can't Change One Without the Other"*, 23 CommLaw Conspectus 222, 237 (2014) ("The entire broadcast industry, arguably, changed once the digital transition occurred in 2009. . . . [T]he propagation characteristics for UHF channels surpassed those of VHF signals. For example, receiving VHF signals now requires a higher antenna than UHF signals, making them inferior for consumers with indoor antennas. Further, VHF signals are more prone to interference especially in urban areas with an excess of electrical devices. These deficiencies were not a surprise to the Commission, who had predicted this would happen in the years preceding the digital transition." (footnotes omitted)); *see also, e.g.*, numerous STA grants authorizing power increases above existing maximum power limits to address viewer reception issues experienced with digital VHF operations, such as WGAL(TV), Lancaster, PA, Ch. 8, LMS File No. 0000123880 and underlying BDSTA-20110602ACR; WHAS-TV, Louisville, KY, Ch. 11, BDSTA-20091014AAM; WABC-TV, New York, NY, Ch. 7, BDSTA-20100108ACK; WUSA, Washington, DC, Ch. 9, BDSTA-20091218ACS; KRCR-TV, Redding, CA, Ch. 7, BDSTA-20090717ABBADD.

<sup>7</sup> The 3 kW facility specified in WIVN's Special Displacement Window application proposed utilization of a highly directionalized antenna (which turned out not to exist in reality) in a deliberate effort to avoid Canadian coordination, which would have likely delayed a grant of the Displacement CP.

discovered that the highly directionalized antenna specified in the Displacement CP was available only in theory and was not procurable in the real world. As the Incentive Auction Task Force and Media Bureau were both aware, those types of “beyond-a-licensee’s-control” issues created unexpected problems for all types of broadcasters—including television facilities affected by the post-Auction channel change process—throughout the nation.<sup>8</sup>

As a result, several months in advance of the Displacement CP’s expiration deadline, WIVN filed for an extension of time to construct. *See* LMS File No. 0000139327. The Commission Staff dismissed the filing on procedural grounds, without addressing the substantive reasons asserted in support of the extension request. *See id.* (Apr. 27, 2021, Letter Decision).<sup>9</sup> By the time the extension request had been dismissed, however, WIVN was outside the FCC-specified time period for viable LPTV displacement extension requests,<sup>10</sup> and WIVN declined to put all its proverbial

---

<sup>8</sup> *See, e.g., Guidance for Stations in Phase 9 of the Post-Incentive Auction Transition As A Result of the Novel Coronavirus (COVID-19) Pandemic*, 35 FCC Rcd 2720, 2720 (2020) (“We recognize that the construction and delivery delays that are occurring as a result of the COVID-19 pandemic, as well as efforts undertaken by the stations themselves to protect the health of their employees and their families, result from circumstances outside of a station’s control.”); *Assessment & Collection of Regul. Fees for Fiscal Year 2020 Assessment & Collection of Regul. Fees for Fiscal Year 2019*, 35 FCC Rcd 4976, 5004 (2020) (noting that “the ongoing COVID-19 pandemic is having an impact on some of our regulatees’ businesses” and therefore crafting ways to provide “assistance in meeting . . . regulatory fee obligations.”); *Media Bureau Announces Availability of Constr. Deadline Waivers for Certain FM Translator Stations Awarded in Auctions 99 & 100*, 35 FCC Rcd 9555, 9555 (2020) (observing generally that “[t]he Media Bureau is aware that shutdowns associated with the pandemic have forced stations to halt construction, have disrupted equipment availability and deliveries, and have interrupted travel for tower and equipment installers,” and observing more specifically with respect to AM broadcasters that “the pandemic has compounded the severe financial difficulties experienced by many AM stations, including the significant loss of advertising revenue due to economic disruptions and the need to cover breaking news and air public service announcements relating to the pandemic[;] [t]hese financial difficulties, in some cases, may have caused AM stations to delay construction of authorized cross-service translators”).

<sup>9</sup> It is not entirely clear to WIVN’s current counsel that the procedural rationale provided in the dismissal was, in fact, procedurally correct. *Compare* LMS File No. 0000139327 (Apr. 27, 2021, Letter Decision stating that: “Applications for extension may not be filed to extend construction permits to modify already licensed digital LPTV/translator stations . . .”), *with, e.g., Incentive Auction Task Force & Media Bureau Announce Procs. for Low Power Television, Television Translator & Replacement Translator Stations During the Post-Incentive Auction Transition*, Public Notice, 32 FCC Rcd. 3860, 3867 (2017) (explaining that “until March 13, 2021, any displaced LPTV/translator station (either analog or digital) that is unable to complete construction of its displacement facility by its deadline may seek an extension of time to construct of up to 180 days” (internal emphases added)). Notably, the extension request filed by WIVN’s prior counsel spoke in terms of an extension to the “displacement construction permit,” and, even if the dismissal letter believed WIVN’s extension request was to cover a digital transition CP, the standard governing displacement and digital transition extensions is substantively identical. *Compare id.* (displacement extension standard), *with, e.g., Media Bureau Reminds Low Power Television & Television Translator Stations of July 13, 2021, Digital Transition Date*, 35 FCC Rcd 6977, 6977 (2020) (digital transition extension standard). But the time has long passed to address that issue anew.

<sup>10</sup> *Compare Incentive Auction Task Force & Media Bureau Announce Procs. for Low Power Television, Television Translator & Replacement Translator Stations During the Post-Incentive Auction Transition*, Public Notice, 32 FCC Rcd. 3860, 3867 (2017) (setting forth March 13, 2021, deadline for

eggs in the “tolling” basket as suggested in the Media Bureau’s dismissal letter, *see id.*, given the traditionally high bar embodied in the tolling rule.

With regulatory relief blocked by another Scylla on one side and by another Charybdis on the other, WIVN rowed the only way it knew how: it pulled at the oars as if its life depended on it. At this juncture, WIVN sought to preserve its very existence by filing an application to modify its Displacement CP to specify interim facilities that would permit WIVN to simultaneously maintain service to the public and meet the July 2021 Displacement CP expiration deadline.<sup>11</sup> *See* LMS File No. 0000147067. Simultaneously, WIVN secured from GatesAir a loan of equipment necessary to build out the interim facilities specified in the modification application. Notably, GatesAir only loaned WIVN the interim transmitter *because WIVN already had committed to order and make a substantial down payment on the transmitter specified in the Displacement CP*.<sup>12</sup> Put differently, in a very real way WIVN was able to construct its modified, interim facilities only because of the equipment expenses WIVN had **already incurred** to construct the facilities specified in the Displacement CP. *See* Attachment B (GatesAir rental agreement for “Temporary Loaner due to CP expiration prior to availability of new transmitter” and that loaner “will be shipped only after GATESAIR’s receipt of . . . a valid purchase order . . .”)

Although the application to modify the Displacement CP did not expressly state that the proposed facilities were “interim” in nature, it specified a maximum ERP of only 0.015 kW—i.e., **only 0.5% of the maximum 3.0 kW authorized for VHF LPTV stations generally and as previously expressly authorized in WIVN’s Displacement CP**. *See* 47 C.F.R. § 74.735(b)(1). With the benefit of both hindsight and the absence of extraordinary pressure to act in advance of a significant looming deadline, WIVN now realizes that the better course would have been to expressly engage with Commission Staff prior to filing to modify the CP to ensure it was understood that the minor modification was only for interim facilities (or to better understand the likelihood of success of a tolling, or tolling waiver, application). At the time, however, WIVN reasonably believed that such an extreme reduction in power (and corresponding downgrade in service capability) could not be reasonably perceived as anything but an interim measure to meet the Displacement CP expiration date and thereby preserve WIVN’s ability to be later constructed in compliance with the original parameters sought in the Special Displacement Window and authorized in the Displacement CP. After all, WIVN’s 0.015 kW ERP is the lowest ERP of any digital Channel 5 LPTV station in the

---

extension requests), *with* FCC File No. 0000139327 (ineligible extension letter decision dated April 27, 2021).

<sup>11</sup> As noted above in footnote 2, WIVN’s locally-focused programming is important for viewers in WIVN’s community of license and beyond, including viewers receiving WIVN’s programming through cable carriage in three separate counties. WIVN’s transition to interim operations was expressly intended to preserve service to WIVN’s viewers, including through the provision of local high-school and college sports that viewers regularly watch via WIVN’s broadcasts and, consequently, on which those viewers depend.

<sup>12</sup> WIVN has now paid in full for the transmitter necessary for WIVN’s 3 kW facilities because it was always committed to the full buildout. Funding for the transmitter was procured by virtue of WIVN’s owner and President *taking out a home equity line of credit* tied to his personal residence. In a nutshell, *that* illustrates the impact that this poorly-rendered reimbursement decision is having in the real world for this real-world LPTV operator.

United States, by a significant margin. *See* Attachment A (TVQuery Results for All Channel 5 Digital LPTV Stations). In light of the facts, it is unreasonable as a regulatory matter for the Fund Administrator or the Commission to take the position that the 0.015 kW facility could have been objectively viewed as WIVN’s final displacement facility. Moreover, as further incontrovertible evidence that WIVN considered its authorization at 0.015 kW to only encompass interim facilities, WIVN is currently on-air only because GatesAir *loaned* the station a transmitter sufficient to build-out the interim facilities, a piece of equipment for which WIVN has not sought reimbursement.

If WIVN had supposed that its unexpected plan for interim operations would render the equipment necessary for its 3 kW operation ineligible for reimbursement, WIVN would almost certainly have chosen to further scramble around and go down another path, even if that other path seemed as dangerously uncertain (from a regulatory perspective) as WIVN perceived. Frankly, looking back at those different options now, through the eyes of new legal counsel, the truth is that WIVN probably should have been counseled to make a tolling (or tolling waiver) filing or to challenge the denial of the CP extension application. **However, the other relevant truth is that none of these things should matter for purposes of the reimbursement program.** In other words, at this point, it is critical to understand and appreciate the difference between WIVN’s procedural gaffes on the one hand and WIVN’s substantive right to reimbursement for its Special Displacement Window facility on the other hand. Unfortunately, the Fund Administrator has erroneously conflated these two things, which has prompted the need for the instant filing.

### **III. Limitation of Reimbursement Funding to WIVN’s 0.015 kW Operation Is Contrary to the Public Interest and Contradicts Obvious, Unassailable Facts**

***A. WIVN Unequivocally Qualifies as Eligible for Reimbursement for Its Full, Final Facility.*** In early 2018, Congress adopted the Reimbursement Expansion Act (the “REA”) and expressly mandated that “the Commission shall reimburse costs reasonably incurred by a . . . low power television station on or after January 1, 2017, in order for such station to relocate its television service from one channel to another channel or otherwise modify its facility as a result of the reorganization of broadcast television spectrum . . . .”<sup>13</sup> In implementing that congressional command, the FCC determined that when an LPTV station was “eligible to file and [did] file an application” in the Special Displacement Window, such an LPTV station would be eligible for reimbursement even if its initial application was dismissed and the Station sought reimbursement through a later-filed displacement application that was granted.<sup>14</sup> The analytical touchstone is that “such stations are affected by the reorganization of broadcast television spectrum in the same way as other displaced LPTV/translator stations.”<sup>15</sup>

In the present case, the Fund Administrator / Commission has already correctly determined that WIVN satisfies the eligibility requirements to fall within the foregoing congressional reimbursement mandate and the FCC’s implementation thereof. *See, e.g.,* LMS File No. 0000088702. Fundamentally, this fact, standing alone, should be dispositive as to whether WIVN-

---

<sup>13</sup> 47 U.S.C. § 1452(k).

<sup>14</sup> *LPTV, TV Translator & FM Broad. Station Reimbursement*, Report and Order, 34 FCC Rcd 1690, 1702–03 (2019) (“*LPTV Reimbursement R&O*”).

<sup>15</sup> *Id.* at 1703.



LD continues to qualify for reimbursement for the facilities specified in its Displacement CP—it does. Indeed, in the *LPTV Reimbursement R&O* the Commission stated that stations would be eligible for reimbursement under far less justifiable circumstances than those attendant to WIVN’s situation:

“For example, if a displaced [LPTV] station filed an application during the Special Displacement Window that was technically deficient and was not amended to resolve the deficiency within the applicable time period stated in a notice of deficiency letter, then such application would be dismissed. However, the displaced station could file another displacement application after the filing freeze is lifted . . . ” and “will be eligible for reimbursement under the REA if its later-filed displacement application is granted.”<sup>16</sup>

In a similar vein, the Commission also stated in the *LPTV Reimbursement R&O* that:

LMS indicates that there are over 1,000 LPTV/translators that do not have a digital facility. If any of these stations were displaced and filed a digital displacement application, costs reasonably incurred to construct a new digital facility will be reimbursed.<sup>17</sup>

In the present case, to deny WIVN reimbursement would be to tacitly conclude that a “better” course for WIVN—i.e., a course that would have resulted in reimbursement of the transmitter for WIVN’s 3 kW facilities—would have been for WIVN to: (1) file a technically deficient application in the Special Displacement window (rather than carefully planning and filing a grantable application); (2) elect, for any reason or no reason at all, not to timely file to correct the technical deficiency (rather than carefully considering all of its options and making a viable modification filing to preserve the station’s service to the public), resulting in the dismissal of the initial application<sup>18</sup>; and (3) go silent for over a year post-displacement (rather than licensing interim facilities to continue serving the public). Or, WIVN could have decided to be a laggard in the digital transition (rather than promptly seeking and licensing digital facilities *well over a decade prior to the LPTV digital transition date*, as WIVN did), and then followed the same “untimely-remedied technical deficiency” course above to secure reimbursement not just for displacement but also for brand new, initial 3 kW digital facilities. As a matter of law, equity, public interest service, and common sense, it simply cannot be the case that the two alternatives outlined above would preserve WIVN’s entitlement to reimbursement of its transmitter (and related equipment) necessary for its 3 kW facilities when the actual proactive, service-saving course WIVN took does not. Put another way, just because the *LPTV Reimbursement R&O* did not expressly discuss WIVN’s specific displacement permutation does not mean that the full costs of this specific displacement permutation should be excluded from reimbursement. Instead, the *LPTV Reimbursement R&O* widely set the brackets for eligible reimbursement costs as extending at least

---

<sup>16</sup> See *id.* at 1702–03 & n.76.

<sup>17</sup> *Id.* at 1713, n.149.

<sup>18</sup> See, e.g., *Media Bureau Lifts LPTV and TV Translator Application Filing Freezes*, Public Notice, 34 FCC Rcd 1381 (2019) (reminding licensees that “Stations that filed during the Window, had their applications dismissed but re-filed, and had their applications granted are also eligible for reimbursement.”).



as far as the “untimely-remedied technical deficiency” and “digital-transition laggard” permutations discussed above; WIVN’s permutation fits well within those brackets, and the mere fact that WIVN sought and constructed interim facilities does not somehow disqualify WIVN from reimbursement for its actual, final 3 kW displacement facilities.

Fundamentally, WIVN was eligible for and did file an application in the Special Displacement Window, and subsequent circumstances beyond the licensee’s control prevented timely construction such that WIVN has only been offered reimbursement for its displacement facilities outside the precise contours of the authorization initially obtained during the Special Displacement Window. If *entirely avoidable* circumstances such as unaddressed technical application deficiencies and last-minute digital transitions do not cut off an entitlement to reimbursement for actual, final facilities, neither should WIVN’s actions to preserve its license and service to the public in response to exigent circumstances.<sup>19</sup>

***B. WIVN’s Interim Facilities, Case-by-Case Analysis, Other Special Displacement Window Filers, and Section 312(g) Silent Situations.*** In 2019, the full Commission not only observed that “equipment and other costs necessary for an eligible LPTV/translator station to construct the facilities authorized by the grant of the station’s Special Displacement Window application shall be considered costs ‘reasonably incurred,’ ”<sup>20</sup> but also committed to consider “on a case-by-case basis whether expenses for interim facilities are eligible for reimbursement under the REA for LPTV/translator stations.”<sup>21</sup> Although the Commission initially expressed doubts about the likelihood of widespread need for LPTV stations to construct interim facilities, it expressly adverted to the fact that interim facilities could be needed “to avoid prolonged periods off the air during the transition.”<sup>22</sup>

---

<sup>19</sup> In reality, the circumstances were not merely “exigent”; they were, in fact, demonstrably once-in-a-station-lifetime—nay, *once in the Commission’s lifetime*—circumstances. Never in the history of the Federal Communications Commission has the agency been called upon to handle a scenario such as the one before it now, and it seems nearly impossible to imagine that the agency will ever be faced with a similar situation. That means that the Commission really only has one chance to get this right.

<sup>20</sup> *Id.* at 1709.

<sup>21</sup> See *id.* at 1713. Out of necessity, in the time since WIVN’s Displacement CP was granted WIVN was required to change its antenna plans due to lack of availability of the antenna originally specified in the Displacement Application. See LMS File. No. 0000186814. WIVN understands and is willing to pay for any aspect of the antenna change that may be considered an “upgrade” as compared to the antenna specified in WIVN’s Displacement CP. However, that change does not affect WIVN’s entitlement to reimbursement overall for the facilities specified in the Displacement CP; critically, both applications specify the same 3 kW operational power in any event.

<sup>22</sup> Compare *LPTV, TV Translator, & FM Broad. Station Reimbursement*, Notice of Proposed Rulemaking, 33 FCC Rcd 7855, 7875 (2018) (“We propose to exclude ‘interim facilities’ from the type of expenses eligible for reimbursement under the REA. . . . Because LPTV/translators will have less time to construct interim facilities as a practical matter due to the timing of their actual displacement, interim facilities are unlikely to be utilized by such stations.”), with *LPTV Reimbursement R&O*, 34 FCC Rcd at 1713–14 & n.150 (citing foregoing NPRM and explaining “that LPTV stations may need to implement interim facilities in certain circumstances,” while noting that such circumstances for similar reimbursable facilities included a “need to use interim facilities to avoid prolonged periods off the air during the transition” (internal emphasis added)).

In the present case, and as previously explained, WIVN satisfies all relevant eligibility criteria to fall within the congressional reimbursement mandate set forth in the REA.<sup>23</sup> In particular, WIVN filed for and obtained the grant of a displacement application filed during the Special Displacement Window.<sup>24</sup> And WIVN's 3 kW operations were previously expressly authorized in the granted Displacement CP and noted in WIVN's reimbursement submissions. *See* LMS File Nos. 0000054240, 0000088705. Put another way and using the full Commission's own words, the equipment for which WIVN is currently seeking reimbursement is "equipment . . . necessary for an eligible LPTV/translator station to construct the facilities authorized by the grant of the station's Special Displacement Window application . . . ." <sup>25</sup> That WIVN's equipment for its actual, final 3 kW operation meets this description is really beyond cavil. Indeed, out of necessity WIVN even sought out and committed to paying a substantial down-payment amount toward the equipment required to build out the 3 kW facility **before** the modification application specifying WIVN's interim facilities was filed, let alone granted. *See* Attachment B (May 5, 2021, GatesAir Rental Agreement). Unfortunately, however, the Fund Administrator has indicated that WIVN's 3 kW operations are no longer relevant for reimbursement purposes because WIVN filed to decrease the station's power to 0.015 kW and licensed that facility. WIVN's response to that mistaken interpretation of the facts is actually quite simple: the 0.015 kW facility was never considered by the licensee—nor could have reasonably been considered objectively by the Fund Administrator or the Commission—to be the final facility, it was only an interim buildout necessary to put WIVN back on the air during the life of the Displacement CP; the final facility was always going to be the same one that was granted based on the application filed in the Special Displacement Window. Nobody—not the Fund Administrator, not the Commission Staff, not Commissioners, not competitors of WIVN, not vendors, not members of Congress, not government or media "watchdog" groups in D.C., not cross-border Canadian broadcasters, not community gadflies—**NOBODY** has proffered any factual evidence whatsoever that the 0.015 kW facility was WIVN's final facility and that construction above 0.015 kW (up to 3 kW) is an "upgrade." All facts point clearly and consistently toward WIVN's ultimate plan always and consistently being to construct the full 3 kW facility. It is patently unreasonable (arbitrary and capricious even) for the Commission, Commission Staff, the Fund Administrator, or anyone else to view (or to have viewed) WIVN's 0.015 kW facility as its final facility when (i) the extraordinary decrease in power sought less than two months prior to the CP's expiration date (ii) made WIVN by far the lowest-powered VHF LPTV station in the entire country, (iii) following the involuntary move (iv) of an existing digital facility (which has been digital since 2010) (v) from a desirable UHF channel to a greatly inferior VHF channel. Yet, against that clear and unambiguous backdrop, and against all evidence to the contrary, the Fund Administrator purports to have made a definitive determination that the least likely course of events has occurred here, namely that WIVN intended for its microscopic 0.015 kW facility to be its displacement facility and that anything else—including a 3 kW facility as specifically applied for and granted during the qualifying Special Displacement Window—is an "upgrade." Such a decision runs contrary not just to the objective facts recounted

---

<sup>23</sup> 47 U.S.C. § 1452(k).

<sup>24</sup> *See LPTV Reimbursement R&O*, 34 FCC Rcd at 1702.

<sup>25</sup> *Id.* at 1709.

above and the public interest,<sup>26</sup> but also “case-by-case” decisions made regarding other displaced LPTV stations.

In fact, to counsel’s knowledge, at no time and in no published Commission decision (not even in the Reimbursement FAQs) has the Commission stated, implied, or even remotely suggested that licensing a displaced facility at a significantly lower power level than the facility granted in a Special Displacement Window CP would preclude reimbursement of the full Special Displacement Window CP facility. The lack of notice on this point would render a decision to deny WIVN reimbursement of its 3 kW facilities here patently arbitrary and capricious. Indeed, the Reimbursement FAQs go so far as to note that even after a station indicates in its Form 399 that “[c]onstruction of final facilities or all necessary modifications are complete” the station “*will still be able to upload invoices and receive reimbursement.*” FCC, *Post-Auction Reimbursement: Broadcaster Frequently Asked Questions*, at 16 (July 27, 2022), <https://www.fcc.gov/sites/default/files/lptv-faq-reimbursement.pdf>. In the present case WIVN—accurately—never even submitted a Form 399 indicating that its final facilities had been constructed. *See generally* LMS File No. 0000088705. WIVN should therefore continue to be eligible for reimbursement of the costs incurred to construct its facilities authorized in the Special Displacement Window CP.

For one comparative case in point, consider the reimbursement circumstances attendant to LPTV station W41DO-D, New York, NY (Facility ID No. 60554). In 2018, W41DO-D was displaced “early,” ahead of the Special Displacement Window due to circumstances outside of its control (“early” launch of wireless services in the applicable geographic area). *See* LMS File No. 0000048498. Accordingly, on March 12, 2018, W41DO-D filed for a Displacement CP along with a request for waiver of the requirement to file its Displacement Application within the Special Displacement Window. *Id.* The Commission did not grant that application until December 21, 2021. *See id.* In the interim, however, on August 29, 2019, W41DO-D filed for and, on September 4, 2019, had granted an application to modify the station’s license so that W41DO-D could enter into a channel sharing agreement (“CSA”) as a sharee on the spectrum allocated to WKOB-LD, New York, NY (Facility ID No. 51441). *See* LMS File No. 0000080714. On March 24, 2021, W41DO-D subsequently submitted an application for a license to cover the CSA CP, which was granted on July 26, 2021. *See* LMS File No. 0000140964. Then, only approximately one month after the license to cover the CSA CP was granted, W41DO-D filed to dissolve the CSA, which dissolution was granted on September 29, 2021. *See* LMS File No. 0000158183. W41DO-D then proceeded to move forward with constructing its actual—i.e., final / non-interim—facilities as set forth in its 2018 Displacement CP application. Notably, the interim CSA CP and the Displacement CP both modified the same underlying license for W41DO-D (BLDTL-20110224ACL), and yet W41DO-D appears to have suffered no negative reimbursement ramifications due to its interim, CSA licensure. *See, e.g.,* 0000185143 (Form 399 Eligibility), 0000197766 (Form 399).

---

<sup>26</sup> It bears repeating that the following categories of LPTV stations are being treated in a superior manner than WIVN: Section 312(g) stations; stations that filed incomplete applications during the Special Displacement Window and then failed to timely correct those application deficiencies; and stations that were still analog and/or unbuilt at the time of the Special Displacement Window. Put simply, there is no public interest criteria under which the foregoing categories of stations deserve reimbursement treatment superior to that afforded (or, really, thus far denied) WIVN.

Succinctly put, W41DO-D's circumstances demonstrate that the Fund Administrator has deemed actual, final LPTV facilities to be fully eligible for reimbursement even when such LPTV stations filed for, constructed, and licensed facilities outside of those specified in their Displacement CP Application and when such interim facilities were built and licensed prior to the buildout of the facilities specified in their Displacement CP Application. Said yet another way: both WIVN-LD and W41DO-D filed for reimbursement-qualifying Displacement CPs, which were granted; and, due to necessity, both stations had to file for and license interim facilities outside the specifications in their Displacement CP applications. Yet it appears only WIVN-LD is being denied reimbursement for its final displacement facilities. There is no substantive difference between the two situations, nor any apparent justification as to why reimbursing one or not the other better serves the public interest in any circumstance. Indeed, if anything WIVN-LD's course of action should be looked upon more favorably than W41DO-D's given that W41DO-D's switch to a CSA for only a month's time was more likely to confuse viewers by increasing channel number changes, and actually had the effect of completely extinguishing W41DO-D's own, independent spectrum channel allocation.

To recast the above point at an even higher level: ultimately, the question whether WIVN's constructed 0.015 kW facility was an interim facility is actually only relevant insofar as that facility should not cut off reimbursement for WIVN's facilities authorized during the Special Displacement Window. Here, not only is there no question that the 0.015 kW facility was an interim facility, **but WIVN also** has never sought reimbursement for anything more than the 3 kW facility it was originally authorized to construct from the Special Displacement Window application.<sup>27</sup> Consequently, the only reimbursement WIVN seeks is that covered by the Special Displacement Window application, and there is no substantive reason whatsoever not to grant WIVN's reimbursement request. In other words, the crux of the issue here is whether WIVN's 0.015 kW operation was actually intended to be an interim facility such that the expenses associated with buildout of the facility specified in the Displacement CP are eligible for reimbursement. The answer to *that* question is a resounding YES, and there is no full Commission or Bureau-level Order, Public Notice, or published decision that would suggest a contrary outcome given the circumstances explained herein.

Respectfully, to now deny reimbursement for WIVN's previously authorized facilities due to WIVN's response to exigent circumstances—i.e., WIVN's CP modification specifying the 0.015 kW interim facilities necessary to permit WIVN to meet its construction deadline and resume service to its community—would elevate form over substance, an approach the Commission previously sought to avoid when evaluating reimbursements. *See LPTV Reimbursement R&O*, 34 FCC at 1702–03 (articulating touchstone that even in atypical situations reimbursement was appropriate because “such stations are affected by the reorganization of broadcast television spectrum in the same way as other displaced LPTV/translator stations”).

**C. *WIVN's Failure to Informally Engage Commission Staff Cannot Be Disqualifying.*** The licensee understands and apologizes for the confusion that was likely generated by the fact that

---

<sup>27</sup> By grant dated August 11, 2022, WIVN is once again authorized to construct a 3 kW channel 5 facility, albeit with a different antenna and without the severe directionalization originally specified. *See* LMS File No. 0000186814; *see also* note 14, *supra*.

WIVN did not expressly communicate with Commission Staff prior to filing its minor modification to the Displacement CP to indicate that such modification was intended only to request authorization for interim facilities. However, the licensee respectfully submits that a lack of express notification to the Commission that a decrease to only 0.5% of WIVN's authorized power output specified in the Displacement CP should not be the lone, dispositive factor in determining whether the severely diminished facilities were "interim" in nature. In order for the "case by case" analysis to which the Commission committed in the *LPTV Reimbursement R&O* to be a substantive analytical tool, it must necessarily account for unique circumstances such as those presented here, as well as the unavoidable delays caused by the unforeseeable COVID-19 pandemic that forced WIVN to have to take drastic action to preserve its operating authorization—indeed its very existence—prior to the Displacement CP's expiration date. Fundamentally, the licensee respectfully submits that it would be difficult to imagine greater proof of legitimate "interim" operations than those present here, where WIVN is currently (1) using a *borrowed* transmitter, (2) at a power that is *less than one percent* of the power applied for during the Special Displacement Window and authorized in the original Displacement CP, (3) which is by far the lowest power of any digital Channel 5 LPTV station in the FCC's database, (4) for which no interim expense reimbursements were sought, and (5) which corresponds to an LPTV operator that was not converting to digital operation for the first time but had in fact been operating and serving a much larger portion of the public with digital transmissions since 2010.

***D. WIVN's Interim Operations Plan Was Obvious and Reasonable and, in Fact, It Better Served the Public Interest than Using "Tolling" (or a Tolling Waiver) to Remain Silent.***

Furthermore, WIVN was entirely unaware that it would risk forfeiting reimbursement by choosing to maintain its broadcast operations by constructing interim facilities within the timeframe set forth in the Displacement CP—instead, WIVN believed its actions to be reasonable, rational, and non-prejudicial under the unforeseeable exigent circumstances that were inarguably outside of the licensee's control. In this regard, WIVN respectfully submits that there is no substantive reimbursement difference between WIVN's reimbursement request and the multiple circumstances where staff has approved reimbursement for LPTV stations who elected to submit a tolling waiver (at times with an accompanying Section 312(g) waiver request to reinstate the station's expired license) rather than construct interim facilities.<sup>28</sup> In both WIVN's case and the case of stations who instead sought tolling waivers: (a) the originally authorized displacement facilities will be/are constructed after the initial CP expiration date; and, because WIVN did not seek reimbursement for its interim facilities (b) the only reimbursement that will be/is being afforded is for the originally authorized, final displacement facilities. WIVN respectfully submits that its decision to maintain broadcast operations by licensing interim facilities, rather than risk losing its license by pursuing the uncertainty of a tolling waiver (especially in light of the fact that the CP extension request submitted by WIVN had been denied), should not preclude WIVN from

---

<sup>28</sup> Because reimbursement decisions are not typically rendered in published decisions, WIVN has been unable to review and analyze similar "case-by-case" LPTV reimbursement decisions aside from those stumbled across by happenstance and/or good fortune. WIVN's counsel in this matter submitted a Freedom of Information Act ("FOIA") request for such decisions so that WIVN could provide additional authority supporting reimbursement in this case. We withdrew the FOIA request, however, upon learning that there is apparently no way for Commission Staff to electronically search reimbursement correspondence or unpublished decisions, thus making the time and resource expenditure for such a manual search unduly burdensome (and costly).

reimbursement for the costs required to construct its 3 kW displacement facilities. Instead, the decision to maintain WIVN's signal should be commended, and it should be overtly and unmistakably supported by a grant of reimbursement for the full 3 kW facility.<sup>29</sup>

As a final point of comparison, WIVN notes that the Commission has previously reimbursed displaced LPTV stations even in the case of avoidable technical mistakes that resulted in the licensee incurring additional construction costs it would not have otherwise incurred.<sup>30</sup> Accordingly, the fact that WIVN did not preemptively engage with Commission Staff regarding the interim nature of the facilities specified in its modification to the Displacement CP and to determine whether some other protocol—such as a reduced power STA—would have been the preferred approach should not affect the reimbursement eligibility of WIVN's 3 kW facility, particularly given that reimbursing WIVN would not generate any additional reimbursement costs beyond those initially contemplated for the station and instead would only afford reimbursement to WIVN in line with the Commission's prior reimbursement eligibility determinations based on WIVN's Forms 399.

At bottom, a truly substantive case-by-case analysis of WIVN's reimbursement situation demonstrates that granting full reimbursement here would be in line with multiple prior reimbursement grants afforded other LPTV licensees. WIVN should be afforded similar treatment here.

#### IV. Conclusion

In light of all the foregoing, WIVN respectfully requests reimbursement for its displacement facilities as initially applied for and authorized during the Special Displacement Window. WIVN's currently licensed facilities cannot reasonably, objectively be interpreted as anything but interim in nature, given the unusually low power of the facility—particularly as compared to WIVN's initial Displacement CP authorization—and the fact that WIVN is currently using loaned equipment to broadcast via its interim facilities. Viewed within this context, WIVN is not seeking to “upgrade” its facilities or otherwise manipulate reimbursement funding. Instead, WIVN's reimbursement request only seeks to access reimbursement funding for which the FCC previously determined WIVN to be eligible and for which WIVN continues to qualify under the relevant statutory mandate, rules, and Commission commitment to examine such reimbursement situations on a “case-by-case” basis. Affording WIVN reimbursement would accord with prior reimbursement decisions made with respect to similarly situated (and more poorly situated) LPTV stations, rather than single WIVN out for disparate reimbursement rejection. WIVN respectfully

---

<sup>29</sup> Cf. *In Re Snake River Radio, LLC Application for Renewal of License Station Kpcq(Am), Chubbuck*, Hearing Designation Order, DA 22-115 (rel. Feb. 8, 2022) (designating station for hearing in light of extended periods of silence throughout license term and noting that purpose “is to ensure ‘that scarce broadcast spectrum does not lie fallow and unavailable to others capable of instituting and maintaining service to the public’ ”); *Vandalia Media Partners 2, LLC Application for Renewal of License Station WJEH(AM), Gallipolis, OH*, Hearing Designation Order, DA 21-384 (rel. Apr. 2, 2021) (same and noting “[s]ilence instead of licensed operation is a fundamental failure to serve [a] station's community of license, because a silent station offers that community no public service programming”).

<sup>30</sup> See *supra* note 27.

submits that the public interest therefore favors reimbursement so that WIVN can restore full-power operations as initially authorized in its Displacement CP and again deliver unique community-responsive informational, emergency, and entertainment programming to a viewing audience that is more commensurate in size with its pre-displacement facility.

\* \* \* \* \*

## **DECLARATION OF MICHAEL TONGES**

I, Michael Tonges, hereby declare, under penalty of perjury, as follows:

1. I am greater than eighteen years of age and am competent to make this Declaration. I am the owner and President of Image Video Teleproductions, Inc. I have held these positions at all times relevant to WIVN-LD's post-Auction displacement project.

2. My signature below indicates, under penalty of perjury, that I have reviewed the foregoing Reimbursement Justifications for Displacement Facilities of WIVN-LD, Newcomerstown, Ohio, and am familiar with its contents, and, except for those of which official notice may be taken or those that are supported by references to separate authority, I hereby verify, to the best of my knowledge, information, and belief, the truth and accuracy of the factual information contained therein.

**[signature appears on following page]**



The undersigned, under penalty of perjury, declares the foregoing to be true, complete, and correct to the best of his personal knowledge.

This, the 25th day of August, 2022.

By:

  
\_\_\_\_\_  
Michael Tonges  
Owner & President, Image Video Teleproductions, Inc.

# **ATTACHMENT A**

*TVQuery Results for All Channel 5 Digital LPTV Stations*



TV Query uses LMS data. Coordinates are NAD83.

## TV Query Results

9



Thu Jul 28 15:49:23 2022 Eastern time

----- Search Parameters -----

Service: LPD  
Facility ID: 0  
Lower Channel: 5  
Upper Channel: 5

- Use "Resize Results" to change the text size in the list below, for easier printing or viewing.
- Click on the blue Call Sign or blue Facility ID Number to retrieve more detailed information from the TV Query, including access to LMS and CDBS database records pertaining to that station.
- Records for stations outside the USA are derived from international notifications.
- License, application, and construction permit (CP) coordinates shown in the TV Query are NAD 83 coordinates.

Thu Jul 28 15:49:23 2022 Eastern time

Call	---KML maps--	Virtual Channel	Channel	Service	Status	City	State	Country	File Number	FacilityID	ERP	HAAT	Licensee/Permittee
K05HA	KML/F111/Text	5	5	LPD	CP	GLENMALLEN, ETC.	AK	US	BDFCDVL-20141117A	62570	0.928 kw	0. m	SULA TV BOOSTER CLUB
KSCT-LD	KML/F111/Text			LPD	LIC	SITKA	AK	US	0000040686	15348	0.619 kw	0. m	GRAY TELEVISION LICENSEE, LLC
KORY-LD	KML/F111/Text			LPD	LIC	FORT SMITH	AR	US	0000073620	14386	3. kw	0. m	KTV MEDIA, LLC
K05MY-D	KML/F111/Text			LPD	LIC	BAKERSFIELD	CA	US	0000152015	130053	1. kw	0. m	HISPANIC FAMILY CHRISTIAN NETWORK, INC.
KVHF-LD	KML/F111/Text			LPD	APP	FRESNO	CA	US	0000195229	23269	3. kw	0. m	VENTURA TV VIDEO AND APPLIANCE CENTER, INC.
KVHF-LD	KML/F111/Text			LPD	LIC	FRESNO	CA	US	0000074995	23269	1.6 kw	0. m	VENTURA TV VIDEO AND APPLIANCE CENTER, INC.
K05MD-D	KML/F111/Text			LPD	LIC	CRIPPLE CREEK, ETC.	CO	US	BLDVL-20111214A8G	167809	1.5 kw	0. m	HC2 STATION GROUP, INC.
WURF-LD	KML/F111/Text			LPD	LIC	GAINESVILLE	FL	US	BLDVL-20100721FSQ	4200	0.3 kw	0. m	BOARD OF TRUSTEES, UNIVERSITY OF FLORIDA
W05DH-D	KML/F111/Text			LPD	LIC	JUPITER	FL	US	0000135158	183761	3. kw	0. m	NEW HOLA TV LLC
WDGT-LD	KML/F111/Text			LPD	LIC	MIAMI	FL	US	0000148088	6046	3. kw	0. m	CAYO HUESO NETWORKS, LLC
WDT0-LD	KML/F111/Text			LPD	LIC	ORLANDO	FL	US	0000143440	10550	3. kw	0. m	WORD OF GOD FELLOWSHIP, INC.
W05CO-D	KML/F111/Text			LPD	LIC	SARASOTA	FL	US	0000194619	66995	.1 kw	0. m	EDGE SPECTRUM, INC.
K05NH-D	KML/F111/Text			LPD	CP	BOISE	ID	US	BNPDTL-20090825AOL	181779	3. kw	0. m	SOVRYN HOLDINGS, INC.
WEXZ-LD	KML/F111/Text			LPD	LIC	BANGOR	ME	US	0000063629	183296	3. kw	0. m	STATION X, INC.
W05BV-D	KML/F111/Text			LPD	LIC	STARKVILLE	MS	US	0000056412	21634	1. kw	0. m	FIRST UNITED METHODIST CHURCH
W05D3-D	KML/F111/Text			LPD	LIC	PORT JERVIS	NY	US	0000121300	127813	0.57 kw	0. m	VENTURE TECHNOLOGIES GROUP, LLC
K05NL-D	KML/F111/Text			LPD	LIC	RENO	NV	US	0000179554	182555	.1 kw	0. m	DNV SPECTRUM HOLDINGS, LLC
WNYX-LD	KML/F111/Text			LPD	LIC	NEW YORK	NY	US	0000060581	29236	0.3 kw	0. m	NEW YORK SPECTRUM HOLDING COMPANY, LLC
WNYX-LD	KML/F111/Text			LPD	CP	NEW YORK	NY	US	0000178115	29236	0.25 kw	0. m	NEW YORK SPECTRUM HOLDING COMPANY, LLC
WTVN-LD	KML/F111/Text			LPD	APP	NEWCOMERSTOWN	OH	US	0000151932	131008	.045 kw	0. m	IMAGE VIDEO TELEPRODUCTIONS, INC.
WTVN-LD	KML/F111/Text			LPD	LIC	NEWCOMERSTOWN	OH	US	0000186814	131008	3. kw	0. m	IMAGE VIDEO TELEPRODUCTIONS, INC.
WTVN-LD	KML/F111/Text			LPD	LIC	NEWCOMERSTOWN	OH	US	0000151099	131008	0.015 kw	0. m	IMAGE VIDEO TELEPRODUCTIONS, INC.
KAMK-LD	KML/F111/Text			LPD	LIC	EUGENE	OR	US	0000063188	24009	0.5 kw	0. m	BETTER LIFE TELEVISION, INC.
W05DA-D	KML/F111/Text			LPD	LIC	FAJARDO	PR	US	BLDVL-20140530AND	183093	0.3 kw	0. m	TELECINCO, INC.
W05CY-D	KML/F111/Text			LPD	LIC	MAYAGUEZ	PR	US	BLDVL-20150205AAD	183016	3. kw	0. m	TELECINCO, INC.
W05DB-D	KML/F111/Text			LPD	LIC	PONCE	PR	US	BLDVL-20140530ANF	183017	0.3 kw	0. m	TELECINCO, INC.
W05DK-D	KML/F111/Text			LPD	CP	SAN JUAN	PR	US	BNPDVL-20090825AVT	182032	0.2 kw	0. m	MAKO COMMUNICATIONS LLC
WMBE-LD	KML/F111/Text			LPD	LIC	MYRTLE BEACH	SC	US	0000179341	187581	.65 kw	0. m	-
KPFW-LD	KML/F111/Text			LPD	LIC	DALLAS	TX	US	0000105767	127891	3. kw	0. m	DTV AMERICA CORPORATION
KTDJ-LD	KML/F111/Text			LPD	LIC	DAYTON	TX	US	0000011256	135827	3. kw	0. m	-
KTDJ-LD	KML/F111/Text			LPD	CP	DAYTON	TX	US	0000019131	135827	3. kw	0. m	-
KXDA-LD	KML/F111/Text			LPD	LIC	GARLAND	TX	US	0000004284	129919	3. kw	0. m	IGLESIA CRISTIANA EBENEZER
K05MN-D	KML/F111/Text			LPD	LIC	LOGAN	UT	US	0000004995	183046	0.75 kw	0. m	EDGE SPECTRUM, INC.
K05MX-D	KML/F111/Text			LPD	CP	NEPHI	UT	US	0000170460	130528	.1 kw	0. m	EDGE SPECTRUM, INC.

\*\*\* 34 Records Retrieved \*\*\*

[Return to TV Query Data Entry screen](#)

# **ATTACHMENT B**

*GatesAir Rental Agreement*



## Global Support Services

5-May-21

### Rental/Loan Addendum

This Rental/Loan Addendum is subject to the Standard Terms and Conditions of Sale for GATESAIR, as amended by this Addendum, all of which are incorporated herein by reference.

<b>Customer Name:</b>	<b>WIVN-LD</b> Michael Tonges, President	<b>Customer Account #:</b>	SF-00032502
<b>Shipping Address:</b>	6755 Freedom Ave., NW North Canton, Ohio 44720	<b>Billing Address:</b>	6755 Freedom Ave., NW North Canton, Ohio 44720
<b>Customer Shipping Instructions:</b>			
<b>Purpose of Rental/Loan:</b>	Temporary Loaner due to CP expiration prior to availability of new transmitter.		

### Products

Line	Product Part No.	Description	Serial Number	RMA#	Periodicity (D, W, M) <sup>1</sup>	Qty	Price per Rate	Extended Price
1	VAXTE-5L-C	5 watt transmitter Low band VHF	DEM0000790		90 Days	1	000	000
Total Rental Charges (if applicable)								n/a
Tax								
Freight								
Grand Total								000

<b>PO Ref.:</b>		<b>Total Stated Value of Products:</b>	\$ 8600.00	<b>GATESAIR, Inc.</b>
<b>PO #:</b>				<b>ATTN: Order Administration</b>
<b>Invoice #:</b>				

Please FAX a signed copy of this form to: GATESAIR ORDER ADMINISTRATION 217-222-8200 or [orders@gatesair.com](mailto:orders@gatesair.com)

The items listed above will be shipped only after GATESAIR's receipt of this signed Rental/Loan Addendum, a valid purchase order, and a contingent credit review.

**IN WITNESS WHEREOF**, the parties have caused this Rental/Loan Addendum to be executed by their duly authorized representatives as set forth below.

**GATESAIR, Inc.**

**Customer**

By: \_\_\_\_\_  
Printed  
Name: \_\_\_\_\_  
  
Title: \_\_\_\_\_  
  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Printed  
Name: \_\_\_\_\_  
  
Title: \_\_\_\_\_  
  
Date: \_\_\_\_\_

<sup>1</sup> D = Daily; W = Weekly; M = Monthly

This Rental/Loan Addendum ("Addendum"), by and between **GATESAIR, Inc.** ("GATESAIR") and the customer identified on Page 1 of this Addendum (the "Customer"), is in addition to and governed by the Standard Terms and Conditions of Sale for GATESAIR located at <http://www.gatesair.com/company/legal-compliance/terms-and-conditions><sup>2</sup> (the "Agreement").

**NOW, THEREFORE, IT IS HEREBY MUTUALLY AGREED THAT:**

- 1. Products to be Provided.** GATESAIR agrees to provide the products listed on page 1 of this Addendum (the "Products") to Customer, subject to the terms and conditions contained in this Addendum. The Products will be located at the Shipping Address provided on page 1 of this Addendum.
- 2. Rent, Shipping, Payment Terms, Taxes.**
  - a. Rent. The total rental obligation of the Customer is as provided on page 1 of this Addendum, and shall be due and paid in equal installments as shown on page 1.
  - b. Shipping Terms. Customer will pay for all shipping charges.
  - c. Payment Terms. Rent shall be due and paid in advance of the upcoming rental period. All other amounts due under this Addendum will be due and paid within thirty (30) days of the invoice date. All balances past due will be subject to an annual finance charge of the lesser of eighteen (18) percent or the highest rate permitted by law, and GATESAIR may elect to suspend warranty services, reject further Customer orders, and/or repossess the Products until such past due payments are received.
  - d. Taxes. All prices are exclusive of all sales, use, excise, VAT, GST, withholding and other taxes, duties, or charges. Unless valid evidence of tax exempt status is provided by the Customer, the Customer will be liable and will indemnify GATESAIR for all such taxes related to this Addendum.
- 3. Term and Termination.**
  - a. Term. The term of this Addendum, including the term of the license for any software Products provided under this Addendum, will become effective upon shipment of the Products and will continue in effect through August 15<sup>th</sup> 2021 (the "Term"). In the event, following the Term, GATESAIR and the Customer mutually agree to continue this business relationship, new rental fees and terms will be mutually agreed upon in a new, separately executed agreement or addendum.
  - b. Termination for Cause. Either party may terminate this Addendum due to a material violation by the other party of any of the terms and conditions set forth herein that continues unremedied for thirty (30) days following notice to the other party. If Customer so terminates this Addendum, Customer will pay upon termination all outstanding fees and charges through the date of termination. If GATESAIR so terminates, Customer will pay upon termination all rental fees for the remainder of the Rental Term, as well as any other outstanding fees and charges set forth herein, and GATESAIR may take possession of any or all Products, wherever located, without demand, notice, without court order or other process of law and without liability to the Customer for damages occasioned by such taking of possession. In addition, the terminating party may seek any and all remedies at law or equity as may be limited by this Agreement.
  - c. Termination for Insolvency. This Agreement may be terminated by a party with immediate effect upon the other party's: (i) filing of a petition in bankruptcy not dismissed within thirty (30) days; (ii) insolvency; (iii) making of an assignment for the benefit of creditors, or the entering into of any other arrangement having similar effect; or, (iv) initiation of proceedings for the dissolution or liquidation of business operations. If GATESAIR so terminates, Customer will pay upon termination all rental fees for the remainder of the Rental Term, as well as any other outstanding fees and charges set forth herein, and GATESAIR may take possession of any or all Products, wherever located, without demand, notice, without court order or other process of law and without liability to the Customer for damages occasioned by such taking of possession.
- 4. Ownership and Title.** The Products are, and shall at all times remain the sole and exclusive property of GATESAIR. The Customer shall have no right, title or interest therein except as expressly set forth in this Addendum. The Products are, and shall at all times be and remain, personal property notwithstanding that the Products or any part thereof may now be, or hereinafter become, in any manner affixed or attached to, embedded in, or permanently resisting upon, real property or any building thereon, or attached in any manner to what is permanent. Customer hereby agrees to permit GATESAIR's representatives or agents access to the Products and to the property where the Products are located. The Customer agrees that the Products may be dismantled and removed if deemed necessary by GATESAIR, and the Customer waives all claims for restoration of the condition of the property which may be occasioned by the removal of the Products; provided, however, that GATESAIR removes the Products exercising reasonable caution to protect the Customer's premises and to avoid injury to any person located thereon. The Customer further waives any claim of action for trespass or damage caused by GATESAIR's entrance and removal of the Products in accordance with this Addendum.
- 5. Risk of Loss/Insurance.** Customer shall take and assume all responsibility for the Products while in its possession. GATESAIR may, in addition to all other remedies provided by law, assess Customer for any loss, cost, damage, claim, or expense resulting from Customer's failure to return the Products in good condition as specified in this Agreement. The Customer agrees to notify GATESAIR immediately in writing if the Products or any part thereof is at any time damaged, lost or stolen. Customer agrees to maintain at its sole cost liability insurance issued by a reputable insurance company, insuring Customer and the Products at all times against damage and loss for any reason. Such insurance shall

---

<sup>2</sup> For a hardcopy of the Standard Terms and Conditions of Sale for GATESAIR, please call (U.S.) 303-476-5000, fax your request to 303-476-5004, or email your request to [legal@gatesair.com](mailto:legal@gatesair.com).

be maintained by Customer for an amount equal to the fair market value of the Products at the time the loan commenced. Customer will provide, at GATESAIR's request, certification of such insurance containing a loss payable clause for GATESAIR's benefit.

6. **Products Maintenance, Damage.** The Customer shall, at its sole expense, (1) operate the Products within their normal capacity, and only in a manner and for such use as described in GATESAIR's operating manual for such products, (2) operate the Products in conformity with all applicable statutes, ordinances, rules and regulations or orders thereunder, (3) exercise due care for the safekeeping of the Products, (4) keep the Products in a safe and secure environment at all times, (5) restrict the use and operation thereof to careful and competent personnel and only for the purposes set forth in this Addendum, and (6) maintain the Products in good working order and repair. If at any time during the Rental Term, GATESAIR supplies the Customer with labels, plates or other makings, stating that the Products are owned by GATESAIR, the Customer shall affix and keep the same upon a prominent place on the Products. The Customer shall give GATESAIR immediate notice of any attachments or other judicial process affecting any item of Products and shall, whenever requested by GATESAIR, advise GATESAIR of the exact location of the Products.
7. **Return of Products, Packaging.** Within three (3) days after the date of expiration or termination of this Addendum, the Customer shall return the Products to GATESAIR in the same condition and working order as when delivered. Additional charges may apply for any items not returned within such three (3) day period. Failure to return the Products within fifteen (15) days will result in it being deemed that the Customer has provided notice of its intent to purchase the Products and Customer becoming immediately and automatically liable to GATESAIR for the then current list price for such item, as well as applicable taxes and for reimbursement of freight charges, which may have been previously paid by GATESAIR. Customer agrees to pay such amounts net thirty (30) days from the date of the invoice. The Customer shall be responsible, at its sole expense, for (i) packing the Products with the Products manufacturer's standard packaging materials, (ii) loading the Products on board a GATESAIR recommended freight carrier, and (iii) shipping the Products to a destination designated by GATESAIR. The Customer may retain the original shipping containers and static protection bags for use in returning the items to GATESAIR.
8. **Indemnity.** The Customer shall indemnify, defend and hold harmless GATESAIR against any and all claims, actions, suits, proceedings, costs, expenses, damages and liabilities, including attorney's fees, arising out of, in connection with, or resulting from the Products while on the premises or in the possession of the Customer, or this Agreement, including without limitation, possession, use, operation, or return of the Products. This indemnity shall survive the termination or expiration of this Addendum.
9. **Warranty Disclaimer; Limitations of Liability**
  - a. Warranty Disclaimer. **EXCEPT AS EXPRESSLY PROVIDED IN THIS ADDENDUM AND THE AGREEMENT, GATESAIR HEREBY EXPRESSLY DISCLAIMS ALL REPRESENTATIONS, CONDITIONS AND WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING BY WAY OF EXAMPLE AND NOT LIMITATION, THE IMPLIED WARRANTIES OF TITLE, MERCHANTABILITY, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE.**
  - b. Damages Limitation. **NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, IN NO EVENT WILL GATESAIR BE LIABLE FOR ANY SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES WHATSOEVER, INCLUDING LOSS OF PROFITS, WHETHER ARISING IN CONTRACT, TORT, WARRANTY OR OTHERWISE, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE LIMITATIONS SET FORTH HERE WILL APPLY EVEN IF THE REMEDIES OF ERROR CORRECTION, REPERFORMANCE OF SERVICES AND REFUND OF PAYMENTS COMPLETELY FAIL OF THEIR ESSENTIAL PURPOSE.**
  - c. Liability Cap. **NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, THE LIMIT OF GATESAIR'S LIABILITY (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY, BY STATUTE OR OTHERWISE) TO CUSTOMER OR TO ANY THIRD PARTY CONCERNING THE PRODUCTS RENTED TO CUSTOMER UNDER THIS ADDENDUM, GATESAIR'S PERFORMANCE OR NON-PERFORMANCE, OR IN ANY MANNER RELATED TO THIS ADDENDUM OR THE AGREEMENT, FOR ANY AND ALL CLAIMS WILL NOT IN THE AGGREGATE EXCEED THE ACTUAL RENTAL PRICE PAID BY CUSTOMER DURING THE RENTAL TERM.**
10. **General.** A copy of this Addendum transmitted by facsimile machine or by e-mail will have the same force and effect as an original. This Addendum is in addition to the Agreement; all other terms and conditions of the Agreement will remain in full force and effect.