



Federal Communications Commission
Washington, D.C. 20554

June 28, 2017

KWEX License Partnership, L.P.
5999 Center Drive
Los Angeles, California 90045

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Re: Request for Waiver of Initial
Construction Permit Filing Deadline
KWEX-DT, San Antonio, Texas
Facility ID No. 35881
LMS File No. 0000024880

Dear Licensee,

On June 12, 2017, KWEX License Partnership, L.P. (KWEX) submitted the above captioned request for waiver of the July 12, 2017, 90-day post-incentive auction construction permit and cost estimate filing deadline for full power television station KWEX-DT, San Antonio, Texas (KWEX-DT or Station), asserting that the Station is "unable to construct" the specified facilities assigned to it in the *Closing and Channel Reassignment Public Notice*¹ due to land mobile (LM) interference and other related technical reasons. KWEX also seeks permission to file an application for construction permit during the first priority alternate channel/expanded facilities filing window (first priority window). For the reasons below, we grant the request for waiver and KWEX is permitted to file an application for construction permit during the first priority window.

Background. The Commission instructed that a reassigned station is eligible to receive a waiver of the July 12, 2017 filing deadline for its post-incentive auction construction permit if the station demonstrates that due to extraordinary technical or legal issues beyond the station's control, it is "unable to construct" the post-auction facilities specified to it in the *Closing and Channel Reassignment Public Notice* or within the permissible contour coverage variance.² If the Media Bureau grants a station such a waiver, the station is permitted to file a request for a construction permit in the first priority window, to

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 (MB & WTB 2017) (*Closing and Channel Reassignment Public Notice*). See LMS File No. 0000024880, KWEX June 12, 2017 Request to Waive Filing Deadline for Construction Permit Application and Engineering Statement (Waiver Request).

² *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6794, para. 554 (2014), subsequent history omitted (*Incentive Auction R&O*); 47 CFR § 73.3700(b)(1)(iv)(A). The Commission has stated that a station may be found to be "unable to construct" the facility specified in the *Closing and Channel Reassignment Public Notice*, for example, if a station is unable to construct a compliant facility on its current tower and a replacement tower cannot be constructed from which the station would be able to meet the specified technical parameters. *Incentive Auction R&O*, 29 FCC Rcd at 6791 n.1551.

seek an alternate channel and/or expanded facilities.³ A station whose request to file its construction permit application in the first priority window is granted because it is “unable to construct” will also be granted additional time to submit its reimbursement cost estimate form (FCC Form 2100, Schedule 399) detailing its estimated relocation costs.⁴ The station may, however, choose to file its cost estimate form by the July 12, 2017 filing deadline so that the Commission can use that information as the basis for the initial allocation for the station’s construction project. The Commission will assign a proxy estimate for stations filing in the first priority window that do not submit cost estimate information on FCC Form 2100, Schedule 399 by July 12, 2017.⁵

KWEX-DT is currently licensed to operate on channel 41 and was reassigned to channel 14 in the *Closing and Channel Reassignment Public Notice*. Television channel 14 is immediately adjacent to the 460-470 MHz land mobile (LM) band. Under subsections 73.687(e)(3) and (4) of the Commission’s Rules, channel 14 permittees and licensees are required to undertake efforts to avoid and prevent interference to adjacent spectrum land mobile radio service facilities.⁶ KWEX’s consulting engineers conducted an analysis of the over 300 LM licensees within 20 miles of KWEX-DT current site and have determined that KWEX will not be able to construct a facility on channel 14 because it is impossible to deploy sufficient filtering to protect these LM operations.⁷ Moreover, given the large number of potentially affected LM licensees in the vicinity of KWEX-DT and the frequency congestion in the area, relocating all of the potentially affected LM licensees to new UHF frequencies with greater spacing with respect to channel 14 is not feasible.⁸

Discussion. A waiver is appropriate “where the particular facts make strict compliance inconsistent with the public interest” and a deviation from the general rule would relieve hardship or produce a “more effective implementation of overall policy on an individual basis.”⁹ In this case, we find that it would not be consistent with the public interest to require KWEX to apply for its assigned post-incentive auction facilities in light of the circumstances KWEX has presented, including the widespread determinantal impact that the channel change would likely have on LM facilities. Even if the Station were to apply mitigation techniques, such as installation of filters, operation on channel 14 is likely to cause prohibited interference to existing LM facilities. A staff analysis of the included technical exhibit confirms that unresolvable interference is likely.¹⁰ Based on the foregoing, we find that ION has

³ See 47 CFR § 73.3700(b)(1)(iv)(A). Applications filed during the first priority window will be treated as filed on the last day of that window for purposes of determining mutual exclusivity and will be given a 90-day period to resolve the MX by proposing a technical solution or settlement in an amendment to their pending applications. See *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broadcast Transition*, Public Notice, 32 FCC Rcd 858, 870, para. 36 (MB 2017) (*Broadcast Transition Procedures Public Notice*).

⁴ See *id.* at 884 n.180 (citing *Incentive Auction R&O*, 29 FCC Rcd at 6823 n.1754).

⁵ *Closing and Channel Reassignment Public Notice*, 32 FCC Rcd at 2815, para. 86 (“The Commission will assign a proxy estimate using, for instance, the cost estimates of similarly situated stations, in order to provide those stations with an initial allocation.”).

⁶ 47 CFR §§ 73.687(e)(3),(4).

⁷ See Waiver Request at 1 and Engineering Statement.

⁸ *Id.*, Engineering Statement at 4.

⁹ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); 47 CFR § 1.3.

¹⁰ See Waiver Request, Engineering Statement at 1-4.

demonstrated that it is unable to construct its post-auction facility as assigned to it in the *Closing and Channel Reassignment Public* and conclude that it is in the public interest to allow KWEX to apply for an alternate facility for KWEX-DT during the first priority window.

We remind KWEX that, when filing in the first priority window, it must protect the construction permit facilities of reassigned stations and band changing stations filed in the initial 90-day period if those stations' applications have been granted or remain pending. Otherwise, applicants in the first priority window must protect the facilities specified in the *Closing and Channel Reassignment Public Notice*.¹¹ In addition, all applications filed in the first priority window must protect the facilities specified in applications filed before the April 2013 freeze with "cut-off" protection.¹² The facilities proposed in applications filed during the first priority window will be entitled to interference protection from subsequently-filed applications and amendments thereto.¹³ We also remind KWEX that our action does not change the transition schedule, including the station's phase assignment, testing period, or phase completion date.¹⁴

The above facts considered, KWEX's request for waiver **IS GRANTED** and the July 12, 2017 deadline for submission of both its application for post-incentive auction construction permit (FCC Form 2100, Schedule A) and reimbursement cost estimate form (FCC Form 2100, Schedule 399) **IS WAIVED**. Furthermore, KWEX is instructed to submit an application for construction permit in the first priority window for KWEX-DT, which will be announced by Public Notice and commence shortly after

¹¹ See *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd at 867, para. 30.

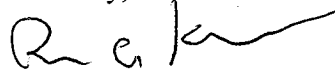
¹² See *Media Bureau Announces Limitations on the Filing and Processing of Full Power and Class A Television Station Modification Applications, Effective Immediately, and Reminds Stations of Spectrum Act Preservation Mandate*, Public Notice, 28 FCC Rcd 4364 (MB 2013).

¹³ See *Incentive Auction R&O*, 29 FCC Rcd at 6794 n.1573 (citing *Commission Lifts Freeze on Filing of Maximization Applications and Petitions for Digital Channel Substitutions, Effective Immediately*, Public Notice, 23 FCC Rcd 8330 (2008)).

¹⁴ See *Incentive Auction R&O*, 29 FCC Rcd at n.1551. To make a change to a station's phase assignment and corresponding transition deadlines a licensee must file a Request for Modification and Waiver of its phase assignment by filing a Legal STA in LMS. See *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd at 887, Appx. A (providing instructions for filing a Legal STA in LMS). The Bureau will evaluate such requests on a case-by-case basis in order to facilitate a timely and orderly transition and assess the impact of such requests on the transition schedule, including the impact on other broadcasters as well as viewers. See *Incentive Auction Task Force and Media Bureau Adopt Post-Incentive Auction Transition Scheduling Plan*, Public Notice, 32 FCC Rcd 890, 912-14, paras. 49-52 (MB 2017); see also *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd at 881-82, para. 73. No fee is required to file a Legal STA that contains a request for modification and waiver of a station's phase assignment.

conclusion of the initial 90-day filing period.¹⁵ KWEX is also instructed to submit its reimbursement cost estimate form for KWEX-DT within 30 days of receiving a construction permit for an alternate channel or expanded facility.

Sincerely,



Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁵ See *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd at 867, para. 30 and n.49 (citing *Incentive Auction R&O*, 29 FCC Rcd at 6795, para. 556 (delegating authority to the Bureau to issue public notices announcing filing opportunities for alternate channels and expanded facilities and stating that the staff will open the first priority window after it substantially completes its processing of initial minor change construction permits)).