



Federal Communications Commission
Washington, D.C. 20554

October 23, 2018

Lilly Broadcasting of Pennsylvania License Subsidiary, LLC
Kevin T. Lilly
3514 State Street
Erie, PA 16508

Re: Request for Modification and
Waiver of Phase Assignment
WSEE-TV, Erie, PA
Facility ID No. 49711
LMS File No. 0000059641

Dear Licensee,

On September 18, 2018, Lilly Broadcasting of Pennsylvania License Subsidiary, LLC (Lilly Broadcasting), the licensee of Station WSEE-TV, Erie, Pennsylvania (WSEE-TV or Station), filed a *Request for Modification and Waiver of Phase Assignment* requesting to modify the post-incentive auction transition phase assigned to the Station in the *Closing and Channel Reassignment Public Notice* from Phase 6 to Phase 2.¹ For the reasons below, we grant Lilly Broadcasting's request for waiver and modify WSEE-TV's phase assignment to Phase 2, as conditioned herein.

Background. Pursuant to the *Transition Scheduling Adoption Public Notice*, individual stations may request waiver and modification of their phase assignment.² A waiver is appropriate where the particular facts would make strict compliance inconsistent with the public interest and deviation from the general rule would relieve hardship, promote equity, or produce a more effective implementation of overall policy on an individual basis.³ The Media Bureau (Bureau) has stated it will evaluate such requests on a case-by-case basis to assess the impact on the transition schedule, including the impact on other broadcasters as well as viewers, in order to facilitate a timely and orderly transition.⁴ The Bureau determined that it would view favorably requests that are compliant with the Commission's rules and

¹ See *Incentive Auction Closing and Channel Reassignment Public Notice: The Broadcast Television Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced*, Public Notice, 32 FCC Rcd 2786 (WTB & MB 2017) (*Closing and Channel Reassignment Public Notice*). See LMS File No. 0000059641 (as amended Oct. 4, 2018), WSEE Request to Waive Phase Assignment, Testing Period, and Phase Completion Date -- Amended (Waiver Request).

² See *Incentive Auction Task Force and Media Bureau Adopt a Post-Incentive Auction Transition Scheduling Plan*, MB Docket No. 16-306 and GN Docket No. 12-268, 32 FCC Rcd 890, 912-14, paras. 47-52 (MB 2017) (*Transition Scheduling Adoption Public Notice*).

³ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); 47 CFR § 1.3 (waiver for good cause shown). See also *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 913-14, para. 51 and n.171.

⁴ See *id.* at 912-14, paras. 49-52. See also *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Broadcast Transition*, 32 FCC Rcd 858, 881-82, para 73 (MB 2017).

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

WSEE-TV is currently licensed to operate on channel 16. It was reassigned to channel 21 in the *Closing and Channel Reassignment Public Notice* and assigned to transition Phase 6, which has a testing period start date of September 7, 2019, and phase completion date of October 18, 2019. WSEE-TV is located in the Erie, Pennsylvania, Designated Market Area (Erie DMA). A total of four stations, including WSEE-TV, were repacked in the Erie DMA, with two stations being assigned to Phase 4 and two to Phase 6. WSEE-TV has been experiencing significant issues with its existing Axcera transmitter, which is now malfunctioning, and causing the Station to operate at 60% of its authorized power. Lilly Broadcasting states that because Axcera is no longer in business, repair of the transmitter is not feasible.⁷ In order to resume full operations to viewers in its coverage area as expeditiously as possible, Lilly Broadcasting has requested modification of WSEE-TV's transition phase from Phase 6 to Phase 2. Phase 2 has a testing period start date of December 1, 2018, and phase completion date of April 12, 2019. Lilly Broadcasting states that transitioning in Phase 2 would eliminate additional work and strain on vendors and service providers and simplify the Station's transition by avoiding the need for two build outs in less than a year – one to replace WSEE-TV's current operations on channel 16; and one to construct WSEE-TV's facility on channel 21, its post-auction channel.⁸ Included with its waiver request are letters of support from its vendors and services providers stating that grant of this phase change "will not hinder their provision of equipment or services to other transitioning stations."⁹

Lilly Broadcasting provides an engineering analysis demonstrating that its early transition will not create any new linked-station sets or result in increased pairwise interference greater than two percent during the transition period.¹⁰ Lilly Broadcasting states that granting the waiver will create an additional rescan period in the Erie DMA, increasing the total number of rescan periods for the DMA to three.¹¹ This would be more than the two rescan periods per DMA limitation used in the tool adopted by the Bureau in the *Transition Scheduling Adoption Public Notice* to assign stations to transition phases.¹² In order to minimize viewer confusion caused by the additional rescan period, Lilly Broadcasting states that it will conduct expanded consumer education and outreach efforts for the Station beyond what is required by Commission rules, including but not limited to additional public service announcements and crawls, the use of digital and social media, and newscasts.¹³

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

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

⁷ Waiver Request at 2.

⁸ *Id.*

⁹ *Id.*, Amendment at 2 (Letter from Worldwide Communications Consultants, LLC)

¹⁰ *Id.* at 2 and 4-8 (Engineering Statement).

¹¹ *Id.* at 2-3.

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

¹³ Waiver Request at 3. The required 90-day MVPD notifications have already been mailed. *Id.* We remind Lilly Broadcasting that per the terms of its construction permit it must also provide notice to healthcare facilities and AM radio station WRIE, Erie, PA. See LMS File No. 0000034791.

Discussion. Upon review of the facts and circumstances presented, we find Lilly Broadcasting's request to modify its phase assignment to permit WSEE-TV to transition to its post-auction channel in Phase 2 satisfies the requirements for a waiver and is in the public interest. We agree that the change to WSEE-TV's transition phase should not have an adverse impact on the overall transition schedule or a negative impact on other stations or viewers. Grant of the waiver will avoid the increased demand on transition resources that would result from the Station having to undertake two buildouts. A staff analysis also confirms that the phase change will not result in new increased pairwise interference above the two percent permitted during the post-auction transition period.¹⁴ While viewers in the Erie DMA will be subjected to a third rescan period, Lilly Broadcasting has committed to put in place viewer outreach programs beyond those required by the Commission rules to ensure that viewers will be well-informed and can manage the additional rescan period. As a result, we find the benefit of facilitating the Station's resumption of operation to its full coverage area, ensuring that the Station does not go silent in the event that its transmitter fails, and the additional consumer education and outreach efforts it commits to conducting outweighs the viewer burden of an additional rescan period in this case.

We caution Lilly Broadcasting that any additional expenses incurred as a result of the grant of WSEE-TV's voluntary phase change may not be reimbursable from the TV Broadcasters Relocation Fund. Such additional costs might include, but may not be limited to, additional legal or engineering expenses; filing fees; and interim or additional equipment that was not contemplated when the station filed its initial estimated expenses but was subsequently necessitated to complete the transition to its post-auction channel due to its phase change. Lilly Broadcasting is responsible for paying for any expenses incurred as a result of voluntarily requested changes to the station's transition schedule.

Accordingly, we **GRANT** Lilly Broadcasting's *Request for Modification and Waiver of Phase Assignment* and modify the transition phase assignment for WSEE-TV **from Phase 6 to Phase 2**, subject to all the commitments made in its waiver request and compliance with all Commission rules applicable to transitioning stations.¹⁵ Testing on the Station's post-auction channel **may not begin until 12:01 am local time on December 1, 2019**, and the Station is required to cease operating on its pre-auction channel

¹⁴ See *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 897, para. 16 (allowing temporary increased pairwise (station-to-station) interference of up to two percent during the transition period).

¹⁵ See generally 47 CFR § 73.3700; *Transition Reminder Public Notice*.

no later than 11:59 pm local time on April 12, 2019.¹⁶ The Station's construction permit expiration date will also be modified to correspond to its new phase completion date.¹⁷

Sincerely,



Barbara A. Kreisman
Chief, Video Division
Media Bureau

Cc: (via electronic mail):
Erin E. Kim, Esq.

¹⁶ Each transition phase has a designated testing period on which a station in that phase may begin testing equipment on its new channel and a designated phase completion date when a station must cease operation on its pre-auction channel. The phase completion date is the date that will be listed in that station's construction permit as its construction deadline and is the date the station must cease operation on its pre-auction channel. *See Closing and Channel Reassignment Public Notice*, 32 FCC Rcd 2806, para. 64. A station that commences testing on its post-auction channel before the beginning of its assigned testing period will be operating in violation of Commission rules.

¹⁷ *Id.* ("The phase completion date is...[also] the date listed in each station's construction permit as its construction deadline."). If a station must commence operations on its post-auction channel at variance from the parameters authorized in its construction permit, it must file for and be granted special temporary authority prior to commencing operations. A station that needs additional time to complete construction of its post-auction facility beyond its construction permit expiration date must file for a 180-day extension of its construction permit in accordance with Section 73.3700(b)(5)(iv). Stations needing additional time to construct after a 180-day extension is granted, will be subject to the Commission's tolling provisions. 47 CFR § 73.3700(b)(5)(iv). Grant of an extension of time to construct does not relieve a station of the requirement that it ceases operation on its pre-auction channel by its assigned phase completion date.