

KFJK-LD, Santa Fe, NM (Fac. Id. No. 183555)
DTV America Corporation

Supplemental Request for Waiver of 47 U.S.C. § 312(g)

DTV America Corporation, licensee of KFJK-LD, Santa Fe, NM (Fac. Id. No. 183555) (the “Station”), hereby supplements its previous request for an extension of silent special temporary authority (LMS File No. 0000072575) and respectfully requests that the FCC grant a waiver extending the twelve-month off-air period permitted under 47 U.S.C. § 312(g) until we receive necessary authorizations from the National Forest Service to commence operations (the “Authorizations”).

Circumstances Beyond Licensee’s Control. The Station has worked diligently to resume operations by the Station’s 312(g) deadline.¹ However, it has been unable to obtain the Authorizations, as it is entirely dependent upon the tower owner (“TO”) to obtain them, which is outside of licensee’s control.

- On June 4, licensee began working with TO on information needed for the Authorizations and was given the expectation that the Authorizations would be issued in early July.
- On July 15, the TO requested additional information from the licensee. The licensee submitted the supplemental information to TO *on the same day* it was requested, and TO communicated the information to the National Forest Service *also on the same day*.
- After July 15, there was nothing more licensee could do to help obtain the Authorizations.
- Because TO told the Station that the Authorizations were imminent, the Station continued with the construction of the facility so that it would be ready to commence operations on August 18th, with the plan to file an application for a License to Cover immediately thereafter.
- On August 27, TO told the licensee that the TO *had an internal mix-up and never sent certain notifications as required by the USFS* that KFJK-LD would operate from the site. Such notifications were sent on August 28, 2019, which pushed back the anticipated date for the Authorizations to September 30, 2019.
- As of the date of this filing, *almost nine (9) months after commencing this process*, licensee has not obtained the Authorizations. Attached is a letter from the TO corroborating these facts.
- The Station was ready to begin operations before its 312(g) deadline, and would have done so were it not for the lack of the Authorizations, the obtaining of which was, and remains to this day, out of the licensee’s control.

Equity and Fairness. In 2004, Congress amended Section 312(g) to authorize the Commission to extend or reinstate a broadcast license otherwise subject to expiration for failure to transmit for “any other reason to promote equity and fairness.”² To be sure, the Commission has determined that its discretion under this new provision is “severely limited,”³ and it has

¹ Note that in the previous extension request the 312(g) deadline was erroneously cited as August 18, 2019. The correct date is November 11, 2109.

² Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 2809, 3431 (2004).

³ See, e.g., *KAWK(FM)*, 32 FCC Rcd 3924, 3927 (MB 2017); *A-O Broadcasting Corp.*, 23 FCC Rcd 603, 616 (2008).

declined to extend the 312(g) deadline where “the failure to transmit a broadcast signal was due to the licensee’s own actions, finances, and/or business judgments.”⁴

However, the Bureau and the Commission have exercised their discretion to waive the 312(g) deadline where the delays were the result of “compelling reasons beyond the licensee’s control.”⁵ In applying that policy, the Bureau should consider that the Broadcast Incentive Auction and its associated repack placed unprecedented strains on the every part of the television station construction process – from engineers; to tower owners; to manufacturers of transmitters, antennas and other components; to installers and in particular, to tower rigging crews. As full power and Class A stations have absorbed the majority of industry resources and have received priority with respect to their construction needs, low power stations have borne the brunt of the resulting scarcities. Time delays and capacity shortages compound as they cascade down to low power stations, culminating in a Rubik’s Cube of ever-shifting interdependent targets, for both displaced stations and others that are in the process of completing permanent facilities. The consequences of those delays in this unique situation were not ones that could be avoided by stations, and they should be regarded as factors outside of the licensees’ control. Recognizing the disruption of the repack on the television construction ecosystem would not weaken Congress and the Commission’s policy of ensuring that allocated spectrum is used to serve the public; rather it would acknowledge the efforts of those licensees that managed to launch new, multi-stream television services for the public *despite* the current industry constraints.

The Station’s short-term failure to resume broadcasting within twelve months was not the result of delays or decisions within the Station’s control; instead the delay resulted entirely from factors beyond the Station’s control. All of the equipment needed to resume operations at the authorized tower site were ordered, delivered, and installed before the Station’s deadline for resumption of operations. Before it can actually commence operations, under the lease between the tower owner and the National Forest Service, the Forest Service must authorize the Station’s operations. The Station provided the information requested by the tower owner for the Forest Service in June, more than five months before the Station’s deadline for resuming service. The tower owner indicated then that it expected the Forest Service to act by early July. The tower owner asked for further information needed by the Forest Service in mid-July which the Station provided *on the same day*. The tower owner then failed to provide required notifications to the

⁴ E.g. *KAWK(FM)*, 32 FCC Rcd at 3927; *Zacarias Serrato*, 20 FCC Rcd 17232 (MB 2005); *Kingdom of God*, 29 FCC Rcd 11589 (MB 2014), *aff’d* 31 FCC Rcd 7522 (2016). In some of these cases, the licensee’s long history of intermittent operations appeared to be a factor in denying their request for a waiver of the 312(g) deadline. HC2 Broadcasting Inc. (“HC2”), which is the ultimate parent of the Station’s licensee, was a signatory to a consent decree relating to intermittent operations by the licensees of a number of stations which were subsequently acquired by HC2. *DTV America Corp.*, FCC 17-1058 (MB re. Oct. 31, 2017)(*Consent Decree*). Notably, the Bureau there recognized that HC2 “was not aware of, nor involved in, any failure to comply with the Commission’s rules and processes.” *Consent Decree* ¶ 11. Further, the Bureau agreed that it “will not use the facts or findings developed in this investigation” in future proceedings. *Id.* ¶ 17. Thus, the failures addressed in the *Consent Decree* are not relevant to the short-term extension that is now being requested.

⁵ *Christian Broadcasting of East Point, Inc.*, 30 FCC Rcd 13975, 13976 (2015); see *Universal Broadcasting of New York, Inc.*, File No. BLSTA-20190211ATT, 2019 FCC Lexis 3492 (MB 2019)(loss of tower site); *V.I. Stereo Communications Corp.*, 21 FCC Rcd 14259 (2006)(reinstatement due to destruction and delays caused by hurricanes); *Community Bible Church*, 23 FCC Rcd 15012, 15014 (MB 2008)(silence to promote air safety after discovery of incorrect tower information in FCC and FAA records); *Mark Chapman*, 22 FCC Rcd 6578 (MB 2007)(silence due to compliance with court order).

Forest Service, and even after that was rectified, the Forest Service has not authorized service, possibly as a result of a flood of authorization requests from repack stations.

In *Universal Broadcasting of New York, Inc.*, the Media Bureau acknowledged that delays due to the government's failure to act on a timely request for authority were outside of a licensee's control and supported grant of an equity and fairness waiver. Similarly, in *Mark Chapman*, 22 FCC Rcd 6578 (MB 2017), a waiver of the section 312(g) deadline was granted when the station's silence was required to comply with a court order. KFJK-LD is not able to commence operations at its authorized site (either on permanent or temporary facilities) without consent from the Forest Service. The Station began the process of obtaining that consent long before its deadline for resuming service, but through delays caused by the tower owner and the Forest Service, it has not obtained the required consent. The resulting delays were entirely due to circumstances beyond the Station's control and were not the result of inaction or choices made by the licensee. It would certainly be inequitable and unfair if the Commission were to terminate this license because of delays caused by another government agency. The Bureau's prior decisions granting equity and fairness extensions because of delays occasioned by the government support grant of a waiver to KFJK-LD.

Serving the Community. Once operational, the Station is prepared to transmit five (5) 24/7 streams of content to the Santa Fe, NM audience. These streams include the licensee's Spanish-language network *Azteca America*, which airs general entertainment and news of interest to the Hispanic community, children's E/I programming, as well as international soccer games in English. The licensee is also planning to add three (3) Spanish-language subchannels, *Azteca Clic*, *Azteca Cinema*, and *Azteca Corazon*, subject to the completion of rights and contract due diligence. The fifth stream will consist of the religious network Three Angels Broadcasting Network, which also provides children's E/I programming to the community at large.

Granting this request would promote equity and fairness for the licensee in this instance, and ensure up to five (5) free, over-the-air viewing choices for the public in Santa Fe, NM. The licensee has demonstrated its commitment to operating the Station for the local community consistently since the build of the Station was completed *and it was ready to become operational before its 312(g) deadline*. Ordering the termination of the Station's operations would result in approximately \$30,000 to \$40,000 of cost to decommission the site (*i.e.*, re-engaging engineers, hiring riggers to take down the antenna, shutting down electrical, shipping and storage of some equipment, disposal fees for non-reusable materials, etc.), plus the additional costs of terminating the multi-year tower lease and internet services contract. The licensee believes that instead of spending this capital on the Station's destruction, the people of Santa Fe would be better served if this capital were to be spent on Station maintenance and improvement of programming and signal delivery.

The Station's presence in the community will also support the public safety function of the emergency alert system (EAS). The Station is built with a fully operational EAS, and in addition to the regular, monthly EAS test messages, the Station will participate in the annual nationwide test to be conducted in the Fall of 2020. By developing up to five (5) subchannels, the Station is capable of delivering federal, state, and local EAS alerts through outlets the

community otherwise would not have, thereby enhancing opportunities to warn viewers of potential dangers to life and property.

Investment and Revenue. The licensee has invested approximately \$166,000 in capital equipment, and has committed additional capital to long-term operational contracts (tower lease, internet connections, etc.), based on its reasonable expectation of meeting its 312(g) deadline. The licensee will soon tie the Station into its 24/7 remote monitoring, fully-staffed data center that will provide the licensee with regular up-to-date transmission reports. These reports will ensure compliance and quality assurance of the Station's over-the-air signal. The subchannels will produce much-needed revenue, which will support the maintenance of the Station.

Advancing Television Technology. Licensee has made an internal commitment for its stations, including potentially the Station, to participate in the transition to ATSC 3.0. The licensee believes that low power television stations can play a critical role in assisting the industry in adopting ATSC 3.0, particularly given its ability to "flash-cut" to the new standard. Whether it is assisting one or more full power station's transition, or offering ATSC 3.0 programming on its own behalf, the Station could serve the public interest in bringing ATSC 3.0 benefits to the public, including but not limited to advanced emergency alerts, better accessibility features, localized content, and interactive educational children's content.

The Public Interest. Exercise of the Media Bureau's discretion in this case will advance the public interest by allowing up to five (5) streams of television service to viewers in the Station's community, ensuring that Santa Fe enjoys a diversity of free, over-the-air viewing options. Permanent removal of the Station's channel from the table of allotments would be inconsistent with the FCC's stated policy goal of ensuring a robust broadcast television sector following the Broadcast Incentive Auction. The licensee further believes that the public interest is not served by the wasteful expenditure of capital to deconstruct a fully operational Station.

For these reasons and those described above, granting this request is in the public interest, and the circumstances faced by the Station justify the Media Bureau's exercise of its discretion to grant the relief requested.



February 12, 2020

Renee Ilhardt
Vice President, Regulatory Affairs
HC2 Station Group, Inc.
450 Park Avenue
New York, NY 10022

RE: HC2 KFJK/KQDF USFS Approval at Sandia Crest (ATC Site # 306762)

Dear Renee:

Please accept this letter as confirmation that American Tower (through its subsidiary SpectraSite Communications, LLC) has been actively working with the USDA Forest Service ("USFS") in an effort to obtain the USFS' approval to the proposed license agreement between American Tower and HC2 Station Group, Inc. along with the approval of the related improvements that will be installed at the above referenced site.

Notably American Tower has made considerable efforts to this end. Sometime around late July or early August 2019, we reached out to the USFS' district ranger with a completed FS-2700-10 Technical Data Sheet (a USFS promulgated form that was filled out by HC2 with the technical data of HC2's proposed installation under the proposed license agreement). The district ranger circulated the completed form to surrounding stakeholders with the intent of making sure that the proposal would not result in any excessive or undue interference at the site.

In October of 2019, the district ranger indicated that a stakeholder objected to the proposal and as a result the ranger requested that a frequency study be performed. We promptly forwarded the requested information to the ranger for review. Between October 2019 and December 2019, we followed up with the USFS no less than nine times.

In December, the USFS requested additional information, to which we immediately responded. From December onward, our contact at the USFS identified several factors contributing to the delay in the review including the holidays, and juror service for a member of the group reviewing the request. We are still awaiting the USFS' approval as of the date of this letter.

American Tower has continued, and will continue, to press the USFS to review the information provided and to render a decision based on that information. Please accept this letter as an explanation of the steps that have been taken thus far and as evidence of our commitment to obtaining a final determination from the USFS on this matter.

Sincerely,


Robert L. Batiste
Supervising Attorney
American Tower Corporation