

Request for Extension of Time for Submission of WUNF-TV's Eligible Invoices for Reimbursement

The University of North Carolina (“UNC”), licensee of full power repacked DTS television station WUNF-TV, Asheville, North Carolina (Facility ID No. 69300) (the “Station” or “WUNF-TV”), hereby seeks an extension to and including March 22, 2022, of its current October 8, 2021, deadline by which to submit all remaining invoices for reimbursement of eligible repack expenses from the TV Broadcaster Relocation Fund (“Fund”).¹ As will be discussed in greater detail below, the fundamental cause of the need for more time is that it remains impossible for all reimbursable repack work for WUNF-TV to be completed and final invoices paid by the October 8, 2021, deadline.

By Public Notice, *TV Broadcaster Relocation Fund Filing Deadline Approaches in Sixty Days*, DA 21-970 (IATF/MB Aug. 9, 2021) (“August 2021 PN”), the Incentive Auction Task Force and Media Bureau (“IATF/MB”) reminded repacked television stations—such as WUNF-TV—of upcoming deadlines to submit invoices for reimbursement from the Fund: (1) October 8, 2021, for full power and Class A stations assigned to Phases 1-5 of the repack transition; (2) March 22, 2022, for full power and Class A stations assigned to Phases 6-10 of the repack transition; and (3) September 5, 2022, for MVPDs, FM stations, and LPTV/TX stations.² Importantly, the August 2021 PN also observed that the IATF/MB “will consider a limited extension [of a station’s invoice submission deadline] by means of shifting an entity with the first or second deadline assignment to the second or third deadline assignment. . . . [who] provide evidence that circumstances requiring the extension were outside of its control, such as local zoning or a force majeure event occurring proximate to the final submission deadline.”³ Based on conditions that have been discussed previously in prior WUNF-TV filings (and as further discussed below), UNC is chagrined to report that ongoing circumstances beyond the control of UNC remain significant factors affecting the practicability of submission of all of WUNF-TV’s eligible invoices by the October 8, 2021, filing deadline. As a result, UNC respectfully requests that its deadline for submitting WUNF-TV repack reimbursement invoices be extended to March 22, 2022.

¹ To the extent necessary, UNC requests a waiver of the deadline for filing this extension request as set forth in the August 2021 PN on the grounds that (i) repetitive tropical storm/hurricane activity has caused conditions at the relevant site to change on nearly a weekly basis, and (ii) developments with respect to the cable car servicing the tower site are currently and actively fluid (and are affected by weather conditions); these two factors have made it difficult to pin down the most current and relevant facts and expectations of the relevant parties. In addition, it took longer than anticipated to obtain a supporting letter from the relevant vendor to submit with this filing. 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. We respectfully submit that both the timing of the filing of this request and the substance of the extension request satisfy these various waiver standards.

² See generally August 2021 PN.

³ August 2021 PN at n.4.

First, to be clear, WUNF-TV timely terminated operations on its pre-transition channel and commenced operations on its post-transition channel.⁴ Thus, an extension of time for submission of invoices will in no way affect the Station's service on its post-transition channel.

Second, UNC has consistently and regularly submitted invoices for eligible WUNF-TV repack services throughout the reimbursement period. The *forty-eight* Form 399 filings for WUNF-TV demonstrate UNC's diligence in that regard. In other words, UNC is not requesting this extension of time with the intent of inundating the Fund Administrator with a waterfall of invoices at the last possible moment. To the contrary, this extension request primarily relates to invoices for work that *has not yet been performed*. Two natural questions arise from this situation:

(1) If the Station's construction was completed nearly two years ago, what is the scope of the work that remains to be completed? The answer is that the pre-transition site for WUNF-TV's DTS Site #1 must still be decommissioned and heavy equipment removed from the top of Mount Pisgah.

(2) Why hasn't the Station's former DTS Site #1 been decommissioned yet? The answer is that it has been literally impossible, impracticable, and unsafe for equipment removal activities to occur at the former DTS Site #1.

Without reiterating all of the facts and circumstances here, it is critical to recall that UNC was forced—for reasons completely beyond its control—to make an “unable to construct” filing for WUNF-TV's Site #1 repack project by June 12, 2017. *See* Legal STA “Unable to Construct” Waiver Request in LMS File No. [0000024877](#) (filed June 12, 2017) (copy attached hereto). *See also Incentive Auction Closing and Channel Reassignment Public Notice; 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 (Apr. 13, 2017), ¶ 70. By letter dated July 3, 2017, the Media Bureau granted the “unable to construct” waiver request and, in so doing, acknowledged the extraordinary site access issues that plagued UNC at the Mount Pisgah site:

In this case, we find that it would not be consistent with the public interest to require UNC to apply for a post-incentive auction facility that it knows it is unable to construct because it cannot safely or reasonably reach the tower site to make the necessary tower modifications. Based on the foregoing, we find that UNC has demonstrated that it is unable to construct its post-auction facility at its current site and we conclude that it

⁴ *See, e.g.*, Pre-Auction Termination Transition Plan Progress Report, LMS File No. [0000081604](#) (filed September 18, 2019); Third Quarter 2019 Transition Plan Progress Report, LMS File No. [0000085846](#) (filed October 10, 2019); Construction Completion Transition Plan Progress Report, LMS File No. [0000093641](#) (filed December 18, 2019).

is in the public interest to allow UNC to apply for an alternate facility for the Station during the first priority window.⁵

As of the date of this extension request, too little progress has been made to the funicular (cable car or tram) that serves as the only possible and reasonable way to transport heavy equipment up and down Mount Pisgah. Indeed, the repaired funicular (i.e., the cable car and track) has still not been cleared by the North Carolina Department of Labor for use by personnel. Thus, just as it was impossible to safely or reasonably construct the post-transition facility at the Mount Pisgah site, it remains impossible to safely or reasonably decommission the pre-transition facility and remove the pre-transition antenna, transmitters, etc. from the top of Mount Pisgah. Indeed, as noted in the Unable to Construct Waiver Request, there is a mile-and-a-half hiking trail that may be traversed only by foot, but it would provide no means of vehicular access to the site or vehicular egress from the site to remove WUNF-TV's pre-transition equipment. Moreover, at least two UNC personnel have sustained minor injuries while making the rigorous hike via the trail to the former WUNF-TV transmitter site, which is at least anecdotal evidence that the footpath to the site has not been and is not a viable route to use for personnel to decommission the pre-transition site.

Furthermore, UNC's vendor for the decommissioning of WUNF-TV's pre-transition tower site has advised (see attached letter from MB Haynes Corp.) that it is unreasonable to expect its crew to use the (impractical and unsafe) pedestrian-only footpath for personnel, even if the funicular is available on a temporary/interim basis to transport equipment. In short, without the funicular's restored capability, the vendor has been physically unable to commence or complete the decommissioning work. And without completing the work, the vendor is unable to issue an invoice for these reimbursable expenses. In turn, without an invoice UNC is unable to pay the vendor or to submit the invoice for reimbursement.⁶

Additional factors that have played a role in the ongoing Mount-Pisgah-funicular-access situation are weather and the COVID-19 pandemic. While neither of those factors is the immediate, proximate cause of the delay in the vendor's ability to engage in the project decommission WUNF-TV's pre-transition site, both factors have undoubtedly contributed to the site owner's delay in addressing the accessibility issue. UNC will gladly provide more details about these factors—which are also beyond the control of UNC—upon request from Commission Staff.

Finally, the facts and circumstances here relating to UNC's limited ability to submit a small (but not insignificant from a financial perspective) percentage of WUNF-TV's repack invoices (due to the vendor's literal inability to complete the contracted-for work) are similar to

⁵ *Letter from Barbara Kreisman to University of North Carolina*, LMS File No. 0000024877 (July 3, 2017), at p.3 (copy attached hereto).

⁶ The only portion of the decommissioning project that has been completed was the removal of hazardous materials from the site, which was transmitter coolant containing ethylene glycol. That work could be accomplished without difficulty and without the need to move heavy equipment. For that portion of the work, the vendor has invoiced UNC \$3,670, which UNC has already submitted for reimbursement. As shown in Form 399, the decommissioning project has a total budgeted amount of \$128,230.

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 (IATF/MB Aug. 2018) at ¶ 12 (citing the following circumstances as relevant to consideration of construction permit extension requests: “(1) weather related delays; (2) delays in construction due to the unavailability of equipment or a tower crew; (3) tower lease disputes; (4) unusual technical challenges; or (5) delays caused by the need to obtain government approvals, such as land use or zoning approvals, or to observe competitive bidding requirements prior to purchasing equipment or services.”).

Because of these unusual and exceptional circumstances—each of which has been beyond the control of UNC—grant a limited extension to March 22, 2022, of the deadline for UNC to submit the final WUNF-TV 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.

* * * * *

HB Haynes Corp. Letter
September 2021

September 14, 2021

Mr. Don Smith
The University of North Carolina (PBS NC)

Re: WUNF-TV Mount Pisgah Decommissioning Project

Dear Don:

As you know, we look forward to completing the decommissioning project for WUNF-TV's pre-transition tower site on Mount Pisgah (the "Project").

We understand that our inability to complete the Project and issue you an invoice by October 8, 2021, puts you in an awkward position from an FCC reimbursement standpoint. We understand that you are requesting an extension of time from the FCC to allow you to submit the invoices for WUNF-TV's repack project by March 22, 2022. I am sending you this letter to support your request.

As you know, the scope of our contracted Project includes the removal of large, heavy equipment from the site. As we have discussed, the site is accessible only by two means: First, there is a pedestrian footpath approximately 1.5 miles long. Second, there is a functional cable car on the mountain, which has historically been relied upon for transporting personnel and equipment and supplies to the site. As we have discussed, the cable car has not been approved by the North Carolina Department of Labor for the transport of humans, and the use of the pedestrian footpath for the removal of equipment is impossible. We have serious concerns about the use of the footpath even for the sole purpose of personnel access to the site: it is unreasonable, unsafe, and inefficient for our personnel to access the site for this Project using what amounts to little more than a hiking trail. Moreover, it is important that our personnel accompany the equipment sent up or down the mountain in the cable car; thus, until the cable car is cleared for use by humans, we remain ready and willing to engage in the Project but we unfortunately remain unable to engage in the Project.

We understand that the cable car situation is beyond your control and that it is frustrating for you to suffer the delay. Safety, practicality, and real-world conditions are such that we must wait for the cable car to be cleared for use by humans before engaging in the Project. Hopefully that will occur in the near future, and hopefully the recent tropical storm/hurricane events that caused severe flooding, damage, and deaths in the Asheville area will not recur, and hopefully the winter weather will not set in before we can complete the Project.

As of today, we are optimistic that the Project will be completed in time for us to invoice you before March 22, 2022. However, because our work on the Project is entirely dependent on factors beyond our control (and your control)—namely restoration of cable car use by humans and cooperative weather conditions—I cannot guarantee that the Project will be complete by March 22, 2022.

Please feel free to submit this letter to the FCC, and let me know if there are any questions.

We appreciate this opportunity to work with you and WUNF-TV.

Sincerely,



David McDonald
Sr Project Manager

Unable to Construct Waiver Request
June 2017

**Explanation of WUNF-TV’s Circumstances Rendering It
“Unable to Construct” the Reassigned Facility Specified in the
Incentive Auction Closing and Channel Reassignment Public Notice**

Pursuant to Sections 1.3 and 73.3700(b)(1)(iv) of the Commission’s Rules¹ and Section III.A.5 of the Media Bureau’s *Broadcast Transition Procedures Public Notice*,² this “unable to construct” waiver request respectfully requests waiver of the Commission’s July 12, 2017, filing deadline for (i) submission of WUNF-TV’s initial minor change construction permit application on FCC Form 2100 (Schedule A) and (ii) submission of WUNF-TV’s estimated reimbursement expenses³ on FCC Form 399.⁴

As observed by the Media Bureau in the *Broadcast Transition Procedures Public Notice*, WUNF-TV must show “good cause” for granting this request.⁵ Further, the

Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission’s rules is appropriate only if both (i)

¹ 47 C.F.R. § 1.3; 47 C.F.R. § 73.3700(b)(1)(iv).

² Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broadcast Transition, Public Notice, 32 FCC Rcd 858 (MB 2017), ¶¶ 24-26 (“Broadcast Transition Procedures Public Notice”); see also Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Report and Order, 29 FCC Rcd 6567 (2014), *aff’d*, Nat’l Ass’n of Broadcasters, et al. v. FCC, 789 F.3d 165 (D.C. Cir. 2015) (“Incentive Auction R&O”), ¶ 554 & n.1571 (finding that “unable to construct” “stations would include those that cannot submit a construction permit application for their assigned channel because they are unable to construct at their current tower site due to technical or legal issues”).

³ *See Broadcast Transition Procedures Public Notice* 32 FCC Rcd 858, nn.41, 180 (noting that “unable to construct” stations that are granted a waiver of the July 12 construction permit filing deadline will also be granted a waiver of the July 12 deadline for submission of estimated reimbursement expenses on Form 399).

⁴ The deadline for filing the instant waiver request is June 12, 2017, which means this request is being timely filed. *See Incentive Auction Closing and Channel Reassignment Public Notice; Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced*, Public Notice, DA 17-314 (WTB Apr. 13, 2017), ¶ 70.

⁵ *See Broadcast Transition Procedures Public Notice*, 32 FCC Rcd 858, n.36.

special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *See id.*⁶

For the reasons discussed below relating to WUNF-TV’s involuntary channel relocation circumstances, the public interest counsels strongly in favor of grant of this waiver request. Indeed, without a finding that the licensee is “unable to construct” WUNF-TV’s reassigned Site 1 facility and without a grant of this waiver request, it is unclear how and when WUNF-TV’s channel reassignment could be effectuated.

WUNF-TV is licensed to operate from two sites using a distributed transmission system (“DTS”) facility. *See* BLEDT-20120615ACE (specifying two licensed sites). This “unable to construct” waiver request applies only to Site 1 of WUNF-TV.

WUNF-TV’s Site 1 is located on Mount Pisgah, on a tower (ASR #1035173) owned by Sinclair Broadcast Group (“SBG”), which is sited on land owned by the U.S. Government and controlled by the U.S. Forest Service. SBG’s full power television station WLOS broadcasts from the same site, but WLOS has not been reassigned to a new channel. *See Incentive Auction Closing and Channel Reassignment*, Public Notice, DA 17-314 (Apr. 13, 2017), ¶ 69, Technical Parameters File.

Mount Pisgah is a mountain in the Blue Ridge Mountains of North Carolina with an elevation of 5,721 feet with the closest access point located off the Blue Ridge Parkway.⁷ The WLOS broadcast antenna from the Mount Pisgah tower is reportedly the highest television antenna east of the Mississippi River.⁸ The maintenance of the tower in a pristine mountain range has been somewhat controversial, as the transition to digital broadcasting resulted in an eight-year struggle with conservation groups and the Blue Ridge Parkway over whether a new tower would be permitted.⁹

Transporting of equipment up the mountain to the SBG tower site has historically been accomplished by a funicular (cable car) that runs up the side of the mountain. There is a pedestrian access point to the site from the Blue Ridge Highway, but the pedestrian path is only for pedestrians

⁶ *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd 858, n.36.

⁷ *See* Danny Bernstein, *Hike to the Top of Asheville’s Most Recognizable Peak*, available at <https://www.exploreasheville.com/stories/post/mount-pisgah-trail/>.

⁸ *See* Wikipedia, *Mount Pisgah (North Carolina)*, available at [https://en.wikipedia.org/wiki/Mount_Pisgah_\(North_Carolina\)](https://en.wikipedia.org/wiki/Mount_Pisgah_(North_Carolina)); Jeff Clark, *Mt. Pisgah, Pisgah National Forest and Blue Ridge Parkway*, Meanderthals Hiking Blog (Sept. 1, 2012 / Aug. 4, 2015), available at <http://internetbrothers.org/2012/09/01/mt-pisgah-pisgah-national-forest-and-blue-ridge-parkway/>.

⁹ *See* Wikipedia, *Mount Pisgah (North Carolina)*, available at [https://en.wikipedia.org/wiki/Mount_Pisgah_\(North_Carolina\)](https://en.wikipedia.org/wiki/Mount_Pisgah_(North_Carolina)).

(it is approximately 1½ miles long and is a rigorous uphill hike¹⁰), and it cannot be used for heavy equipment transportation such as the transmitter, antenna, and other equipment that will be required to effectuate WUNF-TV’s reassignment to its new channel.

On January 30, 2015, the North Carolina Department of Labor ordered that the funicular be shut down, until the facility is either repaired or replaced to meet certain state standards. **To date, the funicular remains out of service, and no definitive date has been provided to WUNF-TV as to an estimated repair/replacement date or a restoration of service date.** And, in addition to the uncertainty surrounding the *timing* of the restoration of service, as of this date WUNF-TV has not been provided with information relating to the *capacity* that a new/repaired funicular system would be able to accommodate; thus, even if funicular service were to be restored in time for WUNF-TV to theoretically complete its Site 1 channel reassignment construction in a timely fashion, it is unknown whether the funicular service would actually be able to accommodate the transport of the heavy equipment required for the channel reassignment. Without the use of the funicular, it is not possible to reasonably deliver WUNF-TV’s new, necessary equipment to the site (or to remove WUNF-TV’s existing equipment from the site). The licensee referenced these challenges nearly two years ago in its Form 381 filing, excerpted below:

WUNF-TV’s DTS site #1 is located on Mount Pisgah. This site has always been a difficult environment in which to work but has recently become even more difficult. There is no road access to WUNF-TV’s transmitter building or tower on Mount Pisgah. Instead, there is a cable-drawn rail car system that has historically provided access to the site. Recently, the rail car system failed a safety inspection and was condemned. Major repairs are required to reinstate the use of the rail car system. Significantly, the rail car system is not owned by the station licensee, which means that its safety, operations, and very existence are beyond the control of the license of WUNF-TV. (The rail car system is owned by the tower owner, Sinclair Broadcast Group.)

As of the time this Certification is being filed, the only access to the WUNF-TV site is on foot using a 1½ mile hiking trail that winds up the opposite side of Mount Pisgah from the transmitter site and rail car system. As a result, the only way currently to get heavy equipment to the site is by helicopter. Under these circumstances—which are beyond the control of the licensee of WUNF-TV—antenna replacement in a repacking scenario would be extremely difficult because the WUNF-TV antenna is side-mounted on the tower about 100 feet below the top of the tower structure. Similarly, performing a channel change on the transmitter would be challenging as a result of the extraordinary logistics of getting the materials to the site. Finally, if WUNF-TV were to be repacked to a lower channel, the licensee would face the separate and additional challenge of attempting to fit the necessary RF filters into the transmitter building due to the extremely limited space in the building. Even if permission could be obtained to expand the building, that whole process would be beyond the control of WUNF-TV’s licensee.

See WUNF-TV, FCC Form 2100, Schedule 381 (LMS File No. 0000003321, filed July 7, 2015).¹¹

¹⁰ See Danny Bernstein, *Hike to the Top of Asheville’s Most Recognizable Peak*, available at <https://www.exploreasheville.com/stories/post/mount-pisgah-trail/>.

¹¹ The legal circumstances surrounding the Mount Pisgah funicular have been covered by the local press as well. See, e.g., Mike Cronin, *State: Tram to Pisgah Tower Operating Without Permit*, ASHEVILLE CITIZEN-TIMES (Feb. 18 / 19, 2016), available at <http://avlne.ws/1XAcMlt>; Mike Cronin, *NC: WLOS tram “Likely to Cause Death,”* ASHEVILLE CITIZEN-TIMES (Aug. 31 / Sept. 1, 2016), available at <http://www.citizen-times.com/story/news/local/2016/08/31/nc-wlos-tram-likely-cause-death/89542566/>.

Moreover, the site’s climactic zone renders construction difficult—if not impossible—for several months of the year between late autumn and spring when snowfall and ice hazards are common on Mount Pisgah. The relevance of the climate in this particular case is obvious: because the licensee has no information as to when the funicular will be reconstructed and pass inspection by the N.C. Department of Labor for use, it is impossible to make reasonable or adequate plans for procurement and delivery of necessary components for use at the site. In normal times—i.e., with an operational equipment transportation and delivery system—the licensee would need to schedule delivery and construction around the late autumn/winter months, but here it isn’t possible to take weather into account until the licensee knows for certain when the funicular operations will be legally restored.

Furthermore, helicopter transport of the equipment necessary to effectuate WUNF-TV’s channel change is neither possible nor safe. While a helicopter has been used in the past to install an antenna on the tower—the current WLOS top-mounted antenna was installed using a helicopter—it is not possible to use a helicopter to (i) transport materials such as WUNF-TV’s new transmitter, RF systems, etc. to the site, (ii) remove existing broadcast equipment from the site, or (iii) install WUNF-TV’s side-mounted antenna approximately 100-plus feet below the top of the tower. Critically, the site lacks an appropriate area on which a helicopter could land (or onto which a helicopter could lower equipment to the ground from the air). In addition, even if there were an appropriate location, it would then be impossible to transport large equipment such as a new transmitter from the landing area into the transmitter building because there are no vehicles at the site (and without a functioning funicular there is no way to bring up the mountain a vehicle or other equipment necessary to move heavy loads around the site). Moreover, before the new transmitter could be installed, the old transmitter would have to be removed from the building, and there is no area at the site to use as a staging area for temporary storage of equipment that is either awaiting removal from the site or awaiting installation into the building. Finally, installation of WUNF-TV’s antenna would be extremely difficult and dangerous because it is a side-mount antenna, which means that during the pick and installation, a helicopter would have to steer clear at all times of the 100-plus feet of tower that rises above the location of WUNF-TV’s side mount slot.

For the reasons described above, as of the date of this filing, the circumstances compel the licensee to treat WUNF-TV’s Site 1 reassignment as “unable to construct,” and the licensee, for good cause shown, respectfully requests a waiver of the July 12 filing deadline for its construction permit application and its Form 399.

Should the Commission Staff seek additional information or documentation relating to the status of the funicular, the licensee will provide it upon request.

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Unable to Construct Waiver Grant
July 2017



Federal Communications Commission
Washington, D.C. 20554

July 3, 2017

University of North Carolina
P.O. Box 14900
Research Triangle Park, North Carolina 27709
Attention: Donald W. Smith

Stephen Hartzell
Brooks, Perce et al.
150 Fayetteville Street
Suite 1700
Raleigh, NC 27601

Re: Request for Waiver of Initial
Construction Permit Filing Deadline
WUNF-TV, Asheville, North Carolina
Facility ID No. 69300
LMS File No. 0000024877

Dear Licensee,

On June 12, 2017, the University of North Carolina (UNC) 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 WUNF-TV, Asheville, North Carolina (WUNF-TV or Station) asserting that the Station is "unable to construct" the specified facilities assigned to it in the *Closing and Channel Reassignment Public Notice* because there is no road access to the transmitter building or tower.¹ UNC also seeks permission to file an application for a 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 UNC is permitted to file an application for a construction permit for WUNF-TV 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*

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. 0000024877, Legal STA Application, Waiver Request Exhibit (Waiver Request).

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 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

WUNF-TV is currently licensed to operate on channel 25 and was reassigned to channel 20 in the *Closing and Channel Reassignment Public Notice*. The station is licensed to operate from two sites using a distributed transmission system (DTS) facility and one site is located on Mount Pisgah.⁶ According to UNC, in the past equipment was transported to the Mount Pisgah tower site by a funicular (i.e., tram) that runs up the mountain. In 2015, however, the North Carolina Department of Labor ordered that the funicular be shut down until the facility is either repaired or replaced to meet state standards, and there is no estimated date for repair/replacement or restoration of service.⁷ UNC further explains that without use of the funicular, delivery of new equipment and removal of the existing equipment is not reasonably possible. While there is a 1½ mile pedestrian path to the site, it cannot be used to transport heavy equipment, such as the transmitter, antenna, vehicles necessary to move heavy loads around the site, and other equipment required to construct the new facility.⁸ In addition, helicopter transport of all necessary equipment is neither possible nor safe since there is no area where a helicopter could land or lower equipment and there is no area to use as a staging area for temporary storage of equipment awaiting

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.

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 Waiver Request at 2.

⁷ *Id.* at 3.

⁸ *Id.* at 3-4.

removal or installation.⁹ Finally, snow and ice hazards on the mountain further constrain site access. UNC contends that because it has no information as to when the funicular will be reconstructed it is impossible plan for the procurement and delivery of equipment.¹⁰

Discussion. 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.¹¹ In this case, we find that it would not be consistent with the public interest to require UNC to apply for a post-incentive auction facility that it knows it is unable to construct because it cannot safely or reasonably reach the tower site to make the necessary tower modifications. Based on the foregoing, we find that UNC has demonstrated that it is unable to construct its post-auction facility at its current site and we conclude that it is in the public interest to allow UNC to apply for an alternate facility for the Station during the first priority window.

We remind UNC 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 Reassignment Public Notice*.¹² 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.¹³ The facilities proposed in applications filed during the first priority window will be entitled to interference protection from subsequently-filed applications and amendments thereto.¹⁴ We also remind UNC that our action does not change the transition schedule, including the station's phase assignment, testing period, or phase completion date.¹⁵

⁹ *Id.* at 4.

¹⁰ *Id.* at 3.

¹¹ 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 (waiver for good cause shown).

¹² See *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd at 867, para. 30.

¹³ 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).

¹⁴ 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)).

¹⁵ See *Incentive Auction R&O*, 29 FCC Rcd at 6791 n.1551. To make a change to the 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.

The above facts considered, UNC'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, UNC is instructed to submit an application for construction permit for WUNF-TV in the first priority window, which will be announced by Public Notice and commence shortly after conclusion of the initial 90-day filing period.¹⁶ UNC is also instructed to submit its reimbursement cost estimate form for WUNF-TV within 30 days of receiving a construction permit for an alternate channel or expanded facility.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. A. Kreisman', with a long, sweeping horizontal line extending to the right.

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁶ 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)).