

Request for Further Tolling, Extension of Silent STA, Waiver of 312(g)

Edge Spectrum, Inc. (“ESI”), licensee and permittee of K41KX-D, Joplin, MO (Fac ID 131115) (the “Station”) hereby requests further tolling of the Station’s displacement construction permit (File No. 0000058756) (the “CP”), an extension of the Station’s authority to remain silent, and a waiver of the deadline by which the Station must return to the air or forfeit its license pursuant to Section 312(g) of the Communications Act of 1934, as amended.

As described herein, ESI has been working diligently to complete construction of the Station’s displacement facilities. ESI initially expected that it would be able to resume service on the Station by July 1, 2022. Due to unique circumstances regarding the availability of the Station’s tower site, it has taken longer than anticipated to resume service. The requested relief will allow the Station to resume serving the public as soon as possible.

I. Background

The Station is one of many stations licensed to ESI and operated by ARK Multicasting, Inc. (“ARK”) that ESI and ARK plan to include as part of a nationwide broadcast and data network using the ATSC 3.0 transmission standard. ARK is developing solutions to use broadcast technology to bridge the connectivity gap in the rural United States. ARK’s ATSC 3.0 network will relieve congestion for Internet Service Providers and provide datacasting services for many verticals including distance learning, the connected car market, smart agriculture, telehealth, and over the top video streaming providers. In furtherance of these efforts, ARK recently entered into an agreement with Hewlett Packard Enterprise to manage orchestration of the broadcast environment virtualizing from edge-to-cloud. ARK has also entered into an agreement with General DataTech for staging, burn-in, and station deployments as well as management of the end-to-end environment which optimize operational processes.

On July 1, 2021, the Station had to go silent after the licensee of the station with which K41KX-D was sharing channel 34 facilities (whose husband had passed away shortly beforehand) abruptly terminated the sharing arrangement when she was planning to sell the land on which the tower was located. (See File No. 0000184412). ESI has been working with the owner of the tower, EMF, to obtain permission to install its own antenna, but that process has taken longer than expected.

On September 14, 2021, ESI requested tolling of the Station’s CP. (File No. 159401). ESI amended its request on April 7, 2022. As part of its amendment of this and other tolling requests, ESI indicated that it intended to complete construction of the Station’s displacement facility by July 1, 2022. Unfortunately, the discussions with the new owner have not proceeded as quickly as planned due, in part, to the need to obtain permission from the new landowner and complete a load study. As a result, ESI’s ability to resume operations has been delayed.

II. The Commission Should Waive Tolling and Extend the CP

Under the present circumstances, a further waiver of tolling and extension of the CP is justified. The Commission’s tolling provisions provide that a construction permit deadline may be tolled under specific circumstances such as acts of God, delays due to administrative or judicial review, or construction that is delayed by any cause of action pending before a court of competent jurisdiction relating to any necessary local, state, or federal requirement for the construction or operation of the

station, including any zoning or environmental requirement.¹ If a station does not qualify for tolling under these criteria, good cause may exist to waive the Commission's tolling provisions and still toll the expiration of the Station's construction permit where the station can demonstrate that "rare and exceptional circumstances" prevented construction.²

Tolling is appropriate here because ESI's inability to complete construction of its displacement facilities for the Station is due to rare and exceptional circumstances beyond its control.³ The Station was operating and on track to complete its displacement facilities when the owner of tower site, with whom ESI was sharing facilities, passed away and his widow abruptly terminated the sharing arrangement. Although ESI has been working to enter into a direct agreement with the tower owner, the transition has taken longer than ESI expected (due in part to the need to complete a load analysis and obtain permission from the landowner).

A waiver of tolling under these circumstances is consistent with the Commission's approach to other construction related delays as part of the post-Incentive Auction transition. In its Public Notice adopting the post-Incentive Auction transition scheduling plan, the Media Bureau and the Incentive Auction Task Force declared that "[r]eassigned stations and band changing stations that are unable to complete construction of their post-auction channel facilities by their deadlines may seek a single extension of up to 180 days."⁴ In justifying the provision of a one-time, 180-day extension, the FCC explained that "[g]iven the variety of challenges that stations may face in connection with the post-auction transition, stations that are able to demonstrate that they have experienced uncontrollable and unexpected delays in construction should be allowed a single extension of up to six months before being subject to our stricter tolling provisions."⁵ Those concerns are only amplified here where the death of the prior tower owner on top of the standard challenges of completing a displacement project.

ESI has all of the equipment that it needs to construct the Station's displacement facilities. The only thing standing in a way is completing arrangements with the tower owner and the landowner. Although ESI does not have a definitive timeline, it expects to have the Station completed on the same timeline as other ESI stations that have been granted tolling through September 6, 2022.

III. The Commission Should Waive Section 312(g)

Section 312(g) provides that "If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast

¹ 47 C.F.R. § 73.3598.

² See *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd. 17525 ¶ 42 (1999) (recognizing that there may be "rare and exceptional circumstances" beyond the control of the licensee that do not fall under the tolling provisions, but "which would warrant the tolling of construction time").

³ See *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd. 17525 ¶ 42 (1999) (recognizing that there may be "rare and exceptional circumstances" beyond the control of the licensee that do not fall under the tolling provisions, but "which would warrant the tolling of construction time").

⁴ *Incentive Auction Task Force & Media Bureau Adopt A Post-Incentive Auction Transition Scheduling Plan*, Public Notice, 32 FCC Rcd. 890 ¶ 40 (MB & IATF 2017); 47 CFR § 73.3700(b)(5).

⁵ *Incentive Auction Order* ¶ 583.

station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, *except that the Commission may extend or reinstate such station license* if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, *or for any other reason to promote equity and fairness.*" 47 U.S.C. § 312(g) (emphasis added).

In the *Incentive Auction Report and Order*, the Commission explained that it would be receptive to requests for waivers of Section 312(g) as a result of the repacking process, "tak[ing] into account the extent to which a station has been involuntarily forced to remain dark as a result of the repacking process and whether, in light of the facts presented, equity and fairness dictate a license extension or reinstatement and a waiver."⁶ The Media Bureau expanded upon this position in the *Post-Incentive Auction Procedures Public Notice*, explaining that in considering requests for waiver of Section 312(g), it "will examine whether the station has demonstrated that its silence is the result of compelling reasons beyond the station's control, including facts that relate to the post-auction transition process."⁷ Finally, in the *Special Displacement Window Public Notice*, the Media Bureau explained that if an LPTV or TV translator station needed to remain silent for a consecutive 12-month period, the Bureau would "consider a request for extension or reinstatement pursuant to Section 312(g) of the Communications Act and a request for waiver of the Commission rule."⁸

The Commission should grant the instant request for waiver because the Station's silence is fully attributable to circumstances beyond its control both relating to and not relating to the post-Incentive Auction transition. The confluence of having to negotiate with the tower owner and having to install new facilities for the Station has resulted in a longer than expected delay than if either event occurred in isolation. ESI is working diligently to reach an agreement and resume operations, but it needs additional time to do so.

For the reasons stated above, the Commission should waive the tolling standard and provide ESI until September 6, 2022 to complete construction and license its displacement facilities.

⁶ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 ¶ 585 (2014), *aff'd*, *Nat'l Assoc. of Broadcasters, et al v. FCC*, 789 F.3d 165 (D.C. Cir. 2015)

⁷ *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broadcast Transition*, Public Notice, 32 FCC Rcd. 858 ¶ 49 (IATF/MB 2017).

⁸ *See Incentive Auction Task Force and Media Bureau Announce Post Incentive Auction Special Displacement Window April 10, 2018, Through May 15, 2018, and Make Location and Channel Data Available*, Public Notice, 33 FCC Red. 1234 ¶ 7 & n.25 (IATF/MB 2017).