

**REQUEST FOR WAIVER OR, IN THE ALTERNATIVE,
FOR TOLLING OF CONSTRUCTION PERMIT**

Koplar Communications International, Inc. (“Koplar”) holds a Construction Permit for new, unbuilt analog Channel 49 television facilities to serve Osage Beach, Missouri (“KRBK”).¹ Koplar purchased the Construction Permit for \$1,732,900.00 at FCC Auction No. 64 in 2006. The Construction Permit expires on August 11, 2009.

The instant application is filed because the Commission requires Koplar to obtain authority to construct digital television (“DTV”) Channel 49 facilities in order to comply with the DTV transition.² *In order for Koplar to be able to construct KRBK’s digital facilities, it is essential that the Commission waive its DTV filing freeze or, at a minimum, toll the Construction Permit, because without such relief Koplar will be unable to complete construction by the August 11, 2009 deadline.* As demonstrated below, circumstances beyond Koplar's control require this requested relief, and a grant of this request would support the public interest in providing new DTV broadcast service in a predominantly rural area, with no detriment to other broadcasters or the public.

¹ File No. BNPCT- 20060421ACD (granted August 11, 2006).

² See *Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order Published in Federal Register Today; Revised Final DTV Table of Allotments is Effective March 21, 2008*, DA 08-631 (rel. Mar. 21, 2008) (“*MO&O Public Notice*”); see also *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order, MB Docket No. 87-268, FCC 08-72 (rel. March 6, 2008) (“*MO&O*”); *Revisions to Proposed New DTV Table of Allotments, Tentative Channel Designations To Be Added to the DTV Table of Allotments Proposed in the Seventh Further Notice of Proposed Rule Making in MB Docket No. 87-268*, Public Notice, DA 07-20 (MB rel. Jan. 8, 2007), 72 FR 2485 (Jan. 19, 2007).

I. Background

For reasons beyond its control, Koplar may not build a suitable height tower for DTV operations at the site authorized in the Construction Permit. Specifically, Koplar has determined that the tower located at the site authorized in the Construction Permit is not structurally capable of supporting a DTV antenna.

A. The Ozark Radio Tower Site

When filing for the original Construction Permit, Koplar relied on information provided by a consultant who identified the proposed site and existing tower (the “Ozark Radio Tower”) as being adequate for Koplar’s use. Key to this finding was information on file indicating that the owner of Ozark Radio Tower intended to increase the height of the tower. Accordingly, Koplar filed its NTSC Channel 49 construction permit application specifying the Ozark Radio Tower as the proposed site but specifying the increased tower height. In subsequent conversations with the Ozark Radio Tower owner, the tower company (Pyrod), and Federal Aviation Administration (“FAA”) personnel, Koplar discovered that the tower and indeed, the site itself, could not under any circumstances support Koplar’s proposed use, for several reasons.

First and foremost, upon discussions with Pyrod, it was discovered that the Ozark Radio Tower cannot be increased to the height required by Koplar, and furthermore, that even if the increase were possible, the tower cannot be modified to support the additional load placed on it by a full power Channel 49 antenna and transmission line. Second, the owner of the Ozark Radio Tower did not complete the engineering necessary to determine if the land underneath the tower was adequate for the additional guy wire dimensions needed to secure the added height. In fact, the land area is wholly insufficient, and the adjacent land is divided among several different owners, making it all but impossible to negotiate a clean lease for the added land required. None

of this information was available prior to Commission grant of the Construction Permit on August 11, 2006. In addition, Koplar did not learn that FAA approval for the Ozark Radio tower had lapsed until after the Construction Permit had been issued.³

B. The Phillipsburg Tower Site

Immediately upon learning that FAA approval for the Ozark Radio Tower site had lapsed, Koplar began searching for a new tower site and located what it believed to be a suitable site (the “Phillipsburg site”). Koplar filed for FAA approval for the Phillipsburg site in June, 2007. On September 19, 2007, the FAA issued a “Determination of Presumed Hazard” in connection with the Phillipsburg site due to air safety concerns (see Exhibit 1).

C. The Bolivar Tower Site

In November 2007, Koplar engaged Herman Hurst of the Carl T. Jones Corporation to locate a suitable tower site within reasonable proximity to the Ozark Radio Tower and the Phillipsburg Tower. Mr. Hurst determined that the new site would need to be located a “significant distance” from the Phillipsburg site “to avoid established airspace.”⁴ Mr. Hurst located a suitable site (the “Bolivar site”), which is approximately 29 miles from the site authorized in the Construction Permit. On January 10, 2008, Koplar requested an FAA No-Hazard Determination for the Bolivar site (see Exhibit 2), and that request remains pending. However, Koplar reasonably believes that the Bolivar site will receive FAA approval in the near future.

³ The FAA No-Hazard determination was originally obtained by Ozark Radio, which transferred the determination to Koplar as the new sponsor of the tower proposal. This No-Hazard determination was used to obtain the ASR number that is listed in the Construction Permit. However, after filing the Construction Permit application, the FAA notified Koplar that the No-Hazard Determination was no longer valid because an extension request had not been filed by Ozark Radio.

⁴ See Exhibit 2. By extension, this also involved moving the tower site a significant distance from the Ozark Radio Tower site.

Accordingly, this application is being filed: a) to modify the Construction Permit to specify digital facilities; and b) to specify the Bolivar site. The Bolivar site meets all Commission requirements including community of license coverage, and Koplar has reasonable site assurance as shown in Exhibit 3.

However, processing of this necessary site relocation requires that the DTV filing freeze be lifted. As of the date of this filing, there are approximately 17 months left in the three-year Construction Permit period, and there will be less than a year left on the Construction Permit on August 18, 2008, which is the date the Commission intends to lift the DTV filing freeze.⁵ *As explained below, it would be impossible for Koplar to wait for the filing freeze to be lifted (even if it is lifted as soon as August 18, 2008), then file the instant application, then wait for Commission processing and still meet the construction deadline.*

Accordingly, for the reasons set forth herein, Koplar requests a waiver of the filing freeze in order to specify the Bolivar site, so that construction of the tower may commence during the 2008 tower building season. In the alternative, Koplar requests that its Construction Permit be tolled until the filing freeze is lifted.

II. A Waiver Of the Filing Freeze Is Warranted

The DTV Table of Allotments adopted in the *Seventh Report and Order* specified the same unbuildable tower site for KRBK's DTV Channel 49 facilities as in the Construction Permit. Koplar filed a Petition for Reconsideration of the *Seventh Report and Order*, proposing that the FCC specify the Bolivar site.

⁵ See *Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes*, Public Notice, 19 FCC Rcd 14810 (MB 2004) ("*Freeze PN*"). The Commission has indicated its "intent" to lift the filing freeze on August 18, 2008, but has reserved the right to postpone that date if necessary.

In its Petition, Koplar did not ask the Commission to waive the filing freeze but rather asked that the geographic coordinates for the station be revised to comport with Koplar's submission to the FAA, consistent with the Commission's previous decision to allow Koplar to change the geographic coordinates of the Osage Beach allocation from the coordinates originally specified for the Osage Beach Channel 49 allocation in Auction No. 64.

The Commission denied Koplar's Petition on March 6, 2008.⁶ In doing so, the Commission appeared to believe that Koplar had requested a waiver of the filing freeze, concluding that:

it is not necessary to waive the freeze to address these concerns. [KRBK and two other stations] should be able to achieve their goal of serving current analog viewers with digital service using their existing equipment by requesting modifications through the application process . . . and, where necessary, filing for maximizations later this year. . . . At the application stage, these stations may take advantage of the 5-mile waiver policy and the 0.5 percent new interference policy adopted in the *Third DTV Periodic Report and Order*."

This decision rests on several factual errors: (1) Koplar did not ask for a waiver; (2) KRBK is unbuilt and therefore has no current analog viewers; (3) KRBK has no existing equipment and has no tower; and (4) Koplar may not take advantage of the 5-mile waiver policy at this late stage because there is insufficient time to locate a compliant suitable tower site, if there is one, and then apply for and receive necessary FAA and FCC approvals.

As matters stand now, Koplar must construct a new television facility from the ground up, including a new tower and a new transmitter building, and then complete testing of the facilities, and then file a license application by August 11, 2009. That would be a very difficult task even if Koplar currently held valid authorizations to begin construction now, which it does not. As the Commission is aware, tower construction materials and crews are in extremely short

⁶ *MO&O*, ¶ 131.

supply due to the impending DTV transition deadline of February 17, 2009, and that situation is only likely to get worse. In addition, winter weather typically precludes tower construction for significant periods each year in Missouri. Therefore, it is critical that this application be granted in the very near future (or the Construction Permit tolled) so that all necessary equipment may be ordered and tower construction begun in the 2008 tower building season. For these reasons, Koplar is now specifically asking for a waiver of the filing freeze to specify the Bolivar site which is beyond the 5-mile zone.⁷

The Commission may waive its rules when good cause is demonstrated.⁸ In the *Freeze PN*, the Media Bureau stated that it would consider, on a case-by-case basis, requests for waiver of the freeze when a modification application is necessary or otherwise in the public interest.⁹ Koplar submits that a waiver in this instance is necessary, and that good cause exists to grant a waiver in this situation because:

1) The facts of this case are unique because Koplar is the only non-operating petitioner to request relief from the Commission on reconsideration, and is one of only six analog auction singletons in the country;¹⁰

2) Because Koplar is in a unique position and because the DTV transition is a once-in-a-lifetime event, the circumstances of this case are unlikely to be repeated;

⁷ The Commission should note that it adopted its 5-mile zone policy *after* Koplar filed its Petition, and is applying the policy retroactively. Koplar had no opportunity to address this problem in its Petition.

⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

⁹ *Freeze PN*, at 2.

¹⁰ See *MO&O*, ¶ 131. The other analog singleton petitioners, WCAV, Charlottesville, VA and KUTH, Provo, Utah, are both operating stations. See *id.* Koplar was one of only six auction winners in Auction No. 64 for analog construction permits. To Koplar's knowledge, it is the only analog auction permittee to have requested a change in tower site.

3) Koplar, through no fault of its own, is unable to construct a suitable tower at the site authorized in the DTV Table and the current Construction Permit;

4) Given the time remaining on Koplar's Construction Permit, no suitable tower site that would comply with the filing freeze is available. As stated above, since the time that it received its Construction Permit in August 2006, Koplar has been actively attempting to obtain FAA approval, first at the Ozark Radio Tower site, and then at the Phillipsburg site, and now at the Bolivar site. Furthermore, Koplar has invested significant time and expense in locating the Bolivar site, receiving reasonable assurances that adequate land can be leased or purchased on which to build a tower of sufficient height to provide coverage to Osage Beach, Missouri, and finally, filing for and prosecuting the required FAA Notice. To abandon all of this work, even as the clock continues to click on its Construction Permit, puts Koplar at very real risk in terms of successfully building the station before the remaining time runs out;

5) Construction of the proposed tower alone will take nearly a year, as shown in the attached letter from the construction tower company retained by Koplar (see Exhibit 4), and that estimate does not factor in such conditions as adverse weather and the potential dearth of tower crews to complete installation of the antenna and other equipment on the tower;

6) The underlying purpose of the filing freeze — to maintain a static database for the completion of the DTV Table of Allotments¹¹ — would not be frustrated by a grant of this waiver request, because: a) the revised DTV Table is now final;¹² b) the Commission already is allowing changes to the DTV Table under the 5-mile waiver rule; and c) as shown in the engineering statement accompanying this application, Koplar's proposed site would not cause

¹¹ "This freeze is a necessary *first step* to ensure a stable television database prior to the commencement of the channel election process." *Freeze PN*, at 2 (emphasis added).

¹² See *MO&O Public Notice*.

impermissible interference to any other station under the 0.5% interference standard, or even under the more strict 0.1% interference standard;

7) In contrast, a strict application of the filing freeze would require Koplar to wait until at least August 18, 2008 to file this application. Assuming that the freeze is lifted on time, which is not certain, Koplar would have to file its application, then await processing and grant of it. Such processing easily could require months because after a filing freeze of more than four years, it is highly likely that the Commission will receive a flood of DTV facilities applications immediately after the freeze is lifted. Therefore, while Koplar has proven here that it needs at least a year to build a tower and complete construction of its television facilities, it is likely that there would be fewer than seven or eight months left to construct if Koplar has to wait until August 18, 2008 to file its application. If the Commission delays lifting the filing freeze for any reason, then the timing would be even shorter; and

8) Application of the filing freeze in this instance would be inequitable in light of the brief amount of time left on the Construction Permit, and in any event would be contrary to the public interest in advancing the DTV transition, particularly for a small television community such as Osage Beach, Missouri.

Considering the totality of the circumstances, Koplar submits that a waiver under these circumstances is warranted.

III. In the Alternative, Koplar Requests That Its Construction Permit Be Tolled

To the extent that the Commission is not inclined to grant a waiver in this situation, Koplar requests that the Commission toll the KRBK Construction Permit until the filing freeze is lifted, *i.e.*, until August 18, 2008 or whatever date the Commission ultimately lifts the filing freeze, and Koplar's application for modification of its permit is granted, whichever is later.

While this tolling request does not fit squarely within any of the enumerated reasons set forth in Section 73.3598(b) of the Commission's rules, the Commission has recognized that there may be circumstances other than those delineated in its rules that would warrant the tolling of construction time. For example, there may be "other circumstances" in which a permittee is prevented from completing construction within the time specified on its original construction permit for reasons beyond its control such that the permittee would be entitled to tolling of the construction time pursuant to 47 U.S.C. Section 319(b).¹³ Koplar submits that the unique confluence of circumstances caused by the intersection of Koplar's tower site problems (which were beyond Koplar's control) and the DTV transition represent such "other circumstances."

Unless the Commission acts expeditiously to grant this application, Koplar will be forced to wait until August 18, 2008, at the earliest, to file an application that permits it to specify a workable tower site, and even then Koplar will have to wait for Commission action on the application, which could take several months. Absent expeditious Commission action on this application, therefore, Koplar will lose nearly five months before it could file an application and likely several more months before a grant of that application, leaving *at best* nine months to construct KRBK. As indicated above, at least 12 months will be required to complete construction of the tower and related facilities. Therefore, any Commission decision to dismiss or delay processing of this application until August 18, 2008, or later, denies Koplar a reasonable opportunity to construct KRBK, absent a tolling of the Construction Permit.

In addition, at the time that Koplar filed its application to participate in the auction, it was unclear that Congress would mandate a "hard" DTV transition date of February 17, 2009.

¹³ *Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, MB Docket No. 07-91, FCC 07-228, n.252 (rel. Dec. 31, 2007).

Koplar went into the auction believing that it would have a full three years to complete construction of its analog facilities prior to any required changeover to digital operations. Therefore, it was beyond Koplar's control reasonably to foresee the need for the instant application during the Construction Permit period, and a tolling period in this instance is therefore appropriate.

Mid-South

This case is unlike the recent *Mid-South* situation in which the Media Bureau denied a request for tolling of a construction deadline.¹⁴ In that case, Mid-South Public Communications Foundation ("Mid-South") had a construction permit for a new unpaired analog station on Channel 56 to serve Memphis, Tennessee. The construction permit expired on November 9, 2007 and Mid-South waited until March 17, 2008 to file a tolling request. Mid-South's sole justification for the tolling request was to avoid significant financial expenditures.¹⁵

In contrast, Koplar's Construction Permit has not expired — it will expire in August 2009 but Koplar is extremely concerned that it will have insufficient time to construct if the Commission strictly applies the filing freeze and does not toll the permit deadline.

Second, unlike Mid-South, Koplar has been and continues to be willing to make the financial expenditures necessary to build facilities on Channel 49, and will be able to do so upon receipt of required FAA and FCC approvals. Koplar is an experienced broadcaster, having owned and operated a television station in St. Louis, Missouri (KPLR-TV) for more than 35 years, from 1959 to 1998.

¹⁴ See Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau to Malcolm G. Stevenson, Esq., DA 08-786 (rel. Apr. 3, 2008) ("*Mid-South*").

¹⁵ *Id.* at 2.

Third, unlike Mid-South, Koplar cannot build analog or digital facilities at the site authorized in the Construction Permit. Mid-South, in contrast, “simply [did] not want to expend the funds necessary to construct and operate an analog station . . . and desire[d] instead to wait until the end of the DTV transition and build on its post-transition [channel].”¹⁶

Finally, Koplar has first and foremost requested a waiver that, if granted, will allow Koplar to begin constructing its digital facilities immediately. Mid-South, in contrast, did not ask for a waiver but merely requested a tolling to avoid financial expenditures. Koplar’s tolling request is simply a recognition of the fact that if the waiver request is denied, there will be insufficient time under current Commission procedures to allow Koplar to complete construction by the Construction Permit deadline.

Channel 16 of Rhode Island, Inc. v. FCC

In many ways, this case is analogous to the situation presented in *Channel 16 of Rhode Island, Inc. v. FCC*.¹⁷ In that case, the advent of community antenna television (“CATV”) “posed innumerable difficult problems [for UHF television stations] across the country.”¹⁸ In recognition of these problems that were beyond the control of individual stations, the D.C. Circuit reversed a Commission decision denying a UHF station’s request for extension of its construction permit, finding that the uncertainty surrounding CATV policies was “due to inaction by the Commission and only the Commission can resolve it.”¹⁹

¹⁶ *Id.*

¹⁷ 440 F.2d 266 (D.C. Cir. 1971).

¹⁸ *Id.* at 275.

¹⁹ *Id.*; see *id.* at 276 (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) and noting that “regulations properly contain waiver provisions as a safety valve” and that the “FCC’s rigidity unaccompanied by meaningful consideration of the particular or partial problems contemplated by its own safety valve regulation, cannot be sustained . . .”). Moreover, unlike in *Temple University*, where “no unresolved policy considerations” were present, here there are clearly unresolved policy considerations, including the date that the filing freeze will be lifted and how

Similarly, the DTV transition is the single largest change to the television industry arguably since the invention of television, and it is causing innumerable difficult problems for television licensees across the country. Koplar's Construction Permit for analog facilities is unbuildable because the authorized tower cannot accommodate the KRBK facilities, and the Phillipsburg tower site has been rejected by the FAA. Koplar's delay in applying for, and then constructing, buildable DTV facilities is directly due to the filing freeze.

Koplar diligently has undertaken all actions available to it and only the Commission can resolve this matter by waiving the filing freeze in this instance or tolling the Construction Permit so that Koplar is provided sufficient time to construct the facilities it paid a substantial sum for in good faith at auction. Koplar urges the Commission to act expeditiously by taking either of the requested measures.

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the nation's television stations will make the final transition to digital-only operations. *See Applications of Temple University of the Commonwealth System of Higher Education*, Memorandum Opinion and Order, FCC 98-128, ¶ 13 (1998).