



Federal Communications Commission
Washington, D.C. 20554

July 11, 2017

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Re: Requests for Waiver of Initial
Construction Permit Filing Deadline/
Requests for Modification of Phase
Assignments
KTVX(TV), Salt Lake City, Utah;
KUCW(TV), Ogden, Utah; KBYU-TV,
Provo, Utah; KJZZ-TV, Salt Lake City,
Utah; KSL-TV, Salt Lake City, Utah;
and KUED(TV), Salt Lake City, Utah
Facility ID Nos. 68889; 1136; 6823;
36607; 6359; 69396 (respectively)
LMS File Nos. 0000024891,
0000024892; 0000024871; 0000024898;
0000024872; 0000024860 (respectively)

Dear Licensees,

On June 12, 2017, Nexstar Broadcasting Inc., licensee of KTVX(TV) and KUCW(TV), Brigham Young University, licensee of KBYU-TV, KJZZ Licensee, LLC, licensee of KJZZ-TV, Bonneville International Corporation, licensee of KSL-TV, and the University of Utah, licensee of KUED(TV) (collectively referred to herein as DTV Utah or Licensees),¹ submitted the above captioned requests for waiver of the July 12, 2017, 90-day post-incentive auction construction permit and cost estimate filing deadline for the above captioned full power television stations (collectively, Stations).² DTV Utah asserts that the Licensees are “unable to construct” the facilities assigned to them in the *Closing and Channel Reassignment Public Notice* due to technical constraints. DTV Utah also seeks permission for the Licensees to file applications for a construction permit during the first priority alternate channel/expanded facilities filing window (first priority window). Furthermore, DTV Utah requests permission for the aforementioned stations to commence testing and operation on their post-auction channel earlier than the testing period start date set forth by *Closing and Channel Reassignment Public Notice* for stations assigned to Phase 1 of the post-incentive auction broadcaster transition schedule.³ For the reasons below, we grant the requests for waiver and the Licensees are permitted to file applications for construction permits for the stations during the first priority window and are permitted to commence testing and operation on their respective station’s post-auction channel prior the Phase 1 testing period start date.

DTV Utah states that its participating stations came together in 1998 in a collective effort to more effectively implement the DTV transition in the Utah market.⁴ As part of the DTV transition and in coordination with the Commission, the eight stations entered into an operating agreement to fund the design and construction of their digital operations and to collocate on a single tower located on Farnsworth Peak.⁵ Since that time, the DTV Utah stations have continued to share facilities, thereby significantly reducing the respective operational costs and overhead of providing television broadcast services in Utah. Currently, the DTV Utah stations share two combiners and two antennas, with each station maintaining its own transmitter.⁶

July 12th Filing Deadline Waiver Request. 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

¹ DTV Utah is a group of eight full power television stations in the Utah market, which includes the six above-captioned Stations and two others that were not repacked – KUEN(DT), licensed to the University of Utah and KUTV(TV), licensed to KUTV Licensee, Inc. For purposes of this letter, DTV Utah refers to the six stations for which waiver has been requested.

² 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*).

³ The concurrently filed waiver requests are substantially the same. Unless otherwise noted, this letter will cite to the KBYU-TV waiver request, LMS File No. 0000024871 (Waiver Request).

⁴ Waiver Request at 1. See *supra* note 2.

⁵ *Id.* Farnsworth Peak is located about 17 miles southwest of Salt Lake City, in the Oquirrh mountain range, on a small mesa at an altitude of 9,050 feet.

⁶ *Id.*

Closing and Channel Reassignment Public Notice or within the permissible contour coverage variance.⁷ 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.⁸ 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.⁹ 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, 2017.¹⁰

In support of its waiver requests, DTV Utah maintains that it faces unique construction issues that require early coordination among the participating stations to continue to serve the public. Specifically, DTV Utah states that its consulting engineer has concluded that the new shared antennas required for each of the stations to continue operating at their current site would not permit any of the Licensees to construct the facility assigned to it in the *Closing and Channel Reassignment Public Notice* without expanding its contour by more than one percent in any direction.¹¹ In addition, DTV Utah represents that the stations’ antenna manufacturer, Katherein, has determined that it will be “far more difficult” to design a new antenna system that can accommodate all eight Utah stations if KUED is required to construct its post-incentive auction facility on Channel 15, as it has been assigned.¹² DTV Utah explains that the antenna system is protected from the site’s harsh environment by a hardened GRP cylinder, which the DTV Utah stations intend to reuse for the new antenna system.¹³ Requiring KUED to operate on channel

⁷ *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.

⁸ See 47 CFR § 73.3700(b)(1)(iv). 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 Procedures*, Public Notice, 32 FCC Rcd 858, at 870, para. 36 (MB 2017) (*Transition Procedures Public Notice*).

⁹ See *id.* at 884 n.180 (citing *Incentive Auction R&O*, 29 FCC Rcd at 6823 n.1754).

¹⁰ *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.”).

¹¹ *Id.* at 1.

¹² *Id.* at 2.

¹³ *Id.* KUED is currently licensed to operate on channel 42. The other Licensees have been reassigned as follows: KTVX is currently licensed to operate on channel 40 and has been reassigned to channel 30 ; KUCW is currently licensed to operate on channel 48 and has been reassigned to channel 35; KBYU-TV is currently licensed to operate on channel 44 and has been reassigned to channel 17; KJZZ-TV is currently licensed to operate on channel 46 and

15 while using the current hardened GRP cylinder would restrict the techniques necessary to mitigate KUED's impact on the other stations antenna patterns and the required replacement of the hardened GRP cylinder.¹⁴ According to Katherein, KUED could apply for channel 27 which would reduce the negative impacts on the other stations and allow DTV Utah to continue to utilize the existing hardened GRP cylinder.¹⁵ Given the interdependent nature of the stations' operations and construction plans, DTV Utah contends permitting all the stations to file in the first priority window will facilitate DTV Utah's ability to implement a coordinated and cost-effective post-auction transition plan.¹⁶ As noted in the context of DTV Utah's request for modification of the Licensees' testing period start date, coordination is critical given the location of the site and the limited construction window.¹⁷

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.¹⁸ In this case, we find that it would not be consistent with the public interest to require Licensees to apply for post-incentive auction facilities that they know they are unable to construct. The construction issues raised by DTV Utah are unique to this group of stations and grant of the requested waiver will allow DTV Utah to implement the necessary coordination of multiple stations at the shared site to facilitate an orderly, safe and cost efficient transition, as was successfully done by DTV Utah during the digital television transition. A staff analysis of DTV Utah's circumstances affirms that DTV Utah would not be able to install the new shared antennas that are required for the Licensees to continue operating their stations at their current site as assigned in the *Closing and Channel Reassignment Public Notice* and that no feasible replacement site is available. In addition, constructing a shared antenna that permits KUED to operate on channel 15 is likely to negatively impact the other stations' post-auction antenna patterns and their ability to construct the facilities assigned in the *Closing and Channel Reassignment Public Notice*. Furthermore, requiring DTV Utah to replace its hardened GRP cylinder would add avoidable costs and may result in delays that could cause Licensees to miss their Phase 1 phase completion date deadline. Given the interdependent nature of DTV Utah's operations and the amount of resources that are needed to facilitate DTV Utah's transition, a delay could have a ripple effect that impacts subsequent phases and the overall transition schedule. Based on the foregoing, we find that DTV Utah has demonstrated that Licensees are unable to construct their post-auction facility at their current site as assigned to it in the *Closing and*

has been reassigned to channel 19; and KSL-TV is currently licensed to operate on channel 38 and has been reassigned to channel 23.

¹⁴ DTV Utah states that relocating KUED to Channel 15, while retaining the existing cylinder, would result in KUED's wavelength increasing by 39 percent. Designing measures to mitigate the effect of this increase on the antenna patterns of KUED and the other DTV Utah stations would require significant resources. Waiver Request at 2 and Attachment B.

¹⁵ According to Katherein, moving to channel 27 instead of 15 reduces the increase in wavelength to 16 percent which results in "reduced drawbacks for other channels" and allows DTV Utah to use the existing hardened GRP cylinder. *Id.*

¹⁶ *Id.* See *Incentive Auction Task Force and Media Bureau Adopt Post-Incentive Auction Transition Scheduling Plan*, Public Notice, 32 FCC Rcd 890, 913, para. 50 (MB 2017).

¹⁷ See Waiver Request at 3-4 (discussing the geographic, climate, and other limitations of its shared transmission facility and tower site).

¹⁸ 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).

Channel Reassignment Public Notice and it is in the public interest to allow the Licensees to file an application for construction permit for their stations during the first priority window.

We remind each Licensee 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 Channel Reassignment Public Notice*.¹⁹ 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.²⁰ The facilities proposed in applications filed during the first priority window will be entitled to interference protection from subsequently-filed applications and amendments thereto.²¹

The above facts considered, DTV Utah's requests for waiver **ARE GRANTED** and the July 12, 2017 deadline for submission of the above captioned stations' applications for post-incentive auction construction permit (FCC Form 2100, Schedule A) and reimbursement cost estimate forms (FCC Form 2100, Schedule 399) **ARE WAIVED**. The Licensees are also instructed to submit applications for construction permit for the stations during the first priority window, which will be announced by Public Notice and commence shortly after conclusion of the initial 90-day filing period.²² The Licensees must also submit their reimbursement cost estimate form for the stations within 30 days of receiving a construction permit for an alternate channel or expanded facility

Phase Modification and Waiver Request. *Background.* Pursuant to the *Transition Scheduling Adoption Public Notice*, individual stations may request waivers of their phase assignments and associated transition deadlines.²³ As discussed above, a waiver is appropriate where the particular facts would make strict compliance inconsistent with the public interest and where deviation from the general rule would relieve hardship, promote equity, or produce a more effective implementation of overall policy on an individual basis.²⁴ The Media Bureau has stated it 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

¹⁹ See *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd at 867, para. 30.

²⁰ 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).

²¹ 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)).

²² 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)).

²³ 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*).

²⁴ 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.

transition schedule, including the impact on other broadcasters as well as viewers.²⁵ The Bureau determined that it would view favorably requests that are compliant with the Commission's rules and have little or no impact on the transition schedule.²⁶ Requests that the staff determines would be likely to delay or disrupt the transition schedule will be viewed unfavorably.²⁷

Each of DTV Utah's stations were assigned to Phase 1 of the post-incentive auction transition. Stations assigned to Phase 1 were assigned a testing period start date of September 14, 2018 and a phase completion date of November 30, 2018.²⁸ DTV Utah argues that the geographic, climate, and other limitations of its shared transmission facility on Farnsworth Peak make it impossible for each station to all test their post-incentive auction facilities in the two-and-a-half month testing period scheduled for Phase 1.²⁹ Vehicles typically can only access the site from June until the first heavy snow, usually in October; and then access to the site is restricted to snowcat or helicopter the rest of the year. Even during the windows when construction is possible travel up the mountainside for large vehicles requires a slow trip up a single-lane dirt road, as well as careful coordination among the site's more than 25 tenants for the use of the site's limited parking and storage space.³⁰ Furthermore, electrical power at the site is limited and the site is already operating near its maximum power capacity. As a result, the site cannot support the testing of all six new transmitters, along with the continued operation of the Stations' existing transmitters, during the scheduled Phase 1 testing period.³¹ Given the myriad of challenges, DTV Utah argues the Licensees must be permitted to test their new transmitters on a rolling basis as soon as each transmitter is installed and be allowed to cease operating on their pre-auction channel and commence operation on their post-auction channel once testing is complete.³²

DTV Utah notes that each of the licensee's proposed post-incentive auction facilities are not part of any linked-station set and will not cause more than *de minimis* interference to each other (on either their pre-auction or post-auction channels) or to any other full power or Class A station. DTV Utah also argues that, because the stations are assigned to Phase 1 and have limited windows during which they can test equipment and commence operation on their post-auction channels, permitting them to both test and commence operations prior to the testing period start date will not draw resources away from any other stations.

²⁵ See *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd at 912-14, paras. 49-52. See also *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Broadcast Transition*, MB Docket No. 16-306 and GN Docket No. 12-268, 32 FCC Rcd 858, 881-82, para 73 (MB 2017).

²⁶ *Transition Scheduling Adoption Public Notice*, 32 FCC Rcd 912-13, para. 49 and n.163.

²⁷ *Id.*

²⁸ A station may not commence operation on its post-auction channel prior to its testing period start date. If the station is in a linked station set it must coordinate testing and commencement of operations with the other stations in its linked station set in order to avoid causing impermissible interference to those stations. 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. See *Closing and Channel Reassignment Public Notice* at 21, para. 64.

²⁹ Waiver Request at 3.

³⁰ *Id.* at 4.

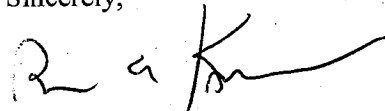
³¹ *Id.*

³² *Id.*

Discussion. Upon review of the facts and circumstances presented, we find that DTV Utah's requests satisfy the requirements for a waiver and will not have an adverse impact on the transition schedule or a negative impact on other stations and will have only a limited impact on viewers. Permitting the Licensees to begin testing, commence operation on their post-auction channel, and cease operation on their pre-auction channel prior to the Phase 1 testing period start date will help facilitate the construction of the DTV Utah shared facility and ensure the timely completion of their transition. Given the significant resources and attention required to facilitate DTV Utah's transition, delay in testing and commencing operations could have a detrimental impact on subsequent phases. A staff analysis confirms that the phase change does not create any new linked station sets. Furthermore, while the time period in which viewers will need to conduct rescans may increase from two-and-a-half months (September 14 to November 30, 2018), to approximately four months (June to early October 2018, depending on weather), viewers will not be required to conduct any more rescans than if DTV Utah implemented its "rolling" transition plan during the current Phase 1 testing period. We find this potential increased burden on viewers is offset by the harm that could result if the stations failed to meet their phase completion date. Not only might the stations be required to go silent, but failing to transition by the end of Phase 1 would require resources to visit the sites in the summer of 2019, potentially diverting significant resources from other stations in subsequent phases. Furthermore, while the timeframe in which the stations may commence operation on their post-auction channel and cease operation on their pre-auction channel may be longer under this waiver, the Licensees will continue to provide the required transition notifications to viewers, as well as MVPDs.³³

Accordingly, DTV Utah's requests for modification of the Licensees' phase testing period start date **ARE GRANTED**.³⁴ The Licensees may begin testing upon the grant of their respective construction permits and commence operations on their post-auction channels upon the completion of testing. All Licensees must cease operating on their pre-auction channels no later than 11:59 pm local time on **November 30, 2018**.³⁵

Sincerely,



Barbara A. Kreisman
Chief, Video Division
Media Bureau

³³ See 47 CFR § 73.3700(c). DTV Utah states it is not seeking waiver of its notification requirements and acknowledges that it will continue to be subject to satisfying the applicable notification requirements to viewers and MVPDs. Waiver Request at 4.

³⁴ The following waiver requests filed by the licensees of Stations KTVX, KUCW, KJZZ and KUED requesting modification of their testing period start date have been dismissed as duplicative: LMS File Nos. 0000024912; 0000024913; 0000025020; 0000024865 (respectively).

³⁵ Each transition phase has 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. Absent grant of a STA or assignment to a new transition phase, every station must cease operation on its pre-auction channel by its assigned phase completion date. See 47 CFR § 73.3700(b)(4)(iii); *Broadcast Transition Procedures Public Notice*, 32 FCC Rcd at 871 and 881-82, para. 39 and 73-74.

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