



Federal Communications Commission
Washington, D.C. 20554

September 21, 2021

Guenter Marksteiner
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marksteiner@whdt.net
(via electronic mail)

Re: Request for Extension of
License and Silent Authority Under
Section 312(g) and Waiver of Tolling
Rules
WHDT-LD, Boston, MA
Fac ID No. 59488
LMS File Nos. 0000159609 and
0000159610

Dear Licensee:

This concerns requests to extend license and silent authority and waiver of the tolling rules, as amended (Requests) filed by Guenter Marksteiner (Marksteiner) licensee of low power television station WHDT-LD, Boston, Massachusetts (WHDT-LD or Station). For reasons set forth below, we grant Marksteiner's Requests; waive all applicable rules; extend the Station's license and silent authority, and toll the Station's digital construction permit to January 21, 2022.

Background. Section 312(g) of the Communications Act of 1934 (the Act) provides that "[i]f 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 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...for any reason to promote equity and fairness."¹ In the *Incentive Auction R&O*, the Commission explained that it would be receptive to requests for reinstatement or extension of a station's license under section 312(g), "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."² Further, in the *Post-Incentive Auction Procedures PN* the Media Bureau (Bureau) stated that, in considering requests to extend or reinstate a stations license under section 312(g)

¹ 47 U.S.C. § 312(g). The Bureau's discretion under that provision of section 312(g) is severely limited. *See e.g., A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 617, para. 27 ("This limited, discretionary provision is phrased as an exception to the general rule that most affected licenses will be forfeited"). The Commission has exercised its authority to reinstate an expired license to "promote equity and fairness" only where the station failed to provide service for 12 consecutive months due to compelling reasons beyond the licensee's control. *See, e.g., V.I. Stereo Communications Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006); *Community Bible Church*, Letter, 23 FCC Rcd 15012, 15014 (MB 2008); *Mark Chapman, Court-Appointed Agent*, Letter, 22 FCC Rcd 6578 (MB 2007). The Commission has declined to reinstate licenses where the failure to transmit a broadcast signal was due to the licensee's own actions, finances, and/or business judgment *See, e.g., A-O Broadcasting*, 23 FCC Rcd at 617, para. 27; *ETC Communications, Inc.*, Letter, 25 FCC Rcd 10686 (MB 2010); *Kirby Young*, Letter, 23 FCC Rcd 35 (MB 2008).

² *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, GN Docket No. 12-268 et al., 29 FCC Rcd 6567, 6806-07, para. 585 (2014) (*Incentive Auction R&O*).

in order to promote fairness and equity, it “will examine whether the station has demonstrated that its silence is the result of compelling reasons beyond the stations’ control, including facts that relate to the post-auction transition process.”³ Finally, in the *Special Displacement Window PN*, the Bureau permitted stations to file a displacement application on a contingent basis for channels in the repacked television band (channels 2-36) that full power and Class A stations would be relinquishing as a result of the Incentive Auction and repacking process.⁴ The Bureau stated that, if a conditional grant would require an LPTV or TV translator station to be silent for a consecutive 12-month period prior to discontinuation of operation by the full power or Class A station, it would “consider a request for extension or reinstatement pursuant to section 312(g) of the Act and a request for waiver of the Commission rule.”⁵

A low power television station, such as WHDT-LD, that has already transitioned to digital and is subsequently granted a digital construction permit for displacement facilities is given three years to complete construction of its displacement facility.⁶ If a station experiences delays licensing its facility, it may only obtain additional time to complete construction through the Commission’s “tolling” rule.⁷ The tolling rule provides that a construction permit deadline may be tolled only for specific circumstances not under the licensee’s control, such as acts of God or delays due to administrative or judicial review.⁸ Stations may also seek a waiver of the tolling rule to receive additional time to construct in the case where “rare or exceptional circumstances” prevent construction.⁹

Requests. As part of the Incentive Auction and repacking process, WHDT’s channel 38 was reallocated for use by wireless operator T-Mobile USA (T-Mobile). WHDT went silent on channel 38 on September 30, 2019, in order to accommodate the commencement of wireless broadband operations.¹⁰ WHDT timely filed a displacement application requesting a construction permit for channel 4 in the Commission’s displacement application filing window for low power television stations that were

³ *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broadcast Transition*, MB Docket No. 16-306 and GN Docket No. 12-268, Public Notice, 32 FCC Rcd 858, 873-74, para. 49 (IATF/MB 2017) (*Post-Incentive Auction Procedures PN*); see also *Incentive Auction Task Force and Media Bureau Remind Repacked Stations of Certain Post-Auction Transition Requirements and Deadlines*, MB Docket No. 16-306 and GN Docket No. 12-268, Public Notice, 33 FCC Rcd 8240, 88243, n.25 (MB/IATF 2018) (citing *Christian Broadcasting of East Point, Inc.*, 30 FCC Rcd 13975, 13976-77, para. 4 (2015)).

⁴ 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*, MB Docket No. 16-306 and GN Docket No. 12-268, Public Notice, 33 FCC Rcd 1234, 1237, para. 7 (IATF/MB 2018) (*Special Displacement Window PN*).

⁵ *Id.* at n.25 citing 47 U.S.C. § 312(g); *The Incentive Auction Task Force and Media Bureau Announce Procedures for Low Power Television, Television Translator and Replacement Translator Stations During the Post-Incentive Auction Transition*, Public Notice, 32 FCC Rcd 3860, 3865-66, para. 12 (IATF/MB 2017).

⁶ See 47 CFR § 74.788(d).

⁷ See 47 CFR § 73.3598(b).

⁸ *Id.*

⁹ See *1998 Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17536, para. 42 (1999).

¹⁰ See LMS File No. 0000087705.

displaced by the incentive auction and repacking process.¹¹ The displacement application was granted September 9, 2018 and expires on September 21, 2021. WHDT-LD was previously granted an extension of license and its license was extended to September 21, 2021.¹²

Since the grant of its last extension of license, Marksteiner states that he has continued pursuing construction at a new tower location. After obtaining a grant on July 21, 2021, of the construction permit specifying the new tower location,¹³ Marksteiner states that he coordinated and mobilized various teams of necessary contractors and undertook many pre-construction activities called for by the buildout. Marksteiner provides a very detailed accounting of all steps taken since July 2021 to complete construction including: (1) RF coordinating with numerous radio station operators on the tower; (2) conducting a in depth structural analysis on the tower; (3) testing the tower's guy wire tensioning; (4) studying the antenna mount locations to assure compatibility with the Station's antenna; (5) analysis of the required FAA tower lighting; (6) arranging for a helicopter lift of the Station's antenna, in the event it is needed; and (7) scheduling a site tour for the transmitter and electrical contractors. At this time, Marksteiner maintains that the remaining steps to be undertaken are completion of the Station's transmitter cage, delivery of the antenna and transmitter, on-site assembly of the transmitter, mounting of the antenna, final testing of the facility and licensing of the construction permit, in accordance with the construction plan. Marksteiner predicts that completion of this work and return to air is projected by the end of the current calendar year.

Based upon the foregoing showing, Marksteiner requests further extension of the Station license and silent authority, waiver of the applicable rules, and tolling of the Station's digital construction permit. Marksteiner argues that grant of these Requests would preserve the Station's license, permit it to complete the construction necessitated by its displacement as a result of the repack, and allow it to ultimately resume serving the public.

Discussion. Upon review of the facts and circumstances presented, we find that Marksteiner's request for extension of the Station's license satisfies the requirements of section 312(g) as described in the *Incentive Auction R&O*, the *Post-Incentive Auction Procedures PN*, and the *Special Displacement Window PN* and is, therefore, in the public interest. Consistent with the public interest and prior Bureau actions, we will provide section 312(g) relief to displaced LPTV and TV translator stations that were displaced by the Incentive Auction, pursued new displacement channels, and those efforts were delayed for circumstances beyond their control. WHDT-LD was displaced by the Incentive Auction and repacking process. Marksteiner diligently pursued construction of his displacement facilities, but his efforts were hindered by a variety of construction delays. For similar reasons, we find that Marksteiner has met the standard for waiver of the tolling rules and tolling of his digital construction permit. Grant of Marksteiner's Requests will permit the Station to once again serve its viewers.

We remind Marksteiner that, pursuant to the Reimbursement Expansion Act, the Station is eligible for reimbursement from the TV Broadcast Relocation Fund (Fund) of costs reasonably incurred

¹¹ See LMS File No. 000052060; *Special Displacement Window PN*; *Incentive Auction Task Force and Media Bureau Extend Post Incentive Auction Special Displacement Window Through June 1, 2018*, Public Notice, 33 FCC Rcd 3794 (IATF/MB 2018).

¹² See LMS File No. 0000130073 and 0000151610.

¹³ See LMS File No. 0000153397.

as a result of the reorganization of broadcast television spectrum.¹⁴ Please note, however, that additional expenses incurred, such as those resulting from changes in a Station's plans to construct their displacement facilities that are unrelated to the displacement, may not be eligible for reimbursement from the Fund.

We further remind Marksteiner that the deadline for submitting final expense documentation for reimbursement for the Stations is September 5, 2022.¹⁵ Thus, we strongly encourage the Marksteiner to diligently to submit eligible invoices as soon as practicable to improve the likelihood that there will be sufficient funds available to reimburse the Stations for their legitimate expenses.

Accordingly, we find that in order to promote fairness and equity the request filed Guenter Marksteiner **IS HEREBY GRANTED**, the applicable Commission rules **ARE WAIVED**,¹⁶ and the license and silent authority for WHDT-LD, Boston, Massachusetts **IS EXTENDED** to January 21, 2022. In addition, the request for waiver of the tolling rules of Guenter Marksteiner **IS GRANTED** and the expiration date of the construction permit (LMS File No. 0000153397) for WHDT-LD, Boston, Massachusetts **IS TOLLED** to January 21, 2022. We note that another request for extension of the Station's license under the equity and fairness provision of section 312(g) and/or tolling of a Station's construction permit under section 73.3598(b) of the Commission's rules will not be favorably viewed unless accompanied by a showing that completion of the Station's displacement facilities was prevented by additional compelling circumstances. Marksteiner must also include with any such request(s) a detailed plan for completing construction and returning the Station to operation.

Sincerely,

/s/

Barbara A. Kreisman
Chief, Video Division

cc (via electronic mail): Lauren Lynn Flick, Esq.

¹⁴ See *Consolidated Appropriations Act, 2018*, Pub. L. 115-141, at Division E, Title V, § 511, 132 Stat. 348 (2018) (codified at 47 U.S.C. § 1452(j)-(n)). See also 47 CFR § 73.3701 (Reimbursement Under the Reimbursement Expansion Act); *LPTV, TV Translator, and FM Broadcast Station Reimbursement; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 34 FCC Rcd 1690 (2019); and *LPTV, TV Translator, and FM Broadcast Station Reimbursement; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking and Order, 33 FCC Rcd 7855 (2018).

¹⁵ See *Invoice Filing Deadlines for TV Broadcaster Relocation Fund*, Public Notice, 35 FCC Rcd 11273, 11277, paras. 10-11 (IATF/MB Oct. 7, 2020) (setting three filing deadlines for the submission of all outstanding repack invoices, notably: 1) October 8, 2021 for eligible entities assigned repack transition completion dates in the first half of the 39-month post-auction transition period; 2) March 22, 2022 for entities assigned completion dates in the second half of the transition period; and 3) September 5, 2022 for all other participants in the reimbursement program).

¹⁶ 47 CFR §§ 74.15(f) and 74.763(c).