

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Amendment of Parts 73 and 74 of the) MB Docket No. 03-185
Commission’s Rules to Establish Rules for Digital)
Low Power Television, Television Translator, and)
Television Booster Stations and to Amend Rules)
for Digital Class A Television Stations)
)

To: The Commission

PETITION FOR A BLANKET EXTENSION OR WAIVER

Advanced Television Broadcasting Alliance (“ATBA”), an organization representing hundreds of low-power and full-power television broadcasters, owners and operators of translators, and allied industry organizations and companies,¹ hereby files this Petition for Blanket Extension or Waiver (hereafter, “Petition”), seeking an extension or waiver of the construction deadline, until September 1, 2015, for all permittees authorized to construct new digital low power television stations (“LPTV”).² The Commission has acknowledged consistently that requiring LPTV licensees to construct facilities that may be eliminated in repacking after the broadcast spectrum auction and repacking proceeding (the “Incentive Auction Proceeding”)³ makes no sense.⁴ The Commission has established a September 1, 2015 construction deadline for analog

¹ Additional information on the Alliance can be found at <http://broadcastingalliance.org/>

² See 47 C.F.R. § 1.3 (“Any provision of the [FCC’s] rules may be waived . . . on petition if good cause therefor is shown”).

³ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd 12357 (2012) (“*Incentive Auction NPRM*”).

⁴ See generally *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Second Report and Order, 26 FCC Rcd 10732 (2011) (“*Second Report and Order*”).

LPTV stations with flash-cut and digital companion channel construction permits.⁵ And though the Commission has not granted a blanket waiver with respect to permits for new digital LPTV facilities, the Media Bureau, under the Commission's direction, has granted more than 650 six-month construction deadline extensions on a "case-by-case" basis. Between now and the September 1, 2015 date, LPTV permittees will file, and the FCC will certainly grant, hundreds and perhaps thousands more case-by-case extension applications. ATBA asks that the Commission grant a blanket extension of the construction deadline for new digital LPTV construction permits until the same September 1, 2015 date that already applies to other LPTV permits, thereby eliminating hundreds or thousands of hours of rote paperwork for permittees and FCC staff.

The continued uncertainty and risk associated with the Incentive Auction Proceeding, including the recently announced delay of the auction until mid-2015, justify grant of this Petition.⁶ Until the repacking and auction processes are more developed, it is impossible to estimate how much spectrum will be cleared for wireless service and how difficult it will be to repack broadcasters in the remaining spectrum. Without an extension of the applicable construction deadline, an LPTV permittee would have to build facilities that may be unusable after 2015.

Anyone would recognize that result to be profoundly wasteful and simply untenable. As explained below, there is, in fact, no disagreement on this point. The question is not whether digital LPTV permits should be extended until enough facts are available for permittees to make rational investment decisions. The question is whether

⁵ See generally *id.*

⁶ See Tom Wheeler, *The Path to a Successful Incentive Auction*, available at <http://www.fcc.gov/blog/path-successful-incentive-auction-0> (last visited February 10, 2014).

it makes sense to require one class of LPTV permittees to file extension requests every six months while another class of LPTV permittees is subject to a blanket extension. For the above reasons, ATBA requests that the Commission expeditiously grant this Petition.

Background

Second Report and Order. In 2011, the Commission established a deadline of September 1, 2015 for all analog LPTV stations to complete their transition to digital transmissions and also extended the expiration date for all outstanding flash-cut and digital companion channel construction permits to coincide with that deadline.⁷ The Commission did not modify the deadline for construction permits for new digital LPTV stations, which by rule are set to be three years from the issuance of the respective construction permit.⁸

The Commission extended the expiration dates for all flash-cut and digital companion channel construction permits until September 1, 2015 because doing so would enhance efficiency, facilitate planning, promote fairness, and increase certainty.⁹ The Commission concluded that “the overall lower power television transition process would be better served by setting the transition date far enough in the future to increase the probability that low power television stations can avoid transitioning twice, once in connection with a future reallocation and again when they complete their digital transition.”¹⁰

⁷ *Second Report and Order*, at ¶ 14.

⁸ See 47 C.F.R. § 73.3598(a).

⁹ See *infra* notes 10-15 and accompanying text.

¹⁰ *Second Report and Order*, at ¶ 8.

The Commission concluded that the September 1, 2015 date, which at the time was four years in the future, would provide sufficient time for parties to plan the transition properly, i.e. choose their locations, “prepare and file an application, obtain a grant of their construction permit, order equipment . . . and carry out other necessary steps toward the transition.”¹¹ Along the same lines, the Commission desired that the deadline provide permittees with enough time to develop “a better understanding of the overall spectrum landscape when determining their final transition plan”¹² and “at minimum . . . enable stations to consider proposals in the *Broadband Innovation* proceeding when they finalize their transition plans.”¹³

The Commission noted that “fairness dictates that stations with outstanding digital construction permits . . . be given until September 1, 2015 to complete their digital facilities . . . [and] should not be forced to transition before they are truly prepared to do so simply because their digital construction permits are set to expire.”¹⁴ The Commission also noted that establishing a uniform deadline of September 1, 2015 for all low power digital construction permits “provide[s] certainty for all stations and streamline[s] the review process.”¹⁵

Cohn and Marks Petition for Reconsideration. In a petition for reconsideration of the *Second Report and Order*, Cohn and Marks LLP argued on behalf of its clients that the aforementioned factors were equally applicable to permittees of new digital

¹¹ *Id.* at ¶ 9.

¹² *Id.* at ¶ 10.

¹³ *Id.* at ¶ 8.

¹⁴ *Id.* at ¶ 14.

¹⁵ *Id.*

construction permits.¹⁶ The Commission did not reject those arguments on the merits or distinguish their applicability. Instead, it simply noted that granting a blanket extension of the deadline for new digital LPTV construction permits was not proposed in the notice portion of the proceeding and was, therefore, beyond the scope of the proceeding.¹⁷

The Commission explained that extension requests would be evaluated on a case-by-case basis, as permitted under the Commission's rules.¹⁸ Specifically, LPTV permittees seeking an extension based on the Commission's ongoing Incentive Auction Proceeding should explain "(i) how such circumstance has delayed their construction, (ii) how it was unforeseeable or beyond their control and (iii) how, despite this delay, they have taken all reasonable steps to resolve the problem expeditiously."¹⁹

The Media Bureau's Case-by-Case Decisions. According to the Commission's Consolidated Database System ("CDBS"), the Media Bureau completed processing of 674 LPTV extension applications filed in 2013,²⁰ granting 657 applications and dismissing 17 applications.²¹ In the vast majority of the granted applications, the applicants supported the request with no more than a simple statement regarding the

¹⁶ See Cohn and Marks LLP, *Request for Commission Action on Petition for Reconsideration*, MB Docket No. 03-185 (January 17, 2013) ("*Cohn and Marks Petition*").

¹⁷ See *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Second Memorandum Opinion and Order, 28 FCC Rcd 14412, at ¶ 13 (2013) ("*Second MO&O*").

¹⁸ *Id.* at ¶ 13 n.56 (referencing 47 C.F.R. § 74.788).

¹⁹ *Id.*

²⁰ ATBA reviewed the Form 337 applications filed in 2013 in CDBS (http://licensing.fcc.gov/prod/cdbs/pubacc/prod/app_sear.htm) by restricting the Service field to "TV Translator or LPTV Station" and "Digital TV Translator or LPTV Station" and restricting the Application Type(s) field to "CP Extension" and "CP to Replace Expired Permit." ATBA omitted from its analysis 16 applications that were filed in 2013 and remain pending.

²¹ Of the 17 dismissed applications, 14 applications were filed after the expiration of the construction deadline and 3 applications appear to have been rendered moot because the permittee filed a license to cover after submission of the extension request.

uncertainty and risk resulting from the pending Incentive Auction Proceeding. For example, one applicant stated: “Due to the pending spectrum auction and potential repacking the County Commissioners are reluctant to expend funds to build this facility and request an extension of time.”²² Another applicant stated: “Applicant is concerned about spectrum auction implications and is reluctant to invest in construction until further information about effects on low power television stations develops.”²³ Another applicant justified its request by stating: “With the current uncertainty in the LPTV industry due to the incentive auction, investment is on hold to see what direction the Commission will take to avoid the expense of displacing to another channel.”²⁴ In each case, the Media Bureau granted a six-month extension without further inquiry or discussion.

Incentive Auction Proceeding. At the time of the *Second Report and Order*, the Commission had not yet begun its proceeding to consider rules for the repacking and auctioning of television channels, including those used by LPTV stations.²⁵ But, the Commission noted that the September 1, 2015 deadline would be consistent with the recommendation in the National Broadband Plan to conclude the digital transition by the end of 2015.²⁶ Given the four-year period at the time (from 2011 to 2015), the Commission stated it would not extend this deadline based on the status of the broadcast spectrum reallocation proceeding.

²² See FCC File No. BEP-20130506AAR (granted May 9, 2013).

²³ See FCC File No. BEP-20131121ATE (granted December 6, 2013).

²⁴ See FCC File No. BEP-20130724AAB (granted August 1, 2013).

²⁵ See *Second MO&O*, at ¶ 3 n.11; see generally *Incentive Auction NPRM*.

²⁶ *Second Report and Order*, at ¶ 8.

Two years later, the Commission affirmed the establishment of the September 1, 2015 deadline. However, the Commission softened its commitment to that date, noting that since the *Second Report and Order* Congress had authorized the Commission to conduct an incentive auction and reallocate broadcast television spectrum, that the Commission had initiated a proceeding to implement that authority, and that its decision affirming the September 1, 2015 deadline was “without prejudice to the Commission’s ability to consider making adjustments to the timing of the low power television transition . . . as the Commission develops the schedule for holding the incentive auction and implementation of the subsequent repacking.”²⁷

Since the release of the Commission’s *Incentive Auction NPRM*, there have been 303 submissions filed, 22 Public Notices issued, 3 workshops, and 1 webinar held in that proceeding.²⁸ In December 2013, a new FCC Chairman took office and announced that the incentive auction would not take place until the middle of 2015 and that a slower schedule is necessary to “ensure that the operating systems and software to run [the auction] work from the moment the first bid is placed, until the final broadcast station is relocated or ‘repacked.’”²⁹

Discussion

The uncertainty and risk associated with the still pending Incentive Auction Proceeding warrant a blanket extension of the construction deadline. As evidenced by the more than 650 LPTV extension applications filed in 2013, that uncertainty and risk

²⁷ *Second MO&O*, at ¶ 4.

²⁸ See generally Docket No. 12-268 in the Electronic Comment Filing System (http://apps.fcc.gov/ecfs/comment_search/input?z=kv0if).

²⁹ See *supra* note 6.

creates a material difficulty for LPTV permittees, beyond their control, to meet their respective construction deadlines.³⁰ The Chairman's recent announcement delaying the broadcast auction until mid-2015 has further heightened the regulatory uncertainty and risk for LPTV permittees.³¹

Establishing a September 1, 2015 deadline for new digital LPTV permits would create certainty and uniformity in the construction deadline, since the same deadline already applies to flash-cut and digital companion channel construction permits.³² It would be arbitrary and capricious for the Commission to treat the similarly situated LPTV permittees differently,³³ and importantly, the FCC would *not* be requiring permittees to build hundreds of facilities that the FCC may soon de-authorize.

Nothing in the *Second Report and Order* or the *Second MO&O* supports denial of the Petition. The Commission made clear in the *Second MO&O* that the issue of a blanket extension of the construction deadline for new digital LPTV permittees was beyond the scope of the proceeding because the specific proposal had not been raised below.³⁴ This Petition does not seek reconsideration or otherwise challenge that conclusion regarding the scope of that proceeding, but instead independently seeks Commission authority for a blanket extension or waiver of its rules for the reasons stated herein.³⁵

³⁰ See *supra* notes 20-24 and accompanying text.

³¹ See *supra* note 6.

³² *Second Report and Order*, at ¶ 8.

³³ *Melody Music, Inc. v. Federal Communications Commission*, 345 F.2d 730 (1965).

³⁴ *Second MO&O*, at ¶ 13.

³⁵ See 47 C.F.R. § 1.3; see also *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (A waiver is permissible "where particular facts would make strict compliance inconsistent with the public interest."); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). As explained above, the justifications provided in this Petition demonstrate good cause for grant of a waiver.

Conclusion

Grant of this Petition is consistent with the common sense reflected in established Commission practice and policy regarding other LPTV construction permits and in other contexts as well.³⁶ Grant would reduce the administrative burden on permittees and the Media Bureau, which processed and granted more than 650 LPTV extension applications in 2013 and can be expected to process and review even more LPTV extension applications in 2014 and 2015. For those reasons, ATBA respectfully urge the Commission to grant this Petition.

Respectfully submitted,

**ADVANCED TELEVISION BROADCASTING
ALLIANCE**

/s/

By: Louis Libin
Executive Director

382 Forest Avenue
Woodmere, NY, 11598
(516) 374-6700

Dated: February 20, 2014

³⁶ The Commission has previously recognized that the public interest is best served by granting blanket relief instead of reviewing a multitude of individual applications. *See, e.g., 900 MHz Specialized Mobile Radio Service Applicants (Waiver of Audited Financial Statements Requirement)*, Opinion, 11 FCC Rcd 10952, at ¶ 6 (1996) (granting a blanket waiver “reliev[es] applicants of an administrative burden as opposed to imposing a reporting burden on them . . . and [t]he waiver will also expedite the Commission’s ability to process . . . applications, thus expediting the delivery of service to the public.”); *Cable Cross-Ownership Limitations and Anti-Trafficking Provisions*, Report and Order and Further notice of Proposed Rulemaking, 8 FCC Rcd 6828, at ¶ 90 (1993) (“such a blanket waiver will eliminate a significant number of waiver requests thereby reducing the administrative burden on the industry and the Commission.”); *see also Improving Public Safety Communications in the 800 MHz Band Sprint Nextel Request for Waiver of June 26, 2008 Rebanding Deadline With Respect to Channels 1-120*, Opinion, 23 FCC Rcd 9558, at ¶ 12 (2008) (requiring the petitioner “to file hundreds of individualized waiver requests would cause needless delay and administrative burden for both [the petitioner] and the Commission.”).

Your submission has been accepted

ECFS Filing Receipt -		
Confirmation number:		
2014220418089		
Proceeding		
Name	Subject	
03-185	Amendment of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations.	
Contact Info		
Name of Filer: Advanced Television Broadcasting Alliance		
Attorney/Author Name: Louis Libin		
Address		
Address For: Filer		
Address Line 1: 382 Forest Avenue		
City: Woodmere		
State: NEW YORK		
Zip: 11598		
Details		
Type of Filing: PETITION FOR WAIVER		
Document(s)		
File Name	Custom Description	Size
02-20-14 ATBA Petition for Blanket Waiver - February 2014 to be filed.pdf	ATBA Petition for Blanket Waiver	488 KB
Disclaimer		
<p>This confirmation verifies that ECFS has received and accepted your filing. However, your filing will be rejected by ECFS if it contains macros, passwords, redlining, read-only formatting, a virus, or automated links to other documents.</p> <p>Filings are generally processed and made available for online viewing within one business day of receipt. You may use the link below to check on the status of your filing:</p> <p>http://apps.fcc.gov/ecfs/comment/confirm?confirmation=2014220418089</p> <p>For any problems please contact the Help Desk at 202-418-0193.</p>		