

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554



**ORIGINAL**

In the Matter of:

**CTB SPECTRUM SERVICES, LLC**

K32JE-D	Quincy	WA	)	File No. BNPTDL-20090825ADN
			)	Facility ID 182530
K24IQ-D	Billings	MT	)	File No. BNPDTL-20090825BFB
			)	Facility ID 181965
K31KR-D	Three Forks	MT	)	File No. BNPDTL-20090825ALH
			)	Facility ID 181980
K46KO-D	Three Forks	MT	)	File No. BNPDTL-20090825AKY
			)	Facility ID 182450
K48LV-D	Three Forks	MT	)	File No. BNPDTL-20090825AKV
			)	Facility ID 182453
K21KD-D	Wyola	MT	)	File No. BNPDTL-20090825AKL
			)	Facility ID 181982
K30KN-D	Wyola	MT	)	File No. BNPDTL-20090825AKG
			)	Facility ID 182461
K40KQ-D	Wyola	MT	)	File No. BNPDTL-20090825AKC
			)	Facility ID 182465
K42JB-D	Wyola	MT	)	File No. BNPDTL-20090835AJW
			)	Facility ID 182467
K43MG-D	Hermiston	WA	)	File No. BNPDTL-20090825AFR
			)	Facility ID 182504
K51KY-D	Hermiston	WA	)	File No. BNPDTL-20090825AFL
			)	Facility ID 182506
K22JK-D	Moses Lake	WA	)	File No. BNPDTL-20090825ADG
			)	Facility ID 182536
K29JB-D	Moses Lake	WA	)	File No. BNPDTL-20090825ADC
			)	Facility ID 182538
			)	
			)	
Request for Extension of Time to Complete			)	
Construction of New Digital Low Power			)	
Television Stations			)	

To: Chief, Video Division, Media Bureau

**REQUEST FOR EXTENSION OF TIME TO COMPLETE CONSTRUCTION**

1. CTB Spectrum Services, LLC (CTB) hereby requests an extension of time to construct the above-captioned new Low Power Television (LPTV) stations until 18 months after a Commission decision on how many television channels will remain after completion of the

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spectrum repacking and reverse auction required by the Middle Class Tax Relief and Job Creation Act of 2012,<sup>1</sup> or at a minimum until September 1, 2015, which is the extended deadline the Commission has established for construction of flash cut or digital companion facilities by existing LPTV stations.<sup>2</sup> The permits currently expire on December 8, 2012. To the extent that a waiver of Section 74.788(a) of the Commission's Rules is required for this request to be granted, such waiver is hereby requested.

2. This request is based on, and an extension is justified by, substantial regulatory uncertainty generated by actions of the Commission itself, which make it impossible to create and to implement a rational business plan for constructing and operating the stations and consequently impede investment in the facilities. It is not based on reasons on which the Commission has relied in the past for rejecting requests for more time to construct new stations, such as unavailability of equipment, loss of a transmitter site, lack of customers, private business decisions, or "do-nothing" permittees waiting to see if business opportunities improve.

3. There have been numerous cases over the years where the Commission has considered requests for deferral of deadlines to construct new stations in various radio services. In some, the Commission has granted relief; in others it has not. With sufficient research, one can find precedent and can fashion an argument to support almost any desired outcome. However, there is a consistent thread, which distinguishes events and decisions under a permittee's control from events and decisions not under its control. In the latter situation, relief has been granted. CTB respectfully submits that its circumstances come well within the scope of cases where relief has been granted, because it is ready and willing to construct, is not awaiting development of a

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<sup>1</sup> *Middle Class Tax Relief and Job Creation Act of 2012*, Pub. L. No. 112-96, §§ 6402, 6403, 125 Stat. 156 (2012) ("Spectrum Act").

<sup>2</sup> See Section 74.788(c) of the Commission's Rules

customer base, and is able to acquire equipment; but actions taken by the Commission, which were not initiated at the request of CTB, have placed severe roadblocks in CTB's way.

4. Specifically, the Commission's proposal to repack the TV spectrum into fewer than the currently available 50 channels<sup>3</sup> raises the realistic probability that many LPTV stations will lose their spectrum and have no place to go, resulting in complete loss of their operating authority.<sup>4</sup> The FCC hopes to complete its repacking within only a very few years, auctioning reclaimed spectrum by 2014.<sup>5</sup> A rational person cannot justify investing in a facility that not only may be modified after only two or three years but more importantly, may not survive at all. The equities thus weigh very heavily in CTB's favor. CTB should not have to construct until it can reasonably estimate, if not know for sure, how many of its construction permits will survive the repacking process, so that it does not throw money away on stations that the Commission will delete in the short-term future.<sup>6</sup>

5. There can be no dispute that the repacking proposal and its threat to the survival of LPTV stations were not of CTB's doing. Moreover, all of the relevant events occurred after CTB filed its applications for construction permit. CTB filed its applications in August of 2009. The spectrum reclamation idea was proposed in the *National Broadband Plan*,<sup>7</sup> which was not

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<sup>3</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, FCC 12-118, rel. Oct. 2, 2012.

<sup>4</sup> The Commission has proposed to provide no spectrum protection at all to LPTV stations in its repacking process, no matter how much effort and investment those stations represent. *Id.*, at ¶ 118.

<sup>5</sup> *Id.*, at ¶ 10.

<sup>6</sup> The Commission has not disclosed enough information or offered any tools that might allow CTB to assess the extent of its risk under different spectrum repurposing scenarios. The Allotment Optimization Model that was discussed for a while appears to have been essentially abandoned as having "limited or no applicability" to the repacking process. *Id.*, at ¶ 49.

<sup>7</sup> [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296935A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf)

sent to Congress until March 16, 2010. The statute providing for TV band spectrum reclamation and a reverse auction was not enacted by Congress until February of 2012; and the implementing Notice of Proposed Rule Making was released on October 2, 2012, only a little more than two months before CTB's permits are scheduled to expire. These developments are major shifts in the legal, regulatory, and business environments that CTB faces. Congress and the Commission have turned the whole spectrum picture upside down in the 11<sup>th</sup> hour of CTB's construction period. Under these circumstances, it is not only harsh but unreasonable and irrational not to give CTB time to see how the dust settles before CTB puts a significant amount of capital at risk.

6. The Commission has previously recognized the serious risk that LPTV operators face in deploying new transmission facilities in the face of so much uncertainty. In extending the deadline for constructing all digital flash cut and companion channel facilities until September 1, 2015,<sup>8</sup> the Commission recognized the risks and problems of investing in facilities that "may have to be substantially modified due to channel displacement or *taken off the air altogether* in connection with the implementation of a spectrum repacking scheme" [*emphasis added*]<sup>9</sup> and decided that adopting a 2015 deadline "will allow low power television stations to have better understanding of the overall spectrum landscape when determining their final transition plan."<sup>10</sup>

7. The same financial and regulatory environmental risks exist for permittees of new stations as for flash cut and digital companion permittees, perhaps even more so, because the permittee of a new station has no established business activity to generate revenue and must

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<sup>8</sup> *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*, 26 FCC Red 10732 (2011).

<sup>9</sup> *Id.*, at ¶ 8.

<sup>10</sup> *Id.*, at ¶ 10.

invest entirely new capital. This point has been made to the Commission in a pending petition for reconsideration in MB Docket No. 03-185,<sup>11</sup> but the Commission has not acted on that petition. Regardless of how the Commission disposes of the petition for reconsideration, CTB submits that an extension of its deadlines is justified, because all of the regulatory obstacles to construction have arisen within the final few months of CTB's construction period. CTB could not have anticipated the extent of the regulatory upset, because it is one thing to evaluate the risk of displacement in an environment of 50 television channels but a very different thing to evaluate that risk in an environment that may be as few as 35 channels if Channels 37-51 are repurposed as the Commission has proposed. No matter how many times applicants may have been warned that LPTV is a secondary service, the warning has been that LPTV is *secondary to full power television* and certain existing land mobile stations,<sup>12</sup> not that the TV spectrum may be truncated by 40%.<sup>13</sup> The spectrum world changed dramatically in 2012, and permittees like CTB, in their final construction year, must be given a chance to adjust.

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<sup>11</sup> *Petition for Reconsideration and/or Clarification*, filed by Cohn and Marks LLP, on August 5, 2011.

<sup>12</sup> See, e.g., *Auction of Low Power Television Construction Permits Scheduled for September 14, 2005*, 20 FCC Rcd 9481 (2005): "Potential bidders should also note that LPTV and television translator stations are authorized with 'secondary' frequency use status. These stations may not cause interference to, and must accept interference from, full service television stations, certain land mobile radio operations, and other primary services [fn omitted]." The omitted footnote cites §§ 74.703, 74.709, and 90.303 of the Rules, which pertain to protecting only TV stations and land mobile stations in specified markets on TV Channels 14-20 (470-512 MHz). Section 74.703(e) requires protection of only "existing land mobile uses." The Rules refer to no other "primary service." The exact same language and rule citations appear in *Amendment of Parts 73 and 74 to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, 19 FCC Rcd 19331 at ¶ 2 (2004). No warning about wholesale spectrum truncation can reasonably be inferred from this language.

<sup>13</sup> See § 74.702(b) of the Rules. Notwithstanding the Commission's authority to change the classification of frequencies as part of a rulemaking of general applicability, whatever the scope of that authority may be, the point here is that the secondary status of LPTV stations pertained to only full power television and certain land mobile stations on Channels 14-20 when CTB filed its applications. The same rule remains in effect today.

8. The Commission has added another barrier to CTB's plans by failing to act on an application for experimental authority that would allow CTB to develop innovative uses of LPTV spectrum to integrate television broadcasting and broadband data services. CTB has partnered with WatchTV, Inc. in this developmental effort. After granting an experimental license to WatchTV, Inc. in April of 2010, the Commission has declined to act on a request to modify that license to allow experimentation to continue.<sup>14</sup> The result is that CTB has been stopped from trying to innovate and improve efficiency of spectrum use, success which would facilitate capital deployment for construction of CTB's stations.<sup>15</sup> Thus CTB has been hit from two directions which have traditionally justified extensions of time to construct, one from proposed rule changes and one from delay in acting on an application.

9. As indicated at par. 3, *supra*, there are many cases where the Commission has denied extensions of time to construct large numbers of stations, including most recently several denials in the Local Multipoint Distribution Service.<sup>16</sup> However, when regulatory uncertainty has been caused by pending rulemakings, the Commission has gone the other way and has extended the time to construct; *see Requests of Progeny LMS, LLC and PCS Partners, L.P. for Waiver of Multilateration Location and Monitoring Service Construction Rules*, 23 FCC Rcd 17250 (WTB 2008). Similarly, delay in granting a license involving a rule waiver has justified an extension; *see requests of Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-Year Deadline for Providing Substantial Service*, 25 FCC Rcd

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<sup>14</sup> *See* File No. BEXP-20100406, Facility 185620, granted April 10, 2010. The Commission has taken no action on a modification application filed on October 19, 2010, over two years ago.

<sup>15</sup> This is so even though Congress gave an explicit nod of approval to flexible non-broadcast activities by television broadcasters in § 6403(b)(4)(B) of the Spectrum Act. *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, supra*, at n. 524.

<sup>16</sup> *E.g.*, *BTA Associates, LLC*, DA 12-1799, *Advantage Cellular Systems, Inc.*, DA 12-1798, and *West Carolina Rural Telephone Cooperative*, DA 12-1800, all released November 8, 2012.

10097 (WTB 2010). Finally, the Commission recently restarted the full construction period for certain new stations where revisions in technical rules have significantly changed the environment facing permittees with near-term construction deadlines; *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, FCC 12-130 at ¶ 121 (rel. Oct. 17, 2012). CTB faces all these obstacles and deserves similar relief.<sup>17</sup>

10. There will be no harm to the public interest from granting relief to CTB that might offset the significant harm to CTB if relief is not granted. An extension will not have any impact on the Commission's ability to repack the spectrum pursuant to its general rulemaking authority, however that authority may be exercised and/or delimited during the rulemaking process. LPTV remains a secondary service such that CTB will not have spectrum rights which impair the Commission's ability to meet the needs of full power television stations. Moreover, the spectrum occupied by CTB's permits cannot be awarded to any other LPTV operator in the foreseeable future, because the Commission is no longer accepting applications for new LPTV stations and does not plan to accept them until after completion of the repacking process.<sup>18</sup>

11. Finally, CTB has not been "sitting" on its construction permits for decades and has not filed for repeated extensions of time, unlike the circumstances underlying recent denials of

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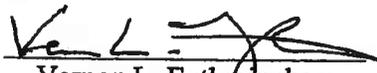
<sup>17</sup> The fact that CTB holds granted construction permits and that only an experimental license remains ungranted does not undermine the point that CTB's plan for developing a productive network of LPTV stations has been stymied. The Commission has recognized that undue focus on one technology without recognizing the potential for technological advances can justify extending construction deadlines. See *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, *supra* at ¶ 120.

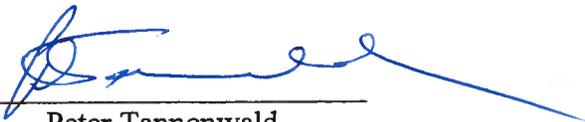
<sup>18</sup> *Freeze on the Filing of Applications for New Digital Low Power Television and Television Translator Stations*, Public Notice DA 10-2080, rel. Oct. 28, 2010. Cf., *Advantage Cellular Systems, Inc.*, *supra*, where the Wireless Telecommunications Bureau noted that it "will expeditiously take action to relicense the spectrum in an appropriate fashion so that another operator could promptly place the spectrum in use."

LMDS extension requests.<sup>19</sup> CTB has held its permits for only three years, this is its first extension request, and the circumstances justifying an extension were imposed on CTB during the final year of its construction period. CTB eagerly wants to deploy its stations and provide service to the public and is being held up only by a Commission-imposed threat to take away many of its licenses and its inability to experiment with technology improvements.

12. In light of the foregoing, CTB respectfully requests that its captioned construction permits be extended until 18 months after a Commission decision on how many television channels will remain after completion of the spectrum repacking and reverse auction or at a minimum until September 1, 2015.

Respectfully submitted,  
CTB Spectrum Services, LLC

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November 13, 2012

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<sup>19</sup> See *Advantage Cellular Systems, Inc.*, *supra*: “ACSI has had these licenses for fourteen years and has done nothing with them.”