

June 21, 2005

DAVID A. O'CONNOR
202-828-1889
david.oconnor@hklaw.com

VIA COURIER AND ELECTRONIC FILING (ECFS)

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
c/o Mellon Bank
Mellon Client Service Center
500 Ross Street - Room 670
Pittsburgh, PA 15262-0001

Please Date Stamp and Return To
HOLLAND & KNIGHT LLP

RE: MB Docket No. 03-15
WHEC-DT, Rochester, New York
FCC File No. BPCDT-19991027ACQ
Facility ID No. 70041

FCC/MELLON

JUN 21 2005

Request For Waiver of the July 1, 2005 Replication Deadline and for Extension of Special Temporary Authorization

Dear Ms. Dortch:

WHEC-TV, LLC ("WHEC"), the licensee of analog station WHEC-TV, Channel 10, Rochester, New York ("WHEC-TV"), and the permittee of digital station WHEC-DT, Channel 58, Rochester, New York ("WHEC-DT"), by its attorneys, hereby submits this Request for Waiver ("Request") of the July 1, 2005 replication deadline set forth in the Commission's *Second Periodic Review*.¹ Specifically, WHEC requests a brief extension of time within which to complete construction of full, authorized facilities that serve 100 percent of the number of viewers served by the April 1997 NTSC Grade B service area upon which WHEC-DT's replication coverage is based, as adjusted for the 2000 Census.

In its *Second Periodic Review*, the Commission generally required that all DTV stations in markets 1 through 100 that are affiliated with one of the top four television networks comply

¹ *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, MB Docket No. 03-15, FCC 04-192 (rel. Sept. 7, 2004) ("*Second Periodic Review*"). This Request was originally filed on May 31, 2005 in the form of a pleading entitled "Request for Extension of Time." The Request is being re-submitted in order to ensure compliance with the waiver procedures set forth in the Commission's June 15, 2005 Public Notice in this proceeding. See *DTV Channel Election Issues – Compliance with the July 1, 2005 Replication/Maximization Interference Protection Deadline; Stations Seeking Extensions of the Deadline*, Public Notice, DA 05-1636 (rel. June 15, 2005).

with a July 1, 2005 “use-it-or-lose-it” deadline for replicating or maximizing their digital signals.² DTV stations failing to meet that deadline face potential loss of interference protection in the future.³ Absent grant of this Request, the July 1, 2005 replication deadline applies to WHEC-DT.

The *Second Periodic Review* provides for a waiver process in order to grant six-month extensions of the replication protection deadline for two general reasons, one being “circumstances beyond a station's control.”⁴ For the reasons demonstrated below, WHEC is respectfully requesting a three-month extension, until October 1, 2005, to complete construction of its replicated facilities. This Request should be granted because WHEC has promptly and diligently sought to build replicated facilities on a timely basis, but circumstances beyond WHEC's control prevent it from complying with the July 1, 2005 deadline.⁵

Background

WHEC is an NBC affiliate in the 75th Demographic Market Area of Rochester, New York, as measured by Nielsen. As a result, WHEC was required to construct initial DTV facilities by May 1, 2002.⁶ WHEC-DT was issued a construction permit on October 18, 2001. On February 25, 2002, WHEC requested an extension of time in which to complete construction of its DTV facilities, owing to technical circumstances beyond WHEC's control.⁷ The Commission granted the request on March 4, 2002 and extended the construction deadline by six months, to November 1, 2002.⁸

On September 5, 2002, nearly two months less than the allotted time, WHEC filed a request for Special Temporary Authority (“STA”) to commence operations of WHEC-DT but at a reduced power from that authorized in the WHEC-DT construction permit.⁹ The Commission granted the STA request on September 12, 2002.¹⁰ The STA stated:

By virtue of being on the air pursuant to this authority and pursuant to the

² *Id.* ¶ 78.

³ *Id.* ¶ 85.

⁴ *Id.* ¶ 87. The Commission also states: “As with any request for waiver of our rules, a request for extension of the applicable deadline will be granted only upon a showing of good cause and where grant of the extension will serve the public interest. *Id.* ¶ 87 n.198.

⁵ This Request is supported by the Declaration of John Walsh, WHEC-DT's Director of Engineering, which is Attachment No. 1 hereto.

⁶ 47 C.F.R. § 73.624(d)(1)(iii).

⁷ FCC File No. BEPCDT-20020225ABN.

⁸ *Id.*

⁹ The construction permit authorizes operations at 1000 kW effective radiated power (“ERP”) and 282 meters height above average terrain (“HAAT”). The STA requested authority to operate at 38 kW ERP with an HAAT of 135 meters.

¹⁰ FCC File No. BDSTA-20020905ABH.

Commission's action in Memorandum Opinion and Order on Reconsideration in MM Docket 00-39 (Adopted: November 8, 2001; Released: November 15, 2001), you are now considered to have met the FCC's May 2002 deadline for the completion of construction of your commercial DTV facilities. In addition, any DTV construction permit issued to you is automatically extended until further notice.

On September 27, 2002, WHEC completed construction of WHEC-DT's reduced power facilities authorized by the STA, and commenced DTV operations. WHEC-DT has been operating pursuant to the STA, as periodically extended and modified, since that time.¹¹ The current STA will expire on July 1, 2005.¹²

On September 7, 2004, the Commission released the *Second Periodic Review* announcing the July 1, 2005 "use-it-or-lose-it" deadline. Pursuant to the *Second Periodic Review*, in order to retain its current interference protection, WHEC-DT must, by July 1, 2005, broadcast with a signal that provides service to the same number of viewers served by the April 1997 WHEC analog Grade B signal, as adjusted for the 2000 census.¹³ If WHEC fails to meet the July 1, 2005 deadline, it will lose interference protection to the unused portion of the service area authorized in its construction permit, and will lose the ability to "carry over" its interference protection to its post-transition channel.¹⁴ In addition, the initial construction permit issued for WHEC-DT will expire on July 1, 2005.¹⁵

Under current operating parameters pursuant to the STA, as modified, WHEC-DT serves approximately 89.4% of the number of viewers served by the April 1997 WHEC analog Grade B signal, as adjusted for the 2000 census. Thus, under current operations, WHEC-DT does not comply with the July 1, 2005 replication deadline.

WHEC Has Diligently Attempted to Comply with All DTV Deadlines

Promptly after the September 7, 2004 release of the *Second Periodic Review*, WHEC initiated steps necessary to meet the July 1, 2005 replication protection deadline. In September 2004, after assessing the build-out requirements and deadlines set forth in the *Second Periodic Review*, WHEC opened discussions with the co-owner of the antenna structure upon which the WHEC-DT antenna would be erected. Also in September 2004, WHEC retained the consulting engineers of du Triel Lundin & Rackley, Inc. to assist in the design, procurement and installation of the WHEC-DT antenna system.

¹¹ See FCC File Nos. BEDSTA-20030220ABN, BEDSTA-20030827ARN, BEDSTA-20040310ADI, BEDSTA-20040921AHP, BEDSTA-20050329AGO, and BMDSTA-20050419AGR.

¹² FCC File No. BMDSTA-20050419AGR.

¹³ *Second Periodic Review*, ¶ 78.

¹⁴ *Id.* ¶¶ 84-85.

¹⁵ *Id.* ¶ 109.

To that end, in October 2004, WHEC engineers identified the station's DTV antenna and transmitter system requirements, and initiated negotiations with several equipment vendors, structural engineers (for necessary tower modification work) and WHEC's tower co-owner. That process, completed in early January 2005, required a considerable amount of time because of the technical complexity of the system, and because the purchase and installation of the DTV transmission system was known to be an expensive proposition, anticipated to be a capital investment of between \$500,000 and \$1.2 million, no small amount for WHEC. In addition, WHEC believes that hundreds of television stations around the country were engaged in the same process, which inhibited the ability of vendors to provide prompt responses.

Ultimately, WHEC selected Harris Corporation as its vendor for the new DTV transmission system and for its installation. On February 4, 2005, WHEC signed and delivered a purchase order to Harris for the equipment and installation. WHEC also paid the initial deposit of one-third of the purchase price on February 22, 2005. In returning the purchase order to Harris, WHEC added a clause requiring that "[i]nstallation must be completed by July 1, 2005" in two places on the purchase order. The purchase order itself represented that the equipment would be shipped within 120-150 days, which reasonably appeared to be a sufficient time period in which to meet the July 1, 2005 deadline.

On March 4, 2005, Harris informed WHEC that it would not agree in writing to a July 1, 2005 installation requirement, although Harris verbally assured WHEC that it could accommodate the July 1, 2005 deadline. Consequently, WHEC re-executed the purchase order on March 7, 2005 in order to keep the process moving forward.

On April 13, 2005, Harris informed WHEC that it had encountered manufacturing problems and could not deliver the digital transmission system in time to meet the July 1, 2005 deadline. Harris estimated that the installation could not be completed before mid-August 2005. Harris explained that it had discovered problems in equipment similar to the equipment ordered by WHEC, which had forced Harris to redesign the control circuits. Attachment No. 2 hereto is a copy of a letter from Harris explaining the situation to WHEC.

WHEC's Inability to Meet the July 1, 2005 Deadline Is for Reasons Beyond Its Control

Along with many other licensees, WHEC was forced to observe a compressed procurement cycle for a major asset, its Channel 58 digital transmission system. The *Second Periodic Review* was released September 7, 2004, leaving less than ten months to initiate and complete that difficult and complex process.¹⁶

¹⁶ The *Second Periodic Review* bears an adoption date of August 4, 2004, more than a month before its release date of September 7, 2004. Thus, more than a month passed before the terms of the order were made available to licensees such as WHEC. Another month to meet the deadline would have been extremely helpful.

Most important of all, Harris has been unable to deliver and install the necessary equipment in time to meet the July 1, 2005 deadline. Harris is a leading, perhaps the best known, manufacturer of digital television transmission systems, a fact that contributed to WHEC's decision to select Harris as its vendor. As explained above, and supported in the Declaration of John Walsh attached hereto as Attachment No. 1, WHEC moved as rapidly as reasonably possible to conclude the engineering analysis, vendor selection, purchase negotiations and actual purchase agreement, less than five months after release of the *Second Periodic Review*.

Obviously, the timing of the release of the *Second Periodic Review* and the manufacturing problems encountered by Harris are circumstances beyond WHEC's control. WHEC submits that it would have been able to observe the deadline but for the manufacturing problems encountered by Harris.

Accordingly, the July 1, 2005 WHEC-DT construction deadline should be waived because WHEC made its reasonable best efforts to meet the deadline but could not for several reasons clearly beyond its control. Grant of this Request would serve the public interest because the future interference protection for WHEC should be preserved. Possible loss of such protection would be harmful to WHEC's viewers, many of them in rural areas. This is especially true because WHEC-DT currently operates on Channel 58, which is considered an "out-of-core" channel that may not be used after the DTV transition is completed. WHEC intends to abandon Channel 58 in favor of Channel 10 as WHEC-DT's permanent channel at the conclusion of its digital transition. WHEC so notified the Commission of its tentative post-transition channel election on February 10, 2005.¹⁷ It would be unwarranted to undermine the integrity of the permanent Channel 10 operation due to circumstances beyond the control of WHEC which caused a delay in the completion of WHEC's temporary DTV operations on Channel 58.

The grant of a brief extension of time in which to replicate its DTV facilities will allow WHEC to maintain its protected service area. Therefore, WHEC respectfully requests that the Commission waive the July 1, 2005 construction deadline, and provide that WHEC shall have until October 1, 2005 within which to complete construction of its replicated facilities and file a license application for WHEC-DT. Such a brief three month extension is only half of the time permitted for such waivers in the *Second Periodic Review*. Moreover, the grant of this Request is fully consistent with the Commission's policy of granting extensions of the initial DTV construction deadline in 2002.

Request for STA Extension

Finally, in connection with this Request, WHEC requests an extension, until October 1, 2005, of its Special Temporary Authority ("STA") to operate WHEC-DT with reduced facilities.¹⁸ The reduced power operation is necessary to maintain a present service that is in the public interest until WHEC completes construction of the full power facilities.

¹⁷ See FCC File No. BFMCT-20050210AKT (accepted for filing Feb. 11, 2005).

¹⁸ See FCC File No. BMDSTA-20050419GR (granted May 9, 2005, expiring July 1, 2005).

In connection with the request for extension of the STA, WHEC is hereby transmitting the required STA fee in the amount of \$150.00, along with an FCC Form 159 payment form.

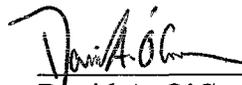
I am authorized to certify, on behalf of WHEC, that neither WHEC nor any other party to this application is subject to a denial of Federal Benefits, including FCC benefits, pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862A.

Conclusion

For the reasons set forth above, WHEC respectfully requests a three-month extension of the July 1, 2005 deadline for complying with the build-out requirements set forth in the *Second Periodic Review*, and a concurrent three-month extension of the STA to operate at reduced power.

Respectfully submitted,

WHEC-TV, LLC



David A. O'Connor
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006
(202) 955-3000
Its Attorney

Enclosures

Cc (w/encl.): Shaun Maher, Room 2-A820

2994270_v1

(1) LOCKBOX #
358185

SPECIAL USE ONLY
FCC USE ONLY

SECTION A - PAYER INFORMATION

| | | |
|---|--------------------------------------|---|
| (2) PAYER NAME (if paying by credit card enter name exactly as it appears on the card) Holland & Knight LLP | | (3) TOTAL AMOUNT PAID (U.S. Dollars and cents) \$150.00 |
| (4) STREET ADDRESS LINE NO. 1 2099 Pennsylvania Avenue. NW | | |
| (5) STREET ADDRESS LINE NO. 2 Suite 100 | | |
| (6) CITY Washington | (7) STATE DC | (8) ZIP CODE 20006 |
| (9) DAYTIME TELEPHONE NUMBER (include area code) (202) 828 - 1889 | (10) COUNTRY CODE (if not in U.S.A.) | |

FCC REGISTRATION NUMBER (FRN) REQUIRED

| | |
|--------------------------------------|-------------------|
| (11) PAYER (FRN) 000414895 | (12) FCC USE ONLY |
|--------------------------------------|-------------------|

**IF MORE THAN ONE APPLICANT, USE CONTINUATION SHEETS (FORM 159-C)
COMPLETE SECTION BELOW FOR EACH SERVICE, IF MORE BOXES ARE NEEDED, USE CONTINUATION SHEET**

| | | |
|--|--------------------------------------|-------------------------------|
| (13) APPLICANT NAME WHEC-DT | | |
| (14) STREET ADDRESS LINE NO. 1 c/o Holland & Knight LLP/ATTN: David O'Connor | | |
| (15) STREET ADDRESS LINE NO. 2 2099 Pennsylvania Avenue. NW. Suite 100 | | |
| (16) CITY Washington | (17) STATE DC | (18) ZIP CODE 20006 |
| (19) DAYTIME TELEPHONE NUMBER (include area code) (202) 828-1889 | (20) COUNTRY CODE (if not in U.S.A.) | |

FCC REGISTRATION NUMBER (FRN) REQUIRED

| | |
|---|-------------------|
| (21) APPLICANT (FRN) 0004955860 | (22) FCC USE ONLY |
|---|-------------------|

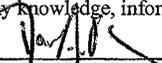
COMPLETE SECTION C FOR EACH SERVICE, IF MORE BOXES ARE NEEDED, USE CONTINUATION SHEET

| | | |
|--|---------------------------------------|----------------------------|
| (23A) CALL SIGN/OTHER ID WHEC-DT | (24A) PAYMENT TYPE CODE MGT | (25A) QUANTITY 1 |
| (26A) FEE DUE FOR (PTC) | (27A) TOTAL FEE \$150.00 | FCC USE ONLY |
| (28A) FCC CODE I | (29A) FCC CODE 2 | |
| (23B) CALL SIGN/OTHER ID | (24B) PAYMENT TYPE CODE | (25B) QUANTITY |
| (26B) FEE DUE FOR (PTC) | (27B) TOTAL FEE | FCC USE ONLY |
| (28B) FCC CODE I | (29B) FCC CODE 2 | |

SECTION D - CERTIFICATION

CERTIFICATION STATEMENT

I, David A. O'Connor, certify under penalty of perjury that the foregoing and supporting information is true and correct to the best of my knowledge, information and belief.

SIGNATURE 

DATE **6/21/05**

SECTION E - CREDIT CARD PAYMENT INFORMATION

AME DISCOV
MASTERCARD _____ VISA _____ X _____ ER _____

ACCOUNT NUMBER _____ EXPIRATION DATE _____

I hereby authorize the FCC to charge my credit card for the service(s)/authorization herein described.

SIGNATURE _____ DATE _____

| VOUCHER NO. | INVOICE NO. | G/L NO. | DESCRIPTION | AMOUNT |
|-------------|-------------|----------------------------------|-----------------------------|----------|
| 1500232 | 062105a | 01104610000000000000000000000000 | 004902.00121 -- Filing fee. | 150.00 |
| TOTAL | | | | \$150.00 |

HOLLAND & KNIGHT LLP

2115 HARDEN BOULEVARD
 LAKELAND, FLORIDA 33803-5918
 (863) 682-1161

Wachovia
 St. Petersburg, FL

63-751/631

80011473

VOID AFTER 180 DAYS

U.S. FUNDS

DATE

06/21/05

AMOUNT

\$150.00

P
 A ONE HUNDRED FIFTY AND 00/100
 Y

TO THE ORDER OF Federal Communications Commission
 445 12th Street SW
 Washington, DC 20554

TWO SIGNATURES REQUIRED ON CHECKS OVER \$2,500

George H. Clardy

⑈80011473⑈ ⑆063107513⑆ 2090002390441⑈