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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Continuum 700 LLC Request for Limited Extension of
Initial Construction Benchmarks

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**REQUEST FOR EXTENSION OF
INITIAL CONSTRUCTION BENCHMARKS**

CONTINUUM 700 LLC

October 15, 2012

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EXECUTIVE SUMMARY

By this submission, Continuum requests that the Commission extend its Interim Construction Benchmark for a period of two years, but in no event less than two years after the Commission renders a final (effective) ruling on interoperability in WT Docket No. 12-69.

Due solely to issues that could not have been foreseen, and that are totally outside of Continuum's control, it would be impractical and contrary to the public interest for Continuum to construct in accordance with its existing Interim Construction Benchmark, Continuum's request complies with both provisions of the Commission's general waiver rules, for a multitude of reasons.

First and foremost, the continuing lack of interoperability, and the associated lack of equipment availability, has absolutely undermined any reasonable business case for a "greenfield" buildout. Additional problems associated with interference involving Channel 51 and high power E Block operations serve only to further justify an extension. For "greenfield" providers, such as Continuum, each of these issues presents a dire problem.

Grant of the relief here requested is particularly appropriate given the Commission's actions in numerous other proceedings where first extensions, such as this one, were requested.

Notably, prior to submitting any request for extension, Continuum has undertaken the "meaningful efforts" that the Commission specified would be considered when the Commission determines whether to apply its "discretion" in applying sanctions for non-compliance with Interim Construction Benchmark. This provides yet another reason for grant of the relief requested herein.

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I. INTRODUCTION

Continuum 700 LLC (“Continuum”), pursuant to Section 1.925(b)(3) and 1.46(e)(1) of the Commission’s Rules, 47 C.F.R. §§ 1.925(b)(3) and 1.46(e)(1), hereby requests an extension of the Interim Construction Benchmark set forth in Section 27.14(g) of the Commission’s rules¹, with respect to those A Block licenses held by Continuum and set forth as Exhibit A to this request (the “A Block Licenses”). Specifically, due solely to circumstances beyond its control, Continuum requests an extension of the Interim Construction Benchmark with respect to its A Block Licenses for a period of two years but, in no event, less than two years after the Commission issues a final (effective) ruling on Interoperability in WT Docket No. 12-69. In support thereof, and as presented

¹ Pursuant to Section 27.14(g), a Lower 700 MHz A Block licensee must build out and offer service over at least 35 percent of the geographic area included in its licensed area by (in Continuum’s case) June 13, 2013 (the “Interim Construction Benchmark”)

below, this request is being made only given that (a) Continuum has taken “meaningful efforts”² to construct, and (b) grant of such extensions would better serve the public interest and be consistent with applicable codified provisions and case law governing extensions of time to construct.

II. THE COMMISSION’S STANDARDS FOR WAIVERS AND EXTENSIONS OF TIME TO CONSTRUCT

A. The Waiver Standard

A waiver of the Commission’s rules applicable to wireless services is appropriate whenever a party demonstrates either (1) that the underlying purpose of the rule would not be served or would be frustrated by its application to the instant case, and that grant of a waiver would be in the public interest, or (2) in view of unique or unusual factual circumstances in the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925(b)(3).

The Commission has authority to waive its rules whenever there is "good cause" to do so. 47 C.F.R. §§ 1.3; 1.925. The Commission may exercise its discretion to waive a rule 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) ("WAIT Radio"). As further explained in WAIT Radio, the Commission is charged with administration of its responsibilities consistent with an over-arching "public interest" standard. That an agency may discharge its responsibilities by promulgating rules of general applicability which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases. In fact, the Commission's right to waive its rules is not unlike an obligation in

² See, e.g. the Commission’s Public Notice of December 6, 2011, (DA-1981) (the “Public Notice”) the Commission articulated this meaningful efforts standard as justifying extensions of the Interim Construction Benchmark.

that it is a sine quo non to its ability to promulgate otherwise rigid rules. It is the necessary "safety valve" that makes the system work. See, WAIT Radio, at 1157, 1159.

B. Rules Governing Build-Out Obligations When There Are Circumstances Beyond a Licensee's Control

Section 1.946(e) of the rules provides additional guidance, directed specifically to requests for extension of time to construct. It provides in pertinent part that:

1. An extension may be granted if the licensee shows that failure to meet the construction or coverage deadline is due to "causes beyond its control", and
2. The filing of a construction request, if based upon circumstances beyond the licensee's control, causes the construction period to be automatically extended pending disposition of the extension request.

The Commission confirmed in its *Second R&O* that, at that time, the Commission did not foresee granting extensions of the time to construct facilities except for unforeseen circumstances beyond a licensee's control (i.e., "unavoidable circumstances"). *Service rules for the 698-746, 747-762 and 777-792 MHz Band, Second R&O 22 FCC Rcd 15289, 15348 (2007) ("Second R&O")*. As demonstrated below, the circumstances giving rise to this request clearly were unforeseen at the time the rules were adopted and at the conclusion of Auction No. 73 and are well beyond the control of Continuum.

III. ARGUMENT

There are three overarching bases for this extension request. In each case, it is unforeseen circumstances that are completely out of Continuum's control that lead to this filing. The first involves the lack of interoperability in the 700 MHz Band. The second focuses on problems unique to A Block licenses associated with high power operation on the adjacent E Blocks. The last involves Channel 51 interference and the adverse impact the National Broadband Plan and Incentive Auction authority have had on the potential to negotiate commercial transactions to relocate

incumbent Channel 51 television operators. There are also several secondary reasons why an extension is warranted. Each is discussed below, under a separate caption.

A. The Lack of Interoperability in the 700 MHz Band Constitutes a Unique and Unusual Circumstance Unforeseen Prior to Auction No. 73 that is Beyond Continuum’s Control ; and Rigid Application of the Rule would be Inequitable and Contrary to the Public Interest.

The Commission established its Interim Construction Benchmark for a reason: “to better promote access to spectrum and the provision of service.” *Second R&O*, at 15348. It was envisioned that the favorable propagation characteristics of the 700 MHz band made the licenses particularly effective in providing innovative services not only in high population markets, but in rural areas as well. *Id.* That is to say, the Commission most certainly did not establish construction requirements without reason, and any consideration of an extension request must consider the actual nexus between the Commission goal in establishing the construction requirement and the reasons for the requested extension. As shown herein, the lack of interoperability across the Lower 700 MHz band, and resulting virtual absence of any workable business model for smaller licensees, has removed that nexus. Simply put: It does not matter what the propagation characteristics of a particular band are if there are no reasonably priced devices and no legitimate potential to roam.

In the last several months alone, the Commission received several dozen comments and reply comments in WT-Docket No. 12-69, the “Interoperability” proceeding. Virtually without exception, commenting parties explained there to be a very critical public interest need for interoperability. Without interoperability smaller carriers and potential new entrants (like Continuum) cannot compete effectively, or even provide any meaningful service on the Lower 700 MHz A Block licenses.³ In Continuum’s case this means that it cannot (1) offer compelling or competitive services to any of its

³ See, e.g., Reply Comments of King Street Wireless submitted on July 16 in WT Docket No. 12-69, at 7, listing a myriad of reasons why, without interoperability, it is simply impossible for small carriers to offer meaningful service, including roaming; offering desired equipment at reasonable prices; accepting customers from another carrier; or offering true 4G services.

potential customers until a meaningful array of cutting-edge devices become available to it at reasonable prices⁴; (2) offer roaming to its customers; and (3) serve others' customers who travel into a Continuum market, or obtain revenue therefrom. The difficulty with obtaining equipment from multiple vendors appears to be worsening rather than getting better. The latest complication on this front is a report released last week from the House Permanent Select Committee on Intelligence, which recommended that U.S. companies avoid purchasing equipment from two Chinese vendors.⁵ If existing carriers that hold A Block licenses find it economically difficult to justify construction on their A Block licenses at this time, Continuum, as a potential new entrant, most certainly cannot. Continuum's situation is not like that of other carriers with customer bases to protect which might deploy on one or more A Block licenses just to attempt to prevent customer erosion – Continuum has no customers. Therefore, the fact that a limited number of carriers that have existing customer bases and that have built systems can in no way legitimately undermine this request. Indeed, the far more relevant fact is that very few 700 MHz licensees have built.

These are universal problems faced by virtually all A Block holders. Yet, they are particularly acute to Continuum which would be a new entrant into its markets with “greenfield” deployments. So, the lack of interoperability and its resulting impact on roaming and device availability effectively erodes any meaningful benefit that otherwise would be derived from Continuum's compliance with the Interim Construction Benchmark. This itself warrants an extension of time for Continuum to comply with the Interim Construction Benchmark.

It is particularly noteworthy that Continuum has not viewed interoperability as an excuse for not building. Quite to the contrary, Continuum has consistently fought to establish interoperability

⁴ For example, no iPhone is available for Band Class 12 application.

⁵ See FierceWireless, rel. October 10, at pp. 3-4.

so that it (and other small carriers) can build, and can operate successfully.⁶ In fact, Continuum was part of a small group of independent carriers that first brought the interoperability issue to the Commission's attention three years ago, very shortly after the issue appeared.⁷ Since that time, Continuum has continued to be at the forefront of the battle for interoperability. It has worked independently and through industry trade organizations such as the CTIA and CCA (formerly, RCA) and with both advocates and opponents of Lower 700 MHz interoperability to devise an "industry solution" to the interoperability issue.⁸ In order to provide the Commission with a true data-driven solution to the interoperability fiasco, Continuum has participated with other A Block licensees in commissioning two separate "real world" independent engineering studies, both of which show there to be no genuine performance differential between Band Class 12 and Band Class 17. Continuum has also strived to identify compelling consumer devices that would operate in the A Block, and has considered alternatives to LTE, such as WiMax and other technologies more suitable for fixed wireless access.

Given the lack of interoperability, reasoned application of the Commission's established standards for grant of waivers and extensions of time to construct warrants a grant of the relief requested herein. The situation is "unique and unusual" because, as the Commission itself recognized in its Notice in WT Docket No. 12-69, the Lower 700 MHz Band is the only mobile band where interoperability has not already been mandated.⁹ The fragmentation of the Lower 700 MHz band was unforeseen by Continuum, the Commission or, upon information and belief, any of the

⁶ In this context, and as set forth in Section IIIB, *infra*, Continuum has taken all of the "reasonable efforts" to which the Commission referred in its Public Notice entitled *700 MHz Construction and Reporting Requirements*, 26 FCC Rcd 16442 (2011)

⁷ See, e.g., the Petition for Rulemaking filed by the 700 MHz Good Faith Purchasers Alliance, submitted on September 29, 2009, RM No. 11592.

⁸ Unfortunately, given the tone and inflexibility included in comments and reply comments in WT Docket No. 12-69 by opponents of interoperability, there remains no realistic chance of a voluntary industry consensus.

⁹ *Notice of Proposed Rulemaking* in WT Docket No. 12-69, 27 FCC Rcd 3521 (2012).

other A Block licensees, prior to Auction 73. Given the dire competitive ramifications stemming from lack of interoperability, the underlying purpose of the construction obligation would not be served by its rigid application in this instance. (In fact, the lack of interoperability has frustrated those purposes.)

Lastly, it is beyond question that the lack of interoperability, which was originated by AT&T after Auction No. 73 and which has been driven almost exclusively by the nation's two largest carriers, is something that is absolutely outside of Continuum's control. Continuum has done all that any small carrier could reasonably be expected to do to prevent or to remedy the interoperability issue. Yet the issue remains unresolved. Regardless of the decision of the Commission in the interoperability proceeding, Continuum needs an extension of the Interim Construction Benchmark in order to be able to offer competitive roaming and in order for the device ecosystem for Band Class 12 devices to develop, mature and become more affordable. Therefore, Continuum requests an extension for all Continuum A Block licenses for two years but, in no event, less than two years after a final (effective) ruling on Interoperability.

B. A Block Licensees Face an Additional Unanticipated Threat: Interference from High Power Operations on the Adjacent E Block Channel.

The Lower 700 MHz band plan adopted by the Commission provides two very different levels of permissible power. For the E Block, 50 kW power is permissible, while only 1 kW power is permissible for the A Block (and all other Blocks). This radical power difference presents a meaningful issue for A Block operators. Significantly, the issues stem from the adjacency of the A Block and the E Block. So, this interference issue is unique to A Block licensees.¹⁰

When the FCC promulgated the 700 MHz band plan, even with widely different power limits for A Block and E Block, it did so with an understanding that the A Block would nevertheless be adequately protected from interference. Specifically, the Commission explained that “we continue to

¹⁰ D Block, which is adjacent to A Block, is used only as a supplement to B and C Block operations.

believe that our out-of-band emission limits. . . will be effective in protecting” the A Block from E Block interference.¹¹ Those members of the industry that were active in that proceeding felt the same way. See Comments of Motorola, Inc., at ii, 9. See also Comments of AT&T, Inc., at 11, and Comments of Qualcomm, Inc. (“Qualcomm”), at 5, 22. Qualcomm reiterated its belief in the reply comment stage of the proceeding, noting that its high power system would utilize “sophisticated interference protection techniques” and that “there have been no reports of interference. . . to any other 700 MHz licensee”. Reply Comments of Qualcomm, at 2, 3, n.7.

The above demonstrates that none of the parties actively involved with the band plan design anticipated interference from E Block to A Block. Conventional thinking at the time appears to have been that the high powered E Block operations would serve a market from a single location. In addition, E Block operations were expected to locate on very tall towers. Reviewing (prior) actual deployment of Qualcomm’s Media Flow system demonstrates that not to be the case.

Another 700 MHz A Block licensee¹² recently commissioned an independent study by V-COMM, LLC (“V-COMM”) to assess the seriousness of this unanticipated E Block interference.

The primary, significant findings by V-COMM include the following:

- High power (50 kW) operations on the E Block provide a real, substantial and unanticipated negative impact on A Block operations.
- The interference potential of E Block operations into A Block operations is greater than foreseen by the FCC when rules were established.
- The power differential, coupled with similar antenna heights, is the crux of the problem faced by A Block licensees. This will cause them to have to build additional sites within a 2-3 square mile area near High Power E Block operations.
- The estimated number of additional sites required for mitigation purposes can approach 4XX across A Block markets.

¹¹ *Second R&O*, at 15328-29.

¹² See Cavalier Wireless, LLC Request for Extension of Interim Construction Benchmarks, submitted this date, at Exhibit D.

V-COMM Summary.

As demonstrated above, high power operations on the E Block have caused serious, unanticipated interference problems for Continuum and other A Block licensees. These problems constitute another reason why grant of the extension request is warranted.

C. The Problematic and Changing Role of Channel 51 Presents an Additional Basis for an Extension or Waiver of the Interim Construction Benchmark.

When A Block licensees bid for their spectrum, certain of the complications associated with Channel 51 were known (or reasonably could have been known) by now-current licensees. But many, many more were not known, or reasonably susceptible to being known, or have come into existence only after the Auction. It is this latter class of issues that has presented severe problems to not only Continuum, but to all A Block licensees, and serves as an independent basis for an extension of time to construct. Several of the more challenging of these issues are discussed below.

1. There Has Been a Dramatic Increase in Channel 51 Licensees and Applications Since the Auction.

Review of the Commission's own licensing and application records available to the public reflects that, following the close of Auction No. 73, licensing activity on Channel 51 has been substantial. Overall, from the day after the close of Auction No. 73 to August 22, 2011, there were 369 Channel 51 "actions" (applications granted or accepted for filing). They include the following:

- (i) 16 license applications for full power TV stations have been granted;
- (ii) 69 license applications for LPTV and TV translators have been granted;
- (iii) 75 applications for new and modified LPTV and TV translator construction permits have been accepted for filing, and another 121 applications for new and modified LPTV and TV translator construction permits have been granted;
- (iv) 27 applications for Special Temporary Authority have been granted;
- (v) 54 LPTV and TV translator digital flash cut conversion applications have been granted, and three additional ones have been accepted for filing; and

(vi) three LPTV and TV translator digital companion channel applications have been granted, with one additional one having been accepted for filing.

The combined effect of these actions is that, since Auction 73 ended, the entire Channel 51 landscape has changed radically, and to the detriment of A block licensees.

2. Commission Actions Have Inadvertently Complicated Settlement Options Involving Channel 51.

Another unanticipated post-Auction 73 development that is materially impeding deployment on the A Block spectrum is the broadcast spectrum repacking and incentive auction proposals advanced in the National Broadband Plan,¹³ subsequently adopted in federal legislation,¹⁴ and very recently included in a Notice of Proposed Rulemaking regarding Incentive Auctions.¹⁵ These generally very positive efforts have inadvertently created significant economic and arbitrage incentives for Channel 51 television stations to remain on Channel 51 and to reject voluntary relocation arrangements (in addition to encouraging hundreds of applications for new Channel 51 permits). The record gathered in response to a petition submitted by the CTIA and RTC regarding Channel 51 (RM-11626) shows that “the potential for Channel 51 broadcasters to receive future incentive auction payments has made it much more difficult, if not virtually impossible, for A Block licensees to enter into voluntary relocation agreements with Channel 51 broadcasters.”¹⁶ One commenter postulated (properly) that

“it has been noted that ‘The Commission’s recent repacking and incentive auction proposals had the unintended effect of incentivizing broadcasters to act in ways that will not only make it more difficult for LTE Band 12 operators to relocate interfering Channel 51 broadcasters, but will likely increase the level of interference to LTE Band 12 operations.’”¹⁷

¹³ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402, 6403, 125 stat. 156 (2012).

¹⁴ Federal Communications Commission, *Connecting America*, at 88-90 (2010)

¹⁵ *Notice of Proposed Rulemaking* in Docket No. 12-268, __ FCC Rcd ___, rel. October 2, 2012 (the “Incentive Auctions” notice of proposed rulemaking).

¹⁶ Letter from Michele C. Farquhar, Hogan Lovell’s US LLP, Counsel to Vulcan Wireless, to Marlene H. Dortch, Secretary, FCC, RM-11626, at 2 (Jun. 21, 2011); *see also* United States Cellular Reply Comments, RM-11626, at 5 (filed May 12, 2011) (“United States Cellular Channel 51 Reply Comments”) (“It has been noted that ‘The Commission’s recent repacking and incentive auction proposals had the unintended effect of incentivizing broadcasters to act in ways that will not only make it more difficult for LTE Band 12 operators to relocate interfering Channel 51 broadcasters, but will likely increase the level of interference to LTE Band 12 operations.’”).

¹⁷ United States Cellular Channel 51 Reply Comments.

These are unanticipated changes in circumstances that are outside Continuum's control that impede construction of its 700 MHz A Block facilities.

While LPTV stations are not entitled to protection, their mere presence on Channel 51 causes significant burdens for A Block licensees seeking to deploy networks free from adjacent band interference. This is because LPTV stations may not voluntarily cease operations promptly, and it may be politically difficult to force them off the air. So, both wireless licensees and LPTV licensees are left in a "no-man's land": Neither knows with certainty when wireless carriers will be permitted to operate without significant impediment and if LPTV licensees are forced off the air (as Continuum believes they should be), such service cessation could be required even though meaningful wireless operations are simply not possible for reasons set forth above. Neither of these scenarios serves the public interest.

The effect of all of this is that Continuum (a) is substantially limited in where it can serve and (b) should it be required to build, would have to explain to potential customers how its service is available only in disjointed parts of a community, or only in a limited ring around a city but not in the city itself. Simply put, these limitations create a very non-competitive product offering that would do nothing to serve the public interest or provide meaningful competition to the dominant two carriers.

3. Recent Commission Actions, While Helpful, Have Not Erased the Problems of Prior Channel 51 Licensing.

The Media Bureau's 2011 actions have helped this situation considerably, but they have not removed the problem entirely. Specifically, in May 2011, the Media Bureau took a step in the right direction by imposing a temporary freeze on the filing of broadcast channel substitution petitions.¹⁸ Unfortunately, the freeze was limited in nature. It was temporary, pending resolution of the issues

¹⁸ "Freeze on the Filing of Petitions for Digital Channel Substitutions, Effective Immediately," *Public Notice*, 26 FCC Rcd 7721 (rel. May 31, 2011) ("*Freeze Notice*"). Similarly, under a different freeze, major changes to low power facilities, including facilities on Channel 51, currently are not being processed.

raised in the *TV Spectrum Innovation NPRM*.¹⁹ And it did not give A Block licensees any greater long-term certainty regarding deployment and related investment. Further, it permitted the continued processing of applications that were filed prior to May 31, 2011 and did not foreclose certain kinds of new Channel 51 applications going forward.²⁰

The Bureau's August 22, 2011 announcement of a "freeze" on the filing of new applications and processing of pending applications for Channel 51 (the "Channel 51 Freeze")²¹ further helped, as it halted further Channel 51 licensing activity. However, the Channel 51 Freeze did not erase the two years of uncertainty that have existed since Auction No. 73. Nor did it fully eliminate the Channel 51 problem associated with existing Channel 51 licenses.

As CTIA – The Wireless Association® ("CTIA") stated before the Channel 51 Freeze was instituted, in explaining the harm done by Channel 51 licensing:

[I]t [was] entirely possible for an A Block licensee to build out its network, only to see its investment undermined by a new Channel 51 licensee whose operations result in significant interference. This fact create[d] a dangerous opportunity for those who would seek a

¹⁹ Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to the VHF, *Notice of Proposed Rulemaking*, 25 FCC Rcd 16498 (2010) ("*TV Spectrum Innovation NPRM*"). Specifically, the Commission explained that the freeze on the filing of broadcast channel substitution petitions was necessary to "permit the Commission to evaluate its reallocation and repacking proposals and their impact." *See Freeze Notice* at 1.

²⁰ For example, under the channel substitution freeze and before the Channel 51 Freeze: (i) an existing broadcast operator (full power, Class A, low power, translator) on Channel 51 could seek and secure Commission authority to modify its station in a way that changes its contour, assuming it does not interfere with another incumbent broadcaster; (ii) low power operators could continue to file displacement applications where the applicant demonstrates actual interference from existing full-power TV stations, or where the applicant is operating on Channels 52-69, and file applications for flash cut and digital companion channels; (iii) full power TV operators could file applications for replacement translators; and (iv) Class A operators can file displacement and expansion applications. In addition, any broadcaster could seek a waiver of the applicable freeze.

²¹ *General Freeze on the Filing and Processing of Applications for Channel 51 Effective Immediately and Sixty (60) Day Amendment Window for Pending Channel 51 Low Power Television, TV Translator and Class A Applications*, Public Notice, 26 FCC Rcd 11409 (MB, Aug. 22, 2011) ("Channel 51 Freeze PN") (announcing a freeze, effective immediately, on (1) applications for low power television, TV translator, replacement translators, and Class A TV facilities on Channel 51, including flash-cut, digital companion channels, and displacement applications; and (2) applications for minor change for low power and full power TV stations on Channel 51).

Channel 51 license to exploit opportunities for personal gain at the expense of an A Block licensee that built out a network.²²

With the Channel 51 Freeze finally in place, there is a new opportunity for A Block licensees to engage with existing Channel 51 broadcasters or to develop unencumbered markets, with less risk of new Channel 51 builds. Two years, however, have already been lost for the reasons discussed above.

4. Continuum Has Acted Responsibly in its Efforts to Overcome Channel 51 Obstacles.

Just as Continuum has been active in attempting to address the interoperability issue, so too has it been active in attempts to alleviate or limit Channel 51 issues. In one instance, after a Channel 51 station requested and received Commission authority to relocate to a lower channel, the licensee subsequently reversed course and sought to remain on Channel 51.²³ In addition, Continuum has been working with representatives of the National Association of Broadcasters (“NAB”) to identify potential areas in which the NAB might be willing to support early, yet voluntary, relocation of Channel 51 television broadcasters or relaxation of the Channel 51 protected zones. Numerous commenters have urged Commission action on these Channel 51 issues in the Interoperability proceedings. Lastly, Continuum has commissioned engineering studies to identify the Channel 51 operations impacting its A Block licenses and to determine what, if any, alternative channels are available for relocation efforts.

²² CTIA Comments, RM-11626, at 7-8 (filed Apr. 27, 2011) (“CTIA Channel 51 Comments”).

²³ See Vulcan Channel 51 Reply Comments at 4-5. See Petition for Rulemaking of Southeastern Media Holdings, Inc., MB Docket No. 11-54, RM-11624 (filed Feb. 25, 2011).

D. Grant of the Relief Here Requested Would Be Consistent with FCC Action in Other Proceedings.

As set forth below, over the last several years, the Commission has properly granted a considerable number of requests for construction extensions in situations that are similar, but less compelling, than this one. Review of those discussions, below, demonstrates that the same relief should here be granted.

(i) *Interference Protection.* The Commission has recognized that where interference protection obligations impair the offering of new services, an extension of the performance benchmark is appropriate. For example, in the case of the Wireless Communications Service (“WCS”), the Bureau was “persuaded . . . that relatively restrictive [out-of-band emission (OOBE)] limits may have impeded the development of WCS equipment and may have contributed to the unique circumstances of the band.”²⁴ The Bureau therefore granted extended construction periods. Here, the interference protection obligations associated with Channel 51 are at least as compelling as those present in the WCS proceeding.

(ii) *Lack of Availability of Equipment.* In 2004, the Commission extended the construction requirements in the 220 MHz Phase II service because equipment for use in that spectrum was “scarce presently or face[d] technical and economic challenges.”²⁵ More recently, the Commission granted an extension of the substantial service deadline for most Local Multipoint Distribution Service (“LMDS”) licensees.²⁶ Those licensees faced factors beyond their control, including difficulties in obtaining viable, affordable equipment, that warrant granting a limited

²⁴ *WCS Extension Order*, 21 FCC Rcd at 14139.

²⁵ Request of Warren C. Havens for Waiver or Extension of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994, 13001 (WTB 2004) (“*Havens*”).

²⁶ Continuum is cognizant that on October 10, 2012, the Wireless Telecommunications Bureau denied an extension request of T-Mobile License, LLC. But here, and not there, is the “systematic problem with equipment availability” that the Bureau has found to justify an extension. Moreover, unlike T-Mobile, this is Continuum’s first request for an extension of time to build.

extension of time to permit these licensees to continue to build out their licenses.”²⁷ In granting Multichannel Video and Data Distribution Service (“MVDDS”) licensees an extension of their substantial service deadline, the Bureau reiterated that an extension is justified when viable and affordable equipment is not available, as lack of availability is a circumstance outside the control of licensees.²⁸ Those same considerations are here present and the same relief should be granted.

(iii) *Existence of Pending rulemakings.* In 1997, the Commission granted a blanket extension of the construction deadline for Interactive Video and Data Service (“IVDS”) authorizations, finding that an extension was warranted because the Commission intended to commence a rulemaking to consider significant revisions to the IVDS rules.²⁹ The Commission reaffirmed this reasoning one year later, finding that “[r]equiring IVDS licensees to comply with rules which are under Commission review would not further the public interest in this instance.”³⁰ In 2001, the Commission extended the MDS construction deadline during a period of substantial regulatory uncertainty associated with recent service rule changes that provided MDS licensees new authority to offer innovative data, voice, and broadband services, instead of anticipated video

²⁷ Applications filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission’s Rules and Extensions of Time to Construct and Demonstrate Substantial Service, *Memorandum Opinion and Order*, 23 FCC Rcd at 5905 (“*LMDS Extension Order*”).

²⁸ 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, *Order*, 25 FCC Rcd 10097, 10102 (WTB 2010). See also, e.g., *WCS Extension Order*, 21 FCC Rcd at 14140 (“We believe that this situation is similar to previous instances where the Bureau extended applicable construction deadlines as a result of a lack of equipment.”); *FCI 900, Inc.*, 16 FCC Rcd at 11077 (extending the five-year construction deadline for certain 900 MHz SMR licensees because commercially-viable equipment was not available to enable licensees to meet the deadline); Requests of Progeny LMS, LLC and PCS Partners, L.P. for Waiver of Multilateration Location and Monitoring Service Construction Rules, *Order*, 23 FCC Rcd 17250, 17258 (WTB 2008) (“*Progeny Order*”) (“[T]he demonstrated lack of available M-LMS equipment, is a factor warranting a further extension of time for all M-LMS licensees”).

²⁹ See Requests by Interactive Video and Data Service Auction Winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181-2 (WTB 1997). The Commission concluded it would be fundamentally “unreasonable and contrary to the public interest to require IVDS licensees to meet the [existing] build-out requirement.” *Id.*

³⁰ Requests by Interactive Video and Data Service Auction Winners to Waive the January 18, 1998, and February 28, 1998, Construction Deadlines, *Order*, 13 FCC Rcd 756, 758 (WTB 1998).

programming services.³¹ Indeed, the Commission has often extended performance requirements where, as here, relevant policy issues were subject to pending Commission proceedings.³² Moreover, the Commission has consistently recognized that the public interest is not served by requiring the construction of “stop-gap” facilities merely to meet construction requirements. This is particularly the case given that any network deployed now may have to be modified once the Channel 51 issues have been resolved and commercially viable equipment becomes available.³³

E. Given the Changed Circumstances, Absent Grant of the Relief Here Requested, a Build Makes No Sense And, Absent a Waiver or Extension, Not Building Also Presents Considerable Risks.

The Initial Construction Requirement now forces Continuum and other A Block holders to either (a) risk sanctions for not building or (b) expend scarce capital resources to deploy systems that make no economic sense, fail to advance the Commission’s broadband goals, and fail to reach and to offer competitive service to significant portions of the population within the license areas. Thus, as another 700 MHz licensee has explained, the Initial Construction Benchmark only creates a “powerful regulatory incentive to engage in economically irrational behavior.”³⁴ Absent prompt grant of the relief here requested, Continuum will face the dilemma of either risking its license rights

³¹ See Extension of the Five-Year Build-out Period for BTA Authorization Holders in the Multipoint Distribution Service, *Memorandum Opinion and Order*, 16 FCC Rcd 12593, 12596 (MMB 2001).

³² See, e.g., DTV Build-out, Requests for Extension of the Digital Television Construction Deadline, Commercial Television Stations With May 1, 2002 Deadline, *Order*, 19 FCC Rcd 10790 (2004); ASC Communications, Inc., Licensee of Multipoint Distribution Service Station WMH541, San Diego, California – Request for Declaratory Ruling, *Memorandum Opinion and Order*, 19 FCC Rcd 24100, 24103 (2004); Application for Extension of Time to Construct, Application for Assignment of Conditional License, Requests for Extension of the Digital Television Construction Deadline, *Order*, 18 FCC Rcd 22705, 22706-07 (2003); 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes, *Report and Order*, 13 FCC Rcd 23056 (1998), *recon. granted in part and denied in part*, 14 FCC Rcd 17525, 17536 (1999); Southern Company, Request for Waiver of Section 90.629 of the Commission's Rules, 14 FCC Rcd 1851, 1857 (1998).

³³ Vulcan Ex Parte, at 20.

³⁴ Comments of USC noted in footnote 366 of the 2nd R & O released August 10, 2007 – Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, W T Docket No. 06-150, Released August 10, 2007

by deferring construction or spending scarce capital on inferior systems which may be marginally competitive and make little economic sense.

To be clear, while certain of the consequences for failing to meet the intermediate 35 percent performance benchmark are not clear, others are known to be severe. The FCC can subject Continuum to loss of its licenses, to loss of authority to operate in the part of its license service areas not served as of November 30, 2013 and/or enforcement action, including the imposition of forfeitures.³⁵ Post-Auction 73 developments discussed above have already put A Block licensees at least three years behind other 700 MHz licensees, particularly the nation's two largest carriers, and a two year license reduction and expedited timeframe to meet the 70% requirement would exacerbate the situation, stifle competition and result in an extraordinarily inefficient use of valuable spectrum.

F. Continuum Has Undertaken “Meaningful Efforts” to Put Its A Block Spectrum to Use.

The Commission has long-recognized that certain bases for requesting extensions of time to construct are far more compelling than others. In this vein, late last year the Commission issued its Public Notice³⁶ providing some clarity on this issue. In particular, with respect to possible sanctions other than shortening license term and the time in which a second level of construction must be completed, the Commission explained that it would use its discretion to impose extra sanctions only where those licensees who did not meet their Interim Construction Benchmarks

“have also failed to undertake meaningful efforts to put this spectrum to use, such as engaging in system planning, exploring site leases, pursuing network engineering planning, or engaging in efforts to procure equipment. Accordingly, licensees undertaking no meaningful efforts to build out their networks may lose

³⁵ See 47 C.F.R. § 27.14(g)(1).

³⁶ Public Notice, “700 MHz Construction and Reporting Requirements, DA 11-1981, __ FCC Red __, rel. December 6, 2011. (“Public Notice”)

authority to operate in part of the remaining unserved areas of the license, at the Commission's discretion."³⁷

The Public Notice provides, unequivocally, that the Commission "may" use its discretion and reduce the area where a licensee may operate only if the licensee is "undertaking no meaningful efforts", as the Commission defined that term in its Public Notice.³⁸ Here, in stark contrast, Continuum has undertaken meaningful efforts in each and every one of the meaningful efforts categories defined by the Commission. It has retained two separate engineering firms to engage in system planning, initial site exploration and lease planning. Additionally, Continuum has attended a number of conferences and had numerous vendor meetings in an effort to procure equipment.

For all of the above reasons, the discretionary authority that the Commission may utilize in limited instances is not here applicable.

³⁷ Public Notice, at 3-4.

³⁸ Public Notice, at 2.

IV. CONCLUSION

As demonstrated by the above, due to circumstances beyond its control, Continuum requests an extension of time to comply with the Commission's Interim Construction Benchmarks for Continuum's A Block licenses. For all of its A Block Licenses, Continuum seeks an extension until the later of (a) two years after its current build date or (b) two years after issuance of an interoperability decision in WT Docket No. 72-69. For those licenses listed on Exhibit B, Continuum seeks an extension until one year after the relevant incumbent Channel 51 licensee ceases operation. It does so only after having taken all "meaningful efforts," as the Commission requested.

The current lack of interoperability and Channel 51 interference issues each fully warrant the two-year extension being requested. Grant of such request is consistent with codified rules and policy, and with applicable case precedent.

Respectfully submitted,

CONTINUUM 700 LLC

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Its Attorney

October 15, 2012

EXHIBIT A

CONTINUUM 700 LICENSES

| License | Market | Block |
|---|--|-------|
| WQLA790 Continuum 700 LLC 0017190216 WY Active 11/16/2019 | BEA032 - Fort Myers-Cape Coral, FL | A |
| WQLA791 Continuum 700 LLC 0017190216 WY Active 11/16/2019 | BEA150 - Boise City, ID-OR | A |
| WQLA792 Continuum 700 LLC 0017190216 WY Active 11/16/2019 | BEA152 - Salt Lake City-Ogden, UT-ID | A |
| WQLA793 Continuum 700 LLC 0017190216 WY Active 11/16/2019 | BEA156 - Albuquerque, NM-AZ | A |
| WQLA794 Continuum 700 LLC 0017190216 WY Active 11/16/2019 | BEA015 - Richmond-Petersburg, VA | A |
| WQLA795 Continuum 700 LLC 0017190216 WY Active 11/16/2019 | BEA026 - Charleston-North Charleston, SC | A |
| WQLA796 Continuum 700 LLC 0017190216 WY Active 11/16/2019 | BEA028 - Savannah, GA-SC | A |
| WQLA797 Continuum 700 LLC 0017190216 WY Active 11/16/2019 | BEA029 - Jacksonville, FL-GA | A |
| WQLA798 Continuum 700 LLC 0017190216 WY Active 11/16/2019 | BEA033 - Sarasota-Bradenton, FL | A |
| WQLA799 Continuum 700 LLC 0017190216 WY Active 11/16/2019 | BEA051 - Columbus, OH | A |