

Request for Tolling of Construction Permit

Justification for Tolling of Construction Permit

WGBH Educational Foundation (“WEF”), licensee of television station WGBX-TV, Boston, Massachusetts (Fac ID. 72098) (WGBX) and NBC Telemundo License LLC (“NBC Telemundo”), licensee of WBTS-CD, Nashua, NH (Fac. ID 9766) (“WBTS”) hereby submit this request for a waiver of the tolling standard and tolling of the construction permit for their permanent post-Incentive Auction facilities, File No. 0000073038 (the “CP”), for an additional 6 months in furtherance of their previously approved post-Incentive Auction transition plan.¹ WEF and NBC Telemundo are collectively referenced herein as “Licensees” and WGBX and WBTS are collectively referenced herein as “Stations.”

In the *Closing and Channel Reassignment Public Notice*, the Commission assigned WGBX to transition from RF channel 43 to RF channel 32 in Phase 8 of the post-Incentive Auction transition. On November 26, 2018, the Licensees timely filed a request for a Legal STA in which they explained:

The current transition plan for the Stations involves transitioning to an interim site (“Needham”) on the Stations’ pre-auction RF channel (RF 43) for a 10-12-month period before returning to the Station’s existing site (“Needham Heights”) on their post-auction RF channel (RF 32). The Stations would operate from the [interim] Needham site along with all other occupants of the Needham Heights tower. Upon transitioning back to the Needham Heights site, the transitional site at Needham will become

¹ To the extent necessary, Licensees request a waiver of the deadline for filing a request for tolling. The Commission’s Rules specify that extension requests should be filed not less than ninety (90) days prior to the CP expiration date. 47 CFR § 73.3700(b)(5)(iv). The FCC may grant a waiver for good cause shown. The agency typically grants a waiver where the particular facts make strict compliance inconsistent with the public interest. *N.E. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); 47 CFR § 1.3. Per the Media Bureau’s practice, the parties waited until it became clear that they would be able to timely complete construction before filing the instant request. Waiver of the deadline for tolling is in the public interest as it will allow the Commission to grant the instant request, which comports with the intent of the Commission to utilize interim facilities to provide stations with additional time to complete construction where the delay is caused by circumstances beyond the Licensee’s control and where the extension will not delay or disrupt the overall transition. Therefore, good cause exists and this waiver should be granted.

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an auxiliary site for the Stations.

File No. 0000063730. However, the broadband antenna for the Needham site was not optimized for RF channel 43. Accordingly, the Licensees requested authority to transition to RF channel 32 from the Needham site in Phase 4. The Commission granted that request and found that the Licensees' transition plan was in the public interest.² On August 29, 2019, the Commission granted Licensees' request to extend the CP through January 29, 2020 to facilitate the Stations' transition plan. File No. 0000079245.

Licensees have transitioned to their post-Incentive Auction RF channel (32) from the interim Needham site. File No. 0000080347. However, although the Stations' transmission system at their permanent Needham Hills facility will be complete by January 29, 2020, the tower crew is not available to install their antenna. Although Licensees currently expect that the antenna installation will be complete by late March, at which point they can commence operation from the Needham site, they are seeking a six month extension out of an abundance of caution.

The Commission has recognized that "interim and auxiliary facilities will be an important part of the transition for broadcasters."³ Here, the Stations have already transitioned to their post auction channel from their auxiliary facility, but need additional time to complete their permanent facilities.

In its Public Notice adopting the post-Incentive Auction transition scheduling plan, the Media Bureau and the Incentive Auction Task Force declared that "[r]eassigned stations and band changing stations that are unable to complete construction of their post-auction channel facilities by their deadlines may seek a single extension of up to 180 days."⁴ Stations requesting an extension must demonstrate that "despite all reasonable efforts, the station is unable to complete construction of its new facility on time due to circumstances that were either unforeseeable or beyond its control." All subsequent requests for additional time to construct

² See Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau to WGBH Educational Foundation and NBC Telemundo License LLC (Jan. 16, 2019).

³ See *Incentive Auction Task Force and Media Bureau Adopt Post-Incentive Auction Transition Scheduling Plan*, Public Notice, DA 17-107 ¶ 62 (rel. Jan. 27, 2017).

⁴ *Incentive Auction Task Force & Media Bureau Adopt A Post-Incentive Auction Transition Scheduling Plan*, Public Notice, 32 FCC Rcd. 890 ¶ 40 (MB & IATF 2017); 47 CFR § 73.3700(b)(5).

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are subject to the Commission's tolling provisions of Section 73.3598(b) of the Rules.⁵ The Commission's tolling provisions provide that a construction permit deadline may be tolled under specific circumstances such as acts of God, delays due to administrative or judicial review, or construction that is delayed by any cause of action pending before a court of competent jurisdiction relating to any necessary local, state, or federal requirement for the construction or operation of the station, including any zoning or environmental requirement.⁶ If a station does not qualify for tolling under these criteria, good cause may exist to waive the Commission's tolling provisions and still toll the expiration of the Station's construction permit where the station can demonstrate that "rare and exceptional circumstances" prevented construction.⁷

Here, waiver of the tolling standard and tolling of the CP is appropriate because the Licensees were unable to complete construction during the initial 180 period due to circumstances beyond their control. The Commission has already recognized that the Licensees' transition plan is in the public interest, and the instant request merely provides additional time to complete construction of their permanent facilities. Accordingly, the Commission should toll the Stations' CP for an additional 6 months to allow Licensees to complete construction of their post-Incentive Auction facilities.

⁵ 47 C.F.R. § 73.3598(b).

⁶ *Id.*

⁷ See *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd. 17525 ¶ 42 (1999) (recognizing that there may be "rare and exceptional circumstances" beyond the control of the licensee that do not fall under the tolling provisions, but "which would warrant the tolling of construction time."