

**Request for Waiver of Section § 73.3598(b) for,  
and Further Extension of, WUND-TV's Repack CP**

**A. Introduction and Background**

The University of North Carolina (“UNC-TV” or the “licensee” or “applicant”), licensee of WUND-TV, Edenton, North Carolina (Fac. ID No. 69292) (“WUND-TV”), respectfully requests a further extension of time to complete construction of its full, authorized post-transition facilities, i.e., the facilities specified in WUND-TV’s repack construction permit (“CP”) issued in LMS File No. [0000025090](#). WUND-TV was granted an initial extension of its repack CP in LMS File No. [0000086772](#), such that the repack CP is now scheduled to expire on July 15, 2020.

From the beginning of UNC-TV’s repack plans, the licensee has consistently expressed that its “compound, complicated lodestar for this entire repack enterprise is timely completion of the repack with full compliance of all applicable state and federal regulation while—most importantly—keeping the station operating with as much coverage areas as possible with the least possible negative impact to viewers.” *See, e.g.*, LMS File No. [0000031458](#) (third quarter 2017 Transition Progress Report); *see also* WUND-TV’s Transition Progress Reports for Each Quarter Between Fourth Quarter 2017 and the Present. To avoid reiterating all of the bona fides in this application, the licensee hereby incorporates by reference all relevant references to its interim facility operations plans from Transition Progress Reports and Form 399 submissions. In short, originally the principal reason that affected the licensee’s ability to fully construct the full, final WUND-TV post-transition facility by the CP’s original Phase 7 deadline was the combination of (i) the state-imposed governing procurement requirements and (ii) the need to continue to continually serve as much of the viewing audience as possible while replacing the station’s top-mount antenna in a timely fashion. Accordingly, the licensee used interim facilities to meet the Phase 7 transition deadline and had been planning to complete its final transition several months after the Phase 7 deadline. These plans are in respect of the law, practical vendor capabilities, and—most importantly—the need and desire of viewers to have uninterrupted service to the station’s noncommercial programming throughout the mandatory transition. Prior to the onset of the COVID-19 pandemic, UNC-TV had expected construction to be complete sometime in July 2020 (which, depending on the precise date, may still have necessitated a tolling waiver / 2<sup>nd</sup> CP extension, albeit only a brief one).

Fast forward to the present, and the installation of the final main antenna system (including the removal of the pre-transition main antenna) is not yet complete; indeed, as a result of COVID-19, the vendor hasn’t even yet arrived on site. As with other UNC-TV repack projects (and the repack projects of other broadcasters across the country), the COVID-19 pandemic has disrupted the intended construction timeline. More specifically, the antenna system contractor, RFS, had sub-contracted the antenna installation portion of the project to GTI – America, a Canadian-based company. In mid-March 2020, GTI – America instructed their tower crews working in the United States to return to Canada. GTI – America’s crews departed the U.S., including some other UNC-TV sites, shortly after receiving those instructions. Fast-forward to the present, and GTI – America has successfully re-deployed Canadian-based tower crew personnel into the United States, which means that UNC-TV repack projects are once again scheduled to actively move forward towards completion.

As of this filing, UNC-TV expects the tower crew to arrive at WUND-TV's site in August or September and to complete the rest of the repack construction work (namely the completion of the final top-mount primary antenna system) in early October. Unfortunately, WUND-TV's transmitter site—which is located in Columbia, North Carolina—is less than 40 miles from the east coast and, as such, is vulnerable to hurricanes and tropical storms; and the new construction schedule calls for vendors to be on site during the height of the Atlantic Hurricane Season which has already proven to be record-breaking.<sup>1</sup> For that reason, UNC-TV believes that an additional 180 days of time to extend the station's repack CP would be appropriate and would build in sufficient "cushion" to handle any weather-related or other issues that might arise and cause unscheduled delays (including delays in the tower crew's arrival at WUND-TV's site beyond the anticipated August/September timeline). To be clear, the circumstances behind the latest delay in the installation of the final main antenna are a direct outgrowth of the COVID-19 pandemic and relate to vendor availability, circumstances that are clearly beyond the control of the licensee.

Pursuant to Section 73.3700(b)(5) of the Commission's rules (Rules), a station that was assigned a new channel as a result of the Commission's incentive auction and repacking process may request a single extension of its construction permit deadline of up to 180 days to complete construction of its post-auction facility.<sup>2</sup> All subsequent requests for additional time to construct are subject to the Commission's tolling provisions of Section 73.3598(b) of the Rules.<sup>3</sup> Indeed, the Media Bureau has observed that if a station's repack construction has been disrupted by circumstances other than those provided for in its tolling rules, "[s]tations may also seek a waiver of the tolling rule to receive additional time to construct in cases where 'rare or exceptional circumstances' prevent construction."<sup>4</sup>

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.<sup>5</sup> If a station does not qualify for tolling under these criteria, good cause may exist to waive the Commission's tolling provisions and tolling may still be warranted where the licensee can demonstrate that "rare and

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<sup>1</sup> See, e.g., Morgan McFall-Johnsen, *The 2020 Hurricane Season Already Broke a Record, and It's Only Day 3*, BUSINESS INSIDER (June 3, 2020), available at <https://www.businessinsider.com/hurricane-season-breaks-record-earliest-ever-third-named-storm-2020-6>.

<sup>2</sup> See 47 C.F.R. § 73.3700(b)(5).

<sup>3</sup> See 47 C.F.R. § 73.3700(b)(5)(i) (citing 47 C.F.R. § 73.3598(b)).

<sup>4</sup> *Incentive Auction Task Force and Media Bureau Remind Repacked Stations of Certain Post-Auction Transition Requirements and Deadlines*, Public Notice, 33 FCC Rcd ¶13 n.34 (MB and IATF 2018).

<sup>5</sup> See *id.*

exceptional circumstances” prevented construction by the station’s construction permit expiration date.<sup>6</sup>

## **B. Waiver Standard and Public Interest Considerations**

Generally, the FCC may grant a waiver for “good cause shown.”<sup>7</sup> A waiver is appropriate where the particular facts make strict compliance inconsistent with the public interest.<sup>8</sup> In considering a waiver, the FCC may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>9</sup> Such a waiver is appropriate if circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.<sup>10</sup>

As demonstrated herein, good cause exists for waiver of Section 73.3598(b) in this particular circumstance. Among the reasons that support the Media Bureau taking action favorable to the applicant are as follows:

- WUND-TV timely terminated its pre-transition channel operations and has been operating on its post-transition channel using interim facilities since the end of Phase 7, which is the phase to which the station was originally assigned.
- Because WUND-TV’s timely transition has already occurred, no interference issues would be caused by a further extension of WUND-TV’s repack CP, and a grant would not delay, alter, or affect in any way the nationwide transition of full power and Class A stations nor the offering of new 600 MHz wireless services by new 600 MHz wireless licensees.
- The vendor for the final services required for WUND-TV’s post-transition primary antenna installation will not be available to perform the requisite services until a few months later than initially anticipated.
- The vendor’s delay beyond the original extension date of July 15 relates almost entirely to the COVID-19 pandemic and its impact on travel, business operations, international

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<sup>6</sup> 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” and concluding that in such “limited circumstances,” the Commission would entertain requests for waiver of its “strict tolling provisions”).

<sup>7</sup> 47 C.F.R. § 1.3.

<sup>8</sup> See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>9</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

<sup>10</sup> See *Northeast Cellular*, 897 F.2d at 1166.

policy, and health and safety measures.

- WUND-TV’s repack project is otherwise complete; in fact, the building modifications have been completed as have the post-transition transmitter installations. A significant indicia of the progress that has been made on WUND-TV’s repack project is the fact that the general contractor’s portion of the project has been “closed out” by the North Carolina State Construction Office because that agency considers the GC’s work to be complete.

**C. Conclusion**

In sum, grant of this Section 73.3598(b) waiver request (i) would be consistent with other actions already taken by the Media Bureau for similarly-situated repacked stations (including other UNC-TV repack stations), (ii) would recognize that WUND-TV took appropriate and timely action to ensure a timely transition by its assigned Phase 7 deadline, (iii) would demonstrate an understanding that the factors causing the further delay in completion of WUND-TV’s final post-transition facility have been beyond the licensee’s control and have been compounded by the effects of a global pandemic, (iv) will not undermine or delay any post-Auction transition goals, and (v) does not require waiver of any interference regulations or policies. Because WUND-TV already successfully terminated its pre-transition channel operations in a timely fashion by the Phase 7 deadline (and successfully cut over to the interim antenna facility to effectuate the timely channel change), a second extension of WUND-TV’s repack CP for 180 days (i.e., until January 11, 2021) will not negatively affect the nationwide transition. Accordingly, grant of this request is in the public interest.

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