

**Request for Waiver of Tolling Standard to Extend Post-Auction Construction Permit**

West Virginia Educational Broadcasting Authority (“WVEBA”), licensee of non-commercial educational television station WSWP-TV, Facility ID No. 71680, Grandview, West Virginia (“WSWP”), respectfully requests a waiver of the tolling standard set forth at Section 73.3598(b) of rules of the Federal Communications Commission (“FCC” or “Commission”) to extend WSWP’s post-auction construction permit, FCC File No. 0000034625 (“Channel 8 CP”). The Channel 8 CP has been extended for 180 days, and is presently scheduled to expire on December 30, 2020. Based upon the special, rare and exceptional circumstances described below, WVEBA respectfully requests a waiver of the FCC’s tolling standard to extend the Channel 8 CP for an additional six months, until **June 30, 2021**.

Pursuant to FCC rules, a television broadcast station assigned a new channel during the broadcast incentive auction may seek a single, 180-day extension of its construction permit to enable more time to construct post-auction facilities.<sup>1</sup> Stations that require additional time may seek a waiver of the tolling standard set forth in Section 73.3598(b) of the FCC’s rules upon a showing of rare and exceptional circumstances.<sup>2</sup> The Commission may waive a rule where the particular facts make strict compliance inconsistent with the public interest, special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.<sup>3</sup> As explained below, such special, rare and exceptional circumstances are present in the case of WSWP.

WSWP is affiliated with the PBS Television Network and is licensed to WVEBA, a public benefit corporation established by the State of West Virginia (“State”) for the purpose of providing non-commercial educational radio and television broadcasting services to residents of West Virginia.<sup>4</sup> WSWP operates as part of the WVEBA television network, which also includes full-power television stations WVBP-TV and WNPB-TV, as well as several television translator stations. In addition, WVEBA holds the licenses for twelve full-power non-commercial educational radio stations and associated FM translator and FM booster stations.

WVEBA first learned in April 2017 that WVPB, along with its sister stations WSWP-TV and WNPB-TV, would be required to transition to new channels as part of the repacking process. Thus, WVEBA was tasked with balancing the transition of three full-power television stations,

---

<sup>1</sup> 47 C.F.R. § 73.3700(b)(5)(i).

<sup>2</sup> See Incentive Auction Task Force and Media Bureau Remind Repacked Stations of Certain Post-Auction Transition Requirements and Deadlines, Public Notice, DA 18-884 (rel. Aug. 27, 2018) at ¶ 13 and n. 34. (“Stations may also seek a waiver of the tolling rule to receive additional time to construct in the case where “rare or exceptional circumstances” prevent construction.” (citing 1998 Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17536, para. 42 (1999)).

<sup>3</sup> See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>4</sup> See W. Va. Code § 10-5-1.

while simultaneously addressing the need to find displacement channels for five of its television translator stations and managing the day-to-day operations of its television and radio network.

As the Commission is aware, as a state-funded governmental entity, WVEBA faced significant challenges in securing the funding necessary to order the equipment required for the post-auction facilities of WSWP and its sister stations. Because it is a governmental entity, WVEBA is required to comply with the State's laws and procedures regarding procurement of goods and services.<sup>5</sup> These laws require, *inter alia*, that equipment purchases in excess of \$25,000 be put out for competitive bidding, a process that is time and resource intensive, and is managed by the state procurement office.<sup>6</sup> Under rules established by the State of West Virginia Purchasing Division, WVEBA could not start the lengthy procurement process for WSWP (or any of its sister stations) until it had adequate funds on hand to pay the winning vendor.<sup>7</sup> For WVEBA, this did not occur until March 14, 2019, when the Governor of West Virginia signed into law an appropriations bill providing WVEBA with \$7.36 million to implement the repack for all of its television stations.<sup>8</sup>

When the funding for the post-auction transition for the WVEBA television stations was finally made available, WVEBA's efforts were necessarily focused on WNPB-TV's transition, which was assigned to transition to its post-auction channel at the end of Phase 4 on August 2, 2019.<sup>9</sup> Indeed, with a staff of only three engineers for the entire WVEBA television and radio network,<sup>10</sup> WVEBA simply did not have the resources to initiate the complicated State procurement process for the equipment required for WSWP until such time as the WNPB-TV

---

<sup>5</sup> See W. Va. Code § 5A-1-10 (2019) (requiring that all spending units use competitive bidding process to purchase commodities wherever possible).

<sup>6</sup> See W. Va. Code § 5A-3-11.

<sup>7</sup> See West Virginia Purchasing Division Procedures Handbook, § 6.6 ("Requisitions submitted to the Purchasing Division are to include proper encumbrance information for purchase orders to be encumbered by the Purchasing Division's Communication and Technical Services Unit. Agencies must designate the appropriate account(s) from which funds to pay for a contract will be taken prior to a contract being awarded"), available at <http://www.state.wv.us/admin/purchase/handbook/2020/handbook.pdf> (last visited June 23, 2020).

<sup>8</sup> See S.B. 681, 84th Leg., Reg. Sess. (W. Va. 2019). See also, Phil Kabler, Public Broadcasting Tech Upgrades Get Boost with \$7.36 Million Appropriation, CHARLESTON GAZETTE-MAIL, available at [https://www.wvgazettemail.com/news/public-broadcasting-tech-upgrades-get-boost-with-million-appropriation/article\\_c136c53b-6938-5278-8d54-5f65f0640546.html](https://www.wvgazettemail.com/news/public-broadcasting-tech-upgrades-get-boost-with-million-appropriation/article_c136c53b-6938-5278-8d54-5f65f0640546.html).

<sup>9</sup> WNPB-TV initially transitioned to its post-auction channel using a reduced power facility.

<sup>10</sup> WVEBA's engineering staff has been further reduced since January 2019. Today, there are effectively 1 ½ engineers to support the entire statewide radio and television network.

facility was fully constructed.<sup>11</sup> The WNPB-TV construction project was quite challenging, as it involved installing the station's new post-auction main antenna via a gin pole in the midst of a West Virginia winter, including heavy ice that stalled the installation efforts more than once. Despite these challenges, WVEBA's successfully completed construction of WNPB-TV's post-auction facility in February 2020.<sup>12</sup>

Once construction of the WNPB-TV post-auction facility was completed, WVEBA turned its focus to the construction of the WVPB and WSWP-TV post-auction facilities, both of which were scheduled to transition in Phase 10. After several months of working with the State procurement office on a requisition request that met the office's requirements for competitive bidding, in approximately April 2020, the channel 8 transmitter required for WSWP was put out to bid. The bidding process took several weeks, and, in early June 2020, WVEBA ordered the channel 8 transmitter. Promptly after the competitive bidding process for the channel 8 transmitter was initiated, WVEBA submitted a requisition request to the State to purchase the WSWP antenna and transmission line. However, due to its focus on procuring personal protective equipment to address the COVID-19 pandemic, the procurement office's processing of this request was significantly delayed such that, it was not until mid-June 2020 that the procurement office placed the WSWP antenna and transmission line out for competitive bidding. Similarly, the State procurement office did not place the contract for the provision of tower services out for bids until the end of June 2020.

At the same time as it was working with the State procurement office to purchase the equipment and services required for its main, post-auction facility, WVEBA also was working to procure the equipment necessary to construct a reduced power channel 8 facility so that WSWP was positioned to timely cease broadcasts on its pre-auction channel. As a result of its efforts, WVEBA completed construction of an interim, reduced power facility and has been broadcasting via this facility since it transitioned from its pre-auction channel in Phase 10.

Since timely transitioning from its pre-auction channel, WVEBA has continued to work to complete construction of the permanent Channel 8 CP facility but has encountered delays outside of its control. For example, GatesAir ("Gates"), the vendor from whom WVEBA

---

<sup>11</sup> In most cases, the State's procurement office required WVEBA to submit separate technical specifications for the various equipment required for WNPB-TV, WSWP-TV and WVPB's post-auction facilities. Drafting the necessary technical specifications as required by the procurement office is a resource-intensive project, such that WVEBA could not dedicate staff to writing multiple specifications concurrently while still managing its day-to-day engineering needs and implementing the WNPB-TV repack. Indeed, WVEBA's small engineering team was tasked with balancing the repack schedule for all three WVEBA full-power television stations while concurrently managing the day-to-day engineering tasks for WVEBA's statewide network of television and radio stations, addressing unforeseen repairs (e.g., replacing two failed radio transmitters), and finding vacant channels for its five television translator stations that were displaced by the repack.

<sup>12</sup> See LMS File No. 0000106559.

purchase WSWP's channel 8 transmitter, had initially told WVEBA that WSWP's channel 8 transmitter would be delivered in August 2020 but subsequently notified WVEBA that transmitter delivery would be further delayed because the necessary mask filter was not yet available. Despite WVEBA's efforts to expedite delivery of the transmitter, Gates did not deliver the WSWP transmitter to WVEBA until early October. Thereafter, WVEBA installed the transmitter, such that, pending completion of certain electrical work scheduled for December 4, it is ready to be connected to the channel 8 antenna once the antenna has been delivered and installed.<sup>13</sup>

To complete construction of WSWP's Channel 8 CP facility, WVEBA also must install the new channel 8 antenna. The State procurement office took much longer to complete the competitive bidding process for the new antenna than WVEBA had anticipated would be the case. The procurement office finally completed this process in early August, at which time Propagation Systems, Inc. ("PSI") was selected as the winning vendor. It typically takes 90 days or longer to complete fabrication of the antenna and, notwithstanding WVEBA's efforts to work with PSI to expedite this process, the channel 8 antenna fabrication process has taken several months because PSI was unable to obtain the required materials (e.g., the steel used in the antenna) from its vendors on an accelerated basis. As of the date hereof, the antenna fabrication process is largely complete, such that the antenna will be ready for delivery once the helicopter and tower crew are available to complete the installation. WVEBA is working to secure a helicopter and tower crew to install the antenna, and anticipates that the crews will be scheduled by mid- to late December. Assuming everything continues on schedule and there are no weather or other unforeseen delays, it is possible that the WSWP antenna can be installed – and the WSWP permanent Channel 8 CP can be fully constructed – before the Channel 8 CP expires on December 30, 2020. Nevertheless, to account for the likely possibility of winter weather conditions at the transmitter site in the mountains of Beckley, West Virginia (e.g., icing conditions that could prevent the helicopter from flying to install the channel 8 antenna), scheduling and other unforeseen delays, WVEBA is filing the instant application out of an abundance of caution.

In light of the special, rare and exceptional circumstances described herein, waiver of the tolling standard to provide WVEBA with additional time to complete construction of the post-auction main facilities for WSWP is warranted. Grant of this request to the extend the Channel 8 CP to June 30, 2021 will not harm the public interest because WSWP has ceased broadcasts on its post-auction channel, and is presently serving its viewers on its post-auction channel.

---

<sup>13</sup> The new antenna transmission line has been delivered.