

Justification for Waiver of Tolling

VPM Media Corporation (“Licensee”), licensee of television station WVPT(TV), Staunton, VA (Fac. ID 60111) (the “Station”) hereby submits this request pursuant to Section 73.3598(b) of the Commission’s Rules¹ for a waiver of tolling of its post-Incentive Auction construction permit, File No. 0000028448 (the “CP”), for a period of six months to allow the Station to modify and complete its transition to its post-Incentive Auction facility.²

I. Background

In the *Closing and Channel Reassignment Public Notice*, the Commission assigned the Station to transition from RF channel 11 to RF channel 12 in Phase 10 of the post-Incentive Auction transition. Licensee initially planned to retune its existing Axcera transmitters from channel 11 to channel 12. After Licensee placed its orders, however, Axcera declared bankruptcy. Axcera initially indicated that it would continue to support the rechanneling project. However, on Oct 7, 2019, Axcera advised Licensee that the transmitters and exciters could not support rechanneling and that the Licensee would need to purchase new equipment. Licensee initially explored the possibility of using new transmitters with its existing antenna, but on Feb 24, 2020, Mega Industries (current owner of the MCI brand) advised Licensee that it no longer supports the existing antenna (originally purchased in 2001) and cannot model the pattern using a new or retuned transmitter. As a result, Licensee will need to replace both the transmitter and antenna at its Elliott Knob site.

In February 2020, the manufacturer of the existing tower, Valmont, performed a structural analysis to determine whether the existing tower at Elliott Knob could support the replacement antenna. This analysis was conducted on an expedited basis in an attempt to obtain consideration from the local planning board in March 2020. However, after reviewing both the original drawings from MCI and the proposed specifications from Dielectric, Valmont determined that the existing tower at Elliott Knob cannot support the replacement antenna and

¹ 47 C.F.R. § 73.3598(b).

² To the extent necessary, Licensees request a waiver of the deadline for filing a request to tolling. The Commission’s Rules specify that requests for additional time to complete construction 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. Waiver of the deadline for requesting additional time is in the public interest as it will allow the Commission to grant the requested Waiver of Tolling, which will allow Station to continue its efforts to complete construction of the permanent post-auction facilities that it will use to serve the public. Therefore, good cause exists, and this waiver should be granted.

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that a replacement would be required. Although the initial structural analysis was performed at Licensee's request, the tower site owner has assumed responsibility for all subsequent analyses.

On July 2, 2020, the Commission granted Licensee a six-month extension of the CP. File No. 0000116867. Since that time, Licensee has been working diligently to design and construct a new antenna system that is optimized for use on its new RF channel. On July 8, 2020, Licensee submitted an application for special temporary authority to utilize its existing facilities on a temporary basis. In the meantime, Licensee continued its efforts to redesign its distributed transmission system (DTS), which included obtaining quotes for a transmitter that will produce the required output power, hiring a consulting engineer for the system redesign, and working with the tower owner to identify a solution to either upgrade the existing tower or construct a new tower.

The tower owner, unfortunately, still has not provided the turn-key proposal to accommodate the Station's new antennas that it originally committed to provide in July. The Licensee has been in regular contact with the site coordinator, who has advised the Licensee that it is working with local officials and the U.S. Forest Service to obtain approval for the necessary upgrades. The owner has attributed the delays to a number of factors, including the Covid-19 pandemic, major unexpected building and electrical renovations, and copper theft at one of its sites that required prioritization of security upgrades. In the meantime, winter conditions have rendered the tower site inaccessible.

VPM, for its part, is analyzing whether requesting an alternate channel to move from channel 12 to channel 15 will allow it to expedite the repack process. Not only is UHF equipment more readily available, but UHF antennas are lighter than VHF antennas. As a result, replacing the antenna at Elliott Knob with a UHF antenna would actually reduce the total weight on the tower. Licensee cannot complete the structural analysis until it designs the new pattern and sources the appropriate antennas to maximize the station's service while protecting the nearby Green Bank Radio Observatory.

II. The Commission Should Waive Tolling and Extend the DTS CP

Under the present circumstances, a waiver of tolling and extension of the CP is justified. 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."³ All subsequent requests for

³ *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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additional time to construct are subject to the Commission's tolling provisions of Section 73.3598(b) of the Rules.⁴

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.⁵ 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.⁶

Tolling is appropriate here because Licensee's inability to complete construction of its post-Incentive Auction facilities is due to rare and exceptional circumstances beyond its control: namely, the bankruptcy of its transmitter supplier and the inability of the existing tower to support a new antenna. Licensee initially sought to simply retune its existing equipment, which would have required minimal time and minimal cost to the Commission. Unfortunately, due to the Axcera bankruptcy and a lack of support from MCI for the Station's existing antenna, retuning proved impossible. Licensee did not determine that it would be unable to retune its existing facilities until late 2019, when the repack was already well underway. Although it may have been possible, under ordinary circumstances, for Licensee to obtain and install a new transmitter and antenna by the end of Phase 10, the Station's existing tower cannot structurally support the new antenna.

In the Incentive Auction Report and Order, the FCC committed to "work diligently with stations to ensure that service disruptions are minimized to the fullest extent possible through the use of a variety of mechanisms."⁷ Providing Licensee with additional time to complete construction will allow the Station to continue to serve viewers without any competing harm. Moreover, because the deadline for Licensee to submit its invoices for the repack is not until March 22, 2022, this additional time should have no effect on the Commission's reimbursement process.

⁴ 47 C.F.R. § 73.3598(b).

⁵ *Id.*

⁶ 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.").

⁷ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567 §§ 569-70 (2014).

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In short, the public interest will be served by grant of a waiver and tolling of WVPT's construction permit.

III. Conclusion

For the foregoing reasons, the Commission should grant Licensee's request for waiver of the Commission's tolling provisions and toll WPVT's CP for an additional six months.