

Tolling Waiver Request

Fort Myers Broadcasting Company (“FMBC”) submits that completion of WINK-TV’s post-auction television facilities was delayed by unforeseeable tower design problems requiring increased environmental review of FMBC’s tower construction proposal. With respect to the design problem, the guy plan for the WINK-TV replacement tower was formulated without complete knowledge of the extent of the Florida Department of Transportation’s (FDOT) plans to widen State Road 31 on the Eastern border of the WINK-TV transmitter site. The omission of FDOT plans from design considerations would, eventually, place the Eastern guy anchor of the new tower within the right of way of a four lane highway. The facts affecting tower design, as FMBC understands them, are these:

The Eastern portion of FMBC’s tower property borders on State Road 31. Across SR31 from FMBC’s property, developers are building Babcock Ranch, a 27 square mile community that will ultimately have almost 50,000 residents. To meet the increased traffic flow expected from the build out of Babcock Ranch, the Florida Department of Transportation (“FDOT”) is planning to expand SR31 from a two lane highway into a four lane highway.¹ FDOT is in the design phase of the SR31 project and current plans contemplate locating portions of the highway on land owned by FMBC and used for its tower site.

The initial guy plan for WINK-TV’s replacement tower was supposed to avoid the FDOT’s planned roadway improvements. However, this guy plan was created before FMBC was aware that FDOT’s ultimate goal was to turn SR31 into a four lane highway with turn lanes. Upon discovering the extent of road expansion needed to support the adjacent Babcock Ranch community, FMBC set out to redesign the replacement tower’s guy system.

¹ FMBC learned in July 2018 that FDOT was formulating plans affecting SR31. At this time FMBC was notified that a new turn lane near FMBC’s property was under consideration by FDOT. There had been no public notification of the FDOT project, which was and still is in an initial planning phase. Over the next 23 months FMBC and its local lawyer regularly communicated with FDOT seeking to learn the nature and extent of FDOT’s plans for SR31 and their potential impact on FMBC’s tower site. FMBC learned that the real estate on the East side of the road was not likely to be appropriated for highway expansion because a large natural gas pipeline was buried in that side of the right of way. So the real estate for any SR31 improvement project would likely come from the property owners on FMBC’s side of the street. FMBC made FDOT planners aware that the existing Eastern guy anchor for the WINK-TV tower was near the area to be used as a turn lane. As of January 2020, FMBC’s counsel had been informed by FDOT planners that then-current plans for SR31 did not impact the existing WINK-TV tower. This intelligence changed dramatically when, in a June 24, 2020 telephone call, FMBC’s director of engineering discovered that FDOT’s ultimate goal was to expand SR31 into a four lane highway with turn lanes. This would impact WINK-TV’s existing guy point and eliminate the Eastern guy point of WINK-TV’s proposed replacement tower.

At first FMBC and its tower manufacturer, Electronics Research Inc. (ERI), sought to fix the guy plan by rotating the replacement tower at its proposed location (next to the existing WINK-TV tower). However that possible solution resulted in shifting one of the guy points outside of FMBC's owned real estate and on to real property owned by the State of Florida. The other possible solution at the original replacement tower site was to short guy the tower. Theoretically, short guying a tower is possible if the tower is constructed with sufficient strength to withstand associated forces and meet code standards. The tower FMBC ordered (which was manufactured in early 2020 and was ready for delivery in June, 2020) was not designed to bear the stress of significant short guying.

FMBC and ERI identified a site on FMBC's tower property which accommodated both FDOT road expansion goals and a suitable guy plan for the new tower. However this site is located roughly two degrees longitude from the existing WINK-TV tower. FMBC was informed that moving the new tower at this location (a) required a new tower registration, instead of a modification of tower registration; (b) required a new FAA notification; (c) required environmental evaluation; and (d) required a modification of construction permit for each and every station that is to be locate on the new tower (WINK-TV, WINK-FM, WXCW and WLZE-LD).

Until late July/early August, 2020, FMBC believed it was ready to erect its tower and finish its post-auction reconstruction project. The new tower was fabricated and ready to ship. Similarly, the new antenna and transmission line were manufactured, stored in a warehouse and ready for shipment. Finally, the transmitter for WINK-TV's post-auction facility was already installed at the WINK-TV transmitter site.

Immediately upon learning of the need to register WINK-TV's replacement tower as a new tower, FMBC retained an environmental consultant. The environmental consultant delivered an Environmental Assessment for construction of the new tower on November 16, 2020 and the tower registration application was filed with the FCC November 17, 2020. The FAA issued its determination of no hazard to air navigation with respect to the new tower on December 11, 2020. The tower registration application cleared environmental public notice, without objection, in late December, 2020. However, by that time, the FCC had lost its wildlife biologist and review of the tower's Environmental Assessment could not completed until a replacement biologist was hired.

By mid-February, 2021, the Commission had a wildlife biologist reviewing the WINK-TV tower registration application. On April 6, 2021, at the request of the FCC's wildlife biologist, FMBC amended its local building permit for the tower. The Commission granted the tower registration application on May 6, 2021. FMBC promptly amended its WINK-TV construction permit to specify the new tower site approved in the antenna structure registration application. The Commission granted the WINK-TV minor modification application May 12, 2021.

FMBC's tower contractor mobilized its personnel at the WINK-TV tower site on June 3, 2021. It completed clearing the guy paths for the new tower and began to disassemble the existing WINK-TV tower. Removal of the existing tower is required prior to erection of the new tower, because the new tower's foundation is located under the Eastern guy wires of the existing tower. Presently the foundations and guy anchors for the new tower have been installed. The existing WINK-TV tower is reduced to approximately 200 feet above ground level. The construction project is awaiting the arrival of a crane to remove the remaining portion of the old tower and to begin the erection of the new tower. The crane is expected to arrive in three to five weeks. FMBC's contractor expects to complete the construction of WINK-TV's post-auction facilities in February 2022.

FMBC submits that waiver of the Commission's construction permit tolling standards is merited on the basis of the facts reviewed above. The factors delaying construction of the WINK-TV tower were all necessary to accommodate governmental plans to use portions of FMBC's tower site for roadway expansion. The FDOT did not make its roadway expansion plans public in time for FMBC to purchase a tower designed for the type of short guying that would allow replacement of the WINK-TV tower adjacent to its original site. To make the newly-purchased tower fit on the WINK-TV tower property without impacting roadway expansion plans, the tower had to be relocated approximately 170 feet East of its original site. This relocation triggered additional significant regulatory requirements which, despite diligent efforts, FMBC has only recently fulfilled.

The public interest benefit of tolling WINK-TV's construction permit is substantial. In return for this delay, WINK-TV, its advertisers and viewers will avoid the large cost and massive disruption of service that would otherwise result from reconstruction of a multi-station television tower destroyed to accommodate a state road expansion project, a project whose true extent was only recently revealed to FMBC. Accordingly, FMBC requests waiver of the Commission tolling standards and grant of this tolling request.