

Request for Waiver of Tolling Standard to Extend Construction Permit

On December 15, 2022, West Virginia Educational Broadcasting Authority (“WVEBA”), licensee of low-power television translator station W41DK-D, Keyser, West Virginia (“W41DK,” Facility ID No. 167356), filed a request for waiver (the “Waiver Request,” LMS File No. 0000205618) of the Federal Communications Commission’s (“FCC” or “Commission”) tolling standard to extend W41DK’s outstanding construction permit (“LMS File No. 0000035614, the “Channel 16 Displacement CP”) through February 13, 2023. WVEBA hereby files this amendment to request a further 60-day extension of the Channel 16 Displacement CP through **April 14, 2023** to account for further delays that have occurred beyond its control, which are described in further detail below.

I. Legal Authority

A station that requires additional time to complete construction beyond its initial construction permit 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.¹ 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.² As explained below, such special, rare, and exceptional circumstances are present in the case of W41DK, and grant of the instant request will serve the public interest.

II. Background

W41DK is affiliated with the PBS Television Network and is licensed to WVEBA, a public benefit corporation established by the State of West Virginia (the “State”) to provide non-commercial educational radio and television broadcasting services to residents of West Virginia.³ W41DK operates as part of the WVEBA television network, which includes full-power television stations WSWP-TV, WVPB-TV, and WNPB-TV (collectively referred to herein as the “Full-Power Stations”), as well as six other television translator stations, including W41DK. In addition, WVEBA holds licenses for twelve full-power non-commercial educational radio stations and associated FM translator and FM booster stations.

In 2017, WVEBA learned that it would be required to transition the three Full-Power Stations to new channels as part of the repacking process, in addition to five of its TV translator stations that were displaced as a result of the incentive auction, including W41DK (these stations collectively referred to herein as the “Displaced Translator Stations,” and together with the Full-Power Stations, the “Stations”). Thus, over the last several years, WVEBA has been tasked with balancing the transition of three full-power television stations and simultaneously addressing the

¹ 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, ¶ 42 (1999)).

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

³ See W. Va. Code § 10-5-1.

need to find displacement channels for five translator stations, all while continuing to manage the day-to-day operations of its television and radio network.

As the Commission is already aware, WVEBA is a state-funded governmental entity with limited resources, and is required to comply with the State's laws and procedures regarding the procurement of goods and services.⁴ 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.⁵ Under rules established by the State of West Virginia Purchasing Division, WVEBA could not start the lengthy procurement process for the Stations until it had adequate funds on hand to pay the winning vendor.⁶ 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 the Stations, a delay over which WVEBA had no control.⁷

When the funding for the post-auction transition for the Stations was finally made available, WVEBA was necessarily forced to first prioritize construction on the three Full-Power Stations, all of which had earlier construction deadlines, before it could initiate work on the Displaced Translator Stations. WVEBA started with WNPB-TV, which was assigned to transition to its post-auction channel at the end of Phase 4 on August 2, 2019. With a staff of only three engineers for the entire WVEBA television and radio network, WVEBA simply did not have the resources to initiate the complicated State procurement process for the equipment required for the two other full-power stations until such time as the WNPB-TV facility was fully constructed – much less to begin that process for the five Displaced Translator Stations.⁸ As a result, construction on W41DK and the other Displaced Translator Stations was delayed from the start.

⁴ See W. Va. Code § 5A-1-10 (2019) (requiring that all spending units use competitive bidding process to purchase commodities wherever possible).

⁵ See W. Va. Code § 5A-3-11.

⁶ 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).

⁷ 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.

⁸ 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 was 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.

This initial setback was compounded by additional delays beyond WVEBA's control that arose during the construction process for the three Full-Power Stations, which, consequently, delayed WVEBA's ability to begin work on W41DK. As an initial matter, 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 installation efforts more than once. Despite these challenges, WVEBA successfully completed construction of WNPB-TV's post-auction facility in February 2020.⁹

Once construction of the WNPB-TV post-auction facility was completed, WVEBA turned its focus to completing the post-auction facilities for its two other Full-Power Stations – WVPB and WSWP-TV – both of which were scheduled to transition in Phase 10. To this end, WVEBA had to work with the State procurement office on requisition requests that met the office's requirements for competitive bidding and complete the bidding processes required to obtain the equipment needed to complete construction on these stations – a process that, in some instances, took the procurement office much longer than WVEBA expected.¹⁰ Even once procurement was complete, WVEBA encountered further delays beyond its control, including delayed equipment deliveries and setbacks due to severe winter weather. For instance, GatesAir ("Gates"), the vendor from whom WVEBA purchased WSWP's channel 8 transmitter, initially told WVEBA that the 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 it to WVEBA until early October 2020.

Similarly, although WVEBA had been working diligently to complete construction on WVPB's post auction facility, it was significantly delayed by the onset of three significant winter weather events, including a snowstorm in mid-February 2021, an ice storm just a few days later, and a rain storm thereafter that flooded the roads leading to the site and temporarily rendered it inaccessible to the crew. Construction on the Full-Power Stations was further complicated due to the COVID-19 pandemic, which made it more difficult to secure the work crews needed to complete installation and construction. As a result of these delays, WVEBA ultimately did not complete construction on the last of its three Full-Power Stations until July 15, 2021, and, consequently, could not begin work on the Displaced Translator Stations until summer 2021.¹¹

III. Status of Construction on W41DK

W41DK historically operated on channel 41, which was reallocated as part of the incentive auction. On September 27, 2017, T-Mobile notified WVEBA that it intended to commence operations on its 600 MHz spectrum, and that W41DK would likely cause harmful interference to T-Mobile's operations. As a result, WVEBA submitted an application on November 27, 2017 for authority to construct displacement facilities for the Station on channel 16.¹² The FCC granted this application on July 6, 2018 and specified a three-year period for

⁹ See WNPB-TV License to Cover (LMS File No. 0000106559).

¹⁰ For a full account of the delays encountered by WVEBA in completing the procurement process for WSWP-TV, please see LMS File No. 000151301.

¹¹ See WSWP-TV License to Cover (LMS File No. 0000152886).

¹² See Channel 16 Displacement CP (LMS File No. 0000035614).

W41DK to construct the channel 16 facilities. Concurrent with the application for the Channel 16 Displacement CP, WVEBA also filed a request for an engineering STA that would allow it to operate on channel 16 using its licensed equipment pending completion of construction of the channel 16 facilities. The engineering STA was granted on December 5, 2017, and was most recently extended until December 15, 2022.¹³ WVEBA is filing an application to extend the engineering STA concurrently with this request.

Since completing construction on the three Full-Power Stations, WVEBA has put forth its best efforts to complete work on the Displaced Translator Stations, including W41DK, but has encountered a number of unforeseen circumstances that delayed construction. These circumstances, which are described and documented more fully in WVEBA's prior filings, included massive staff turnover, including the loss of key engineering staff, and several emergency incidents that temporarily diverted WVEBA's engineering resources away from its construction projects.¹⁴

Despite these unforeseen delays, WVEBA has made significant progress toward completing work on all five of its Displaced Translator Stations. In an effort to use its resources most efficiently, WVEBA decided to prioritize construction on the two translator stations that were closest to completion: W34FE-D, Facility ID No. 167359 ("Parkersburg"); and W08EE-D, Facility ID No. 167357 ("Martinsburg"). As a result of these efforts, WVEBA was able to complete construction on its Parkersburg station on September 19, 2022,¹⁵ and completed construction on its Martinsburg station on November 17, 2022.¹⁶ WVEBA also recently completed construction on a third station, W23DR-D, Facility ID No. 167358 ("Romney"), for which it filed a license to cover on January 26, 2023.¹⁷ As a result of this progress, only W41DK and one other Displaced Translator Station, W30CO-D, Facility ID No. 167354 ("Wheeling"), remain under construction at this point.

With regard to W41DK specifically, WVEBA is close to completing construction. As described in WVEBA's last request to extend the Channel 16 CP, WVEBA shares the tower from which W41DK operates with AT&T. AT&T performed a structural analysis of the site in 2018, the results of which it provided to WVEBA in October 2021. Unfortunately, this structural analysis revealed a number of technical issues that led to a failing result. After obtaining additional documentation from AT&T in early 2022, WVEBA determined that these issues could be remediated, and, in July 2022, WVEBA initiated a new structural analysis to determine whether the tower was now in suitable shape for construction to be completed. In order to complete this structural analysis, WVEBA requested additional documentation from AT&T regarding welding work AT&T had done on the tower. However, AT&T did not respond to these requests, which delayed WVEBA's ability to move forward with the structural analysis.

To work around this issue, WVEBA has opted to conduct an independent inspection of the tower welds for purposes of completing the structural analysis. WVEBA had initially hoped

¹³ See LMS File No. 0000130385, as extended by LMS File No. 0000197687.

¹⁴ See, e.g., LMS File No. 0000197690.

¹⁵ See LMS File No. 0000201163.

¹⁶ See LMS File No. 0000204148.

¹⁷ See LMS File No. 0000208185.

to conduct this inspection in early January 2023, but encountered several unforeseen circumstances that created further delays. Specifically, WVEBA unexpectedly lost a key member of its finance department, which temporarily stalled WVEBA's ability to get payments out to its contractors, and, in turn, delayed WVEBA's ability to schedule a tower specialist to come and conduct the necessary inspection.¹⁸ Once WVEBA was finally able to make arrangements for the tower inspection, it encountered additional delays due to winter weather, which rendered the transmitter site inaccessible for much of January and early February, and the fact that the tower inspector is currently running around three weeks behind schedule, with no suitable alternative provider available on a shorter timeframe.¹⁹ Assuming that the weather cooperates, WVEBA is currently on track to have the inspector visit the transmitter site this week (the week of February 13, 2023). Provided that the inspection reveals no issues, WVEBA expects that the inspector will be able to certify the tower welds, which is the final step needed to complete the structural analysis.

Once the structural analysis has been completed with a passing result, WVEBA will then be in a position to schedule a work crew to complete the installation, as all of the equipment necessary to complete the Channel 16 facilities has now been delivered.²⁰ As the Commission is already aware, WVEBA's tower sites, including the one used for W41DK, are located in mountainous areas that are prone to ice and other inclement weather during the winter months. These conditions often make it treacherous for work crews to ascend towers and install equipment during the winter months, and have delayed other construction efforts in the past. Accordingly, out of an abundance of caution, WVEBA is requesting that the Channel 16 CP be extended for an additional 60 days to account for possible weather-related delays that may occur once the site is ready for installation.

IV. Grant of this Request Will Serve the Public Interest

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 channel 16 facilities for W41DK is warranted. Grant of this request to extend the Channel 16 Displacement CP to April 14, 2023 will not harm the public interest because W41DK has ceased broadcasts on channel 41, and is presently serving its viewers on channel 16 using its licensed equipment. Moreover, grant of this request will affirmatively advance the public interest because it will facilitate WVEBA serving viewers with important non-commercial educational programming in the future using its soon-to-be constructed channel 16 facilities.

¹⁸ Documentation confirming the departure of WVEBA's finance staff is attached hereto as **Exhibit A**.

¹⁹ Documentation confirming that the tower inspector is currently running behind schedule is attached hereto as **Exhibit B**.

²⁰ Correspondence confirming that all equipment has been delivered is attached hereto as **Exhibit C**.

Exhibit A

Documentation Confirming the Departure of WVEBA's Finance Staff

Archived: Monday, February 13, 2023 4:19:27 PM

From: [Hiner, Virginia](#)

Mail received time: Mon, 13 Feb 2023 16:15:37

Sent: Mon, 13 Feb 2023 16:15:36

To: [Alex, Virginia](#)

Subject: Fwd: business office

Importance: Normal

Sensitivity: None

Begin forwarded message:

From: Tyler Garner <tgarner@wvpublic.org>
Date: February 13, 2023 at 4:02:32 PM EST
To: "Hiner, Virginia" <vhiner@akingump.com>
Cc: Dale Malcomb <dmalcomb@wvpublic.org>
Subject: FW: business office



****EXTERNAL Email****

Tyler Garner
Director of Engineering and IT
West Virginia Public Broadcasting

From: Tammy Treadway <ttreadway@wvpublic.org>
Sent: Monday, February 13, 2023 3:55 PM
To: Tyler Garner <tgarner@wvpublic.org>
Subject: business office

Steven Grindstaff was our accountant responsible for paying invoices through WVOASIS, the state's computer system for payments. It is a very complicated process and different types of invoices require different steps and procedures. Steven resigned and his last day was October 14th. We hired a replacement that started in mid November, however, training has been going very slow which has also affected the productivity of the CFO and other staff member who have been trying to train her. We have gotten behind on many tasks including paying invoices.

Tammy Treadway
Chief Financial Officer
West Virginia Public Broadcasting
ttreadway@wvpublic.org
304-254-7842

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Exhibit B

Documentation Confirming That Tower Inspector is Currently Behind Schedule

Hiner, Virginia

From: Tyler Garner <tgarner@wvpublic.org>
Sent: Monday, February 13, 2023 9:48 AM
To: Hiner, Virginia
Subject: FW: Keyser Tower

****EXTERNAL Email****

Shows delay on scheduling and weathers delay.

Tyler Garner
Director of Engineering and IT
West Virginia Public Broadcasting

From: Arthur Austin <aaustin@wvpublic.org>
Sent: Wednesday, January 25, 2023 2:57 PM
To: Todd Hetrick <toddhetrick@pillarinnovations.com>; Tyler Garner <tgarner@wvpublic.org>
Cc: Brian Reese <breesee@reasetowerservices.com>; Brian Crawford <briancrawford@pillarinnovations.com>; Scott Crawford <scottcrawford@pillarinnovations.com>
Subject: Re: Keyser Tower

Todd,
Class two.

Get [Outlook for iOS](#)

From: Todd Hetrick <toddhetrick@pillarinnovations.com>
Sent: Wednesday, January 25, 2023 1:37:48 PM
To: Tyler Garner <tgarner@wvpublic.org>; Arthur Austin <aaustin@wvpublic.org>
Cc: Brian Reese <breesee@reasetowerservices.com>; Brian Crawford <briancrawford@pillarinnovations.com>; Scott Crawford <scottcrawford@pillarinnovations.com>
Subject: Keyser Tower

Tyler/ Art – Talking with Brian Reese in regards to the Keyser mapping and engineering project. In his setup/ prep – he is looking to see what Class tower you guys want this ran as. Class II or Class III.

As far as his schedule – he said they are 3-4 weeks out with getting a crew in to do the mapping – coupled with the weather – that may all be a huge variable.

If you can let us know on the class – that would be great.

Any questions please let us know. As we get a better schedule together we'll be sure to let you know.

Thank You

Todd Hetrick

Department Manager – Wireless Services

24 HR Service Line 855-257-1116

Pillar Innovations, LLC

104 Corporate Drive - Morgantown, WV 26501

P - 304.983.8900 x2425 | **F** - 304.983.8905 | **C** - 301.616.6344

www.pillarinnovations.com

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Exhibit C

Correspondence Confirming All Equipment Has Been Delivered

Hiner, Virginia

From: Tyler Garner <tgarner@wvpublic.org>
Sent: Thursday, December 15, 2022 11:20 AM
To: Hiner, Virginia
Subject: Equipment, Keyser, Romney

****EXTERNAL Email****

All the transmitters are at their respective transmitter sites. Romneys antenna is at the transmitter site for install on 12/16/22. Keyser and Wheeling antennas are ready to go at the staging area at Pillar to be brought to their sites on their install days.

On Saturday 12/17 Reese Tower Services will conduct their structural analysis on the Keyser site to either certify the welds or add certified clamps to the tower to allow us to pass the structural analysis. If we can pass the structural with certifying the welds or adding clamps, AT&T should not have to remove their antennas for us to replace our antenna.

Paul Frampton is the attorney for South Branch Inn and has been working with the land owner at Romney. He has given us permission to move forward with the install on the tower as we rework our lease on that site. We are expecting to finalize a lease shortly.

Tyler Garner
Director of Engineering and IT
West Virginia Public Broadcasting
tgarner@wvpublic.org
Office: (304) 556-4914
Cell: (304) 941-9866

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