

**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](#), and subsequently granted a tolling waiver in LMS File No. [0000116241](#) (“Initial Tolling Waiver”) such that the repack CP is now scheduled to expire January 11, 2021. To be clear, the reasons for those extensions were for causes beyond UNC-TV’s control, and WUND-TV has been operating on its post-transition channel since the Phase 7 deadline using an interim facility. That interim facility is the licensed auxiliary facility for WUND-TV (LMS File No. [0000098257](#)).

As set forth in WUND-TV’s third quarter 2020 Transition Plan Progress Report (filed October 6, 2020, in LMS File No. [0000124033](#)), the principal work remaining for WUND-TV’s repack project relates to the following:

The tower services contractor, GTI-America has mobilized to the site and begun working on the main antenna system installation. The principal remaining tasks include (a) the removal of the existing main antenna (which cannot be retuned to WUND-TV’s post-transition channel) and (b) the installation of the permanent post-transition main antenna in the same location.

Fast-forward nearly three months (since the filing of the WUND-TV third quarter 2020 Transition Plan Progress Report), and we see that—as expected—significant progress has been made toward completion of the repack project. This includes the removal of the existing main antenna and the installation of the permanent post-transition main antenna. Unfortunately, and much to the chagrin of UNC-TV, in late November 2020 when system testing began on the newly installed post-transition main antenna system, it failed to meet performance specifications. Further testing revealed a problem with the newly installed antenna. Since that time—which was three or so weeks prior to the filing of this second tolling waiver request—the antenna manufacturer, Radio Frequency Systems (“RFS”), has had its RF engineers reviewing the test data to determine the best course of action that needs to be taken to most effectively correct the problem. As of this filing, the scope of work remains undetermined as well as the amount of time that will be required: On the one hand, there is a possibility that the antenna problem could be corrected with the final post-transition antenna still on top of the tower at over 1600 feet off the ground (requiring a specialized tall tower crew’s services); on the other hand, there is also the possibility that the antenna will need to be removed from the tower and returned to RFS’s Connecticut manufacturing facility for repair, which would obviously take more time and rescheduling of tower crew services to even later.

As of this filing, UNC-TV believes that repairs to the WUND-TV main antenna will not be completed prior to the WUND-TV main facility extended construction deadline of January 11,

2021.¹ For that reason, UNC-TV believes that an additional 120 days of time (i.e., until May 11, 2021) to extend the station's repack CP would be appropriate and would build in sufficient "cushion" to handle any additional issues that might arise and cause further unscheduled delays. **To be clear, the circumstances behind the latest delay in the installation of the final main antenna are due to a manufacturing problem with the new main antenna, which has already been installed. The ability to address this situation has been further complicated by the COVID-19 pandemic; these circumstances are clearly beyond the control of the licensee.** In other words, the facts show (and have shown in prior filings) that this isn't a situation where UNC-TV is purposefully delaying the final construction of WUND-TV's final post-transition construction; to the contrary, UNC-TV would prefer to already be done with this project but has been hamstrung by multiple factors and schedules beyond its control.²

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.³ All subsequent requests for additional time to construct are subject to the Commission's tolling provisions of Section 73.3598(b) of the Rules.⁴ 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."⁵

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.⁶ 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

¹ UNC-TV suspects that it is probably as frustrated as the Commission Staff is about this state of affairs, which has been beyond the control of the licensee from the start!

² We respectfully remind the FCC Staff to remember, too, that because UNC-TV is a government agency, it can't simply pivot to find new or more timely contractors without complying with certain mandatory state law procurement requirements; finding substitute vendors who could provide speedier service would require input from multiple other North Carolina state agencies as described in WUND-TV's previously-filed Transition Plan Progress Reports.

³ See 47 C.F.R. § 73.3700(b)(5).

⁴ See 47 C.F.R. § 73.3700(b)(5)(i) (citing 47 C.F.R. § 73.3598(b)).

⁵ *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).

⁶ See *id.*

exceptional circumstances” prevented construction by the station’s construction permit expiration date.⁷

B. Waiver Standard and Public Interest Considerations

Generally, the FCC may grant a waiver for “good cause shown.”⁸ A waiver is appropriate where the particular facts make strict compliance inconsistent with the public interest.⁹ 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.¹⁰ Such a waiver is appropriate if circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.¹¹

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.
- In addition to the circumstances relating to construction of the WUND-TV post-transition facility previously disclosed to the Commission in prior filings, UNC-TV is now dealing with a new issue, namely a post-transition antenna fabrication / performance issue that is entirely beyond the control of the applicant.
- As discussed previously, the COVID-19 pandemic and its impact on travel, business

⁷ 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”).

⁸ 47 C.F.R. § 1.3.

⁹ See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁰ 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.

¹¹ See *Northeast Cellular*, 897 F.2d at 1166.

operations, international policy, and health and safety measures have hindered efforts to timely complete the main antenna installation. While those circumstances aren't directly relevant to the current request, we want to remind the Commission of the reasons for the prior extensions of the CP expiration date.

- 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 120 days (i.e., until May 11, 2021) will not negatively affect the nationwide transition. Accordingly, grant of this request is in the public interest.

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