

WXCW Tolling Waiver Request

The chief impediment to completion of WXCW's post-auction facilities has been a tower design problem adversely affecting construction of the WINK-TV replacement tower. The WINK-TV replacement tower is the tower on which WXCW's post-auction facilities will be constructed.

In its most recent tolling application, Fort Myers Broadcasting Company (FMBC) gave the following description of the factors impeding construction of the WINK-TV replacement tower:

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 can accommodate 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 has been informed that moving the new tower at this location (a) requires a new tower registration, instead of a modification of tower registration; (b) requires a new FAA notification; (c) requires environmental evaluation; and (d) requires a modification of construction permit for each and every station that intends to 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 be completed until a replacement biologist was hired.

By mid-February, 2021, the Commission had a wildlife biologist reviewing the WINK-TV tower registration application. Today that environmental review of the new tower proposal is almost complete. All that remains in this respect is to respond to the Commission's request to review the local building permit for the new tower.² FMBC had been under the impression that it could build WINK-TV's new tower using its original local building permit and correcting the tower coordinates and guy paths in its "as built" filings with the local authorities. However, the Commission's need to compare local building permits with the tower registration proposal requires amendment of the local building permit to conform to the tower registration application.

After the Commission completes its tower registration review, FMBC needs to file an amendment to the WINK-TV post-auction construction permit to specify the new tower location and the new tower's antenna structure registration number.³ Upon grant of all necessary construction permit modification applications, FMBC will be in a position to construct the new WINK-TV tower along with the final post-auction WINK-TV facilities.

Construction under the WXCW construction permit of Sun Broadcasting Inc. ("Sun") has progressed to the same extent as construction under the WINK-TV construction permit. Sun is informed that FMBC's new tower is fabricated and ready to ship. Sun's new antenna and transmission line are also manufactured, stored in a warehouse and ready for shipment. The transmitter for WXCW's post-auction facility is already installed at the transmitter site. Finally, the WXCW construction permit needs to be modified to the new tower site after grant of the antenna structure registration.

Sun submits that the public interest benefit of waiving the FCC's tolling criteria and extending WXCW's construction permit is substantial. In return for this delay, WXCW, 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 and Sun. Accordingly Sun requests waiver of FCC tolling criteria and grant of this tolling request.

² *The Commission requested the local building permit on March 18, 2021. FMBC's contractors are in the process of preparing an amendment to the local building permit. FMBC hopes to file this amendment with local authorities this week. FMBC will supply the amended building permit to the Commission as quickly as the amendment can be granted.*

³ *FMBC is under the impression that this modification application cannot be granted without an antenna structure registration number, which requires grant of the tower registration application. The construction permits for the other broadcast stations to be located on the tower will also need to be modified.*