

Gray Television Licensee, LLC (“Gray”), licensee of full power television WHSV-TV and permittee of digital replacement translator station WHSV-TV, Broadway, VA (FID 4688) (the “Station”), requests a waiver of the Commission’s tolling rules, to allow for an extension of the Station’s digital replacement translator construction permit (File No. 71679) (the “CP”) or tolling of the CP to account for the delays in obtaining zoning and quiet zone approval.

On August 31, 2018, Gray submitted an application for a digital-to-digital replacement translator at Great North Mountain (the “Great North Mountain DRT”) to provide service to Broadway, which lost over-the-air service due to the necessary relocation of WHSV-TV. File No. 54797. On April 16, 2019, Gray filed an application to modify Great North Mountain DRT to specify an alternate directional antenna and associated pattern, which the FCC granted. However, on June 15, 2021, the Commission issued a Notice of Proposed Rulemaking to substitute WVPT-TV’s channel 15 for channel 11 at Staunton, Virginia.<sup>1</sup> As a result, the CP will be displaced and Gray will need to modify its transmitter to operate on Channel 25 instead of Channel 15.

Before commencing service on Channel 25, Gray needs: (1) a Forest Service Permit/lease; (2) a notice of non-objection from the National Radio Astronomy Observatory (“NRAO”); and (3) permits from the Shenandoah County Zoning Board.

- Gray recently obtained the Forest Service Permit/lease.
- Gray submitted its antenna pattern to NRAO on July 26, 2021 and expects to receive a notice of non-objection shortly.
- Gray submitted its application for a Special Use Permit on September 10, 2021 immediately after receiving the Forest Service lease. The Planning Commission met on September 23, 2021. However, Gray is awaiting Stormwater Management drawings which are necessary to complete its submission to Shenandoah County. Gray currently expects to receive approval from Shenandoah County in early December.

All of the equipment needed for the Great North Mountain DRT has been ordered except for the antenna, which Gray has not ordered while it awaits approval from the NRAO of the proposed antenna pattern. The transmitter is ready to be shipped, the STL equipment will be shipped in two weeks, and the antennas will be shipped at the end of December (assuming the NRAO provides its non-objection in a timely manner). Because Gray will not have the necessary approvals and antennas until December, the tower work almost certainly will be delayed due to winter weather.

The FCC’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.<sup>2</sup> 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

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<sup>1</sup> See *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Staunton, Virginia)*, Notice of Proposed Rulemaking, MB Dkt. No. 21-248, RM-11910, DA-21-694 (MB Jun. 15, 2021).

<sup>2</sup> 47 C.F.R. § 73.3598(b).

Station's construction permit where the station can demonstrate that "rare and exceptional circumstances" prevented construction.<sup>3</sup>

Here, a waiver or tolling is appropriate because the primary delay in completing construction of the Channel 25 facility is due both to the recent need to change channels and the ongoing review by the NRAO and Shenandoah County. Although Gray expects the NRAO review to be completed shortly, that is Gray must also complete the local zoning review process, which will push right up against the February 14, 2022 CP deadline. Accordingly, the Commission should toll the CP from the date this request was submitted until the zoning process is complete. Alternatively, a waiver of the tolling standard is appropriate because the combination of the extensive local and federal permitting and coordination requirements for this site and the WVPT-TV Petition for Rulemaking created "rare and exceptional circumstances" beyond Gray's control that prevented construction. Gray had identified channel 15 as an available channel to serve Broadway, but the WVPT petition, if granted, is mutually exclusive with the CP. It would not have made sense for Gray to continue efforts to construct the facilities specified in the CP while the rulemaking to reallocate WVPT-TV's channel is pending. Rather, Gray identified another available channel and is taking steps to construct the digital replacement translator on that channel. The Commission can provide Gray with an additional 180 days to complete construction of its channel 25 facilities – which provide sufficient time to retune the transmitter and obtain all the necessary permits.

A waiver of tolling under these circumstances is consistent with the Commission's approach to other construction related delays as part of the post-Incentive Auction transition. 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."<sup>4</sup> In justifying the provision of a one-time, 180-day extension, the FCC explained that "[g]iven the variety of challenges that stations may face in connection with the post-auction transition, stations that are able to demonstrate that they have experienced uncontrollable and unexpected delays in construction should be allowed a single extension of up to six months before being subject to our stricter tolling provisions."<sup>5</sup> Although the Commission was specifically addressing full power and Class A stations, here the Great North Mountain DRT is being displaced by a full power station that still has not completed its post-auction transition.

For the reasons stated above, the Commission should either: (1) waive the tolling standard and provide Gray with an additional 180 days to complete construction of the Great North Mountain DRT or (2) toll the CP until the zoning process is complete. Either approach will allow Gray to quickly restore over-the-air service to viewers who lost access to WSHV-TV's signal as a result of the repack.

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<sup>3</sup> 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").

<sup>4</sup> *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).

<sup>5</sup> *Incentive Auction Order* ¶ 583.