

## Justification for Further Waiver of Tolling

VPM Media Corporation (“VPM” or “Licensee”), licensee of television station WVPT(TV), Staunton, VA (Fac. ID 60111) (the “Station”) hereby submits this request pursuant to Section 73.3598(b) of the Commission’s Rules<sup>1</sup> for a waiver of tolling of its post-Incentive Auction construction permit, File No. 0000028448 (the “CP”), for a period of six months to allow time for the FCC to process the Licensee’s pending Petition for Rulemaking to relocate the Station to UHF channel 15 and for the Licensee to construct the post-Incentive Auction facility.<sup>2</sup>

### I. Background

In the *Closing and Channel Reassignment Public Notice*, the Commission assigned the Station to transition from RF channel 11 to RF channel 12 in Phase 10 of the post-Incentive Auction transition. Licensee initially planned to retune its existing Axcera transmitters from channel 11 to channel 12. After Licensee placed its orders, however, Axcera declared bankruptcy. Axcera initially indicated that it would continue to support the rechanneling project. However, on Oct 7, 2019, Axcera advised Licensee that the transmitters and exciters could not support rechanneling and that the Licensee would need to purchase new equipment. Licensee explored the possibility of using new transmitters with its existing antenna, but on Feb 24, 2020, Mega Industries (current owner of the MCI brand) advised Licensee that it no longer supports the existing antenna (originally purchased in 2001) and cannot model the pattern using a new or retuned transmitter. As a result, Licensee will need to replace both the transmitter and antenna at its Elliott Knob site.

In February 2020, the manufacturer of the existing tower at Elliott Knob, Valmont, performed a structural analysis to determine whether the tower could support the replacement antenna. This analysis was conducted on an expedited basis in an attempt to obtain consideration from the local planning board in March 2020. However, after reviewing both the original drawings from MCI and the proposed specifications from Dielectric, Valmont determined that the existing tower cannot support the replacement antenna and that a replacement would be

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<sup>1</sup> 47 C.F.R. § 73.3598(b).

<sup>2</sup> To the extent necessary, Licensees request a waiver of the deadline for filing a request to tolling. The Commission’s Rules specify that requests for additional time to complete construction should be filed not less than ninety (90) days prior to the CP expiration date. 47 CFR § 73.3700(b)(5)(iv). The FCC may grant a waiver for good cause shown. The agency typically grants a waiver where the particular facts make strict compliance inconsistent with the public interest. *N.E. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); 47 CFR § 1.3. Waiver of the deadline for requesting additional time is in the public interest as it will allow the Commission to grant the requested Waiver of Tolling, which will allow Station to continue its efforts to complete construction of the permanent post-auction facilities that it will use to serve the public. Therefore, good cause exists, and this waiver should be granted.

required. Although the initial structural analysis was performed at Licensee's request, the tower site owner has assumed responsibility for all subsequent analyses.

In the meantime, on June 30, 2020, the Station suspended operations on RF channel 11 and began operating on RF channel 12 on an interim basis using a new transmitter and its existing antenna. Licensee received several complaints from viewers about a loss of reception due to the unpredictable changes in pattern using the existing antenna, confirming that the interim facilities are not suitable for use on a permanent basis.

On January 8, 2021, the Commission granted Licensee's request to waive the Commission's tolling provisions and toll the CP through June 28, 2021, in part, to allow VPM to analyze a potential move of the Station to channel 15. Thereafter, VPM completed its analysis, worked with its vendors and its consulting engineer to develop the technical proposal, and submitted a petition for rulemaking, File No. 0000149712. The Commission issued a Notice of Proposed Rulemaking on June 15, 2021, in which it proposed to substitute the Station's channel 15 for channel 11.<sup>3</sup> On June 16, 2021, the FCC granted the Licensee's request for further waiver of tolling and tolled the CP through December 27, 2021.

Before the Station can complete construction of its channel 15 facilities, however: (1) it must complete the coordination process with the nearby Green Bank Radio Observatory ("Green Bank") and the Sugar Grove Research Station ("Sugar Grove"); (2) the FCC must issue an order substituting channel \*15 for channel \*11 at Staunton, Virginia; (3) the Station must obtain a construction permit for the channel 15 facility; and (4) VPM must construct the channel 15 facility.

The coordination process has proven challenging and time consuming. The Licensee began the coordination process on July 27, 2021. On July 28, 2021, the NRQZ Administrator responded with an objection on behalf of Green Bank and Sugar Grove. The Licensee has worked diligently to address the Green Bank and Sugar Grove concerns, but those efforts were stalled by the ransomware attack at Dielectric (which delayed the preparation of new antenna designs) and by the delays inherent in the Green Bank and Sugar Grove review process. The Licensee has been through multiple rounds of revisions. Most recently, on December 2, 2021, the Licensee received additional comments from Sugar Grove, which the Licensee is working expeditiously to understand and address.

Despite these challenges, moving to channel 15 remains preferable for a number of reasons. First, UHF equipment is more readily available than VHF equipment. This is particularly relevant in light of the current supply chain issues facing the broadcast industry. Second, because UHF

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<sup>3</sup> See *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Staunton, Virginia)*, DA 21-695, MB Docket No. 21-248, RM-11910 (June 15, 2021).

antennas are lighter than VHF antennas, replacing the antenna at Elliott Knob with a UHF antenna would reduce the total weight on the tower. Since the FCC granted VPT's last request for a waiver of tolling, the Licensee received the results of study confirming that it can install the channel 15 antenna on WVPT's existing DTS-1 tower (whereas remaining on Channel 12 would have required the installation of a new tower). Accordingly, moving to channel 15 will be more cost effective and ultimately expedite a difficult repack process.

## **II. The Commission Should Waive Tolling and Extend the DTS CP**

Under the present circumstances, a waiver of tolling and extension of the CP is justified. 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> All subsequent requests for additional time to construct are subject to the Commission's tolling provisions of Section 73.3598(b) of the Rules.<sup>5</sup>

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.<sup>6</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 Station's construction permit where the station can demonstrate that "rare and exceptional circumstances" prevented construction.<sup>7</sup>

Tolling is appropriate here because Licensee's inability to complete construction of its post-Incentive Auction facilities is due to rare and exceptional circumstances beyond its control and pending administrative review. Since the Commission last granted tolling in June 2021, the Licensee has been engaged in ongoing coordination with Green Bank and Sugar Grove, which has required multiple revisions to the DTS 1 and DTS 3 antenna patterns. On December 2, 2021, Sugar Grove appears to have raised new concerns that it did not address in prior rounds of

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<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> 47 C.F.R. § 73.3598(b).

<sup>6</sup> *Id.*

<sup>7</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.").

coordination. Licensee also received the results of a study confirming that its existing DTS 1 tower can accommodate the UHF antenna (in contrast to a VHF antenna that likely would have required reconstructing the tower).

The Licensee hopes to complete the coordination process in the near future so it can obtain the necessary authorizations from the Commission and construct the channel 15 facilities in Spring 2022.

In the Incentive Auction Report and Order, the FCC committed to “work diligently with stations to ensure that service disruptions are minimized to the fullest extent possible through the use of a variety of mechanisms.”<sup>8</sup> Providing Licensee with additional time to complete construction will allow the Station to continue to serve viewers without any competing harm.

In short, the public interest will be served by grant of a waiver and tolling of WVPT’s construction permit.

### **III. Conclusion**

For the foregoing reasons, the Commission should grant Licensee’s request for waiver of the Commission’s tolling provisions and toll WPVT’s CP for an additional six months.

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<sup>8</sup> See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567 §§ 569-70 (2014).