

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 a further 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 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.

Since the Commission last granted a waiver of tolling, Gray has been working with its civil engineer to develop a stormwater management plan for submission to Shenandoah County. Gray expects to receive the plan this week. Once that is complete, Gray will need to construct the facility, which entails: (1) digging and laying concrete for the tower base and generator pad; (2) building the tower, (3) installing the generator; (4) installing the building; (5) running electrical service; (6) installing and sweeping the antenna; (7) installing microwave equipment; and (8) installing and testing transmitter. Gray was not able to commence this work until it received the necessary permits and completed its stormwater management plan. Gray anticipates that construction will take approximately 12 weeks.

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 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 was due both to the need to change channels and the ongoing review by the NRAO and Shenandoah County. Now that the review process is complete, Gray is prepared to begin construction as soon as it receives the stormwater management plan.

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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).

<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”).

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 will provide sufficient time to complete construction.

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 waive the tolling standard and provide Gray with an additional 180 days to complete construction of the Great North Mountain DRT.

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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> *Incentive Auction Order* ¶ 583.