

## Request for Tolling of Construction Permit

Lilly Broadcasting, L.L.C. (“Lilly”), holder of the Commission authorization for television translator station W34FR-D (analog station W07BJ), Ithaca, NY (Facility ID 71512) (the “Station”), hereby requests that the Commission waive the provisions of Section 73.3598 of its rules and toll the construction period under the Station’s digital construction permit<sup>1</sup> (the “CP”) until January 11, 2023.

The construction period under the CP is scheduled to expire on July 11, 2022.<sup>2</sup> An application to modify the CP to move the facilities to an available tower site was filed in March 2022,<sup>3</sup> but the processing of that application has been delayed due to the need for international coordination with Canada. While action on the modification application is pending the Station currently is operating with reduced power facilities pursuant to special temporary authority.<sup>4</sup>

Good cause exists to waive the Commission’s tolling requirements in this case due to the rare exceptional circumstances beyond the control of Lilly that have resulted in Lilly’s inability to meet the construction deadline.<sup>5</sup> As acknowledged by the Commission,<sup>6</sup> despite diligent efforts by Lilly to find a new tower site for the Station, a suitable site was not available until December 2021. Lilly filed a modification application to move to that tower but action on the application has been delayed by the need for international coordination, a process clearly outside Lilly’s control. Lilly intends to construct facilities under the CP promptly after such coordination has been completed and the modification application granted.

The Commission will grant a waiver of its rules for good cause.<sup>7</sup> The Commission also is required to take a “hard look” at applications for waiver,<sup>8</sup> and to consider all relevant factors in making its decision.<sup>9</sup> For its part, the Media Bureau has recognized that “long-standing precedent...establishes that unintended consequences of a Rule are a significant factor favoring a Rule waiver.”<sup>10</sup> The intent of the Commission’s

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<sup>1</sup> LMS File No. 0000179437.

<sup>2</sup> See Letter dated May 25, 2022 from Barbara Kreisman, Chief, Video Division, Media Bureau LMS File Nos. 0000179421 and 0000179437 (the “Kreisman Letter”).

<sup>3</sup> LMS File No. 0000187436

<sup>4</sup> LMS File No. 0000189742.

<sup>5</sup> See *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17542 (1999).

<sup>6</sup> See Kreisman Letter at p. 3.

<sup>7</sup> 47 C.F.R. § 1.3. The Media Bureau is authorized to act by delegated authority on waiver requests pursuant to Sections 0.61(h) and 0.283 of the Commission’s rules.

<sup>8</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The court also noted the importance of the waiver process as a “safety valve procedure” in special circumstances. *Id.* at 1157.

<sup>9</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>10</sup> *WRKH(FM), Mobile, Alabama*, 23 FCC Rcd 4526, 4530 (Audio Div. 2008).

construction period rules was to provide limits on the period during which a permittee could hold a permit without constructing, and to thereby prevent the “warehousing of scarce spectrum.”<sup>11</sup>

As explained above, there has been no attempt to warehouse spectrum by failing to build the Station’s displacement facilities. The Station was involuntarily displaced because of the broadcast incentive auction and can no longer operate on its licensed channel. Delays in locating a suitable tower, and in international coordination, have prevented Lilly from completing construction of the Station’s full displacement facilities. In the meantime, Lilly is operating the Station on its displacement channel with reduced power, an undertaking inconsistent with a desire to warehouse spectrum. This case thus presents the prospect of precisely the sort of “unintended consequences” which support a waiver request.

For the above reasons, Lilly urges the Commission to toll the construction period under the Station’s CP until January 11, 2022.

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<sup>11</sup> See *1998 Regulatory Review-Streamlining of Mass Media Applications, Rules and Processes*, Report & Order, 13 FCC Rcd 23056, 23093 (1998).