



Federal Communications Commission
Washington, D.C. 20554

May 22, 2023

Fort Myers DTV, LLC
5244 SW Orchid Bay Drive
Palm City, FL 34990
marksteiner@whdt.net

Re: Requests for Tolling Waiver
WXDT-LP, Naples, FL
WZDT-LP, Naples, FL
Fac ID Nos. 25537 and 25539
LMS File Nos. 0000194814 and
0000194815

Dear Licensee,

This concerns requests for waiver of the Commission's tolling provisions and tolling of construction permit expiration date (Requests), as amended, filed by Fort Meyers DTV, LLC (FMD), licensee of low power television (LPTV) stations WXDT-LP, Naples, Florida (WXDT-LP) and WZDT-LP, Naples, Florida (WZDT-LP) (collectively Stations).¹ For the reasons below, we grant FMD's Requests and toll the expiration date of the construction permits for the Stations through July 1, 2023.

Background. Requests for additional time to construct LPTV facilities are subject to the Commission's tolling provisions of section 73.3598(b) of the Rules.² 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.³ If a station does not qualify for tolling under these criteria, good cause may exist to waive the Commission's tolling provisions and tolling may still be warranted where the licensee can demonstrate that "rare and exceptional circumstances" prevented construction by the station's construction permit expiration date.⁴

Requests. WXDT-LP and WZDT-LP are co-located stations that share transmission facilities, including a shared antenna that operates from a shared tower. WXDT-LP is a licensed LPTV station that previously operated in analog on channel 23. The Station went silent on July 13, 2021, in conjunction with the LPTV digital transition.⁵ The Station was previously granted a digital flash cut construction

¹ FMD is wholly-owned by Guenter Marksteiner, the previous licensee of the Stations. Through a *pro forma* transaction, Marksteiner transferred the Stations to FMD in February 2023. See LMS File Nos. 0000211601.

² See 47 CFR § 73.3598(b).

³ *Id.*

⁴ See 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17542, para. 42 (1999) (*Streamlining MO&O*) (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." The Commission concluded that in such "limited circumstances," it would entertain requests for waiver of its "strict tolling provisions"); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1072 (1972); 47 CFR § 1.3 (waiver for good cause shown).

⁵ See LMS File No. 0000157388.

permit⁶ and, because it was operating in analog at the time, it was given an expiration date of July 13, 2021.⁷ WXDT-LP was granted an extension of its digital construction permit and a tolling waiver and the expiration date was most recently extended to July 11, 2022.⁸ WXDT-LP is currently operating on its digital channel 23 with temporary facilities.⁹

WZDT-LP is a licensed LPTV station that previously operated in analog on channel 39. The Station's analog channel 39 was displaced by the Incentive Auction and repacking process. The Station was granted a construction permit for a digital displacement channel 36¹⁰ and, because the Station was operating in analog at the time, it was given an expiration date of July 13, 2021.¹¹ WZDT-LP was granted an extension of the displacement construction permit and a tolling waiver and the expiration date was extended to July 11, 2022.¹² WZDT-LP is currently operating on its displacement channel 36 with temporary facilities.¹³

Since the grant of their previous tolling waivers, FMD states that its previously documented delays involving delivery of its equipment have been resolved. Further, site access issues that arose following the landfall of Hurricane Ian in September 2022, during the pendency of its Request, have now been addressed and FMD has received approval from its landlord to restart construction.¹⁴ FMD is currently contracted with a tower crew that is scheduled to be on the Stations' tower site to coordinate the arrival and perform the installation of the Stations' antenna and transmission line. FMD has finalized the delivery schedule for the Stations' antenna equipment and now expects it will arrive at its tower site by the end of May 2023. At that point, FMD anticipates that the tower crew will complete installation within approximately two weeks. Accordingly, FMD requests waiver of the Commission's rules and tolling of the construction permit expiration dates for the Stations through July 1, 2023.

Discussion. Upon review of the facts and circumstances presented, we find that sufficient circumstances exist to waive the rules and toll the expiration dates of the Stations' digital construction permits.¹⁵ FMD has demonstrated that he has been diligently making progress towards completion of the Stations' digital facilities but was unable to complete construction due to delays outside of its control, including, equipment delivery delays and site access issues.. Ultimately, we conclude that the public interest will be served by grant of waivers and tolling of the Stations' digital construction permits.

⁶ See LMS File No. 0000152394.

⁷ See 47 CFR § 74.788(a). See also *Media Bureau Reminds Low Power Television and Television Translator Stations of July 13, 2021, Digital Transition Date*, Public Notice, 36 FCC Rcd 4771 (MB 2021).

⁸ See LMS File No. 0000179384.

⁹ See LMS File No. 0000179337.

¹⁰ See LMS File No. 0000054428.

¹¹ See *infra* n. 8.

¹² See LMS File No. 0000179385.

¹³ See LMS File No. 0000179336.

¹⁴ FMD initially filed the instant request for waiver of the tolling rule in July 2022 and sought tolling of the Station's construction permit into September 2022 as the result of equipment delivery delays. However, during the pendency of its request, Hurricane Ian impacted Naples, Florida resulting in additional unexpected delays, including being restricted by the tower owner from accessing the site until it could be fully evaluated for damage and safety.

¹⁵ 47 CFR § 73.3598(b).

We further remind FMD of the deadline for submitting final expense documentation for reimbursement for WZDT-LP is **June 12, 2023**.¹⁶ **We caution WVEBA that we do not anticipate allowing further extensions of WZDT-LP's extended invoice filing deadline. A station's failure to complete any remaining construction in a timely manner and to make final submissions by the assigned invoice filing assignment deadline could preclude that station from receiving full reimbursement.** Unobligated amounts in the Fund must be rescinded to Treasury and the Commission staff (with the support of the Fund Administrator) must have sufficient time to fully process all reimbursement requests and complete close-out procedures prior to July 3, 2023.¹⁷ Thus, we strongly encourage FMD to diligently pursue satisfaction of its current deadline and we encourage FMD to submit eligible invoices, as well as proof of payment of such invoices as detailed in the IDE Grant,¹⁸ as early as possible without waiting for the June 12, 2023, final invoice filing deadline.

The above facts considered, Fort Myers DTV, LLC's requests for waiver of the Commission's tolling provisions **ARE GRANTED**. The construction permits (LMS File Nos. 0000152394, and 0000054428 respectively) for WXDT-LP, Naples, Florida and WZDT-LP, Naples, Florida **ARE TOLLED through July 1, 2023**. Although we anticipate that this will be FMD's last request for tolling waiver, to the extent FMD seeks additional tolling for any station, such a request must include a detailed plan for completing construction and a showing demonstrating that completion of the station's facilities was prevented for either an eligible tolling reason or rare and extraordinary circumstances outside of FMD's control.¹⁹ We will look unfavorably upon any future request that does not include such information.

Sincerely,

/s/

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc (via electronic mail): Lauren Lynch Flick, Esq.

¹⁶ FMD was granted an extension of its September 6, 2023 invoice submission deadline and WZDT-LP's deadline was extended to June 12, 2023. See Letter from Barbara A. Kreisman, Chief, Video Division, FCC Media Bureau, to Fort Myers DTV, LLC (May 22, 2023) (on file at LMS File No. 0000199109); see also *Invoice Filing Deadlines for TV Broadcaster Relocation Fund*, MB Docket No. 16-306 and GN Docket No. 12-268, Public Notice, 35 FCC Rcd 11273, 11277, paras. 10-11 (IATF/MB 2020) (*Invoice Deadline PN*) (setting filing deadlines for submission of repack invoices).

¹⁷ See *Invoice Deadline PN*, 35 FCC Rcd at 11277-78, para 13.

¹⁸ *Supra* note 15.

¹⁹ 47 CFR § 73.3598(b). A station may also seek a waiver of the tolling rule to receive additional time to construct in the case where "rare or exceptional circumstances" prevent construction. See *Streamlining MO&O*, 14 FCC Rcd at 17536, para. 42.