



Federal Communications Commission
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In reply refer to: 1800B3-VM

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In re: W236DS, Juncos, PR
Facility ID No. 203037
File No. BNPFT-20181101AAC

W287DP, Dorado, PR
Facility ID No. 203065
File No. BNPFT-20181101AAD

Request for tolling

Dear Mr. Montero:

On December 21, 2021, you filed a request for tolling of the construction deadline for two FM translator stations, W236DS, Juncos, Puerto Rico and W287DP, Dorado, Puerto Rico, on behalf of Media Power Group, Inc. (MPG).¹ The permits were granted on November 20, 2018 for a three-year term which expired on November 30, 2021. MPG bases the request for tolling on unavailability of the transmitter site that MPG proposed to use in each construction permit, supply chain issues resulting from the COVID-19 pandemic, and repercussions of local hurricane activity over the past several years.² This request is denied.

Section 73.3598 (b) of our rules governs requests for tolling. Pursuant to that section, tolling of the construction period can be granted under the following circumstances not within the control of the permittee: 1) Act of God, defined in terms of natural disasters (e.g., tornado, flood, hurricane, earthquake); 2) Administrative or judicial review of the grant of the permit; 3) Litigation related to a necessary governmental requirement for construction or operation of the station (including zoning); or 4) Failure of a condition precedent on the permit (e.g., requirement of international coordination, or prior channel substitution of another station).³ Requests for tolling are required to be filed within 30 days of the occurrence of the tolling event.⁴

¹ Letter from Francisco R. Montero Esq. to James Bradshaw, Deputy Chief, Audio Division, MB, FCC (Dec. 21, 2021) (Tolling Request). The Tolling Request is styled as an “amendment.” However, we did not receive a previous tolling request to the one filed on December 21, 2021, and consider this to be the first and only request for tolling for these stations.

² Tolling Request at 2-4 and 1.

³ See 47 CFR §73.3598(b); 1998 Biennial Regulatory Review—Streamlining of Mass Media Application Rules and Processes, Report and Order, 13 FCC Rcd 23056 (1998) (*Streamlining R&O*), recon. granted in part and denied in part, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540, para. 39 (1999) (*Streamlining MO&O*).

⁴ 47 CFR § 73.3598(c).

This request for tolling is denied for the following reasons. First, it is untimely filed because the permits had both expired prior to the date MPG filed the Tolling Request.⁵ In addition, the primary reason MPG advances for tolling for each permit is that its respective transmitter site is unavailable. The Junco site is unavailable due to its owner's refusal to grant access, and the inability of MPG to afford the rent. The Dorado site is owned by the city and required an agreement before construction could commence, which has not been finalized. MPG alleges that it could not order equipment prior to securing the sites.⁶ It also claims that hurricane activity in the region has affected its ability to complete construction.

It is long-standing Commission tolling policy that issues related to site choice, including losing or gaining access to one's site, and any local governmental permissions, are within the permittee's control, and are not grounds for tolling of the construction deadline.⁷ The issue regarding supply chain delays does not provide a basis for tolling because the choice to delay ordering the equipment was also within the permittee's control, particularly because it was based on the permittee's belief that its proposed sites would not be available. Regarding the hurricane activity, we find that MPG has failed to show that there was any storm damage that specifically affected its ability to construct. Accordingly, tolling does not apply, and we will consider the filing as a request for a waiver of the tolling rule.

When treated as a waiver request, MPG's request does not establish that a waiver is warranted in this case. The Commission's rules may be waived for good cause shown.⁸ In addition, the *Streamlining MO&O* recognized "rare and exceptional" circumstances beyond a licensee's control not delineated in the tolling provisions. In these very limited circumstances, we will entertain requests for waiver of our strict tolling provisions.⁹ When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.¹⁰ Waiver is appropriate only if both (1) special

⁵ See 47 CFR §§ 73.3598(c) (a permittee must notify the Commission as promptly as possible and, in any event, within 30 days of a tolling event) and 73.3598(e) (construction permit is automatically forfeited upon the expiration date if construction has not been completed and a license application has not been filed).

⁶ We note that the correspondence regarding the transmitter order for W236DS is dated December 17, 2021, but does not state when the order was placed. The invoice submitted in support of the W87DP request shows that the order for that station was placed on December 21, 2021, after its permit had expired. See Tolling Request at Exh. A and C. Exhibit B is undated.

⁷ See *Streamlining R&O* at 23091, para. 86 (permittee may choose a site that does not require zoning approval, but if it does so choose, "a permit would not qualify for tolling on the basis of delays due to pendency of a zoning application before a local zoning board"), *aff'd in relevant part*, *Streamlining MO&O*, at 17539-40, paras. 37-38 (noting that diligent permittees can eliminate or mitigate zoning delays by applying for approval from the pertinent local authorities prior to the issuance of a construction permit); see also *Levine/Schwab Partnership d/b/a Schwab Multimedia LLC*, Memorandum Opinion and Order, DA 22-1, pp. 4-5, paras. 6-8 (Jan. 5, 2022) (site loss, a circumstance which does not qualify for tolling, was the proximate cause of permittee's inability to construct); *Royce Int'l Broad. Co.*, Memorandum Opinion and Order, 23 FCC Rcd 9010, 9016, para. 15 (2008) (site-related difficulties are not part of the tolling criteria); *Letter from Peter H. Doyle, Chief, Audio Division, MB, FCC to Christopher Imlay, Esq., et al.*, 24 FCC Rcd. 11809, 11812, (MB 2009) (site choice, even if flawed, is solely within the control of the permittee and does not provide a basis for tolling).

⁸ 47 CFR § 1.3.

⁹ *Streamlining MO&O* at 17541, para. 42.

¹⁰ See, e.g., *Spirit Radio of North Florida, Inc.*, Letter, 24 FCC Rcd 2958, 2959 (MB 2009); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*") (subsequent history omitted). The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate," *WAIT*

circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.¹¹ As noted, waiver of the three-year construction deadline for site-related construction delays is appropriate only under rare and exceptional circumstances beyond the permittee's control. For example, the Commission has waived the three-year construction deadline following governmental actions that took the land by eminent domain,¹² or highly restricted the periods during which construction could occur to accommodate the breeding and migration of endangered species first discovered at the site during construction.¹³

We find that MPG has failed to show that special circumstances exist here, or that the public interest would be served by a grant of a waiver in this case. Here, the permittee has waited until the permit's expiration to deem its Junco site unavailable and begin a search for alternative sites, and to finalize an agreement to use the Dorado site. In *Streamlining R&O*, the Commission stated that the three-year construction permit term provides sufficient time for issues of site choice to be resolved.¹⁴ This request, which states that the permittee is unable to afford the rent of the property that it chose when it filed the application for construction permit, and is now searching for alternative sites, does not provide grounds for waiver, because site choice is within the permittee's control. The issue of supply chain delays does not provide a basis for waiver because the documentation provided shows that the permittee waited until after each permit's expiration to order the equipment. Finally, MPG has raised the issue of hurricane activity in general terms and has not argued with any specificity as to damage to the permittee's sites or its ability to construct.

Based on the showing in the request, there are no rare and exceptional circumstances here, such as eminent domain taking or the discovery of an endangered species at a proposed construction site. In addition, deviation from the rule would not better serve the public interest because a waiver would undermine the purpose of section 73.3598, which is to prevent radio spectrum from being warehoused based on circumstances within the control of the party that was granted the construction permit. Accordingly, the request fails to meet the legal standard delineated above.

Radio, 418 F.2d at 1157, and must support its waiver request with a compelling showing. *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broad. Sys., Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹¹ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (D.C. Cir.1990)).

¹² See *Rebecca Duke, Esq.*, Letter, 18 FCC Rcd 5034 (MB 2003) (six-month waiver of construction period justified by loss of site due to taking by local authority through eminent domain).

¹³ See *Dorann Bunkin, Esq.*, Letter, 21 FCC Rcd 8671 (MB 2006) (six-month waiver of the construction period granted to accommodate the local requirement that outdoor construction cease for extended periods during the breeding and migration of endangered species).

¹⁴ See *Streamlining R&O* at 23091, para. 86 (three-year construction period provides ample time to complete access issues or choose a new site free from difficulties).

Based on the above discussion, the Request for Tolling filed by Media Power Group, Inc. IS DENIED. The construction permits (File Nos. BNPFT-20181101AAC, BNPFT-20181101AAD) HAVE EXPIRED BY THEIR OWN TERMS. The permits are canceled and the call signs deleted.

Sincerely,

Albert Shuldiner

Albert Shuldiner
Chief, Audio Division
Media Bureau