



Federal Communications Commission  
Washington, D.C. 20554

April 8, 2020

Gray Television Licensee, LLC  
WNDU John O'Brien  
54516 State Road 933  
South Bend, IN 46637

Re: Request for Tolling Waiver  
WNDU-TV, South Bend, IN  
Facility ID No. 41674  
LMS File No. 0000109122

Dear Licensee,

On March 25, 2020, Gray Television Licensee, LLC (Gray), the licensee of WNDU-TV, South Bend, Indiana (WNDU or Station), filed the above-referenced request for waiver of the Commission's tolling provisions and tolling of the Station's construction permit expiration date. For the reasons below, we grant Gray's request and toll the expiration date of WNDU's construction permit through October 13, 2020.

*Background.* Pursuant to Section 73.3700(b)(5) of the Commission's rules (Rules), a station that was assigned a new channel as a result of the Commission's incentive auction and repacking process may request a single extension of its construction permit deadline of up to 180 days to complete construction of its post-auction facility.<sup>1</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>2</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>3</sup> 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.<sup>4</sup>

Gray requests waiver of the tolling rule and tolling of its construction permit for its post-incentive auction channel facilities through October 13, 2020. WNDU is currently operating on its post-auction channel with temporary facilities.<sup>5</sup> WNDU was previously granted a six-month construction permit

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<sup>1</sup> See 47 CFR § 73.3700(b)(5).

<sup>2</sup> See 47 CFR § 73.3700(b)(5)(i) citing 47 CFR § 73.3598(b).

<sup>3</sup> *Id.*

<sup>4</sup> 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) (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).

<sup>5</sup> See LMS File No. 0000086435. WNDU was repacked from channel 42 to channel 27.

extension to April 15, 2020.<sup>6</sup>

Gray states that WNDU was on track to complete its final facility by late March, however in order to protect its workers, its tower crew has ceased all construction work for the next several weeks due to Coronavirus pandemic (COVID-19).<sup>7</sup> Accordingly, Gray seeks a waiver of the tolling rules and tolling of its construction permit deadline to October 13, 2020.

*Discussion.* Upon review of the facts and circumstances presented, we find that sufficient circumstances exist to waive Section 73.3598(b) of the Rules and to toll the expiration date of the Station's construction permit to October 13, 2020. We find that Gray was unable to complete construction of its post-auction channel facilities due to delays resulting from the COVID-19 pandemic. We also find that grant of Gray's waiver and tolling request is not likely to negatively impact the overall transition schedule and will not cause interference to other stations. WNDU has already ceased operation on its pre-auction channel and initiated temporary operations on its post-auction channel. To the extent some viewers are unable to receive WNDU's signal while it operates using its interim facility, we believe that Gray has every incentive to ensure viewers are fully informed about the Station's transition plan. Ultimately, we conclude that the public interest will be served by grant of waiver and tolling of the Station's construction permit.

We remind Gray that pursuant to the Spectrum Act, the Station is eligible for reimbursement from the TV Broadcast Relocation Fund (Fund) of costs "reasonably incurred . . . in order for the licensee to relocate its television service from one channel to the other."<sup>8</sup> Additional expenses incurred, such as expenses resulting from changes in a Station's transition plan that are not related to the post-incentive auction channel change, may not be reimbursable from the Fund.

The above facts considered, Gray Television Licensee, LLC's request for waiver of the Commission's tolling provisions **IS GRANTED**. The construction permit (LMS File No. 0000025267) for WNDU-TV, South Bend, Indiana **IS TOLLED to October 13, 2020**. Grant of this tolling waiver does not permit WNDU to recommence operation on its pre-auction channel. We also remind Gray that

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<sup>6</sup> See LMS File No. 0000084364.

<sup>7</sup> The World Health Organization has classified COVID-19 as a pandemic and the President declared it a national emergency.

<sup>8</sup> 47 U.S.C. § 1452(b)(4)(A)(i). See also *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268 et. al., Report and Order, 29 FCC Rcd 6567, 6821, para. 622 (2014) ("The appropriate scope of 'costs reasonably incurred' necessarily will have to be decided on a case-by-case basis.").

any subsequent requests for tolling of its construction permit deadline will be subject to the Commission's tolling provisions.<sup>9</sup>

Sincerely,

/s/

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau

cc (via electronic mail): Joan Stewart, Esq.

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<sup>9</sup> See 47 § CFR 73.3598(b).