



Federal Communications Commission
Washington, D.C. 20554

November 12, 2020

Sun Broadcasting, Inc.
James Schwartzel
2824 Palm Beach Boulevard
Fort Myers, FL 33916
Jim.Schwartzel@sbroadcast.com
(via electronic mail)

Re: Request for Tolling Waiver
WXCW(TV), Naples, FL
Facility ID No. 61504
LMS File No. 110468

Dear Licensee,

Sun Broadcasting, Inc. (Sun), the licensee of WXCW(TV), Naples, Florida (WXCW 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 Sun's request and toll the expiration date of WXCW's construction permit for 180 days to April 30, 2021.¹

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.² All subsequent requests for additional time to construct are subject to the Commission's tolling provisions of section 73.3598(b) of the Rules.³ 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.⁴ 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.⁵

¹ Because 180 days from the Station's current construction expiration date falls on Sunday March 7, 2021, we will extend the construction permit to the next business day, which would be Monday, March 8, 2021. *See* 47 CFR § 1.4.

² *See* 47 CFR § 73.3700(b)(5).

³ *See* 47 CFR § 73.3700(b)(5)(i) citing 47 CFR § 73.3598(b).

⁴ *Id.*

⁵ *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).

Sun requests waiver of the tolling rule and tolling of its construction permit for its post-incentive auction channel facilities. WXCW is currently operating on its post-auction channel using an interim facility while it completes construction of its post-auction channel facilities.⁶ Sun was previously granted a construction permit extension through September 9, 2020.⁷

Sun states that the Station has worked diligently to complete installation of its post-auction facilities; however, construction has been delayed by work stoppages caused by the COVID-19 pandemic.⁸ Most recently, Sun states that construction has been delayed by a tower design problem adversely affecting construction of the Station's replacement tower. Therefore, in light of these circumstances, Sun requests tolling of the Station's construction permit. Sun has requested tolling of its construction permit through December 1, 2021.

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 April 30, 2021.⁹ Sun has demonstrated it has been unable to complete construction of its post-auction channel facilities due to construction delays. We also find that grant of Sun's waiver and tolling request is not likely to negatively impact the overall transition schedule and will not cause interference to other stations. WXCW has already ceased operation on its pre-auction channel and is operating from an interim facility on its post-auction channel. To the extent some viewers are unable to receive WXCW's signal while it operates using its interim facility, we believe that Sun 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. While Sun requests a tolling through December 1, 2021, at this time we find it prudent to only extend the Station's construction permit to April 30, 2021. This will allow Video Division staff to monitor the progress of the Station's construction efforts and provide more time if necessary.

We remind Sun 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."¹⁰ 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.

⁶ See LMS File No. 0000120161. WXCW was repacked from channel 45 to channel 32.

⁷ See LMS File Nos. 0000093301.

⁸ The World Health Organization has classified COVID-19 as a pandemic and the President declared it a national emergency.

⁹ 47 CFR § 73.3598(b).

¹⁰ 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) (*Incentive Auction R&O*), aff'd, *Nat'l Ass'n of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015) ("The appropriate scope of 'costs reasonably incurred' necessarily will have to be decided on a case-by-case basis.").

We further remind Sun of the deadline for submitting final expense documentation for reimbursement for the Station is March 22, 2022.¹¹ Thus, we strongly encourage the Station to diligently pursue satisfaction of the current deadlines to improve the chances that there will be sufficient funds available to reimburse the Station for its legitimate repacking expenses, and we encourage Sun to submit eligible invoices as soon as practicable.

The above facts considered, Sun Broadcasting, Inc.'s request for waiver of the Commission's tolling provisions **IS GRANTED**. The construction permit (LMS File No. 0000034571) for WXCW, Naples, Florida, **IS TOLLED to April 30, 2021**. Grant of this tolling waiver does not permit WXCW to recommence operation on its pre-auction channel. We also remind Sun that any subsequent requests for tolling of its construction permit deadline will be subject to the Commission's tolling provisions.¹²

Sincerely,

/s/

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc (via electronic mail): Joseph Belisle, Esq.

¹¹ See *Invoice Filing Deadlines for TV Broadcaster Relocation Fund*, MB Docket No. 16-306, GN Docket No. 12-268, Public Notice, DA 20-1171, para. 10 (IATF/MB Oct. 7, 2020) (setting three filing deadlines for submission of all remaining repack invoices: for eligible entities assigned repack transition completion dates in the first half of the 39-month post-auction transition period, the deadline for submitting all remaining invoices is October 8, 2021; the deadline for entities assigned completion dates in the second half of the transition period is March 22, 2022; and the deadline for all other participants in the reimbursement program is September 5, 2022).

¹² See 47 CFR § 73.3598(b).