



Federal Communications Commission
Washington, D.C. 20554

August 26, 2021

West Virginia Educational Broadcasting Authority
Chuck Roberts
600 Capitol Street
Charleston, WV 25301
croberts@wvpublic.org
(via electronic mail)

Re: Request for Tolling Waivers
W08EE-D, Martinsburg, WV
W51EG-D, Parkersburg, WV
W41DK-D, Keyser, WV
Fac ID Nos. 167357, 167359 and
167356
LMS File Nos. 157476, 157477 and
0000151791

Dear Licensee,

This concerns requests for waiver of the Commission's tolling provisions and tolling of construction permit expiration dates (Requests) filed by West Virginia Educational Broadcasting Authority (WVEBA) licensee of low power television stations W08EE-D, Martinsburg, West Virginia (W08EE-D); W51EG-D, Parkersburg, West Virginia (W51EG-D); and W41DK-D, Keyser, West Virginia (W41DK-D) (referred to collectively as Stations). For the reasons below, we grant WVEBA's Requests and toll the expiration date of Stations' construction permits to February 15, 2022.¹

Background. Requests for additional time to construct modified digital low power television 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

¹ We note that WVEBA seeks tolling for an additional 180 days for the Stations, however each Station has been assigned a different construction permit expiration date based on when the construction permit application was granted. In order to synchronize the Stations' construction permit expiration dates we toll the Stations' construction permits to the same day. February 15, 2021, is 180 days from the construction permit with the latest expiration date.

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

Request For Tolling Waivers. The Stations are television translators that are part of a State-wide educational television network in West Virginia. As part of the Incentive Auction and repacking process, the Stations' pre-auction operating channels (channels 8, 41 and 51) were displaced. WVEBA filed displacement applications requesting new digital channel 27 for W08EE-D, channel 34 for W51EG-D, and channel 16 for W41DK-D in the Commission's displacement application filing window for low power television stations that were displaced by the Incentive Auction and repacking process.⁵ W08EE-D's displacement application for channel 27 was granted on August 15, 2018; W51EG-D's displacement application for channel 34 was granted on August 14, 2018; and W41DK-D's displacement application for channel 16 was granted on July 6, 2018 (Displacement CPs). W08EE-D has yet to receive notice from the full power station that caused it to be displaced that it is causing impermissible interference and, therefore, it remains operating on channel 8. W51EG-D and W41DK-D are operating with temporary facilities on their new displacement channels while WVEBA completes construction of their permanent displacement facilities.⁶

WVEBA notes that all of its three full power television stations were reassigned to new channels as a result of the Incentive Auction and repacking process. In addition, five of its television translator stations were displaced including the three Stations that are the subject of this decision. As a result, WVEBA states that, over the last several years it has been tasked with balancing the transition of three full power television stations and simultaneously addressing the need to find displacement channels for five television translator stations, all while continuing to manage the day-to-day operations of its television and radio network.

WVEBA points out that it is a State-funded governmental entity with limited resources and is required to comply with the State's laws and procedures regarding procurement of goods and services. These laws require that equipment purchases in excess of \$25,000 be put out for competitive bidding, a process that is time and resource intensive, and is managed by the State procurement office. WVEBA states that, under rules established by the State of West Virginia Purchasing Division, it could not start the lengthy procurement process until it had adequate funds on hand to pay the winning vendor. For WVEBA, this did not occur until March 14, 2019, when the Governor of West Virginia signed into law an appropriations bill providing WVEBA with \$7.36 million. WVEBA states further that, when the funding was finally made available, it was forced to prioritize construction on its three full power repacked stations first, all of which had earlier construction deadlines and were required by the Commission to vacate their pre-auction channels by specific dates in order to facilitate the repack,⁷ before it could initiate work on the displaced television translator stations.

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 Nos. 000054634, 0000054632 and 000035614; *Special Displacement Window PN; Incentive Auction Task Force and Media Bureau Extend Post Incentive Auction Special Displacement Window Through June 1, 2018*, Public Notice, 33 FCC Rcd 3794 (IATF/MB 2018).

⁶ We note that W51EG-D went silent on February 18, 2020 and was subsequently granted an extension of license to August 17, 2021, under the equity and fairness provision of section 312(g) of the Communications Act of 1934, 47 U.S.C. § 312(g). See LMS File No. 0000128002. W51EG-D subsequently resumed operations with a temporary facility on July 16, 2021. See LMS File No. 0000153210.

⁷ See *Incentive Auction Closing and Channel Reassignment Public Notice: The Broadcast Television Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced*, Public Notice, 32 FCC Rcd 2786 (WTB & MB 2017).

WVEBA states that it has made best efforts to begin the construction of the Stations' permanent displacement facilities. WVEBA has hired a third-party company to oversee the equipment procurement, construction, and installation process for the Stations. WVEBA expects that this solution will help to expedite the construction process by allowing WVEBA to reduce the delays associated with the State purchasing process, as the third party will be responsible for procuring all of the equipment and additional resources necessary to complete the displacement facilities as well as providing the work crews necessary to complete the installation process.

WVEBA reports that the third party is currently performing a structural analysis and complete engineering drawings on the Stations' existing towers which will then be submitted to a structural engineer for review and approval. Upon receiving such approval, the third party will be in a position to begin ordering and installing the equipment necessary to complete the Stations' permanent displacement facilities. WVEBA also anticipates that there may be equipment shipping delays due to current supply chain issues, including the current semiconductor chip shortage. As a result, WVEBA anticipates that it will need an additional 180 days to complete construction of the displacement facilities.

Discussion. Upon review of the facts and circumstances presented, we find that sufficient circumstances exist to waive the rules and toll the expiration date of Displacement CPs to February 15, 2021.⁸ WVEBA has demonstrated that it has been diligently making progress towards completion of the Station's displacement facilities but was unable to complete construction due equipment manufacturing and installation crew delays. Ultimately, we conclude that the public interest will be served by grant of waiver and tolling of the Stations' construction permits.

We remind WVEBA that, pursuant to the Reimbursement Expansion Act, the Stations are eligible for reimbursement from the TV Broadcast Relocation Fund (Fund) of costs reasonably incurred as a result of the reorganization of broadcast television spectrum.⁹ Please note, however, that additional expenses incurred, such as those resulting from changes in a Stations' plans to construct their displacement facilities that are unrelated to the displacement, may not be eligible for reimbursement from the Fund.

We further remind WVEBA that the deadline for submitting final expense documentation for reimbursement for eligible Stations is September 5, 2022.¹⁰ Thus, we strongly encourage the WVEBA to diligently pursue completion of the current deadlines to improve the likelihood that there will be sufficient funds available to reimburse the Stations for their legitimate expenses, and we encourage WVEBA to submit eligible invoices as soon as practicable.

⁸ 47 CFR § 73.3598(b).

⁹ See *Consolidated Appropriations Act, 2018*, Pub. L. 115-141, at Division E, Title V, § 511, 132 Stat. 348 (2018) (codified at 47 U.S.C. § 1452(j)-(n)). See also 47 CFR § 73.3701 (Reimbursement Under the Reimbursement Expansion Act); *LPTV, TV Translator, and FM Broadcast Station Reimbursement; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 34 FCC Rcd 1690 (2019); and *LPTV, TV Translator, and FM Broadcast Station Reimbursement; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking and Order, 33 FCC Rcd 7855 (2018).

¹⁰ See *Invoice Filing Deadlines for TV Broadcaster Relocation Fund*, Public Notice, 35 FCC Rcd 11273, 11277, paras. 10-11 (IATF/MB Oct. 7, 2020) (setting three filing deadlines for the submission of all outstanding repack invoices, notably: 1) October 8, 2021 for eligible entities assigned repack transition completion dates in the first half of the 39-month post-auction transition period; 2) March 22, 2022 for entities assigned completion dates in the second half of the transition period; and 3) September 5, 2022 for all other participants in the reimbursement program).

The above facts considered, the requests for waiver of the tolling rules of West Virginia Educational Broadcasting Authority **ARE GRANTED** and the expiration date of the construction permits (LMS File Nos. 0000054634, 0000054632 and 000035614, respectively) for W08EE-D, Martinsburg, West Virginia; W51EG-D, Parkersburg, West Virginia; and W41DK-D, Keyser, West Virginia **ARE TOLLED** to February 15, 2022. We note that another request for tolling or tolling waiver will not be favorably viewed unless accompanied by a showing and written support that completion of the Stations' permanent displacement facilities was prevented by additional rare and extraordinary circumstances outside of the Stations' control. WVEBA must also include with any such request a detailed plan for completing construction and returning the Stations to operation.

Sincerely,

/s/

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc (via electronic mail): Tom Davidson, Esq.