



Federal Communications Commission
Washington, D.C. 20554

March 25, 2022

West Virginia Educational Broadcasting Authority
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(via electronic mail)

Re: Requests for Tolling Waiver
W23DR-D, Romney, WV
W30CO-D, Wheeling, WV
W41DK-D, Keyser, WV
W08EE-D, Martinsburg, WV
W51EG-D, Parkersburg, WV
Fac ID Nos. 167358, 167354, 167356,
167357 and 167359
LMS File Nos. 0000180609,
0000180610, 0000184888, 0000184886
and 0000184887

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 the West Virginia Educational Broadcasting Authority (WVEBA), licensee of the five above-referenced West Virginia television translator (TV translator) stations (collectively Stations). For the reasons below, we grant WVEBA's Requests and toll the expiration date of the construction permits for W23DR-D, Romney, West Virginia; and W30CO-D, Wheeling, West Virginia through July 18, 2022, and the construction permits for W41DK-D, Keyser, West Virginia; W08EE-D, Martinsburg, West Virginia; W51EG-D, Parkersburg, West Virginia, through August 15, 2022.¹

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

¹ Because WVEBA requests tolling through Sunday, August 14, 2022, for W41DK-D, W08EE-D and W51EG-D, we will extend the construction permits to the next business day, which would be Monday, August 15, 2022. *See* 47 CFR § 1.4.

² *See* 47 CFR § 73.3598(b).

³ *Id.*

demonstrate that “rare and exceptional circumstances” prevented construction by the station’s construction permit expiration date.⁴

Requests For Tolling Waiver. The Stations are digital TV translators that are part of WVEBA’s State-wide educational broadcasting network. The Stations’ digital channels were displaced by the Incentive Auction and repacking process.⁵ WVEBA filed displacement applications that were granted in two batches, first on July 6, 2018, and later on January 29, 2019, and were issued construction permits (Displacement CPs) with corresponding three-year expiration dates of July 6, 2021 (W41DK-D, W08EE-D, and W51EG-D) and January 29, 2022 (W23DR-D and W30CO-D), respectively.⁶ The Displacement CPs for W41DK-D, W08EE-D and W51EG-D were previously tolled to February 15, 2022.⁷

In its Requests, WVEBA provides well-documented showings to demonstrate why each of the Station’s displacement facility was not constructed by its respective construction deadline. By way of background, WVEBA notes that it entered into an open-ended, turnkey services contract with an outside vendor which covers the entire procurement, construction, and installation process for the Stations. The contract provides a \$500,000 spending limit per translator “district.” Once the \$500,000 limit has been met, WVEBA states that a competitive bidding process must be conducted before additional purchases can be made. WVEBA reports that for all of its stations, it has diligently pursue construction of the displacement facilities. However, WVEBA states, it has encountered several issues outside of its control that have prevented final construction.

W41DK-D Request. WVEBA states that it has encountered issues related to the structural analysis of W41DK-D’s tower for the Keyser tower site, which WVEBA shares with a wireless telephone company. The wireless company provided WVEBA documentation in October 2021, which, unfortunately, revealed a number of technical issues that led to a failing structural analysis. In order to assess the possibility of remediating these issues, WVEBA requested additional supporting documentation which the wireless company did not provide until mid-February 2022. WVEBA reports that it is currently reviewing the new information to determine whether timely remediation of the tower structural issue is possible. As a backup plan, WVEBA states that it is also negotiating with the State Interoperable Radio Network (SIRN), an emergency services network operated by the West Virginia Department of Homeland Security that owns a separate tower nearby, for permission to use their tower in case remediation of the existing site is not possible. WVEBA reports that it has already ordered and received a new transmitter for W41DK-D’s displacement channel and the station’s antenna has also been ordered and manufactured, but cannot be delivered until WVEBA confirms which tower site will be used.

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 Because they have yet to receive formal notice to discontinue operations by their displacing repacked full power television stations, W08EE-D, W23DR-D and W30CO-D continue to operate on their pre-auction digital channels. W41DK-D and W51EG-D are operating on their displacement channels with temporary facilities. See LMS File Nos. 0000184878 and 0000184884.

⁶ See LMS File Nos. 0000054636 (W23DR-D); 0000054635 (W30CO-D); 0000035614 (W41DK-D); 0000054634 (W08EE-D); and 0000054632 as modified by 0000073090 (W51EG-D).

⁷ See LMS File Nos. 0000157476, 0000157477 and 0000151791.

Similarly, WVEBA must wait until it determines the station's tower location before ordering its transmission line.

W08EE-D Request. WVEBA reports that it also unexpectedly discovered structural issues with the W08EE-D tower in December 2021. WVEBA is exploring using a nearby SIRN tower for W08EE-D. WVEBA has completed the tower mapping process and is now in the process of negotiating this arrangement with SIRN, but is awaiting geo-technical information required from SIRN in order to finalize an agreement. Once an agreement is in place, WVEBA states that it will need to undertake a new structural analysis, which, once complete, must be approved by a structural engineer. As with W41DK-D, WVEBA reports that it has already ordered and received a new transmitter for W08EE-D's displacement channel and the station's antenna has also been ordered and manufactured, but cannot be delivered until WVEBA confirms which tower site will be used. Similarly, WVEBA must wait until it determines the station's tower location before ordering its transmission line.

W51EG-D Request. As for W51EG-D, WVEBA reports that the tower site that originally housed the station is in desperate need of remediation, primarily as a result of failing guy wires. WVEBA has been working with its third party vendor to transition to a different tower site and completed a structural analysis of the alternate tower structure in December 2021 which revealed four technical issues that caused the new site to fail the analysis. WVEBA states that it is currently working to remediate these failures so that a new structural analysis can be performed. In terms of equipment, WVEBA states that it has already ordered a new transmitter for W51EG-D's channel 34 displacement facility and recently received confirmation from the vendor that this equipment is expected to ship in early March 2022. Similar to W41DK-D and W08EE-D, WVEBA cannot order its antenna and transmission line until it confirms which tower structure will be housing W51EG-D's facilities.

W23DR-D and W30CO-D. WVEBA states that as a result of the serious technical issues discovered during the structural analyses for the other stations discussed above WVEBA reached its \$500,000 state procurement limit for its vendor contract much earlier than anticipated. As a result, WVEBA states that it was forced to put all plans for construction on W23DR-D and W30CO-D on hold until it was able to complete a new competitive bidding process for these stations. WVEBA maintains that it promptly submitted a new solicitation to the State purchasing office on December 8, 2021, but a new contract was not awarded until March 1, 2022. Pursuant to State law, WVEBA states that it was prohibited from discussing any work covered by the solicitation with prospective bidders between the time the solicitation documents were submitted and the time the new contract was awarded. Accordingly, WVEBA states that its staff was unable to discuss W23DR-D and W30CO-D with the tower crews, or do any other work during this period. Now that a new contract is in place, WVEBA reports that it has resumed discussions with the tower crew responsible for work on W23DR-D and W30CO-D, which is now in the process of preparing and submitting cost estimates for the site. Once these estimates have been submitted, WVEBA maintains that it will be in a position to issue a purchase order for a structural analysis. Assuming the two Stations' tower sites pass structural analysis, WVEBA states that it can then order the necessary transmitter and antenna and arrange for the installations necessary to complete construction.

In conclusion, WVEBA maintains that grant of its Requests, and tolling of the Displacement CPs for an additional 180 days from their current expiration dates will serve the public interest by allowing its five West Virginia TV translator stations to continue to provide their viewers with free, over-the-air, important noncommercial educational programming on their new displacement channels.

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' Displacement CPs.⁸ WVEBA has demonstrated that it has been diligently making progress towards completion of the Stations' displacement facilities but was unable to complete construction due to delays outside of its control, including construction delays related to issues with the structural integrity of its stations' existing tower structures and delays related to state procurement requirements. Ultimately, we conclude that the public interest will be served by grant of waivers and tolling of the Stations' Displacement CPs.

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 Station's plans to construct its displacement facilities that are unrelated to the displacement, may not be eligible for reimbursement from the Fund.

We further remind WVEBA of the deadline for submitting final expense documentation for reimbursement for the Stations is September 6, 2022.¹⁰ **We caution the Stations that we do not anticipate allowing extensions of the final September 6, 2022 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, 2023.¹¹ The Fund Administrator will initiate close out procedures for any entity that has failed to initiate interim close-out procedures by the September 6, 2022 invoice filing deadline. Any unused allocations made to that entity's account will be returned to the Fund and made available for allocation to other program participants or rescinded to Treasury. Thus, we strongly encourage the Stations to diligently pursue satisfaction of the current deadlines and we encourage WVEBA to submit eligible invoices as soon as practicable.

The above facts considered, West Virginia Educational Broadcasting Authority's requests for waiver of the Commission's tolling provisions **ARE GRANTED**. The construction permits (LMS File Nos. 0000054636 and 0000054635, respectively) for W23DR-D, Romney, West Virginia; and W30CO-D, Wheeling, West Virginia **ARE TOLLED through July 18, 2022**. The construction permits (LMS

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*, MB Docket No. 16-306 and GN Docket No. 12-268, Public Notice, 35 FCC Rcd 11273, 11277, paras. 10-11 (IATF/MB 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 6, 2022).

¹¹ See *id.* at 11277-78, para 13.

File Nos. 0000035614; 0000054634; and 0000073090, respectively) for W41DK-D, Keyser, West Virginia; W08EE-D, Martinsburg, West Virginia; W51EG-D, Parkersburg, West Virginia, **ARE TOLLED through August 15, 2022**. To the extent WVEBA 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 WVEBA's control.¹² 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): Tom C. Davidson, Esq.

¹² 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.