



Federal Communications Commission
Washington, D.C. 20554

March 25, 2022

Fort Myers Broadcasting Company
Mark Gilson
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Fort Myers, FL 33916
mark.gilson@fmbcmail.com
(via electronic mail)

Re: Request for Tolling Waiver
WINK-TV, Fort Myers, FL
Facility ID No. 22093
LMS File No. 0000186592

Dear Licensee,

On March 14, 2022, Fort Myers Broadcasting Company (FMBC), the licensee of WINK-TV, Fort Myers, Florida (WINK 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, as amended (Request). For the reasons below, we grant FMBC's Request and toll the expiration date of WINK's construction permit to June 30, 2022.

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.¹ All subsequent requests for additional time to construct 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 See 47 CFR § 73.3700(b)(5).

² See 47 CFR § 73.3700(b)(5)(i) citing 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) (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).

FMBC requests waiver of the tolling rule and tolling of its construction permit for the Station's post-incentive auction channel facilities. FMBC was granted an extension and a waiver of the tolling rule and the Station's construction permit expiration date was most recently tolled to March 22, 2022.⁵ The Station is currently operating on its post-auction channel with interim facilities.⁶

FMBC states that the Station has worked diligently to complete installation of its post-auction facilities and that only approximately five days of tower work remain to complete installation of its antenna and transmission line. FMBC reports that the Station's antenna and 220 feet of six-inch transmission line remain to be installed on the tower, as well as cut pieces connecting the antenna and transmission line. Sun states that all of this equipment is on site and awaiting installation. Unfortunately, FMBC states, wind conditions at the tower site are such that work on the tower was suspended on March 7, 2022 for safety reasons. FMBC maintains that the tower crew remains on site ready to resume work when the weather breaks. FMBC provides an email from the tower crew stating that it needs at least five days of uninterrupted clear weather to complete construction and "sweep" the transmission lines and antennas. In order to complete the remaining work in a safe manner, FMBC requests that the Station's construction permit be tolled until June 30, 2022, so that it can be reasonably certain of having sufficient good weather to complete construction.

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 the Station's construction permit through June 30, 2022.⁷ FMBC has demonstrated it did not complete construction of its post-auction channel facilities due to weather-related construction delays. We also find that grant of FMBC's tolling request is not likely to negatively impact the overall transition schedule and will not cause interference to other stations. WINK 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 WINK's signal while it operates using its interim facility, we believe that FMBC 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 tolling of the Station's construction permit.

We remind FMBC 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."⁸ 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.

⁵ LMS File Nos. 0000093188, 0000109642, 0000141654 and 0000160091.

⁶ See LMS File No. 0000186593. WINK was repacked from channel 50 to channel 31.

⁷ 47 CFR § 73.3598(b).

⁸ 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 FMBC of the deadline for submitting final expense documentation for reimbursement for the Station is September 6, 2022.⁹ **We caution the Station that we do not anticipate allowing further 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, 2023.¹⁰ 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 Station to diligently pursue satisfaction of the current deadline and we encourage FMBC to submit eligible invoices as soon as practicable.

The above facts considered, Fort Myers Broadcasting Company's request for waiver of the Commission's tolling provisions **IS GRANTED**. The construction permit (LMS File No. 0000034572) for WINK-TV, Fort Myers, Florida, **IS TOLLED to June 30, 2022**. Grant of this tolling waiver does not permit WINK to recommence operation on its pre-auction channel.. While we anticipate this will be FMBC's final request for tolling, we remind FMBC that any subsequent tolling requests will be subject to the Commission's tolling provisions.¹¹ To the extent the Station seeks an additional extension of tolling, such a request must include a detailed plan for completing construction of the Station's permanent post-auction facilities. We will look unfavorably upon any future request that does not include such a plan.

Sincerely,

/s/

Barbara A. Kreisman
Chief, Video Division
Media Bureau

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

⁹ The Station was granted an extension of the March 22, 2022 invoice submission deadline and its deadline was extended to September 6, 2022. *See* LMS File No. 0000186732; *see also 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).

¹⁰ *See id.* at 11277-78, para 13.

¹¹ *See* 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 1998 Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17536, para. 42 (1999).