



Federal Communications Commission
Washington, D.C. 20554

October 27, 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
Fac ID Nos. 167358, 167354, 167356
and 167357
LMS File Nos. 0000195320,
0000195232, 0000197690, and
0000197691

Dear Licensee,

This concerns requests for waiver of the Commission's tolling provisions and tolling of construction permit expiration date (Requests) filed by the West Virginia Educational Broadcasting Authority (WVEBA), licensee of the four 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 Stations' construction permits through December 15, 2022.

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.¹ 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.² 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.³

¹ See 47 CFR § 73.3598(b).

² *Id.*

³ 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,

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.⁴ 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 and W08EE-D) and January 29, 2022 (W23DR-D and W30CO-D), respectively.⁵ The Displacement CPs for W41DK-D and W08EE-D were previously tolled to August 15, 2022;⁶ and for W23DR-D and W30CO-D to July 18, 2022.⁷

In its Requests, WVEBA provides well-documented showings to demonstrate the steps it has taken to complete construction of each of the Station's displacement facilities and the issues it encountered outside of its control that have prevented final construction since the last grant of tolling waivers in March 2022. Generally, with respect to all four stations, WVEBA states it experienced a significant staff turnover, including the loss of several full-time broadcast field engineers, and was unable to hire a new Director of Engineering until May 9, 2022. In addition, WVEBA states that it experienced other emergency situations beyond its control during the second quarter of 2022 that further diverted resources and engineering staff away from constructing the Stations including a tree damaging guy lines of one of the WVEBA sites; a site being burglarized and robbed of equipment; a site being struck by lightning strikes that damaged equipment; and an equipment truck blowing an engine. WVEBA provides documentation for each of these delays.

W41DK-D Request. With respect to W41DK-D, Keyser, WVEBA states its contractor and an outside vendor conducted a structural analysis of the Keyser tower site, but were unable to provide a study until July 15, 2022, due to delays encountered by a co-tenant on the tower providing required documentation. WVEBA represents that all equipment has been delivered and the installation company is ready to install it as soon as the structural analysis is complete. WVEBA notes that the company performing the structural analysis is awaiting one last piece of information from the co-tenant and then will finalize its report. WVEBA estimates that this will occur before the end of October 2022. Assuming that the structural analysis returns with a positive result, WVEBA estimates that it will be in a position to complete the installation and expects to finish construction by November 30, 2022.

W08EE-D Request. With respect to W08EE-D, Martinsburg, WVEBA states that filed an application to modify the station's channel 27 displacement construction permit to reflect the change to the new tower site that was granted in August 2022.⁸ WVEBA states that the structural analysis has been completed and all equipment has been delivered. The installation company has delivered the antenna to the tower site and WVEBA estimates that construction will be completed by the end of October 2022.

1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1072 (1972); 47 CFR § 1.3 (waiver for good cause shown).

⁴ 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 is operating on its displacement channels with temporary facilities. *See* LMS File No. 0000184878.

⁵ *See* LMS File Nos. 0000054636 (W23DR-D); 0000054635 (W30CO-D); 0000035614 (W41DK-D); 0000054634 (W08EE-D).

⁶ *See* LMS File Nos. 0000184888 and 0000184886.

⁷ *See* LMS File Nos. 0000180609 and 0000180610.

⁸ LMS File No. 0000197688.

W23DR-D Request. With respect to W23DR-D, Romney, WVEBA states that all equipment has been delivered; however, the structural analysis for the station's tower failed due to excessive weight on the tower. WVEBA advises it has access to another tower and is in the final stages of executing a lease that will allow WVEBA to move its operations to that site. Licensee states it is confirming that a structural analysis has already been completed for this site and, assuming that is so, WVEBA will begin installation as soon as the lease is executed and expects to complete construction by the end of November 2022.

W30CO-D Requests. With respect to W30CO-D, Wheeling, WVEBA states it is awaiting the final structural analysis for W30CO's tower, which has been delayed due to a co-tenant's inability to locate structural drawings. WVEBA however, reports that all equipment has been delivered hopes to complete construction by November 30. In the worst case scenario, WVEBA states that it may be able to have workers climb the tower and take these measurements themselves, but this will be a complicated process and requires paint to be removed from certain parts of the tower. WVEBA is hoping to avoid that and, at present, is aiming to complete construction before the end of November 2022.

In conclusion, WVEBA maintains that grant of its Requests, and tolling of the Displacement CPs 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.⁹ 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 further remind WVEBA of the deadline for submitting final expense documentation for reimbursement for the Station **is December 15, 2022.**¹⁰ **We caution the Station that we do not anticipate allowing further extensions of the Station's extended 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 Station's extended 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

⁹ 47 CFR § 73.3598(b).

¹⁰ WVEBA was granted an extension of the September 6, 2022 invoice submission deadline and the Stations' deadline was extended to December 15, 2022. *See* Letter from Barbara A. Kreisman, Chief, Video Division, FCC Media Bureau, to West Virginia Educational Broadcasting Authority (Oct. XX, 2022) (on file at LMS File No. 0000199227); *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 filing deadlines for submission of repack invoices).

¹¹ *See id.* at 11277-78, para 13.

participants or rescinded to Treasury. Thus, we strongly encourage the Station to diligently pursue satisfaction of the current deadline 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, 0000054635, 0000035614; and 0000054634, respectively) for W23DR-D, Romney, West Virginia; and W30CO-D, Wheeling, West Virginia; W41DK-D, Keyser, West Virginia; and W08EE-D, Martinsburg, West Virginia, **ARE TOLLED through December 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 a 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.