



Federal Communications Commission
Washington, D.C. 20554

May 22, 2023

West Virginia Educational Broadcasting Authority
Carl Antolini
600 Capitol Street
Charleston, WV 25301
bantolini@wvpublic.org
(via electronic mail)

Re: Request for Tolling Waiver
W41DK-D, Keyser, WV
Fac ID No. 167356
LMS File No. 0000214837

Dear Licensee,

This concerns a request for waiver of the Commission's tolling provisions and tolling of construction permit expiration date (Request) filed by the West Virginia Educational Broadcasting Authority (WVEBA), licensee of W41DK-D, Keyser, West Virginia (W41DK-D or Station). For the reasons below, we grant WVEBA's Request and toll the expiration date of W41DK-D's construction permit through August 15, 2023.

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

Requests For Tolling Waiver. The Station is a digital TV translator that is part of WVEBA's State-wide educational broadcasting network. The Station's digital channel was displaced by the Incentive Auction and repacking process.⁴ WVEBA filed a displacement application that was granted and

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

⁴ W41DK-D is operating on its displacement channel with temporary facilities. See LMS File No. 0000205629.

the Station was issued a construction permit (Displacement CP) with a corresponding three-year expiration date of July 6, 2021.⁵ The Displacement CP was most recently tolled to May 15, 2023.⁶

In its Request, WVEBA provides a well-documented showing to demonstrate the steps it has taken to complete construction of the Station's displacement facilities and the issues it encountered outside of its control that have prevented final construction. Since grant of its last tolling waiver WVEBA has been working to address structural issue related to a tower foundation that was cracked and corroded around the base anchor rods. WVEBA had expected to stabilize the foundation in mid-April and schedule a final stress test to ensure the repairs were successful before it installed the Station's antenna. WVEBA now reports that a more detailed inspection performed on the tower to ensure there were no other deficiencies before installing the Station's remaining equipment has revealed "extensive maintenance and structural issues" far beyond what WVEBA had expected. In light of this new information, WVEBA's tower inspector has determined that the conditions on the tower are "critically unsafe," to the point where it will likely need to be condemned altogether. The tower inspector recommended that WVEBA construct a new tower on the site. Given the urgent need to complete the displacement facilities for the Station, WVEBA has decided that, in the interim, it will install a temporary facility at the tower location until a new permanent tower structure can be installed. Once the necessary temporary equipment has been secured, WVEBA's tower crew will need to clear a path up the mountain in order to transport the equipment to the tower site before completing the rest of the installation. WVEBA anticipates that this entire process will be completed by August 15, 2023 and requests its construction permit be tolled until that date.

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 Displacement CP to August 15, 2023.⁷ 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 to delays outside of its control due to unexpected structural issues with the Station's proposed tower structure. Ultimately, we conclude that the public interest will be served by grant of a waiver and tolling of the Station's Displacement CP.

We further remind WVEBA of the deadline for submitting final expense documentation for reimbursement for the Station **is June 15, 2023.**⁸ **We caution WVEBA 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

⁵ See LMS File No. 0000035614.

⁶ See LMS File No. 0000213692.

⁷ 47 CFR § 73.3598(b).

⁸ WVEBA was granted an extension of its May 15, 2023 invoice submission deadline and the Station's deadline was extended to June 15, 2023. See Letter from Barbara A. Kreisman, Chief, Video Division, FCC Media Bureau, to West Virginia Educational Broadcasting Authority (May 22, 2023) (on file at LMS File No. 0000214835); 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) (*Invoice Deadline PN*) (setting filing deadlines for submission of repack invoices).

reimbursement requests and complete close-out procedures prior to July 3, 2023.⁹ Thus, we strongly encourage the Station to diligently pursue satisfaction of its current deadline and we encourage WVEBA to submit eligible invoices, as well as proof of payment of such invoices as detailed in the IDE Grant,¹⁰ as early as possible without waiting for the June 15, 2023, final invoice filing deadline.

The above facts considered, West Virginia Educational Broadcasting Authority's request for waiver of the Commission's tolling provisions **IS GRANTED**. The construction permit (LMS File No. 0000035614) for W41DK-D, Keyser, West Virginia, **IS TOLLED through August 15, 2023**. Once construction of the Station's temporary facility is completed, WVEBA should file an engineering request for special temporary authority prior to commencing operation.¹¹ To the extent WVEBA requires additional tolling for the 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): Virginia Hiner, Esq. (vhiner@akingump.com)

⁹ See *Invoice Deadline PN*, 35 FCC Rcd at 11277-78, para 13.

¹⁰ *Supra* note 8.

¹¹ See 47 CFR § 73.1635.

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.