



Federal Communications Commission
Washington, D.C. 20554

April 19, 2021

Sun Broadcasting, Inc.
James Schwartzel
2824 Palm Beach Boulevard
Fort Myers, FL 33916
Jim.Schwartzel@sbroadcast.com
(via electronic mail)

Re: Request for Tolling Waiver
WXCW(TV), Naples, FL
Facility ID No. 61504
LMS File No. 0000141856

Dear Licensee,

On March 30, 2021, Sun Broadcasting, Inc. (Sun), the licensee of WXCW(TV), Naples, Florida (WXCW 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. For the reasons below, we grant Sun's request and toll the expiration date of WXCW's construction permit to October 27, 2021.

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

Sun requests waiver of the tolling rule and tolling of its construction permit for the Station's post-incentive auction channel facilities. Sun was granted an extension and a waiver of the tolling rule and the

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).

Station's construction permit was most recently tolled to April 30, 2021.⁵ The Station is currently operating on its post-auction channel with interim facilities.⁶

Sun states that the Station has worked diligently to complete installation of its post-auction facilities. Construction has most recently been delayed by what Sun has been told are unforeseeable design problems on the tower that the Station is sharing with WINK-TV, Fort Myers, Florida (WINK), requiring additional local land use approvals as well as FCC environmental review of the tower construction proposal. Sun notes that the owner of the tower is working with local and FCC officials to obtain the remaining approvals. Sun has been informed that the new tower is fabricated and ready to ship, its new antenna and transmission line are also manufactured and being stored in a warehouse and ready for shipment. The transmitter for WXCW's post-auction facility is already installed at the transmitter site. Sun concludes that, upon grant of all necessary construction permit modification applications, it will be in a position to complete construction of its facilities on the new tower. Therefore, in light of these circumstances, Sun requests tolling of the Station's construction permit through October 27, 2021.

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 to October 27, 2021.⁷ Sun has demonstrated it did not complete construction of the Station's post-auction channel facilities due to permitting and construction delays. While the timeline set forth in Sun's tolling request asserts that they will need until December 1, 2021, we believe an extension through October 27, 2021, is appropriate and will allow us to better monitor the Station's construction progress. We also find that grant of Sun's waiver and tolling request is not likely to negatively impact the overall transition schedule and will not cause interference to other stations. The Station has already ceased operation on their pre-auction channels and is operating from interim facilities on its post-auction channel. To the extent some viewers are unable to receive the Station's signal while it operates using interim facilities, we believe that Sun has every incentive to ensure viewers are fully informed about the Station's transition plans. Ultimately, we conclude that the public interest will be served by grant of waiver and tolling of the Station's construction permit.

We remind Sun 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 See LMS File Nos. 0000093301 and 0000110468.

⁶ See LMS File No. 0000120161. WXCW was repacked from channel 45 to channel 32.

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 Sun of the deadline for submitting final expense documentation for reimbursement for the Station is March 22, 2022.⁹ Thus, we strongly encourage the Station to diligently pursue satisfaction of the current deadlines to improve the chances that there will be sufficient funds available to reimburse the Station for its legitimate repacking expenses, and we encourage Sun to submit eligible invoices as soon as practicable.

The above facts considered, Sun Broadcasting, Inc.'s request for waiver of the Commission's tolling provisions **IS GRANTED**. The construction permit (LMS File No. 0000034571) for WXCW, Naples, Florida, **IS TOLLED to October 27, 2021**. Grant of this tolling waiver does not permit WXCW to recommence operation on its pre-auction channel. We also remind Sun that any subsequent requests for tolling of its construction permit deadline will be subject to the Commission's tolling provisions.¹⁰ 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 email): Joseph Belisle, Esq.

⁹ 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 Oct. 7, 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 5, 2022).

¹⁰ See 47 § CFR 73.3598(b).