



Federal Communications Commission
Washington, D.C. 20554

September 30, 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. 0000160117

Dear Licensee,

On September 23, 2021, Sun Broadcasting, Inc. (Sun), the licensee of WXCW(TV), Naples, Florida (WXCW or Station), filed the above-referenced request for waiver of the rules and tolling of the Station's construction permit expiration date (Request). For the reasons below, we grant Sun's Request and toll the expiration date of WXCW's construction permit through March 22, 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

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 October 27, 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. Licensee states that after receiving certain building approvals, work on the new tower that the Station is sharing with WINK(TV), Fort Myers, Florida (WINK), began in June 2021 including clearing the guy paths for the new tower and disassembly of the existing WINK tower. Sun states that the foundations and guy anchors for the new tower have been installed and the existing WINK tower was reduced to approximately 200 feet above ground level. Currently, Sun reports that the construction project is awaiting the arrival of a crane to remove the remaining portion of the old tower and to begin the erection of the new tower. Sun states that the crane is expected to arrive in October 2021. Sun states that the tower contractor expects to complete the construction of WXCW's post-auction channel facilities in February 2022. Given the foregoing, Sun requests waiver of the tolling rules and tolling of the Station's construction permit.

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 March 22, 2022.⁷ Sun has demonstrated it did not complete construction of its post-auction channel facilities due to construction delays. We also find that grant of Sun's tolling request is not likely to negatively impact the overall transition schedule and will not cause interference to other stations. WXCW 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 WXCW's signal while it operates using its interim facility, we believe that Sun 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 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, 0000110468 and 0000141856.

⁶ See LMS File No. 0000160291. 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 that the Station's 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 March 22, 2022**. Grant of this tolling waiver does not permit WXCW to recommence operation on its pre-auction channel. While we anticipate this will be Sun's final request for tolling, we remind Sun that any subsequent tolling requests 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 mail): 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). 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).