



Federal Communications Commission
Washington, D.C. 20554

March 17, 2023

West Virginia Educational Broadcasting Authority
Carl Antolini
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(via electronic mail)

Re: Requests for Tolling Waiver
W30CO-D, Wheeling, WV
W41DK-D, Keyser, WV
Fac ID Nos. 167354 and 167356
LMS File Nos. 0000205618 and
0000205619

Dear Licensee,

This concerns requests for waiver of the Commission's tolling provisions and tolling of construction permit expiration date (Requests), as amended, filed by the West Virginia Educational Broadcasting Authority (WVEBA), licensee of W30CO-D, Wheeling, West Virginia (W30CO-D) and W41DK-D, Keyser, West Virginia (W41DK-D) (collectively Stations). For the reasons below, we grant WVEBA's Requests and toll the expiration date of W41DK-D's construction permit through April 14, 2023 and W30CO-D's construction permit through April 30, 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 Stations are digital TV translators that are part of WVEBA's State-wide educational broadcasting network. The Stations' digital channels were displaced by the

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).

Incentive Auction and repacking process.⁴ WVEBA filed displacement applications that were granted and the Stations were issued construction permits (Displacement CPs) with corresponding three-year expiration dates of July 6, 2021 (W41DK-D) and January 29, 2022 (W30CO-D).⁵ The Displacement CPs were previously tolled to December 15, 2022.⁶

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 October 2022.⁷ Generally, with respect to each of the Stations, WVEBA experienced a series of delays beyond its control including the discovery of technical issues that required a new bidding process, staff turnover and shortages, and other emergency situations. Each of the Stations also experienced delays unique to its transition, which continue to delay completion of construction.

W41DK-D Request. With respect to W41DK-D, WVEBA states that a co-tenant on the station's shared tower did not respond to WVEBA's requests for information regarding welding the co-tenant was undertaking on the tower. Because of this, WVEBA states that it arranged to have an independent vendor inspect the tower welds in early January 2023 but, because it lost a key member of its finance department that month, WVEBA states that its vendor payments delayed scheduling of the inspector until January 2023. WVEBA also maintains that severe winter weather made the Keyser transmitter site inaccessible for much of January 2023, further delaying the inspection.

WVEBA reports that its efforts are now back on track. Assuming the inspection reveals no issues and allows them to certify the tower welds, WVEBA the tower crew can then complete installation of the antenna and complete construction of the station's displacement facilities. Once the structural analysis has been completed, WVEBA states it will schedule a work crew to complete the installation, as all necessary equipment has already been delivered.

W30CO-D Request. With respect to W30CO-D, WVEBA states that ongoing problems with the station's original tower site have resulted in a decision to move to a new site operated by the West Virginia State Interoperable Radio Network (SIRN). WVEBA states that this tower is near another WVEBA tower, so it is working to complete a propagation report for this new tower to ensure that the coverage areas do not overlap before proceeding with installation. WVEBA states it has already confirmed that W30CO will be able to receive a signal at this new location so, assuming no other delays, WVEBA states that it will perform a structural analysis on the new tower site, submit an application for minor modification specifying the new site, and following grant of that application, prepare to install the equipment in time to meet its extended deadline.

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 the Stations to complete their displacement facilities and continue to provide their viewers with free, over-the-air, important

⁴ Because it has yet to receive formal notice to discontinue operations by its displacing repacked full power television station, W30CO-D continues to operate on its pre-auction digital channel. W41DK-D is operating on its displacement channel with temporary facilities. *See* LMS File No. 0000205629.

⁵ *See* LMS File Nos. 0000054635 (W30CO-D) and 0000035614 (W41DK-D).

⁶ *See* LMS File Nos. 0000197690 (W30CO-D) and 0000195232 (W41DK-D).

⁷ *Id.*

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 to April 14, 2023 for W41DK-D and April 30, 2023 for W30CO-D.⁸ 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. Although WVEBA requests that we toll the Displacement CP for W30CO-D to May 14, 2023, in order to ensure diligent progress continues and given that station's April 30, 2023 deadline for submitting final expense document for reimbursement, we find it is appropriate to extend W30CO-D's construction permit through April 30, 2023.⁹ 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 Stations **is April 14, 2023 for W41DK-D and April 30, 2023 for W30CO-D.**¹⁰ **We caution WVEBA that we do not anticipate allowing further extensions of the Stations' extended invoice filing deadlines. 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 participants or rescinded to Treasury. Thus, we strongly encourage the Stations to diligently pursue satisfaction of their current deadlines 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 permit (LMS File No. 0000035614) for W41DK-D, Keyser, West Virginia, **IS TOLLED through April 14, 2023** and the construction permit (LMS File Nos. 0000054635) for W30CO-D, Wheeling, West Virginia **IS TOLLED through April 30, 2023**. 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

⁸ 47 CFR § 73.3598(b).

⁹ WVEBA was granted an extension of its December 15, 2022 invoice submission deadline and the Stations' deadlines were extended to April 14, 2023 for W41DK-D and April 30, 2023 for W30CO-D. *See* Letter from Barbara A. Kreisman, Chief, Video Division, FCC Media Bureau, to West Virginia Educational Broadcasting Authority (Mar. 17, 2022) (on file at LMS File Nos. 0000205613 and 0000205616) (WVEBA IDE Extension); *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).

¹⁰ *See* WVEBA IDE Extension.

¹¹ *See Invoice Deadline PN*, 35 FCC Rcd at 11277-78, para 13.

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 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.