



Federal Communications Commission
Washington, D.C. 20554

MAY 25 2017

In reply refer to: 1800B3-VM

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Ted Johnson
Southern Wabash Communications Corporation of Middle Tennessee, Inc.
810 Dominican Drive
Nashville, TN 37228

In re: WBGB(FM), Portland, TN
Facility ID No. 172966
File No. BPED-20130909AAI

Dear Mr. Johnson,

On May 22, 2017, Southern Wabash Communications Corporation of Middle Tennessee, Inc. (SWCCMT) filed a request for additional time to construct the construction permit (File No. BPED-20130909AAI) (permit) for WBGB(FM), Portland, Tennessee. SWCCMT was granted the permit on April 21, 2014, for a three-year term expiring on April 21, 2017. On April 21, 2017, we granted SWCCMT a 30-day waiver of expiration to complete construction once its transmitter was repaired. SWCCMT's new request states that the transmitter repair is complete, but that SWCCMT does not have access to its transmitter site, and does not have a timeframe within which it will regain access to the site or obtain an alternate site. SWCCMT's request offers no basis for grant as either a tolling request or waiver request, and therefore is denied.

Section 73.3598 (b) of our rules governs requests for tolling. Pursuant to that section, tolling of the construction period can be granted under the following circumstances not within the control of the permittee: 1) Act of God, defined in terms of natural disasters (e.g., tornado, flood, hurricane, earthquake); 2) Administrative or judicial review of the grant of the permit; 3) Litigation related to a necessary governmental requirement for construction or operation of the station (including zoning); 4) Failure of a condition precedent on the permit (e.g., requirement of international coordination, or prior channel substitution of another station).¹ Requests for tolling are required to be filed within 30 days of the occurrence of the tolling event.²

Under our current broadcast station construction policies, the selection of a transmitter site is an independent business decision within a permittee's control.³ Typically, loss of a transmitter site stems from a permittee's own misjudgment in specifying a site.⁴ Issues related to site choice, including losing access to the transmitter site, have been deemed to be within the permittee's control, and are not grounds

¹ See 47 CFR §73.3598(b); 1998 Biennial Regulatory Review—Streamlining of Mass Media Application Rules and Processes, Report and Order, 13 FCC Rcd 23056 (1998) (*Streamlining R&O*), recon. granted in part and denied in part, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540, para. 39 (1999) (*Streamlining MO&O*).

² 47 CFR § 73.3598(c).

³ Royce at 9017.

⁴ Dennis J. Kelly, Esq., Letter, 23 FCC Rcd 4786, 4788 (MB 2008).

for tolling of the construction deadline.⁵ Accordingly, tolling does not apply, and we will consider the filing as a request for a waiver of the tolling rule.

When treated as a waiver request, SWCCMT's request does not establish that a waiver is warranted in this case. The Commission's rules may be waived for good cause shown.⁶ When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.⁷ The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"⁸ and must support its waiver request with a compelling showing.⁹ Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.¹⁰ As noted, waiver of the three-year construction deadline for site-related construction delays is appropriate only under rare and exceptional circumstances beyond the permittee's control.¹¹ For example, the Commission has waived the three-year construction deadline following governmental actions that took the land by eminent domain,¹² or highly restricted the periods during which construction could occur to accommodate the breeding and migration of endangered species first discovered at the site during construction.¹³

Based on the showing in the request, there are no rare and exceptional circumstances here, such as eminent domain taking or the discovery of an endangered species at a proposed construction site. In addition, deviation from the rule would not better serve the public interest because a waiver would undermine the purpose of Section 73.3598, which is to prevent radio spectrum from being warehoused based on circumstances within the control of the party that was granted the construction permit. SWCCMT gives no explanation why it began the process to obtain access to its designated tower site at the end of the three-year construction period, and states no reason why it failed to act earlier. Accordingly, the request fails to meet the legal standard delineated above.

⁵ See *Streamlining MO&O*, at 17539-40, paras. 36-37 (diligent permittees are expected to bring urgency to completion of construction to avoid delays related to loss of site); see also *Royce Int'l Broad. Co.*, Memorandum Opinion and Order, 23 FCC Rcd 9010, 9016, para. 15 (2008) (site-related difficulties are not part of the tolling criteria).

⁶ 47 CFR § 1.3. In addition, the *Streamlining MO&O* recognized "rare and exceptional" circumstances beyond a licensee's control not delineated in the tolling provisions. In these very limited circumstances, we will entertain requests for waiver of our strict tolling provisions. *Streamlining MO&O* at 17541, para. 42.

⁷ See, e.g., *Spirit Radio of North Florida, Inc.*, Letter, 24 FCC Rcd 2958, 2959 (MB 2009); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*") (subsequent history omitted).

⁸ *WAIT Radio*, 418 F.2d at 1157.

⁹ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broad. Sys., Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹⁰ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (D.C. Cir.1990)).

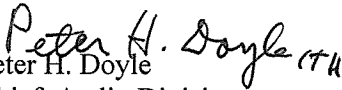
¹¹ See Note 6, *supra*.

¹² See *Rebecca Duke, Esq.*, Letter, 18 FCC Rcd 5034 (MB 2003) (six-month waiver of construction period justified by loss of site due to taking by local authority through eminent domain).

¹³ See *Dorann Bunkin, Esq.*, Letter, 21 FCC Rcd 8671 (MB 2006) (six-month waiver of the construction period granted to accommodate the local requirement that outdoor construction cease for extended periods during the breeding and migration of endangered species).

Based on the above discussion, the request filed by Southern Wabash Communications Corporation of Middle Tennessee, Inc., for Station WBGB(FM), Portland, Tennessee, is denied. The construction permit (File No. BPED-20130909AAI) HAS EXPIRED BY ITS OWN TERMS.

Sincerely,


Peter H. Doyle
Chief, Audio Division
Media Bureau