



Federal Communications Commission
Washington, D.C. 20554

DA 08-786
Released: April 3, 2008

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1233 20th Street, N.W.
Washington, DC 20036

Re: New Television Station, Memphis, TN
Request for Tolling of Construction Deadline
Facility ID: 85102

Dear Counsel:

This concerns the request, filed on behalf of Mid-South Public Communications Foundation (Mid-South), permittee of a new single-channel television station on Channel *56, Memphis, Tennessee, to toll the station's period of construction until February 17, 2009. For the reasons set forth below, we deny the request for tolling.

Background. Mid-South is a noncommercial educational broadcaster and is also the licensee of noncommercial educational station WKNO-TV, Channel 10, Memphis, Tennessee. The construction permit for the new Memphis station on Channel *56 was granted on November 9, 2004 and expired three years later on November 9, 2007.¹ Mid-South erroneously filed an application² to extend the station's digital construction deadline pursuant to Section 73.624(d)(3) of the rules.³ The extension provisions of Section 73.624(d)(3), however, apply only to stations with paired analog and DTV channels. As a single-channel digital station, the new Memphis station was subject to the stricter tolling provisions of Section 73.3598(b).⁴ Mid-South subsequently submitted the instant request for tolling on March 17, 2008.

Section 73.3598(b) provides three categories where the Commission will toll a construction deadline: (1) act of God; (2) the permit is the subject of administrative or judicial review; or (3) the permit is delayed by any cause of action pending before any court related to local, state or federal requirement for the construction or operation of the station, including zoning or

¹ See File No. BPEDT-19961213KH.

² See File No. BEPEDT-20070917ADC.

³ See 47 C.F.R. § 73.624(d)(3).

⁴ See 47 C.F.R. § 73.3598(b).

environmental requirement.⁵ The Commission has also acknowledged that there are “rare and exceptional circumstances” beyond those delineated in the rule that may also warrant tolling.⁶ The Commission specifically acknowledged that public broadcasters may face unique issues with respect to DTV implementation. Although it declined to adopt a specific exception for noncommercial educational stations, the Commission did say “if presented with specific problems affecting a particular noncommercial educational licensee or permittee, we retain the discretion to fashion whatever relief is appropriate.”⁷

Mid-South does not qualify for tolling under any of the three categories set out in Section 73.3598(b). However, in its request for tolling, Mid-South maintains that “equitable considerations and the public interest amply warrant grant of relief.” Mid-South estimates that the cost to construct a facility on its pre-transition Channel *56 would be in the range of \$1.7 to \$2 million and would “constitute a severe financial hardship diverting substantial resources away from permanent DTV operation on Channel *10.”⁸ Mid-South requests that the Commission permit it to forego construction on Channel *56 and instead construct its new Memphis station on its post transition DTV Channel *10.

Discussion. We find that Mid-South has failed to demonstrate “rare and exceptional circumstances” that warrant tolling of the construction deadline for its new television station on Channel *56 at Memphis, Tennessee. From its showing, we discern that Mid-South simply does not want to expend the funds necessary to construct and operate an analog station on Channel *56 and desires instead to wait until the end of the DTV transition and build on its post-transition Channel *10. This is not an option, however, for single-channel television stations. In the *Third Periodic DTV Report and Order* the Commission allowed stations with paired analog and digital channels that are not remaining on their pre-transition DTV channels for post-transition operation the opportunity to forego construction of their pre-transition DTV facilities.⁹ However, that policy does not apply to single-channel stations. Single-channel stations were given the benefit of a three-year construction period during which some type of station (analog or digital, if feasible from an engineering standpoint) must be constructed and operating. Mid-South was required by the Commission’s rules for single-channel stations to construct either an analog or digital-only station on Channel *56 at Memphis, Tennessee. The three-year construction period expired and Mid-South failed to construct any station on Channel *56. Tolling is not an option in this case, as Mid-South cannot justify tolling under the criteria set forth in the rule.

⁵ See 47 C.F.R. § 73.3598(b).

⁶ See 1998 Biennial Regulatory Review – Streamlining Of Mass Media Applications, Rules and Processes, *Memorandum Opinion and Order*, 14 FCC Rcd 17525, ¶ 42 (1999).

⁷ *Id.*

⁸ Channel *10 was allotted as the new Memphis, Tennessee station’s post-transition DTV channel. See *Seventh Report and Order and Eighth Further Notice of Proposed Rule Making, In the Matter of Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service*, 22 FCC Rcd 15581 App B. (2007).

⁹ See Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, *Report and Order*, FCC 07-228, released December 31, 2007 (*Third DTV Periodic Review Report and Order*).

Although the Commission has stated that it will provide noncommercial entities with additional flexibility when considering whether to toll a construction deadline, we do not believe that unwillingness to build qualifies as the type of “rare and exceptional circumstance” for which the Commission retained the “discretion to fashion whatever relief is appropriate.”¹⁰

Wherefore, the above facts considered, Mid-South Public Communications Foundation’s request for tolling IS DENIED and its application for extension of digital construction permit (File No. BEPEDT-20070917ADC) is DISMISSED. Pursuant to Section 73.3598(e) of the rules, the construction permit for the new Memphis, Tennessee television station on Channel *56 was automatically forfeited.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁰ See 1998 Biennial Regulatory Review – Streamlining Of Mass Media Applications, Rules and Processes, *Memorandum Opinion and Order*, 14 FCC Rcd 17525, ¶ 42 (1999).