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In re: **Levine/Schwab Partnership d/b/a
Schwab Multimedia LLC**
KWIF(AM), Culver City, CA
Facility ID No. 161348
File Nos. BNP-20140715ABO, BMP-
20190522AAJ, BMP-20201026AAC

Dear Counsel:

We have before us a Petition for Reconsideration (Petition) filed by Levine/Schwab Partnership d/b/a Schwab Multimedia LLC (Schwab), permittee of KWIF(AM), Culver City, California (Station).¹ Schwab seeks reconsideration of our denial of its request for further tolling of the construction deadline for the Station.² For the reasons set forth below, we dismiss in part and otherwise deny the Petition, and dismiss all pending applications to modify the construction permit for the Station.

¹ Levine/Schwab Partnership Petition for Reconsideration, File No. BNP-20140715ABO (filed Oct. 26, 2020) (Petition). See also, *Broadcast Applications*, Public Notice, Report No. 29854, at 3 (MB Oct. 29, 2020).

² Levine/Schwab Partnership, Letter Order (MB Sept. 25, 2020) (*Letter Order*).

Background. We granted Schwab a construction permit (Permit) for the Station on November 2, 2016.³ The Permit specified a three-year construction period ending on November 2, 2019. On December 1, 2016, we received a petition for reconsideration of the Permit's grant.⁴ Pursuant to section 73.3598 of the Commission's rules (Rules),⁵ Schwab sought tolling of the construction period.⁶ We dismissed the petition for reconsideration on December 14, 2016.⁷ The construction deadline for the Station thus became April 13, 2020.

On May 22, 2019, Schwab filed an application (2019 Application) to modify the Permit to specify a different site (2019 Site), and a different antenna system. We received two Informal Objections to the 2019 Application.

On March 23, 2020, Schwab requested that we toll the construction deadline for the Station, citing construction delays caused by COVID-19 and a statewide shelter-in-place order issued by Governor of California on March 19, 2020.⁸ We granted the request, indicating that tolling would remain in effect for six months, until September 23, 2020, "absent earlier resolution of the COVID-19 closure."⁹ We also noted that, when tolling ended, "22 days will remain on the permit."¹⁰

On September 21, 2020, Schwab filed a request for further tolling of the construction deadline for the Station (Tolling Request).¹¹ Schwab cited both the continuing COVID-19 pandemic and "intense fires in Southern California."¹² Schwab asserted that, due to COVID-19 being widespread in Los Angeles County, many non-essential business operators in Los Angeles County were closed, which had "made it virtually impossible to obtain equipment because of supply chain issues" and had caused consulting engineers and tower crews to be unavailable or unwilling to travel to the area.¹³ Schwab also noted that air quality in the Culver City area had been "severely impacted by smoke" from wildfires raging in Southern California. Schwab noted that the Los Angeles Department of Public Health had urged all

³ *Broadcast Actions*, Public Notice, Report No. 48856, at 3 (MB Nov. 7, 2016).

⁴ Petition for Reconsideration of Ontario Broad., LLC, File No. BNP-20140715ABO (filed Dec. 1, 2016).

⁵ 47 CFR § 73.3598.

⁶ Petition for Tolling of Levine/Schwab P'ship, File No. BNP-20140715ABO (filed Dec. 7, 2016).

⁷ *KWIF(AM), Culver City, California*, BNP-20140715ABO, Letter Order (MB April 14, 2017).

⁸ Tolling Request and/or Request for Waiver of 47 USC § 319(b) of Levine/Schwab P'ship, File No. BNP-20140715ABO (filed Mar. 23, 2020). Our tolling rule, 47 CFR § 73.3598 (Tolling Rule), provides that a construction permit's expiration date may be tolled if the permittee shows that construction of the proposed broadcast station is being impeded by certain circumstances beyond the permittee's control. In this case, the pending tolling claims all involve the provision of the Tolling Rule specifying that the construction permit can be tolled if construction is prevented by an act of God. *See* 47 CFR § 73.3598(b)(1).

⁹ Levine/Schwab P'ship, File No. BNP-20140715ABO, Letter Order (MB Mar. 24, 2020).

¹⁰ *Id.*

¹¹ Request for Extension of Tolling Issued March 24, 2020, of Levine/Schwab P'ship (filed Sept. 21, 2020) (Tolling Request).

¹² *Id.* at 1.

¹³ *Id.*

individuals “in impacted areas” to stay inside.¹⁴ Schwab indicated that, until the air quality improved, “it would be difficult to find construction crews to work in such dangerous conditions.”¹⁵

We denied the Tolling Request.¹⁶ In so doing, we noted that radio stations are “essential services” and not subject to the restrictions that Schwab cited.¹⁷ We also noted that Schwab had not submitted any evidence that it had tried to construct the Station.¹⁸ Finally, we denied tolling based on the wildfires in the state and the air quality.¹⁹ We noted that Culver City was not in an area that was evacuated or burned, and Schwab had failed to provide a specific showing as to how air quality in Culver City may have affected potential construction activities or how long any such problem may have lasted.²⁰ We noted that tolling had ended. The construction deadline for the Station thus became October 30, 2020.²¹

Schwab timely filed the Petition, which challenges our denial of Tolling Request.²² Schwab also concurrently filed an application (2020 Application) to modify the Permit to specify a new site (2020 Site) on October 26, 2020.²³

Discussion. Procedural Issue. At the outset, we find that certain evidence submitted by Schwab for the first time with the Petition is procedurally barred.²⁴ Specifically, Schwab for the first time

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ *Letter Order* at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ The *Letter Order* erroneously indicated the new construction deadline for the Station was March 6, 2021. This error was corrected via a second letter order issued on October 8, 2020. *Levine/Schwab P’ship*, Letter Order (MB Oct. 8, 2020) (amending the construction permit to specify an expiration date of October 30, 2020).

²² We did receive an Opposition to Petition for Reconsideration (Opposition) and a Reply to Opposition to Petition for Reconsideration (Reply). Opposition to Petition for Reconsideration of Intelli, LLC, BNP-20140715ABO (filed Nov. 16, 2020); Levine/Schwab P’ship Reply to Opposition to Petition for Reconsideration, BNP-20140715ABO (filed Nov. 30, 2020). However, because the Opposition was late-filed, we do not consider it. See 47 CFR § 1.106(g) (“Oppositions to a petition for reconsideration shall be filed within 10 days after the petition is filed . . .”). And, because replies are “limited to matters raised in the opposition,” 47 CFR § 1.106(h), we also do not consider the Reply.

²³ File No. BMP-20201026AAC. *Broadcast Applications*, Public Notice, Report No. 29855, at 4 (MB Oct. 30, 2020).

²⁴ 47 CFR § 1.106(c). Under section 1.106(c) of the Rules, a petition for reconsideration may rely on new facts or arguments only if (1) the facts or arguments were unknown to the petitioner until after his last opportunity to present the arguments and the petitioner could not through the exercise of ordinary diligence have learned of the arguments in question prior to such opportunity, (2) the facts or arguments relate to new events or changed circumstances since the petitioner’s last opportunity to present arguments to the Commission, or (3) consideration of the facts or arguments is required by the public interest.

provided (1) a copy of an August 12, 2019, lease for 2019 Site,²⁵ (2) a copy of an August 2020 potential lease for the 2020 Site,²⁶ (3) a letter from the President of Kintronic Labs Inc.,²⁷ (4) an email from Nautel Transmitter,²⁸ (5) an email from a consulting engineer,²⁹ (6) a list of equipment for the Station's studios,³⁰ (7) an email from the President of the Culver City Chamber of Commerce,³¹ (8) a site survey for the 2020 Site,³² (9) invoices for legal fees related to the 2020 Site,³³ and (10) air quality daily values for 2020.³⁴ None of this evidence relates to events occurring or circumstances which changed after Schwab filed its Tolling Request. Further, none of this evidence was unknown to Schwab at the time it filed the Tolling Request. Given this, we do not believe the public interest requires consideration of the evidence or arguments that rely upon it. We therefore dismiss the new evidence proffered by Schwab, and dismiss those portions of the Petition that rely upon it.

Substantive Issues. We reject Schwab's unsupported assertion that the Bureau erred in finding that "radio stations are essential services and are not subject to the . . . restrictions" applicable to non-essential services.³⁵ Schwab argues that, while radio station operations are considered essential services, "construction, equipment delivery and the like related to building the station are subject to restrictions."³⁶ However, Schwab offers no support for this claim, which appears inconsistent with the State Public Health Officer's list of Essential Critical Infrastructure Workers.³⁷

We also affirm our finding that Schwab is not eligible for a construction deadline waiver pursuant to the Public Notice that the Media Bureau (Bureau) issued on September 10, 2020

²⁵ Petition, Exh. 1.

²⁶ *Id.*, Exh. 2. This lease has not been signed by the lessor.

²⁷ *Id.*, Exh. 3. While the letter is dated October 19, 2020, Kintronic indicates it has been working with Schwab on the Station for "at least three years." Schwab could have provided evidence regarding Kintronic's involvement in the Tolling Request.

²⁸ *Id.*, Exh. 4. The Nautel email and the quote attached to it both are dated April 28, 2020, and could have been submitted with the Tolling Request.

²⁹ *Id.*, Exh. 5. While this email is dated October 25, 2020, the consulting engineer indicates he has been working with Schwab since October 2016. Schwab could have provided evidence regarding the engineer's services in its Tolling Request.

³⁰ *Id.*, Exh. 6.

³¹ *Id.*, Exh. 7. While this email is dated October 22, 2020, it indicates that the Culver City Chamber of Commerce has been working with Schwab "[o]ver the past year plus." *Id.* Schwab could have provided information regarding the organization's involvement in its Tolling Request.

³² *Id.*, Exh. 8.

³³ *Id.*

³⁴ *Id.*, Exh. 10.

³⁵ *Letter Order* at 1. *See also* Petition at 3.

³⁶ Petition at 3.

³⁷ State of California, *Essential Workforce*, <https://covid19.ca.gov/essential-workforce/> (last visited Nov. 16, 2020). Among those workers considered to be essential are "[w]orkers who support radio, television, and media service . . .," and "[w]orkers responsible for infrastructure construction," including "construction of new facilities." *Id.*

(*Waiver Public Notice*).³⁸ The waivers announced therein are available only for construction permits that (1) were awarded in Auctions 99 and 100, and (2) are due to expire on or before June 30, 2021.³⁹ The *Waiver Public Notice* made clear that “the public interest finding” set forth therein was specific to these permits.⁴⁰ It noted that “other applicants and permittees are free as always to seek waiver relief” but would need to make the appropriate waiver showing, “including a specific showing of the impact of the pandemic on the permittee.”⁴¹ Despite this guidance and its awareness of the *Waiver Public Notice*, Schwab did not request a waiver of the construction deadline for the Station.⁴²

We likewise affirm our finding that, in the Tolling Request, Schwab failed to provide evidence of its efforts to construct the Station.⁴³ In so doing, we reject Schwab’s argument that “the documented history on file with the Commission relative to this permit” demonstrates it made efforts to construct the Station.⁴⁴ At most, the materials on file demonstrate that towers already exist at the sites specified in the Permit and the 2019 Application, and that “very little construction” would be required at either of those sites.⁴⁵ However, Schwab no longer proposes to use either of those sites. Most significantly, neither these materials nor the materials submitted with the Tolling Request address whether Schwab has purchased equipment for the Station, or completed any other construction-related activities.

³⁸ *Letter Order* at 1, referencing *Media Bureau Announces Availability of Construction Deadline Waivers for Certain FM Translator Stations Awarded in Auctions 99 and 100*, Public Notice, 35 FCC Rcd 9555 (MB 2020) (*Waiver Public Notice*).

³⁹ *Waiver Public Notice*, 35 FCC Rcd at 9555.

⁴⁰ *Id.* at 9556. We acknowledge that Schwab is the permittee of an AM station and that, in making its public interest finding, the Bureau cited “the extreme financial hardships experienced during the pandemic by AM broadcast stations.” *Id.* However, the Bureau also cited “the unique nature of cross-service translators and their ability to enhance vital AM service to local communities.” *Id.* Accordingly, we reject Schwab’s argument that the rationale set forth in the *Waiver Public Notice* applies equally with respect to the Station. Petition at 3-4. We further note that the financial hardships referred to in the *Waiver Public Notice* were those related to “the significant loss of advertising revenue due to economic disruptions and the need to cover breaking news and air public service announcements relating to the pandemic.” *Waiver Public Notice*, 35 FCC Rcd at 9555. Schwab has not yet constructed—and therefore is not operating—the Station; therefore, Schwab cannot have experienced these financial difficulties. Finally, we find Schwab’s reliance on the statement that “shutdowns associated with the pandemic have forced stations to halt construction, have disrupted equipment availability and deliveries, and have interrupted travel for tower and equipment installers” to be misplaced. See Petition at 3, quoting *Waiver Public Notice*, 35 FCC Rcd at 9555. While the Bureau discussed these issues in the *Waiver Public Notice*, it did not cite them in making its public interest finding.

⁴¹ *Waiver Public Notice*, 35 FCC Rcd at 9556. The Bureau stated that “[t]his showing may include such evidence as financial statements demonstrating the pandemic’s economic impact on the individual permittee; affidavits or other evidence of the unavailability of components or tower crews; or copies of equipment orders.” *Id.*

⁴² Even if Schwab had sought a waiver of the construction deadline due to the COVID-19 pandemic, we note that Schwab did not provide any of the supporting evidence identified in the *Waiver Public Notice*. See *supra* note 41.

⁴³ *Letter Order* at 1.

⁴⁴ Petition at 4.

⁴⁵ *Id.* In any event, we note that Schwab has indicated it no longer has authorization to use the site specified in the Permit, and apparently is no longer pursuing construction at the 2019 Site. Petition at 2, 4.

To the extent that Schwab submits new evidence regarding its construction efforts in the Petition and makes arguments in the Petition which rely on this new evidence, as discussed above, we are dismissing the evidence and arguments as procedurally barred. We further note that, even were we to consider the new evidence, we would not find it persuasive. Schwab has not provided the type of evidence specifically identified in the *Letter Order*.⁴⁶ For instance, Schwab provides copies of an August 2019 lease for the 2019 Site, and a potential lease for the 2020 Site. These documents—while probative of site availability—are not probative of whether Schwab has made efforts to construct the Station’s facilities.⁴⁷ The letter from Kintronic Labs and the emails from the President of the Culver City Chamber of Commerce, and Schwab’s consulting engineer likewise are not germane.⁴⁸ Further, without evidence that it was accepted, the quote for the AM transmitter that Schwab submits is unhelpful. Likewise, without receipts or invoices, the equipment list that Schwab submits proves nothing. Finally, the legal bills that Schwab submits do not prove that it has undertaken construction efforts.⁴⁹

We affirm our finding that Schwab “failed to provide a specific showing as to how air quality in Culver City may have affected potential construction activities, or how long any such problem may have lasted.”⁵⁰ Schwab relied solely on a Citywide Coronavirus Update from September 9, 2020. While the update did indicate that “the combination of fire, smoke and . . . high temperatures” created conditions that were unhealthy and did advise individuals in “impacted areas to avoid unnecessary outdoor exposure” and “limit physical exertion,” it did not specify what areas were considered impacted.⁵¹ Schwab offered no other evidence to demonstrate that the Station’s antenna site was located in an impacted area. Moreover, to the extent that Schwab now submits “air quality data values for 2020,” we note that this new evidence is procedurally barred.

⁴⁶ *Letter Order* at 1 (noting that, in order to justify further tolling of the Station’s construction deadline, Schwab “would have needed to provide explicit evidence of an attempt to construct, such as (i) evidence that equipment was ordered on time but had been delayed due to shipment constraints or supply chain issues; (ii) correspondence from tower crews indicating that they were scheduled to install equipment but did not have the crew to send; [or] (iii) invoices demonstrating expenditures to further construction”). To the extent that the *Letter Order* suggests that evidence of “a lease for the tower site” would be adequate to demonstrate construction efforts, we disavow that aspect of the decision as inconsistent with Commission precedent. *See infra* notes 47 and 48.

⁴⁷ Construction efforts involve actions such as “clearing a transmitter site or actually purchasing equipment.” *See Deleted Station WPHR(FM), Ashtabula, Ohio*, Memorandum Opinion and Order, 11 FCC Rcd 8513, 8518, para. 17 (1996), *citing Community Svcs. Telecasters, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 6026, 6030, para. 12 (1991) (*Community Services*).

⁴⁸ *Community Services*, 6 FCC Rcd at 6029-30, para. 12 (affirming finding that evidence regarding legal and engineering expenses was not evidence that permittee had taken steps to construct station).

⁴⁹ *Id.*

⁵⁰ *Letter Order* at 1.

⁵¹ City of Culver City, *Citywide Coronavirus Update - September 9, 2020*, <https://content.govdelivery.com/accounts/CACULVER/bulletins/29f82e4> (last visited Nov. 16, 2020) (emphasis added).

Finally, we find Schwab's claim that the Station is the "last new AM station" the Commission will ever authorize to be both procedurally defective and irrelevant.⁵² The claim is procedurally defective because it is made for the first time in the Petition. It also is immaterial to our tolling analysis, which relates to whether there have been any construction delays caused by an act of God.⁵³

Conclusion/Ordering Clauses. ACCORDINGLY, IT IS ORDERED that the Petition for Reconsideration filed by Levine/Schwab Partnership d/b/a Schwab Multimedia LLC on October 26, 2020, IS DISMISSED IN PART AND OTHERWISE DENIED, pursuant to section 405(a) of the Communications Act of 1934, as amended, and sections 1.106(c), and (j) of the Commission's Rules.⁵⁴

IT IS FURTHER ORDERED that the KWIF(AM) construction permit (File No. BNP-20140715ABO) has expired on its own terms and will be deleted from the Commission's database.

Finally, IT IS ORDERED that the applications to modify the construction permit for KWIF(AM) (File Nos. BMP-20190522AAJ, and BMP-20201026AAC) ARE DISMISSED.

Sincerely,

Albert Shuldiner

Albert Shuldiner
Chief, Audio Division
Media Bureau

⁵² Petition at 4 (characterizing the Station as "the very *last* new AM Station"), 5, n.7 (asserting the Station is "the last new AM"), and 7 (referring to the Station as "this final new AM station") (emphasis in original)

⁵³ See *supra* note 8.

⁵⁴ 47 U.S.C. § 405(a); 47 CFR § 1.106(c), (j).