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**DA 23-281**

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*In Reply Refer to:*  
1800B-IB

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In re: DW236DS, Juncos, Puerto Rico  
Facility ID No. 203037  
File No. BNPFT-20181101AAC

DW287DP, Dorado, Puerto Rico  
Facility ID No. 203065  
File No. BNPFT-20181101AAD

Petition for Reconsideration of Tolling Denial

W287DR, Barceloneta-Manati, Puerto Rico  
Facility ID No. 202952  
File No. 0000178388

Petition for Reconsideration of License Grant

Dear Counsel and Petitioner:

The Media Bureau (Bureau) has before it two closely related petitions for reconsideration by Media Power Group, Inc. (MPG). The first petition<sup>1</sup> seeks reconsideration of a Bureau decision<sup>2</sup> that

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<sup>1</sup> MPG, Petition for Reconsideration, Pleading File No. 0000184708 (filed Feb. 10, 2022) (Tolling Petition).

<sup>2</sup> See Francisco R. Montero, Esq., Letter Order, File Nos. BNPFT-20181101AAC, BNPFT-20181101AAD, Ref. No. 1800B3-VM (MB Jan. 11, 2022) (Tolling Decision).

denied MPG's request to toll the construction deadlines of permits<sup>3</sup> to build new FM translator stations at Juncos and Dorado, Puerto Rico (Juncos and Dorado Stations, respectively). The second petition<sup>4</sup> seeks reconsideration of the Bureau's grant, following the nominal expiration of MPG's permits, of an application by Wilfredo Getulio Blanco-Pi (Blanco-Pi) to license modified facilities for FM translator station W287DR (formerly W221EL) at Barceloneta-Manati, Puerto Rico (Barceloneta Station),<sup>5</sup> on the channel previously authorized to the Dorado Station.<sup>6</sup> For the reasons set forth below, we deny both petitions.

**Background.** These cases raise three related issues: (1) whether MPG timely filed requests to toll the construction deadline of the Juncos and Dorado Permits; (2) whether there was merit to any such requests; and (3) whether the Bureau erred in licensing Barceloneta Station facilities that conflicted with the Dorado Permit.

Under the Commission's rules (Rules), broadcasters receive an unencumbered three-year period to construct a new broadcast station.<sup>7</sup> Construction permits automatically forfeit on the expiration date if the permittee has not completed construction and filed a covering license application.<sup>8</sup> If, however, the three-year construction period becomes encumbered by certain limited circumstances identified in the Rules, including natural disasters,<sup>9</sup> the permittee can, within 30 days of the encumbering event,<sup>10</sup> request tolling, *i.e.*, a temporary stop of the construction clock. If the Bureau has not yet ruled on a timely-filed request for tolling prior to the construction deadline, the Bureau's general practice is to hold any conflicting, post-deadline applications in queue behind that permit while determining whether to grant tolling.

Tolling does not apply to circumstances not named in the Rules, but the Commission may waive construction deadlines in other rare and exceptional circumstances of a similar magnitude beyond the permittee's control.<sup>11</sup> It is also Bureau practice to provide brief waivers to permittees that construct by the

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<sup>3</sup> File No. BNPFT-20181101AAC (granted Nov. 28, 2018) (Juncos Permit); File No. BNPFT-20181101AAD (granted Nov. 30, 2018) (Dorado Permit).

<sup>4</sup> MPG, Petition for Reconsideration, Pleading File No. 0000184716 (filed Feb. 10, 2022) (Barceloneta Petition).

<sup>5</sup> The Barceloneta Station rebroadcasts co-owned WBQN(AM), Barceloneta-Manati, Puerto Rico.

<sup>6</sup> See Application File No. 0000178388 (filed Jan. 3, 2022, granted Jan. 11, 2022) (License Application/Barceloneta License).

<sup>7</sup> 47 CFR § 73.3598(a).

<sup>8</sup> *Id.* § 73.3598(e).

<sup>9</sup> *Id.* § 73.3598(b)(1).

<sup>10</sup> *Id.* § 73.3598(c). The requirement of prompt notification is designed to ensure permittee construction diligence and to avoid *post hoc* permittee temporizing. This time frame generally applies to waiver requests as well. See *Birach Broad. Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1416 (2003), *recon. denied*, 20 FCC Rcd 5764 (2005) (*Birach*). If a permittee requests tolling more than thirty days after a tolling event, Commission practice is to look back 30 days from the date of the request and, if an encumbrance still existed at that time, to begin tolling treatment on the 30-day look-back date. See *Birach*, 18 FCC Rcd at 1416, para. 8.

<sup>11</sup> 1998 Biennial Regulatory Review-Streamlining of Mass Media Applications, Rules and Processes, 14 FCC Rcd 17525, 17541, para. 42 (1999). Such a waiver can apply to the three-year construction deadline and/or the automatic expiration provision. See 47 CFR §§ 73.3598(a), (e).

deadline but experience a short delay in filing a covering license application.<sup>12</sup>

The Bureau granted the Juncos Permit on November 28, 2018 and the Dorado Permit on November 30, 2018, each for a three-year term expiring on November 28, 2021 and November 30, 2021, respectively.<sup>13</sup> MPG did not file a license application for either station by the permits' respective expiration dates. However, MPG later represented to Bureau staff that it had, by the construction deadline, built the Juncos Station and was very close to completing the Dorado Station. MPG attempted to seek tolling treatment shortly before permit expirations in November 2021 based on natural disasters earlier in the construction period, *i.e.*, hurricanes and the COVID-19 pandemic.<sup>14</sup> As explained below, however, MPG did not properly file its November Request.

At the time that MPG first attempted to seek tolling, Commission staff was teleworking due to closure of FCC headquarters during the COVID pandemic. The traditional method of filing documents with the Office of the Secretary by U.S. mail was, therefore, unavailable. The Bureau encouraged broadcasters to submit filings electronically through the Bureau's database but because electronic filing was not available for some types of submissions, including tolling requests, the Bureau's Audio Division announced alternate filing procedures by public notice.<sup>15</sup> The Procedures Notice instructed radio permittees to e-mail tolling requests to two specific Bureau attorneys who are responsible for processing tolling requests and for manually updating the Bureau's licensing database to reflect tolling requests.<sup>16</sup> On Sunday, November 28, 2021, several hours before expiration of the Juncos Permit and two days before expiration of the Dorado Permit, MPG's counsel incorrectly submitted a tolling request that did not follow the announced procedures. Instead of contacting the attorneys specified in the Procedures Notice, MPG emailed a member of the Bureau's engineering staff not named in the Procedures Notice.<sup>17</sup> As a result, the Bureau attorneys responsible for tolling matters did not receive the e-mail, were unaware of the request, and did not update the database.

Because the Bureau did not receive a properly filed tolling request that would have triggered staff to manually update the Bureau's licensing databases, those databases did not reflect any request for tolling of either permit. Instead, they would have displayed to the public that the permits had expired, they no longer needed to be protected, and that the spectrum was available for other proposed uses. On the November 30, 2021 expiration date of the Dorado Permit, Blanco-Pi filed an application to move the Barceloneta Station from Channel 221 to Channel 287 without protecting the Dorado Permit, which had authorized MPG to use Channel 287.<sup>18</sup> The Modification Application appeared on public notice on

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<sup>12</sup> See, *e.g.*, *Clear Channel Broad. Licenses, Inc.*, Letter Order, 21 FCC Rcd 8677, 8680-81 (MB 2006) (permit expiration waived to accept license application filed two days after permit expiration for facilities completed prior to expiration).

<sup>13</sup> The Juncos and Dorado Stations would retransmit the signals of WLEY(AM), Cayey, PR and WSKN(AM), San Juan, PR, respectively.

<sup>14</sup> See MPG, Tolling Request for Construction Permits BNPFT-20181101AAC and BNPFT-20181101AAD (transmitted by Nov. 28, 2021 e-mail from Sarah Hinckle, Fletcher, Heald & Hildreth, to Robert Gates, FCC, and attached to Tolling Petition as Exh. 1) (November Request).

<sup>15</sup> Audio Division Announces Procedures Related to Coronavirus, Public Notice, DA 20-266 (Mar. 13, 2020) (Procedures Notice).

<sup>16</sup> *Id.*

<sup>17</sup> See Tolling Petition, Exh. 1.

<sup>18</sup> File No. 0000173206 (filed Nov. 30, 2021 and amended Dec. 3, 2021) (Modification Application).

December 7, 2021.<sup>19</sup> No one, including MPG, filed any objection to the Modification Application, which was uncontested.

On December 16, 2021, counsel for MPG inquired about the status of the November Request in e-mails with the Audio Division's Senior Deputy Chief (Deputy Chief), who was named in the Procedures Notice but for matters other than tolling. MPG's counsel described the Juncos Station as "built" but not yet able to operate at full power and the Dorado Station as "very close" to completion<sup>20</sup> consistent with representations in the misdirected November Request, a copy of which MPG provided to the Deputy Chief at that time.<sup>21</sup> The Deputy Chief believed that MPG intended to file an application to license the purportedly "built" Juncos Station shortly<sup>22</sup> and reinstated the Juncos Permit in the database on December 17, 2021<sup>23</sup> so that MPG could apply and appropriate legal staff could consider whether to waive the application due date. The Deputy Chief did not immediately reinstate the Dorado Permit, however, because construction was reportedly incomplete. He advised MPG that it would need to pursue tolling, which is granted only upon evidence of encumbrances directly preventing construction.<sup>24</sup>

MPG submitted the Tolling Amendment on December 21, 2021 by e-mail, providing more information about the purported impact of hurricanes and COVID.<sup>25</sup> Again, MPG did not direct this submission to the staff responsible for tolling. MPG disclosed in the Tolling Amendment that the stations were not "built" or "very close" as previously suggested.<sup>26</sup> Rather, MPG indicated that it had never been able to obtain access to the permitted sites for either station prior to the construction deadline; had built temporary facilities for the Juncos Station at an undisclosed location with an other-than-authorized

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<sup>19</sup> *Broadcast Applications*, Public Notice, Rep. No. PN-1-2111207-01 (Dec. 7, 2021).

<sup>20</sup> Tolling Petition, Exh. 2.

<sup>21</sup> The November Request stated that MPG "has made so much progress in building out its CPs that both Translators would be able to operate at reduced power at this time," that MPG expected to be able to "finalize construction quickly," but that due to "lingering effects from the multitude of natural disasters" and "supply chain problems caused by the COVID-19 pandemic" it was not yet capable of operating at full power. November Request at 1-3. MPG also stated in a December 16, 2021 e-mail that it was "ready to put [the Juncos Station] on the air and file a license to cover if the permit were to be reinstated and tolled." *Id.*, Exh. 3.

<sup>22</sup> See Tolling Petition, Exh. 5. ("Since [the Juncos Station] has been constructed already I can reinstate that one so you can file the license ASAP.").

<sup>23</sup> *Id.*, Exh. 6.

<sup>24</sup> *Id.*, Exh. 5 ("As for [the Dorado Station], we are only able to provide relief to permittees that have had a direct impact from Covid, hurricanes, or other disaster .... Otherwise, that one is done.").

<sup>25</sup> See MPG, Amended Tolling Request for Construction Permits BNPFT-20181101AAC and BNPFT-20181101AAD (submitted by e-mail Dec. 21, 2021) (Tolling Amendment) (attached to Tolling Petition as Exh. 2).

<sup>26</sup> MPG maintains that those prior representations were truthful because they reflected counsel's understanding at the time and the need for tolling. See MPG February Reply at 5. MPG explains that its reference to filing a license application anticipated a waiver request therein to propose operation from different sites, with different equipment, and with lower power than authorized. *Id.* We give no credence to this claim, as MPG offers no precedent and no basis (and we are not aware of any precedent, nor can we conceive of any basis) for allowing an applicant to modify a site location through a "waiver" request submitted with a license application rather than through an application to modify the construction permit for the proposed station.

antenna;<sup>27</sup> subsequently dismantled the temporary facilities while looking for a different site;<sup>28</sup> and was negotiating a site lease for the Dorado Station.<sup>29</sup> MPG attempted to link these site problems to disasters by stating, for example, that approval for the Dorado Station's use of a local government site was delayed because the government had prioritized hurricane response and that equipment delivery was, in general, taking much longer than it had pre-COVID.<sup>30</sup>

The Deputy Chief reinstated the Dorado Permit on December 23, 2021<sup>31</sup> so that staff could consider the Tolling Amendment. At virtually the same time on December 23, 2021, however, staff granted Blanco-Pi's uncontested Modification Application for the Barceloneta Station's use of the same channel. On January 3, 2022, Blanco-Pi filed the License Application to cover its Barceloneta Station construction as well as an informal objection to MPG's Tolling Amendment. MPG e-mailed an Opposition to the informal objection to the Deputy Chief on January 11, 2022.<sup>32</sup> Also on January 11, 2022, the Bureau granted Blanco-Pi's License Application and dismissed MPG's Tolling Amendment as untimely because it was submitted after permit expiration. Alternatively, the Bureau denied tolling because the primary cause of non-construction was the unavailability of MPG's chosen sites, rather than natural disasters beyond its control.<sup>33</sup> The Bureau also declined to grant any additional construction time

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<sup>27</sup> This amounts to unauthorized construction. MPG would have been required to file an application to modify the Juncos Permit to receive authority to construct at a new location or with different equipment. MPG notes that it had no access to the authorized Juncos Site and that the Juncos Station equipment needed to be site-specific, but it does not explain its failure to file a modification application.

<sup>28</sup> Tolling Amendment at 3, Exh. C. MPG submitted a quote dated December 21, 2021 for an antenna not yet ordered for the Juncos Station. MPG explained that it had been unable to order equipment for the Juncos Station because it would need to be customized to work at a particular location due the shape of its service contour, that MPG had not been able to obtain an affordable lease for the permitted site, and had attempted to build temporarily with borrowed equipment. *Id.* at 3. MPG in response to an Opposition from Blanco-Pi, states that it would have been able to afford the rent prior to the COVID pandemic but that the costs became infeasible due to a COVID-related financial downturn. MPG Opposition to Informal Objection (Jan. 11, 2022) at 8-9, submitted as Barceloneta Petition, Exh. 5 (MPG Opposition). MPG indicated in the Tolling Amendment that it was in negotiations to use a different site and would file an application for consent to construct the Juncos Station at that other location if tolling were granted. Tolling Amendment at 3.

<sup>29</sup> MPG reported siting difficulties for the Dorado Station because it was to be located on municipal land. MPG stated that it had only recently obtained permission to use the land and was in the process of drafting a contract to memorialize the agreement. *Id.* As of December 21, 2021, MPG states that it had ordered and received a transmitter for the Dorado Station. *Id.* at 3-4.

<sup>30</sup> Similarly, in the misdirected November Request, MPG stated that the local government agency that approves construction has either been non-operational or operating at a very limited capacity throughout the COVID-19 pandemic. *See* November Request at 2-3. MPG later clarified in a response that correspondence reflecting long delivery times for ordered equipment due to COVID pertained to a different station and that MPG had not then ordered equipment for the Juncos and Dorado Stations. *See* MPG Opposition at 6 ("the letter from Nautel is about a different broadcaster's purchase, but Nautel has indicated that the timing is the same for all broadcasters placing transmitter orders – none can be delivered prior to March 2022 from this manufacturer.").

<sup>31</sup> *See* Tolling Petition, Exh. 6.

<sup>32</sup> *See* MPG Opposition. This pleading was uploaded to the database on February 10, 2022.

<sup>33</sup> Specifically, the Tolling Decision stated that: (1) the request was untimely because it was filed after the permits had expired; (2) the primary reason MPG advanced for tolling of each permit was site availability whereas it is longstanding tolling policy that issues related to site choice are within the permittee's control; (3) claims of hurricane activity in the region were general and failed to show any storm damage that specifically affected MPG's ability to construct; and (4) the claimed supply chain delays provided no basis for tolling because it was MPG's

by waiver because it concluded that MPG had not demonstrated good cause or rare and exceptional circumstances beyond the permittee's control.<sup>34</sup> On February 10, 2022, MPG concurrently filed the Tolling and Barceloneta Petitions. Blanco-Pi filed a consolidated opposition on February 14, 2022<sup>35</sup> and MPG filed a reply on February 28, 2022.<sup>36</sup>

**Discussion.** We affirm our dismissal of the Tolling Amendment and grant of the Barceloneta License. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's action or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.<sup>37</sup> For the reasons set forth below we find that the Bureau did not err in ruling that MPG did not file timely tolling requests; the requests it attempted to file were without merit; and the Barceloneta License did not need to protect the expired Dorado Permit.

**Tolling Petition.** We affirm but clarify the Bureau's determination that MPG's attempted tolling submissions were untimely. The Tolling Decision treated the November Request as never filed and the Tolling Amendment as late-filed. We clarify that neither document was "filed" in accordance with the Rules. MPG's argument that it timely requested tolling relies upon section 1.7 of the Rules,<sup>38</sup> which considers documents filed when received, read together with the Procedures Notice, which recognizes tolling notifications by e-mail during the relevant period.<sup>39</sup> As discussed above, however, MPG directed its e-mails to staff members who had no responsibility for tolling requests, contrary to express instructions in the Procedures Notice. The attempted requests did not meet the requirements of section 1.7, because they were not received at the location the Procedures Notice designated for tolling requests,<sup>40</sup>

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choice to delay ordering the equipment until near or after permit expiration based on site availability problems. *See* Tolling Decision at 2-3.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> *See* Pleading File No. 0000184788 (filed Feb. 14, 2022).

<sup>36</sup> *See* Pleading File No. 0000185501, filed Feb. 28, 2022 (MPG February Reply). Blanco-Pi also submitted a reply to MPG's reply on March 1, 2022 (Pleading File No. 0000185715) to which MPG filed a Motion to Strike on March 2, 2022 (Pleading File No. 0000185615). We dismiss Blanco-Pi's March 1, 2022 pleading as unauthorized. *See Christian Family Network, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 2459, para. 1 n.4 (2016) (dismissing unauthorized pleadings). The Rules contemplate that the last document in the pleading cycle is a reply from the petitioner, not from the objector. *See* 47 CFR § 1.45(c).

<sup>37</sup> 47 CFR § 1.106(c)(1); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 15556, para. 5 (MB 2011).

<sup>38</sup> 47 CFR § 1.7.

<sup>39</sup> *See* Tolling Petition at 2, n.6 (arguing that the November Request was filed "upon receipt by the FCC staff member of the relevant e-mail.").

<sup>40</sup> *See* 47 CFR § 1.7 ("[u]nless otherwise provided in this Title, by *Public Notice*, or by decision of the Commission or of the Commission's staff acting on delegated authority, pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission)(emphasis added). MPG opines that staff to whom the e-mail was addressed received it but "forgot to act" because of the Thanksgiving holiday. Tolling Petition at 6. We reject that contention. As explained above, the correct staff did not receive MPG's request because MPG did not follow filing instructions. We further note that MPG e-mailed its November Request on a Sunday, which is outside of Commission business hours. *See* 47 CFR § 0.403 (Office Hours). If we assume *arguendo* that the Tolling Request arrived immediately in the mailbox of the incorrect staff member to which it was directed, actual receipt could not have occurred until the Commission opened for business on Monday, November 29, which is after the Juncos Permit's automatic expiration. *See id.* § 73.3598(e). Unlike broadcast applications submitted through the Commission's electronic filing system, which are considered filed if received in

*i.e.*, the electronic mailboxes of two specific staff members.<sup>41</sup> Thus, MPG never officially filed *any* tolling request in the manner required under section 1.7. We reject MPG’s contention that the Deputy Chief’s reinstatement of the permits in December 2021 proves otherwise.<sup>42</sup> The Deputy Chief did not consider whether MPG’s request was timely, properly filed, or viable. His reinstatement of the permits merely ensured that the database would not automatically reject a license application expected from MPG shortly and that other staff could reach whatever decision they might deem appropriate on questions of tolling and waiver, including potential dismissal as untimely.

MPG’s failure to file a timely tolling request moots its other arguments. We will, however, address those arguments in the interest of a complete record. First, even had MPG properly filed either of its attempted tolling submissions, they would have failed on the merits because MPG did not demonstrate any encumbrance beyond its control that existed 30 days prior to either request.<sup>43</sup> As stated in the Tolling Decision, the primary reason that MPG did not construct is that it had no lease and/or local permits for the authorized sites it chose. The Commission does not grant tolling for site-related difficulties because choice of a broadcast station’s antenna site is an independent business decision within the permittee’s control, and the Commission has determined that a three-year construction period provides ample opportunity for permittees to overcome unanticipated difficulties, including leasing, zoning, and other siting issues.<sup>44</sup> The D.C. Circuit has upheld our denial of tolling where the primary reason for non-construction was site loss but the permittee instead based its tolling request on natural disasters.<sup>45</sup> As the court stated, “even absent those obstacles, construction was impossible. You can’t build a radio station without a place to put it.”<sup>46</sup> Thus, we reject MPG’s argument that it qualifies for tolling or waiver based on new local land use procedures in Puerto Rico and purported lingering “bureaucratic” delays in issuing local permits following hurricanes and COVID.

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the system by midnight (even though offices are then closed) there is no comparable provision for documents submitted in another manner such as by e-mail. *See generally* 47 CFR § 1.4(f) (Computation of Time).

<sup>41</sup> The Tolling Decision incorrectly referred to the Tolling Amendment as “filed” on December 21, 2021. *See* Tolling Decision at 1, n. 1. The Bureau was, however, referencing the date of submission, without making any affirmative finding that the Tolling Amendment met section 1.7 requirements. *See id.* (rejecting claimed November Request and treating the Tolling Amendment as MPG’s first and only tolling request). Appropriate staff learned of the Tolling Amendment only indirectly, when the Deputy Chief shared the document MPG had sent to him.

<sup>42</sup> *Id.* at 6.

<sup>43</sup> *See* 47 CFR § 73.3598(c) (30-day requirement); *Birach*, 18 FCC Rcd at 1416, para. 8 (same 30-day period generally applicable to waiver requests). In the instant proceeding, MPG relied on the 2020 and 2021 hurricane seasons, neither of which occurred within 30 days of November Request or Tolling Amendment. We reject MPG’s contention that it was appropriate to wait until the very end of the construction period to request tolling so as not to appear that it was not being diligent and because it did not yet know whether tolling would be necessary. *See* MPG February Reply at 2-4. This is precisely the type of nonfeasance that the Commission sought to eliminate when it replaced its former permit extension rules with the current tolling system. *See Birach*, 18 FCC Rcd at 1416, para. 7. MPG misreads the language requiring permittees to request tolling “as promptly as possible” to endorse filing more than 30 days after an event. Tolling Petition at 4, citing 47 CFR § 73.3598(c). The full language of the Rule explicitly requires permittees to request tolling “as promptly as possible and, in any event, within 30 days, of any event.” Although it is Bureau policy to look back 30 days from the date of the late-filed request (the earliest that the request could be considered timely), MPG did not show any encumbrance 30 days prior to its requests while the permits were still in effect. *See supra*, n. 10.

<sup>44</sup> *See Cram Comm.*, Memorandum Opinion and Order, *LLC*, 23 FCC Rcd 658, 661-662, paras. 10-11 (2008).

<sup>45</sup> *Levine/Schwab Partnership v. FCC*, 61 F.4<sup>th</sup> 183 (D.C. Cir. 2023), affirming *Levine/Schwab Partnership*, Memorandum Opinion and Order, FCC 22-1 (rel. Jan. 5, 2022).

<sup>46</sup> *Id.*, 61 F.4<sup>th</sup> at 185.

MPG's additional COVID-related arguments fail to demonstrate any direct nexus between the pandemic and its failure to construct during the relevant time period.<sup>47</sup> For example, MPG cites COVID-related supply chain and manufacturing delays for broadcast equipment, but such delays could not have affected construction of the Juncos or Dorado Stations because MPG never timely ordered equipment for either one. MPG also argues that the Juncos site became unaffordable due to a COVID-related economic downturn. A permittee's finances are not generally grounds for tolling and, in any event, MPG never provided any supporting evidence such as financial statements and rental costs pre- and post-COVID.

We reject MPG's contention that the Tolling Decision conflicts with the Bureau's grant of additional construction time to other permittees.<sup>48</sup> The Commission must provide an adequate explanation before it treats similarly situated applicants differently,<sup>49</sup> but the facts of the instant case are not similar to the cases MPG cites. In *Caguas*, a COVID-related delay in local government approvals was insufficient on its own for tolling or waiver but supported a waiver when combined with a multitude of other factors, none of which apply to MPG.<sup>50</sup> The other case, *Yauco*, reflects more liberal treatment of COVID-related difficulties early in the pandemic.<sup>51</sup> Although the *Yauco* decision extended tolling granted under the initial policies, the Bureau warned that it would deny further tolling requests absent evidence of a direct connection to the inability to construct.<sup>52</sup> In fact, the Bureau denied the *Yauco* permittee's subsequent tolling request for lack of such evidence and the permit expired.<sup>53</sup>

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<sup>47</sup> MPG's Tolling Amendment provided links to weather websites from September and November 2020 stating that the 2020 Atlantic Hurricane Season had a record-breaking number of storms. Tolling Amendment at 1, n. 2. The Tolling Amendment also provided COVID statistics for Puerto Rico between April 2020 and December 2021 as well as December 2021 correspondence with an equipment manufacturer. *Id.*, Exh. D. Correspondence dated December 17, 2021 stated that that receipt of equipment (ordered for a different station) would take longer than expected. *Id.*, Exh. B.

<sup>48</sup> See Tolling Petition at 8-9, citing WUJA(TV), Caguas, PR, File No. 0000186748, Letter Order (MB Mar. 21, 2022) (*Caguas*) and WENA(AM), Yauco, PR, File No. BP-20170201AAM, Letter Order (MB June 29, 2021) (*Yauco*).

<sup>49</sup> See *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965).

<sup>50</sup> There, a licensed and operating television station was subject to tolling rules in connection with a required channel change under the incentive auction and repacking process. See 47 CFR § 73.3700(b)(5)(i), citing 47 CFR § 73.3598(b). The Caguas permittee ordered all equipment well in advance of expiration, and the public would lose existing service without a waiver. Additionally the Caguas permittee was operating with Special Temporary Authority on its post-auction channel and a waiver would not negatively impact other stations. None of those factors apply to MPG.

<sup>51</sup> The Bureau later returned to standard tolling policies, *i.e.*, requiring evidence directly linking specific circumstances to an inability to construct. See *Availability of Construction Deadline Waivers for Certain FM Translator Stations Awarded in Auction 99 and 100*, Public Notice, 35 FCC Rcd 9555, 9556 (MB 2020) ("this evidence may include 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").

<sup>52</sup> *Yauco* at 2, n.3 ("Please note that we require any future tolling requests based on COVID-19 related delays to include documentation demonstrating the specific steps the permittee took to commence construction and how COVID-19 impacted those efforts. . . . If a permittee offers no such evidence or any similar evidence of an attempt to construct, any further tolling will be denied.").

<sup>53</sup> See WENA(AM), Yauco, PR, Letter Order (MB Apr. 25, 2022) (*Yauco II*). MPG's circumstances are closer to *Yauco II* than *Yauco*. For example, the *Yauco II* order noted discrepancies between the permittee's prior statement that it had obtained all equipment, funding, staffing and approvals and its later contrary claim. Similarly, the Bureau reinstated MPG's permits because MPG stated it had built or was close to completion, but that was not the case. See



Nor do we find any merit to MPG's allegation that the Bureau erred by issuing the Tolling Decision without considering the MPG Opposition pleading that it e-mailed to the Deputy Chief on the same day.<sup>54</sup> MPG did not file that pleading with the staff responsible for tolling and, thus, they were unaware of the pleading at that time. Moreover, staff did not need to await potential filing of an opposition to Blanco-Pi's objection because staff did not rely on or give any weight to Blanco-Pi's submission because it raised matters that were already known to the Bureau.<sup>55</sup> To the extent that MPG wanted the Bureau to address arguments that MPG presented in its opposition, including the merits of the November Request<sup>56</sup> and impact of governmental delays,<sup>57</sup> we note that the Bureau addresses those matters herein and finds them without merit.

**Barceloneta Petition.** For reasons similar to those discussed above, we find that there was no error in the Bureau's grant of Blanco-Pi's License Application for the Barceloneta Station. The Communications Act of 1934, as amended, directs the Commission to grant license applications if it finds that all the terms of the application and permit have been fully met, and that there are no new circumstances that would make such grant contrary to the public interest.<sup>58</sup> MPG's petition is, in reality, an untimely request for reconsideration of the Modification Application's grant.<sup>59</sup> MPG did not object to the Modification Application or allege that Blanco-Pi failed to construct in accordance with the terms of the resulting permit.<sup>60</sup> Rather it raises a public interest argument that the Modification and License Applications were never acceptable or grantable because they were "cut off" by MPG's earlier, mutually exclusive Dorado Permit for which it had sought tolling.<sup>61</sup> These are essentially the same arguments we rejected above with respect to the Tolling Petition.

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*generally Foundation for a Beautiful Life*, Memorandum Opinion and Order, 36 FCC Rcd 15933 (2021), *appeal dismissed sub nom. Foundation for a Beautiful Life v. FCC* (D.C. Cir. Feb. 22, 2022 per curiam) (dismissal of license application where permittee mis-certified to completion of authorized construction but had only built temporarily at authorized site and more permanently at an unauthorized location).

<sup>54</sup> MPG notes that the Rules provide for ten days to submit replies and that MPG timely submitted the MPG Opposition within eight days of Blanco-Pi's objection. *See* 47 CFR § 1.45(b).

<sup>55</sup> For example, the mechanics by which MPG attempted to request tolling was already set forth in MPG's own Tolling Petition and the Bureau's database already reflected that MPG had not contested Blanco-Pi's applications.

<sup>56</sup> Tolling Petition at 7.

<sup>57</sup> *Id.* at 8.

<sup>58</sup> 47 U.S.C. § 319(c) (grant of license if "all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest.").

<sup>59</sup> *See* 47 U.S.C. § 405(a) (a petition for reconsideration must be filed within 30 days of public notice of the FCC's action or order); *see also* 47 CFR § 1.106(f) (same).

<sup>60</sup> MPG suggests that it did not have adequate time to object because there were only about 39 days between Blanco-Pi's filing of the Modification Application and the Bureau's grant of the License Application and it did not expect the Bureau to act or Blanco-Pi to build so quickly. *See* Barceloneta Petition at 7. We note, however, that because the Act calls for greater scrutiny at the permit stage rather than the licensing stage, the 30-day waiting period for action on permit applications does not apply to applications for covering licenses. *See* 47 U.S.C. § 309(C)(2)(c).

<sup>61</sup> Barceloneta Petition at 1, 5 citing 47 CFR § 73.7573(f) ("the first acceptable application cut[s] off the filing rights of subsequent applicants.").

MPG maintains that the November Request prevented the Dorado Permit from expiring, staff should have known of the November Request because MPG made status inquiries, and the database's non-inclusion of the November Request resulted from an "oversight by Commission staff."<sup>62</sup> We disagree. As discussed above in the context of the Tolling Petition, the November Request and Tolling Amendment were never filed because MPG did not follow filing instructions set forth by Public Notice. The Dorado Permit expired,<sup>63</sup> Blanco-Pi filed the Modification Application, and MPG did not contest that application or timely seek reconsideration in accordance with 47 U.S.C. § 405(a) or 47 CFR § 1.106(f). Thus, the Dorado Permit did not "cut off" filing of the Modification Application or grant of the Barceloneta License. We reject MPG's argument that the Bureau's action conflicts with the *Clear Channel* case. There, the Bureau dismissed an application that was mutually exclusive with a permit for a station that was constructed and continued to operate pursuant to valid program test authority but that filed a license application two days late.<sup>64</sup> Unlike the *Clear Channel* permittee, MPG did not construct, operate authorized facilities with program test authority, or file a license application.

### **Ordering Clauses.**

Accordingly IT IS ORDERED that the February 10, 2022 Petition for Reconsideration (Pleading File No. 0000184708) of Media Power Group, Inc. with respect to tolling of the period to construct FM translator stations DW236DS Juncos, Puerto Rico (Application File No. BNPFT-20181101AAC) and DW287DP, Dorado, Puerto Rico (Application File No. BNPFT-20181101AAD) IS DENIED.

IT IS FURTHER ORDERED that the February 10, 2022 Petition for Reconsideration (Pleading File No. 0000184716) of Media Power Group, Inc. with respect to the licensing of FM translator station, W287DR, Barceloneta-Manati, Puerto Rico (Application File No. 0000178388) IS DENIED.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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<sup>62</sup> *Id.* at 2-3, 8.

<sup>63</sup> MPG argues that expiration dates of both permits were "paused" as of November 28, 2021 when it e-mailed the November Request. *See* Tolling Petition at 1. The rule MPG cites for this contention, section 73.3598(b), simply sets forth circumstances for grant of tolling and does not contain any such concept of license expiration being paused upon filing of a tolling request. *See* 47 CFR § 73.3598(b). Rather, when a permit has expired but a valid request to toll or to waive the expiration date has been filed, Bureau practice is to hold any mutually exclusive applications in queue behind the expired permit while awaiting a final determination of whether tolling or waiver is appropriate. *See, e.g., Royce Int. Broad. Co.*, Memorandum Opinion and Order, 23 FCC Rcd 9010, 9013-14, para. 9 (2008) (subsequent history omitted). We reject MPG's argument that it filed a timely tolling request, action upon which is non-final. *See* Barceloneta Petition at 6. As discussed previously, MPG did not file a timely tolling request. Blanco-Pi's applications, thus, did not need to be held in queue.

<sup>64</sup> *See Clear Channel Broad. Licenses, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 7153 (2011) (*Clear Channel*).