

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

March 20, 2003

In Reply Refer To:
1800B3-IB/GDG

Rebecca Duke, Esq.
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W./Suite 100
Washington, D.C. 20006-6801

In re: WMLB(AM), East Point, GA
Facility ID No. 15521
BP-19990622AC, as modified by
BMP-20020923AAQ

Dear Counsel:

This letter concerns the uncontested request, filed February 5, 2003, on behalf of Atlanta Area Broadcasting, Inc. ("AAB"), that the referenced construction permit be treated pursuant to the tolling provisions of 47 C.F.R. § 73.3598(b) or that it be given a waiver of the construction rules. For the reasons detailed below, AAB's waiver request is granted.

Background. WMLB(AM) is a licensed and operating station, serving East Point, Georgia on 1160 kHz. On March 7, 2000, the staff approved AAB's application to modify the station's facilities at its licensed site, requiring completion of construction by March 7, 2003. On October 18, 2001, the Fulton County, Georgia School System notified AAB that it planned to exercise eminent domain over the station's licensed site for construction of a new elementary school.

AAB promptly secured a new site, and applied on November 5, 2001 (File No. BMP-20011105ABF) to relocate WMLB's tower to a site 20.5 miles northwest of East Point. Salem Media of Georgia, Inc. ("Salem"), licensee of WGKA(AM), Atlanta, Georgia, filed an objection to AAB's application, alleging that the proposed facilities would interfere with WGKA(AM)'s operations. On August 27, 2002, the staff agreed with Salem and dismissed AAB's modification application.¹ AAB identified a new site and applied on September 23, 2002 to modify its outstanding permit. The staff approved this modification on November 1, 2002, making no change to the stipulated March 7, 2003, expiration date.

¹Letter to Edward W. Hummers, Jr., Reference 1800B3-AG (Aud. Div., Aug. 27, 2002).

On February 5, 2003, AAB requested that its permit be treated pursuant to the Commission's tolling rules and that its expiration date be extended to recognize the following encumbrances towards construction of its modified facilities: (1) Fulton County's October 18, 2001, notification of its intention to exercise eminent domain; (2) Salem's informal objection to its November 5, 2001, modification application; and (3) delays in securing local zoning approval for the facilities approved by the Commission on November 1, 2002.

Discussion. Section 73.3598(a) requires that licensees complete construction of authorized changes to their existing facilities within three years from the date of issuance of the construction permit and file the appropriate application for broadcast license. It is well established, however, that the Commission can waive any of its rules, upon a finding of good cause consistent with the public interest.² With respect to waiver of our construction period tolling rules, the Commission recognizes that "there may be rare and exceptional circumstances . . . which would warrant the tolling of construction time."³

We agree that the decision of a government entity to acquire an authorized broadcast transmitter site through, if necessary, the exercise of its condemnation powers, warrants waiver of our rules. The forceable taking of private land for government use is rare and exceptional. Our recognition of the highly unusual nature of these procedures does not signal in any way a departure from the Commission's general view that loss of site in other contexts is a common event warranting neither tolling nor waiver.⁴

We take this opportunity to clarify construction period requirements when a site is lost as a result of a governmental acquisition. To determine the appropriate length of a waiver, we generally attempt to determine the amount of time that the permit was encumbered. The exercise of a governmental unit's eminent domain power, unlike events for which we traditionally grant tolling, is not an "event" with an identifiable end point. Given that resolution depends on the active and diligent efforts of the permittee, we conclude that a permit for a condemned site can be considered encumbered only as long as the permittee demonstrates timely and diligent efforts to replace its site. We clarify that the encumbered period will end upon a lapse in those efforts or upon Commission approval of a new site, whichever is earlier. We also clarify that, in any event, we expect a permittee to file a grantable application for a constructable facility within six months of the date on which a condemnation or similar notice from the government is received.

Here, AAB was diligent for the entire period between receiving notification that Fulton County intended to acquire its transmitter site and our approval of an alternate site. Fulton County notified AAB of the impending condemnation on October 18, 2001.

²*Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied* 409 U.S. 1027 (1972).

³*1998 Biennial Regulatory Review-Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056 (1998), *recons. granted in part and denied*, 14 FCC Rcd 17525, 17541 (1999) ("*Streamlining MO&O*").

⁴ *See Streamlining MO&O*, 14 FCC Rcd at 17538-39.

Within 30 days AAB located a new site and filed an acceptable application to modify its permit. AAB used the standard M3 ground conductivity values, as permitted under the Commission's rules.⁵ The Commission dismissed the application based on Salem's subsequent submission of actual measurements to rebut those standard presumptions. AAB filed a second modification application within 30 days of our dismissal, and we granted that application on November 1, 2002. Given the special difficulties in siting AM facilities, we consider AAB's prompt actions especially diligent. AAB has demonstrated that its inability to construct is due entirely to rare and exceptional circumstances beyond its control. We will therefore waive our rules to compensate AAB for the 379-day period (October 18, 2001 to November 1, 2002) it lost between notification of the impending condemnation and Commission approval of the modification application.⁶

Accordingly, AAB's request for waiver of the Commission's construction period rule, 47 C.F.R. § 73.3598(b), IS GRANTED.⁷ The construction deadline for the referenced construction permit IS REVISED TO March 21, 2004.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁵ See 47 C.F.R. § 73.183. See also 47 C.F.R. § 73.190 (Figure R3, replicating Figure M3).

⁶Neither of the two remaining events warrants additional construction time. While our grant of additional time encompasses the period in which Salem's informal objection was under consideration, our action is not based on the informal objection. Such objections are not comparable to the type of administrative review that qualifies for tolling. Similarly, initial zoning is not a tolling encumbrance.

⁷Although we are granting this request, we caution AAB that an applicant requesting waiver of a Section 73.3598 construction requirement should file its request "as promptly as possible following the event upon which it bases its request, preferably within the same 30-day period afforded to tolling applicants." *Birach Broadcasting Corporation*, ___ FCC Rcd ___ (FCC 03-14, released Jan. 31, 2003), at paragraph 8, *pet. for recon. pending on other grounds*. AAB relies on an event occurring over a year ago. Because AAB filed its request only six days after the Commission established its position on this timing issue, however, we considered its request.