

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of )  
 )  
1998 Biennial Regulatory Review -- ) MM Docket No. 98-43  
Streamlining of Mass Media Applications, )  
Rules and Processes )

TO: The Commission

**PETITION FOR RECONSIDERATION**

Family First ("Family"), by counsel and pursuant to Section 1.106 of the Commission's rules, hereby respectfully petitions the Commission to reconsider certain aspects of the rules and policies which it adopted in the Report and Order ("R&O"), FCC 98-281, released November 25, 1998, in the above-identified proceeding. Public notice of this R&O was published in the Federal Register on December 18, 1998, at 63 Fed.Reg. 70040.

Family is the permittee of unbuilt AM station WBAJ, Blythewood, South Carolina. Family acquired WBAJ in an assignment transaction approved by the FCC on May 14, 1998, and consummated by the parties on July 10, 1998. Under the Commission's rules in effect at the time, the construction permit was thereby automatically extended until July 10, 1999. While the assignment application was pending before the Commission, the authorized site for WBAJ's antenna was condemned by eminent domain for a highway construction project. Upon assuming control of the station, Family diligently sought a suitable alternate antenna site. After extensive research, an appropriate tract of land was identified. A land use proposal was submitted to the

local zoning authority on November 10, 1998. The zoning board approved the use of the site for a radio station on December 2, 1998. Upon obtaining zoning approval, Family purchased the land at the site and prepared a minor modification application. That application is expected to be filed as of January 19. Ostensibly, Family will have the presently unknown amount time from the date of the grant of that application until July 10 in which to commence and complete construction of WBAJ.

In the Notice of Proposed Rule Making (“NPRM”), 13 F.C.C.Rcd. 11349 (1998), in this proceeding, the Commission proposed a variety of amendments to its rules characterized as a “streamlining” of the processes governing broadcast applications and construction permits. Among these, was a series of procedural and substantive changes concerning the length of the life of the broadcast construction permit. In the NPRM, at ¶59 *et seq.*, the Commission proposed to establish the length for all construction permits at three years. No extensions of permits would be contemplated. Under certain specified circumstances where the permittee encountered encumbrances which would legitimately preclude construction, the running of that three-year life of the permit could be tolled upon proper notification to the Commission. Where the permit expired without the completion of construction of the station and the filing of a license application, the Commission stated its preference for the automatic forfeiture of the permit.

At ¶68 of the NPRM, the Commission described how it proposed to apply the new rule to permittees with existing construction permits. The new rule would cover all permits in their initial construction periods. However, the Commission explicitly stated that

[I]t would be administratively unworkable to apply the proposed rules to construction permits that are already beyond their initial construction periods (whether through extension, assignment, transfer of control, or modification). Because many of these

permits have already been afforded a construction period close to (or in many instances, in excess of) the three-year term proposed in this Notice, we propose to continue to apply the rules as they exist today to permits outside their initial periods. We invite comment on the tentative conclusion that it is more appropriate to continue to apply our current rules to construction permits that are beyond their initial periods.

Notwithstanding the Commission's explicit statement about its intentions for dealing with existing construction permits already beyond their initial construction period, the agency adopted precisely the opposite approach in the R&O. At ¶89, the Commission indicated that the new regime would apply to all existing permits, including those with extensions. Any permittee currently authorized to construct under an extension of its permit may request the further extension of the permit under the new rule for a period extending until three years from the issue date of its original permit. If the permittee makes an appropriate showing, the calculations to determine the ultimate expiration date are to include consideration of permissible tolling for encumbrances incurred anytime during the history of the permit. However, the Commission stated in stark terms that

No additional time will be granted when the permittee has had, in all, at least three unencumbered years to construct. The construction permit will be subject to automatic forfeiture at the expiration of the last extension.

This ruling was announced without explanation or rationale. Such a result is surprising given that the Commission had previously said in the NPRM in this proceeding that applying the new rule to permits which had already been extended under the old rule "would be administratively unworkable." The Commission had indicated that its "tentative conclusion" was to continue the existing regulations for permits which had already been extended, and it had solicited public comment on that tentative conclusion. Now, in the final R&O, the Commission has adopted a rule completely at odds with the proposal made in the NPRM. No information is

given with respect to the existence or contents of comments received concerning this issue. Neither is there any explanation to support whatever *sua sponte* internal reasoning the Commission may have conducted on this topic. Without notice or explanation, the Commission simply reversed its prior “tentative conclusion.”

The Commission’s adoption of its new three-year construction permit regimen with respect to permits which had previously been extended under the old rule constitutes a violation of the advance notice and comment requirements of the Administrative Procedure Act (“APA”), 5 United States Code § 553. The APA requires publication of a general notice about a proposed rulemaking which includes the terms and substance of the proposed rule, or a description of the subjects and issues involved. The Commission did not offer any warning that it might apply the three-year rule to existing extended permits. In fact, the Commission expressly stated the opposite – that it had concluded that applying the new rule to the older permits would be “administratively unworkable.”

That the FCC is obliged to comply with the advance notice provisions of the APA in its rulemaking proceedings is a well-established and judicially confirmed principle. The APA requires an administrative agency to provide notice of a proposed rulemaking “adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.” MCI v. FCC, 57 F.3d 1136, 1140 (D.C.Cir. 1995), quoting Florida Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C.Cir. 1988). Accord, Reeder v. FCC, 865 F.2d 1298 (D.C.Cir. 1989).

It is true that the subject-matter of this proceeding was described to include a new system of regulating extensions of construction permits. There is a doctrine which holds that public notice is adequate where “the content of the agency’s final rule is a ‘logical outgrowth’ of its

rulemaking proposal.” Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 , 445-446 (D.C.Cir. 1991), citing United Steelworkers of America v. Marshall, 647 F.2d 1189, 1221 (D.C.Circ. 1981). However, the final rule in this case cannot be deemed a “logical outgrowth” of the proceeding when the Commission had explicitly announced its conclusion in the NPRM that to apply the new rule to older permits would be “administratively unworkable.” The Commission cannot reasonably expect the public to guess that it would reject a conclusion expressly announced in the NPRM. If the Commission had questions or doubts concerning the application of the new three-year permit rule to older permits, it should have so indicated. With the express statement that the Commission had reached a conclusion, affected permittees were lulled to believe that the proposal did not pertain to them. Such machinations by the FCC are antithetical to the clear public notice requirements of the APA and associated case law.

Application of the new rule as announced in the R&O would be unfair and disastrous for Family and the community of Blythewood, for which WBAJ is the only authorized broadcast station. The prior permittee of WBAJ sought and received several extensions of the construction permit. The Commission found justification in granting each of these extension applications. However, none of the circumstances which gave rise to these extensions would qualify as a tolling encumbrance under the new rule. Consequently, the WBAJ permit has already exhausted the newly defined allotment of three encumbrance-free years.

Innocently unaware of this looming change in the rules, Family purchased the permit for WBAJ at considerable expense and has continued to invest substantial sums in pre-construction costs associated with identifying, securing and obtaining zoning approval for a suitable alternate

antenna site.<sup>1</sup> Since gaining control of WBAJ, Family has acted with due diligence to overcome an obstacle which arose due to circumstances beyond its control, i.e., the loss of the antenna site. The proposed new site has been secured and a minor modification application is being submitted, with a request for expedited processing. Now Family must await action on its modification application. How much time Family will ultimately have for constructing WBAJ before the July 10 expiration date of its permit is unknown. However, Family has acted in good faith and expended considerable resources under the reasonable belief that if it does not receive authorization to commence construction in time to complete the station before July 10, these circumstances would justify a further extension of the permit under the Commission's old policies. There is certainly the prospect that it may not be possible, even with all due diligence, to complete construction of WBAJ by July 10, 1999.

If the new rule were to be strictly and literally applied to WBAJ, Family would sustain the considerable risk that its permit would be forfeited come July 10. Family's expensive and diligent effort to establish a new aural service for the community of Blythewood would be unceremoniously terminated. The conclusion stated by the Commission in the NPRM that application of the new rule to older permits already past their original construction term would be "administratively unworkable" is certainly correct, at least as it concerns Family and WBAJ. It is "unworkable" because it is unfair to Family, who has labored in good faith to bring about a new broadcast service for the Blythewood community under difficult circumstances. It is "unworkable" because there apparently is no viable compromise between the strictures of the

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<sup>1</sup>The purchase price paid for the construction permit was \$60,000 exclusive of legal fees and other costs incurred in negotiating and implementing the acquisition.

new rule and the legitimate needs of a permittee such as Family whose plans and expectations were reasonably centered around the requirements of the old regulatory policies. The distress resulting from this “unworkable” situation is compounded by the lack of proper notice concerning the prospective change in the rule due to the Commission’s failure to provide that notice.

For the foregoing reasons, Family respectfully urges the Commission to reconsider certain aspects of ¶89 of the R&O. Specifically, Family asks the Commission to reverse its decision to apply the new three-year construction permit rule to existing construction permits which are no longer in the initial construction period. Instead, as to that class of permits, the Commission should reinstate the old rule and policies concerning the life and extension of construction permits which were in effect prior to the adoption of the R&O.

Respectfully submitted,

FAMILY FIRST

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