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BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
)
1998 Biennial Regulatory Review--)
Streamlining of Mass Media)
Applications, Rules, and Processes)
)
)
Policies and Rules Regarding)
Minority and Female Ownership of)
Mass Media Facilities)

MM Docket No. 98-43

MM Docket No. 94-149

TO: The Commission

PETITION FOR RECONSIDERATION

W. Russell Withers, Jr. (Withers), permittee of FM Broadcast Stations KZXA, Santa Fe, New Mexico, and KEFE, Los Alamos, New Mexico¹, by his attorney, and pursuant to Section 1.429 of the Commission's Rules, hereby respectfully seeks reconsideration of paragraphs 77-90 of the "Report and Order" adopting final rules in the above-captioned proceeding, FCC 98-281, released October 22, 1998, published in the Federal Register on December 18, 1998, 63 Fed. Reg.

¹Withers is also permittee of LPTV Stations K27EZ and K64EQ, Victoria, Texas, and permittee for Class C1 facilities of licensed Class A FM Station KOKX-FM, Keokuk, Iowa. Each of these permits, as modified and extended, is over three years old, and each of which is subject to adverse consequences as the result of newly adopted Section 73.3534 of

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70040-70051. Withers hereby requests the Commission to reconsider its amendment of Sections 73.3534 and Section 73.3598 of the Commission's Rules placing a three-year "cap" on broadcast station construction periods, and retroactively applying that "cap" to construction permits granted over three years ago. In support whereof, the following is shown:

Preliminary Statement

1. Section 1.4(b)(1) provides that, for purposes of computation of time in notice and comment rulemaking proceedings, public notice of FCC 98-281 occurred when publication in the Federal Register took place. As noted above, FCC 98-281 appeared in the Federal Register on December 18, 1998, Volume 63, Number 243, Pages 70040-70051.

2. Section 1.429(d) permits a petition for reconsideration to be filed within 30 days of public notice. In this case, the 30th day subsequent to December 18, 1998 was Sunday, January 17, 1999. Pursuant to Section 1.4(j) of the Rules, the due date for this petition became Tuesday, January 19, 1999, as Monday, January 18, 1999 was the Martin

the Rules. For purposes of brevity, the factual situations of KZXA and KEFE are used to highlight the problems with the new rule.

Luther King, Jr. federal holiday. Therefore, this petition is timely.

Grounds for Reconsideration

3. In the case of Withers' New Mexico FM construction permits, the Commission's radical amendment of Sections 73.3534 and 73.3598 of the Rules constitutes a "changing of the rules in the middle of the game" for reasons which appear to be based solely on the Commission's own convenience. As a result, despite the fact that Withers expended substantial amounts of time and money in an attempt to construct KZXA and KEFE, in reliance on the regulatory scheme in place when he acquired both construction permits, the Commission would place an arbitrary time limit on placing both stations in operation, and would require Withers to forfeit both construction permits, and all of the time and money spent on both, should he fail to meet that arbitrary time limit. This raises questions as to both administrative due process and the "takings" provision of Amendment 5 to the federal Constitution.

Factual Background

4. Withers consummated his acquisition of the KZXA construction permit on August 1, 1996 (he paid \$96,000.00 to the original permit holder to acquire the permit). Withers

consummated his acquisition of the KEFE construction permit on August 8, 1997 (he paid \$35,000.00 to the permit holder to acquire the permit). Both stations would serve similar areas in northern New Mexico, including Santa Fe, Los Alamos and Espanola.

5. A major problem in constructing these stations is the extremely restrictive zoning ordinances which exist in Rio Arriba County, New Mexico. Because of co- and adjacent-channel spacing restrictions imposed by Section 73.207 of the Commission's Rules, a fully-spaced site for either KZXA or KEFE which permits city-grade coverage of the cities of license can only be found in Rio Arriba County, New Mexico, which is north of Santa Fe. That county's ordinance permits only a 70-foot tall tower. As can be seen from the attached newspaper article, Rio Arriba County refused to grant a waiver or variance of this ordinance to a competing radio company to construct a tower of modest height.

6. The only means to avoid the application of this county zoning ordinance is for a broadcaster to successfully negotiate a lease with one of the Indian tribes in the area, whose reservations (called Pueblos in New Mexico) are sovereign territories not subject to county land use ordinances. For a substantial period of time, Withers has

engaged in painstaking negotiations with the tribe within whose Pueblo Withers was able to discern a fully-spaced site which could (1) provide city-grade service to both Santa Fe and Los Alamos and (2) be approved by the Federal Aviation Administration as not posing a "hazard to air navigation". As of today those negotiations are still on-going. Essentially, if a joint tower for KZXA and KEFE cannot be constructed at this site, neither station will ever be built (unless either Rio Arriba County can be persuaded to change its zoning ordinance or the FCC pre-empts all state and local regulation of broadcast tower construction).

7. The current KZXA construction permit expires on March 9, 1999, and the current KEFE construction permit expires on March 16, 1999. FCC Form 307 applications for one further extension of time will be filed by the end of this week, well over one month prior to their respective expiration date. It is unclear to us what action the Commission will take with respect to them.

8. The fundamental unfairness of this regulatory situation is readily apparent. Withers expended time and money in good faith reliance on Commission rules and regulations in existence when the KZXA and KEFE construction permits were acquired. Withers could not reasonably foresee

the radical changes to Sections 73.3534 and 73.3598 adopted by this new group of Commissioners. It goes without saying that investors will invest money in a regulated industry such as broadcasting only when they can be assured of a stable regulatory environment. The changes to Sections 73.3534 and 73.3598 "pull the rug out from under" Withers, and do not serve the public interest because they are contrary to the public interest inherent in a stable regulatory environment.

Legal Considerations

9. The Supreme Court of the United States ruled that the federal government may not change "rules in the middle of the game" where the effect of those rule changes was to injure private parties and at the same time releasing the federal government from its own obligations. ***United States v. Winstar Corporation***, 518 U.S. 839, 135 L. Ed. 2d 964, 1008-1010 (1996). While ***Winstar*** dealt with Congressionally-implemented changes to accounting rules governing savings and loan associations, the principle enunciated in that case governs other regulated industries: don't change your rules in the middle of the game.

10. Further, a construction permit is a form of a property right, and this has been recognized by the courts.

For example, in *L. B. Wilson, Inc. v. FCC*, 170 F.2d 793 (D. C. Cir. 1947), it was stated that:

While a station license does not under the Act confer an unlimited or indefeasible property right [citation omitted] the right is limited in time and quality by the terms of the license and is subject to suspension, modification or revocation in the public interest- nevertheless the right under a license for a definite term to conduct a broadcasting business requiring- as it does- substantial investment is more than a mere privilege or gratuity. A broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. We set forth in the margin quotations from decisions of the Supreme Court which support these statements and also provisions of the Communications Act itself which recognize that a broadcasting license confers a private right although a limited and defeasible one. [footnote omitted]

11. The Court in *Wilson* went on to cite the predecessor of current 47 U.S.C. §316 to confirm that its use of the word "license" also applied to "construction permit". The result of *Wilson* was that a unilateral modification of a license by the Commission, without permitting the license holder its right to administrative due process, was an unconstitutional taking proscribed by Amendment 5 to the federal Constitution.

12. Therefore, the Commission's abolition of current Section 73.3534 and amendment to Section 73.3598 without any provision for construction permit holders such as Withers to have a full and fair opportunity to demonstrate to the Commission that they are entitled to one or more additional

extensions of their construction permits constitutes an unconstitutional taking of a private property right which is proscribed by the Fifth Amendment.

13. As an additional consideration, it is totally unfair to allow new permittees a three year period, without affording permittees such as Withers a similar three year period to complete construction. Were the Commission to treat all of its broadcast permittees in a fair and equitable manner, it would declare that a three year construction period would obtain for all permittees, commencing on February 16, 1999 and continuing until February 16, 2002. If the Commission were really concerned about merging administrative convenience with administrative due process and fundamental fairness, it would magnanimously grant a three year construction period for all permittees--and not foreclose the possibility of more time for permittees such as Withers who have devoted substantial time and money to a project, only to be arbitrarily denied additional time. This disparity in treatment would be found by a reviewing court to constitute reversible error. **Melody Music, Inc. v. FCC**, 345 F.2d 730 (D. C. Cir. 1965).

Conclusion

14. As has been demonstrated herein, the Commission, in attempting to develop a rule for administrative convenience, failed to realize that the "defeasible property right" inherent in a construction permit held by a party such as Withers would be trampled as a result. It is simply lacking in fundamental fairness to "change the rules in the middle of the game". Withers expended time and money based on the rules he found when he entered the game; it is fundamentally unfair of the Commission to change those rules in such a way as to adversely affect him (and others similarly situated with him). If the Commission wishes to change its rules to govern construction permits granted for the first time after October 22, 1998, it is free to do so. However, there are administrative due process and Fifth Amendment "takings" problems inherent in the retroactive application of such a rule. The availability of an FCC Form 307 application and the opportunity to make a showing pursuant to current Section 73.3534 must continue to be made available to all permittees whose original construction permits were granted prior to October 22, 1998.

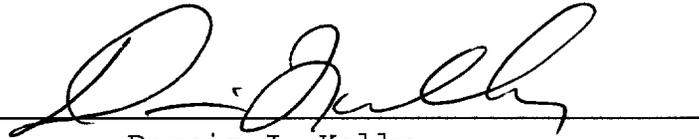
WHEREFORE, W. Russell Withers, Jr. urges that reconsideration **BE GRANTED**, and that the Commission either **RESCIND** new Sections 73.3534 and 73.3598 of the Commission's

rules, or **REVISE** Sections 73.3534 and 73.3598 so that their original provisions continue to apply to construction permits granted prior to October 22, 1998.

Respectfully submitted,

W. RUSSELL WITHERS, JR.

By

A handwritten signature in cursive script, appearing to read "D. Kelly", is written over a horizontal line.

Dennis J. Kelly
(D. C. Bar #292631)
His Attorney

LAW OFFICE OF DENNIS J. KELLY
Post Office Box 6648
Annapolis, MD 21401
Telephone: 888-322-5291

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EXHIBIT A

Commission Denies Putting Radio Tower Near Truchas

By Julia Goldberg
SUN Staff Writer

A request by radio station owner Richard Garcia to place a 300-foot radio tower in the Truchas area of Llano Quemado was denied, but the community agreed to help him find a home for his new FM station.

Garcia went before the Rio Arriba County Commission Nov. 21 seeking a variance from zoning laws that limit towers to 70 feet in height. About 15 Truchas residents also attended the meeting to protest the tower.

Garcia was denied the variance by the Planning and Zoning Committee in September and appealed to the commission.

The proposed site was a 5.12 acre parcel in Llano Quemado owned by Ireño Martinez. Martinez had proposed renting or leasing the property to the station for the tower.

Garcia, the operator of KDCE, a popular AM station in Española, has received a license from the Federal Communication Commission and clearance from the Federal Aviation Administration to operate KYBR, an FM station.

Although the commission upheld the committee's recommendation to deny the variance, they told the committee and the residents to work with Garcia to find

a place in the area where a tower of some height - whether it is 70 or 300 feet - would be less objectionable.

Kevin Wolfe told the commission he was considering purchasing property west of the tower but that he intended to "terminate the contract if you approve it."

"That's indicative of the impact it will have on the community," Wolfe said.

Truchas resident Jerry Keene said "the entire community is opposed to the radio tower. I've yet to find anyone who wants it. The only pro-comments have come from the land owner and the radio station."

"We understand it's a good place for radio towers, but it's also a good place to live," he said.

Keene's comments sparked applause from the residents.

However, Garcia was not summarily dismissed. His words on why he needed the tower seemed to reach the commission, who directed those involved to work together for a compromise.

"My being here is not to intrude on the people from Truchas," Garcia said. Garcia told the commission that because of regulations governing radio, he did not have the option of moving the tower to Abiquitú or a Santa Fe ridge.

"But I'm asking you, if you

turn this down, to help me find another site," he said. "We're doing this to have better coverage so we can compete with the bigger markets that are swallowing up smaller radio stations.

"If radio stations that are locally and minority owned are going to exist we need to keep up and not be swallowed by competition," Garcia said. "I ask you to vote your conscience."

"I understand the competition and that you are upgrading," said Commissioner Ray Tafuya, who lives in Truchas. "The people of Truchas do want to work with you and help you."

"You are being sensitive to what the community is trying to say," Commissioner Alfredo Montoya said to Garcia. "We encourage the community to work with KDCE. I listen to KDCE every day. I'd like to see you stay in business. I like the idea of the community being involved in the planning department. Negotiate so everyone can win."

Tafuya and Montoya denied the variance, which prompted more applause from the audience, but it was with the understanding that the Planning Zoning Committee, as well as members of the Truchas grant, were going to work Garcia to find an alternative for the tower.