VERNER · LIIPFERT
BERNHARD · McPHERSON AND HAND
CHARTERED

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

ERIC THOMAS WERNER
(202) 371-6230

e-mail address:
etwerner@verner.com

RECEIVED
JAN 19 1999

January 19, 1999

HAND-DELIVERED
Ms. Magalie Roman Salas
Secretary
Office of the Secretary
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
TW-A325
Washington, D.C. 20554.

Re: *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, FCC 98-281, released November 25, 1998 (*Report and Order* in MM Docket Nos. 98-43 and 94-149) -- Petition for Partial Reconsideration

Dear Madam Secretary:

On behalf of Royce International Broadcasting Company ("RIBC"), and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429 (1997), I enclose herewith, for filing, an original and eleven (11) copies of RIBC's Petition for Partial Reconsideration in the proceeding referenced above. Kindly stamp and return to this office the enclosed receipt copy of the filing designated for that purpose.

You may direct any questions concerning this filing to the undersigned.

Respectfully submitted,

Eric T. Werner

Enclosures

cc: Mr. Edward Stoltz
Erwin G. Krasnow, Esquire
Service List

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED
JAN 19 1999

In the Matter of	)	
	)	
1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes	)	MM Docket No. 98-43
	)	
Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities	)	MM Docket No. 94-149

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

ROYCE INTERNATIONAL BROADCASTING COMPANY

Erwin G. Krasnow, Esquire
Eric T. Werner, Esquire
VERNER, LIIPFERT, BERNHARD, MCPHERSON, AND HAND, CHARTERED
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301
(202) 371-6000

Date: January 19, 1999

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. BACKGROUND 2

A. RIBC's Interest in the Proceeding 2

B. The Streamlining Notice of Proposed Rule Making 3

C. The Streamlining Order 5

III. THE COMMISSION'S DECISION TO ABANDON THE CONSTRUCTION TOLLING PERIOD FOR CONSTRUCTION DELAYS STEMMING FROM LOCAL ZONING PROBLEMS IS CONTRARY TO THE RECORD AND LACKS A REASONED BASIS 8

IV. THE COMMISSION'S APPLICATION OF ITS NEW RULE TO DENY PERMITTEES THE BENEFIT OF TOLLING FOR ZONING-RELATED DELAYS ENCOUNTERED PRIOR TO THE EFFECTIVE DATE OF THE NEW RULE CONSTITUTES IMPERMISSIBLE RETROACTIVE RULE MAKING 12

V. CONCLUSION 19

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes	)	MM Docket No. 98-43
	)	
Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities	)	MM Docket No. 94-149

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Royce International Broadcasting Company ("RIBC"), by its attorneys, and pursuant to Sections 1.429(a), (d) and 1.4(b)(1) of the Commission's rules, 47 C.F.R. §§ 1.429(a), (d), 1.4(b)(1) (1997), hereby petitions the Federal Communications Commission ("FCC" or "Commission") to reconsider a portion of its *Report and Order* ("*Streamlining Order*") released November 25, 1998, in the proceeding captioned above.[1/]

I. INTRODUCTION AND SUMMARY

RIBC asks the Commission to revisit and rescind its decision in the *Streamlining Order* to abandon, retroactively, its longstanding practice of tolling a permittee's construction period when construction is encumbered by delays in obtaining local zoning approval. The Commission's abrupt reversal of a rule that has been in place for thirteen years came without adequate

---

1/ *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, FCC 98-281, released November 25, 1998 (*Report and Order* in MM Docket Nos. 98-43 and 94-149) (hereinafter "*Streamlining Order*"). A summary of the *Order* appeared in the Federal Register on December 18, 1998. *See* 63 FED. REG. 70040 (Dec. 18, 1998). Accordingly, this Petition is timely filed. *See* 47 C.F.R. §§ 1.429(d), 1.4(b)(1).

explanation and despite uniform opposition from commenting parties who demonstrated that the proceedings of local zoning authorities, like those of administrative agencies and reviewing courts, are matters beyond a permittee's control which should not be counted against a permittee's construction period. Moreover, the Commission's apparent intention to apply its new rule to deny existing permittees the benefit of tolling for zoning delays that they have heretofore suffered at the hands of local authorities constitutes retroactive rulemaking prohibited by the Communications Act and the Administrative Procedure Act. For both of these reasons, the Commission should reconsider its action in the *Streamlining Order* and continue to allow a permittee to toll its construction period during the pendency of local zoning board proceedings related to the permittee's site as well as during those periods when the permit is the subject of administrative or judicial review.

II. BACKGROUND

A. RIBC's Interest in the Proceeding

RIBC is the permittee of Stations KIOQ(AM), 1030 kHz, Folsom, California, and KRCK(AM), 1500 kHz, Burbank, California. Both permits have been the subject of protracted zoning proceedings.

With respect to Station KRCK, after the Los Angeles Zoning Administrator denied RIBC's zoning application for a conditional use permit, RIBC pursued both administrative and judicial appeals of the adverse determination. In reliance on the Commission's extensions of the construction deadlines which were granted as a result of circumstances beyond the permittee's control, RIBC has made expenditures in excess of $300,000.00. As shown in the extension application granted by the Mass Media Bureau on November 24, 1998 (File No. BMP-

981110DA), RIBC has filed an opening brief and a reply brief with the Second Appellate District of the State of California, and continues to prosecute this appeal.

With respect to Station KIOQ(FM), RIBC has been involved in a protracted and litigious zoning proceeding with the El Dorado County Planning Department and the El Dorado County Board of Supervisors. Faced with the Planning Department's actions which, in RIBC's view, have been highly irregular and constitute an abridgement of its due process rights, RIBC has negotiated a lease with the owner of a different site in Sacramento County and has filed an application with the Commission for authority to move its transmitter site to this new location (File No. BMP-970829AA). However, under the rules adopted in the *Streamlining Order*, the Mass Media Bureau will cancel the underlying construction permit of KIOQ on February 16, 1999, which would, in turn, result in the dismissal of KIOQ's application to change site.

B. The Streamlining Notice of Proposed Rule Making

In its Notice of Proposed Rule Making in MM Docket No. 98-43, the Commission proposed wide-ranging and fundamental changes to its broadcast application and licensing procedures, including those governing construction permit extensions.[2/] Specifically, with respect to its construction permit extension procedures, the Commission proposed to:

> (1) issue all construction permits for a uniform three-year term; (2) extend permits only in circumstances where the permit itself is the subject of administrative or judicial appeal or where construction delays have been caused by an "Act of God;" (3) eliminate the current practice of providing extra time for construction after a permit has been the subject of a

---

2/ *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 11349 (1998) (*Notice of Proposed Rule Making* in MM Docket No. 98-43) (hereinafter "*Streamlining Notice*").

> modification of an assignment or transfer of control; and (4) make construction permits subject to automatic forfeiture upon expiration.[3]

With respect to its proposal to limit the circumstances under which extensions would be available, the Commission correctly observed that Section 319(b) of the Communications Act provides a statutory safe harbor against forfeiture of a permit where the permittee's delay in completing construction has been caused by circumstances beyond the permittee's control.[4] However, the Commission proposed "to strictly limit the circumstances that would qualify for such treatment."[5] In so doing, the Commission proposed to eliminate that portion of Section 74.3534(b)(3), adopted in 1985, that included "zoning problems" among the circumstances deemed to be "clearly beyond the control of the permittee."[6]

Specifically, the Commission solicited comments on "whether difficulties in obtaining local zoning authorization are sufficiently beyond the permittee's control to warrant treatment similar to that of delays caused by administrative and judicial review."[7] Without further elaboration, the Commission then stated its tentative conclusion that "zoning delays can be overcome and construction can be completed within the proposed three-year construction period if a permittee pursues the zoning process diligently."[8]

3/ *Id.* at 11371.

4/ *Id.* at 11373. *See also* 47 U.S.C. § 319(b).

5/ *Id.*

6/ *See* 47 C.F.R. § 73.3534(b)(3).

7/ *Streamlining Notice*, 13 FCC Rcd at 11373.

8/ *Id.*

Significantly, the Commission further proposed to apply these new rules, if adopted, "to any construction permit that is within its initial construction period" at that time.[9] By contrast, the Commission specifically proposed to continue to apply its then-existing rules to permits, like RIBC's, that were outside their initial construction periods.[10]

C. The Streamlining Order

In its discussion of construction permit extension procedures in the *Streamlining Order*, the Commission adopted its proposed uniform three-year construction period for construction permits.[11] More significantly, the Commission also embraced its earlier proposal to toll a permittee's three-year construction period only for "those periods in which the permit was 'encumbered' by an administrative or judicial review or by an act of God."[12] The Commission stated that it would construe "administrative or judicial review" as including either:

> (1) petitions for reconsideration or applications for review within the Commission of the grant of a construction permit or a permit extension, and any appeal of any Commission action thereon; or
>
> (2) any cause of action pending before any court of competent jurisdiction relating to any necessary local, state, or federal requirement for the construction or operation of the station, including any environmental requirement.[13]

9/ *Id.* at 11371. The Commission clarified that "initial construction period" encompassed only "the first 24 months for a full power TV facilities permit and the first 18 months for an AM, FM, International Broadcast, low power TV, TV translator, TV booster, FM translator, FM booster, or broadcast auxiliary permit." *Id.* at 11374.

10/ *Id.* at 11374. The Commission invited comment on this proposal. *Id.*

11/ *Streamlining Order*, slip op. at 35 ¶ 83.

12/ *Id.*

13/ *Id.*, slip op. at 36 ¶ 86.

Formally abandoning a principle that has been embedded in its rules for thirteen years, the Commission further explained that "a permit would not qualify for tolling on the basis of the pendency of a zoning application before a local zoning board . . . . However, the pendency of an appeal in a local court of a final zoning board decision would qualify for tolling."[14/]

Much as it did in the *Streamlining Notice*, the Commission stated in bare, conclusory fashion that "[t]he three-year construction period provides ample time to complete [the zoning approval process] and construct the station or choose a new site free from zoning difficulties."[15/] Nowhere in the *Streamlining Order* did the Commission set forth its reasoning that led to this conclusion or identify any predicate facts that support it.

The Commission's conclusion on this point is squarely contrary to the evidence received by the Commission in the proceeding. In its summary of comments, the Commission observed that

> [s]ix of the seven comments received in response to our query as to whether problems in obtaining local zoning authorizations are sufficiently beyond the permittee's control to warrant treatment similar to that of delays caused by administrative and judicial review disagreed with our tentative conclusion that they do not. One commenter concluded that the continued inability to obtain land use permits should remain a valid basis to extend the construction permit; three commenters provided anecdotal support based upon zoning delays experienced by the commenters in specific cases.[16/]

14/ *Id.*

15/ *Id.*

16/ *Id.*, slip op. at 34-35 ¶ 82 (footnotes omitted, emphasis added). The Commission received only 23 sets of comments relative to its streamlining proposals in MM Docket No. 98-43. *See id.*, slip op. at Appendix A, p.A-1. Accordingly, the seven sets of comments that the Commission received on this issue constitute input from more than 30 percent of the participants in the proceeding, a point made more significant by the fact that parties opposing the Commission's proposal included the National Association of Broadcasters and Independent Broadcast Consultants, Inc. *See id.*, slip op. at 34 n.142.

If any commenters supported the Commission's proposal relative to the treatment of zoning proceedings, the *Streamlining Order* makes no mention of them.

In one material respect, however, the Commission did depart from its proposals in the *Streamlining Notice*: Contrary to its earlier tentative proposal to apply its new tolling rules only to construction permits that were within their initial 18 or 24 month construction period upon the adoption of the *Streamlining Order*, the Commission concluded that "the fairer approach is to allow all permitees to take advantage of the extended construction period" subject to the other procedural requirements adopted in the *Streamlining Order*.[17/] Thus, where a permittee, like RIBC, is authorized to construct under a previously-granted extension of its construction permit, the Commission stated that it would, upon request from the permittee, extend that extension to a date three years from the initial grant of the construction permit.[18/] While the Commission would allow such a permittee to request additional time, such a request must be based upon the new tolling provisions adopted in the order.[19/] Moreover, the Commission unequivocally stated it would grant no additional time where the permittee has already had a minimum of three unencumbered years to construct, as calculated using the Commission's new standards.[20/]

The foregoing modifications to the Commission's construction permit extension procedures, as adopted and applied in the *Streamlining Order*, would preclude RIBC, during the pendency of its site change modification application for Station KIOQ, from obtaining a necessary further extension of its permit based upon the delays it has encountered while prosecuting local

---

17/ *Id.*, slip op. at 35 ¶ 84.

18/ *Id.*, slip op. at 37 ¶ 89(2).

19/ *Id.*

20/ *Id.* The Commission further added that "[t]he construction permit will be subject to automatic forfeiture at the expiration of the last extension. *Id.*

zoning proceedings. Because RIBC has already expended more than three years in pursuit of local zoning approval, this preclusion would effectively result in the termination of RIBC's permits for both Stations KIOQ and KRCK. The Commission's recent reversal on the legal effect of local zoning proceedings for permit extension purposes constitutes a dramatic departure from the agency's preexisting law in this area and, accordingly, must be supported by reasoned decision making on an adequate record. As demonstrated hereinafter, the Commission has failed to furnish such a reasoned explanation for its action. Additionally, because the change effected by the Commission attaches a new legal disability to RIBC's past prosecution of its zoning case and divests RIBC of a right previously available under Section 73.3534(b)(3), it constitutes retroactive rulemaking in violation of the APA and the Communications Act. For both of these reasons, the Commission on reconsideration should set aside these portions of the *Streamlining Order* and reinstate the right of permittees to obtain an extension of their construction permits to offset the delaying effects of local zoning proceedings.

III. THE COMMISSION'S DECISION TO ABANDON THE CONSTRUCTION TOLLING PERIOD FOR CONSTRUCTION DELAYS STEMMING FROM LOCAL ZONING PROBLEMS IS CONTRARY TO THE RECORD AND LACKS A REASONED BASIS

It is a fundamental precept of administrative law that an administrative agency, in rendering its decision, "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,' and its failure to do so requires reversal.[21/] "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately

---

21/ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *accord American Mining Congress v. United States EPA*, 907 F.2d 1179, 1187-91 (DC Cir. 1990).

sustained."[22] Moreover, the need to supply a reasoned analysis is particularly great where, as here, the Commission is revoking a rule that has been in place for thirteen years. As the Supreme Court has observed:

> Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808, 93 S. Ct. 2367, 2374-2375, 37 L.Ed.2d 350 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.[23]

Certainly, an agency's rules are not expected to endure forever, and the courts have recognized that agencies must have sufficient flexibility to adapt their rules and policies to changing circumstances.[24] However, the Court has recognized that when an agency seeks to abandon an existing rule, as the FCC has done in the *Streamlining Order*, it faces a presumption established by Congress "*against* changes in current policy that are not justified by the rulemaking record."[25]

The Commission's decision in the *Streamlining Order* to eliminate its rule providing for extensions of construction permits based upon delays engendered by local zoning proceedings fails to satisfy this requirement of reasoned decision making. In the *Streamlining Notice*, the Commission merely recited a tentative conclusion that "zoning delays can be overcome and construction can be completed within the proposed three-year construction period if a permittee

---

22/ *Securities and Exchange Comm. v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

23/ *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42.

24/ *Id.* at 42.

25/ *Id.* (emphasis in original).

pursues the zoning process diligently."[26] Similarly, in the *Streamlining Order*, the Commission repeated this conclusion, stating that "the three year construction period provides ample time to complete [the local zoning] process and construct the new site or choose a new site free from zoning difficulties."[27] Yet, in neither the *Notice* nor the *Order* did the Commission provide any discussion whatsoever of the facts or reasoning upon which it relied to reach this conclusion.

As an initial matter, while holding local zoning proceedings to be within a permittee's ability to control and administrative and judicial review proceedings to be outside a permittee's control, the Commission provided absolutely no basis for distinguishing the former from the latter. Local zoning is inherently an administrative process with rules, procedures, and decision makers similar to those that characterize the FCC. The *Streamlining Order* implicitly concedes that individual permittees possess very limited influence or control over the Commission's own processes, yet it fails to state why these permittees should be expected to exercise any greater influence over local or municipal zoning administrators. There is no apparent reason to believe this to be so,[28] and as the commenters demonstrated, there is ample evidence to believe otherwise.[29]

26/ *Streamlining Notice*, 13 FCC Rcd 11349, 11373.

27/ *Streamlining Order*, slip. op. at 36 ¶ 86.

28/ And certainly the functioning of local zoning authorities is not a subject matter within the FCC's particular expertise under the Communications Act.

29/ In addition, the Commission provided no rational explanation for its decision to treat judicial review proceedings of a zoning board decision differently than the zoning board proceedings themselves. Since one must necessarily complete the former in order to reach the latter, the Commission's new rule vests a permittee's local competitors and local zoning authorities with a powerful weapon: A permittee's opponent or an adversarial member of a zoning panel can effectively preclude judicial review by delaying initial zoning action for a sufficiently long period to lead to forfeiture of the permit, thus rendering the permittee's application for site approval moot.

Moreover, the absence of a reasoned explanation is particularly noteworthy in light of the rulemaking record before the Commission. As previously discussed, the comments received by the Commission on this issue uniformly supported the view that the course and timing of local zoning proceedings, like administrative and judicial review proceedings, were beyond a permittee's ability to control.[30/] Indeed, several of the commenters furnished accounts of their own experiences with local zoning boards that flatly refuted the Commission's claim that diligence in the pursuit of zoning approval is sufficient to overcome zoning delays.[31/]

Yet, while noting that the comments had been submitted, the Commission undertook no critical examination or consideration of their substance. The Commission did not attempt to rebut the arguments made by the commenting parties. Nor did it identify any other commenters on the issue who did so. In fact, the Commission did not identify even one commenting party that supported its tentative conclusion.

Such a superficial treatment of a substantial rulemaking record in stark conflict with the agency's chosen course simply does not fulfill the important obligation that an agency bears to provide a satisfactory explanation of its reasoning when it seeks to rescind an existing rule. Because the Commission does not preempt or otherwise restrict local zoning rules or proceedings governing the placement of broadcast facilities or the conduct of broadcasting operations as it does in other contexts,[32/] it should, at a minimum, afford permittee's the opportunity to extend

---

30/ *See Streamlining Order*, slip op. at 34-35 ¶ 82. These same entities likewise uniformly opposed the Commission's proposed conclusion to the contrary.

31/ *Id.* Indeed, RIBC's own experience with local zoning authorities in El Dorado County, California stands as a stark rebuttal to the Commission's claim. RIBC initiated proceedings in 1994 to obtain zoning authority for of its proposed site. Yet, after more than three years of diligently prosecuting its application, RIBC still had not received the approval it needed.

32/ *See, e.g.*, 47 C.F.R. § 1.4000 (preempting local zoning and land use regulations that restrict (continued...)

their permits during the pendency of those local proceedings. Accordingly, the Commission, on reconsideration, should (1) reinstate its previous position that local zoning proceedings are beyond a permittee's control and (2) continue to grant extensions of construction permits on that basis.

IV. THE COMMISSION'S APPLICATION OF ITS NEW RULE TO DENY PERMITTEES THE BENEFIT OF TOLLING FOR ZONING-RELATED DELAYS ENCOUNTERED PRIOR TO THE EFFECTIVE DATE OF THE NEW RULE CONSTITUTES IMPERMISSIBLE RETROACTIVE RULE MAKING

The Administrative Procedures Act ("APA")[33/] and the Communications Act of 1934[34/] flatly prohibit an agency from applying a new rule retroactively. Simply put, a retroactive rule is one that alters "the past legal consequences of past actions."[35/] More specifically, a rule is retroactive if "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."[36/] Because the *Streamlining Order* alters the legal consequences of prior lawful conduct of parties who detrimentally relied on the FCC's previous rule, the rule runs afoul of the APA and the Communications Act.

The United States Court of Appeals for the District of Columbia Circuit has repeatedly held that rules promulgated by the Commission and other agencies pursuant to the APA may not

---

32/ (...continued)
placement of television, direct broadcast satellite, and multipoint distribution service receiving antennas.).

33/ 5 U.S.C. §§ 551 *et seq.*

34/ 47 U.S.C. §§ 151 *et seq.*

35/ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring).

36/ *Ass'n of Accredited Cosmetology v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992) (quoting *Neild v. District of Columbia*, 110 F.2d 246, 254 (D.C. Cir. 1940)) (emphasis added).

be given retroactive effect.[37] In *Bowen*, the Secretary of Health and Human Services ("HHS") issued a rule in 1984 that lowered the "cap" on the amount previously paid to hospitals (between 1981-1984) as reimbursement for expenses incurred in connection with the provision of service to Medicare beneficiaries. Specifically, the rule excluded certain wages paid during the three year period that had previously been reimbursable under the rule in effect during those years. Under its new rule, HHS sought to recoup the "overpayments" to the hospitals.

This Court struck down the HHS rule on the ground that it violated the APA's prohibition on retroactive rulemaking. The Court first noted that "rules adopted pursuant to rulemaking procedures under the APA are to be 'prospective in nature only.'"[38] Accordingly, retroactive application of the HHS rule, adopted under the APA's notice-and-comment procedures, "is foreclosed by the express terms of the APA."[39] Likewise, the Court rejected the agency's contention that it was merely correcting a procedural defect in a previous rule: "both the express terms of the APA and the integrity of the rulemaking process demand that the corrected rule, like all other legislative rules, be prospective in effect only."[40] Thus, the ruling in *Bowen* stands for

---

37/ *See, e.g., MCI Telecomm. Corp. v. F.C.C.*, 10 F.3d 842, 846 (D.C. Cir. 1993); *A.T.& T. v. F.C.C.*, 978 F.2d 727, 732 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987), *aff'd*, 488 U.S. 204 (1988).

38/ *Bowen*, 821 F.2d at 757 (quoting 5 U.S.C. 551(4)).

39/ *Id.*

40/ *Id.* at 758. On appeal, the Supreme Court affirmed on the grounds that HHS had exceeded its statutory authority under the Medicare Act. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 208 (1988). However, Justice Scalia, in a concurring opinion, would have invalidated the rule as an impermissible retroactive rulemaking. Specifically, he cited the APA's definition of a rule as meaning "the whole or a part of an agency statement of general or particular applicability and future effect. . . ." *Id.* at 216 (quoting 5 U.S.C. § 551(4) (emphasis added by Scalia, J.)). Justice Scalia rejected the notion that the phrase "future effect" in this context could "mean merely 'taking effect in the future,' that is, having a future effective date even though, once effective, altering the law applied in the past...." *Id.* at 217 (emphasis in original). Thus, he concluded that the definition obviously meant (continued...)

the proposition that an agency rule that changes the legal significance of prior conduct -- taken pursuant to a prior rule upon which a regulated party has detrimentally relied -- runs afoul of the APA's prohibition on retroactive rulemaking.[41/]

The Commission's application of its new rule, as contemplated in the *Streamlining Order*, carries precisely the retroactive effect that the Court of Appeals has held to be unlawful. RIBC, and undoubtedly many other permittees, continued to pursue zoning approval of its specified site despite encountering repeated delays before those local authorities because the site had already received Commission approval and because Section 73.3534(b)(3) expressly recognized that such delays were beyond a permittee's control and constituted good cause to extend the construction period. The Commission's new treatment of zoning board proceedings as not beyond a permittee's control changes the legal significance of RIBC's prior conduct, namely, its continued prosecution of those proceedings -- a prosecution that RIBC continued in reliance on the previous rule.

The Commission's proposed application of its rule is unlawfully retroactive in another important way, as well. Specifically, many permittees, like RIBC, previously received extensions of their permits from the Commission based upon delays encountered in prosecuting local zoning proceedings. In granting these extensions, the Commission necessarily had to find that the

---

40/ (...continued)
that "a rule is a statement that has legal consequences only for the future." *Id.* (emphasis added). The add-back rule as applied by the FCC is impermissibly retroactive, because it indisputably acts to "alter the past legal consequences of past actions." *Id.* (emphasis in original).

41/ *See also Bowen*, 488 U.S. at 214 (quotation omitted) (HHS rule impermissibly retroactive because it failed to let hospitals "know in advance the limits to Government recognition of incurred costs and have the opportunity to act to avoid having costs that are not reimbursable."); *Nat'l Wildlife Fed'n v. Marsh*, 747 F.2d 616, 621 (11th Cir. 1984) (city had "legitimate expectation" that it would receive federal grant under rules in existence at time of application, notwithstanding subsequent change in law withdrawing benefits).

proceedings in question were beyond the permittee's control and that the permittee had taken all possible steps to resolve the problem expeditiously and proceed with construction.[42] To the extent that the time for seeking administrative or judicial review of the grant of these extensions has passed, the Commission's findings have become final actions binding on the Commission as well as the permittees and any private parties.[43] Yet, the Commission's proposed application of its rule would effectively overturn these past rulings, plainly altering "the past legal consequences of past actions."[44]

Other decisions by the Court of Appeals also underscore that the FCC may not apply its new rule in a retroactive fashion that impairs RIBC's "legitimate expectation" to an extension for zoning related delays under former Section 73.3534(b)(3).[45] For example, in *Communications Satellite Corp. v. F.C.C.*,[46] the Court held that the Commission could not retroactively apply a newly formulated ratemaking standard to the detriment of the carrier's established expectations. The FCC, at the end of 1975, set the carrier's maximum rate of return for calendar year 1975

42/ *See* 47 C.F.R. § 73.3534(b)(3).

43/ For this reason, the Commission is estopped by the doctrine of *stare decisis* from applying its new rule as proposed.

44/ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring).

45/ Both the Communications Act and the FCC's rules legitimized RIBC's expectation that it would receive an extension of its construction permits in respect of its zoning-related delays. First, Section 319(b) of the Communications Act provides that a permittee will not automatically forfeit a permit for failure to complete construction on time where timely completion was "prevented by causes not under the control of the grantee." 47 U.S.C. § 319(b). Section 73.3534(b) amplified this statutory precept, expressly providing that "[a]pplications for extension of time to construct broadcast stations . . . will be granted . . ." where, *inter alia*, "[n]o progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) . . . ." 47 C.F.R. § 73.3534(b)(3) (1997) (emphasis added).

46/ 611 F.2d 883 (D.C. Cir. 1977) ("*COMSAT*").

based on an assumed capital structure different from that which existed throughout 1975.[47] Specifically, the FCC chose to impute a 45% level of debt for 1975 (and future years) in a decision issued in December of 1975. The Court concluded the Commission had erred in relying on the assumed capital structure for 1975, because COMSAT had no opportunity to alter its actual debt and equity structure to conform to the FCC's assumption:

> The Commission's warning did not come until December of 1975. . . . [Accordingly,] it could not fault COMSAT for maintaining an all-equity structure as late as 1973. . . . [I]t is a stretch of the Commission's finding to rule that COMSAT should have begun to lever its capital structure in 1973. COMSAT was not aware of the consequences for rate-making of not obtaining debt financing until late 1975. Accordingly, it was an abuse of discretion for the Commission to treat COMSAT as though it had 45% debt all at once (indeed, retroactively, since the 45% assumption applied to the entire 1975 year, while the Commission's opinion did not issue until December of 1975.[48]

Moreover, it has long been held that the FCC is bound by the prohibition against retroactive application of a newly announced regulation.[49]

47/ *Id.* at 908.

48/ *Id.* (emphasis added).

49/ *New England Tel. & Tel. Co. v. F.C.C.*, 826 F.2d 1101, 1110 (D.C. Cir. 1987) (agency may not apply "a new policy retroactively to parties who detrimentally relied on the previous policy."), *cert. denied sub nom. So. Bell Tel. & Tel. Co. v. F.C.C.*, 490 U.S. 1039 (1989); *RKO General, Inc. v. F.C.C.*, 670 F.2d 215, 223-24 (D.C. Cir. 1981) (same), *cert. denied*, 456 U.S. 927 (1982).

These principles do not apply solely to the FCC. For example, in *Boston Edison Co. v. F.P.C.*, 557 F.2d 845 (D.C. Cir. 1977), *cert. denied sub nom. Town of Norwood, Mass. v. Boston Edison Co.*, 434 U.S. 956 (1977), the Court held that the Federal Power Commission could not retroactively require, in an application for wholesale electric power rates, different information than that mandated at the time the petitioner submitted its application: "the changed standard [may be applied] only to those actions taken by parties after the new standard has been proclaimed as in effect." *Id.* at 849. Likewise, in *Air Transport Ass'n of America v. C.A.B.*, 732 F.2d 219 (D.C. Cir. 1984), the Court held that the Civil Aeronautics Board could not retroactively raise the rates it charged carriers for Board services: "the Board's 'offsetting' procedures effectively imposes on air carriers obligations that did not exist when the fees originally were paid. Imposing such obligations is tantamount to retroactive rulemaking and is destructive of the air carriers' justifiable reliance on the fee schedule as it previously read." *Id.* at 227 n.16. *See also New England Tel. & Tel. Co.*, 826 F.2d

(continued...)

Based on the foregoing, the *Streamlining Order* is impermissibly retroactive because it "is destructive of [RIBC's] justifiable reliance" on Section 73.3534(b)(3) "as it previously read."[50] The Commission's action retroactively alters the regulatory effect of construction delays stemming from the pendency of a zoning application before local zoning boards. Had RIBC been aware that the Commission would not extend RIBC's permit for delays precipitated by such proceedings, RIBC would have abandoned its efforts to secure approval of its original site and sought out a new location much sooner.[51] However, RIBC "was not aware of the consequences" for continuing to prosecute its zoning application.[52]

Although no such argument appears in the *Streamlining Order*, the Commission, in the *Streamlining Notice*, appears to assert that the Court of Appeals' decision in *Chadmoore Communications, Inc. v. F.C.C.*,[53] affords it the authority to apply its new rule retroactively to pending applicants who have encountered past delays in the zoning process.[54] However, that assertion is incorrect. On the contrary, the Court in *Chadmoore* underscored the continuing vitality of the *Bowen* principle that a legislative rule like that at issue here, adopted through notice

---

49/ (...continued)
at 1117 (Buckley, J., dissenting) (FCC application of change in policy to party that relied to its detriment on former policy violates "the prohibition against retroactive application of a newly announced regulation.").

50/ *Air Transport Ass'n of America*, 732 F.2d at 227 n.16.

51/ As previously noted, on August 29, 1997, as a consequence of its continuing difficulties in obtaining zoning approval, RIBC filed an application for a major change in facilities that specified a new site for the station. *See* File No. BMP-970829AA. Concurrently with the filing of this petition, RIBC is submitting to the Commission, under separate cover, a letter request asking that that application be treated as an application for a new station.

52/ *COMSAT*, 611 F.2d at 908.

53/ 113 F.3d 235 (D.C. Cir. 1997) ("*Chadmoore*").

54/ *See Streamlining Notice*, slip op. at 24 n.93.

and comment rulemaking procedures, "may only be applied prospectively."[55] In *Chadmoore*, however, the Court concluded that the challenged rule did not meet the test for retroactive effect because it did not " 'impair[ ] rights a party possessed when [it] acted, increase[ ] a party's liability for past conduct, or impose[ ] new duties with respect to transactions already completed.'"[56]

Unlike in *Chadmoore*, however, here the Commission's action does increase RIBC's and other similarly situated permitees' liability for past conduct (their continued pursuit of zoning approval undertaken in reliance on the pre-existing rule) by denying the permit extension that would otherwise be available to them. Also, unlike the circumstances in *Chadmoore*, here the Commission's action impairs a right possessed by permitees like RIBC -- the right to receive a permit extension where zoning delays have prevented completion of construction: As discussed *supra* note 40, the language of Section 73.3534(b)(3) prior to the *Streamlining Order* mandated that an application for extension of a permit "will be granted" where any one of the three specified circumstances had occurred. By contrast, Section 90.629, which was at issue in the *Chadmoore* case, uses permissive language which creates no such right. That section states only that "[a]pplicants requesting frequencies for either trunked or conventional operations <u>may</u> be authorized" for an extended implementation period upon satisfaction of the provisions of the rule.[57] Accordingly, *Chadmoore* does not rescue the Commission's action in the *Streamlining Order* from the defect of unlawful retroactive effect.

55/ *Chadmoore*, 113 F.3d at 240.

56/ *Id.* (quoting *DIRECTV, Inc. v. F.C.C.*, 110 F.3d 816, 825-26 (D.C. Cir. 1997), in turn quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

57/ *See* 47 C.F.R. § 90.629 (emphasis added).

V. CONCLUSION

For the foregoing reasons, the Commission should reconsider that portion of its *Streamlining Order* concerning the treatment of local zoning board proceedings for purposes of qualifying for a construction permit extension, and should promptly reinstate its previous rule and treat local zoning board proceedings in the same fashion that it intends to treat administrative and judicial review proceedings.

Respectfully submitted,

ROYCE INTERNATIONAL BROADCASTING COMPANY

By: _____

Erwin G. Krasnow, Esquire
Eric T. Werner, Esquire
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHARTERED
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301
(202) 371-6000

Date: January 19, 1999

CERTIFICATE OF SERVICE

I, Anastasia Chung, a secretary with the law firm of Verner, Liipfert, Bernhard, McPherson, and Hand, Chartered, hereby certify that I have this nineteenth (19th) day of January, 1999, caused a copy of the foregoing Petition for Partial Reconsideration to be served, by First-class United States Mail, postage prepaid, to the following:

Roy R. Russo, Esquire
COHN AND MARKS
1920 N Street, N.W.
Suite 300
Washington, D.C. 20036-1622
Counsel for Susquehanna Radio Corp.

Anastasia C Chung

Anastasia Chung