

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

PETITION FOR RECONSIDERATION

STARR COUNTY HISTORICAL  
FOUNDATION, INC.

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## SUMMARY

The FCC's recent *Report and Order* in MM Docket 98-43 applies a new construction permit extension policy to holders of existing permits, but treats disparately those permits falling on one side or other of a date three years from grant of the original authorization. That decision warrants reconsideration.

It appears that the Commission may not have intended its New Extension Policy to have draconian effect on parties who have held their permits for three or more years. In the *Notice of Proposed Rulemaking* launching the proceeding, the FCC tentatively decided to apply its existing Part 73 extension policies to permits beyond their initial term. This approach was necessary, said the Commission, because attempting to apply the new rules to permittees in this class would be "administratively unworkable."

Ostensibly acknowledging that problem, but anxious nonetheless to simplify its processes, the Commission in the *Report and Order* decided on what it deemed a "fairer approach" that would ensure an extended life to some permittees beyond their initial construction phase. Unfortunately, that procedure does not take into account anomalies which, unless adequately resolved, conflict both with the FCC's stated objectives in MM Docket 98-43 and with the requirements of the Administrative Procedure Act.

The FCC should reconsider this portion of the *Report and Order* so that these errors can be rectified.

## TABLE OF CONTENTS

I.	REGULATORY BACKGROUND . . . . .	1
	1. <i>The NPRM's Version of the New Extension Policy</i> . . . . .	1
	2. <i>The Rationale for Limiting the Scope of the New Extension Policy</i> . . . . .	3
	3. <i>The Report and Order's Version of the New Extension Policy</i> . . . . .	4
II.	ARGUMENT . . . . .	6
	A. Reconsideration Will Afford the FCC the Opportunity to Correct Unintended Consequences of the New Extension Policy . . . . .	6
	B. If the FCC In Fact Intended the Draconian Consequences that Flow from a Literal Interpretation of the New Extension Policy, the Policy Is Not Defensible. . . . .	8
III.	AN ILLUSTRATIVE CASE . . . . .	12
IV.	CONCLUSION . . . . .	17

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To: The Commission

**PETITION FOR RECONSIDERATION**

Starr County Historical Foundation, Inc. (“the Foundation”), by its attorneys, hereby petitions for reconsideration in part of the *Report and Order* released November 25, 1998, in the captioned rulemaking proceeding (FCC 98-281) (“*Report and Order*”).<sup>1</sup> the Foundation’s concerns relate principally to the amendment of 47 C.F.R. 73.3534, the rule governing extensions of construction deadlines. We refer to this amendment as the “New Extension Policy.” Reconsideration on the limited basis explained below will bring the revised policy into full harmony with the *Report and Order*’s stated purposes. Accordingly, reconsideration is warranted.

**I. REGULATORY BACKGROUND**

1. *The NPRM’s Version of the New Extension Policy.* The public interest predicate of MM Docket 98-43 is the salutary effect of “streamlining” the Mass Media Bureau’s

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<sup>1</sup> 63 *Fed. Reg.* 70040, December 18, 1998.

rules and policies. In the notice<sup>2</sup> initiating this proceeding, the FCC proposed to simplify its procedures by “reducing applicant and licensee burdens” and “increasing the efficiency of application processing.” *NPRM*, at ¶¶ 1 - 3 . As part of that effort, the Commission devised to modify its consideration permit extension procedures in order “to reduce the necessity for extensions.” *NPRM*, ¶¶51 - 68. This would be achieved “by increasing the authorized construction period” so as to “allow sufficient time for a diligent permittee to complete construction of a facility, even if the permittee encounters significant construction difficulties.” *Ibid*. Under the modified procedure the FCC would “issue all construction permits for a uniform three-year term” and “exclude from the calculation of this term periods during which the permit itself is the subject of an administrative or judicial review or where construction delays have been caused by an ‘act of God.’” *Ibid*.

In the *NPRM*, the FCC tentatively concluded that the New Extension Policy would *not* apply to construction permits that are beyond their initial term pursuant to an extension of the construction deadline. Instead, the FCC proposed that “the rules regarding construction permits, and extensions thereof, that we adopt in this rulemaking proceeding be applied to *any construction permit that is currently in its initial construction period.*” *NPRM*, at ¶68 (emphasis added). The *NPRM* expressly limited the proposed changes to permits in their initial construction phase. Thus, by definition, the New Extension Policy would not affect construction permits which had a different status -- for

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<sup>2</sup> *Notice of Proposed Rulemaking*, 13 FCC Rcd 11349 (1998) (“*NPRM*”).

example, a permit valid under a current extension, or a permit valid by virtue of the pendency of a timely filed extension application. Permits in these categories would continue to be governed by the “one in three” standard of extant Section 73.3534(b).

2. *The Rationale for Limiting the Scope of the New Extension Policy.* In the *NPRM*, the FCC explained its rationale for excluding from the scope of the New Extension Policy permits that are beyond their initial construction period.

We believe, however, that it 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.

*NPRM*, at ¶68 (emphasis added).

Significantly, the FCC’s tentative decision evidently was animated by a concern for existing permittees caught in the transition, if the New Extension Policy were applied to them in a mechanical fashion. If, as the FCC posited, a class of permittees had already held their authorizations for close to or more than three years, the retroactive effect of applying the New Extension Policy to them could mean the automatic forfeiture of their permits, regardless of the merits of a particular permittee’s circumstances. That state of affairs, the FCC concluded, would be “administratively unworkable,” too complicated to

manage fairly by a consistent standard. The FCC no doubt envisaged, for example, the case of a permittee on the verge of inaugurating a new broadcast service, only to forfeit its permit because it happened to have held it for “three years and a day.” Not only would this result be inequitable to the permittee, who typically would have invested substantial money and time toward constructing the station, but it would delay the new service indefinitely. Because that chain of events could not be said to promote the objectives of the proceeding or to align with the rationality standard of the Administrative Procedure Act (“APA”), the FCC wisely proposed that the New Extension Policy would not apply to permits outside their initial term. Rather, permittees in that class would be evaluated under the extant version of Section 73.3534, according to the discretion and case by case flexibility inherent in that rule.

3. *The Report and Order’s Version of the New Extension Policy.* In the *Report and Order*, the FCC adopted its original proposal to apply the New Extension Policy to any construction permit that is within its initial construction period. Accordingly, the construction period for all “eligible permittees” would be “increased to afford each an initial three year term, and extension of such permits would be governed by the strict criteria outlined here.” *Report and Order*, at ¶80.

As to permits beyond their initial construction term, however, the FCC abandoned its earlier view in favor of what it deemed to be “a fairer approach.”

Although we proposed in the *Notice* that these rules apply to any construction permit that is within its initial construction period at the time

these rules are adopted, we conclude that *the fairer approach* is to allow *all permittees* to take advantage of the extended construction period in the manner set forth below.

*Report and Order*, at ¶80 (emphasis added). Specifically, permits would be classified as follows:

(1) *Construction permit is in its initial construction period and/or an initial extension request is pending.* Construction permits will be automatically extended to three years from the date of an initial grant upon a timely request from the permittee. In addition, a permittee may submit a showing requesting additional time based on the tolling procedures adopted herein.

(2) *Permittee is authorized to construct under an extension of its construction permit.* The current extension, as an outstanding permit, will be extended to three years from the initial grant of the construction permit....” In addition, a permittee may submit a showing requesting additional time based on the tolling procedures adopted herein. 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.

\* \* \*

*Id.* at ¶89. While we commend the Commission for electing what it took to be “a fairer approach,” we are concerned that the *Report and Order’s* resolution of this critical issue does not fairly account for a variety of fact patterns which show, under any reasonable interpretation, that a permittee’s efforts to construct have been hindered by elements beyond its control.

## II. ARGUMENT

### A. Reconsideration Will Afford the FCC the Opportunity to Correct Unintended Consequences of the New Extension Policy.

The wording of the *Report and Order* would appear to articulate a standard that demarcates the universe of existing permittees solely according to where a permittee falls on the three year time line, regardless of any other factors the FCC previously has viewed as sufficiently compelling to justify an extension of a construction deadline. This rendering of the *Report and Order*, if accurate, would not be defensible. It would, for example, entail outcomes that could not be rationally harmonized. Suppose Permittee A, by the fortuity of the timing of its original grant, has held its authorization two and a half years. Permittee B, whose efforts to construct have been substantial and earnest, and is on the brink of initiating service, has held its authorization for three and a half years. Where does the sword of Damocles fall? One reading of the *Report and Order* is that Permittee B forfeits its authorization because it is on the wrong side of the three year mark. Interpreted in this fashion, the New Extension Policy would cause grave inequities and senseless delays in new broadcast service.

Obviously, this result would not be the "fairer approach" the FCC intended. Nor would it be consistent with the FCC's stated objectives in MM Docket 98-43. The source of the confusion that creates this untenable anomaly is the use of a time line that cannot be divided in a principled way. Given two permittees of equal merit, the FCC must

ensure -- on pain of acting arbitrarily -- that they are treated similarly. The *Report and Order's* version of the New Extension Policy compromises that requirement.

Unlike the proposal set forth in the *NPRM*, the *Report and Order's* formula is void of meaningful criteria to make that judgment.

Presumably it is for this reason that the FCC in the *NPRM* characterized as "administratively unworkable" a rule that would uncritically apply the New Extension Policy to permits beyond the initial construction term. Nor is there anything in the *Report and Order* to suggest that the FCC rejected its earlier sense of the matter as wrong-headed. Rather, the *Report and Order* reads as if the FCC had meant to adopt a policy that would *accommodate* permittees in this status -- not put them at near-fatal risk -- while at the same time simplifying the procedures for doing so. The problem is that, as it is framed in the *Report and Order*, the resolution does not achieve that result in a coherent way.

Given these analytical problems on one hand, and the tenor of the FCC's discussion in the *Report and Order* on the other, it is difficult to believe that the FCC intended that the New Extension Policy be interpreted literally. More likely is that the Commission simply did not focus in detail on the ramifications of its decision as drafted. Reconsideration of the *Report and Order* will provide the FCC with the opportunity to correct and clarify the New Extension Policy with respect to this narrow issue.

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**B. If the FCC In Fact Intended the Draconian Consequences that Flow from a Literal Interpretation of the New Extension Policy, the Policy Is Not Defensible.**

If, contrary to our assumptions concerning the FCC's understanding of the ramifications of the New Extension Policy, the Commission actually meant to hinge a permittee's life or death on "which side" of the three year mark it falls, this approach is problematic for several reasons.

*First*, as we discussed above, it is difficult to see how this version of the New Extension Policy can avoid the criticism of irrationality. It is fundamental that an administrative agency "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." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, however, that connection would be illusory. Without a principled basis for distinguishing permittees who lie at different points of the time line, the divisions cannot occur rationally: They are not susceptible in principle to any kind of check or meaningful review.

*Second*, the New Extension Policy interpreted in this way has an undermining effect on other, unrelated arguments in the *Report and Order*. For example, earlier in the *Report and Order* the FCC sets forth its analysis for lifting the payment restriction on the sale of unbuilt stations. Part of that argument is a reaffirmation of the view that a permittee does not, in the constitutional sense, hold "property rights" in its authorization, but does

hold a legal interest of value. *Report and Order*, at ¶¶30 - 34. This means that a permittee with a valid authorization pursuant to, say, one extension of its construction deadline, has no superior property rights to a permittee whose authorization has been extended, say, five or six times. Yet, under the New Extension Policy, a permittee in the first category is preferred.

Conversely, the FCC's justification for lifting the payment restriction at this juncture is a recognition that a permittee, having invested time and money toward construction, holds an interest of value for which it should be paid in a sale. It is not uncommon, however, for a permit to have greatest value where the impediments to construction are most oppressive, and thus where extensions are most appropriate. Yet the *Report and Order*'s New Extension Policy undermines that dynamic.<sup>3</sup>

*Third*, there is a genuine question as to whether the FCC has, in connection with the narrow issue we have been discussing, complied with the notice and comment requirements of the APA. The APA requires agencies to provide notice and an opportunity to comment on proposed rules. *See* 5 U.S.C. § 553(c); *see also McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988). Moreover, an agency must "demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant." *Grand Canyon Air Tour Coalition*

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<sup>3</sup> The problems only multiply if other FCC policies are introduced into the equation. For instance, we are aware of cases in which minority permittees of broadcast facilities would, but for the flexible standard of Section 73.3534, have long since forfeited their permits under a test such as the New Extension Policy.

*v. FAA*, 154 F.3d 455 (D.C. Cir. 1998). See also *Professional Pilots Fed'n v. FAA*, 118 F.3d 758, 763 (D.C. Cir. 1977); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

In *National Tour Brokers Ass'n v. United States*, 591 F.2d 896 (D.C. Cir.1978) the District of Columbia Circuit observed that the APA's requirement of a chance to comment serves two purposes: "(1) to allow the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule, and (2) to see to it that the agency maintains a flexible and open-minded attitude towards its own rules."

*Id.* at 902.

In the *NPRM*, the FCC indicated its tentative decision to continue to apply the existing version of Section 73.3534 to permits beyond their initial term. The Commission's explanation of the basis for this approach was that, in its expert view, any alternative would be "administratively unworkable." Nowhere in the *NPRM* did the FCC even hint at the possibility that it might settle on a rule which accommodates permits that are beyond the initial term, but only if that period is less than three years from the date of grant of the application.

A rule introduced in this crabwise fashion is legally infirm. Notice of the nature of a proposed rule change must be clear and to the point. See, e.g., *AFL-CIO v. Donovan*, 757 F.2d 330, 339 (D.C. Cir. 1985) ("no notice, much less adequate notice" where agency reprinted entire set of regulation in 40 pages of the Federal Register, including the

proposed change but not identifying it in the preamble, which highlighted other proposed changes); *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 899 (D.C. Cir. 1978) (notice inadequate since it indicated that agency intended to suggest congressional amendments of its enabling act rather than new administrative rules); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291 (3d Cir.1977) (notice did not state manufacturing processes to be covered by the proposed regulations); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549-50 (D.C. Cir.1983) (same--notice requirement not "an elaborate treasure hunt").

*Fourth*, the version of the New Extension Policy adopted in the *Report and Order* is problematic on retroactivity grounds. The APA requires that legislative rules, *i.e.*, rules adopted pursuant to the notice and comment procedures of the APA, 5 U.S.C. §553, be given prospective effect only. Equitable considerations are irrelevant to the determination of whether the agency's rule may be applied retroactively. Retroactive application is categorically foreclosed by the express terms of the APA. *See, Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987).

Application of the New Extension Policy in the fashion adopted in the *Report and Order* subjects a party who has held its permit for more than three years to imminent risk of the loss of the permit by automatic cancellation. That is a liability which is newly created by the imposition of the New Extension Policy on permittees in this class. As

such, it is impermissibly retroactive. *See, Landgraf v. USI Film Prods.*, 114 S.Ct. 1483, 1505 (1994).

Specifically, the formula announced in the *Report and Order* has a retroactive effect because it reaches back three years into the history of a permittee that was laboring under the reasonable belief that its actions would be judged under the “one in three” standard. Now, however, the permittee’s reasons for having been unable to complete construction will include only the limited category listed in the “tolling” section of the *Report and Order*.

Perhaps construction has been delayed due to protracted negotiations with local residents and hearings before local zoning authorities. The permittee could not have known that, in late 1998, the FCC would decide that such procedures would toll the running of the construction period only if the permittee took the zoning board to court. If the permittee had known that the court action would be required to qualify for tolling, it would have filed suit at an early stage, even though such litigation might have hindered the permittee’s ability to work out an amicable resolution of the concerns expressed by community groups.

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### III. AN ILLUSTRATIVE CASE

The Foundation is the permittee of television station KTLM (formerly KAIO), Rio Grande City, Texas. The Foundation has worked hard to make KTLM a reality, not only

as the first local television transmission service in Rio Grande City and Starr County, but also in order to expand the viewing choices available to residents of the entire lower Rio Grande Valley (i.e., the Harlingen-Weslaco-Brownsville-McAllen DMA). Moreover, Station KTLM will provide a first television reception service to thousands of people in a vast unserved area of South Texas.

The Foundation's Board of Directors is controlled by of minorities. Thus, KTLM is one of only two minority-owned full service television stations on non-reserved channels in the lower Rio Grande Valley. More than 80 percent of the population of this area is comprised of members of minority groups.

A brief review of the history of this matter is appropriate in order to understand the potential effect of the New Extension Policy on this project. The original construction permit for KTLM specified a transmitter site in Starr County, Texas, a few miles north of Rio Grande City. At that site, the KTLM antenna could only be some 113 meters above the average surrounding terrain. Accordingly, the station's Grade B contour would only encompass 5,374 square kilometers with a population of 71,033.

The Foundation determined, not long after the issuance of the KTLM construction permit, that the public interest would best be served by construction of the station at a new location. Through unstinting efforts, including the retention of consultants with expertise in aeronautical safety considerations, the permittee found a site where, it was led

to believe, much greater antenna height was possible. Construction at this new site would thus allow for substantially improved coverage.

The Foundation secured reasonable assurance of the availability of that site and commissioned a detailed engineering study of the facility to be built there. In June of 1995, within 12 months after the issuance of the KTLM construction permit, the Foundation filed an application for modification of the KTLM construction permit to specify the new tower location. From the new site, the permittee expected to be able to serve an area of 25,749 square kilometers with a population in excess of one million. Unfortunately, to the applicant's surprise the Federal Aviation Administration did not approve the new tower proposal.

From the time that the permittee learned that the FAA harbored an objection to the Foundation's proposal, the Foundation pursued the matter diligently. It enlisted the aid of additional consultants and studied in detail the air traffic patterns in the area in an effort to understand the FAA's concerns and, if possible, to mollify the agency's opposition. In addition, the Foundation devoted substantial resources to the search for an alternate site that would assuage the FAA's legitimate concerns, while still providing the wider service that is essential for the success of this venture.

The applicant finally came to the realization that the work required to secure FAA approval for the site proposed in the modification application as originally filed would involve unacceptable delays. Therefore, the Foundation examined a number of sites in

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the fully spaced site location area in an effort to find an available site, with acceptable zoning, that would fall outside of any approach to the McAllen International Airport.

The Foundation finalized its plans for the new site in early 1997. After clearing that site informally with the FAA, the Foundation submitted an amendment to the modification application on April 1, 1997 specifying a new site on State Road 490 northeast of Rio Grande City.

The wait for express FAA approval of the new tall tower plan was excruciating. The comment period on the request for a determination from the FAA that the new tower proposal does not constitute a hazard to air navigation did not close until January 4, 1998. This time, FAA approval was secured. The Commission then granted the modification application on June 18, 1998.

Because of the need to await governmental authorizations as noted above, the Foundation has had a total of less than 20 months in which it has been free to proceed with construction.

Since the grant of the modification application, the Foundation has moved forward with this project with dispatch. Among other things, the Foundation has secured the site specified in the modified permit. It has cleared the site and graded a road for access to it. Its operating affiliate, Sunbelt Multimedia, has negotiated the specific details of a financing program under which over a million dollars has been invested in the project, mainly for acquisition of the 1800 foot tower and five Mega Watt transmitter.

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The Foundation has commissioned a geotechnical engineering study of the weight-bearing characteristics of the soils at the site, including the plans for the tower foundation. The Foundation has been assured by the transmitter manufacturer that the transmitter for the new station will be shipped this spring so as to coincide with the approximate time when erection of the tower will have been completed.

Based on this rapid progress, the Foundation's efforts clearly support a grant of the Foundation's pending, unopposed application for extension of the permit under the "one in three" policy. However, the *Report & Order* seems to indicate that the delay occasioned by the problems the Foundation encountered in securing the approval of the FCC and the FAA of the new site proposal would not qualify for a tolling of the new three year construction period. Therefore, under the New Extension Policy, the Foundation's permit could be cancelled just as it is mounting its antenna on the 1800 foot tower in Starr County. The millions of dollars that will have been invested in this project by that time will be lost, and the new service that KTLM would otherwise be able to provide will be postponed indefinitely.

Such a result cannot be squared with the public interest. The Commission, while stating that it desired to "*allow all permittees to take advantage of the extended construction period*" (emphasis added), would have destroyed everything that the Foundation has worked for. This result would in no way be something of which a rational permittee would want to "take advantage."

Where, in such a result, would be the public interest in giving lenders a stable situation on which to base a loan? How would such an outcome be reconciled with the Commission's stated objective of increasing minority ownership of broadcast stations? Inasmuch as the Commission would have no way of ensuring that a party who would obtain the permit for Channel 40 at auction would build an 1800 foot tower, how would the loss of the KTLM permit serve the objective of extending free, over the air television service to those parts of the United States which currently lack such service?

#### IV. CONCLUSION

Accordingly, in order to address the foregoing problems, the FCC should reconsider that portion of the *Report and Order* discussed herein.

Respectfully Submitted,

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FOUNDATION, INC.**

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