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FEDERAL COMMUNICATIONS COMMISSION
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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

OPPOSITION TO PETITION FOR RECONSIDERATION

Aspen FM, Inc., Calipatria Broadcasting Company, L.L.C., Rancho Palos Verdes Broadcasters, Inc., and Entravision Holdings, LLC (collectively "Opposing Parties"), by and through their counsel, and pursuant to Section 1.429(f) of the Commission's Rules, hereby file their opposition ("Opposition") to the Petition for Reconsideration ("Petition") filed by Long Island Multimedia, LLC ("LIM") in 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 ("Rulemaking"). Specifically, the Opposing Parties respond to LIM's arguments with regard to Paragraphs 77-90 of the Rulemaking. Those Paragraphs deal with the duration of and procedures for the extension of broadcast facility construction permits in existence both before and after the effective date of the Rulemaking. The Opposing Parties disagree with: (1) LIM's desire for an even stricter interpretation of the limited tolling provisions adopted in the Rulemaking, and (2) LIM's request that any permit currently more than three years beyond its date of issuance be subject to immediate forfeiture. In support thereof, the Opposing Parties state as follows:

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The Opposing Parties are permittees of various FM radio, low power, and full power television stations, located in, respectively, Aspen, Colorado, and Calipatria, Rancho Palos Verdes, Indio, and Palm Springs, California. All of the Opposing Parties were granted construction permits by the Commission under the rules in effect prior to the Rulemaking. All have received extensions of those permits, and submitted applications for extensions prior to the effective date of the new rules. All of the Opposing Parties will be adversely affected by the new rules adopted in the Rulemaking. The Opposing Parties have joined in a timely Petition for Reconsideration that clearly shows the new rules are contrary to the law and should thus be reconsidered.

Under the rules formerly in existence governing the term of construction permits, 18 or 24 months, depending on the service, were allowed for the completion of the construction of broadcast facilities. 47 C.F.R. 73.3598(b). Extensions were granted upon a showing of cause. 47 C.F.R. 73.3534(b). Among the circumstances sufficient to cause the grant of an extension were where "[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*) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction." 47 C.F.R. 73.3534(b)(3) (emphasis added). See, e.g., Aspen FM, Inc., 6 FCC Rcd 1602 (1997).

The new rules adopted in the Rulemaking establish a nearly absolute three-year limit on the length of construction permits, with limited allowances for the tolling of that period. Rulemaking at ¶83. The three-year period may be tolled only for the limited circumstances where the permittee has been prevented from constructing its facilities by virtue of administrative

review, judicial review, or other specific an acts of God. Id. Under the new rules, construction permits granted over three years ago and presently under a valid extension are subject to automatic forfeiture if construction has not been completed by the expiration of the latest extension. Rulemaking ¶¶80, 84, 89(2).

I. The Tolling Provisions Contained in the Rulemaking Should Not Be Applied At All

In its Petition, LIM contends that the tolling provisions contained in the Rulemaking are too lax and should be applied more strictly than presently proposed. LIM contends that tolling of the three-year construction period should be allowed only for circumstances *absolutely* beyond the control of a permittee. Petition ¶10. LIM bases this suggestion on its belief that the tolling provisions contained in the Rulemaking will allow permittees to create causes of action relating to local, state, or federal requirements in order to toll the construction period, resulting in the manipulation of the tolling provisions. Id. at ¶6.

The Opposing Parties disagree. The tolling provisions as now anticipated by the Rulemaking are, on the contrary, not lax, but too restrictive, as they fail to take into consideration the many and varied circumstances which make construction impossible. Permittees regularly face local land use ordinances and zoning problems, arising from the need to build antenna supporting structures which are often tightly regulated and preclude the construction of broadcast facilities until resolved. Yet, the tolling provisions contained in the Rulemaking fail to account for land use restrictions unless they are the subject of litigation in court.

For example, one of the Opposing Parties, Aspen FM, Inc. ("Aspen"), was recently able to resolve zoning problems which had postponed construction of its broadcast facilities and had been the basis for its construction permit extensions. However, Aspen faces a local land use

ordinance which restricts construction of any sort between October 15 and April 15. This limitation is intended to protect the environment from the effects of construction during the winter months. Thus, Aspen's hands are tied because, although its zoning problems have been resolved, it is prohibited from undertaking construction until April, while the term of its permit is running out, and then may only construct during a limited window. The new tolling provisions fail to account for this reasonable land use problem in any way, penalizing Aspen for events wholly beyond its control.

Had Aspen received an unfavorable zoning decision and appealed that decision to a court of law, another effect would ensued. Although the new rules do not toll the three-year period for zoning problems, an appeal of the zoning decision to a court of law would constitute judicial review sufficient to toll the period. Rulemaking at ¶86. But were a reversal of the zoning decision obtained, this favorable resolution would be for naught as, although the clock had stopped during the appeal, the time lost during the now overturned zoning period would be gone forever, leaving little, if any, time to construct. Such a position would be even more untenable if the favorable judicial resolution to the zoning problem was received while a land use ordinance, limiting construction to six months per year, was in effect. In such a situation, the clock would run out before a chance to construct ever occurred. All of these very real, and not theoretical, concerns prove that the Commission has failed to act in a rational manner in adopting rules that do not consider the peculiar circumstances affecting each permittee, especially in the land use area.

The situation faced by Rancho Palos Verdes Broadcasters, Inc. ("RPVB") displays yet another example of the restrictiveness of the tolling provisions contained in the Rulemaking.

RPVB has sought to construct an antenna on Santa Catalina Island, California, for some time now. However, due to environmental concerns, RPVB has had to secure approval from a multitude of organizations and agencies, including the State of California, the County of Los Angeles, and the Santa Catalina Conservancy, the private entity that controls land use on the island, before construction could begin. Yet the time spent securing these approvals does not constitute litigation or judicial or administrative review within the contemplation of the new rules, and thus, does not toll the three-year construction period.

This is yet another example of how the tolling provisions contained in the Rulemaking are too strict, not too lax. As such, LIM's contentions regarding the tolling provisions should be disregarded.

II. The Retroactive Application of the Rulemaking is Improper, But Not In the Manner Asserted by LIM

In its Petition, LIM contends that allowing construction permits over three years of age to utilize the tolling provisions contained in the Rulemaking constitutes a retroactive application of a legislative rule in violation of the law. LIM contends instead that all holders of construction permits over three years should be precluded from taking advantage of the tolling provisions contained in the Rulemaking, resulting in their forfeiture upon the expiration of their extension periods.

In one sense, LIM is right: the application of the tolling provisions contained in the new rules to construction permits existing under the old rules violates the law as it amounts to retroactive application of a legislative rule. However, the alternative proposed by LIM, involving uniform forfeiture of all construction permits over three years old, upon the expiration

of their extensions, also amounts to retroactive application of the new rules to permits granted under the former rules. Both applications are impermissible due to their retroactivity.

Legislative rules are those adopted pursuant to the notice and comment requirements of the Administrative Procedure Act ("APA"), and must adhere to the APA's goal of prospective application. Chadmoore Communications, Inc. v. FCC, 113 F.3d 235, 241 (1997); Mason General Hospital v. Secretary of the Department of Health and Human Services, 809 F.2d 1220, 1224-5 (6th Cir. 1987); MCI Telecommunications Co. v. FCC, 10 F.3d 842, 846 (D.C. Cir. 1993). The final rules contained in the Rulemaking constitute legislative rules as they were adopted following such a notice and comment period.

Courts interpreting the APA have consistently ruled that legislative rules are not to be applied retroactively. Chadmoore, 113 F.3d at 240. ("[T]he APA requires legislative rules . . . be given future effect only . . . retroactive application is foreclosed by the express terms of the APA"). See also, Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) (holding legislative rules cannot be applied retroactively absent express direction to do so). Retroactive application of legislative rules may occur only where statutory language requires such a result or Congress expressly authorized retroactive application; without such instruction, agencies lack the authority to apply retroactively legislative rules. See, e.g., Bowen, 488 U.S. at 208; Motion Picture Association of America v. Oman, 969 F.2d 1154, 1157 (D.C. Cir. 1992); Gersman v. Group Health Association, Inc., 975 F.2d 886, 897 (D.C. Cir. 1992), cert. denied, 511 U.S. 1068 (1994).

A rule has retroactive effect if it impairs rights a party possessed when it acted. Chadmoore, 113 F.3d at 240-41; New York v. Lyng, 829 F.2d 346 (2nd Cir. 1987) (stating

legislative rules affect previously existing rights and obligations). Such is the case with the Opposing Parties. All of the Opposing Parties possessed, under the old rules, permits from the Commission for the construction of broadcast facilities and the right, upon a showing of cause, to secure extensions to such permits under the former Section 73.3534(b) standards. Their right to obtain further extensions, if necessary, and construct broadcast facilities, is now impaired by the retroactive application of the three-year limit and limited tolling provisions of the new rules to construction permits granted under the old rules.

For example, one of Entravision's construction permits was originally granted in 1994. Under the new rules, this permit is subject to automatic forfeiture at the end of its extension period because three years will have passed since the grant of the original permit and the permit does not fulfill the new tolling requirements. This means that the right to secure further extensions thereto, a right Entravision had possessed and acted upon, is not merely impaired, but is eliminated by the imposition of the new three-year limit. This is despite the fact that Entravision has made substantial progress in construction, which would have warranted extension under the old rules.

It is clear that rights conferred under permits granted pursuant to the old rules are affected by the new rules. The three-year limit imposed by the Rulemaking threatens permittees operating under extensions granted under the old rules with forfeiture of their construction permits. This is despite the fact that the rules under which the permits were granted contained provisions allowing for their further extension. Rulemaking at ¶83. And, the Rulemaking

specifically disallows tolling for zoning problems, although the old rules under which the permits were originally granted contained such a provision. Id.; 47 C.F.R. § 73.3534(b)(3). The Rulemaking is, therefore, impermissibly retroactive in application.

The retroactive application of the tolling provisions argued by LIM violates the APA. However, the stricter interpretation of the new rules advocated by LIM also constitutes retroactive application of a legislative rule, in violation of the APA, and should be treated similarly. As such, the Opposing Parties request the that Commission reject LIM's Petition for Reconsideration because it has failed to offer any substantial basis for its requested relief.

Respectfully submitted,

ASPEN FM, INC.
CALIPATRIA BROADCASTING COMPANY, L.L.C.
RANCHO PALOS VERDES BROADCASTERS, INC.
ENTRAVISION HOLDINGS, LLC

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Date: February 22, 1999.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Petition for Reconsideration was sent, via United States Mail, first class, on February 19, 1999, to the following:

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