Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To: The Commission, *en banc*

REPLY TO OPPOSITIONS TO
PETITIONS FOR RECONSIDERATION

U.P. WIRELESS, LLC and MARK SILBERMAN (collectively the APetitioners≅), by their attorney, respectfully reply to the opposition papers filed by Aspen FM, Inc., *et al.*,[1] and Press Communications LLC[2] in connection with certain petitions for reconsideration of the Report and Order (the AR&O≅) issued in the captioned proceeding, FCC 98-281, adopted October 22, 1998 and released November 25, 1998. The record created herein not only by Petitioners, but also by the multitude of other parties who raised similar or identical issues in their own petitions for reconsideration, overwhelmingly supports rescinding the new extension rules and policies as they apply to existing construction permits. In fact, that conclusion is not disputed by *any* party to this proceeding, even the petitioner contending that the new rules are too lax on a going forward basis.

As their reply to the oppositions, Petitioners respectfully state:

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[1] Aspen FM, Inc., Calipatria Broadcasting Company, L.L.C., Rancho Palos Verdes Broadcasters, Inc. and Entravisic dings, LLC, Opposition to Petition for Reconsideration, MM Docket No. 98-43, filed February 19, 1999.

[2] Press Communications LLC, Opposition to Petition for Reconsideration, MM Docket No. 98-43, filed February 22 9.

Background

The captioned proceeding was initiated by a Notice of Proposed Rulemaking (NPRM), FCC 98-57, adopted April 2, 1998 and released April 3, 1998, which was intended to reduce applicant and licensee burdens and increase the efficiency of application processing, while preserving the public=s ability to participate fully in broadcast licensing processes. One of the issues addressed was modification of Sections 73.3598 and 73.3534 of the Commission=s rules, which specified the term of a construction permit and the criteria to be applied in determining whether an extension of a construction permit should be granted in particular cases.

Noting that the processing of extension requests consumes a considerable portion of the staff=s resources, the Commission proposed (1) to issue all broadcast construction permits for a uniform three-year period (rather than 24 months for full power TV and 18 months for all other types of broadcast facilities, including LPTV); (2) to extend permits only in circumstances where the permit itself is the subject of an administrative or judicial appeal or where construction delays have been cause by an Aact of God;≅ (3) to eliminate the Commission=s historical practice of providing extra time for construction after a permit has been modified or assigned; and (4) to make construction permits subject to automatic forfeiture upon their expiration, absent affirmative action by the Commission to extend them. NPRM at &&58-67. Further, in addition to applying the new policies to permits issued after their effective date, the Commission proposed in the NPRM to apply them only to those existing permits that were still within their initial construction period, thus automatically affording those permittees the benefits of the full three-year construction period contemplated by the new policies.

In its Report and Order, the Commission adopted the substantive changes in policies

virtually as it had proposed, and, as also proposed, applied those changes both to new permits and to existing permits within their initial term. R&O at &&83-89. Nonetheless, in a sharp departure from its proposal and with no discussion whatsoever of its rationale for doing so, the Commission also applied its new policy to *all* existing permits, including permits which have already been granted an extension. R&O at &89(2). The Commission thus applied its new policies retroactively to all existing permit holders, notwithstanding that the existing permittees sought and obtained those permits on the basis of the Aone-in-three≅ showing as traditionally applied by the staff. Stated another way, all existing permit holders that have had a total of what is now defined, albeit erroneously, as three Aunencumbered≅ years to construct, are scheduled to lose their permits in less than six months, absent licensing of the authorized facilities, even if the permit holders could continue to show Asubstantial progress≅ as the doctrine has been previously defined and applied by the staff.

In their joint petition for reconsideration filed on January 19, 1999, Petitioners argued that such a harsh result is unwarranted under the law and otherwise is contrary to the public interest, and is especially unfair to LPTV permit holders such as Petitioners and their associated permit holders. Accordingly, Petitioners requested the Commission to reconsider and rescind its application of the new extension policies, at least insofar as existing LPTV permit holders are concerned. Petitioners further requested that the Commission direct its staff to apply a flexible extension policy, consistent with the Commission=s public interest objectives for LPTV services, to existing permit holders that continue to demonstrate Asubstantial progress≅ -- as traditionally interpreted -- toward completing their construction.

An extraordinary number of other parties raised similar or identical issues in their own

petitions for reconsideration. By Petitioners= count, some 37 other separate petitions were filed, many of which were actually filed on behalf of multiple parties, and substantially all of which echoed Petitioners= concerns or raised issues concerning the new rules and policies consistent with Petitioners= concerns. Out of all those parties, not a single entity disagreed that the new rules were improperly applied to existing permit holders, including the only petitioner -- Long Island Multimedia, LLC (LIM) -- that believes the new rules actually will be too lax on a going forward basis.

Most of the petitioners argued, in contrast, that the new Atolling≅ concept as embodied in the rules is unrealistic and too restrictive, primarily because the pendency of zoning approvals would not Atoll≅ the construction period unless and until court litigation is initiated, and because the pendency of modification applications (such as displacement applications now required for many LPTV permit holders) likewise would not Atoll≅ the construction period. Numerous parties pointed out that the zoning process itself can easily consume the three year construction period, even without court litigation. The parties also argued that modification application similarly can consume substantially all of a three year construction period beyond the permit holder=s control, and they offered other anecdotal evidence that the Atolling≅ concept as now conceived by the Commission is simply not broad enough to rationally account for the myriad obstacles faced by permit holders that are effectively beyond their reasonable control.

Reply

Due to the particular and limited oppositions filed herein, only a brief reply is required. First, none of the opposition arguments derogates from the relief sought by Petitioners herein and, in important respects, such arguments actually support Petitioners= position. The principal

point of the opposition filed by Aspen FM, Inc., *et al.*, is that LIM=s *conclusion* is correct that the Commission improperly applied its new extension rules and policies to existing permit holders, but that its reasoning in drawing that conclusion is fallacious. This is so, according to Aspen FM, Inc., *et al.*, because the stricter Atolling≅ standards sought by LIM cannot properly be applied retroactively to existing permit holders any more than can the new Atolling≅ standards fashiomed by the Commission in the R&O.

Petitioners agree with Aspen FM, Inc., *et al*. The vice of the Commission=s retroactivity is that doing so works to the disadvantage and prejudice of existing permit holders. Obviously, since LIM seeks even more stringent Atolling≅ standards than adopted by the Commission, those standards would be even more prejudicial and disadvantageous, and thus likewise cannot properly be applied retroactively to existing holders. Moreover, LIM=s unsupported speculation that the new Atolling≅ standards are too lax and are subject to manipulation by permit holders is thoroughly refuted by the arguments of other petitioners who document that the new standards actually are far too restrictive and unrealistic.

The only other opposition file against the petitions for reconsideration, *i.e.*, by Press Communications, LLC (Press), does not quarrel with the general proposition that the new policies were improperly applied to existing permit holders. Instead, Press= argument is that under the particular circumstances pertaining to the permit issued to Central Florida Educational Television, Inc., that permit has long since expired and cannot properly be resuscitated whether or not the new rules are deemed to have been improperly applied retroactively to existing permit holders. The dispute between those parties is particular and of long standing, and does not derogate from the retroactivity arguments advanced by Petitioners and numerous others herein,

regardless of who ultimately is proven correct.

The decisive consideration, therefore, is that it is undisputed on the record herein that the Commission cannot properly apply its new extension and Atolling≅ policies to existing permit holders. Accordingly, there is no doubt that the rules and policies adopted in the R&O must be reconsidered and appropriately modified, as requested by Petitioners in their Petition for Reconsideration.

In this regard, one other point should be made in light of the arguments advanced in other petitions for reconsideration. Petitioners agree with numerous others that the Atolling≅ concept as promulgated in the new rules is too restrictive and unrealistic, even for new permits granted in the future. The zoning process, the exclusion of which from the Atolling≅ concept was cited by petitioners as the principal defect in the new rule, has traditionally been deemed sufficient to justify an extension because it is beyond the control of a permit holder, as has the pendency of major modification applications. The resolution urged by Petitioners, *i.e.*, judging extension requests by existing permit holders by the standards of the former Section 73.3534, would have cured this defect for existing permit holders, but not for new permit holders.

On the other hand, reinstating the old standards for new permit holders as well as existing permit holders obviously would defeat the intent of the Commission to devise new permit processing procedures that do not require investing substantial staff resources in processing permit extension requests.

Given the competing interests involved, Petitioners believe that a fair compromise would be to broaden the Atolling≅ concept to encompass the principal concerns such as zoning and major modification applications raised by the petitioning parties, and to give *all* existing permit

holders three years from the effective date of the order on reconsideration to complete their construction and license their authorized facilities, subject, of course, to the more expansive Atolling≅ provisions adopted on reconsideration. Petitioners prefer their original suggested resolution of Agrandfathering≅ existing permit holders under the standards of former Section 73.3534 of the rules, combined with appropriate direction from the Commission to apply the standards flexibly, but recognize that the Commission may be concerned that continuing to process extension requests for the Agrandfathered≅ permits might impose an undue burden on the staff=s resources. The compromise resolution suggested herein for the Commission=s consideration would minimize the burden on the staff from processing extension requests while avoiding prejudicial and improper retroactivity arising from applying the new rules and policies to existing permit holders.

Conclusion

Accordingly, for the reasons stated above and in their Petition for Reconsideration herein, Petitioners respectfully submit that the Commission should reconsider and rescind its application of the new permit extension policies, at least for existing LPTV permits, and should instead direct the staff to apply a flexible interpretation of the existing Section 73.3534 of the rules to existing permit holders that seek further extensions of their existing construction permits. In the alternative, the Commission should broaden its new Atolling≅ concept to address the arguments made by numerous petitioners demonstrating that the Atolling≅ concept is too restrictive and unrealistic as now formulated. The Commission should then afford all existing permit holders three years from the effective date of its order on reconsideration in which to construct and apply for a license for their authorized facilities, subject to the modified Atolling≅

provisions fashioned by the Commission on reconsideration herein.

Respectfully submitted,

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March 9, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of March, 1999, served the foregoing Reply to Oppositions to Petitions for Reconsideration upon Aspen FM, Inc., *et al.*, by mailing a true copy thereof, first class postage prepaid and properly addressed, to their attorneys, Barry A. Friedman, Esquire, Andrew S. Hyman, Esquire, THOMPSON HINE & FLORY LLP, 1920 N Street, N.W., Suite 800, Washington, DC 20036, and upon Press Communications LLC by mailing a true copy thereof, first class postage prepaid and properly addressed, to its attorney, Harry F. Cole, Esquire, BECHTEL & COLE, CHARTERED, 1902 L Street, N.W., Suite 250, Washington, DC 20036.

s/ Kenneth E. Hardman
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