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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 21, 1999

Ms. Magalie Salas
Secretary
Federal Communications Commission
Washington, DC 20554

Re: MM Docket No. 98-43
MM Docket 94-149
Biennial Regulatory Review

Dear Ms. Salas:

This ex parte comment is presented by Butte County Office of Education and Paradise Unified School District, two ITFS permittees in northern California, in connection with the Commission's reconsideration of its November 25, 1998 decision in the above-referenced Dockets (1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes, FCC 98-281, released November 25, 1998 (the Order). It is intended to bring to the Commission's attention a recently discovered anomaly in the new rules which may not have been intended by the drafters. Section II D. of the Order covered the subject of extension of construction permits, the problems associated with the repeated extension requests which the Commission was having to contend with, the new uniform three year construction period applicable to mass media services, and the new procedures and standards applicable to extensions. In general terms, the Commission struck a balance between the need for a reasonable time period to construct a station and the need to permit extensions in cases of true need. To achieve that balance, the Commission extended the routine time period for construction of a station to three years. Then because the additional construction period will reduce the need for extensions of time to construct a facility, the Commission both reduced the circumstances in which an extension would be granted and made forfeiture of a construction permit automatic upon expiration of the construction period. Though it is unclear from the rules or the test, the latter provision presumably eliminates the possibility of reinstatement of an expired permit.

Nothing in the text of the Order addressed in any way the circumstances of noncommercial ITFS permittees or how the extension standards or time periods would apply to such permittees; the entire discussion of the purpose and effect of the new rule related only to "broadcast" entities and did not distinguish ITFS permittees from other

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broadcast entities in any way. Indeed, a person reading the text of the Order would reasonably assume that the new rules, including extended construction periods, apply to ITFS entities as well as other broadcasters. However, when one refers to the rules themselves one discovers that the ITFS construction period has been "bobbed" at the end by eliminating the possibility of reinstatement of an expired CP but without at the same time providing the concomitant extension of the basic construction period to three years applicable to all other broadcast permittees. In other words, ITFS permittees for some reason were denied the lengthened construction period which was intended to eliminate the need for extensions requests or reinstatements. This peculiar anomaly is explained or justified nowhere in the text.

The anomaly is especially strange when we consider that ITFS permittees are generally recognized by the Commission as more susceptible to the vagaries of financing and budget considerations which are beyond their control than most commercial permittees. The latter can seek financing through conventional means, while ITFS permittees are often at the whim of legislative bodies or boards for whom the construction of ITFS facilities is of secondary importance. It is also ITFS permittees who are likely to be the least sophisticated about the Commission's rules and thus the most likely to require equitable relief such as reinstatement of an expired permit. Thus it is ITFS permittees who could most benefit by a longer construction period and also the possibility of reinstatement. Yet it is precisely these permittees whom the November 25 Order excludes from the construction scheme established by the new rules.

It is also worth noting that there was some confusion in the industry (and indeed within the Commission itself) about the applicability of the new rules to ITFS permittees. Many permittees may have assumed based on the text of the Order that the three-year period applied to them since there was no indication otherwise.

The upshot then is that the Commission should make its mass media licensing scheme consistent by automatically extending the construction period of ITFS permittees whose 18 month period was open when the new rules were adopted, just as it did for all other mass media permittees. All of the considerations applicable to commercial permittees are at least as applicable to ITFS permittees, and the rationale of the rule should therefore cover ITFS permittees as well. The alternative is that the Commission will have adopted a change in the rules having very serious consequences for ITFS permittees without the slightest discussion of the reason for that change or the basis for distinguishing those permittees from others.

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Respectfully submitted,

Butte County Office of Education
and
Paradise Unified School District

By: _____
Donald J. Evans

Cc: Honorable William Kennard
Honorable Susan Ness
Honorable Michael Powell
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Honorable Michael Powell
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