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

In the Matter of)
)
An Inquiry Into the Commission's Policies and) MM Docket No. 93-177
Rules regarding AM Radio Service Directional)
Antenna Performance Verification)

ACCEPTED/FILED

DEC - 5 2013

To: The Commission

Federal Communications Commission
Office of the Secretary

PETITION FOR RECONSIDERATION

1. NTCH, Inc. ("NTCH"), by its attorneys, hereby petitions the Commission to reconsider the Third Report and Order and Second Order on Reconsideration (the "Order")¹ with respect to certain impermissibly retroactive policies adopted therein.

2. The Order endeavors to streamline and clarify the Commission's rules for new communications tower construction and modification near existing AM antenna arrays. Applied prospectively to proposed new tower construction or modifications to existing structures, the new protection scheme seeks to consolidate and harmonize disparate and service-specific rules² and therefore promises greater certainty for tower owners and AM station licensees alike. However, the Order has changed the legal landscape for existing tower owners and operators by

¹ *An Inquiry Into the Commission's Policies and Rules regarding AM Radio Service Directional Antenna Performance Verification*, Third Report and Order and Second Order on Reconsideration, FCC 13-115 (rel. August 16, 2013) (the "Order"). Notice of the Order appeared in the Federal Register on November 5, 2013. 78 FR 6288 (2013).

² As explained in the Second Report & Order and Second Further Notice of Proposed Rulemaking, then-existing rules "impose differing requirements on the broadcast and wireless entities, although the issue is the same regardless of the types of antennas mounted on a tower[.]" and Part 90 and Part 24 of the Commission's rules "entirely lack provisions for protecting AM stations from possible effects of nearby tower construction." *An Inquiry Into the Commission's Policies and Rules regarding AM Radio Service Directional Antenna Performance Verification*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 23 FCC Rcd 14267, ¶ 14 (2008) ("*Second Order & FNPRM*").

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promoting unlawfully retroactive application of the new rules in certain situations. The explicit carve-out for retroactive applications of the new AM protection scheme leaves tower owners and builders such as NTCH vulnerable to demands for remediation of pre-existing interference, upsetting the rights and reasonable expectations of tower owners and licensees who abided by the previous regulatory regime. The new rules must therefore be reconsidered and revised to eliminate the opportunities for retroactive application. At minimum, the Commission must stay the effectiveness of the proposed look-back carve-out and issue a new notice of proposed rulemaking to meet the fair notice requirements of administrative law.

3. **The Order Alters Prospective Rule Changes to Allow Unlawful Retroactive Application.** The Order adopts the tentative conclusion set forth in the proceeding's Second Further Notice of Proposed Rulemaking ("Second FNPRM") that the new rules "should be applied only to towers constructed or modified after the effective date of the new rules, *i.e.*, where actual construction commences after the effective date."³ Indeed, the Order acknowledges that its intent is to codify and make universally applicable the Commission's amorphous and unwritten "newcomer" policy. This policy, which obligates permittees and licensees to remedy any interference new facilities may cause to existing licensee, will apply in the context of new or modified communications towers on existing AM arrays.⁴ In other words, the Order confirms that all *prospective* tower construction and modification shall be beholden to the tradition newcomer policy *vis a vis* existing AM antennas.

4. Despite these assurances, the Order then asserts that the Commission in fact will "apply the new rules' remediation requirement to construction commenced *before* the effective

³ *Order*, at ¶ 18, quoting *Second Order & FNPRM*.

⁴ *Id.*, at ¶ 19, citing notes 7-8 (discussing the history of the application of the "newcomer" policy to a variety of Commission licensees and scenarios).

date,”⁵ establishing one-year window during which an AM station licensee may employ the Commission staff to force an owner whose tower construction or modification was commenced or completed *before* the effective date of the rules to remediate any adverse effects to AM antennas determined *after* the effective date.⁶ Moreover, the Commission extends this opportunity to certain *pending* interference complaints, establishing in a footnote that, where certain existing rules make resolution difficult (read: the Commission has thrown up its hands rather than address a tricky scenario), an AM licensee may now resubmit the complaint to take advantage of the new regime.⁷ Perhaps conscious of the blatantly retroactive nature of the policy, the Commission suggests that the “rule change does not impose any new obligations on licensees or permittees.”⁸ It goes on to argue that “this change simply clarifies and codifies [the] implicit remediation obligation, or the ‘newcomer’ policy, a mainstay of interference protection.”⁹ In a footnote, the Commission dismisses any suggestion of impermissible retroactivity, asserting, in the face of the facts, that the rule creates no new legal consequences to events completed before its enactment.¹⁰

5. The Commission's position is simply erroneous. The Order explicitly creates a mechanism whereby this new application of the newcomer policy may be applied against existing towers which were not previously subject to the policy. Not only does this turn the so-called “newcomer” policy into a farce, it is, *prima facie*, the imposition of a new obligation, and thus, new legal consequences on events completed before the enactment of the rule. Such

⁵ *Id.*, at ¶ 19 (emphasis added).

⁶ *Id.*, at ¶ 20.

⁷ *Id.*, at n. 65.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*, at n. 70.

retroactive regulation is prohibited under administrative law.

6. Nor is the effect de minimis. Many tower constructors like NTCH have built hundreds of towers over the last few years that were not subject to any obligation, implicit or otherwise, to remediate any negative effects on AM towers. The new rule would subject such tower owners to literally tens of millions of dollars in new liability to AM station owners for construction that was perfectly lawful and free of liability at the time it was undertaken. For tower owners, the rent charged to tenants on long-term leases has been based on the costs that were known at the time of construction, including the costs of complying with laws and regulations that existed at the time of construction. The Commission's retroactive action injects a potentially massive new cost into the tower financial equation that could never have been anticipated by either the tower owners or the tenants on the towers; the entire basis of the economic relationship will have been upset.

7. Unfortunately, because the Commission radically changed its proposal (which promised no retroactive application) to the retroactive rule adopted, without any notice to the public whatsoever, the Commission got no information about the serious adverse financial consequences which its new rule would cause. Apart from violating the APA in failing to permit meaningful opportunity for comment on this change, the Commission as a practical matter was unable to effectively evaluate the cost-benefits of the new rule, either for the public generally or especially for small businesses like NTCH, as required by the Regulatory Flexibility Act, as amended ("RFA"), 5 U.S.C. § 603. The Commission notes in its analysis in Appendix C that it sought comments about the impacts of the proposed rules on small businesses in accordance with the directives of the RFA's Supplemental Initial Regulatory Flexibility Analysis, but none were received. It is disingenuous, at best, for the Commission to have expected comments about the

retroactive application of a rule when such a proposal was not set forth in the Second FNPRM for the public to review.

8. **Failure to Provide Adequate Notice and Opportunity to Comment Violates the Administrative Procedures Act.** Section 553(c) of the Administrative Procedures Act, 5 U.S.C. §553(c), requires an agency in a rulemaking to provide a meaningful opportunity for public comment on its proposed rules. “The adequacy of notice is a critical starting point which affects the integrity of an administrative proceeding.” *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986), citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). It also is an established tenet of administrative law that, “[w]hile a final rule need not be an exact replica of the rule proposed in the Notice, the final rule must be a ‘logical outgrowth’ of the rule proposed. Clearly, ‘if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.’” *Id.* (quoting *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985)). The test is whether the agency’s notice would fairly apprise interested persons of the subjects and issues of the rulemaking. *Id.* (citing *Small Refiner*, 705 F.2d at 547, and *American Iron & Steel Institute v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977)) (internal quotes omitted). “[Because] unfairness results unless persons are sufficiently alerted to likely alternatives so that they know whether their interests are at stake[,]” courts have invalidated decisions made in the absence of adequate notice. *Id.* (quoting *Spartan Radiocasting*, 619 F.2d 314, 321 (4th Cir. 1980)) (internal quotes omitted).

9. Neither NTCH nor the public at large was provided notice of the potential for retroactive application of the new protection scheme; the Second FNPRM explicitly proposes only *prospective* application. Despite the FCC’s references in the Order to comments made by

other parties requesting the Commission look into alternatives for certain exceptional situations,¹¹ the comments of other interested parties do not satisfy an agency's obligation to provide notice. *Id.* Because the notice failed to “describe the range of alternatives being considered with reasonable specificity,” and instead required the public to anticipate a rule that was not proposed, the notice was wholly inadequate and in violation of the APA. *Id.* (citing *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450-52 (3d Cir. 2011) (internal quotation marks omitted)); *accord. Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 171 (2d Cir. 2013).

10. **Application of the Rules to Towers Constructed After the Effective Date is Impermissibly Retroactive.** It is well-established that an agency may not promulgate retroactive rules without express Congressional authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Nothing in the Order or the proceeding history establishes that the Commission is acting under express Congressional authority with respect to the specific issues at hand, thus the question turns to whether the rule is retroactive and therefore barred in absence of such authority. The Supreme Court has held that an agency regulation operates retroactively when it “impair[s] rights a party possessed when he acted, increase[s] a party’s liability for past conduct, or impose[s] new duties with respect to transactions already completed.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). By upsetting expectations and creating new legal consequences for past actions (*i.e.*, the completed construction of new or modified towers), the application of these new rules to parties who acted in accordance with a particularly regulatory regime and whose construction commenced or was completed within the proscribed parameters of those prior requirements unquestionably impairs the tower owner’s rights, increases liability for past conduct, *and* imposes new duties with respect to completed acts.

¹¹ *Id.*, ¶¶ 18 and 20.

11. The D.C. Circuit has likewise determined that a rule is retroactive if it “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.” *Nat'l Mining Ass'n v. United States Dep't of Interior*, 177 F.3d 1, 8 (D.C. Cir. 1999) (quoting *Ass'n of Accredited Cosmetology Sch. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992)). There is no doubt that, upon an AM licensee’s showing during the one-year “look-back” permitted by the Order, new obligations and duties — the remediation of interference — will be imposed on tower constructors that did not exist before. Insofar as the Commission has determined that the remediation obligation may be applied to towers authorized or constructed *prior to* the enactment of the rules, such regulation is impermissibly retroactive and is therefore unlawful.

12. **Conclusion.** As demonstrated herein, the Commission must RECONSIDER the Order and REVISE the policies adopted therein to prohibit retroactive rule application. At minimum, the Commission must stay the retroactive aspects of the rule and issue a further notice of proposed rulemaking soliciting comments to permit a fair opportunity for notice and comment to all interested parties.

Respectfully submitted,

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