

Construction Additional Time
Construction Period
Construction Permit Expiration of
Construction Permit Extension of
Construction Permit Modification of

The Commission extended the time period for construction of b/c stations. However, stricter criteria for the granting of applications to extend the time to construct broadcast facilities and for granting modifications and assignment-/transfers were adopted to avoid unwarranted delays and expedite service to the public. These criteria were not imposed on Instructional TV Fixed and International Broadcast stations.

— *Amendment of Sec. 73.3598*

FCC 85-647

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Amendment of Section 73.3598 and
associated rules concerning the
construction of broadcast stations.

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1985; Released: December 17, 1985

BY THE COMMISSION:

1. The matter before us is the amount of time taken by broadcast permittees to construct their facilities. Currently, Section 73.3598 of the Commission Rules provides that the period for construction of television and radio broadcast stations is 18 and 12 months, respectively. The latter period also applies to other broadcast, auxiliary and Instructional TV Fixed (ITFS) stations.¹

¹ Specifically, this provision (Rule 73.3598(b)) includes International Broadcast, low power TV, TV translator, FM translator, FM booster and broadcast auxiliary. Through an oversight, Section 73.3598 of the Commission's Rules

However, the many applications for extension of time (FCC Form 701) granted makes this period to build much greater and thus precludes activation of new broadcast service to the public. We are seriously concerned about this situation and intend to strictly review applications for extensions. However, in recognition of the substantial changes in the complexity and amount of the equipment needed and the growing multiplicity of business decisions involved in establishing a station, we are extending the initial period to construct.² We will now allow construction periods of 24 months for television stations and 18 months for AM and FM radio and other broadcast and auxiliary stations.³

2. By extending the initial length of time allowed permittees to construct their stations, we have provided an adequate time to build broadcast facilities. Thus, there should be fewer applications to extend time. In any event, permittees would be well advised to note our present determination to limit the grant of extension requests. We are providing strict criteria for the granting of applications to extend time to construct broadcast stations.⁴ Thus, an application for extension of time to construct such facilities will be granted only under one of the following three circumstances:⁵

was not amended to reflect an extension of the construction period for Instructional TV Fixed stations to 18 months which was adopted by the Commission in the ITFS *Report and Order* (MM Docket No. 83-523), 49 Fed. Reg. 32590 (August 15, 1984). This oversight is corrected in the instant document.

² Under the Federal Radio Commission, the time period within which to construct broadcast stations was four months, whereas in 1934 the FCC provided an eight month construction time period. In 1970, the construction period was again lengthened, that time to its current amount.

³ A petition for rule making was filed on July 29, 1985, by Mary P. Norman, requesting that International Broadcast stations be allowed a longer initial period within which to construct their facilities. Since this *Memorandum Opinion and Order* extends the time for construction of broadcast stations in general, including International Broadcast facilities, Ms. Norman's petition is dismissed as moot.

⁴ We are not applying these new stricter standards for granting applications for extension of time to construct to International Broadcast stations and ITFS. In view of the size and complexity of the equipment for International Broadcast stations and their frequent location in obscure areas, strict criteria for extensions of time will not be imposed on this service. ITFS, in light of the specialized nature and the limited funds available for its growth, also will not be subjected to the new stricter extension of time criteria.

⁵ On May 14, 1984, a *Public Notice* (No. 4177) was released establishing similar guidelines for processing applications for additional time within which to construct AM and FM broadcast stations. This *Memorandum Opinion and Order* is intended to supesede the May 14, 1984 *Public Notice* and establish uniform standards for broadcast (not International or ITFS) stations.

- a. Construction is complete and testing is underway looking toward prompt filing of a license application.
- b. Substantial progress has been made *i.e.*, demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion.
- c. No 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.

3. In order to expedite service to the public, we also are establishing strict criteria for the granting of applications for modifications and assignment/transfers of unbuilt facilities,⁶ and extensions of time relating to them. If a permittee finds it necessary to file either an application to modify its authorized but unbuilt facilities, or an assignment/transfer application, such application shall be filed within the first 9 months of the issuance of the original construction permit for radio and other broadcast and auxiliary stations, or within 12 months of the issuance of the original construction permit for television facilities. Before such an application can be granted, the permittee or assignee must certify that it will immediately begin building after the modification is granted or the assignment is consummated. Modifications and assignment applications filed after the above time periods will not be granted absent a showing that one of the three criteria in paragraph 2, *supra* applies, and a certification by the permittee or the assignee that it immediately will begin building after the modification is granted or the assignment consummated. The seller must make the "one of three criteria" showing in the assignment/transfer application. Moreover, the burden to meet one of the three criteria increases as the period in the second half of the construction period term continues. If a modification is granted, the time period allowed for construction will be 6 months from the issuance of the authorization to modify or the remainder of the construction period, whichever is longer. Also, in the case of an assignment, the time period allowed for construction will be 12 months from the consummation of the assignment or the remainder of the construction period, whichever is longer.⁷ The

⁶ When referring to assignments and transfers, we mean those requiring long form assignments (FCC Form 314) or long form transfers (FCC Form 315).

⁷ We do not contemplate allowing repeated assignments which would each permit 12 months from their consummation for the construction of a facility. Allowing such extended time periods would not be in the public interest as it would delay service to the audience.

extension will be given subject to the condition that the modification is completed or the assignment is consummated. Failure to modify or consummate within the time allowed will result in cancellation of the construction permit. We will *not* entertain an application for modification or assignment/transfer if filed after the expiration of the initial construction period.

4. We are amending Section 73.3598 to provide what, under present circumstances, are more realistic time periods for construction.⁸ Permittees should nevertheless be advised that we expect station construction to commence and be brought to fruition expeditiously. Moreover, applications for extension of time to construct broadcast stations will be carefully scrutinized. Thus, unwarranted delays will be avoided and service to the public expedited. If stations are not constructed within the allowed time, permittees will lose their authorizations.⁹ Others more able to commence operations and provide expeditious service to the public will be given the opportunity to apply for the frequency involved.

5. We believe that providing more time initially for the building of facilities can substantially reduce the volume of requests for extension of time to construct. This will reduce the administrative burdens imposed on Commission personnel, thus allowing scarce staff resources to be better utilized. For this reason and the others expressed in this document, we conclude that the public interest will be served by extending the time periods for construction of broadcast stations and imposing strict criteria for the granting of applications to extend time to construct as well as for granting modifications and assignment/transfers.¹⁰

6. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease requirements or burdens upon the public. This decrease will be subject to approval by the Office of Management and

⁸ In view of the stricter standards being applied to extension of time requests, we believe the requirement in rule 73.3598 that TV permittees file a report on the progress of station construction is unnecessary. Therefore, that provision is being eliminated.

⁹ See *P & R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984), in which the U.S. Court of Appeals affirmed the Commission's decision cancelling authorizations of those who failed to comply with channel loading and construction requirements within the required time period.

¹⁰ Since the Commission already has the requisite information to take this action and the matter is noncontroversial, prior notice and comment proceedings are neither necessary nor required. 5 U.S.C. § 553(b)(3)(B); and Section 1.412(c) of the Commission's Rules.

Budget as prescribed by the Act.

7. Authority for the action taken herein is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.¹¹

8. Accordingly, IT IS ORDERED, that the Commission's Rules ARE AMENDED, effective December 10, 1985,¹² as described above and set forth in the attached Appendix.¹³

9. IT IS FURTHER ORDERED, That the Petition for Rule making filed by Mary P. Norman on July 29, 1985, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

* * * * *

2. 47 CFR 73.3534 is revised in its entirety to read as follows:

¹¹ The amendments being adopted include a conforming editorial revision which substitutes the word "declared" for "automatically" in rule 73.3599 in order to conform our Rules with our long-standing practice of declaring a construction permit forfeited before considering it actually to have lapsed. For court affirmation of this procedure, see *MG-TV Broadcasting Company v. FCC*, 408 F.2d 1257, 1261 (D.C. Cir. 1968); *Mass Communicators, Inc. v. FCC*, 266 F.2d 681 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 828 (1959); and *United Detroit Theatres Corp. v. FCC*, 178 F.2d 700 (D.C. Cir. 1949).

¹² Since the benefits of these rule changes should be made available to broadcasters and the public immediately, and the matter is noncontroversial, good cause has been found to order this *Memorandum Opinion and Order* effective within less than thirty days from the time it is published in the Federal Register. 5 U.S.C. § 553(d)(3) and Section 1.427(b) of the Commission's Rules.

¹³ The new policies for granting modification and assignment/transfer applications and applications for extensions of time will apply, as will the new time periods for initial construction (§ 73.3598), to all construction permits granted after the effective date of this *Order*. As to those permittees holding unexpired construction permits granted prior to the effective date of this *Order*, if they wish additional time to construct they must file an application for extension (Form 701). At that time, such permittees will automatically receive a first extension of six additional months for a total initial construction period of 24 months for TV stations and 18 months for radio, other broadcast and auxiliary stations. We believe this provides current permittees with fair and just treatment. After an initial construction period of 24 or 18 months has been given to current permittees, however, broadcast permittees (not International or ITFS) will be required to meet the new stricter criteria before an extension of time request or an application for modification or assignment is granted.

§ 73.3534 Application for extension of construction permit or for construction permit to replace expired construction permit.

(a) Application for extension of time within which to construct a station shall be filed on FCC Form 701, "Application for Extension of Construction Permit or to Replace Expired Construction Permit." The application shall be filed at least 30 days prior to the expiration date of the construction permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases, an application will be accepted upon a showing satisfactory to the FCC of sufficient reasons for filing within less than 30 days prior to the expiration date.

(b) Applications for extension of time to construct broadcast stations, with the exception of International Broadcast and Instructional TV Fixed stations, will be granted only if one of the following three circumstances have occurred: (1) construction is complete and testing is underway looking toward prompt filing of a license application; (2) substantial progress has been made *i.e.*, demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or (3) no 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.

(c) Applications for extension of time to construct International Broadcast and Instructional TV Fixed stations will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the permittee, or upon a specific and detailed showing of other matters sufficient to justify an extension.

(d) If an application for extension of time within which to construct a station is approved, such an extension will be limited to a period of no more than 6 months except when an assignment or transfer has been approved that provides for a longer period up to a maximum of 12 months from the date of consummation.

(e) Application for a construction permit to replace an expired construction permit shall be filed on FCC Form 701. Such applications must be filed within 30 days of the expiration date of the authorization sought to be replaced. If approved, such authorization shall specify a period of not more than 6 months within which construction shall be completed and application for license filed.

3. New 47 CFR 73.3535 Application to modify authorized but unbuilt facilities, or to assign or transfer control of an unbuilt facility, is added to Subpart H, Part 73, to read as follows:

§ 73.3535 Application to modify authorized but unbuilt facilities, or to assign or transfer control of an unbuilt facility.

(a) If a permittee finds it necessary to file either an application to modify its authorized, but unbuilt facilities, or an assignment/transfer application, such application shall be filed within the first 9 months of the issuance of the original construction permit for radio and other broadcast and

auxiliary stations, or within 12 months of the issuance of the original construction permit for television facilities. Before such an application can be granted, the permittee or assignee must certify that it will immediately begin building after the modification is granted or the assignment is consummated.

(b) Modification and assignment applications filed after the time periods stated in paragraph (a) will not be granted absent a showing that one of the following three criteria apply: (1) construction is complete and testing is underway looking toward prompt filing of a license application; (2) substantial progress has been made *i.e.*, demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or (3) no 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. A certification by the permittee or the assignee that it immediately will begin building after the modification is granted or the assignment is consummated is also necessary. A seller must make the "one of three criteria" showing in an assignment application.

(c) If a modification is granted, the time period allowed for construction will be 6 months from the issuance of the authorization to modify or the remainder of the construction period, whichever is longer. Also, in the case of an assignment, the time period allowed for construction will be 12 months from the consummation of the assignment or the remainder of the construction period, whichever is longer. The extension will be given subject to the condition that the modification is completed or the assignment is consummated. Failure to modify or consummate within the time allowed will result in cancellation of the construction permit.

(d) We will not entertain an application for modification of an authorized but unbuilt facility or an application for assignment or transfer of control of an unbuilt facility if filed after the expiration of the initial construction period.

4. 47 CFR 73.3598 is revised in its entirety to read as follows:

§ 73.3598 Period of Construction.

(a) TV broadcast stations. Each original construction permit for the construction of a new TV broadcast station, or to make changes in an existing station, shall specify a period of no more than 24 months from the date of issuance of the original construction permit within which construction shall be completed and application for license filed.

(b) Other broadcast, auxiliary and Instructional TV Fixed Stations. Each original permit for the construction of a new AM, FM or International Broadcast; low power TV; TV translator; FM translator; FM booster; broadcast auxiliary; or Instructional TV Fixed station, or to make changes in such existing stations, shall specify a period of no more than 18 months from the date of issuance of the original construction permit within which construction shall be completed and application for license be filed.

5. 47 CFR 73.3599 is revised in its entirety to read as follows:

§ 73.3599 Forfeiture of construction permit.

A construction permit shall be declared forfeited if the station is not ready for operation within the time specified therein or within such further time as the FCC may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the FCC as of the expiration date.