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EXTENSIONS OF BROADCAST CONSTRUCTION PERMITS

Gary P. Schonman*

Caveat broadcast permittee! That is the warning from the Federal Communications Commission (FCC or Commission) as the effects of its newest policies¹ on broadcast extension applications² are felt throughout the broadcast community.

Ordinarily, the FCC will grant a construction permit (CP) to a qualified applicant for construction of a new radio broadcast station (AM or FM) or for changes in such an existing facility for a period of twelve months.³ CPs for TV broadcast stations are granted for a period of eighteen months.⁴ A permittee is expected to complete construction and equipment testing and place the station on-the-air within these time periods. Often, however, for a variety of reasons, a permittee will fail to complete construction within the specified time. It then becomes necessary for the permittee to file with the Commission an FCC Form 701 Application.⁵ This form allows a permittee

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The opinions expressed herein are solely those of the author and do not necessarily represent the views of the Federal Communications Commission.

1. The Audio Services Division, Mass Media Bureau officially announced its new policy on extension applications with the release of FCC Public Notice, Mimeo No. 4177, May 14, 1984. The Video Services Division, Mass Media Bureau, however, has to date released no such official announcement; rather, it has developed its own new policy on a case-by-case basis. See *Sunrise Broadcasting, Inc. (KCKU (TV))*, *Memorandum Opinion and Order*, FCC 4123, rel. April 26, 1985, in which the Chief, Video Services Division stated: "That the Commission is strictly enforcing [its rules on extensions] is apparent. In the 12 months preceeding the filing of [this] application, the Commission [has] cancelled 14 television construction permits for failure to construct within the time allotted." See also *Texas Gulf Communications, Inc. (KTGC (TV))*, *Memorandum Opinion and Order*, FCC 1897, rel. January 14, 1985.

2. Broadcast applications in general are governed by regulations set forth at 47 C.F.R. §§ 73.3500-3605 (1984).

3. 47 C.F.R. § 73.3598(b) (1984).

4. 47 C.F.R. § 73.3598(a) (1984).

5. 47 C.F.R. § 73.3534 (1984).

to apply for an extension of the term of an existing CP or for a replacement of an expired CP.

Both Congress and the Commission (the latter through its rulemaking authority) have established standards that specify the conditions under which extensions of CPs will be granted. The Communications Act of 1934 (Act), as amended, provides in pertinent part:

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.⁶

The relevant provision through which the FCC implements this statute is section 73.3534(a) of the Commission's Rules.⁷ It states that "[s]uch [extension] applications will be granted upon a specific and detailed showing that the failure to complete [construction] was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension."⁸ The rationale for such legislation relating to extensions of time within which to construct broadcast stations is clearly derived from public service objectives:

The policy embodied in . . . the statute and rules is based on the recognition that the privilege of using a radio frequency is granted to a permittee upon a showing that the frequency will be used to promote the public interest, necessity or convenience. Serving this objective requires that the permittee proceed expeditiously to complete construction of the station and to commence operation. Once a new station has been authorized, the public is entitled to expect that it will be placed in operation without unnecessary delay.⁹

For years, the FCC's Mass Media Bureau (Bureau),¹⁰ which carries out initial review of extension applications via delegated authority,¹¹ liberally granted such requests.¹² The new policies change all that. Pursuant to the

6. 47 U.S.C. § 319(b) (1982).

7. 47 C.F.R. § 73.3534(a) (1984).

8. *Id.*

9. WHAS, Inc., 14 F.C.C. 124, 134-35 (1949).

10. The Mass Media Bureau is comprised of, *inter alia*, the Video Services Division, which administers policies and programs for the regulation of television industry broadcast services, and the Audio Services Division, which performs similar functions for radio industry broadcast services. The Audio Services Division is comprised of the AM and FM Branches. 47 C.F.R. § 0.62 (1984).

11. See 47 U.S.C. § 5(d) (1982); 47 C.F.R. §§ 0.5(c), 0.61, 0.283 (1984).

12. Statistics are not available from the Commission.

new Audio Services Division guidelines, the AM and FM branches of the FCC will favorably consider an extension application under the following circumstances:

1. Construction is complete and testing is underway preparatory to the filing of a license application.
2. Significant progress has been made (equipment on order, or on hand, site acquired, cleared, construction proceeding, etc.) toward completing construction.
3. No progress has been made for reasons clearly beyond the control of the permittee (loss of site, zoning delays, weather, etc.) but the permittee is taking all possible steps to resolve the problem and proceed with construction.¹³

There is no doubt that the new policies are designed to get broadcast stations built and on the air more promptly than in the past. The new policies also serve an important deregulatory function. Deregulation has made it possible for applicants for new stations merely to certify compliance with qualification standards that once required a plethora of documentation. The bold new extension policies provide notice (and the Audio Services Division's relatively unusual act of publicly announcing the policy emphasizes the fact) that despite such changes brought about by deregulation, the Commission will hold permittees fully accountable for their essentially unsupported assurances of ability (financial and otherwise) to complete construction on time.

The new guidelines represent the Commission's desire to reaffirm the integrity of its extension rules but with a new conservative tack toward implementing them. Thus, only "[t]o the extent that these new guidelines depart from past practices or policies, [do] they represent new Bureau policies"¹⁴ It remains important, therefore, for broadcasters and broadcast lawyers to be familiar with the existing body of case law on the subject of extensions of broadcast CPs.

I. ANALYSIS

A. *Substantive Law*

Extension applications supported by facts indicating that delays were caused by ill health or death of a permittee or principal have received, when

13. FCC Public Notice, Mimeo No. 4177, May 14, 1984. Although no such formal announcement has been released by the Video Services Division, recent Commission decisions suggest that TV permittees are subject to standards which are equally as strict as those announced by the Audio Services Division. *See supra* note 1.

14. *Id.*

properly documented, favorable action by the Commission. For example, extension applications have been granted when the permittee underwent a tumor operation;¹⁵ when one corporate officer of the permittee died and the company president suffered a heart attack;¹⁶ and when a one-third partner's absence in the management of the radio station, caused by ill health, made it impossible for the permittee to continue construction.¹⁷ Requests for extensions based on ill health have been denied, however, when the applicant's medical condition existed prior to the filing of the original CP;¹⁸ when the applicant presented insufficient medical evidence to show how the illness of the two principals delayed construction;¹⁹ and when the applicant presented insufficient evidence to show that in the absence of illness construction would have been completed.²⁰

The new policies incorporate the Commission's past policy of granting extensions when delays were caused by acts of God or otherwise were clearly beyond the control of the permittee.²¹ For example, the Commission has granted extensions on the basis of inclement weather,²² a labor strike,²³ and city council delay in rezoning an applicant's transmitter site.²⁴

It is settled doctrine that a permittee that postpones construction of its broadcast facility solely because of economic considerations is deemed to have exercised its independent business judgment, a circumstance held by the Commission to be within the permittee's control and, therefore, not a basis for granting an extension.²⁵ Thus, the Commission has viewed unfavorably extension requests when delays were occasioned by depressed business conditions,²⁶ applicant's interest in avoiding competition from other broadcast facilities in the same market,²⁷ applicant's failure to contract for

15. See R. Edward Ceries, 29 F.C.C.2d 78 (1975).

16. See Northeast Television Cablevision Corp., 21 F.C.C.2d 442, 445 (1970).

17. See Beacon Radio, Inc., 18 F.C.C.2d 648 (1969).

18. See Bernard Rappaport, 18 F.C.C.2d 1022 (1969).

19. See Beta Television Corp., 27 F.C.C.2d 761, 772 (Rev. Bd. 1970).

20. See Nelson Broadcasting Co., 18 F.C.C.2d 609 (1969).

21. According to the Chief, Video Services Division, "by definition, the circumstances alleged must also be shown to have been crucial to the construction of the station." *Sunrise Broadcasting, Inc. (KCKU (TV))*, Memorandum Opinion and Order, FCC 4123, rel. April 26, 1985.

22. See Central Wisconsin Television, Inc., 37 F.C.C.2d 257, 272 (1964).

23. See Northeast Television Cablevision Corp. 21 F.C.C.2d at 446.

24. See Nathan Frank, 20 F.C.C. 154, 157-58 (1955).

25. See Comet Television Corp., 46 F.C.C.2d 1107, 1108 (Rev. Bd. 1974); Tex-Ark Television Co., 38 F.C.C.2d 650, 653-54 (Rev. Bd. 1972); Joe L. Smith, Jr., Inc., 5 Rad. Reg. 2d (P & F) 582, 589-90 (1965); Thames Broadcasting Corp., 29 F.C.C. 1110, 1113 (1960).

26. See Hymen Lake, 56 F.C.C.2d 379, 381 (Rev. Bd. 1975).

27. See UHF Broadcasting Co., 53 F.C.C.2d 660, 665 (Rev. Bd. 1975).

network affiliation,²⁸ permittee's decision to restrict its business activities to another co-owned broadcast facility,²⁹ applicant's uncertainty surrounding the planned rerouting of a highway in the vicinity of its proposed transmitter site,³⁰ the financial impact of the energy crisis on applicant's parent company,³¹ the pending release of Commission Rules relating to cable television,³² applicant's reliance upon sources of funding that it knew to be speculative,³³ applicant's belief that its proposed broadcast station represented a poor financial risk,³⁴ municipality-applicant's mistaken judgment regarding station's available finances,³⁵ and permittee's efforts to move its proposed station to a more financially attractive channel.³⁶

With regard to economic considerations, it is apparent that the Commission has considered the hardships facing some permittees. "We recognize that the 'independent business judgment' doctrine has its limits, and that compelling an applicant to build in the face of certain financial disaster no more serves the public interest than does enabling an applicant to postpone construction indefinitely"³⁷ The Commission, however, does not consider that the public interest would be served by granting additional time merely to enable a permittee to decide whether or not to construct its broadcast facility.³⁸ "The precedent is clear that an applicant seeking an extension of a construction permit based on the 'other matters' clause [of Rule 73.3534] must make an unequivocal commitment to construct the station."³⁹ The Commission has recognized such a commitment in a variety of situations, including cases in which the permittee: demonstrated in its application that it expended considerable sums of money toward construction of the

28. See *Northeast Television Cablevision Corp.*, 21 F.C.C.2d at 448; *Radio Longview, Inc.*, 19 F.C.C.2d 966, 969 (1969); *Wilmington Television Corp.*, 20 F.C.C. 1194, 1205-06 (1956).

29. See *Nelson Broadcasting Co.*, 18 F.C.C.2d at 610; *Hartford County Broadcasting Corp.*, 38 F.C.C. 847, 849 (Rev. Bd. 1965).

30. *Rollins Broadcasting, Inc.*, 28 F.C.C. 103, 107 (1959) (stating that the decision to delay construction represents "the applicant's business judgment and, however commercially prudent, is quite unrelated to the public interest").

31. *Rock City Broadcasting, Inc.*, 52 F.C.C.2d 1246, 1247 (Rev. Bd. 1975).

32. See, e.g., *Channel 16 of Rhode Island, Inc. v. FCC*, 440 F.2d 266, 274 (D.C. Cir. 1971); *Community Telecasters of Cleveland, Inc.*, 58 F.C.C.2d 1296, 1300 (Rev. Bd. 1976).

33. *Desert Broadcasting Co.*, 34 F.C.C. 1237, 1247 (1963).

34. See, e.g., *Thames Broadcasting Corp.*, 29 F.C.C. at 1113.

35. *City of Jacksonville*, 15 F.C.C. 89, 99 (1950).

36. *Wrather-Alvarez Broadcasting, Inc.*, 25 F.C.C. 1121, 1134 (1958).

37. *Bay Video, Inc.*, 25 F.C.C.2d 167, 173 (Rev. Bd. 1970).

38. See, e.g., *Plains Empire Broadcasting Co.*, 11 Rad. Reg. (P & F) 814i, 819i (1954); *Maison Blanche Co.*, 5 Rad. Reg. (P & F) 595, 598 (1949).

39. *Harold A. Jahnke*, 79 F.C.C.2d 109, 113 (1980).

facility;⁴⁰ purchased the broadcast station tower, contracted to purchase equipment, and exercised an option to acquire real property for the facility;⁴¹ constructed the station's tower consistent with periodic reports to the Commission, hired personnel, ordered and received delivery on equipment;⁴² constructed a road to the transmitter site, fully erected the station's tower, commenced assembly and installation of the station's antenna, and ordered other equipment;⁴³ secured adequate financing for its facility;⁴⁴ and signed a ten-year, noncancellable lease for its transmitter and studio site, and purchased technical and office equipment for the station.⁴⁵

It is important to note that, as evidenced by these cases, "construction" within the meaning of the Act is not limited to the physical erection of a building or other structure. "[T]here can be much preparatory activity and planning, provision of equipment, etc., which are as important to the 'construction' of a station as the erection of buildings."⁴⁶ The Commission, therefore, will examine all of the applicant's actions to determine whether they indicate a bona fide attempt to construct a station. "[T]he factor that work on proposed buildings has not begun is [but] one to be weighed and is not a fatal deficiency."⁴⁷

Often, an application for extension of time within which to complete construction of a broadcast facility is associated with an application for assignment of that facility. In such cases, the Commission has granted extension requests when the proposed assignee evidenced a firm commitment to complete construction.⁴⁸ It is well established, however, that an extension is not warranted if requested by the permittee solely for the purpose of assigning a bare CP and recouping its out-of-pocket expenses.⁴⁹ The United States Court of Appeals for the District of Columbia has stated that "[p]ermitting a

40. See, e.g., *Onondaga UHF-Television, Inc.*, 65 F.C.C.2d 582, 584 (1977); see also *Chicago Fed'n of Labor & Indus. Union Council*, 54 F.C.C.2d 471, 475 (Rev. Bd. 1975); *Northeast Television Cablevision Corp.*, 21 F.C.C.2d at 448; *Radio Longview, Inc.*, 19 F.C.C.2d at 970.

41. *Thames Broadcasting Corp.*, 29 F.C.C. at 1113.

42. *John J. Tibiletti*, 28 F.C.C.2d 493, 496 (Rev. Bd. 1971).

43. *Hubbard Broadcasting, Inc.*, 13 F.C.C.2d 56 (1968).

44. *Mississippi Broadcasting Co.*, 28 F.C.C.2d 462, 466 (Rev. Bd. 1971).

45. *Northeast Television Cablevision Corp.*, 21 F.C.C.2d at 446.

46. *Wrather-Alvarez Broadcasting, Inc.*, 25 F.C.C. at 1131.

47. *Id.*

48. See *King Communications, Inc.*, 47 Rad. Reg. 2d (P & F) 109 (Rev. Bd. 1980); *Pan American Broadcasting Corp.*, 65 F.C.C.2d 684 (Rev. Bd. 1977); *New Television Corp.*, 65 F.C.C.2d 680 (Rev. Bd. 1977); *Hymen Lake*, 56 F.C.C.2d 379 (Rev. Bd. 1975); *Chicago Fed'n of Labor & Indus. Union Council*, 54 F.C.C.2d 471 (Rev. Bd. 1975); *Carson City Broadcasting Corp.*, 26 F.C.C.2d 694 (Rev. Bd. 1970); *Jackson Television Corp.*, 24 F.C.C.2d 439 (Rev. Bd. 1970); *Island Teleradio Servs.*, 22 F.C.C.2d 43 (Rev. Bd. 1970).

49. See *Community Telecasters of Cleveland, Inc.*, 58 F.C.C.2d at 1300; *Comet Television*

permittee to recoup his investment [is] not . . . justified on equitable or humanitarian grounds if no interest of the *public* [is] served thereby."⁵⁰ The public interest benefits most frequently cited by the Commission are the institution of a first local service to a community⁵¹ and the diversification of control of the media of mass communication.⁵² The Commission also has emphasized the importance of fostering the growth of a new broadcast service or implementing a new Commission policy.⁵³

B. Procedural Law

Standing to file a petition to deny is governed by section 309(d)(1) of the Act.⁵⁴ This section provides that a party-in-interest may file such a petition against any application to which section 309(b)⁵⁵ applies. Because section 309(c)(2)(d)⁵⁶ specifically provides that section 309(b)⁵⁷ does not apply to extensions, a petition to deny does not lie against extension applications.⁵⁸

Standing to file a petition for reconsideration is not conferred by the grant of an application for extension, absent a clear showing of added injury flowing from the extension itself.⁵⁹ Thus, a party opposing a grant of extension does not have standing on the theory that it retained an equitable interest in

Corp., 46 F.C.C.2d at 1108; Beta Television Corp., 27 F.C.C.2d at 765; Telemusic Co., 4 F.C.C.2d 221 (Rev. Bd. 1966).

50. MG-Television Broadcasting Co. v. FCC, 408 F.2d 1257, 1263 n.17 (D.C. Cir. 1968) (emphasis in original).

51. Hymen Lake, 56 F.C.C.2d at 381; Beacon Radio Inc., 18 F.C.C.2d at 650.

52. See Daniel Enterprises, 21 F.C.C.2d 565, 567 (Rev. Bd. 1970).

53. See Philip Hahn, Jr., 26 F.C.C.2d 707, 708 (Rev. Bd. 1970); Jackson Television Corp., 24 F.C.C.2d at 440; Onondaga UHF-Television, Inc., 21 F.C.C.2d at 526; Northeast Television Cablevision Corp., 21 F.C.C.2d at 444; Connecticut Radio Found., 4 F.C.C.2d 389, 390 (Rev. Bd. 1966); Joe L. Smith, Jr., Inc., 1 F.C.C.2d at 664. In *Mekaoy Co.*, the Commission stated:

[T]he Commission has readily granted extensions of time to construct UHF stations when, after a history of failure to construct, a potential buyer made an undertaking to construct quickly. This policy stemmed from the lack of interest in building and operating UHF stations, and represented an effort to get these stations on the air as quickly as possible through the only means available, that is, a buyer who promised to construct expeditiously. . . . Today, there is no dearth of applicants for new UHF stations and there is a keen interest in building and operating these stations. . . . Consequently, where, as here, a UHF permittee has held an authorization for eight years and has yet to commence construction, there is no valid reason for granting additional time to allow an assignment.

48 Rad. Reg. 2d (P & F) at 817.

54. 47 U.S.C. § 309(d)(1) (1982).

55. *Id.* § 309(b).

56. *Id.* § 309(c)(2)(d).

57. *Id.* § 309(d).

58. South Eastern Alaska Broadcasters, Inc., 4 Rad. Reg. 2d (P & F) 109, 110 (1965).

59. Southwest Broadcasting Co., 18 F.C.C.2d 858, 859 (Rev. Bd. 1969).

the CP by virtue of having been an unsuccessful applicant for it.⁶⁰ Furthermore, the fact that the grant complained of is for replacement of an expired CP makes it no more vulnerable to attack.⁶¹ Standing to file a petition for reconsideration, however, will be conferred on a party, including a broadcast competitor, that has been aggrieved or whose interests, including financial, have been adversely affected within the meaning of section 405 of the Act.⁶²

It is clear that an application for extension of time within which to complete construction is not similar to an application for a new CP.⁶³ Accordingly, an applicant for a new CP is not entitled to comparative consideration, within the meaning of *Ashbacker Radio Corp. v. FCC*,⁶⁴ with a permittee that is merely seeking to extend the completion date of an existing facility.⁶⁵ It is also established that, pursuant to section 319(b) of the Act⁶⁶ and section 73.3599 of the Commission's Rules,⁶⁷ an expired CP does not lapse unless and until the Commission declares it forfeited.⁶⁸ Thus, one's right to a comparative hearing in the *Ashbacker* sense does not arise upon the expiration of a CP absent adverse administrative action.

The Commission's decision on an application for extension is based upon facts existing during the life of the CP⁶⁹ or during the last extension period.⁷⁰ Evidence from earlier extensions, however, may be introduced for background purposes.⁷¹ In addition, the progress or construction made after the filing of an extension application may be determinative in deciding whether or not an extension will be approved.⁷² Therefore, the filing of an extension request will not excuse a permittee from its obligation to continue with construction of its authorized facility during the pendency of the appli-

60. Z-B Broadcasting Co., 4 F.C.C.2d 642, 643 (Rev. Bd. 1966).

61. Metromedia, Inc., 8 F.C.C.2d 747 (Rev. Bd. 1967).

62. See 47 U.S.C.A. § 405 (West Supp. 1984); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940); see also *Hubbard Broadcasting, Inc.*, 10 F.C.C.2d 519 (1967); *Z-B Broadcasting Co.*, 4 F.C.C.2d 642 (1966); *Valley Telecasting Co.*, 12 Rad. Reg. (P & F) 196e (1955); *Tri-State Television, Inc.*, 10 Rad. Reg. (P & F) 1049 (1954); *Channel 16 of Rhode Island, Inc.*, 10 Rad. Reg. (P & F) at 377.

63. *Bremer Broadcasting Corp.*, 12 F.C.C. 274 (1947).

64. 326 U.S. 327 (1945).

65. *WAAB, Inc.*, 13 Rad. Reg. (P & F) 461 (1956); *Lacy-Potter Television Broadcasting Co.*, 13 F.C.C. 246 (1948); *National Broadcasting Co.*, 13 F.C.C. 46 (1948); *Allentown Broadcasting Co.*, 12 F.C.C. 795 (1948); *Don Lee Broadcasting Sys.*, 12 F.C.C. 680 (1948); *Bremer Broadcasting Corp.*, 12 F.C.C. 274 (1947).

66. 47 U.S.C. § 319(b) (1982).

67. 47 C.F.R. § 73.3599 (1984).

68. *Mass Communicators, Inc. v. FCC*, 266 F.2d 681, 684 (D.C. Cir. 1959), cert. denied, 361 U.S. 828 (1959).

69. See *City of Jacksonville*, 15 F.C.C. at 230.

70. See *Oregon Radio, Inc.*, 26 F.C.C. 197 (1959).

71. See *id.*

72. See *Radio Longview, Inc.*, 19 F.C.C.2d at 970 n.4.

ation before the Commission.⁷³ It is important to emphasize that the filing of an application for modification of a CP does not ipso facto extend the permit's expiration date. Section 73.3533(b) of the Commission's Rules is explicit in this regard.⁷⁴

Finally, it need only be briefly mentioned that one need not comply with the Commission's local public notice requirements⁷⁵ when filing an application for extension. Section 73.3580(a)(4)⁷⁶ expressly excepts extension applications from any such requirement. Also, a permittee need not file an extension application during the period when the Commission is considering its application for a station license.⁷⁷ This is so because a license application ordinarily is filed by a permittee upon completion of construction of the broadcast facility in accordance with the terms of its CP.

II. CONCLUSION

Since the inception of radio regulation, the government has recognized the importance of balancing permittees' frequent need for additional time within which to complete construction of their broadcast facilities with the public's right to obtain expedient service from such trustees of the airwaves.⁷⁸ The importance of this balance is perhaps even more significant today.

The number of extension applications filed with the Commission is certain to increase with the number of CPs that are granted.⁷⁹ Whether or not there

73. *See id.*

74. 47 C.F.R. § 73.3533(b) (1984); *cf.* Polan Indus., 9 Rad. Reg. (P & F) 809 (1953) (extension granted to applicant that expected its previously filed application for modification to carry with it an automatic extension).

75. 47 C.F.R. § 73.3580 (1984).

76. 47 C.F.R. § 73.3580(a)(4) (1984).

77. 47 C.F.R. § 73.1620(c) (1984).

78. Federal Radio Commission Rules 11 and 12, adopted November 7, 1931, effective February 1, 1932, stated:

11. Any application for extension of time within which to commence and/or complete construction of the station shall be filed at least 30 days prior to the expiration date of such permit. No application for extension of a permit already forfeited will be granted except upon a satisfactory showing to the Commission of sufficient reasons for the delay in filing such application.

12. Any construction permit shall be automatically forfeited if the station is not ready for operation within the time specified unless prevented by causes not under the control of the grantee.

Rules 11 and 12, Federal Radio Commission Rules and Regulations (1934) (copy on file at FCC Library, Washington, D.C.).

79. The Commission, at 50 Fed. Reg. 3514 (1985), amended its Table of Assignments in 47 C.F.R. § 73.202(b) (1984) to allot new FM channels to 689 communities throughout the United States. It is expected that a large number of applications will be filed in response to the implementation of this omnibus rulemaking, a factor which reasonably contributed to implementation of the new strict extension standards.

will be a corresponding increase in the number of extensions that are granted will be determined by the merits of each case and by Commission policy.