

FCC Stops Processing Applications By "Eligible Entities" - No Extensions of Unbuilt CPs When Sold to a Small Business

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The recent decision of the Third Circuit Court of Appeals which overturned the FCC's 2007 rulings on newspaper-broadcast cross ownership and on diversity initiatives, took an unexpected turn today. The FCC issued a Public Notice announcing that it would immediately stop giving "**Eligible Entities**" an advantage in certain instances - most particularly the **extension of construction permits for new stations** that are close to their expiration dates. In the FCC's 2007 Diversity Order, the Commission, to encourage more diversity in broadcast ownership, allowed "eligible entities", i.e. small businesses under SBA definitions, to acquire construction permits for new stations that were close to expiration, and to get an additional 18 months in which to construct the station. In most other circumstances, the FCC will not extend a construction permit (absent some limited "tolling events" that will give applicants a limited amount of time to construct - but just the amount of time that a limited unforeseen event takes out of the usual 3 year construction period). The 18 month extensions given to Eligible Entities have become an important way of saving construction permits about to expire when the original permit holder could not complete construction in the given 3 year construction period.

Today's decision takes away that opportunity to extend unbuilt construction permits. And the ruling goes even further, pulling the rug out from under recent grants of CP extensions - even ones that have already been granted, unless the extensions have become "final," i.e. no longer subject to reconsideration or appeal. Those extensions granted in the last 40 days are subject to this order, and if these CPs have an initial expiration date that has already passed, they will be canceled. This will no doubt cause some great consternation among parties who have purchased a construction permit in reliance on an FCC order extending the permit by 18 months, and may even have taken steps to construct the station since purchasing it, and now find themselves with a permit that has already expired. The Commission makes no suggestion why some other remedy consistent with the Court's order, but not so harmful to parties that relied on prior Commission policy, could not have been adopted - perhaps a new "tolling event" giving applicants a limited period of time to get a station on the air before the CP was canceled. Sellers no doubt relied on the prospects of a pending sale (and simultaneous extension) to stop taking last minute extraordinary efforts to get a station constructed before the CP expired, and Buyer's relied on the FCC order extending a CP to close

purchases. Given the potential for some entities to suffer greatly by this ruling, look for appeals to be filed.

The Court decided that the FCC's diversity efforts, which were justified as an effort to encourage minority and female ownership of broadcast stations, did not have that effect. The Commission adopted the Eligible Entity definition instead, thinking that it did not have enough evidence to adopt racial and gender preferences consistent with constitutional principles. What standards to adopt to advance diversity in a manner consistent with the Court's order will be reviewed in the FCC's pending ownership proceeding. But, in the meantime, while that review is pending, we are likely to see the expiration of many more construction permits that would have otherwise been saved by a sale to a small business. Is this really in the public interest?