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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act Competitive Bidding	)	PP Docket No. 93-253
	)	
	)	

To: The Commission

JOINT COMMENTS OF ASSOCIATION FOR MAXIMUM SERVICE TELEVISION AND NATIONAL ASSOCIATION OF BROADCASTERS

The Association For Maximum Service Television, Inc.[1/] ("MSTV") and the National Association of Broadcasters ("NAB")[2/] here jointly comment on the Commission's Notice of Proposed Rulemaking, PP Docket No. 93-253, FCC 93-455, released October 12, 1993 ("Notice"), proposing to implement spectrum auctions pursuant to Section 309(j) of the Communications Act, 47 U.S.C. § 309.

The purpose of these comments is to underscore the clear intent of Congress that spectrum employed by over-the-air broadcasters will not be subject to spectrum auction requirements. The Commission has acknowledged this basic

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1/ MSTV is a trade association representing over 270 commercial and noncommercial broadcast television stations throughout the United States on issues relating to the technical quality of the broadcast signal.

2/ NAB is a nonprofit, incorporated association of radio and television stations and networks which serves and represents the American broadcast industry.

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Congressional decision, Notice, supra note 2, ¶ 23, and thus proposes to exclude broadcast services from the competitive bidding process.[3/] This Congressional decision applies to both current or future broadcast spectrum, and the Congressional exemption covers not only spectrum employed for "main channel" broadcast signals but also that spectrum used for various broadcast "subcarrier" operations and "broadcast auxiliary" purposes. Id. at ¶ 24. Adoption of the proposed rules will enable broadcasters to continue to provide free, universal, local services to the American public.

The principle of exempting broadcast and broadcast-related operations from competitive bidding requirements is clear -- from the specific language of the statute and from the legislative history accompanying it. The Committee's extensive record reveals that there are limited cases in which competitive bidding would be appropriate and in the public interest. The legislative history states that the Commission is restricted to utilizing competitive bidding procedures only when mutually exclusive applications are filed for subscription-based services. The legislative history further

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[3/] As the Commission has acknowledged, its competitive bidding authority extends only to spectrum used principally for subscription services. Notice at ¶ 23. See 47 U.S.C. 309(j)(2)(A). Because traditional over-the-air broadcasters provide service to the public without charging subscription fees, the Commission properly proposes to exempt these

underscores that competitive bidding procedures should only be utilized when the Commission has determined that the principal use of that license will be to offer service in return for compensation from subscribers. Omnibus Budget Reconciliation Act of 1993 @ 5203, 47 U.S.C. § 309. Over-the-air broadcasters provide service to the public without charging subscription fees.[4/] Moreover, Congress created this exemption with the intent that broadcasters not be subject to competitive bidding even though some broadcasters may receive compensation. The legislative history expressly states:

> [I]nasmuch as mass media broadcast signals are provided to the general public without the payment of a subscription fee, the current licensing practices of the FCC remain unchanged. The fact that some television licensees may receive compensation from cable television operators as a result of the enactment of the "retransmission consent" provisions of the Cable Act should have no effect on the Commission's licensing of television stations.

Report of the Committee on the Budget, U.S. House of Representatives, Rep. 103-111, 103d Cong., 1st Sess. 253-54 (1993) ("House Report"); Notice at ¶ 23 n.5.

The Commission appropriately has proposed to exempt Broadcast Auxiliary Services, as well as subcarrier-based and similar services -- including services provided on the Vertical Blanking Interval-- from spectrum auctions. Notice

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[4/] Id. at ¶¶ 23-24 and n.7.

at ¶ 24 n.7. Specifically, the legislative history explains:

> [spectrum auctions] should not affect the manner in which the Commission issues licenses for virtually all private services, including . . . the Broadcast Auxiliary Service, and for subcarriers and other services where the signal is indivisible from the main channel signal.

Notice at ¶ 24 (citing House Report at 253) (emphasis added). The Commission also should make a similar judgment fully exempting certain broadcast auxiliary operations that share spectrum with the Cable Television Relay Service ("CARS") operated by cable television companies (licensed under Part 78 of the Rules) from spectrum auction requirements.[5/]

By exempting subcarrier operations, the Congress intended to allow broadcasters to use this portion of broadcast-allocated spectrum in a fashion unencumbered by the threat of spectrum auctions. This judgment was based -- in part -- on the recognition that such subcarrier operations are "indivisible" from the main channel signal. Moreover, and related to the Commission's proposal to exempt "subcarrier-based and similar services, such as [the] Vertical Blanking Interval ...,"[6/] it would be impractical and illogical to include these services in a competitive bidding scheme where the "underlying" service is exempt. A failure to so conclude

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[5/] At footnote 7 of the Notice, the Commission refers only to Broadcast Auxiliary operations licensed under Part 74 of the Commission's Rules.

[6/] Id. at n.7.

also would work against the efforts of broadcasters to employ such subcarrier frequencies -- and other portions of broadcast spectrum -- in new, innovative ways, employing the latest technological advances.

In recognition of the fact that there are several "mixed use" services, the Commission has proposed to employ competitive bidding when at least a majority of communications -- by the average users or majority of users -- for the service or class of service is on a subscription basis. Notice at ¶ 32. The Commission also has proposed several alternatives for comparing the amount of subscriber and free information provided by each class of service. Id. at ¶ 32 n.14. Because broadcasters provide free, universal and local service to the American public, the Commission should ensure that any standard adopted for "mixed use" services would not apply competitive bidding requirements to broadcasters.

Thus, MSTV and NAB request that the Commission clarify that this exemption applies so long as the broadcast channel is used primarily for broadcast services, even if a portion of the channel is used for ancillary subscription services. As America stands poised to enter the information superhighway and HDTV eras, technology likely will develop that will enable broadcasters to use distinct and subsidiary portions of their channels for other types services. Broadcasters need the flexibility to experiment with these

portions of the channel and the freedom to provide ancillary services, including potential ancillary subscription services.

Finally, even assuming arguendo, that the Commission had authority to auction broadcast spectrum when a portion of the channel is used for ancillary subscription services, the Commission should not employ competitive bidding procedures. The Commission can decline to use competitive bidding if it finds that four objectives -- the rapid deployment of new technologies, promotion of economic opportunity and competition, recovery of a portion of the value of the public spectrum resource, and efficient use of the spectrum -- are not promoted by the use of bidding. 47 U.S.C. § 309(j)(2),(3).

CONCLUSION

Broadcasters are uniquely situated because they collectively provide universal, free and local service to the American public. In providing for the exemption of broadcast uses of spectrum, Congress recognized that free, universal, local broadcast service plays a vital role in our society. Accordingly, the Commission should adopt its proposal to exempt broadcast and broadcast auxiliary spectrum from competitive bidding. Additionally, we request that the Commission clarify that the exemption also applies when the broadcast channel is used primarily for broadcast services,

even if a portion of the channel is used for ancillary subscription services. These policies will help ensure that broadcasters can continue to provide free, universal and local service to the American public.

Respectfully submitted,

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