

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

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PETITION FOR RECONSIDERATION

Dennis C. Brown and Robert H. Schwaninger, Jr. ("we" or "Brown and Schwaninger"), on behalf of numerous clients authorized for stations in the Private Radio Services, respectfully request that the Commission reconsider one part of its Second Report and Order (SR&O) (FCC 94-61 Released April 20, 1994) in the above captioned matter. In support of our position, we show the following.

Finder's Preferences Cannot Be Selected By Competitive Bidding

At paragraph 65 of its SR&O, the Commission stated that it saw

no reason to treat mutually exclusive finder's preference requests for SMR frequencies differently from mutually exclusive applications for SMR frequencies. Therefore, we hold that in such event, the licenses should be awarded pursuant to competitive bidding. Conversely, if mutually exclusive finder's preference requests target General Category or non-SMR frequencies, they would not be subject to competitive bidding.

We see numerous reasons why finder's preference requests should not, and cannot lawfully, be subject to competitive bidding, and we shall explain those reasons herein.

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Interest Of The Party

Brown and Schwaninger has represented clients in the Private Radio Bureau's Finder's Preference program since the window was first opened to the filing of such requests. In fact, one of our clients received the first Finder's Preference which the Commission awarded. On behalf of our clients, we have both prosecuted and defended against a large number of Finder's Preference requests. Accordingly, we believe that we have a correct understanding of the nature of the program and that we have both the standing and the qualifications to explain why the Commission's action concerning the Finder's Preference program should be reconsidered.

We Just Don't Get It

The Commission was not entirely clear as to what it meant by its holding that, in the event that there are mutually exclusive finder's preference requests, the licenses should be awarded pursuant to competitive bidding. It is possible that more than one finder's preference request targeting the same station may be filed on the same day. However, as the Commission's Rules demonstrate, finder's preference requests cannot become mutually exclusive to one another.

Section 90.173(k)(2) of the Commission's Rules provides that "where more than one finder obtains a preference for the same channel(s), the Commission will grant the license to operate on the channel(s) to one of these applicants through its random selection procedures," 47 C.F.R. §90.173(k)(2). Part 90 of the Commission's Rules was not revised in any way by the SR&O. Accordingly, Rule Section 90.173(k)(2) demonstrates that the Commission does not

regard any two finder's preference requests as mutually exclusive to one another. While the grant of two or more finder's preference requests may result in the filing of mutually exclusive applications, the Commission's Rules demonstrate that there is no such thing as mutually exclusive finder's preference requests.¹

It may be that the Commission intended to revise Rule Section 90.173(k)(2) to state that "Where more than one finder obtains a preference for the same channel(s), the Commission will grant the license to operate on the channel(s) through competitive bidding." However, it did not make any change to the rule and the text of its decision seems clearly to indicate that it intended to submit finder's preference requests, rather than applications for channels, to competitive bid. If the Commission's actual intent was to state that it would submit to competitive bidding two or more mutually exclusive applications, all of which were supported by finder's preference awards for the same channel(s), then it might clarify that such was its intent.

The Commission's Authority Is Not Broad Enough

Section 309(j) of the Communications Act of 1934, as amended by the Omnibus Budget Reconciliation Act of 1983, 47 U.S.C. §309(j) (the Act) provides that "if mutually exclusive applications are accepted for filing for any initial license or construction permit . . . then the

¹ There is obviously something amiss here, but we can't be sure what it is. A finder's preference is supposed, by its own terms, to be dispositive, that is, to dispose of any competing claim to the frequency, or to dispossess all other persons from any right to file an application. However, Rule Section 90.173(k)(2) makes cloudy the allegedly dispositive nature of a finder's preference request. The Commission may very well want to take another look at Rule Section 90.173(k)(2) against the full context of its intentions for the Finder's Preference program.

Commission shall have the authority . . . to grant such license or permit to a qualified applicant [through competitive bidding]." The principal reason to treat mutually exclusive finder's preference requests differently from mutually exclusive applications is that a finder's preference request is not an application. Rather, a finder's preference request is a request that the Commission cancel an existing license and provide the finder with an opportunity to file an application. Not until after the Commission has granted a finder's preference request can anyone file an application for a license on a channel already encumbered by an exclusive license.

The reason that a finder must file a request for a preference is that there is an existing license which precludes his filing an application. Were the finder to file an application prior to grant of his finder's preference request, it would be dismissed because of the preclusive effect of the existing license. Therefore, no opportunity even to file an acceptable application arises until after the Commission acts on the finder's request. In the absence of an application which the Commission has accepted for filing, Section 309(j) of the Act does not authorize the Commission to select a licensee by competitive bidding. Therefore, the Commission is not authorized to submit finder's preference requests to competitive bidding.

The grant of a finder's preference request does not assure that the finder will file an application. In a number of instances, finder's preferences have been granted, only to expire without any application's having been filed. Since it is entirely possible that no application will be filed following the grant of a finder's preference request, the Finder's Preference program

does not provide the circumstances under which the Commission can lawfully submit anything to competitive bidding.

We recognize that the Finder's Preference program provides the opportunity for a person to obtain a license for an SMR Category channel without engaging in competitive bidding. However, the simple fact is that the Finder's Preference program never results in the filing of a mutually exclusive application for an initial license, which is one of the conditions which must be met for the Commission to require competitive bidding. The disposition of mutually exclusive finder's preference requests occurs prior to the time that any application is accepted for filing.² While one may wish that Congress provided for competitive bidding among persons filing requests other than "mutually exclusive applications for an initial license," Congress did not do so and the Commission should recognize the limits which Congress placed on its authority.

The Finder Has Already Contributed

In contrast to the filing of an application for, for example, a Personal Communications Service license, in which all one need do is, in essence, sign up for the forthcoming auction, the filer of a finder's preference request has already made a contribution to the public wealth. The finder must do what the Commission's compliance staff would otherwise have to do at public

² Even if the Commission were to attempt to revise the Finder's Preference program to have a finder accompany her request with an application, it still would not meet the requirement of Section 309(j) of the Act that there be "mutually exclusive applications accepted for filing." If the grant of a finder's preference would be required to make the frequency available for grant, then the Commission could not reasonably accept an application which it knew could not be granted at the time of its filing.

expense, namely, detect the existence of a rule violation and develop the evidence necessary to prove his case. By saving the Commission the cost of detecting and prosecuting a violation of rules intended to assure that spectrum is actually used, rather than warehoused, the finder makes a substantial contribution to the public budget. Therefore, it would not be just for the Commission not only to accept the contribution of the work which the finder has put into her case and the costs which she has incurred in preparing and filing her request, but also to require her to pay to have her information considered. When it weighs the balance of the equities, the Commission should take into account the contribution which a finder makes by the filing of a request³ and determine that the public interest would be better served by not submitting finder's preference requests to competitive bidding.

The Public Interest Is Served By The Existing Procedure

The public interest would not be well served by submitting finder's preference requests to competitive bidding. The Finder's Preference program is not directly concerned with the filing of an application. While the filing of an application may result from the grant of a finder's preference request, the Finder's Preference program primarily serves as an adjunct to the Commission's own rule compliance efforts, limited as they are by budgetary constraints. The opportunity to obtain a dispositive preference for the filing of an application is an incentive which the Commission provides to a person who is able and willing to report and prove that an

³ Even if a Finder's Preference Request is dismissed because it fails to present a *prima facie* case, the Commission may still investigate the target station based on that information and enforce its rules, materially assisted by the information filed by the proposed finder. In such case, the information becomes a gift to the public.

existing licensee has violated certain of the Commission's Rules. In that respect, the program functions like the system of rewards which are offered for information leading to the arrest and conviction of a criminal.

A program in which a reward is offered for information concerning violations of law cannot be expected to function if the person having the information must then bid for the opportunity to have his information considered. If Melvin Purvis had said to the Lady in Red, "Okay, lady, what will you pay me to listen to your story?" John Dillinger would today be an aged client of the Social Security Administration.

The reporting of information to a law enforcement agency does not guarantee conviction of the perpetrator. Similarly, the filing of a Finder's Preference request does not give the finder any assurance that the Commission will grant the preference. Rather, like the handing up of an indictment based on the testimony of an informant, the filing of a Finder's Preference request is merely the opening round in a sequence of litigation. A threshold issue is whether the request presents a *prima facie* case, and a Commission finding that the finder has presented a *prima facie* case is subject to controversy by the target licensee. The target licensee has the right to oppose the finder's preference request by presenting contradictory evidence, and many requests have, in fact, failed when the Commission determined that, based on the evidence presented by both parties, the target licensee should prevail. In contrast, the filing of an application for an SMR license is not expected to and, in fact, typically does not result in litigation.

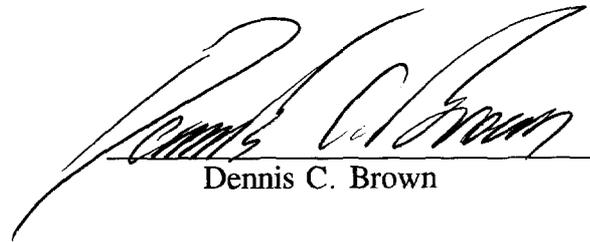
Sidenote

Formally, we request that the Commission reconsider its decision to submit mutually exclusive finder's preference requests to competitive bidding. Informally, we respectfully suggest that the Commission's decision discloses some lack of coherence to the Finder's Preference program. We have nothing but praise for the Finder's Preference program, in both its design and its execution. It provides the Commission with countless additional eyes and ears to supplement its own compliance forces and provides an appropriate incentive for persons with information to bring their information forward. However, the Commission may desire to take this opportunity to review its Finder's Preference program, harmonize some apparent inconsistencies, and then present a clearer explanation of the program to the public.

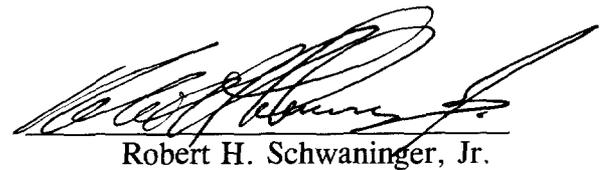
Conclusion

For all the foregoing reasons, we respectfully request that the Commission reconsider its holding that it would submit mutually exclusive finder's preference requests to competitive bidding.

Respectfully submitted,



Dennis C. Brown



Robert H. Schwaninger, Jr.

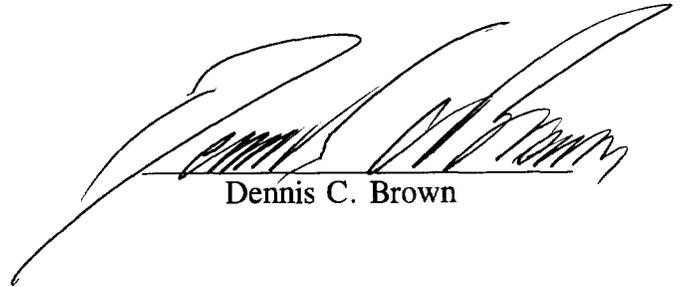
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Dated: May / 8, 1994

CERTIFICATE OF SERVICE

I hereby certify that on this eighteenth day of May, 1994, I served a copy of the foregoing Petition for Reconsideration on the following person by placing a copy in the United States Mail, first-class postage prepaid:

Wayne Watts, Esq.
Linda M. Hood, Esq.
Southwestern Bell Mobile Systems, Inc.
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Dallas, Texas 75252



Dennis C. Brown

Note: Southwestern Bell was the only party which expressed any concern for the issue which our Petition presents.