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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

To: The Commission

COMMENTS

George S. Flinn, Jr., by his attorney, hereby respectfully submits his Comments in response to the Federal Communications Commission's **Notice of Proposed Rulemaking**, FCC 97-397, released November 26, 1997 (i.e., hereinafter "NPRM"). In support thereof, the following is shown:

1. As noted in the NPRM, on August 5, 1997, President Clinton signed the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), which expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act of 1934, 47 U.S.C. Section 309(j) to include mutually-exclusive initial license applications for certain types of broadcast stations. In its NPRM, the Commission proposed general competitive bidding procedures for all auctionable

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broadcast services within the scope of amended Section 309(j) except for digital television services. The reasons for such a proposal are varied but are in no small part a consequence of the decision by the United States Court of Appeals for the District of Columbia Circuit in **Bechtel v. FCC**, 10 F.3d 875, 878 (D.C.Cir. 1993), i.e., essentially holding that the Commission's traditional reliance upon comparative hearings for the award of broadcast licenses was legally unsupported.

2. As part of its general proposal to employ auctions to award broadcast construction permits in the future, the Commission found it necessary in its NPRM to determine how it would treat the large number of pending applicants who had been caught in a post-**Bechtel** processing freeze. The way the Commission proposed in its NPRM to deal with said applicants was to engage in a questionable interpretation of Section 309, i.e., proposing to establish the following arbitrary classes of pending applicants: (a) "pre-July, 1997" applicants who had filed during filing windows which closed before July 1, 1997; (b) "pre-July, 1997" applicants who had filed during filing windows which opened before July 1, 1997 but closed after July 1, 1997; (c) "post-July, 1997" applicants who had filed during filing windows which opened before July 1, 1997 but closed after July 1, 1997; and, (d) "post-July, 1997" applicants who had filed during filing windows which opened and closed after July 1, 1997.[1] As justification for this stratified classification of pending applicants, the Commission in its NPRM stated:

> Thus, we tentatively interpret Section 309(l) as prohibiting us from opening an additional filing window for mutually exclusive applications or including as eligible bidders, applicants who filed mutually exclusive applications filed after June 30,

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[1] It should be noted that the Commission instituted a "freeze" on the filing of any new broadcast applications as of the date of the NPRM.

1997. Thus, any such applications filed after June 30, 1997 would be dismissed and the applicants would not be eligible to participate in the auction.

3. The Commission recognizes that its narrow interpretation of Section 309(l) "may lead to a harsh result, particularly where it requires the dismissal of applicants that timely filed within an announced filing period, and we ask for comment on whether there is any other legally permissible interpretation of section 309(l)".

4. George S. Flinn, Jr. currently has pending a significant number of applications for commercial FM and TV stations, i.e., in both the "pre-July 1, 1997" category and the "post-July 1, 1997" category. The applications were timely filed in response to the FCC's various filing windows. Each applicant who filed pursuant to an FCC window, including Flinn, was required to commit to a substantial expenditure of capital in filing said FCC Form 301 applications (i.e., FCC filing fees, legal fees, engineering fees, site acquisition expenses, etc.).

5. Succinctly stated, George S. Flinn, Jr. concurs with the bulk of the Commission's NPRM as it pertains to the use of auctions to resolve mutually-exclusive broadcast applications and to the award of future broadcast construction permits through the use of auctions. Flinn is confident that the Commission will fashion fair and equitable auction rules which protect against collusion and which provide for a non-discriminatory award of constructions permits to future applicants. However, Flinn must go on record as stating that the artificial differentiation between "pre-July 1, 1997" applications and "post-July, 1997" applications is arbitrary and capricious. The Commission has proffered no rationale basis for discriminating between the two classes (and two subclasses therein) other than to generally argue that it was the intent of

Congress to establish such an arbitrary distinction and, as such, it is required to do the same.

The Commission, in issuing its NPRM, also imposed a "freeze" on the issuance of new filing windows and, consequently, the filing of new FCC Form 301 applications. George S. Flinn, Jr, respectfully submits that with respect to any future auctions, "post-July 1, 1997" applications should be accorded the same proposed rights as "pre-July 1, 1997" applications. In short, any future auction covering mutually-exclusive applications timely filed in response to an FCC window issued prior to the "freeze" imposed by virtue of the Commission's NPRM should not be opened up to general bidding. Rather than be dismissed, mutually-exclusive applications timely filed in response to an FCC window issued prior to the "freeze" should constitute the limited class of applicants eligible to bid at the auction for the allotment in question. To rule otherwise would not only be inequitable but would also blatantly violate the basic tenets Equal Protection Clause.

Respectfully submitted,

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