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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 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 OF JACOR COMMUNICATIONS, INC.

Jacor Communications, Inc. ("Jacor"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, hereby submits these Comments in response to the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding. 1/ In the *Notice*, the Commission requested comments regarding its proposed rules to implement Section 309 of the Communications Act,

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1/ *Notice of Proposed Rulemaking, In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, and Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, FCC 97-397 (released November 26, 1997) ("*Notice*").

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which details the authority the Commission has with respect to broadcast license and permit applications, as amended by the Balanced Budget Act of 1997. Although Jacor generally supports the expansion of auctions for new broadcast stations, Jacor urges the Commission: (1) to limit the times when and types of competing applications that may be filed against modification applications; and (2) to resolve, prior to auction, any petitions to deny based on technical or interference grounds against applications for AM broadcast and FM translator permits subject to competitive bidding.

I. THE COMMISSION SHOULD LIMIT COMPETING APPLICATIONS FILED AGAINST MODIFICATION APPLICATIONS AND OTHERWISE AMEND MODIFICATION REGULATIONS IN ORDER TO PROTECT EXISTING LICENSEES.

The text of Section 309(j), as amended, directs the Commission to grant "any initial license or construction permit" for which "mutually exclusive applications are accepted" to a "qualified applicant through a system of competitive bidding." *See* 47 U.S.C. § 309(j)(1). The text also states that the Commission "shall, by regulation, establish a competitive bidding methodology" for "each class of licenses or permits." *Id.* Because modification applications should be viewed as requests for a separate class of permits -- a class which, by definition, involves changes to *existing* licenses -- they should not be subject to the same procedures as applications for completely new broadcast facilities. Instead, the Commission should:

- permit only applications that also seek to modify existing licenses to compete against any major modification application; and
- limit the types of modifications subject to competing applications of any sort.

Under Commission's Rules, a number of modification applications, especially those affecting AM broadcast stations, are subject to competing applications even though the initial application does not propose anything more major than even a slight increase in operating power. *Cf.* 47 C.F.R. § 73.3571 (requiring filing of a major modification for *any* power increase in an AM station, even if the contours remain unchanged). Consequently, an AM licensee that is unable to renew a lease for its current transmitter site may be forced to file for Commission consent for a major modification even though the licensee is simply seeking to maintain its current level of service, albeit from a new transmitter location if that location requires a shorter AM tower. It is unfair to compel such an applicant to subject its application to an auction in which it may lose its entire investment in the station associated with the license because, through no fault of its own, its transmitter site lease was not renewed.

The Commission should address the inequity of forcing existing licensees to compete against new applicants in two ways. First, the Commission should no longer accept competing applications filed against a major modification unless the competing application also proposes a modification to an existing license. This is a matter of simple fairness: major modification applications, which involve existing licenses or permits (in which the licensee or permittee has typically

invested substantial resources) should not have to compete in auctions against new license applications, which typically have not demanded much, if any, prior capital expenditure on the part of the applicant. 2/ Of course, if two or more licensees propose mutually exclusive modifications to existing licenses, the Commission could then hold an auction among these licensees to determine which of the licensees should be permitted to change their operations.

In addition, or in the alternative, the Commission should revise its broadcast regulations to stipulate that certain modifications that do not result in widespread changes to an existing AM broadcast station's contours do not offer the opportunity for the filing of *any* competing applications. For example, an AM broadcast licensee should be able to file for a power increase, or other change, such as a change in transmitter site, that would only result in a minor adjustment to the station's service area without having to face competing applications. This brings the AM rules into closer conformance with the FM rules, where power increases are considered minor changes, provided that the station class remains unchanged. Although such "intermediate" modification applications should be reviewed by the Commission to ensure that the application complies with all technical rules, the existing licensee should not have to suffer the uncertainty of an auction for an

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2/ The placement of limitations on the filing of competing applications to major modifications is not without precedent. For example, the Commission's change to filing windows for low-power television applications has, as a practical matter, enabled parties to file major modification applications late in the relevant filing window without fear that other parties would have sufficient time to develop and file mutually exclusive applications for completely new permits.

application that does not result in wholesale changes in the existing station's service area.

Proposals to modify existing licenses are, by definition, distinct in posture from proposals that seek an entirely new broadcast license. The adoption of either of the above-described policies would help to protect this separate class of applicants from competing applicants that are less than serious about obtaining an available permit or license but want to obstruct a modification needed by an existing licensee. To best implement the statutory mandate for auctions among only those applicants seeking the same type of Commission authorization, however, the Commission should enact both policies, which would ensure fair auctions among like-situated applicants as well as limit the procedural obstacles involved in processing non-major AM broadcast applications.

II. THE COMMISSION SHOULD RESOLVE PETITIONS TO DENY FILED AGAINST AM BROADCAST AND FM TRANSLATOR APPLICATIONS SUBJECT TO COMPETITIVE AUCTIONS PRIOR TO SUCH AUCTIONS.

In the *Notice*, the Commission acknowledges that a too-hasty auction may result in wasted proceedings: unless all bidders' applications are thoroughly reviewed for their technical merit prior to the relevant auction, the Commission may be forced to reject the application of an initial winning bidder on engineering grounds and again conduct the auction. *See Notice* at ¶ 70. This risk is particularly great with regard to two services -- FM translator and AM broadcast -- as the interference that may be caused by the operation of a new facility in either service

may not be readily apparent on the face of an application's technical data. 3/ However, the Commission has not yet concluded that it will provide an opportunity for parties to file any type of petition to deny against FM translator or AM broadcast applications prior to the relevant auction. *See Notice* at ¶ 68. Because the resolution of technical issues prior to auction may prove critical to the successful grant of contested permits in the FM translator or AM broadcast services, and, in fact, a defective technical proposal may show mutual exclusivity where none actually exists, Jacor urges the Commission to receive and resolve petitions to deny such applications on technical or interference-related grounds prior to auction. 4/

The resolution of such petitions to deny prior to auction would ensure that every potential bidder has a technically feasible proposal, which in turn would help to ensure that every bidder is actually interested in owning the permit to be auctioned and not simply intending to inflate its price. Because the Commission cannot be expected to identify every area of potential interference to be caused by a

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3/ For example, if the stability of an AM array is unsatisfactory or the tower heights do not produce FCC-required efficiency, the application would be deemed technically unacceptable. In addition, translators, which are considered to be secondary to full-service broadcast facilities, may cause interference to regularly-used signals outside of main stations' contours as predicted using the methods outlined in Section 73.313.

4/ By limiting pre-auction petitions to deny to those based on technical matters, the proposed procedure should not overly burden the Commission or unnecessarily delay an auction. After all, a technically deficient application should not, in fairness, receive the right to bid on a permit. Moreover, a claim that an application is technically deficient may, in most cases, be resolved based on established principles of the Commission, thus ensuring that the resolution of any such dispute is relatively quick.

particular AM broadcast or FM translator application, it should seek comment from other interested parties that may have noticed technical flaws in a particular application prior to auction. The requirement that applications be technically qualified would result not only in fairer auctions, as every bidder would at least have a technically sound proposal, but also in smoother implementation of the winning bidder's proposal, as each bidder is more likely to have resolved any technical issues related to its proposal prior to auction. 5/ In addition, the Commission should face less difficulty resolving technically-grounded petitions to deny prior to auction because a winning bidder is more likely to dispute a Commission decision to deny its application on technical defects than a mere potential bidder.

Notwithstanding whether petitions to deny will be entertained by the Commission prior to or after auction, the auction winner should not obtain any additional right to operate a broadcast station that causes actual interference to previously operating or otherwise protected stations. *Cf. Notice* at ¶ 80. The Commission has long safeguarded full-service broadcast stations from interference caused by translators or newly operational stations, *see, e.g.*, 47 C.F.R. 74.1203, and

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5/ Resolution of petitions to deny based on technical grounds prior to auction is also appropriate in light of the potentially narrow filing window to file petitions to deny once a bidder has won an auction. According to the *Notice*, parties may have only five days to respond to the receipt of the winning bidder's long-form application. *See Notice* at ¶ 77. Five days is, in virtually all cases, too brief of a time for other parties to analyze the technical data supporting an AM broadcast or FM translator application and to draft documents demonstrating any problems posed by the application. Consequently, the Commission should entertain petitions to deny on technical or interference-related grounds separately.

such protection should continue regardless of the means by which a permittee obtained its permit.

III. CONCLUSION

For the foregoing reasons, Jacor endorses suitable changes in the Commission's modification regulations and the resolution of petitions to deny based on technical or interference concerns prior to auction of any FM translator or AM broadcast permit.

Respectfully submitted,

JACOR COMMUNICATIONS, INC.

By: _____

Peter A. Rohrbach
Marissa G. Repp
F. William LeBeau
HOGAN & HARTSON, L.L.P.
555 13th Street, N.W.
Washington, DC 20004-1109
(202) 637-5600

Its Attorneys

January 26, 1998

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments of Jacor Communications, Inc. were hand delivered this 26th day of January, 1998 to:

Roy J. Stewart, Chief
Mass Media Bureau
Federal Communications Commission
Room 314
1919 M Street, N.W.
Washington, D.C. 20554

Ms. Linda Blair, Chief
Audio Services Division
Mass Media Bureau
Federal Communications Commission
Room 302
1919 M Street, N.W.
Washington, D.C. 20554

Janine L. Jeter