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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed 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 Hearings	)	GEN Docket No. 90-264

To: The Commission

COMMENTS OF KM BROADCASTING, INC.

KM Broadcasting, Inc. ("KMB"), licensee of Low Power Television Station W14BN, Channel 14, Richmond, Virginia, hereby submits its Comments with respect to the above-referenced proceeding.[1] Specifically, KMB submits its comments with respect to the Commission's proposal to award licenses for the Low Power Television ("LPTV") Service through competitive bidding. The Commission's adoption of rules to award LPTV licenses by action would violate the Budget Reconciliation Act of 1997, as well as a prior Congressional mandate on this exact

[1] Comments were required to be filed 45 days after publication of the *Notice of Proposed Rulemaking* ("*Auction NPRM*") in the above-referenced proceeding, FCC 97-397, released November 26, 1997. The publication date of the *Auction NPRM* was December 12, 1997. Consequently, the KMB Comments are timely filed.

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issue.

First, all mutually exclusive LPTV applications pending at the Commission are major modification applications, not applications for initial licenses or initial construction permits. As such, they are specifically exempted from auctions by virtue of the specific language of the Congress both in the Budget Reconciliation Act of 1997 and prior legislation creating the FCC's authority to award licenses by auction. Consequently, the Commission's proposal with respect to LPTV stations is moot with respect to currently pending applications.

As to future LPTV applications for initial licenses or initial construction permits, the Commission should resolve the pending issues concerning primary status for LPTV licenses prior to formulating auction rules for LPTV applications for initial licenses. This would allow the Commission to present a cogent auction scheme for all television license applications in the future, and eliminate any issues that might otherwise cause confusion in an arbitrary and capricious manner.

I. FCC's Proposed Rule Change

In its *Notice of Proposed Rulemaking* issued in the above referenced proceeding, the Commission stated that:

> Procedures for Pending Applications Not Subject to Section 309(l)
>
> 39. A broader group of mutually exclusive pending applicants is outside the scope of section 309(l). Specifically, we have pending before the Commission a number of mutually exclusive applications for secondary broadcast service licenses which are not subject to section 309(l). These include LPTV and television translator applications that were filed in response to

previous filing windows and previously would have been decided by random selection. Also pending before the Commission are a small number of mutually exclusive applications for commercial FM translators. Under our current rules, mutual exclusivity among FM translator applications is resolved based upon specific criteria set forth in 47 C.F.R. ^U 74.1233(d)-(g), and such mutually exclusive applications are neither designated for comparative hearing nor lotteried. Finally, since the enactment of the Balanced Budget Act, applicants have continued to file applications for AM and FM construction permits in accordance with our existing filing procedures. Thus, we additionally have pending before the Commission a number of post-June 30th AM and FM applications.

40. As discussed above, auctions are mandatory under section 309(j) for mutually exclusive applications for new commercial radio and television stations filed after June 30, 1997. We believe that this auction requirement applies also to all pending mutually exclusive applications for constructions permits to provide secondary broadcast service, whether filed before or after June 30, 1997. Specifically, the Commission's discretion to use competitive bidding procedures to resolve pending applications filed before July 1, 1997 under new section 309(l) is expressly limited to "competing applications for commercial radio or television stations." We tentatively construe this as encompassing only full service commercial radio or television station applications, which have traditionally been decided by comparative hearing and which are subject to the comparative freeze initiated after Bechtel. Pending secondary broadcast service applications, whether filed before or after July 1, 1997, are in our view, governed by the broad language of amended section 309(j)(1) requiring competitive bidding procedures "if mutually exclusive applications are accepted for any initial licensee or construction permit." In so concluding, we also note that subsection 309(l) is entitled "Applicability of Competitive Bidding Procedures to Pending Comparative Licensing Cases." Further, given the simultaneous changes in our lottery authority under section 309(i), a more expansive reading of "competing applications for commercial radio or television stations" would authorize us to decide by comparative hearings certain secondary service applications which, prior to enactment of the Balanced Budget Act, would have been lotteried. Nothing in the statutory language nor the legislative history indicates that this is what Congress intended. We seek comment on our tentative conclusions regarding the applicability of section

309(l) to pending secondary broadcast service applications.

41. We thus propose that pending mutually exclusive applications for construction permits to provide broadcast service or secondary broadcast service, which are not subject to the special provisions of new section 309(1), discussed in ^T^T 23-38 above, will be subject to the general competitive bidding procedures outlined below for future broadcast applications. Additionally, depending upon what we ultimately decide regarding the auctionability under section 309(j)(1) of mutually exclusive applications to modify existing broadcast service and secondary broadcast service facilities, pending modification applications, whether filed before or after July 1, 1997, could also be subject to our competitive bidding procedures for broadcast applications generally. However, certain minor adjustments in our proposed general competitive bidding procedures are necessary for applications filed before the effective date of those procedures.

42. With respect to the pending broadcast and secondary broadcast applications, described in Par. 39 above, the time for filing mutually exclusive applications under our existing procedures has, in many instances, expired. In contrast to new section 309(l), which expressly restricts the group of applicants eligible to participate in an auction, section 309(j)(1) is silent on that question. It neither precludes the Commission from restricting the class of eligible bidders to the applications already on file, nor requires that the Commission reopen the filing period for additional applicants that would be eligible to participate in the auction. Thus, we appear to have discretion as to whether we conduct a closed auction that is limited to these pending mutually exclusive applications, or whether we include these applications within our first general broadcast auction, and permit new applicants to file additional applications that may be mutually exclusive with the pending applications. We ask for comment on how we should exercise this discretion, i.e., should we open the windows or keep them closed?

II. Auctions May Not Be Used to Resolve Mutual Exclusivity Between Major Modification Applications

As the Commission itslef notes, all mutually exclusive LPTV applications pending at the Commission are major modification

applications, not applications for initial licenses or initial construction permits.[2] Section 309(j) refers specifically for applications for initial licenses and initial construction permits.[3] Consequently, any applications for major modifications which create mutual exclusivity must be excluded from any auctions, since, by definition, an initial license or construction permit has already been issued as the predicate for the major modification application.[4] This is consistent with the Commission's earlier determination that Congress did not expect that applications to modify existing licenses would be subjected to competitive bidding.[5]

III. The Commission Should Forebear from Exercising Such Discretion Until the LPTV Licensing Scheme For Initial Licenses is Clarified

As to future LPTV applications for initial licenses, the Commission should resolve the pending issues concerning primary status for LPTV licenses prior to formulating auction rules for LPTV applications for initial licenses. As noted in the *Auction NPRM*:

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[2] See *Auction NPRM*, at footnote 19.

[3] The word "initial" must be construed to modify both parts of the conjunctive phrase "license or construction permit".

[4] See Sections 73.1690 and 73.3544.

[5] See *Notice of Proposed Rulemaking* in PP Docket No. 93-253, 8 FCC Rcd 7635, 7639 [75 RR 2d 64, 67] (1993); *Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Second Report and Order)*, 9 FCC Rcd 2348 (1994), *recon. granted in part, Second Memorandum Opinion and order*, 9 FCC Rcd 7245 (1994) (*Second Report and Order*).

> 64. We also seek comment on our proposal to have a combined filing window rather than separate filing windows for each type of broadcast or secondary broadcast service. In proposing a combined filing window, we recognize that while the opening of a combined window for the filing of applications for the various broadcast and secondary broadcast services at the same time may be more efficient, there may be advantages to opening separate windows for each service at separate times to accommodate circumstances unique to each service. For example, an LPTV auction may not be held until consideration of a pending Community Broadcasting Association request that "primary" status be awarded to licensees who comply with certain requirements. We request comment on these disparate options. (emphasis added)

The Commission's forbearance with respect to auction issues for LPTV licenses until the issue of primary status for LPTV licenses has been resolved would allow the Commission to present a cogent auction licensing scheme for all television license applications in the future. This would benefit the public interest because it would establish a clear basis for issuing all classes of television licenses, while at the same time conserving scarce Commission resources other wise squandered by numerous appeals of patchwork licensing decisions.[6] The Commission's television licensing process could then move forward smoothly, with most of the major issues resolved with respect to all television licenses, both existing and potential.

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[6] Such a scenario would be similar to the numerous reconsideration requests recently filed with respect to the DTV Table of Allotments, for example.

WHEREFORE, the foregoing premises considered, KMB respectfully requests that Commission incorporate the comments of KMB into any regulations formulated to govern the auction of LPTV licenses, if indeed such rules are adopted.

Respectfully submitted,

KM BROADCASTING, INC.

By: _____

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Dated: January 26, 1998