Rosenman

ROSENMAN & COLIN LLP
1300 19TH STREET, N.W.
WASHINGTON, D.C. 20036
TELEPHONE: (202) 463-4640
FACSIMILE: (202) 429-0046
WEB SITE: http://www.rosenman.com

NEW YORK OFFICE
575 MADISON AVENUE
NEW YORK, NY 10022-2585

NEW JERSEY OFFICE
ONE GATEWAY CENTER
NEWARK, NJ 07102-5397

SPECIAL COUNSEL
JEROLD L. JACOBS

DOCKET FILE COPY ORIGINAL

RECEIVED
JAN 26 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

92-52

January 26, 1998

Magalie Roman Salas, Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 97-234
Competitive Bidding

Dear Ms. Salas:

On behalf of our clients, the Board of County Commissioners of Monroe County, Florida, Chambers Communications Corp., Island Broadcasting Co., Prime Time Christian Broadcasting, Inc., Sage Broadcasting Corporation, and Selective TV, Inc. (together, "Six Video Broadcast Licensees"), transmitted herewith for filing are an original and eleven (11) copies of their "**Comments of Six Video Broadcast Licensees**" on the Notice of Proposed Rule Making in the above-referenced Docket.

Please direct any communications or inquiries concerning this matter to the undersigned.

Very truly yours,

Jerold L. Jacobs

Jerold L. Jacobs

Enc.

cc: Video Services Division Rm. 702
Audio Services Division Rm. 302
Office of General Counsel Rm. 610 **(All FCC - By Hand)(w/enc.)**

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 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 SIX VIDEO BROADCAST LICENSEES

THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, CHAMBERS COMMUNICATIONS CORP., ISLAND BROADCASTING CO., PRIME TIME CHRISTIAN BROADCASTING, INC., SAGE BROADCASTING CORPORATION, AND SELECTIVE TV, INC. (together, the "Six Video Broadcast Licensees" or the "Licensees"), licensees of full-power television broadcast stations, low power television ("LPTV") stations, and television translator stations in California, Florida, Minnesota, New Mexico, New York, Oregon, and Texas, by their attorneys, pursuant to §1.415 of the Commission's Rules, hereby submit their Comments on the Notice of Proposed Rule Making ("Notice"), FCC 97-397, released November 26, 1997, in the above-captioned matter. In support whereof, the following is shown:

I. Introduction

1. Because of their many years of video broadcast experience and their existing

licenses, construction permits, and pending applications in the full-power TV, LPTV, and TV translator broadcast services, the Six Video Broadcast Licensees wish to comment on the following selected sections of the Notice concerning the establishment of competitive bidding auction rules for awarding authorizations for new stations and major and minor modifications of existing licenses and construction permits in those video broadcast services:

- Whether pending and future TV, LPTV, and TV translator applications should be subject to closed auctions limited to the then-pending mutually exclusive applications or open auctions in which newcomers may participate (¶42);

- Whether there should be combined auctions and filing windows for all services, or separate filing windows and auctions for each AM, FM, TV, and LPTV service (¶¶43, 64);

- Whether pre-auction settlements among pending mutually exclusive applicants should continue to be permitted under §311(c) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §311(c) (¶¶45, 73);

- Whether mutually exclusive applications for major or minor modifications of existing AM, FM, TV, LPTV, and translator stations should be subject to auctions (¶¶47, 72);

- Whether all applicants, including applicants for LPTV and translator services, should be required to file their FCC Form 175 applications electronically (¶67);

- Whether the Commission should delete the "reasonable assurance" of site certification from its application forms (¶81); and

- What kind(s) of "bidding credits" should be adopted, whether they should be "tiered," and whether they should apply only to new-station applications (¶¶83-93).

II. Specific Comments by the Six Video Broadcast Licensees

A. All Auctions Should Be "Closed"

2. The Licensees urge that all broadcast auctions should be closed, i.e., newcomers should not be allowed to file mutually exclusive applications against applications that were filed

before the first auction filing window is opened as a result of this proceeding, and once a filing window is opened, only those applicants who file an FCC Form 175 short-form application by the filing window deadline should be permitted to participate in a subsequent auction concerning the frequency at issue. Such closed auctions will help prevent speculators from filing ill-considered and belated Form 175 broadcast applications and will also give initial applicants a deserved priority for having filed their proposals earlier.

3. For example, to allow new mutually exclusive applications to be filed against full-service TV proposals that were filed before July 1, 1997 may well increase the number of auction participants and may cause a bidding up of the ultimate auction price, but it will likely do nothing to increase the broadcast calibre of the applicants. Historically, the Commission has been much more concerned about the character, credentials, and motivations of broadcast licensees than about non-broadcast licensees. See, e.g., Character Policy Statement, 102 FCC 2d 1179, recon. granted in part, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Ass'n for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987); Policy Statement and Order, 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448, partial stay granted, 6 FCC Rcd 4787, errata, 6 FCC Rcd 5017 (1991), recon. granted in part, 7 FCC Rcd 6564 (1992). Even where broadcast frequencies are awarded by auction, and even though an important political goal may be to maximize receipts by the U.S. Treasury, the Licensees urge that, consistent with §308(b) of the Act, the Commission should continue to do its utmost to discourage speculation in broadcast frequencies, since such speculation is bound to result in licensees with diminished qualifications to operate broadcast stations in the public interest.

B. Separate Filing Windows But Combined Auctions Are Appropriate For TV, LPTV, And Translator Applications

4. Similarly, the Licensees maintain that the quality and integrity of the broadcast application process will be enhanced if the Commission maintains separate filing windows for full-power TV applications on the one hand and LPTV and TV translator applications on the other. There has not been an LPTV/translator filing window in almost two years, and recent windows have engendered hundreds of applications. On the other hand, there are many fewer frequencies available for new applications in the Table of TV Allotments. Therefore, the Licensees believe that, while quarterly TV filing windows may be often enough, filing windows for LPTV/translator applications should be more frequent to lessen the likelihood of application floods which are fostered by infrequent windows. Moreover, more frequent LPTV/translator windows will allow the prompt identification and processing of non-mutually exclusive applications which do not need to go to auction.

5. However, the Licensees urge that combined TV and LPTV/translator auctions should be held because of the interplay of TV and LPTV/translator frequency utilization. In this way, LPTV and translator auction participants will be aware of what full-power TV frequencies are about to become utilized or improved locally or within a region, which may have direct impact upon the value and viability of different LPTV and translator application proposals.

C. Pre-Auction Settlements Should Be Permitted If Auctions Are "Closed"

6. The Notice (at ¶73) tentatively concludes that, where there are no pre-existing application proposals and all applications have been filed in response to an auction filing window, pre-auction settlements will run afoul of the anti-collusion auction rule. The Licensees

agree; however, they urge that where there are pre-existing application proposals (either filed before July 1, 1997 or after July 1, 1997 but before the first auction filing window is announced), no new mutually exclusive applications should be entertained (see Paragraphs 2-3 above), and the pre-existing applicants should be treated as "grandfathered" and should be allowed to settle among themselves in accordance with §311(c) of the Act, perhaps thereby obviating the necessity for an auction. This limited "grandfathering" for settlements comports with the Commission's thinking in Paragraph 45 of the Notice.

D. No Auctions Should Be Held For Modification Applications For TV, LPTV, And Translator Stations

7. The Licensees strongly oppose the possibility of applying auction procedures to TV, LPTV, and translator major or minor modification applications (Notice, ¶¶47, 72). The Commission itself recognizes in Paragraphs 47 and 72 of the Notice that it has not previously applied auctions to major or minor modification applications in any other FCC-regulated service. However, the Act no longer permits mutual exclusivity involving major or minor modification applications to be resolved by lottery. Moreover, while the Commission asks (at ¶48) whether it "should (or could) use comparative hearings" to resolve these types of mutual exclusivity, it obviously is not eager to do so.

8. Given the fact that, by definition, mutually exclusive major or minor modification applications involve at least one existing licensee or permittee that is attempting to upgrade or otherwise improve (or save) its facilities, the Licensees urge that the Commission should do its utmost to ensure that such licensees or permittees do not have to "buy" their upgrades or improvements at auction as if they were new-station applicants. Such an auction requirement will certainly discourage existing licensees or permittees from making such filings and

maximizing their use of the spectrum, which is surely contrary to the public interest. Hence, the Licensees recommend that, rather than auctions, the Commission should adopt a point accumulation system, such as currently exists for mutually exclusive applications in the Instructional Television Fixed Service (ITFS)(see §74.913 of the Rules), which will permit the Commission to resolve major and minor modification mutual exclusivity without auction or hearing, if the parties are unable to eliminate the mutual exclusivity by re-engineering their respective proposals.

E. TV, LPTV, And Translator Applicants Should Not Be Required To File Form 175 Applications Electronically

9. At first blush, the Commission's proposal (Notice, ¶ 67) that all broadcast applicants should file their FCC Form 175 short-form pre-auction applications electronically seems reasonable. However, the Licensees have two major objections. First, many LPTV and translator applications are filed pro se by applicants for whom mandatory electronic filing would be a severe financial and practical barrier to participation. Second, and more importantly, the Notice also recognizes (at ¶¶66 and 67) that there will be many instances in which it is necessary to accompany the Form 175 with engineering data contained in the pertinent FCC Form 301, 346, or 349. Assuming arguendo that such engineering data cannot be filed electronically, the Licensees submit that such bifurcated filing of Form 175 and engineering data would be confusing and counterproductive.

10. Thus, instead of mandatory electronic filing, the Licensees urge that electronic filing be made optional for those who wish to use it. However, in the many instances in which a Form 175 application must be accompanied by engineering data, the applicant should be required to file its complete application package manually, whether or not it files its Form 175

electronically. And if such an applicant does use electronic filing for its Form 175, it should be required to cross-reference its separate engineering filing to ensure adequate notice to the Commission and the public.

F. The "Reasonable Assurance" Site Certification Should Not Be Deleted From Broadcast Applications

11. The Notice (¶81) proposes to eliminate the requirement that applicants must certify in their applications that they have "reasonable assurance" of the availability of their proposed transmitter sites. The Licensees strongly object. During the 1980's, the Commission experimented with a legal presumption announced in George E. Cameron Jr. Communications, 71 FCC 2d 460, 467 (1979), that an incumbent's transmitter site would be available to a successful challenger in a comparative renewal proceeding. However, in Prevention of Abuses of the Renewal Process, 4 FCC Rcd 4780, 4788-89 (1989), the Commission scrapped the presumption on the ground that this relaxed filing policy -- which did not require the filing of a site assurance certification -- facilitated the filing of non-bona fide competing applications. The Licensees urge that the Commission should not repeat this mistake in the instant proceeding.

12. Site assurance is a necessary ingredient for a genuine and viable technical engineering proposal. Both an initial applicant and any competing applicants should be required to demonstrate "reasonable assurance". Otherwise, processing such applications could easily become a waste of Commission time and effort. To say that enforcement of the Commission's construction time limits will ensure that winning bidders present viable engineering proposals at the outset is unduly optimistic. Commission policy and rule provide a number of valid grounds for permit extensions. Lacking or "losing" reasonable assurance will only delay service to the public. Making all applicants certify to reasonable assurance of site availability at the

outset will help to eliminate this problem.

G. Bidding Credits Should Apply Only To New-Station Applications, Should Be Tiered, And Are Appropriate For Nonprofit Applicants

13. The Licensees believe that because "bidding credits" will reduce the final auction price for small business applicants, minorities, females, and those with few or no other media interests, such credits likely will encourage such entities to overbid. Therefore, in an effort to try to keep auction bids at real market value levels for existing stations, the Licensees oppose the use of bidding credits in any auction other than for new stations. See Paragraphs 7-8 above for a further discussion as to why major and minor modification applications should not be subject to auctions (and, a fortiori, should not receive bidding credits).

14. Assuming arguendo that the Commission decides to allow bidding credits in broadcast auctions, the Licensees agree that a "tiered" format should be used, as the Commission has done in other auction contexts. See Notice (¶93).

15. Finally, noting that, under §1.1162(c) of the Rules, the Commission already exempts from payment of annual regulatory fees those entities possessing nonprofit status under §501 of the Internal Revenue Code, 26 U.S.C. §501, the Licensees submit that if bidding credits are approved for small business applicants (as explored in Paragraph 85 of the Notice), parallel logic warrants affording an auction bidding credit to nonprofit new-station applicants because of their nonprofit status.[1] In making this proposal, the Licensees recognize that in Paragraph 50 of the Notice, the Commission proposed that it would apply its general auction rules to

---

[1] Prime Time Christian Broadcasting, Inc., one of the Six Video Broadcast Licensees, has non-profit status under §501 of the Internal Revenue Code.

nonprofit applicants for commercial frequencies. Obviously, that tentative conclusion does not preclude the Commission from affording auction bidding credits to nonprofit new-station applicants for commercial frequencies.

WHEREFORE, in light of the foregoing, the Six Video Broadcast Licensees respectfully request that the Commission should adopt a Report and Order in this proceeding consistent with the Licensees' Comments.

Respectfully submitted,

BOARD OF COUNTY COMMISSIONERS OF
MONROE COUNTY, FLORIDA
CHAMBERS COMMUNICATIONS CORP.
ISLAND BROADCASTING CO.
PRIME TIME CHRISTIAN
BROADCASTING, INC.
SAGE BROADCASTING CORPORATION
SELECTIVE TV, INC.

By _____
Howard J. Braun
Jerold L. Jacobs

ROSENMAN & COLIN LLP
1300 - 19th Street, N.W. Suite 200
Washington, D.C. 20036
(202) 463-4640

Their Attorneys

Dated: January 26, 1998