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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

COMMENTS

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January 26, 1993

SUMMARY

Pre-Bechtel cases should be resolved on a comparative basis. Nothing in Bechtel precludes resolution of pending cases on the basis of established comparative criteria, excluding only integration of ownership and equities warrant meeting the applicants reasonable expectations, based upon unequivocal representations by the Commission, that the authorizations for which they applied would be awarded on a comparative basis.

If pending cases are to be resolved on the basis of competitive bidding procedures, at minimum applicants should be reimbursed out of the proceeds of competive bidding process for their reasonably and prudently expended costs incurred in the preparation, filing and prosecution of their applications.

The Commission should adopt policies designed to encourage the elimination of mutual exclusivities through settlement and should continue to waive its limitations on settlement, at least with regard to pending cases, where circumstances exist which the Commission has previously held to support such waivers.

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COMMENTS

Rio Grande Broadcasting Company ("RGB") by its undersigned counsel herewith submits its comments in the above proceeding, as follows:

I. Pre-Bechtel Cases Should Be Resolved On A Comparative Basis.

1. In its Notice of Proposed Rulemaking the Commission seeks comments inter alia on its proposal to utilize competitive bidding procedures to resolve mutually exclusive broadcast applications filed prior to July 1, 1997, while also seeking comment on whether it should utilize comparative hearings to resolve a subset of those applications. In this regard the Commission states (at para. 13) its conclusion that it is authorized under 47 USC 309(l), as amended, to select among mutually exclusive applications filed prior to July 1, 1997 on a

comparative, as opposed to a competitive bidding, basis. Nevertheless, the Commission has tentatively concluded that it should utilize a competitive bidding process.

2. In Separate Statements issued in this proceeding, Commissioners Michael Powell and Gloria Tristani expressed concern with the dearth of minority ownership in broadcasting, which has declined to an even lower level in recent years. However, the Commission has not offered any suggestion regarding how the proposed competitive bidding process would address this concern. While the Commission may be precluded from awarding direct preferences for minority ownership, the ability of minorities to vie for ownership through the comparative process appears far more likely to address the current dearth of minority ownership than the Commission's proposal to award broadcast authorizations to the highest bidder.

3. The Commission states (at para. 15) its tentative view that any unfairness that might result from its utilization of competitive bidding to resolve pre-July 1, 1997 cases "is not strong enough to offset benefits." While the Commission notes that a majority of the pre-July 1, 1997 applications were filed after Bechtel v. FCC, 10 F.3d 875, 878 (D.C. Cir. 1993) ("Bechtel"), this observation in no manner addresses the expectations of the numerous applicants whose applications were filed prior to Bechtel and who have expended many years and enormous resources attempting to play by the rules--rules which the Commission now proposes to alter radically.

4. In every instance, pre-July 1, 1997 applicants were invited to apply for the frequencies for which they applied by notices which indicated that selection among mutually exclusive applicants would be on a comparative basis. Even after Bechtel the Commission continued to issue such notices. While the Commission is correct (at para. 15) that applicants filing after Bechtel could have had no reasonable expectation that a particular set of criteria would apply, that does not obviate that fact that the Commission continued to solicit applications based upon the assurance that any mutual exclusivity would be resolved on a comparative basis.

5. The Commission's argument that pending cases cannot be resolved in accordance with the applicants' expectations at the time of filing, due to Bechtel's elimination of the integration criterion, is unpersuasive. While, as the Commission notes (at para. 15), applicants filing subsequent to Bechtel could have had no reasonable expectation that a particular set of criteria would be applied, they did in fact have reasonable expectation that a permit would be awarded on the basis of comparative selection, given the Commission's repeated representations that such would be the case.

6. The Commission asserts (at para. 17) that the selection of permitees through a competitive bidding process would result in less administrative and judicial litigation. However, the Commission offers no evidence to support such a conclusion. The Commission must reasonably anticipate that any decision to

scuttle the comparative process for existing cases will be challenged in court. Furthermore, not only its determination of selection procedures, but the application of those procedures will likely be subject to challenge, as will the qualifications of numerous successful bidders in the individual auctions that follow. Thus, are the anticipated efficiencies of auctions likely to prove illusory.

7. The Commission discusses (at para. 19) its continued concern with the delay, cost and uncertainty inherent in utilizing a comparative selection process. In this regard the Commission asserts that "continued consideration of integration and local residence/civic participation is effectively precluded by" Bechtel. This contention is meritless. Indeed, the Commission's characterization of Bechtel is extremely troubling in light of the number of years it has supposedly devoted to deriving new comparative criteria, despite the fact that Bechtel required no such endeavor. In fact the Bechtel decision specifically criticized the Commission's refusal to award credit for residence and civic activities to applicants, such as Mrs. Bechtel, who did not propose to be integrated into management. See: Bechtel, slip op. at 12-13.

8. The Commission suggests (at para 21) that any party advocating the use of comparative selection criteria in lieu of auctions should explain how any such proposed criteria would be implemented in an administratively workable and judicially sustainable manner. The Commission requested similar comments in

GC Docket No. 92-52. In 1994 RGB filed comments GC Docket No. 92-52, emphasizing that Bechtel did not require new criteria or the abandonment of any of the comparative criteria previously utilized by the Commission, with the sole exception of the integration of ownership into management criterion. RGB argued then and continues to contend that the Commission should continue to apply the criteria in effect prior to the adoption of Bechtel to all pre-Bechtel, excluding only the integration criterion, and should decide cases on the basis of the records developed in those cases and the law then applicable.

9. As noted above, Bechtel not only did not require the adoption of new criteria or the abandonment of any then existing criterion other than integration, the Court specifically criticized the Commission's policy of refusing to award Mrs. Bechtel and similarly situated applicants credit for residence and civic activities, solely on the basis that they would not be "integrated". Bechtel, slip op. at 12-13. Nothing in Bechtel suggests that the Commission cannot continue to decide cases on the basis of the comparative factors of diversification of ownership, local residence, participation in local civic activities and broadcast experience. Thus, inasmuch as Bechtel does not indicate that the Commission cannot continue to consider the comparative factors of diversification of ownership, residence, civic participation, or broadcast experience, it affords the Commission no basis for modifying those comparative factors or the weight accorded them, much less required the

Commission to develop any new comparative criteria.

10. Furthermore, as the Commission recognized in its Notice of Proposed Rulemaking in GC Docket No. 92-52, there exists no inherent impediment to applying the existing comparative factors of diversification of ownership, residence, civic participation and broadcast experience, in the absence of the integration criterion, which it had already proposed to eliminate. See: 7 FCC Rcd. 2664, 2665-68 (1992). Each of these comparative factors pre-dates the Commission's Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393 (1965) and, prior to its adoption in 1965, were accorded credit without regard to the presence or absence of integration of ownership into management. Accordingly, inasmuch as they have previously been applied by the Commission without regard for the presence or absence of integration, any contention that they are fundamentally dependent upon integration or that integration credit is a prerequisite to their application must be rejected, as must any contention that their continued application has been undermined by Bechtel.

11. Therefore, inasmuch as Bechtel affords no basis for modifying the existing comparative factors (with the exception of the integration criterion) or the weight accorded them, and inasmuch as the continued application of the existing comparative factors is in no manner dependent upon the integration criterion, there exists no impediment to the continued application of those criteria and they should be applied in those cases in which mutually exclusive applications had been filed prior to Bechtel.

12. This is especially the case with respect to all pending proceedings, where applications have been designated for hearing on the standard comparative issue. These applicants have filed and prosecuted their applications with settled expectations regarding the criteria upon which their cases are to be decided. Furthermore, in each instance where hearings have been held and evidence adduced under the standard comparative issue, each applicant has been afforded an opportunity to adduce evidence with respect to each of these existing factors. Accordingly, comparative decisions can be rendered by the Commission based upon the record already developed, without need for supplementation or further hearings.

13. The Commission requests comment (at para. 22) regarding whether selection by means of comparative criteria should be used for a subset of pre-July 1, 1997 applicants, noting that eight cases involving mutually exclusive applications had already progressed to a decision by the full Commission, while another twelve cases had progressed to at least an initial decision. There can be no question that the applicants in these twenty cases would be most adversely affected by the use of selection by competitive bidding. While in other cases the applicants no doubt have expended more than the hearing and filing fees the Commission proposes to refund, in the referenced twenty cases, the applicants have invested significantly more in both time and resources. Indeed in many of these cases hundreds of thousands of dollars have been incurred by the applicants. Having induced the

expenditure of substantial resources by these applicants, the Commission would be remiss in changing the rules this late in the game. Having solicited applications on the basis that a permit would be awarded by means of the comparative selection process and having designated applications for hearing and induced the expenditure of significant sums of money on that basis, any action by the Commission to select a permitee on any other basis at this late date would in any other context be characterized as fraudulent and tortious.

14. The Commission has concluded that the Balanced Budget Act leaves it free to elect to resolve the mutual exclusivity in these cases on a comparative basis. Accordingly, the Commission should fulfill the reasonable expectations of these applicants by resolving these pending cases on the basis of the comparative criteria in effect at the time they were designated for hearing (excluding integration) and the evidentiary records already developed under the standard comparative issue in these cases.

II. Reimbursement of Expenses Incurred In Reliance Upon Commission Established Procedures.

15. Should the Commission ultimately determine to utilize competitive bidding to award permits in cases involving pre-July, 1997 applications, it should at minimum mitigate the damage to such applicants by fully reimbursing them for all out of pocket expenses, reasonably and prudently incurred by them in the

reimbursement should be funded out of the proceeds of the competitive bidding process. This is especially the case with regard to the twenty cases (identified by the Commission at para. 22) where mutually exclusive applicants have expended significant time and resources to prosecute their applications through hearings and subsequent appeals in order to allow the Commission to select a permitee on the basis of comparative criteria, which it now proposes to abandon. Reimbursement of the funds these applicants were improperly induced to expend is the very least that could be expected under such circumstances.

III. Promoting Settlement and Waiver of Settlement Limitations.

16. The Commission proposes (at para. 27) that waivers of its rules and policies regarding settlement should apply only to settlements among pre-July 1, 1997 applicants and then only with respect to settlements filed within the 180 day window. Likewise, the Commission proposes (at para. 45) only to permit settlements prior to the deadline for submission of Form 175. The Commission's proposals in this regard are unduly restrictive, would not serve the public interest and should not be implemented as proposed.

17. The Commission should in all instances adopt procedures which are designed to encourage the elimination of mutual exclusivity among competing applicants by means of settlement. Such a policy serves the public interest not only by expediting service to the public, but also by avoiding litigation, thereby

conserving the Commission's limited resources.

18. In addition to adopting procedures designed to encourage settlement, the Commission also should continue to waive on a case by case basis the limitations on settlements imposed by its rules, at least with respect to all pre-July 1, 1997 applications. In that regard waivers would be warranted and should be granted in all such cases as reflect circumstances analogous to those previously found by the Commission to support waiver of the limitations on settlements. See: Public Notice (FCC 95-391), 10 FCC Rcd. 12182 (1995). As the Commission has previously recognized, the waiver of its limitations on settlement with regard to applicants who prepared, filed and prosecuted their applications with no reasonable expectation of profiting from a settlement would not reward improper speculation or encourage the filing of abusive proposals in the future. Id.

19. It must be emphasized that the Balanced Budget Act of 1997 contains no evidence that Congress intended to restrict the Commission from waiving or modifying its settlement rules. On the contrary, given the fact that Congress has only authorized the use of auctions as a means of resolving mutual exclusivity, its failure to prohibit settlements is indicative of its tacit support for settlements, inasmuch as the elimination of mutual exclusivity through settlement serves to eliminate any basis for an auction. Furthermore, Congress has required the Commission to waive any of its rules that might impede settlement for a period of 180 days. This evidences Congressional support for settlement

as an appropriate means of resolving mutual exclusivity.

20. Therefore, inasmuch as the elimination of mutual exclusivity would serve the public interest by expediting the introduction of new service and avoiding litigation, and inasmuch as settlements to eliminate mutual exclusivity not only have not been prohibited by Congress, but in fact encouraged, the Commission should adopt procedures designed to encourage settlements and should waive its limitations on settlements on a case by case basis under circumstances previously found to warrant such waivers.

IV. Other Issues.

21. The Commission proposes (at para. 11) to adhere to the general competitive bidding procedures set forth at Sections 1.2101-2111. of its Rules. However, those procedures were adopted for use with respect to nonbroadcast spectrum and are a poor fit for awarding broadcast authorizations.

22. The Commission proposes (at para. 16) to refund hearing fees, as well as filing fees of those applicants who choose not to participate in competitive bidding. While this is entirely appropriate, the Commission's proposal to delay the refund of the previously submitted hearing fees until the grant of a construction permit is final and the full amount of the bid has been paid is unacceptable. These fees were obtained under false pretenses, are being improperly retained by the Commission and should be refunded at once with interest. Thus, all previously

submitted hearing fees should be should be refunded at once. Furthermore, the Commission's tentative conclusion to adopt competitive bidding procedures with respect to all pre-July 1, 1997 applications obviates any possible basis for retaining such fees. If a hearing must be held with respect to the qualifications of a successful bidder, then any appropriate hearing fee could be submitted at such time. With regard to previously submitted filing fees, those fees should be refunded promptly upon receipt by the Commission of an applicants request, accompanied by a waiver of the applicants right to bid in any competitive bidding procedure.

23. The Commission proposes (at para. 30) to require applicants in cases that were previously designated for hearing to go through the additional procedure of filing FCC Form 175. What possible purpose there could be for this requirement is not stated. Where the Commission already has on file a long-form application there exits no basis, whatsoever, for requiring submission of a short-form application. Any applicant who has already submitted a long-form application should be exempt from further filing requirements and should be accorded the right to bid in any competitive bidding process without further action on its part. [1]/

1. It also is noted that Form 175 still is not available in electronic (PDF) format on the Commission's ftp site. It should be made available well before the initial filing deadline.

24. The Commission proposes (at para. 34) to provide a period of 30 days after announcement of winning bidder for the submission of any necessary amendments and a period of 15 days for response to any petition raising issues regarding the qualifications of the winning bidder. In that regard the Commission also should provide for no less than 30 days following the deadline for submission of amendments for the filing of petitions to deny or specify issues.

25. The Commission seeks comment (at para. 47) regarding whether mutually exclusive applications for modification of existing authorizations should be subject to competitive bidding procedures. It is noted, however, that 47 USC 309(j) provides that competitive bidding procedures are applicable to the award of "any initial license or construction permit." Inasmuch as applications for modification of an existing authorization do not seek the award of "any initial license or construction permit," such applications do not fall within the purview of the Commission's authority to utilize competitive bidding procedures.

26. The Commission proposes (at paras. 52-55) to utilize simultaneous, multiple-round remote bidding. Sequential multiple-round auctions, using remote, electronic bidding should be adopted. The Commission should provide for submission of bids by email and provide adequate time between rounds for both the publication and posting on the Commission's internet site of the results of each round of the bidding. Providing for sufficient time between bidding rounds and utilizing bid submission by

generic email and the Commissions current public notice procedures (including the posting of public notice releases on its web site) should be sufficient to "provide bidders a safeguard against power outages, computer breakdowns, or other unforeseen circumstances that might prevent them from bidding electronically." The same type of bidding procedure should apply to all broadcast services.

27. The Commission proposes (at para. 56) to require upfront payments and have Mass Media Bureau establish their amount. This proposal should not be adopted. As an initial matter the Mass Media Bureau has no expertise in determining the value of broadcast construction permits and has more important endeavors to consume its limited resources. Furthermore, the penalties provided by Sections 1.2104(g) and 1.2109(c) are sufficient to discourage, as well as punish, the submission of fraudulent or unfunded bids. The burden is on the Commission to establish what incentive a potential bidder would have in not being sincere. If an applicant bids funds it cannot timely remit, it gains nothing and would also be subject to a forfeiture penalty in accordance with 47 CFR 1.2104(g) and 1.2109(c).

28. The Commission seeks comment (at para. 57) regarding whether the establishment of "a reasonable reserve price or a minimum opening bid" would serve the public interest. If so, the Commission then proposes to have the Mass Media Bureau "work with" the Wireless Bureau to determine how such a price would be established. Neither the establishment of a reserve price or a

minimum opening bid would serve the public interest. Neither the Mass Media Bureau nor the Wireless Bureau possesses any expertise, whatsoever, that would allow them to establish the appropriate price in either instance. Furthermore, both Bureaus have more than sufficient duties to occupy their time already and the added burden is unwarranted. Adoption by Congress of a competitive bidding process reflects a recognition that the market can and will best determine the appropriate price. Accordingly, it should be concluded that implementation of the Commission's proposal in this regard would disserve the public interest and constitute an enormous waste of resources.

29. The Commission's proposal (at para. 67) to require electronic filing of FCC Form 175 should not be adopted. As an initial matter, given the relative minor nature of the application, the Commission has not shown any need for dispensing with well established filing procedures. Furthermore, after several years, the Commission has yet to make Form 175 available in electronic (i.e., PDF) form on its web site. Furthermore, as noted in the Notice, certain types of broadcast applications will have to be accompanied by technical date in order to permit determination as to mutual exclusivity, thus, requiring complex rules to cover different services and types of filings within the same services, were electronic filing to be mandated.

30. The Commission's proposal (at para. 69) to defer determinations regarding the acceptability and grantability of an application until subsequent to the auction, appears to be a

workable solution, provided that the Commission strictly enforces the proposed prohibition against major amendments and assures that winning bidders whose complete long-form applications cannot ultimately be granted for either legal or technical reasons are subject to default payments under the Commission's general competitive bidding rules, in accordance with 47 C.F.R. 1.2104(g) and 1.2109(c).

31. The Commission seeks comment (at para. 69) regarding whether, should the disqualification of a winning bidder result in the need for a new auction, submission of new applications should be allowed. The Commission should adopt rules to provide that new applications be allowed only where there remains no qualified applicant from the initial filing window. In that regard any re-auction should involve only applications timely filed within the initial window. Where only one qualified applicant remains, its application should be granted forthwith, there being no need or basis for conducting any further auction, inasmuch as the Commission's authority to utilize competitive bidding procedures extends only to the resolution of mutually exclusivities.

32. The Commission seeks comment (at para. 73) on the appropriateness of applying its anticollusion rules. The anticollusion rules should not apply to competitive bidding procedures involving broadcast authorizations in a manner that might serve to discourage removal of mutual exclusivity by settlement. Settlements should be encouraged, not discouraged.

Nothing in the Balanced Budget Act of 1997 suggests any intent to discourage settlements.

33. The Commission seeks comments (at para. 74) regarding whether it should apply bid withdrawal and default penalties in accordance with Sections 1.2104(g) and 1.2109 of its Rules. These provisions most certainly should apply with respect to competitive bidding for broadcast authorizations.

34. The Commission seeks comment (at para. 81) regarding its proposal to delete the requirement that applicants have reasonable assurance of site availability and rely instead upon strict enforcement of construction periods. Under no circumstances would this proposal serve the public interest. Elimination of the reasonable assurance requirement would result in the filing of applications with technical proposals based on nothing more than pure fantasy. Processing of such applications and the issuance of permits on this basis would be a waste of resources, necessitating in the subsequent preparation filing and processing of modification applications. Thus, the processing of the initial application as well as the petition to deny process would be rendered a nullity. An even bigger joke, however, is the notion that the Commission's staff would ever implement a policy of strict enforcement of construction periods. Supposedly such a policy exists today and has existed for many years. A single example, however, will suffice to demonstrate the foolishness of the Commission's proposal: WKNJ, Lakeside, New Jersey, was issued an initial construction permit in 1988. After numerous

extensions and an equal or greater number of reinstatements of its permit, necessitated by the applicant's repeated failure to timely submit applications for extension, the station still has not been constructed after a period of almost ten years. Yet, the staff steadfastly refuses to cancel the permit and delete the call sign. Accordingly, the proposal to eliminate the reasonable assurance requirement should not under any circumstances be implemented.

Respectfully Submitted,

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January 26, 1998

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have, this 24th day of January, 1998, served a copy of the foregoing Comments by First Class mail, postage prepaid upon the following:

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