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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 25, 1998

Magalie Roman Salas, Secretary
Federal Communications Commission
Washington, DC 20554

Re: MM Docket 97-234, GC Docket 92-52, & GEN Docket 90-264

Dear Madam Secretary:

These comments are filed in response to the Notice of Proposed Rulemaking referenced above.

I am John W. Barger, 7800 I-10 West, Suite 330, San Antonio, Texas, 78230. I am an individual applicant in a comparative case for Channel 289C3 to serve San Angelo, Texas. I am also involved in another comparative proceeding, Channel 290C2 to serve Round Rock, Texas, as president and 70% shareholder of a corporate applicant, August Communications Group, Inc. ("ACG"). In addition, I am president and sole shareholder of Radio KRIO-FM, Inc., general partner of Radio KRIO, Ltd., licensee of Radio Station KRIO-FM, Floresville, Texas. I am also president and sole shareholder of Radio KONO-FM, Inc., general partner of Radio KONO, Ltd., licensee of Radio Stations KONO(AM), San Antonio, Texas, and KONO-FM, Helotes, Texas. An application to transfer the broadcast licenses of these last two stations, KONO(AM) and KONO-FM, to Cox Radio, Inc., is currently on file with and under consideration by the Commission.

I. Existing Fully-Tried Cases

It is in reference to the Round Rock, Texas, comparative case that I first wish to comment. In setting forth initial proposals for dealing with comparative cases, the NPR noted,

> "...there are approximately eight unresolved cases involving mutually exclusive applications for new stations that progressed to a decision by the Commission, and another approximately 12 such unresolved cases that progressed to either an Initial Decision by an ALJ or a decision by the former Review Board, before...*Bechtel II*."

The NPR asked for comment on whether the resources these applicant have expended as well as the delays they have encountered raise special equitable concerns that should lead the Commission to have comparative hearings in these cases even if auctions are used for other pending cases.

I strongly suggest that the Round Rock case meets the definition, above, even absent an initial order from the ALJ because the record in the case is closed, including a closed record in the separate disqualification hearing involving two of the three remaining applicants. In summary, 13 applicants filed for the channel in 1988, eight paid the hearing fee and started discovery, only three remained as the close of the initial hearing in 1991, and those same three were present in the disqualification hearing. The records in both the initial hearing and the disqualification hearing closed in 1992. All the briefing has been done, also in 1992. It remains only for the ALJ to decide the disqualification issues against the two other applicants and then, if necessary, consider the application of ACG against the other remaining qualified applicants, if any.

The equities of the three remaining parties in the Round Rock case are of the same magnitude as those of other parties in fully-tried and fully-briefed cases in which an ALJ's decision has been written. By 1992, more than five years ago, the Round Rock parties had incurred all of the litigation costs and burdens of applicants in others cases who received an ALJ decision. The Round Rock contestants were merely waiting for the ALJ to write. They should not be penalized because the Round Rock ALJ attended to other dockets and took no action on the pending briefs from 1992 when the record closed to 1994 when the freeze was imposed, and even thereafter, based on the freeze order.

Equally compelling for permitting the Round Rock case to be determined under the *Integration*-less prior criteria is that unless the ALJ is permitted to decide the case or at the minimum make

an advanced-determination on the disqualification of each of the other applicants, two futile auctions, each followed by a full-blown qualification hearing would conceivably be required to ultimately decide the permittee. For example, if Elinor Stephens (an individual applicant in the Round Rock case) were the high bidder in an FCC auction and the previously-litigated-but-as-yet-unresolved-issue of falsification of documents were found against her, then Grass Roots, Inc. (the third applicant along with Stephens and ACG in the Round Rock case) and ACG would be back for a second auction of the channel, and if Grass Roots, Inc., were the high bidder in the second FCC auction and the previously-litigated-but-as-yet-unresolved-issue of false financial certification were found against Grass Roots, ACG would have been needlessly placed in the position of having to qualify for and bid in two auctions and then twice re-brief the very same issues which were fully litigated before the ALJ, awaiting only his final decision.

The system proposed in the NPR of bidding-first and qualification-determination-second will work well on future allocations, since litigating from scratch all potential applicants is the very burden the Commission wants most to rid itself from. However, in the event Round Rock and other similar cases are subjected to auction, the disqualification issues should all be resolved before the auction, not after conducting the auction. This makes full use of the existing records and briefs on those issues, and thus avoids the potential risk of back-and-forth bidding-and-disqualifying rounds.

II. Criteria

A positive alternative exists, at least for the 20-or-so initially-decided cases plus the Round Rock case and any other similarly-situated proceedings (awaiting only decisions). I believe equity as well as the public convenience and necessary will be best served by resuming the comparative consideration employing essentially the same criteria in place at the time of *Bechtel II*, save and except presence or absence of *Integration*.

In this regard, I encourage the Commission to re-adopt the following criteria for decision in these initial-ID or closed-record cases: (1) efficient use of frequency, (2) daytime AM station

ownership, (3) auxiliary power facilities, (4) diversification of control of the media of mass communications, (5) broadcast experience, (6) broadcast record, (7) local residency in the proposed service area, and (8) civic activity in the service area. The last five of these should be applied to the individual parties in each applicant, proportionate to their equity interests (voting or non-voting). On each of the determinative elements, the Commission and its able ALJ staff have developed a solid pattern of decisions (*Stare Decisis*) over the past thirty years which will guide the finders of fact and concluders of law in these few remaining cases.

Procedurally, it will not be necessary to reopen these records for new evidence. The applicants may file proposed findings of fact and conclusions of law, and exceptions and briefs, and responsive pleadings, addressed to the existing hearing records under the eight comparative criteria noted above. ALJs and the Commission should then render initial and final decisions based thereon. There is no unfairness to the parties, whose applications were filed, based on the broadcast experience and records, local residence and civic activities of the parties, their proposed signal coverage and their impact on the principle of favoring diversity of ownership of mass communications. The revised criteria only make adjustments to remove the *Integration* gloss on the parties' credentials and to follow judicial decisions relative to minority and gender-based preferences.

Application of this decision-making procedure will result in a minimum of appeals and court challenges, since all of the other elements have survived in the face of decades of litigation.

III. Other Pending Cases

The large group of cases not heard which involve applicants filing prior to July 1, 1997, should be decided by auction, but unlike the procedure suggested for new-window auctions below, participation in these auctions should be limited to only the applicants and there should be a nominal $1,000 initial bid deposit.

IV. General Auction Procedures

As for the general auction procedures, I suggest the up-front deposit should be in the amount of the minimum bid, and that for a TV station or FM radio station this be calculated by multiplying the number of viewers or listeners residing within the city-grade contour of the station by fifty cents ($0.50) while the AM station calculation would be based on a dime ($0.10) per potential listener residing within the daytime city-grade contour. Commission staff can easily make the computation based on an arbitrary reference point for each allocation.

Once priced and noticed, interested parties would be given sixty (60) days in which to evaluate the offering and make the required initial bid deposit. The Commission's way of handling money should be changed at least to permit auction participants to file and pay in the same community where the auction is to take place, namely in Washington, DC, rather than be forced to use the less-than-completely-dependable couriers to Pittsburgh, particularly in the dead of winter. The Commission should arrange for a minimum of three Federally-chartered multi-state banks to receive the deposits in Washington, DC, on behalf of the FCC.

Accompanying each deposit would be an FCC Form, similar to Form 175, in which the applicant bidder would provide mailing address, telephone number, attorney (if any), and the responsible party certifying to the basic qualifications and accepting the auction terms. Proof of deposit would be given to the depositor (mailed, in the case of a wire transfer) and electronically noticed to the Commission. The FCC would publish the list of qualified bidders within two weeks of the close of the filing window.

The auction would be conducted 28 days following the close of the filing window, and the bidding would be open-auction (bid-and-over-bid, not bid-in-turn), conducted live, in person or by personal representative before a senior Commission staffer, specially prepared to conduct auctions. Minimum bid increment would be 20% of the initial bid price for the particular auction. The FCC would publish the winner bidder's complete certificate and invite petitions to deny for a period of thirty (30) days, and thereafter issue a construction permit.

The winner bidder would have the same 30 days in which to deposit the bid balance or lose the initial deposit. Deposits from the non-winning bidders would be refunded once the bid balance is deposited. In the event of a default by the winning bidder, the Commission would retain the deposits of the non-winning bidders (who need not necessarily have submitted a bid) and notify them of a second auction limited to only them to be held 30 days following the first auction date.

A later-disqualified winning bidder having made the complete bid deposit would be entitled to a full refund, absent fraud or intentional wrong. Given a disqualification, the entire notice and bid procedure would start anew. Participation would not be limited to prior participants, thereby discouraging baseless petitions to deny from losing bidders.

In the event of award by preference (discount bid, etc.), the initial deposit from a later-disqualified winning bidder would not be refunded, thereby discouraging false preference claims.

The basic idea in any good system is to as much as possible minimize litigation by eliminating the adversary nature of the process, and as a result, limiting competition to wallet size and desire.

V. Preferences

With regard to the matter of preferences, it is unfortunate the previous attempts by the Commission to foster diversity have been disgustingly manipulated so as to discourage even their most progressive or liberal supporters. The idiocy of *Anax* made possible bifurcated applications which benefitted manipulators and saw minorities and women have a brief taste of only a small fraction of the financial rewards of competing for allocations. Had the Commission and the Courts looked to fully-diluted equity percentages and granted preferences in that light, it is entirely possible that even *Bechtel I and II* and the matter of *Integration* would have been decided differently by the Court of Appeals.

Voting control is an absolute fiction unless every last piece of each underlying agreement is brought to light and given a worst-case scenario look. Real power is derived from money. The Commission's tax certificate policy would still have friends today on Capitol Hill had the minorities with 51.0% voting control been given 51.0% of the actual financial benefit obtained or earned rather than a paultry 1.5% cash-out profit, based on fully-diluted equity when the stations or systems were sold a short time later. If experienced white or Anglo-American males wish to enjoy gender and minority credits or preferences let them be prepared to share full equity returns with the women and minorities recruited to enhance their applications or petitions.

Respectfully submitted

John W. Barger