DOCKET FILE COPY ORIGINAL

RECEIVED

JAN 26 1998

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 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 KERM, INC.

KERM, Inc. ("KERM"), by its attorney, hereby submits its Comments on the Commission's Notice of Proposed Rulemaking, FCC 97-397 (released Nov. 26, 1997) ("NPRM") in the above-captioned proceeding.

I. INTRODUCTION

KERM is a small business, which owns and operates AM stations KURM in Rogers, Arkansas and KARV in Russellville, Arkansas. Its President is Kermit Womack, a veteran broadcaster with more than 30 years of experience in the industry. Station KURM has been in continual operation since 1979, while KARV has operated for more than 25 years. Due to its position as an AM operator with a long term history of providing quality broadcasting to its communities of license, KERM is uniquely situated to provide input in this matter.

KERM welcomes the proposed overhaul of the current comparative hearing process. It does so with the caveat that the Commission should not lose sight of its primary mission

and focus: licensing diverse voices committed to serving specific communities. The now defunct comparative process has in recent years undermined this mission. It encouraged the development of an expensive and time-consuming hearing process between sham applicants, money-interested brokers and befuddled locals.

The evolution of the comparative hearing process coupled with the ultimate emphasis on the financial value of stations and the relaxation of the multiple ownership rules hastened several unfortunate trends within the broadcast industry. First, a large number of communities lost their radio stations to more lucrative and larger nearby markets. Second, deep pocket operators were enabled and encouraged to purchase clusters of stations, resulting in further loss of local services. Third, the FCC failed to adequately address the need for permitting AM operators to obtain FM facilities, thus penalizing a critical source of local, experienced operators. Fourth, the comparative hearings themselves were held in the remote venue of Washington, D.C., away from the actual, interested parties to the proceeding. Finally, the emphasis on integration and minority and female participation increased the numbers of sham applications filed with the Commission. The secondary result of the sham applications was the extraordinary intervention and growth of legal practices dedicated to participating in and manipulating the comparative process.

The Bechtel case amplified the problems associated with a hearing process, which emphasized a complex legal scheme lacking a coherent purpose or logical conclusion. See Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992); Flagstaff Broadcasting Foundation v. FCC, 979 F.2d 1566 (D.C. Cir. 1992). KERM disagrees with the finding of the court that integrated owners do not generally provide better service to the public. Properly integrated local broadcasters with a stake in the welfare of their community do generally provide better

service. The problem with the comparative process was that it did not necessarily identify or reward the best-qualified local broadcaster. Accordingly, the comparative process is properly discredited and discarded at this juncture and should not be applied to any future proceedings.

In making these critical points about the comparative process, KERM nevertheless cautions that the wholesale and unfettered auction of the spectrum is not the solution to this problem. Although it is too late to influence the decision of the United States Congress in passing the Budget Act of 1997, KERM believes that the Commission continues to have both the authority and obligation to ensure that communities are properly served and that the overall auction process does not become simply a mechanism for generating funds from big businesses for the U.S. Treasury. The process adopted by the Commission must emphasize the interests of the communities to be served, encourage diversity, protect the input and participation of small businesses, and encourage local broadcast pioneers to continue their service to the community and the industry. Comments have been requested concerning how to treat existing broadcast applications; what procedures should govern the filing of new applications; and what sort of bidding credits would be appropriate. Specifically, KERM supports the adoption by the Commission of an auction process which:

1. Sets reasonable guidelines for filing new applications and participating in the auction process while simultaneously protecting the equitable interests of previously filed applications.

2. Provides bidding credits which allows local small business participants to engage in the bidding process on a competitive footing with large-scale brokers and outside interests, and enhances the ability of local existing station operators to upgrade their service the

community.

These concepts are addressed in detail below.

II. THE COMMISSION SHOULD SET REASONABLE GUIDELINES FOR FILING APPLICATIONS AND PARTICIPATING IN THE BIDDING PROCESS WHILE SIMULTANEOUSLY PROTECTING THE INTERESTS OF PREVIOUSLY FILED APPLICATIONS.

The Commission has requested comment on what form of application should be required prior to awarding a broadcast permit by auction. NPRM ¶ 61. KERM agrees with the Commission's determination at paragraph 62 that long form applications should not required for participating in the bidding process. NPRM ¶ 62. The primary purpose of the pre-bid applications should be solely to determine mutual exclusivity rather than to study the acceptability of engineering or other data. Under the proposal, once the winning bidder is identified, it will be required to file a long-form application. This filing of a post-bid application will be sufficient to provide an in-depth statement of the applicant's proposed engineering. Prior to completing the bidding process, this information is unnecessary and preparing it is burdensome and expensive for potential applicants. The only exception to this procedure should be in the instances of the filing of applications for AM stations, where the initial filing is necessary to establish mutual-exclusivity. Therefore AM applicants' applications should be required to contain specific and necessary engineering information as a part of their initial filings.

KERM believes, however, that the Commission's proposal contained in paragraph 76 of the NPRM fails to provide adequate time to prepare a long-form application in an instance where an applicant wins the bidding process. Due to the time that sometimes is required to

find transmitter sites not only that comply with FCC rules, but that only comply with local zoning or FAA concerns, more time is necessary. The time period should be adjusted from 30 days to 60 days.

Also, insofar as competing applicants and other members of the public have a right to study the credentials and engineering proposals of a high bidder, and the FCC has the obligation to ensure that it is granting only applications that are filed by fully qualified applicants, the Commission's proposed five day "petition to deny" period (NPRM ¶ 77) is grossly inadequate to ensure proper and complete filings of petitions to deny, and only a retention of the current 30-day period would permit sufficient study of the winning bidders' long-form application. As the Commission has noted previously:

> The filing of a petition to deny by a party in interest is not only a statutory right, but is also essential to the performance of the Commission's statutory functions and responsibilities. As the Court of Appeals for the District of Columbia has stated, the Commission's "duties and jurisdiction are vast, and it . . . cannot begin to monitor or oversee the performance of every one of thousands of licensees." The court went on to state that listening and viewing audiences "are generally among the best vindicators of the public interest." Such audience input is utilized in the manner of a "private attorney general," to bring licensee misconduct to the attention of the Commission. Thus, "every applicant is on notice that consideration of his application might be delayed by the filing of a petition to deny. . . [E]ven though the challenged applicant is undoubtedly put to extra time and expense in defending his application, such burdens are an inseparable part of the statutory scheme under which the applicant seeks his authorization."

Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, 2 FCC Rcd 5563, ¶ 5 (1987) (footnotes omitted); United Church of Christ v. FCC, 7 R.R.2d 2001, 2010 (D.C. Cir. 1966). In keeping with this concept that the Commission is relying on petitioners as "private attorneys general" to assist the Commission in the fulfillment of its functions, the Commission desire to "rush" winning applicants' applications to grant must not result in the abandonment of the Commission's

obligation to grant applications only to fully-qualified applicants. That determination only can be made if sufficient time is provided for filing petitions to deny.

KERM agrees with the Commission's proposal that applications filed before July 1, 1997 be protected from competing with additional applicants in any auction. Following the effective date of the auction rules adopted in this proceeding, the Commission should identify the groups of pending mutually exclusive (long-form) broadcast applications and notify them exclusively of a filing deadline for bid-related short form applications.

KERM, however, also believes that this exclusivity should apply to all applications filed prior to the Commission's freeze, not just those protected by Congressional mandate in section 309(l). Any attempt to permit previously uninterested parties to become involved in the auction process at this stage, long after the close of the original "filing windows" for the allotments would undermine the rights of those parties which filed during those original windows in a timely fashion. The original applicants have a reasonable expectation that their applications would be acted upon and both the applicants and the communities have suffered from the long-term delay caused by the legal wrangling over the comparative hearing process. Moreover, permitting additional applicants to file after the original filing deadline would encourage bidding by applicants which simply are seeking to benefit from the nature of a cash-based system. The field would become cluttered with additional speculators and non-locals hoping to turn a quick profit instead of serving the community.

With regard to pre-auction settlements, KERM agrees with the Commission's observation that the new process necessarily indicates that settlements by participants prior to short-form deadlines would not violate the Commission's anti-collusion rules. NPRM ¶ 45. Such settlements should be permitted.

The auction system will necessarily invite non-locals with little stake in the communities of license, many of which will be interested in utilizing the license purely for financial gain. KERM believes that this situation is a serious danger to the concept of local programming and control and believes that the best method for alleviating this situation is described at "III" below.

III. A SPECIAL BID CREDIT PROCESS SHOULD ENCOURAGE SMALL BUSINESSES AND LOCAL BROADCASTERS TO OBTAIN NEW LICENSES

In the NPRM, the Commission notes that "[o]ur experience has been that most applicants for new broadcast stations are small businesses..." This statement will not necessarily be correct in an environment where a new license goes to the highest bidder. Accordingly, it is crucial that the FCC provide bidding credits and/or other incentives to properly encourage local small businesses to obtain licenses.

KERM proposes a special bidding credit provision for small businesses as defined within the Small Business Act where the business is located within the 1 mV/m contour of the proposed station. Additionally, as the Commission has noted previously, "it is in the public interest to afford some form of special consideration to daytime-only licensees when they apply for FM allotments in their community of license." See In the Matter of Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, MM Docket No. 84-231, Second Report and Order, 57 R.R.2d 1607, 1610 (1985). Therefore, KERM is of the belief that is remains necessary to promote that policy, and therefore also proposes the implementation of special credits for existing AM station owners seeking to upgrade to a FM station.

KERM offers the following bidding credit scheme to ensure the award of new FM

licenses to local small businesses and broadcasters with a track record in providing service to the community of license. First, a 20 percent bidding reduction should be available to principals of existing AM facilities bidding on an FM allotment where the principals do not already own an FM station within the city grade contour of the proposed station. This credit should not, however, be blindly available to all bidders. KERM recognizes that there have been situations where proposed owners previously owned powerful FM facilities in a market but voluntarily chose to sell the facilities for a profit. These applicants and their principals should not be eligible for the credit. The credit would not apply in cases where within five years of the date of the application the applicant or any member of its principals' immediate family has sold a controlling interest in a FM station when its city grade contour overlapped the city grade contour of the proposed station. Thus, the credit should be solely to allow an existing AM station to upgrade to an FM station, and *not* to allow an existing or recent FM station owner to simply "trade-up" to a more powerful facility at the expense of the Federal Government or competing applicants. Also, the bidding credit would not apply if the applicant or any member of his immediate family already owns a controlling interest in a FM station where its city grade contour overlaps the city grade contour of the proposed station. A non-FM owner who qualifies for the bidding credits in this scenario would be given an opportunity to pay out 50 percent of his bidding cost over a five year period of time with the prevailing interest rate applicable.

KERM agrees with the five-year standard proposed by the Commission with regard to ensuring that applicants do not utilize a special bidding credit and then resell the new station. KERM's bidding credit scenario would provide that any selectee selling its station within five years following the grant of his construction permit would be required to repay any bidding

credits provided. KERM does not see the need for additional penalties beyond restitution in instances of premature divestiture or resale.

The purpose of the bidding credit is to enable the small operator to compete more favorably at auction while assisting an AM operator who is operating a stand-alone facility. The bidding credit described here would have a positive influence in encouraging diversity of ownership and would be helpful in dealing with the issue of operators who have bought and sold stations and subsequently have made application within their families for another FM facility. This bidding credit process also would not penalize existing AM station owners.

IV. CONCLUSION

The Commission should tailor the new spectrum auction procedures to encourage small business operators within the potential community of license to participate and prevail in the auction whenever possible. Otherwise, the auction process could become the catalyst in developing a conglomerate construction of broadcast stations, which ultimately undermines the participation of the communities, which the stations should serve. Special emphasis should be placed on providing bidding credits which discourage brokers from accumulating, purchasing and selling stations simply for profit. The Commission should be wary of family based operations involved in routine purchase and sale for profit of stations. In the end, the Commission must protect the interest of broadcast listeners and maintain the diversification of broadcast entities.

WHEREFORE, it is respectfully requested that these Comments be considered in conjunction with the matter being reviewed in this proceeding.

Respectfully requested,

KERM, INC.

By: _____
Dan J. Alpert

Its Attorney

The Law Office of Dan J. Alpert
2120 N. 21st Rd.
Suite 400
Arlington, VA 22201
(703) 243-8690

January 26, 1998