

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	MM Docket No. 97-234
of the Communications Act	)	
-- Competitive Bidding for	)	
Commercial Broadcast and	)	
Instructional Television Fixed	)	
Service Licenses	)	
	)	
Reexamination of the Policy	)	GC Docket No. 92-52
Statement on Comparative Broadcast	)	
Hearings	)	
	)	
Proposals to Reform the	)	GEN Docket No. 90-264
Commission's Comparative Hearing	)	
Process to Expedite the Resolution	)	
of Cases	)	

TO: The Commission

**JOINT REPLY COMMENTS OF ADAMS COMMUNICATIONS CORPORATION  
AND ALAN SHURBERG D/B/A SHURBERG BROADCASTING OF HARTFORD**

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February 17, 1998

1. Adams Communications Corporation ("Adams") and Alan Shurberg d/b/a Shurberg Broadcasting of Hartford ("SBH") (referred to collectively as "Adams/SBH") submit these Reply Comments in response to the "Joint Comments of Parties to Comparative Renewal Proceedings" ("Joint Comments") filed in the above-captioned proceeding by Trinity Broadcasting of Florida, Inc., Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network, Trinity Broadcasting of New York, Inc. (these three entities are referred to herein collectively as "Trinity"), Reading Broadcasting, Inc. ("RBI") and Two If By Sea Broadcasting Corporation ("TIBS") (all the commenters are referred to collectively as "the Joint Commenters").

2. Adams is an applicant for a construction permit for a new television station in Reading, Pennsylvania. Adams's application is mutually exclusive with the renewal application of RBI for Station WTVE(TV). SBH is an applicant for a construction permit for a new television station in Hartford, Connecticut. SBH's application is mutually exclusive with the renewal application of Station WHCT-TV. TIBS is seeking to purchase Station WHCT-TV from its current licensee.

3. The Joint Commenters support the notion, articulated in the Notice of Proposed Rulemaking ("NPRM") in this proceeding, that the Commission can and should adopt a "two-step" process to resolve the handful of comparative renewal proceedings still pending before the Commission. See Joint Comments at 3; NPRM at 43-44 (¶¶101-102).<sup>1/</sup>

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<sup>1/</sup> The proposed process calls for review of the renewal application and, if the renewal applicant is determined to have earned a "renewal expectancy" for "substantial" performance during the preceding license term, the renewal will be granted and competing applications will not be considered. While the Commission characterizes its proposal as a "two-step" process, in actual practice the process is likely to consist of only one step, *i.e.*, the rubberstamp granting of renewal applications. Under the Commission's proposal, once a  
(continued...)

The Joint Commenters also suggest certain comparative standards which might be utilized in connection with that proposed two-step process. However, the "two-step" process itself is not available to the Commission and, even if it were available, the suggestions advanced by the Joint Commenters are factually insupportable and inherently illogical.

4. The two-step process suggested by the Commission and supported by the Joint Commenters is essentially the same process unsuccessfully adopted by the Commission almost 30 years ago. *See Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C.2d 424 (1970). The U.S. Court of Appeals for the D.C. Circuit held that the 1970 Policy Statement "violates the Federal Communications Act of 1934, as amended, as interpreted by both the Supreme Court and this court." *Citizens Communication Center v. FCC*, 447 F.2d 1201, 1205 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972). Clarifying its initial opinion, the Court stated that the 1970 Policy Statement was "contrary to law" and, therefore, "null and void and may not be used by the Commission for any purpose." 463 F.2d at 823.

5. Nothing has changed in the intervening 26 years to alter the Court's conclusions. Neither *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), nor *Citizens Communications Center, supra*, nor any of their progeny have been overruled, reversed, narrowed or otherwise interpreted in any way which would leave room for the resuscitation

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1/ (...continued)

renewal application has been evaluated and granted, the only remaining step is to summarily reject any competing applications which might have been filed.

of the long and properly dead two-step process. <sup>2/</sup>

6. At paragraph 102 of the NPRM, the Commission acknowledges that *Citizens Communications Center* presents an imposing obstacle to the Commission's present proposal, which is merely a re-hash of the 1970 Policy Statement. The Commission queries whether the "two-step" approach would be "judicially sustainable", and then states:

In this regard, we note our analysis in the *Cellular Order*, 8 FCC Rcd at 2836 ¶12, that the court could be persuaded to overrule *Citizens Communications Center*. . . .

The "analysis" referred to by the Commission, however, consists of mere conclusions without any factual support or legal reasoning. The following two conclusionary sentences comprise the totality of any "analysis" in the paragraph cited by the Commission :

After carefully reassessing *Citizens*, we do not believe that adoption of the two-step procedure for comparative cellular renewal proceedings which we outline herein is necessarily inconsistent with *Citizens*. Further, even if our new procedure is considered to be inconsistent with *Citizens*, after considering relevant judicial precedents decided during the past twenty years since the issuance of *Citizens*, we conclude that *Citizens* appears to no longer represent

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<sup>2/</sup> The Joint Commenters seem to agree that *Ashbacker* remains valid law which must be addressed. See Joint Comments at 3, n. 2, where the Joint Commenters assert that summary dismissal of all competing applications "would not violate" *Ashbacker*. This particular argument by the Joint Commenters strains credulity. According to them, because "sustainable comparative criteria" may not be attainable, the Commission can and should just throw up its hands and dismiss all competing applicants. Of course, the Joint Commenters' initial premise -- that "sustainable comparative criteria" are a practical impossibility -- is not at all a given. Indeed, for years the Commission resolved comparative proceedings in which the integration criterion -- *i.e.*, the only comparative criterion which has thus far been found to be unlawful by the Court of Appeals, see *Bechtel v. FCC*, 10 F.3rd 875 (D.C. Cir. 1993) ("*Bechtel II*") -- was not a dispositive consideration. This fact demonstrates that "sustainable comparative criteria" are not only possible, but have been identified and utilized by the Commission for years. And even if "sustainable comparative criteria" were impossible to establish, the Commission would still have to establish a legitimate mechanism, consistent with the law, for the disposition of competing applications. Simply throwing out any application which was not filed by one of the Joint Commenters is *not* such a mechanism.

the court's current thinking in this area, and that the court could thus be persuaded to overrule *Citizens*.

8 FCC Rcd at 2836, ¶12.

7. Adams/SBH are unable to comment on the "analysis" because the Commission failed to flesh out this "analysis" with the usual accoutrements of "analysis", *e.g.*, citations and explanation. Adams/SBH know of no precedent which questions either *Ashbacker* or *Citizens Communications Center*, or which could legitimize the "two-step" process which the *Citizens* court expressly and unequivocally held to be "contrary to law".<sup>3/</sup>

8. The amendments of the Communications Act effected by the Telecommunications Act of 1996 and the Balanced Budget Act of 1997 affirm the continued validity of *Citizens Communications Center* and, therefore, the unlawfulness of the "two-step" process now proposed once again by the Commission.

9. In the Telecommunications Act of 1996, Congress enacted a "two-step" process for resolution of comparative renewal proceedings involving renewal applications filed after May 1, 1995. See Section 204(a) of the Telecommunications Act of 1996, amending Section 309 of the Communications Act; see also *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 ("Broadcast License Renewal Procedures")*, 11 FCC Rcd 6363 (1996). In so doing, Congress expressly and unequivocally chose *not* to apply that new process retroactively to renewal applications filed

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<sup>3/</sup> While the Joint Commenters "concur with the Commission's analysis in the *Cellular Order*", they offer no further insight into the basis or validity of that "analysis". Joint Comments at 3. Similarly, the Joint Commenters assert, without explanation or elaboration, that the proposed "two-step" process is "legal and judicially sustainable". In the face of the *Citizens* Court's detailed exposition of precisely the contrary position, the Joint Commenters' facile and conclusory assertion is valueless here.

on or before May 1, 1995. See Section 204(c) of the Telecommunications Act of 1996; *Broadcast License Renewal Procedures, supra*. See also Conference Report on S. 652.

Adams's application and SBH's application (as well as the other competing applications filed against the Joint Commenters' various stations) were filed significantly *before* May 1, 1995, and therefore are *not* subject to the newly-enacted statutory process.

10. Thus, Congress declined to authorize the "two-step" process which the Commission is once again proposing. In view of Congress's decision *not* to grant such authority to the Commission, the Commission can *NOT* implement its proposal. The Commission's authority to act is derived wholly from Congress. Congress has considered the possible use of the "two-step" process for applications already on file as of the date of the enactment of the Telecommunications Act of 1996. And Congress has specifically restricted that process to renewal applications filed *after* May 1, 1995. As a result, the Commission has no authority to apply that process to applications which were filed on or before May 1, 1995.

11. Stated another way, clearly Congress was aware of the comparative renewal process as it had developed prior to the Telecommunications Act of 1996. It is equally clear that, in that Act, Congress sought to change the process going forward, without changing the process which had been in place and which would still apply to applications filed on or before May 1, 1995. Obviously, the Commission is without authority to contravene Congress's explicit intent.

12. Moreover, the "two-step" process is inconsistent with the specific order of the Court of Appeals more than four years ago in *Bechtel II* for the Commission to consider

applications properly before it "under standards free of [the integration] policy." The court never suggested that the Commission should completely eliminate comparative proceedings in favor of the "two-step" procedure the court previously had struck down. Even if the Commission were deemed, *arguendo*, to have the discretion to change its procedures, the Commission's proposal of a process that -- even by the Commission's own admission -- might not be "judicially sustainable" suggests, in part, an attempt to circumvent the order of the Court of Appeals and simply delay action on applications filed prior to May 1, 1995.

13. Accordingly, the "two-step" process proposed by the Commission and supported by the Joint Commenters is simply not an available alternative.

14. In addition to their support for the "two-step" proposal, the Joint Commenters also offer a number of observations concerning the comparative renewal process and suggestions for changes in that process. The Joint Commenters' observations are of, at most, limited accuracy, and their suggestions are inconsistent even with their own Comments.

15. The Joint Commenters fire their opening salvo by asserting that "competing renewal applications often are not *bona fide* and deserving of comparative process at all." Joint Comments at 4. The sole bases cited in support of this broad claim are a speculative Commission statement <sup>4</sup> and a single extraordinary proceeding involving abuse of process by a single applicant (*see Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir.

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<sup>4</sup> In that statement, the Commission suggested that "unscrupulous parties *may* be using the renewal process" for improper purposes. Joint Comments at 4, quoting 3 FCC Rcd 5179 (1988) (emphasis added). The Joint Commenters cite no finding by the Commission as to the *actual* extent of any such supposed improprieties, as indeed no finding exists.

1993)). If there were some actual serious history of repeated abuses of the comparative renewal process, presumably the Commission would have identified it and cited it at some point during the 64 years since the enactment of the Communications Act of 1934. Since the most that the Joint Commenters offer is a 10-year-old piece of agency speculation, it is reasonably safe to conclude that, contrary to the Joint Commenters' claim, there is no "long record" of improper comparative renewal challenges. Certainly Adams/SBH are aware of no such "long record."

16. The Joint Commenters then attempt to argue merits of two of their own pending cases -- without affording the Commission the benefit of a full disclosure of the underlying facts. Adams/SBH do not believe that comments in a general rulemaking proceeding are an appropriate place in which to argue the merits of specific pending adjudicatory cases, and Adams/SBH do not propose to offer such arguments here. For the sake of a complete record, though, Adams/SBH note the following:

(a) The Joint Commenters broadly refer to a renewal challenger which (supposedly) "has not had reasonable assurance of its proposed transmitter site for *over eight years* and is subject to numerous grounds requiring its dismissal and disqualification." Joint Comments at 4 (emphasis in original). This is an oblique reference to the Station WHCT-TV/Hartford, Connecticut proceeding, in which TIBS, one of the Joint Commenters, is a party. In that case, TIBS has advanced various allegations against the competing applicant, SBH -- but those allegations remain nothing more than allegations. Indeed, in its own responsive pleadings SBH has offered substantial rebuttal, including eight-year-old documents which demonstrate

that it *did* have and has had reasonable assurance of the availability of its proposed site. The Joint Commenters' reliance on the disputed (at the very least) allegations of one of the Joint Commenters hardly affords significant support to the Joint Commenters' position.

(b) In an apparent reference to Adams, the Joint Commenters claim that one renewal challenger "is comprised of principals who in an earlier case dragged the Commission through a *ten-year* comparative proceeding only, upon being declared victorious, to return the station to the incumbent licensee for a payment of many millions of dollars." Joint Comments at 4 (emphasis in original). As the Commission's and the Court's records demonstrate, the majority of Adams's principals were principals of Monroe Communications Corporation ("Monroe"), which in 1982 filed a competing application for Channel 44 in Chicago. After a comparative hearing with the incumbent renewal applicant, Monroe's application was initially granted by the presiding administrative law judge. *Video 44*, 102 F.C.C.2d 419 (ALJ 1985). While that decision was reversed by the Review Board, *Video 44*, 3 FCC Rcd 3587 (Rev. Bd. 1988), and the Commission, *Video 44*, 4 FCC Rcd 1209 (1989), the Court of Appeals reversed the Commission's decision, *Monroe Communications Corporation v. FCC*, 900 F.2d 351 (D.C. Cir. 1990) and, on remand, the Commission itself granted Monroe's application, *Video 44*, 5 FCC Rcd 6383 (1990), *recon. denied*, 6 FCC Rcd 4948 (1991).

The history of the Monroe proceeding demonstrates that Monroe was in fact the superior applicant. The goal of the comparative renewal policy has always been

to identify and encourage superior applicants who seek authorizations. Thus, far from reflecting some failure of the process, the Monroe application is a success story.<sup>21</sup>

17. The Joint Commenters are correct that the Monroe proceeding was ultimately resolved through a settlement with the incumbent pursuant to which the incumbent made a substantial cash payment to Monroe. *Video 44*, FCC 92I-097. From this the Joint Commenters conclude that Adams should be disqualified from further participation in the Commission's processes. That is a truly bizarre notion. After litigating for almost ten years, and after encountering (and surmounting) administrative roadblocks consistently throughout that litigation, Monroe settled the case. Virtually all fora regard mutually agreeable settlement of disputes as preferable to litigation. Even the Joint Commenters themselves strongly advocate "settlement as the preferable approach to resolving the few

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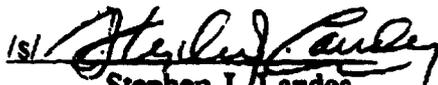
<sup>21</sup> Curiously, while the Joint Commenters attempt to make much of their own one-sided allegations which have not been addressed at all by the Commission, they fail to remind the Commission of a number of decisions in which the qualifications of some of the Joint Commenters (or parties closely related thereto) *have* been addressed. For example, Trinity has been found to be disqualified by an administrative law judge after an extensive hearing. *See Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020 (ALJ 1995), *exceptions pending*. Similarly, the Commission has found that substantial questions exist concerning the qualifications of TIBS as a result of the involvement of its principal, Micheal Parker, in fraudulent conduct before the Commission. *See Two If By Sea Broadcasting Corporation*, 12 FCC Rcd 2254, 2257 (1997), citing *Religious Broadcasting Network*, 2 FCC Rcd 6561, 6566-67 (ALJ 1987), *aff'd in relevant part*, 3 FCC Rcd 4085, 4090 (Rev. Bd. 1988). *See also Mt. Baker Broadcasting Co., Inc.*, 3 FCC Rcd 4777 (1988) (Mr. Parker was an owner, officer and director of the permittee in that case, a permittee which was found to have attempted to deceive the Commission). Mr. Parker is also a principal of RBI, another Joint Commenter.

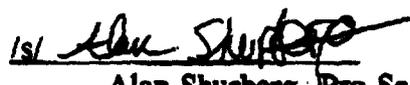
Again, Adams/SBH prefer not to utilize a general rulemaking proceeding to advance specific arguments more appropriate for the adjudicatory context. Still, it is difficult to comprehend how the Joint Commenters could strive to conjure up fanciful bases for disqualification of their competitors, while the Joint Commenters fail to mention, much less substantively address, their own serious qualifications problems which the Commission has plainly identified.

remaining comparative renewal proceedings". Joint Comments at 3. How, then, can the Joint Commenters legitimately claim that Adams should be disqualified because Monroe entered into just such a settlement? This is particularly true where Monroe was not a frivolous, bad faith applicant: Monroe actively litigated for ten years, during the course of which the ALJ and, ultimately, the Commission (with the prodding of the Court) all determined that Monroe's application could and should be granted.

18. In sum, the Joint Commenters offer the Commission no substantive support at all. Rather, they merely parrot the Commission's notion that a "two-step" process might be lawful. Neither the Joint Commenters nor the Commission offers any explanation of the method of squaring such a process with the clear rationale of *Citizen Communications Center*. For the reasons stated in that decision, Adams/SBH firmly believe that the proposed "two-step" process is not lawful. And the Joint Commenters' various other thoughts are, at best, far-fetched and self-serving efforts which enjoy no factual or logical support and which are not properly considered in a general rulemaking proceeding.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

Howard M. Wasserman, an attorney, certifies that on February 17, 1998, he caused to be served the *Joint Reply Comments Of Adams Communications Corporation And Alan Shurberg D/B/A Shurberg Broadcasting Of Hartford*, by United States First Class Mail, on:

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