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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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:

REPLY COMMENTS OF JACOR COMMUNICATIONS, INC.

Jacor Communications, Inc. ("Jacor"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, hereby submits these Reply Comments in response to certain comments filed with regard to Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding. 1/ In the *Notice*, the Commission requested comments regarding its proposed rules to implement Section 309 of the

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1/ *Notice of Proposed Rulemaking, In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, and Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, FCC 97-397 (released November 26, 1997) ("*Notice*").

Communications Act, which details the authority the Commission has with respect to broadcast license and permit applications, as amended by the Balanced Budget Act of 1997. O January 26, 1998, Jacor submitted its initial comments with regard to the *Notice*, which urged the Commission: (1) to limit the times when and types of competing applications that may be filed against modification applications; and (2) to resolve, prior to auction, any petitions to deny based on technical or interference grounds against applications for AM broadcast and FM translator permits subject to competitive bidding.

Most of the other parties who commented on these issues echoed Jacor's concerns. For example, the National Association of Broadcasters ("NAB") opposed any proposal that would subject proposed modifications to existing facilities to auction. *See* NAB Comments at 2-3. Cox Radio, Inc. ("Cox"), similarly recognized the danger that competitive bidding with regard to modification proposals would pose to the public interest and noted that such applications are not governed by the new Section 309(j)(1) because modifications to existing facilities are not "initial" applications, in the proper sense of the term. *See* Cox Comments at 1-3. In addition, Cox supported a proposal also suggested by Jacor: that the Commission should use this proceeding to make its rules regarding modification applications for AM broadcast stations consistent with those in other services by limiting the types of AM modifications that are subject to competing applications. *See id.* at 6 n.7. On procedural issues, Hatfield & Dawson Consulting Engineers, Inc., among others, repeated the key Jacor concerns that complete technical information for AM

broadcast and FM translator applications be provided and reviewed prior to auction and that deadlines for filing petitions against a winning bidder's long-form application not be too brief. *See* Hatfield & Dawson Comments at 2-4.

Because of the solid consensus in favor of Jacor's key proposals, these brief reply comments seek only to remind the Commission that it should not subject competing applications for spectrum in the commercial band to drawn-out comparative hearings simply because one or more of the applicants may be a noncommercial entity. The argument to the contrary contradicts the statute's structure and intent and cannot be implemented.

The phrasing of Section 307(j)(2) limits any noncommercial exception to applications for spectrum in the band reserved solely for noncommercial use. 2/ According to long-established doctrines of statutory interpretation, exceptions to a broad statutory mandate, such as that expressed in Section 309(j)(2), are to be read narrowly, *see, e.g.*, *Commissioner v. Clark*, 489 U.S. 726, 739 (1989), and, as important in this case, an item in series is to be given a scope similar to other terms in that series. *See, e.g.*, *Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990). According to the strict language of Section 307(j)(2), the requirement of competitive bidding does not govern only three distinct classes of initial licenses or permits. These three classes are identified by a common characteristic: each already has

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2/ Of course, this class would include frequencies in the commercial band that the Commission has explicitly allotted as noncommercial because of concerns that allotments in the noncommercial band in those areas would interfere with broadcasts on television channel 6.

specific spectrum set aside for their particular use. Consequently, the exception for these classes should apply only to applications related to such reserved spectrum. In the case of noncommercial stations, such reserved spectrum is limited to the noncommercial band.

Moreover, a common sense reading of the statute confirms this interpretation. The statute did not except any non-commercial *applicant* from being subject to competitive bidding. Nor did it exempt any set of competing applications *involving* a noncommercial applicant among commercial applicants. Instead, the provision grants an exception only to permits that will be used for a noncommercial *station*. Because the only way the Commission could know for sure that grant of an application will be used for a noncommercial station is with regard to a permit in the *noncommercial band*, the exception must be limited to competing applications for noncommercial spectrum.

A practical reading of Section 309(j) leads to the same result. According to the text of Section 309(j)(2)(c), only an initial license or permit for a noncommercial station is exempted from the auction requirement. Otherwise, the statute requires that the Commission allocate the permit through competitive bidding. With regard to competing applications in the commercial band, however, it is impossible to determine whether a commercial applicant or a noncommercial "station" ultimately will be granted the permit. Consequently, unless the exception contained in Section 309(j)(2)(c) is read as Congress intended -- to refer only to applications involving the noncommercial band -- the Commission will be unable to

determine how it should allocate the permit in question *until after the permit has been granted.* 3/ Such an interpretation is plainly unworkable and must be rejected in favor of an interpretation consistent with the structure and sense of the statute.

In addition, an unjustifiably broad reading of the noncommercial exception would open the door for additional manipulation of the application process. Ostensibly noncommercial parties could seek pre-filing pay-offs in exchange for not filing a competing application as parties actually interested in receiving the permit would naturally fear the risk of the lengthy competitive hearings that would result from such a noncommercial application. In addition, an unreasonably broad reading of what was intended to be a narrow exception may cause many, if not most, initial permit proceedings involving spectrum in the commercial band to be determined by comparative hearing, rather than by auction, which would clearly contradict the intent behind Section 309(j).

3/ For example, if the Commission auctions the permit, and the noncommercial applicant wins, the auction, according to a few commenters, is thereby invalid because the exception does not permit auctions, even in the commercial band, for permits ultimately awarded "for" a noncommercial station. But, if in the same situation, the Commission uses a comparative hearing, and the commercial applicant wins, the permit was not awarded to a noncommercial station, and the narrow exception in Section 309(j)(2), which permitted use of the comparative hearing in the first place, no longer applies.

For the foregoing reasons, and in light of the broad congressional mandate for resolving competing applications for new construction permits through auctions, Jacor urges the Commission to require noncommercial and commercial applicants alike to bid for initial construction permits for which they have submitted mutually exclusive, competing applications as described above.

Respectfully submitted,

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February 17, 1998

CERTIFICATE OF SERVICE

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