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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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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

REPLY COMMENTS OF
PAXSON COMMUNICATIONS CORPORATION
ON THE
NOTICE OF PROPOSED RULEMAKING

Paxson Communications Corporation ("Paxson") by its attorneys files these reply comments in response to the Notice of Proposed Rulemaking, FCC 97-397, released November 26, 1997 in this proceeding concerning competitive bidding (auctions) for broadcast station licenses ("NPRM").

I. White Knight Settlements for Certain Pre-July 1, 1997 Pending Applications

Paxson strongly urges the Commission to adopt as final the Commission's proposal to waive its policy prohibiting so-called "white knight" settlements of mutually exclusive broadcast station applications. This would permit a third-party non-applicant to effect

a settlement among pre-July 1, 1997 applicants for a contested permit where the parties filed their settlement agreement by January 30, 1998.

The Commission stated in the NPRM that, "in order to facilitate full-market settlements among pre-July 1 applicants, consistent with the congressional policy underlying [new] section 309(l)(3) [of the Communications Act], we are inclined to waive our policy against 'white knight' settlements . . . ."[1/] Paxson asserts that such a waiver is not only consistent with congressional intent, it is mandated by it. As part of the Balanced Budget Act of 1997,[2/] Congress added new section 309(l)(3) to the Communications Act, explicitly stating that, with respect to competing applications for initial licenses or construction permits filed before July 1, 1997, "the Commission shall . . . waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180-day period" beginning on the legislation's date of enactment.[3/] In the accompanying Conference Report, Congress reiterated the point: "The Commission shall also waive its rules to permit competing applicants to procure the removal of conflict between their applications during the 180 days following enactment of this title."[4/] Congress thus indicated its

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1/ NPRM, ¶ 26.

2/ Pub. L. No. 105-33, 111 Stat. 251 (1997).

3/ Pub. L. No. 105-33, § 3002(a)(3), 111 Stat. 251, 260 (1997) (emphasis added).

4/ See H.R. Conf. Rep. No. 105-217 (1997) ("Conference Report"), at 573 (emphasis added).

strong support for settlement as a means of resolving the backlog of mutually exclusive applications for new broadcast services.

If the Commission's prohibition against white knight settlements were codified in a promulgated regulation, the Commission apparently would not even question its mandate to waive the rule pursuant to section 309(l)(3), just as it waived section 73.3525(a)(3) which limits the reimbursement of applicants in a settlement agreement to their legitimate and prudent expenses.[5/] Yet, because the prohibition against white knights is not a promulgated rule, the Commission seems to believe that it has discretion, rather than a mandate, for waiver. It strikes Paxson as odd that the Commission might consider a mere "policy" articulated in a very few Commission decisions to be more entrenched, and hence potentially less waivable, than a written promulgated rule. On the contrary, common sense dictates that Congress' mandate to waive "any provision of [the Commission's] regulations" encompasses mere policies which are far less binding, such as that governing white knight settlements. Paxson therefore asserts that the operative language of section 309(l)(3) applies to "provisions of [the Commission's] regulations" in the broader sense to include the white knight settlement policy.

This is especially tenable because the main concern which the Commission has expressed regarding third-party non-applicant (*i.e.*, white knight) settlements is completely inapplicable in the scenario involving pending mutually exclusive applications. In the case which the Commission cites in the NPRM as articulating the policy against white knights,

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5/ 47 C.F.R. § 73.3525(a)(3) (1996).

Rebecca Radio of Marco,[6] the Commission's concern was that approval of a third-party settlement prior to evidentiary hearing would disserve the public interest by creating an economic incentive for individuals with no real interest in building and operating broadcast stations to file "sham" applications "conceived only for the purpose of entering into a profitable settlement agreement."[7] Certainly the competing applications now pending were not filed with the expectation of resolution by white knight settlements. Furthermore, a comparative hearing process to determine the "best" candidate based on qualitative criteria is no longer a realistic option anyway. Given the courts' rejection of previously used comparative hearing criteria,[8] it seems a futile exercise to try to develop new comparative criteria that will withstand judicial scrutiny and prove workable, at least for the foreseeable future. The time involved in trying to develop such criteria, not to mention the time involved in implementing them, would obviously create excessive delays in resolving pending applications as well as those filed in the near future. Such an approach makes no sense and undermines one of the main purposes behind the NPRM: arriving at methods to process mutually exclusive broadcast applications expeditiously.

Allowing white knight settlements is particularly appropriate where the white knight is, like Paxson, a well-established broadcast licensee with an excellent track record before the Commission and so clearly interested in building and operating the subject broadcast

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6/ 5 FCC Rcd 937 (1990) ("Rebecca Radio"), ¶¶ 4-5.

7/ Id.

8/ See Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) (Bechtel II).

station as quickly as possible. In this sense, white knight settlements undoubtedly serve the public interest and the policy goals underlying the Balanced Budget Act provisions.

Moreover, as the Commission noted in the NPRM, Congress did not waive section 311(c) of the Act,[9/] so that any settlement agreement, including white knight settlements, filed pursuant to new section 309(l) must pass Commission muster based on public interest factors. So long as the Commission is able to scrutinize white knight settlements under section 311(c), the Commission can safeguard the public interest against settlements involving "sham" applications and which are otherwise not likely to bring new stations into service to the affected communities.

There is a fairness issue to consider as well. In reliance on the language of the Balanced Budget Act, the Conference Report, and the Commission's "inclination" stated in the NPRM, many parties expended an enormous amount of time, energy, and money in negotiating white knight settlements prior to the issuance of any final rule in this proceeding. Parties entered into such negotiations in good faith, and were the Commission to reverse its NPRM proposal and decide, after the fact, that white knight settlements should not be permitted, such parties' efforts would be rendered all for nought.

There are several other public interest arguments in favor of white knight settlements for mutually exclusive applications. It will take some time before the Commission's broadcast auction rules are finalized and implemented. Rather than having to wait for the Commission's own auction proceedings to get underway, parties who settle conflicting

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9/ See NPRM, ¶ 28 (referring to 47 U.S.C. § 311(c) (1994)).

applications by means of a white knight benefit the affected community by moving more quickly toward bringing new service into operation. In other words, permitting this type of settlement attracts those, like Paxson, who are more than ready and willing to get a new station up and running, and have the proven capability to do so.

Finally, in any private settlement prior to auction, the U.S. Government retains none of the settlement proceeds pursuant to waiver of section 73.3525(a)(3).[10/] Hence, a white knight settlement agreement cannot be said to deprive the U.S. Treasury of revenues it would otherwise receive in a settlement which does not involve a white knight.

Paxson has reviewed the more than 130 comments that were submitted to the Commission by January 26, 1998 in response to the NPRM and finds it noteworthy that virtually none of those parties objected to white knight settlements. A number of parties strongly endorse the Commission's proposal to waive its settlement limitations, and in that context either explicitly or implicitly support white knight settlements.[11/] Paxson noted only two parties who filed opposing comments, and they based their opposition on (1) the notion that in white knight settlements the "rich guys win and the poor guys loose,"[12/] or (2) the fear that, as applicants are "bought out at a profit with 'white knights'" rather than selected by comparative hearing, the

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10/ 47 C.F.R. § 73.3525(a)(3) (1996).

11/ See comments of the following parties, all filed on January 26, 1998: Grace Communications L.C. at 7; SL Communications, Inc. at 5; Rio Grande Broadcasting Co. at 10-11; Liberty Productions, Limited Partnership, ¶¶ 6-10; Heidelberg-Stone Broadcasting Co. at 9-11; James G. Cavallo at 2-5; Howard G. Bill at 5-7; Dewey Matthew Runnels at 5-7; Marri Broadcasting, L.P. at 5-7; and KM Communications, Inc. at 4.

12/ Comments of De La Hunt Broadcasting filed January 26, 1998, ¶ 4.

"best 'local' community service or operator" is not awarded the permit.[13/] These arguments, however, ignore several factors inherent in the broadcast auctions legislation and its requisite implementation. First, as noted above, selection by comparative hearing is no longer a realistic option in any event. Second, given the choice between an auction proceeding and a private pre-auction settlement involving a white knight, such settlement may actually be more favorable to smaller businesses with limited financial resources, since it results in speedier resolution of the conflict, the non-prevailing parties collect settlement proceeds in excess of their expenses, and the applicants also forego the time and expense of participating in the auction. Indeed, as the Commission stated in Rebecca Radio, "a third-party settlement may be the only realistic means of settling multi-party cases where no one party has the financial resources to pay off all of its competitors."[14/] Finally, as noted above, pursuant to section 311(c),[15/] the Commission is still able to review the white knight settlement to determine whether it is in the local community's best interest.

Concerning partial as opposed to full-market settlements, the Commission stated its belief that "the waiver provision applies to any settlement agreement among pre-July 1, 1997 applicants, regardless of whether all such applicants are parties to the agreement."[16/] Paxson fully agrees with the Commission that applying the waiver regarding white knight settlements

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13/ Comments of The Cromwell Group, Inc. filed January 26, 1998, at 2.

14/ 5 FCC Rcd 937, ¶ 4.

15/ 47 U.S.C. § 311(c) (1994).

16/ NPRM, ¶ 27.

only for full-market settlement agreements would be far too restrictive a reading of the statute and Congressional intent. Neither the statute itself (new section 309(l)) nor the related discussion in the Conference Report evidences any intent by Congress to limit waivers to those scenarios in which all parties agree to a particular settlement. On the contrary, especially in a situation in which all parties but one come to an agreement, the Commission's rejection of such a settlement agreement allows that one party to thwart the policy underlying section 309(l)(3). Also, the same fairness considerations noted above must be taken into account here: parties who have relied on the Commission's proposal to permit partial settlements have entered into negotiations in good faith, and their efforts should not be rendered moot by the fact that certain parties in the group prefer to go to auction. A partial white knight settlement allows willing settlers to withdraw gracefully -- and with financial consideration in hand -- from the inevitable auction process. The Commission can then proceed to an auction between the white knight and any non-settling parties, barring further developments prior to auction such as, for example, a withdrawal of the non-settling parties' applications.

II. White Knight Settlements for Other Categories of Applications

A. Settlements Filed By Pre-July 1 Applicants After January 30, 1998: With respect to settlements (including white knight settlements) among pre-July 1 applicants who did not file an agreement during the 180-day period specified by Congress (*i.e.*, by January 30, 1998), the Commission stated: "we do not envision that we would waive our settlement rules except in extraordinary circumstances." Paxson urges the Commission to reconsider this point and agrees with those commenters who suggested extending the waivers of both the white knight

and "limited payment"[17/] rules beyond the 180-day window.[18/] The NPRM was not issued until November 26, 1997, just before the year-end cycle of holidays. While the Balanced Budget Act enacted in the summer of 1997 put parties on notice regarding the January 30, 1998 deadline, parties did not have the benefit of the Commission's proposals concerning how auctions would be conducted until late in the year. Paxson believes that, in some instances, if parties have more time to digest the NPRM, which covered an unusually large number of very detailed issues, such parties might opt to enter into good-faith settlement negotiations as an alternative to competitive bidding.

In addition, extending the waivers would not conflict with the Commission's motives for the prohibitions as articulated in Rebecca Radio. It is also noteworthy that Congress did not prohibit the Commission from allowing more time for settlement replete with waivers of the white knight or limited payment rules. Congress even directed the Commission not to resort to competitive bidding without considering whether negotiated solutions or other tools could resolve the competing applications.[19/] This evidences Congress' preference for settlement, and thus there is every reason to believe that Congress would endorse an extended settlement period.

17/ 47 C.F.R. § 73.3525(a)(3) (1996).

18/ See, e.g., Comments of Grace Communications L.C. at 7-8; Comments of Marri Broadcasting, L.P. at 6-7 (noting also that continuing waiver of the restrictions would "break no new ground" in light of Commission precedent for cases pre-1990 and during a 90-day period in 1995).

19/ See Conference Report at 572, noting: "The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity."

particularly since finalization of the auction procedures and commencement of the auction process is not likely to happen imminently. Paxson also agrees that 120 days would be an appropriate length of time for an additional settlement period permitting white knight settlements.[20/]

B. Post-June 30 Pending Applications: Likewise, although Congress mandated waiver of the Commission's settlement regulations explicitly to facilitate resolution of competing applications filed prior to July 1, 1997, for reasons outlined above, Paxson believes that Congress would endorse white knight settlements among parties who filed their applications after June 30, 1997 and whose applications are now pending. Such applications were not filed with the expectation that the Commission's settlement rules and policies would be waived to permit white knight settlements or any other settlement entailing unlimited payments to the non-prevailing parties. Hence, there is little reason to fear that such applications are "sham" applications filed with the intent of gaining a profit rather than putting a new station into service. Nor would waivers in such instances encourage the filing of speculative applications in the future. Also, once again, the requirement for Commission review and approval of such settlements pursuant to section 311(c) would further guard against a sham applicant from being rewarded under a white knight settlement agreement.

C. Permanent Waiver Policy: At least one party who submitted initial comments in response to the NPRM went so far as to propose a permanent waiver of the white

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20/ See Comments of Grace Communications L.C. at 8.

knight prohibition.[21/] Paxson sees no reason why the Commission could not adopt a waiver policy for future applications, subject to case-by-case review. So long as Congress has not repealed section 311(c), the Commission would still review each white knight settlement to ensure that it is in the public interest and does not reward disingenuous applicants.

III. DTV and Technical Considerations

In reviewing and granting the various settlement agreements filed by competing applicants, the Commission is encouraged to fulfill the congressional policy of procuring settlement of these contested proceedings by liberally granting waivers of its technical/engineering rules. To the extent that rule waivers are necessary for the grant of these construction permits, Paxson urges the Commission to consider that the public interest will generally be served by such rule waivers. Congress has clearly indicated its desire for a speedy resolution of these contested proceedings with a view to having construction permits granted and stations constructed. In order to accomplish this objective of the initiation of new broadcast service, the Commission is urged, where necessary, to waive its technical and engineering requirements.

Such rule waivers may be extremely important as new television stations are sought to be constructed by utilizing existing towers that may not always satisfy the Commission's spacing rules or city grade coverage or requirements.

21/ See Comments of James G. Cavallo at 3.

Furthermore, the Commission is urged in approving television settlements and granting television construction permits to be sure that these new permittees are given a DTV allotment. Again, the Congressional mandate to the Commission to eliminate the backlog of mutually-exclusive applications and initiate new broadcast service can only be accomplished on a long-term basis by allocating DTV channels to these new television facilities. Without such an allotment, the award of these permits may simply be an illusory benefit to the public without any lasting benefit. The permittees who will be attempting to build the new television facilities pursuant to Commission-approved settlements deserve an opportunity to survive and prosper in the DTV world.

In sum, Paxson submits that congressional intent, public interest concerns, as well as fairness considerations not only favor but dictate waiver of the Commission's policy against white knight settlements at a minimum with respect to competing applications filed pre-July 1 and where the parties filed their settlement agreement with the Commission by January 30, 1998, whether or not all applicants agreed to the settlement. Paxson therefore urges the Commission to finalize its proposal to adopt this approach. Paxson also agrees with other commenters that the waiver should apply to a much broader set of mutually exclusive applications for new construction permits and licenses. Specifically, the waiver should encompass settlement agreements filed after January 30, 1998, including those involving post-June 30 applications now pending. This would be wholly consistent with Congress' endorsement of negotiated

settlements to resolve mutually exclusive applications for new broadcast service. Based on the comments submitted in response to the NPRM, there is ample support, and a dearth of opposition, for this broader reading of the settlement waiver provisions of the Balanced Budget Act.

Respectfully submitted,

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February 17, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply Comments of Paxson Communications Corporation on the Notice of Proposed Rulemaking" was sent via hand delivery on this 17th day of February, 1998, to the following:

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