each winning bidder in every broadcast service or ITFS auction shall make a down payment in an amount sufficient to bring its total deposits up to twenty (20) percent of its high bid(s), as set forth in 47 C.F.R. § 1.2107(b).

(c) Each winning bidder in every broadcast service or ITFS auction shall pay the balance of its winning bid(s) in a lump sum within ten (10) business days after release of a public notice announcing that the Commission is prepared to award the construction permit(s) or license(s), as set forth in 47 C.F.R. § 1.2109(a). If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due. Broadcast construction permits and ITFS licenses will be granted by the Commission following the receipt of full payment.

§ 73.5004 Bid withdrawal, default and disqualification.

(a) The Commission shall impose the bid withdrawal, default and disqualification payments set forth in 47 C.F.R. § 1.2104(g) upon bidders who withdraw high bids during the course, or after the close, of any broadcast service or ITFS auction, who default on payments due after an auction closes, or who are disqualified. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may also be subject to the remedies set forth in 47 C.F.R. § 1.2109(d).

(b) In the event of a default by or the disqualification of a winning bidder in any broadcast service or ITFS auction, the Commission will follow the procedures set forth in 47 C.F.R. § 1.2109(b)-(c) regarding the reauction of the construction permit(s) or license(s) at issue.

§ 73.5005 Filing of long-form applications.

(a) Within thirty (30) days following the close of bidding and notification to the winning bidders, each winning bidder must submit an appropriate long-form application (FCC Form 301, FCC Form 346, FCC Form 349 or FCC Form 330) for each construction permit or license for which it was the high bidder. Long-form applications filed by winning bidders shall include the exhibits required by 47 C.F.R. § 1.2107(d) (concerning any bidding consortia or joint bidding arrangements); § 1.2110(i) (concerning designated entity status, if applicable); and § 1.2112(a) & (b) (concerning disclosure of ownership and real party in interest information, and, if applicable, disclosure of gross revenue information for small business applicants).

(b) The long-form application should be submitted pursuant to the rules governing the service in which the applicant is a high bidder and according to the procedures for filing such applications set out by public notice. When electronic procedures become available for the submission of long-form applications, the Commission may require all winning bidders to file their long-form applications electronically.

(c) An applicant that fails to submit the required long-form application under this section, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and shall be subject to the payments set forth in 47 C.F.R. § 1.2104(g).

(d) An applicant whose short-form application, submitted pursuant to 47 C.F.R. §73.5002(b), was not mutually exclusive with any other short-form application in the same service and was therefore not subject to auction, shall submit an appropriate long-form application within thirty (30) days following release of a public notice identifying any such non-mutually exclusive applicants. The long-form application should be submitted pursuant to the rules governing the relevant service and according to any procedures for filing such applications set out by public notice. The long-form application filed by a non-mutually exclusive applicant need not contain the additional exhibits, identified in § 73.5005(a), required to be submitted with the long-form applications filed by winning bidders. When electronic procedures become available, the Commission may require any non-mutually exclusive applicants to file their long-form applications electronically.

§ 73.5006 Filing of petitions to deny against long-form applications.

(a) As set forth in 47 C.F.R. § 1.2108, petitions to deny may be filed against the long-form applications filed by winning bidders in broadcast service or ITFS auctions and against the long-form applications filed by applicants whose short-form applications to participate in a broadcast or ITFS auction were not mutually exclusive with any other applicant.

(b) Within ten (10) days following the issuance of a public notice announcing that a long-form application has been accepted for filing, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The time for filing such oppositions shall be five (5) days from the filing date for petitions to deny, and the time for filing replies shall be five (5) days from the filing date for oppositions.

(d) If the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, a public notice will be issued announcing that the broadcast construction permit(s) or ITFS license(s) is ready to be granted, upon full payment of the balance of the winning bid(s). *See* 47 C.F.R. § 73.5003(c). Construction of broadcast stations or ITFS facilities shall not commence until the grant of such permit or license to the winning bidder.

§ 73.5007 Designated entity provisions.

(a) *New entrant bidding credit.* A winning bidder that qualifies as a "new entrant" may use a bidding credit to lower the cost of its winning bid on any broadcast construction permit. A thirty-five (35) percent bidding credit will be given to a winning bidder if it and/or its owners have no recognizable interest (more than fifty (50) percent or *de facto* control) in the aggregate, in any other media of mass communications. A twenty-five (25) percent bidding credit will be given to a winning bidder if it and/or its owners, in the aggregate, have a recognizable interest in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities serves the same area as the proposed broadcast station, or if the winning bidder and/or its owners have recognizable interests in more than three mass media facilities.

(1) The new entrant bidding credit is not available to applicants that control, or whose owners control, in the aggregate, more than fifty (50) percent of any other media of mass communications in the same area as the proposed broadcast facility. The facilities will be considered in the "same area" if the following defined areas wholly encompass, or are encompassed by, the proposed broadcast or secondary broadcast facility's relevant contour:

(i) AM broadcast station--predicted or measured 2mV/m groundwave contour (*see* 47 C.F.R. §§ 73.183 or 73.186);

(ii) FM broadcast or FM translator station--predicted 1.0 mV/m contour (*see* 47 C.F.R. § 73.313);

(iii) Television broadcast station--Grade A contour (*see* 47 C.F.R. § 73.684);

(iv) Low power television or television translator station--the predicted, protected contour (*see* 47 C.F.R. § 74.707(a));

(v) Cable television system--the franchised community of a cable system;

(vi) Daily newspaper--community of publication; and

(vii) Multipoint Distribution Service station--protected service area (*see* 47 C.F.R. §§ 21.902(d) or 21.933).

(2) *Unjust enrichment.* If a licensee or permittee that utilizes a new entrant bidding credit under this subsection seeks to assign or transfer control of its license or construction permit to an entity not meeting the eligibility criteria for the bidding credit, the licensee or permittee must reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was originally granted, as a condition of Commission approval of the assignment or transfer. If a licensee or permittee that utilizes a new entrant bidding credit seeks to assign or transfer control of a license or construction permit to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was originally granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. The amount of the reimbursement payments will be reduced over time. An assignment or transfer in the first two years after issuance of the construction permit to the winning bidder will result in a forfeiture of one hundred (100) percent of the value of the bidding credit; during year three, of seventy-five (75) percent of the value of the bidding credit; in year four, of fifty (50) percent; in year five, twenty-five (25) percent; and thereafter, no payment. If a licensee or permittee who utilized a new entrant bidding credit in obtaining a broadcast license or construction permit acquires within this five-year reimbursement period an additional broadcast facility or facilities, such that the licensee or permittee would not have been eligible for the new entrant credit, the licensee or permittee will not be required to reimburse the U.S. Government for the amount of the bidding credit.

§ 73.5008 Definitions applicable for designated entity provisions.

(a) *Scope.* The definitions in this section apply to 47 C.F.R. § 73.5007, unless otherwise specified in that section.

(b) A *medium of mass communications* means a daily newspaper; a cable television system; or a license or construction permit for a television station, a low power television or television translator station, an AM, FM or FM translator broadcast station, a direct broadcast satellite transponder, or a Multipoint

Distribution Service station.

(c) The *owners* of a winning bidder shall include the winning bidder, in the case of a sole proprietor; partner, including limited or "silent" partners, in the case of a partnership; the beneficiaries, in the case of a trust; any member, in the case of a nonstock corporation or unincorporated association with members; any member of the governing board (including executive boards, boards of regents, commissions, or similar governmental bodies where each member has one vote), in the case of nonstock corporation or unincorporated association without members; and owners of voting shares, in the case of stock corporations.

§ 73.5009 Assignment or transfer of control.

(a) The reporting requirement contained in 47 C.F.R. § 1.2111(a) shall apply to an applicant seeking approval for a transfer of control or assignment of a broadcast construction permit or license within three years of receiving such permit or license by means of competitive bidding.

(b) The ownership disclosure requirements contained in 47 C.F.R. § 1.2112(a) shall apply to an applicant seeking consent to assign or transfer control of a broadcast construction permit or license awarded by competitive bidding.

IV. **Part 74 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:**

Subpart I - Instructional Television Fixed Service

Section 74. 910 is amended as follows:

§ 74.910 Part 73 application requirements pertaining to ITFS stations.

* * * * *

73.3522(a) Amendment of Applications
Subpart I, "Competitive Bidding Procedures" (Secs. 73.5000 - 73.5006).

Section 74.911 is amended as follows:

§ 74.911 Processing of ITFS station applications.

* * * * *

(c)(1) (i) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing ITFS applications for a new station or for major modifications in the facilities of an authorized station. (ii)

Such ITFS applicants shall be subject to the provisions of §§ 1.2105 and the ITFS competitive bidding procedures. See 47 C.F.R. §§ 73.5000 et seq.

* * * * *

(d) [Removed]

§ 74.912 [Removed]

§ 74.913 [Removed]

Section 74.1233 is amended to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

(a) Applications for FM translator and booster stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. In the case of FM translator stations, a major change is any change in frequency (output channel), or change (only the gain should be included in determining amount of change) or increase (but not decrease) in area to be served greater than ten percent of the previously authorized 1 mV/m contour. All other changes will be considered minor. All major changes are subject to the provisions of §§ 73.3580 and 1.1104 of this chapter pertaining to major changes.

(2) In the second group are applications for licenses and all other changes in the facilities of the authorized station.

(b) Applications for booster stations and reserved-band FM translator stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing reserved-band applications that have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and/or petitions to deny the listed applications must be filed.

(c) In the case of an application for an instrument of authorization, other than a license pursuant to a construction permit, grant will be based on the application, the pleadings filed, and such other matters that may be officially noticed. Before a grant can be made it must be determined that:

(1) There is not pending a mutually exclusive application filed in accordance with paragraph (b) of this section.

(2) The applicant is legally, technically, financially and otherwise qualified;

(3) The applicant is not in violation of any provisions of law, the FCC rules, or established policies

of the FCC; and

(4) A grant of the application would otherwise serve the public interest, convenience and necessity.

(d) Processing non-reserved band FM translator applications.

(1) Applications for minor modifications for non-reserved FM translator stations, as defined in (a)(2) of this paragraph, may be filed at any time, unless restricted by the FCC, and, generally, will be processed in the order in which they are tendered. The FCC will periodically release a Public Notice listing those applications accepted for filing. All minor modification applications found to be mutually exclusive, must be resolved through settlement or technical amendment.

(2)(i) The FCC will specify by Public Notice, pursuant to § 73.5002(a), a period for filing non-reserved band FM translator applications for a new station or for major modifications in the facilities of an authorized station. FM translator applications for new facilities or for major modifications will be accepted only during these specified periods. Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely. (ii) Such FM translator applicants will be subject to the provisions of §§ 1.2105 and 73.5002(a) regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. To determine which FM translator applications are mutually exclusive, FM translator applicants must submit the engineering data contained in FCC Form 349 as a supplement to the short-form application. Such engineering data will not be studied for technical acceptability, but will be protected from subsequently filed applications as of the close of the window filing period. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction. (iii) FM translator applicants will be subject to the provisions of § 1.2105 regarding the modification and dismissal of their short-form applications. (iv) Consistent with § 1.2105(a), beginning January 1, 1999, all short-form applications must be filed electronically.

(3) Subsequently, the FCC will release Public Notices: (i) identifying the short-form applications received during the appropriate filing period or "window" which are found to be mutually exclusive; (ii) establishing a date, time and place for an auction; (iii) providing information regarding the methodology of competitive bidding to be used in the upcoming auction, bid submission and payment procedures, upfront payment procedures, upfront payment deadlines, minimum opening bid requirements and applicable reserve prices in accordance with the provisions of § 73.5002; (iv) identifying applicants who have submitted timely upfront payments and, thus, are qualified to bid in the auction.

(4) If, during the window filing period, the FCC receives non-mutually exclusive applications for a non-reserved FM translator station, a Public Notice will be released identifying the non-mutually exclusive applicants, who will be required to submit the appropriate long form application within 30 days of the Public Notice and pursuant to the provisions of § 73.5005. These non-mutually exclusive applications will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584 of this chapter. If the applicants are duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the non-mutually exclusive long-form application, the same will be granted.

(5)(i) The auction will be held pursuant to the procedures set forth in § 1.2101. Subsequent to the auction, the FCC will release a Public Notice announcing the close of the auction and identifying the winning bidders. Winning bidders will be subject to the provisions of § 1.2107 regarding down payments and will be required to submit the appropriate down payment within 10 business days of the Public Notice. Pursuant to § 1.2107, a winning bidder that meets its down payment obligations in a timely manner must, within 30 days of the release of the public notice announcing the close of the auction, submit the appropriate long-form application for each construction permit for which it was the winning bidder. Long form applications filed by winning bidders shall include the exhibits identified in § 73.5005.

(ii) These applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of § 73.3584 of this chapter. If the applicants are duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the winning bidder's long form application, a Public Notice will be issued announcing that the construction permit is ready to be granted. Each winning bidder shall pay the balance of its winning bid in a lump sum within 10 business days after release of the Public Notice, as set forth in § 1.2109(a). Construction permits will be granted by the Commission following the receipt of the full payment. (iii) All long-form applications will be cut-off as of the date of filing with the FCC and will be protected from subsequently filed long-form translator applications. Applications will be required to protect all previously filed applications. Winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications, but such change may not constitute a major change. If the submitted long-form application would constitute a major change from the proposal submitted in the short-form application or the allotment, the long-form application will be returned pursuant to paragraph (d)(2)(i) of this section.

(e) Selection of mutually exclusive reserved band FM translator applications.

(1) Applications for FM translator stations proposing to provide fill-in service (within the primary station's protected contour) of the commonly owned primary station will be given priority over all other applications.

(2) Where applications for FM translator stations are mutually exclusive and do not involve a proposal to provide fill-in service of a commonly owned primary stations, the FCC may stipulate different frequencies as necessary for the applicants.

(3) Where there are no available frequencies to substitute for a mutually exclusive application, the FCC will base its decision on the following priorities: (i) First-full-time aural services; (ii) second full-time aural services; and (iii) other public interest matters including, but not limited to the number of aural services received in the proposed service area, the need for or lack of public radio service, and other matters such as the relative size of the proposed communities and the growth rate.

(4) Where the procedures in paragraph (1), (2) and (3) of section (f) fail to resolve the mutual exclusivity, the applications will be processed on a first-come-first-served basis.

STATEMENT OF CHAIRMAN WILLIAM E. KENNARD REGARDING REQUEST FOR RECUSAL

I write separately to respond to the request of Willsyr Communications that, due to congressional influence, I should recuse myself from participating in this rulemaking proceeding with respect to the adoption of any rules that would govern the resolution of the application of Orion Communications for a license for a new FM station in Biltmore Forest, North Carolina. In support of its recusal request, Willsyr attaches excerpts from the Congressional Record and newspaper clippings purportedly showing that Senator Helms placed a hold on my nomination as chairman in order to secure assurances regarding the disposition of Orion Broadcasting's application for a new FM radio station in Biltmore Forest, North Carolina. Based upon a careful review of the facts and the law governing recusals by administrative officials, I decline to recuse myself from this rulemaking proceeding.

The courts have made clear that in an administrative adjudication "the appearance of bias or pressure may be no less objectionable than reality." *ATX, Inc. v. United States Department of Transportation*, 41 F.3d 1522, 1527 (D.C. Cir. 1994), *citing District of Columbia Fed. of Civic Assns. v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir. 1972)[1] Guided by these principles and out of an abundance of caution, I recused myself from participating in the adjudicatory proceeding involving the radio license for Biltmore Forest as soon as it became clear that the proceeding might become an issue in the confirmation process.[2] I did so because I was acutely aware of the need to avoid even the appearance of any bias, which is critical to safeguarding the integrity of the FCC processes.

Willsyr argues that, having recused myself from the adjudicatory licensing proceeding, I must also recuse myself from participating in the rulemaking with respect to the adoption of any rules that would govern the resolution of the licensing proceeding. However, a request for recusal by an administrative official from a rulemaking proceeding is subject to a far higher evidentiary showing than a similar request in an adjudicatory proceeding. Recusal from a non-judicial proceeding -- such as the rulemaking to implement the Commission's newly expanded auction authority -- is appropriate only where there is clear and convincing evidence of an unalterably closed mind on an issue that is critical to the disposition of the proceeding.[3] Further, congressional influence in a rulemaking is improper only to the extent that it causes the agency to deviate from the substantive law.[4] Finally, the appearance of bias in the non-adjudicatory context may be cured by the development of "a full-scale administrative record which might dispel any doubts about the true nature of [the agency's] action." *ATX*, 41 F.3d at 1528, *citing Volpe*, 459 F.2d at 1249.

---

[1] *See also Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1990) (speech by FTC Chairman addressing the merits of a pending adjudicatory case warrants his recusal from proceeding); *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir.1966) (in the context of a pending formal adjudication to be decided on the basis of an on-the-record hearing, congressional pressure focusing on the mental, decision-making processes of an administrative agency taints the proceeding).

[2] *See* Letter, dated July 15, 1997, from William E. Kennard, General Counsel, Federal Communications Commission, to Mark Langer, Clerk of the Court, United States Court of Appeals for the District of Columbia (withdrawing my notice of appearance in *Orion Communications Ltd. v. FCC* (Case No. 96-1430) and notifying the court of my recusal from further participation in that proceeding).

[3] *See C & W Fish Company v. Fox*, 931 F.2d 1556, 1564 (D.C. Cir. 1991) (pre-appointment statements of administrator endorsing particular standard were insufficient to show bias).

[4] *See, e.g., Chemung County v. Dole*, 804 F.2d 216, 222 (2d Cir. 1986) (holding that the test is whether political pressure was intended to and did influence the agency to act for irrelevant reasons); *District of Columbia Fed. of Civic Assns. v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1972) (administrative decision must be strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes).

Willsyr points to no specific statements that even suggest, let alone provide clear and convincing evidence, that I have an unalterably closed mind on any issue in this rulemaking proceeding. During the confirmation process, in written responses to questions, I acknowledged that "the *Bechtel* decision has caused unfairness to many applicants who have had further processing of their applications delayed and, as a result of that court decision, will necessarily have their applications processed under new procedures."[5] Consistent with that response and my responsibility regarding the implementation of the Commission's newly authorized auction authority under the Balanced Budget Act in a fair and impartial manner, I also indicated that "[t]he Commission certainly may consider as part of th[e] rulemaking proceeding any arguments that particular classes of pending applicants should be treated differently."[6] However, inclusion of that issue was largely dictated by statutory language unambiguously according the agency discretion to resolve such cases by auctions or comparative hearings. Therefore, my willingness to support inclusion in the Notice of Proposed Rulemaking in this proceeding of a request for comment on whether there were equitable circumstances warranting the use of comparative hearings in certain types of cases is certainly not evidence that I have a closed mind on any issue in the rulemaking.

Nor did I agree to support the adoption of rules, or take any other action, that would be favorable to a particular applicant in exchange for Senator Helms's agreement to support my nomination to be Chairman of the Commission. Senator Helms's remarks in support of my confirmation, published in the *Congressional Record* and quoted in a variety of press reports, do not reflect otherwise. Senator Helms stated:

> I have been given assurances satisfactory to me by Mr. Kennard that he will, within statute and regulation, work in good faith with me and others to resolve the problems the Bechtel decision caused.
>
> I was very impressed when Mr. Kennard came to my office and met with me about 3 weeks ago. I appreciate his voluntary assurance that he will work with us on the Zeb Lee case.[7]

Senator Helms further explained this matter in a letter to the Senate Select Committee on Ethics. Specifically, the November 20, 1997 letter states:

> After his recusal from the WZLS matter, and before his confirmation, I met with Mr. Kennard to discuss, among other things, the difficulties of implementing the Bechtel decision. I appreciated Mr. Kennard's candor; and on the Senate floor I announced that I would vote for his confirmation, stating "I have been given assurances satisfactory to me by Mr. Kennard that he will, *within statute and regulation,* work in good faith with me and others to resolve the problems associated with the Bechtel decision." . . . At no time, either publicly or in my private conversations with Mr. Kennard, did I state that my support for his nomination depended on the outcome of any specific adjudication. Instead, I sought clarification and acknowledgment of the public policy issues raised by implementation of the Bechtel decision, a matter of great importance to not only one of

---

[5]Congressional Record, S11309 (Oct. 29, 1997) (Exhibit 1).

[6] *Id.*

[7]*Congressional Record* at S11309 (October 29, 1997).

my constituents, but to all those similarly situated.[8]

As Senator Helms's remarks and my written answers to the committee reflect, my concerns regarding the unfairness resulting from the *Bechtel* decision pertained not to a particular applicant in a pending case, but to the general policies surrounding applicants that were caught in the comparative freeze. As the Commission's General Counsel, I headed the office that was chiefly responsible for making recommendations to the Commission regarding these hearing cases, and I was well acquainted with the issues that arose from the *Bechtel* decision. It was these policy concerns, in light of the explicit discretion in the statute regarding the use of auctions or hearings in certain pending cases, that led me to support the inclusion of a request for comments on whether equitable considerations militated against the use of auctions in all of these cases. Of course, even without a specific request focusing on this issue, commenters would have had an opportunity to argue that equitable considerations warranted different treatment for certain classes of pending applicants.

Finally, scattered, purely speculative newspaper articles reporting the circumstances surrounding my confirmatiion and the initial opposition but ultimate support of my nomination by Senator Helms, are not a basis for requiring my recusal from this rulemaking proceeding. None of the press reports quote me directly and only quote material from Senator Helms published in the Congressional Record. Nevertheless, various articles and editorials surmise that, because Senator Helms expressed some concern regarding the plight of Orion in connection with my nomination, his ultimate support of that nomination must have been the result of my agreement to assist Orion not only in the adjudicatory proceeding but through the adoption of rules that would somehow favor Orion. However, none of these articles corroborate the existence of such an agreement, reflect my prejudgment of any issue in MM Docket No. 97-234, et al. (or in the related Biltmore Forest case from which I am recused), or otherwise provide any evidence supporting the request that I recuse myself from participating in any aspect of this rulemaking proceeding.

Suffice it to say that Senator Helms received no assurance from me regarding the outcome of the adjudicatory proceeding involving Biltmore Forest or the adoption of any rules to govern the resolution of that proceeding. To safeguard the integrity of the adjudicatory proceeding and to avoid the appearance of any impropriety regarding any decision ultimately reached in that proceeding, I recused myself from that proceeding. Having done so, I see no reason also to recuse myself from any aspect of this rulemaking proceeding. On the discrete issues raised in the rulemaking proceeding, I have participated in every aspect of this First Report and Order. As is my practice, I approached every issue decided herein with an open mind and I have relied solely on the record compiled in this proceeding.

---

[8]Letter, dated November 20, 1997, from Jesse Helms to Bob Smith, Chairman, and Harry Reid, Vice Chairman, Senate Select Committee on Ethics (emphasis in the original).

STATEMENT OF COMMISSIONERS HAROLD FURCHTGOTT-ROTH AND GLORIA TRISTANI, DISSENTING IN PART

In the Matter of Implementation of Section 309(j) of the Communications Act -- MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264

We would not have sought additional comment on the question whether section 309(j)(2)(C) precludes us from using competitive bidding to award a broadcast license to a noncommercial educational broadcast or public broadcast station to operate on a commercial channel. We believe that Congress' mandate is clear: the Commission lacks authority to employ auctions to issue licenses to such stations, regardless of whether they operate on a reserved or on a commercial frequency. Since the statute is clear on its face, we are bound to give it effect. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

The express exemption to our competitive bidding authority in section 309(j)(2)(C) provides that such authority "shall not apply to licenses or construction permits issued by the Commission . . . for stations described in section 397(6) of this title." Section 397(6), in turn, defines the terms "noncommercial educational broadcast station" and "public broadcast station" as "a television or radio broadcast station which . . . under the rules and regulations of the Commission . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association" or "is owned and operated by a municipality and which transmits only noncommercial programs for education purposes."

Nothing in section 309(j)(2)(C) limits the inapplicability of our auction authority to licenses issued for noncommercial and public broadcast stations *on reserved channels*. The statute makes no distinction between licensees granted to section 397(6) stations to operate on reserved spectrum and licensees granted to such entities to operate on unreserved spectrum; the prohibition on the licensing of these stations pursuant to auctions is, in this regard, unqualified. The statute makes plain that the Commission simply has no competitive bidding authority when it comes to licenses issued for stations described in section 397(6).

Similarly, nothing in section 397(6) limits the definition of noncommercial educational and public broadcast stations to those operating on reserved channels. Rather, section 397(6) defines the stations exempt from auctions under section 309(j)(2)(C) in terms of the station's *eligibility* under Commission rules to be licensed as a noncommercial educational or public broadcast station. And Commission rules do not require broadcast stations to operate only on reserved bands in order to be eligible for status as a noncommercial educational or public broadcast station. *See* 47 C.F.R. § 73.503. To the contrary, our rules specifically address the situation in which noncommercial educational stations operate on unreserved channels. *See* 47 C.F.R. § 73.513.

Had Congress intended to limit the exemption for noncommercial educational and public broadcasters from competitive bidding to cases in which such broadcasters were applying for reserved frequencies, presumably Congress would have done so explicitly. Indeed, prior versions of both the House and Senate bills expressly provided for an auction exemption limited to "channels reserved for noncommercial use," but those limitations were eliminated prior to passage. *See* H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1); S. 947, 105th Cong., 1st Sess., § 3001(a)(1). Where Congress deletes limiting language from a bill prior to enactment, it may be presumed that the limitation was not intended. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983). We would not read this limitation back into the statute.

We fully agree with the majority, however, that it is not clear how the exemption from our

auction authority contained in section 309(j)(2)(C) should be implemented. The practical question of how to establish a process for awarding licenses to noncommercial educational and public broadcast stations without running afoul of section 309(j)(2)(C) is, admittedly, a difficult one. We also agree that there is a range of options for how the Commission could award broadcast licenses to stations described in section 397(6). But to the extent that the majority fails to exclude the possibility that noncommercial educational and public broadcast stations seeking commercial frequencies will be forced to obtain their licenses through auctions, we respectfully dissent.