DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 13 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 Licensees	)	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

PETITION FOR RECONSIDERATION

Dewey Matthew Runnels (hereafter "Runnels"), by his attorneys, and pursuant to Section 405 of the Communications Act of 1934, as amended, 47 C.F.R. § 405 and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby requests the Commission to reconsider its First Report and Order, FCC 98-194, released August 18, 1998, in the above referenced rule making proceeding, and upon such reconsideration, to amend Sections 73.3525(l) and 73.5002(d) of its rules to provide for the settlement of pending and future mutually exclusive broadcast auction cases for a discrete period (e.g., ninety days) subsequent to the filing of short-form

No. of Copies rec'd 0+9
List ABCDE

applications (FCC Form 175). In support thereof, Runnels respectfully states as follows:

1. By First Report and Order, supra, the Commission adopted comprehensive rules, pursuant to Section 309(j) of the Communications Act, to provide for competitive bidding for inter alia commercial broadcast licenses, excluding digital television licenses. Runnels filed Comments (Ibid., Appendix A thereto) and is in general agreement with the Commission's decision save in one material respect.

2. The Commission will afford mutually exclusive applicants in pending cases the opportunity to conclude partial or universal settlements by merger or reimbursement of out-of-pocket expenses until the deadline for the filing of short-form (Form 175) applications. The Commission will not, however, permit the settlement of pending and future mutually exclusive cases after the short-form filing deadline. (Ibid., Para. 156). In Runnels's view, both Section 309(j) of the Act and the public interest require that the Commission afford mutually exclusive broadcast applicants a reasonable opportunity to settle their differences after the short-form filing deadline.

3. In its Report, the Commission observed that it "sought comment on whether applicants for broadcast auctions should be subject to the Commission's anti-collusion rule, which provides

that, after the short-form filing deadline, applicants generally may not discuss the substance of their bids or bidding strategies with other applicants that have applied to bid on the same licenses or permits" (Ibid., Para. 155).

4. The Commission acknowledged that a number of commenters opposed the imposition of the anti-collusion rule "believing instead that auction applicants should be permitted to conclude settlement agreements following the short-form filing deadline with those applicants with whom they are mutually exclusive" (Ibid.). The Commission disagreed concluding that its "anti-collusion rule is necessary to deter bidders from engaging in anti-competitive behavior", that the "rule has proven effective in the 16 spectrum auctions conducted to date" and that "it should apply in the broadcast context as well" (Ibid.).

5. In particular, the Commission directed that after "short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders that have applied to bid in the same geographic license area, unless such bidders are members of a bidding consortia or other joint bidding arrangement identified on the bidder's short-form application" (Ibid., Para. 156).

6. The Commission also "will not permit applicants to modify or amend their technical or engineering data submitted with their short-form applications following the short-form filing deadline so as to eliminate mutually exclusivity" except in cases involving competing major modification applicants (Ibid.). Finally, winning bidders in broadcast service auctions must detail in their long-form applications the "terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process" which arrangements must have been finalized prior to the filing of their short-form applications (Ibid., Para. 157).

7. Section 309(j) (Use of Competitive Bidding) provides in subsection (6) (Rules of Construction) thereof:

> Nothing in this subsection, or in the use of competitive bidding, shall --
>
> * * *
>
> (E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings ... (emphasis supplied).

Heretofore the Commission has, consistent with Section 311(c) of

the Act, encouraged the settlement of mutually exclusive broadcast application and licensing proceedings. Indeed, the cases are legion that such settlements serve the public's interest by providing for inter alia the conservation of Commission resources and the earlier inauguration of new broadcast service. KOOS, Inc., 18 RR 239 (1959); Dismissal of Applications by Agreement, 20 RR 1669 (1961); Shorewood Broadcasting Corp., 22 RR 90 (1961); and Rem Malloy Broadcasting, 11 FCC Rcd 4064, 2 C.R. 1307 (1994).

8. The public interest standard aside, Section 309(j)(6)(E) expressly requires the Commission to use "other means" to avoid mutual exclusivity in application and licensing proceedings. It is indisputable that settlements are in fact other means, in addition to engineering solutions, negotiation, threshold qualifications and service regulations, for avoiding mutual exclusivity. The failure to provide for such settlement opportunities cannot be reconciled with the plain meaning of Section 309(j)(6)(E) of the Act, and is arbitrary, capricious and an abuse of administrative discretion.

9. The legislative history on the 1997 Budget Act amendments to Section 309(j), enacted August 5, 1997, specifically admonish the Commission not to overlook "other tools that avoid mutual exclusivity" in the administration of its auction authority in broadcast licensing cases. Vol. 143 Congressional Record H6173-6176 (July 29, 1997). In particular, the Conference Report

concerning the extension and expansion of the Commission's auction authority pointedly stated (Ibid., at H6173):

> [T]he conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). 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.

10. The Congress was, of course, fully aware of the critical importance which settlements have historically played in the resolution of mutually exclusive broadcast cases. Indeed, with respect to mutually exclusive applications filed prior to July 1, 1997, Congress expressly provided in Section 309(l)(3) of the Act, that the Commission shall waive its rules to permit competing applicants to procure the removal of conflicts between their applications during the 180 day period following enactment. In sum, there can be absolutely no question but that Congress both intended and expressly provided that the Commission is obliged in the public interest to continue to use settlements to avoid mutual exclusivity in broadcast auction proceedings.

11. Elsewhere in its Report (Par. 74), the Commission has

acceded that it is obliged by Section 309(j)(6)(E) to use "appropriate means" to avoid mutual exclusivity in application and licensing proceedings and that indeed such continuing obligations were "specifically highlighted" (as quoted above) in the Conference Report. The Commission, therefore, has authorized mutually exclusive applicants in pending cases to settle their differences until their short-form applications are due (Ibid., Para. 77). The failure to extend such settlement opportunities to future applicants which become mutually exclusive only upon the filing of their short-form applications cannot be reconciled with the Commission's treatment of pending cases.

12. Runnels would acknowledge that the Commission considers its anti-collusion rules to play a crucial role in the implementation of its auction authority (Report, Para. 155). When adopting rules prohibiting collusion, the Commission acknowledged, however, that "the statute does not require special rules to prohibit collusion" and that "in most cases the number of bidders and the auction design method [the Commission selects] will effectively deter collusion ..." Second Report and Order Implementing Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 2348, 2387 (1994). Placed in this context, there is scant justification for the implementation of a Commission policy (the anti-collusion rule) in a manner that

effectively overrides Congressional will clearly expressed in legislative history. There is, of course, no justification whatever for implementing the anti-collusion rule in a manner which violates the express statutory requirement that the Commission use "other means" in addition to engineering solutions and negotiations to avoid mutual exclusivity.

13. Runnels would urge too that settlement discussions among mutually exclusive applicants need not implicate prohibited discussions under the anti-collusion rule. Thus, the Commission could provide that during settlement negotiations, bidders would be prohibited from discussing or disclosing in any manner the substance of their prospective bids or bidding strategies with other mutually exclusive bidders.

14. Significantly, the Commission has acknowledged that "the anti-collusion rule does not prohibit non-auction related business negotiations between auction applicants that have applied for the same geographic service areas" (Report, Para. 159). The Commission cautioned auction applicants, however, that such discussions "may convey pricing information and bidding strategies" and that "applicants should [thus] avoid all discussions with each other that will likely affect bids or bidding strategies...." (Ibid.). Finally, the Commission has admonished that it "will aggressively investigate any allegations that an auction participant has

violated" the anti-collusion rule and that if such violations are found, the violators may "among other sanctions, have their applications denied, be subject to forfeitures, be subject to the loss of their down payments or their full bid amounts, or face the cancellation of their licenses" (Report, at Para. 160). These admonitions and prospective sanctions are more than sufficient to ensure that bidders will act at their peril in ignoring the dictates of the anti-collusion rule.

15. In sum, Runnels would respectfully urge that (1) Section 309(j)(6)(E) requires the Commission to afford a reasonable opportunity for mutually exclusive applicants to conclude a settlement, (2) such a settlement opportunity is in furtherance of Congressional will and the public interest, and (3) such settlement opportunity need not lead to collusion and other anti-competitive behavior. Runnels, therefore, would urge the Commission to amend Sections 73.3525(1) and 73.5002(d) of its Rules to authorize the settlement of mutually exclusive cases for a discrete period (e.g., ninety days) after the filing of short-form applications in pending[1]/ and future broadcast auction cases.

---

[1]/ Pending applicants will not know to a certainty who all their competitors will be until after the short-form filing deadline. That is, some pending applicants may elect not to participate in the auctions and seek instead the reimbursement of their filing fees. These drop-outs may facilitate a settlement which in turn would conserve Commission resources and facilitate the earlier inauguration of new broadcast service.

WHEREFORE, Runnels requests the Commission to grant this Petition.

Respectfully submitted,

DEWEY MATTHEW RUNNELS

By: James K. Edmundson

James K. Edmundson
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., #510
Washington, D.C. 20036
(202) 78502800
Its Attorneys

October 13, 1998

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary in the law office of Smithwick & Belendiuk, P.C. do hereby certify that a copy of the foregoing "Petition for Reconsideration" was, this 13th day of October, 1998, hand delivered to the following:

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Michael K. Powell
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Mr. Roy Stewart
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, D.C. 20554

Ms. Lisa Scanlan
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 332
Washington, D.C. 20554

Ms. Jerianne Timmerman
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 702
Washington, D.C. 20554

John Riffer, Esquire
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 610
Washington, D.C. 20554

Lee Martin, Esquire
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 610
Washington, D.C. 20554

Sherry L. Schunemann

Sherry L. Schunemann