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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) 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 Hearings Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

To: The Commission

REQUEST FOR CLARIFICATION

Latin Communications Group Television, Inc. ("LCG") hereby requests clarification of the Commission's statement in the *First Report and Order* in the above-captioned proceeding that it "reserves" the right to subject competing low power television ("LPTV") displacement applications filed June 1, 1998 to competitive bidding.[1/] *First Report and Order*, FCC 98-194, at ¶178 (released August 18, 1998). It is not clear from the *First Report and Order* what criteria or procedures the Commission intends to use to decide between such competing applicants prior to subjecting them to competitive bidding. This Request deals only with applicability of competitive bidding to LPTV displacement applications filed on June 1, 1998.

1/ To the extent that this request is deemed to be a petition for reconsideration, it is timely filed pursuant to Section 1.429(d) of the FCC's Rules, because it is being filed no more than 30 days after publication of the *First Report and Order* in the Federal Register on September 11, 1998.

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I. The FCC Has Left Unclear How It Intends to Decide Between Competing LPTV Displacement Applications Filed on June 1, 1998.

As a result of the reallocation of spectrum currently used for television broadcast channels 60-69, all LPTV and television translator stations operating on Channels 60-69 are being displaced. Many, but not all, LPTV and translator stations operating below Channel 60 are also being displaced by the allocation of DTV channels to full-power television stations.

Recognizing the valuable public service that many LPTV and television translator stations provide to the public, the Commission decided to permit displaced licensees to apply for replacement channels, and it established June 1, 1998, as the first day that displaced licensees generally could file such applications.[2/] On June 1, 1998, the Commission received over 1,000 applications from displaced LPTV and television translator licensees seeking replacement channels. *First Report and Order* at ¶ 178. Many, but by no means all, of these applications were mutually exclusive.[3/]

Under the Commission's rules generally, an LPTV "displacement" application is treated as a minor change application. *See* 47 C.F.R. § 73.3572(a)(2); *DTV Reconsideration Order* at

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2/ *See* 47 C.F.R. § 73 .3572(a)(2); *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service*, 11 CR 634 at ¶ 115 (released February 23, 1998) *("DTV Reconsideration Order")*; *Public Notice, Commission Postpones Initial Date for Filing TV Translator and Low-Power TV Applications for Displacement Channels, Mimeo No. 82914* (released April 16, 1998).

3/ *See Public Notice, Low Power Television and Television Translators: Mutually Exclusive Displacement Applications*, Report No. MX98-1 (released September 2, 1998) ("*MXed Displacement Public Notice*"). The *MXed Displacement Public Notice* listed 280 applications in 110 different mutually exclusive subsets. The mutually exclusive applicants include two applications filed by LCG, one for a replacement channel for LPTV station WVEA-LP, Tampa, Florida, which operates on Channel 61, and the other for WVEN-LP, Orlando, Florida, which operates on Channel 63.

¶ 115. In the *First Report and Order*, the Commission concluded that competing minor change applications would generally not be subject to the auction procedures. *First Report and Order* at ¶ 19. Instead, the Commission said that it would "encourage parties 'to use engineering solutions, negotiation . . . and other means' to resolve any mutual exclusivities." *Id.* (citing 47 U.S.C. § 309(j)(6)(E)) (alteration in original).

In the *First Report and Order*, however, the Commission carved out an exception for displacement applications filed on June 1, 1998. Apparently in reaction to the large number of LPTV and television translator displacement applications received on June 1, 1998, the first day for the filing of such applications, the Commission "reserved" the right to subject such competing displacement applications to competitive bidding if the applicants are unable to resolve their mutual exclusivities. *Id.* at ¶ 178.

It is not clear from this statement how the Commission intends to resolve competing June 1, 1998 displacement applications. LCG therefore seeks clarification of the procedures that the Commission intends to follow. In this regard, LCG offers the following suggestions.

II. There Are Several Relatively Easy-to-Apply Priorities That The FCC Can Use to Decide Between Competing Displacement Applications Prior to Subjecting Them to Competitive Bidding.

In reserving the right to use competitive bidding to decide between competing displacement relief applicants, the Commission stated that there is no efficient alternative by which to select one applicant over another. *First Report and Order* at n.206. This premise is flawed, as there are several uncomplicated, efficient and equitable methods by which the Commission may resolve mutual exclusivities.

A. Operating LPTV Stations Should Have Priority Over Stations That Have Never Operated.

It appears that some competing displaced applicants are not in fact operating licensees, but merely hold construction permits for unbuilt stations. Granting applications for such stations over those of operating stations would contravene the spirit of displacement relief. The Commission has stated that such relief is being provided "[b]ecause of the importance of preserving, to the extent possible, the existing LPTV programming service for its viewers . . . so that low power stations can continue to operate . . . ." *DTV Reconsideration Order* at ¶ 115. By their very definition, non-operating stations have no programming to be preserved and should not be given displacement relief to the detriment of an operating station.

B. "Qualifying" LPTV Stations Operating on Channels 60-69 Should Have Priority Over "Non-Qualifying" Applicants.

In resolving mutual exclusivity between competing displacement applications for operating stations, the Commission should give a priority to displaced "qualifying" LPTV stations, as defined by the Balanced Budget Act of 1997 (the "Budget Act"), the very legislation that gave rise to the *First Report and Order*. Pursuant to the Budget Act, the Commission is required to "seek to assure . . . that each qualifying low-power television station is assigned a frequency below 746 megahertz to permit the continued operation of such station." Budget Act at § 3004.[4] Such a determination is minimally burdensome and, more importantly, has a

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[4] Under Section 3004 of the Budget Act, a station is a "qualifying" LPTV station if, during the 90 days preceding August 5, 1997, the date of enactment of the Budget Act:

i. such station broadcast a minimum of 18 hours per day;
ii. such station broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station; and
iii. such station was in compliance with the requirements applicable to low-power television stations.

substantial statutory basis. Just last week, the Commission stated that it is currently examining ways in which it may assure that LPTV and TV translator stations displaced from channels 60-69 are assigned channels below 60. *Memorandum Opinion and Order, Reallocation of Television Channels 60-69, the 746-806 MHz Band*, FCC 98-261 at ¶ 14 (released October 9, 1998). Granting priority to the displacement relief applications of such stations is one way to implement this requirement.

C. LPTV Stations Should Have Priority Based on Length of Service to Their Communities.

If ascertaining which LPTV stations are operating or "qualifying" does not fully resolve the mutual exclusivity, the Commission can turn to other objective, uncomplicated criteria. For example, the Commission can look to a station's length of service to the community. Stations that have been on the air the longest should be given preference over those that have not. Such comparisons are not without precedent. In the case of requests for the same call sign being received on the same date, the assignment is made to the station having the longest continuous record of broadcasting operation under substantially unchanged ownership and control. 47 C.F.R. § 73.3550(h) (1997).

Another alternative would be to determine which qualifying LPTV stations have been "qualified," as defined in the Budget Act, for the longest period of time, giving preference to those stations that have been qualified the longest. Under either scheme, those stations that have provided continuous, valuable programming to their communities for the longest period of time will have the greatest rights to continue serving their audiences. Of added appeal is the fact that these determinations and preferences are entirely consistent with the "first-come, first-served"

nature of granting displacement applications. *First Report and Order* at n.205. Essentially, the first stations on the air or qualified are given preference over other latecomers.

III. Conclusion.

Low power television stations have a long history of providing valued service to the communities they serve. LCG urges the Commission to provide for the continuation of this history by first using other methods to resolve mutual exclusivities between June 1, 1998 applicants for displacement relief prior to subjecting them to competitive bidding.

Respectfully submitted,

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October 13, 1998

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