Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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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

PETITION FOR RECONSIDERATION

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SUMMARY

The proposed application of the anti-collusion provisions is inconsistent with the Commission's obligations under 47 USC 309(j)(6)(E), inasmuch as they preclude any resolution of mutual exclusivity by any means other than competitive bidding. Although it has no obligation to apply its anti-collusion provisions to the broadcast service, the Commission can readily accomodate its obligations under 47 USC 309(j)(6)(E) with the interests intended to be served by its anti-collusion provisions by providing for them to become effective 60 to 90 days following release of public notice, announcing the acceptance for filing of applications for the authorization at issue.

The imposition of reserve price and minimum bid requirements disserve the public interest. Any attempt by the Commission to establish a fair market price would be essentially arbitrary, the competitive bidding process may reasonably be expected to establish the fair market value of the authorizations at issue, and unless the authorization is awarded to the highest bidder, there will be no new station constructed, no new service to the public, nor will the public derive any revenue, whatsoever. The public interest would not be served if authorizations were withheld on the basis of an arbitrary reserve price.

Congress intended that, where there is only one qualified applicant, that the authorization be awarded by default. In order to assure this outcome, the Commission must adopt some reasonable procedure: (a) allowing a successful bidder to demonstrate, where the facts and circumstances of the case so warrant, that it is the sole qualified applicant and, therefore, entitled to a grant by default, and (b) where such a demonstration is made successfully, relieving the winning bidder of the obligation to remit payment of its bid.

The Commission's decision to protect "preferred" coordinates was ill-advised and should be reversed. Such a practice is unnecessary, given the recent elimination of the site availability requirement and adoption of liberal amendment provisions, and will only serve to create unnecessary congestion, require significant expenditure of time and resources by the Commission's technical staff and impede the ability of existing licensees and permitees to upgrade their facilities, which outweighs any of the considerations cited by the Commission.

The Commission decision to require applications to be submitted electronically and to make electronically filed applications available for inspection by means of a proprietary network and software would not be in the public interest. The public interest would be better served by an internet based filing and access scheme, utilizing standard email for application submission and the Commission's web server for access to electronically filed applications.

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PETITION FOR RECONSIDERATION

Colon Johnston ("Petitioner") by his undersigned counsel herewith petitions for reconsideration in part of the Commission's action in the above proceeding, as set forth in its First Report and Order in MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, released August 18, 1997, 63 FR 48615-33 (September 11, 1998). In support whereof, the following is shown:

1. In its First Report and Order the Commission adopted Rules to implement the revisions to the Communications Act occasioned by the Balanced Budget Act of 1997. Petitioner seeks reconsideration in part of the Commission's action, specifically with respect to those provisions of the First Report and Order which: (a) apply the anti-collusion provisions to competitive

bidding in the broadcast services; (b) impose reserve price and minimum bid requirements; (c) fail to relieve an applicant from the obligation to remit payment of a winning bid, where such applicant is the only qualified applicant; (d) provide for the protection of preferred site coordinates submitted with a short-form application; (e) would require the utilization of proprietary networks and software in order to submit and inspect both short-form and long-form applications.

2. Petitioner has previously applied for and obtained construction permits, has constructed and operated broadcast stations and intends to do so in the future. Accordingly, Petitioner is an interested person for purposes of 47 CFR 1.429.

I. The proposed application of the anti-collusion provisions is inconsistent with the Commission's obligations under 47 USC 309(j)(6)(E).

3. In the First Report and Order (at paras. 155-56) the Commission announced its determination to apply the anti-collusion provisions to broadcast service auctions, as necessary "to deter bidders from engaging in anti-competitive behavior." The Commission offered no explanation, whatsoever, why application of the anti-collusion provisions could not be delayed for a reasonable period of time following submission of short-form applications in order to provide an opportunity for the resolution of mutual exclusivity by settlement or technical amendment. Likewise, the Commission made no effort to reconcile

its application of the anti-collusion provisions with its obligations pursuant to 47 USC 309(j)(6)(E). Section 73.3525(l), as adopted, provides that the anti-collusion provisions will apply to broadcast service applications, effective as of the date of submission of any short-form application. Section 73.5001(d), as adopted, provides only a single exception to the application of the anti-collusion provisions, allowing for resolution of mutual exclusivity by settlement or engineering amendment in cases involving conflicting major modification applications or conflicts between new station applications and major modifications.

4. At the time Congress first authorized the Commission to award authorizations by means of competitive bidding, it imposed on the Commission the obligation "to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutually exclusivity in application and licensing proceedings." See: 47 USC 309(j)(6)(E). Thereafter, in adopting the Balanced Budget Act of 1997, Congress expressed its concern "that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligation under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations or other tools that avoid mutual exclusivity." See: Joint Explanatory Statement of the Committee of Conference, at 572 (1st paragraph).

5. While the First Report and Order reflects (at para 74) the Commission's acknowledgment of its obligations under 47 USC

309(j)(6)(E) and even of Congress' expressed concern that those obligations not be forgotten in the rush to auction, the Commission's application of the anti-collusion provisions operates to preclude absolutely the utilization of any "tools that avoid mutual exclusivity". [1] Thus, despite Congress' expressed concerns and the Commission's tacit acknowledgment of its obligations under 47 USC 309(j)(6)(E), the procedures adopted in the First Report and Order absolutely preclude any resolution of mutual exclusivity by any means other than competitive bidding. As such, the Commission's action in this regard is arbitrary, capricious and contrary to law.

6. The Commission's obligations, pursuant to 47 USC 309(j)(6)(E), to accomodate reasonable means of eliminating mutual exclusivity, including the use of engineering amendments and negotiated settlements, is clear and unequivocal. By contrast, the Commission is under no obligation, whatsoever, to apply its anti-collusion provisions to competitive bidding in the broadcast services. Indeed, the Commission sought comment regarding whether or not it should do so. In resolving that issue (First Report and Order at para. 155) the Commission offered little explanation of its decision, stating only its beliefs that application of the anti-collusion provisions is necessary to deter anti-competitive behavior and that they have been effective in prior auction proceedings.

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1. The sole exception, as indicated in paragraph 3, supra., is cases involving major modification applications.

7. Although it has no obligation to apply its anti-collusion provisions to the broadcast service, the Commission can readily accomodate its obligations under 47 USC 309(j)(6)(E) with the interests intended to be served by its anti-collusion provisions. By simply delaying the application of the anti-collusion provisions for a reasonable period of time, subsequent to identifying by public notice those applicants entitled to participate, the Commission could accomodate both interests.

8. Accordingly, Section 73.5001(d) should be modified to specify that the anti-collusion provisions will become effective 60 to 90 days following release by the Commission of a public notice, announcing the acceptance for filing of applications for the authorization at issue. Section 73.3525(1) should also be modified consistent with the above suggested modification to Section 73.5001(d). These simple modifications of the applicable rules represent a reasonable accomodation between and will serve to harmonize the anti-collusion provisions with the Commission's obligations under 47 USC 309(j)(6)(E).

II. The imposition of a reserve price and minimum bid requirement does not serve the public interest.

9. The Commission sought comment on whether it should impose a reserve price and minimum bid requirement. In adopting the implementing rule the Commission concluded (First Report and Order at para. 133-34) that reserve prices and minimum bids

should be utilized and delegated to the Bureaus the authority to establish the amount.

10. While the Commission asserts in the First Report and Order that the Balanced Budget Act of 1997 directed it to prescribe methods by which reserve prices and minimum opening bids would be established, that directive was explicitly made contingent upon a finding by the Commission that the imposition of reserve prices and minimum opening bids would serve the public interest. However, the First Report and Order is silent with respect to any basis for the Commission's conclusion that the public interest is served by such a practice.

11. However, there exist a number of reasons for concluding that the imposition of a reserve price and minimum bid requirements would disserve the public interest. Initially, neither the Commission nor its staff has the expertise to determine an appropriate reserve price, making such determination essentially arbitrary. Furthermore, inasmuch as authorizations in the broadcast service will be awarded by competitive bidding and that process will be open to wide participation, characterized by a low barrier to entry and governed by strict anti-collusion provisions, it may reasonably be expected to establish the fair market value of the authorizations so issued. The Commission cannot credibly assert that its staff, lacking any experience in the valuation of broadcast properties, is better able to determine the fair market value than the market, itself. Finally, the Commission has not indicated what it intends to do

with those authorizations upon which it places a higher value than does the market. Unless the authorization is awarded to the highest bidder, there will be no new station constructed and no new service to the public. Nor under such circumstances would the public derive any revenue, whatsoever. How the public interest is served by such an approach is difficult to comprehend.

12. The Commission has long recognized that the public interest is served by the initiation of new broadcast service. Congress has recently determined that the public interest also is served by the revenue derived from the award of authorizations by competitive bidding. However, neither interest is served when an authorization is withheld on the basis of an arbitrary reserve price. Accordingly, the Commission should abandon this folly and eliminate the imposition of reserve prices and minimum bids in competitive bidding in the broadcast services.

III. An applicant who is the winning bidder should be relieved of the obligation to remit payment of the winning bid, where he/she is the only qualified applicant.

13. In the First Report and Order the Commission indicated that it would defer resolution of issues regarding the qualifications of applicants until subsequent to the conclusion of competitive bidding and, then, consider such issues only with respect to the winning bidder. The Commission indicates (First Report and Order at Note 81) that, where the winning bidder's (or a series of winning bidders') qualifications are successfully

challenged, the sole qualified applicant will be awarded the authorization, without further auction and without the need for payment of any winning bid.

14. While this procedure would suffice where the sole qualified applicant submitted the lowest bid, it fails to address the circumstance where a sole qualified applicant is the successful bidder, either initially or ultimately. Under the scheme set forth in the First Report and Order there is no provision for the winning bidder to demonstrate any lack of qualification on the part of the remaining applicants and thereby avoid the necessity of paying for an authorization, which should have been awarded to him/her by default.

15. Section 309(j)(1) of the Communications Act, as modified by the Balanced Budget Act of 1997, requires that initial licenses and permits be awarded by competitive bidding to qualified applicants, where mutual exclusivity exists. Section 309(j)(6)(E) imposes on the Commission the obligation to utilize reasonable means to resolve mutual exclusivity among applicants, including threshold qualifications. Read together these provisions evidence the intent of Congress that authorizations be awarded by competitive bidding only where there exists more than one qualified applicant. However, as indicated above, the procedures adopted by the Commission do not assure this outcome.

16. In order to assure the outcome intended by Congress, the Commission should adopt some reasonable procedure, allowing a successful bidder to demonstrate, where the facts and

circumstances of the case so warrant, that it is the sole qualified applicant and, therefore, entitled to a grant by default. In cases in which such a demonstration is made successfully, the winning bidder should be relieved of the obligation to remit payment of its bid. Clearly, the number of cases to which such a procedure would apply would be few. Indeed, a finding by the Commission that even one of the losing bidders was qualified would defeat such a showing. Thus, while it is apparent that the Commission's determination to defer consideration of the qualifications of applicants until subsequent to competitive bidding is sound, some reasonable provision is necessary to assure (post-auction) that more than one of the auction participants is qualified. Accordingly, the Commission should adopt a procedure to be applied on a case by case basis whereby, upon petition by the winning bidder, it would consider evidence intended to demonstrate the lack of qualification of the remaining applicants.

IV. The Commission should protect only the allocation reference coordinates and those coordinates necessary to establish mutual exclusivity or submitted with long-form applications.

17. In the Notice of Proposed Rulemaking in this proceeding, the Commission indicated that only the allocation reference coordinates and coordinates submitted in the context of long-form applications would be accorded protection. In response to comments the Commission determined (First Report and Order at

paras. 142, 180) also to accord protection to any "preferred" coordinates an applicant might elect to submit with its short-form application.

18. The Commission's determination to protect "preferred" coordinates was ill-advised and should be reversed. Such a practice will only serve to create unnecessary congestion, require significant expenditure of time and resources by the Commission's technical staff and impede the ability of existing licensees and permitees to upgrade their facilities. Given the substantial numbers of short-form applications that may be submitted, an obligation to accord protection to "preferred" coordinates could significantly increase (far beyond historical numbers) the number of sites which must be protected. Furthermore, in light of the Commission's elimination of the site availability requirement and the liberal amendment provisions with respect to long-form applications, there exists little need for protecting "preferred" coordinates for every potential bidder. This is especially the case in light of the significant public interest benefits inherent in according existing licensees and permitees maximum flexibility in upgrading and improving existing service. Accordingly, Section 73.3573(f)(2)(ii) should be amended to eliminate the provision for according protection to preferred site coordinates.

V. The Commission should not require the utilization of proprietary networks or software as a condition for submitting or inspecting applications, whether short-form or long-form.

19. In the First Report and Order (at paras. 147-48) the Commission determined that it would require electronic submission of both short-form and long-form applications. The Commission also indicated that one of its principal rationales for requiring electronic submission was its ability to make electronically filed applications readily and promptly available for online inspection by the public. However, although not explicitly stated, the First Report and Order implies that such electronic filing, as well as any inspection of applications, would be solely by means of a proprietary network and software. Also unstated, but reasonably presumed given prior conduct, the Commission apparently intends to limit access to this proprietary network by imposing a toll charge of up to $ 2.99 per minute.

20. Petitioner fully supports the Commission's proposals to require applications to be submitted electronically and to make electronically filed applications available for online inspection. However, Petitioner objects to the Commission's proposal to achieve these goals by means of a proprietary network and software and urges the Commission to adopt an internet based approach, which would better serve the public interest.

21. The public interest would be better served by an internet based filing and access scheme, utilizing standard email for application submission and the Commission's web server for access to electronically filed applications. This approach would

permit applicants to prepare their applications with the assistance of their attorneys and technical consultants, as desired, prior to conversion to a standard multi-page format for submission as an attachment to a standard email message. [2] The proposal to use a proprietary network and software offers none of these benefits and increases barriers to entry, thereby decreasing the prospects of wide participation, which is to be encouraged if the revenue derived from competitive bidding is to reflect fair market value.

22. Likewise, the proposal to use a proprietary network and software for access to electronically filed applications via 900 number (essentially a "dial-a-porn" model) does not serve the public interest. As an initial matter, the Commission is legally obligated to make all such applications available for public inspection. The Commission has never charged for such access nor is it evident that it has authority to do so. Therefore, where

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2. Adoption of such an approach would permit applicants maximum control over the preparation of their applications and would allow for the submission of signed applications with the original to be retained by the applicant and made available to the Commission upon request. The Commission could either specify use of the .pdf format, which it currently uses extensively, or permit the use of a variety of commercially available multi-page formats, provided they are readily convertible to .pdf. Copies of applications filed in (or converted to) .pdf format could be promptly placed in an appropriate directory on the Commission's web sever, for immediate access by both the public and the staff. Where long-form applications are submitted, payment of filing fees through the lockbox could be verified subsequent to filing. In addition, provision could be made for providing proof of filing by programming the mail server to echo back to the sender all filings received, which would establish the date and time of receipt.

applications are filed electronically, the Commission must either to adopt procedures to make them available for inspection, electronically, in the public reference room or it will incur the substantially more significant cost of creating and managing paper records. If, as can be logically expected, the Commission chooses the former approach, there exists no legitimate basis for requiring the public to travel to the reference room to view applications electronically, as they can be made readily available for inspection online via the Commission's web server. Accordingly, even if the Commission persists in its illadvised proposal to utilize a proprietary network and software for submission of applications, it should, nevertheless, provide prompt and readily available access to electronically filed applications by internet connection to its web server, preferably in .pdf format.

Respectfully Submitted,

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