

Before the
Federal Communications Commission
Washington, DC

In the Matter of)
) MM Docket No. 95-31
)
 Reexamination of the Comparative)
 Standards for Noncommercial)
 Educational Applicants)
)
 To: **The Commission**)

COMMENTS of DE LA HUNT BROADCASTING

De La Hunt Broadcasting (ADeLaHunt≅), by its attorney, hereby submits its Comments with regard to the *Further Notice of Proposed Rule Making*, FCC 98-269 (rel. Oct. 21, 1998) (ANPRM≅). With respect thereto, the following is stated:

DeLaHunt is the licensee of licensee of Stations KDKK(FM) and KPRM(AM), Park Rapids, Minnesota. Its President, Ed de La Hunt, is an established broadcaster with 37 years of ownership experience. As such, DeLaHunt Broadcasting brings a wealth of practical experience in submitting these Comments.

Insofar as DeLaHunt is a commercial broadcaster, DeLaHunt does not possess a strong preference with regard to the precise method that should be used to choose between competing noncommercial educational applicants. In such an instance, where all applicants are proposing to provide a noncommercial service, each of the different methods the FCC proposes to choose between competing applicants appear to be fair and efficient methods of choosing between competing applicants.

Of great interest to DeLaHunt is the question of how to choose between applicants in those instances where both commercial and noncommercial applications can be filed for the non-

reserved TV and FM channels.

First, as a general matter, DeLaHunt continues to object to the manner in which the FCC has changed the rules pertaining to applications that already were on file prior to the court proceedings that invalidated the FCC's comparative hearing process. Parties affiliated with DeLaHunt filed applications intending to proceed under the comparative hearing process. As long-time local area residents, and based upon their record of experience and community service, these applicants would have been far and away the best qualified applicants to receive the permits and provide the best possible service to the public. That process, however, was found to be arbitrary and capricious. Instead, the FCC is substituting that arbitrary process with a process that simply rewards the most *wealthy* applicants, in a manner that will not ensure strong, dedicated service to the public. To be sure, the FCC has adopted a process with modest credits given to parties with certain attributes (*i.e.*, bidding credits). That system, however, does not in any way *protect* the public or ensure that best-qualified applicants (who *may not* necessarily be the most wealthy) are given the opportunity to provide new service to the public, or to expand their current operations in a manner to *continue* to serve the public. This is especially unfair as it pertains to applicants that applied specifically under the old rules. Insofar as these proposed rules exacerbate the harm being inflicted on existing applicants, DeLaHunt objects to the proposed procedures.

With respect to the matters raised in the *NPRM*, DeLaHunt is concerned about the claim that has been made that Section 309(j)(2)(C) of the Act may preclude the Commission from using competitive bidding to award a broadcast license in those instances where both commercial and noncommercial entities have applied for a non-reserved allotment. Clearly it does not. Section

309(j)(2)(C) states in relevant part:

(j) Use of Competitive Bidding. -

(1) General authority.--If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions.--The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission-

* * *
(C) for stations described in Section 397(6) of this Act.

47 U.S.C. § 309(j)(2)(C). The definition refers to the definition of a noncommercial educational broadcast station contained in 47 U.S.C. § 397(6).

However, except in those rare circumstances where all applicants for an allotment happen to be proposing a noncommercial educational service, the stations at issue are not strictly stations described in Section 397(6), but for commercial service in the non-reserved band. As the Commission observed in *Richmond, Virginia*, 61 R.R.2d 892, 1 FCC Rcd 1048 (1986), a station providing a noncommercial service on the commercial band:

voluntarily operate[s] its station with a noncommercial educational format. Because neither its channel nor its license are reserved, it is free at any time to change to commercial operation without our prior notice or approval.

Id. at 894-95. Thus, under this reasoning, unlike those operators in the reserved band, even the applicant proposing an *initial use of the allotment for noncommercial* would be free to alter its service at a later, thereby having received an unintended windfall. Therefore, the nature of the *particular applicant* should not determine whether a particular allotment is to be subject to the Commission's auction authority. The *nature of the allotment* should control, and since any such

applicant simply is proposing a *noncommercial format* on a *commercial* allotment that is not subsumed by the definition contained in 47 U.S.C. §397(6), it should be concluded that the FCC's auction authority is not disturbed, even in the hybrid circumstances that may sometimes exist.

To conclude otherwise would have far reaching implications which also should not be ignored. Under the short-form filing procedure established by the Commission, non-commercial Applicants may well file for all future, as-yet-unopened, allotments. An interpretation of Section 397(j)(2)(C) to prevent the holding of auctions in such circumstances may well lead to the total collapse of the entire auction process if even *one* noncommercial group owner would state an intention to participate in the majority of the as-yet-unapplied for allotments. In such a circumstance, the holding of standard auctions in the manner that has now been established by the Commission would not be allowed to take place. This could not be what Congress intended in establishing the auction program.

The solution to the problem is two-fold. First, the Commission should interpret the Congress' action simply to treat all similarly-situated applicants the same by requiring all such applicants to go through the same auction process. Under the requirement of *Melody Music, Inc. v. FCC*, 345 F.2d 730 (1965), the FCC is *required* to treat similarly-situated applicants in an identical manner. Indeed, in *Central Michigan University*, 7 FCC Rcd 7636 (1992), the Commission was left with a choice of whether to apply the *Commercial* or *Noncommercial* processing policies to an NCE applicant applying for a commercial allotment. In determining the *Commercial* rules apply to NCE applicants for non-reserved allotments, the Commission stated

that it was taking that action:

to ensure comparable treatment of similarly situated applicants as required by Melody Music, which broadly sets out the Commission's obligation in this regard. *Melody Music, Inc. v. FCC*, 345 F.2d 730 (1965). *See also Ramon Rodriguez & Associates*, 3 FCC Rcd 407 (1988).

Applicants for non-commercial frequencies already have an advantage not available to commercial applicants. They have a reserved portion of the spectrum. In those instances where a non-commercial applicant *voluntarily chooses* to apply for a frequency that is not subject to that protection, they should be required to play under the same rules as commercial applicants. As the Commission points out in the *NPRM*, in the hearing context noncommercial applicants were subject to the commercial rules where engaged in a comparative hearing for a new non-reserved allotment. In the same manner, non-commercial applicants should be subject to the commercial rules when applying for a new non-reserved frequency under the new selection process.

In the event the Commission chooses to interpret the Congressional language differently, there are two actions it should take. First, to avoid perpetuation of the problem in future auctions, it should require all entities to file as commercial applicants, but allow each applicant to choose whatever legal *format* it may wish to adopt *once it obtains the channel*, in accord with its First Amendment/freedom of speech rights. In the event such *winning* applicant wishes to modify its license to operate as a noncommercial applicant, it would be free to do so as long as it follows the procedures required under Section 73.1690 of the Commission's rules.

Second, as to existing noncommercial entities applying on non-reserved allotments, efforts should be made to simply find alternative *reserved* frequencies on which such applicants could

operate and provide service to their preferred communities of license, and require that such applications amend their applications to specify the new channels. As the Commission repeatedly has stated in the past, no applicant has a vested interest in the frequency on which it has requested to operate. The Commission has held that the substitution of an existing station's channel at one community serves the public interest where the substitution permits the provision of a new or expanded service at another community. *See, e.g., Marietta, Ohio, and Ravenswood, WV*, 2 FCC Rcd 4681 (1987), *Albany, NY et al.*, 2 FCC Rcd 4300 (1987), 3 FCC Rcd 4681 (1987), and *Mayville and Wickliffe, KY, et al.*, 48 R.R.2d 1232 (1981). The Commission also has exercised its discretion in allocating one channel in lieu for another. *Arnold and Clarksville, CA*, DA 98-1972 (Chief, Policy and Rules Div. 1998) (A[i]t is also well established that an alternate channel may be allotted, provided it is equivalent, *i.e.* it is of the same class, meets the minimum distance separation requirements, and provides a 70 dBu signal over the entirety of the community). A similar policy should be adopted with regard to noncommercial applications that conflict with commercial applications. Such a procedure would eliminate any conflict, allow an otherwise stalled auction to proceed forward, and expedite service to the public.

In the event noncommercial applicants are not required to establish that reserved frequencies are not available as a prerequisite to filing for a non-reserved allotment, DeLaHunt requests that commercial applicants be permitted to apply on, and use, the reserved frequencies that noncommercial applicants choose not to use. This would add an element of fundamental fairness to the entire process. Non-commercial applicants, *unless absolutely necessary*, should not be permitted to potentially delay processing of applications through the auction process. It is not absolutely necessary when reserved frequencies exist on which NCE service to the same

communities can be provided. Failure to use such an available frequency should trigger a concomitant right for a commercial applicant to go after the unused reserved frequency.

WHEREFORE, it is respectfully requested that these Comments be considered in conjunction with the matter being reviewed in this proceeding.

Respectfully requested,

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