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

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Bidding for Commercial Broadcast and Instructional Television 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

To: Magalie Roman Salas, Secretary
for direction to
The Commission

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MOTION FOR STAY

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MOTION FOR STAY

1. Jerome Thomas Lamprecht, Susan M. Bechtel and Lindsay Television, Inc. ("Lindsay") (collectively, the "moving parties") move the Commission for a stay of its "First Report and Order" released August 18, 1998, 13 FCC Rcd. 15920, and its Memorandum Opinion and Order ("Reconsideration Order") released April 20, 1999, insofar as they order the commencement of auctions to dispose of four broadcast frequencies identified in the Statement of Facts below prior to appellate review of the lawfulness of that agency action.

SUMMARY

2. There is no policy and legal reason for the Commission to rush into auction proceedings regarding the small number of comparative hearing cases which have been tried and have been the subject of past Commission decisions, court litigation, remands,

etc. To do so would cause the parties in those cases to now undertake major changes in their positions, in order to deal with the new auction mechanism, that could not be unwound if their current appeals regarding the agency's auction decision result in a court decision that the auction mechanism should not have been applied. The requirements for stay of the Commission's action while the appeal process runs its course, Virginia Petroleum Jobber's Association v. F.P.C., 259 F.2d 921 (D.C.Cir. 1958), are met in the facts and circumstances here.

STATEMENT OF THE FACTS

3. For seventeen years, since 1982, Mr. Lamprecht has litigated before the Commission and in the Court of Appeals his quest for authorization to construct, own and operate a new FM radio broadcast station in Middletown, Maryland. See, Lamprecht v. F.C.C., 958 F.2d 382 (D.C.Cir. 1992), which struck down the Commission's "female preference policy" as unconstitutional reverse discrimination applied to Mr. Lamprecht.

4. For thirteen years, since 1986, Mrs. Bechtel has litigated before the Commission and in the Court of Appeals her quest for authorization to construct, own and operate a new FM radio broadcast station in Selbyville, Maryland. See, Bechtel v. F.C.C., 10 F.3d 875 (D.C.Cir. 1993), which struck down the "integration of ownership and management" comparative factor as arbitrary and capricious.

5. For thirteen years, since 1986, Lindsay (No. 98-1445) has litigated before the Commission and in the Court of Appeals

its quest for authorization to construct, own and operate a new television broadcast station in Charlottesville, Virginia. See, Achernar Broadcasting Company v. F.C.C., 62 F.3d 1441 (D.C.Cir. 1995), which reversed, as arbitrary and capricious, the FCC's denial of all outstanding applications under the agency's "quiet zone" rule for protecting operation of the National Radio Astronomy Observatory at Green Bank, West Virginia.[1]

6. For thirteen years, since 1986, Orion Communications Limited ("Orion"), which has recently filed a stay motion in this matter, has litigated before the Commission and in the Court of Appeals its quest for the permanent license to construct, own and operate a new FM radio broadcast station in Biltmore Forest, North Carolina. Orion currently operates the station under interim authorization pending the ultimate conclusion of that litigation. See, Orion Communications, Ltd. v. F.C.C., 131 F.3d 176 (D.C.Cir. 1997), which reversed an FCC decision that had revoked such interim authorization, holding (contrary to the Commission's decision) that Orion's construction of the station was reasonably undertaken.

7. In August 1997, Congress enacted the Balanced Budget Act of 1997. P.L. 105-33, 111 Stat. 251 (1997). This law requires that competing applications for commercial broadcasting stations be resolved through public competitive bidding, excepting from

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[1] There is currently pending before the Commission a proposed settlement of the proceeding amongst the two contending applicants and the Obsevatory. If that settlement is approved, the concern of Lindsay will become moot.

the mandate, however, those applications that were pending on June 30, 1997. The FCC was given the discretion to resolve such cases by comparative hearings or an auction mechanism, opened only to the parties to the pending proceedings. 47 U.S.C. §§309(j)-(l).

8. The subject Commission orders were entered following a notice and comment rulemaking proceeding addressed, among other things, to the issue of whether competing applications pending on June 30, 1997 should be governed by a comparative or auction selection procedure. The Commission called for comments concerning whether a small number of long-standing cases[2], for which a record had been compiled and at least an initial decision by the hearing officer had been issued, should be considered differently than a much larger number of cases for which administrative processing had never reached that point.[3] The moving parties and Orion represent four of the "fewer than ten" long-standing cases, and theirs date back for periods of no less than 13 years and as long as 17 years.

9. The subject Commission orders (a) adopt the auction mechanism for all pending cases, even those for which the hearing record was long ago completed and the subject of decision and (b) become effective 60 days following publication in the Federal Register.

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[2] Fewer than ten. First Report and Order at ¶34, n. 31, 13 FCC Rcd. at 15933.

[3] Approximately 120 cases, none of which has ever been designated for hearing. Id.

10. The moving parties and Orion have filed notices of appeal or applications for review in the Court of Appeals for the District of Columbia Circuit, Orion Communications, Ltd. v. F.C.C., et al, Nos. 98-1424, 1444, 1445, 1528). While their substantive positions on the merits may not be identical (reflecting treatment of issues under their respective facts and circumstancs), all of the moving parties and Orion are united in their concern that the Commission stay the commencement of auctions in their cases until appellate review of their appeals and petitions has been completed.

STANDARDS GOVERNING STAY MOTIONS

11. Under the traditional test of Virginia Petroleum Jobber's Assocation v. F.P.C., supra, parties are entitled to a stay of an administrative order based on a showing that (A) they will suffer irreparable harm absent a stay; (B) other interested parties will not suffer substantial harm; (C) the public interest will not be disserved; and (D) the merits of their cause raise serious and doubtful questions concerning the agency action.[4]

12. In Washington Metropolitan Area Transit System v. Holiday Tours, Inc., 559 F.2d 841 (D.C.Cir. 1977), the Court refined the Virginia Jobbers standard. Under WMATA, when a party seeking a stay shows irreparable injury, a reasonable balance of hardships and lack of harm to the public interest, the preliminary analysis of the likelihood of prevailing need only

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[4] See also Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 673-74 (D.C.Cir. 1985); Foundation on Economic Trends v. Heckler, 756 F.2d 143, 151 (D.C.Cir. 1985).

show "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and for more deliberative investigation."[5] Stated another way, relief may be granted "with either a high probability of success and some injury, or vice versa."[6]

THE MOVING PARTIES MEET THE STANDARDS FOR STAY

13. The moving parties satisfy both the traditional Virginia Jobbers test and the WMATA analog. There is the requisite probability of both irreparable injury, and constitutional and other highly meritorious issues warranting appellate review, with no significant harm to other interested parties or the public interest.

A.
The Moving Parties Face Irreparable Injury

14. To proceed immediately with auctions would wreak havoc on the moving parties. This is not a case where, if the petitioner or appellant prevails in the appeal, he or she will be adequately compensated by monetary damages or other economic considerations or benefits. Rather, this is a highly unusual, if not unique case, where the petitioners and appellants have for many, many years prosecuted their applications for broadcast licenses under one regulatory program providing for a comparative selection among the competing parties, and now are faced with an entirely new and revolutionary regulatory program to auction the

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[5] WMATA, 559 F.2d at 844.

[6] Cuomo v. U.S.N.R.C., 772 F.2d 972, 974 (D.C.Cir. 1985).

frequencies to the highest bidder.

15. This mega-year litigation has been an enormous undertaking which none of them could reasonably have foreseen when their applications were filed in the 1980's; for Orion, the undertaking has also included the cost of construction of the station pursuant to interim authorization from the Commission. The revolutionary new regulatory program is not one of adjusting the comparative selection process, such as the adjustment that was made following the Lamprecht decision to eliminate gender preferences or various adjustments proposed in several rulemaking proceedings to deal with the Bechtel decision concerning the "integration" requirement for management by the owners.[7] Parties may reasonably be subjected to such an ebb and flow of agency policies, adjudications and related court decisions. But not a brand new regulatory program that wipes out all past application preparation, administrative processing and litigation concerning the comparative selection mechanism and abruptly imposes on the parties the burden of purchasing the frequencies at full market value.

16. This draconian decision -- when Congress gave the FCC discretion to modify and continue to apply a comparative selection mechanism which it has done successfully in one form or another since the 1930's -- raises serious issues regarding its

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[7] The parties who take the initiative to change an unlawful practice are entitled to a decision on their application that is totally free of the unlawful taint; otherwise, the determination of unlawfulness would become obiter dicta in their own cases. Stovall v. Deno, 388 U.S. 293 (1967).

lawfulness, e.g., as an arbitrary and capricious retroactive application of changed agency policy not mandated by Congress and/or as a violation of the due process and equal protection provisions of the Constitution.

17. The harshness of the agency action will be compounded if the Commission refuses to stay the new auction program for these long-standing applications until the moving parties have had their day in court. The resulting harm to the parties would be manifest, and irreparable:

(a) Assume for purposes of discussion that a moving party here participates in and wins the auction, pays the money into the United States Treasury, and then wins the instant appeal on the merits, overturning the use of the auction regulatory program as applied to its own case. Has the moving party done so at its peril? As the Commission and this Court found in Orion v. F.C.C. cited earlier, determining whether a party acts reasonably in making expenditures and commitments while a case is still in litigation can be a troublesome issue. In the Balanced Budget Act of 1997, Congress made no provision for a refund of the auction money in such a situation. Perhaps the FCC could undertake to order the refund, sua sponte, but we doubt it, and to determine the efficacy of such an order may, itself, involve litigation. As of this writing, there is no certainty on the point and such a party's assurance of the refund is not free from doubt.

(b) Already drained by massive multi-year litigation,

parties simply may not have the financial resources to participate in the auction. They will have sustained a "double hit" in the cost -- first, the cost of the endless prosecution of their applications for the license and, now, pendente lite, the cost of the purchase of the license at full market value. We submit that these facts and circumstances are a unique burden in the annals of stay motion cases.

(c) Nor will it do to say that such parties are free to sit out the auction and simply wait for a favorable appellate decision to strike down the auction regulatory program. In litigation, particularly one in which so much time and effort have already been invested, it is highly risky to be left out of any strategic line of attack or defense, even though the ultimate result of involvement cannot be predicted.

(d) For an example, the auction rules allow competing applicants to bid, whether or not questions exist concerning their qualifications to become the licensee, and the FCC will entertain petitions addressed to such qualifications only if the target party becomes the successful bidder. Maybe a passive party who sits out the auction can participate in that post-auction attack on the successful bidder no less effectively than if he or she had participated in the auction. As a practical matter, we doubt it. As a minimum matter, the passive party can expect a fight on its hands to do so from the successful bidder.

(e) For another example, the Commission's auction rules are designed to facilitate settlements/mergers amongst the parties.

There are no fewer than five opportunities for global or partial settlements/mergers:

(1) Applicants are eligible to enter into merger agreements at any time prior to the filing of a short form application indicating an intent to participate in the auction. 47 C.F.R. §1.2105(c)(1). A party who sits out the auction would be unfettered in its ability to participate in any such merger effort at that early stage.

(2) After the filing of the short form application indicating an intent to participate in the auction, however, there are four additional opportunities for settlement activities, i.e., (a) the Commission by public notice opens a window of opportunity to resolve conflicting applications by settlement, 47 C.F.R. §73.5002(d); (b) applicants may merge and acquire a non-controlling interest in other pending applications that are not mutually-exclusive with the application in question, 47 C.F.R. §1.2105(c)(2); (c) applicants may enter into agreements to make joint bids with respect to other applications which, similarly, are not mutually exclusive with the application in question, 47 C.F.R. §1.2105(c)(3); and (d) parties with noncontrolling interests may even merge with another applicant in the same proceeding, 47 C.F.R. §1.2105(c)(4). A party who sits out the auction would not have the equal ability, indeed if any ability, to participate in these categories of settlement

activities.[8]

B.
No Substantial Harm to Other Interested Parties

18. The only conceivable harm resulting from the requested stay to other interested parties would be deferral of the auction until its lawfulness has been established in frustration of a competing applicant having financial resources with the intent to outbid the others and gain the license under the auction mechanism. This harm is purely hypothetical. The moving parties are aware of no competing applicant in their respective proceedings that is willing and prepared to proceed with the auction immediately, pay money into the United States Treasury and proceed with construction of the station pendente lite. The moving parties and the other competing applicants have all endured the years of litigation and there is no inequity to any of us to await appellate review here.

C.
No Adverse Public Interest from the Requested Stay

19. The requested stay will not delay inauguration of new broadcast services. In three of the four cases, the station is on the air, (a) in Biltmore Forest, North Carolina, operated by Orion, (b) in Middletown, Maryland, operated by Mr. Lamprecht's

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[8] Conceivably, the passive party could file its notice of intent to participate and gain a little bit of negotiating time, but as soon as the Commission sets the time for the initial earnest money payment from auction participants, the other competing parties would be alerted to its intention not to participate. In fact, merger/settlement negotiations could intentionally be deferred until after the auction proceedings reach the point of the earnest money payment to determine who the "players" are and who aren't.

competing applicant, Mrs. Marmet, and (c) in Selbyville, Delaware, operated by a competing applicant of Mrs. Bechtel. In the other remaining case (Charlottesville, Virginia), given the pending settlement proposal referred to earlier, neither of the two contending applications is in a position to pay a winning bid into the United States Treasury, construct the station and commence operation pendente lite.

20. The requested stay will not have any meaningful effect on the United States Treasury or the national interest in balancing the budget. There are only four broadcast frequencies involved, all in relatively small communities, and the delay in the receipt of the funds, assuming the auction mechanism is upheld, will be a finite one.

D.
Merits of the Cause of the Moving Parties
Raise Serious and Doubtful Questions
Concerning the Commission's Action

21. This is a case of first impression concerning the protected interests of parties who have invested many years in the prosecution of applications for federal broadcast licenses and whose investment is to be wiped out by a retroactive change in the ground rules to require those parties to pay full market value of the licenses. That action is taken following enactment of the Balanced Budget Act of 1997. Serious and doubtful questions exist concerning whether the Commission's rulemaking decision, implementing the statute, is arbitrary and capricious. Also, serious and doubtful questions exist concerning the provisions of the statute itself, thus implemented by the agency,

as a violation of the due process provisions of the Fifth Amendment of the Constitution.

22. The core issue of concern is the government's retroactive action adverse to the legitimate and reasonable interests of the moving parties. For purposes of considering the lawfulness of retroactive government action, the only reported decision of which we are aware involving applications for federal licenses is a decision of the full panel of the Court of Appeals of the Distict of Columbia Circuit in Clark-Cowlitz Joint Operating Agency v. F.E.R.C., 826 F.2d 1074 (1987). That case involved competing applications for a hydroelectric power license to which a changed groundrule (elimination of previous preference for municipal vs. private ownership) was retroactively applied by the Federal Energy Regulatory Commission. Both the majority opinion and the dissenting opinion held that a party's investment and activities in the filing and pursuit of an application for federal license constituted an "interest" requiring consideration in determining the lawfulness of the retroactive government action.

23. It is significant that the majority opinion (upholding retroactive application of the new groundrule) downplayed the importance of that interest because the party in question had relied on the previous groundrule in filing and prosecuting its application for a period of only six months, whereas the minority opinion (that would have struck down retroactive application of the new groundrule) determined the party's investment under the

old groundrule to be over a three-year period and held this to be a persuasive factor against retroactivity. Moreover, the change in groundrules, while altering the prospects of securing the license in the comparative hearing, did not abort all prior investment and adopt a new regulatory program requiring the purchase of the license at full market value. The case here, in which that is done after investments of 13 to 17 years under the aborted groundrules, is vastly more compelling and Clark-Cowlitz is precedent that supports the protected interests of the moving parties with regard to both the agency law question and the constitutional law questions, to which we now turn our attention.

Agency Action is Arbitrary and Capricious

24. The Balanced Budget Act of 1997 permits, but does not require, the Commission to employ an auction mechanism to the long-standing cases of the moving parties. That is a key difference in terms of retroactivity. Congress did not mandate retroactive application with legal implications such a statute might have placed into effect; rather, Congress removed the impediments to retroactivity that would otherwise arise if permission were not expressed in the statute. E.g., Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). Congress thus left to the Commission the agency's "retroactivity" determination under principles of administrative law. E.g., City of Chicago v. Federal Power Commission, 385 F.2d 629, 641-645 (D.C.Cir.), cert. denied, 390 U.S. 945 (1967) (reviewing the equities of the parties and, on the facts, finding that the FPC's

retroactivity judgment under a permissive statute, making the period of retroactivity shorter than desired by some parties, longer that desired by other parties, to be in "good sense and reasonableness").

25. Consideration of administrative law regarding "retroactivity" starts with SEC v. Chenery, 332 U.S. 194 (1947), which held:

> ...[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

332 U.S. at 203; see, also, Greene v. United States, 376 U.S. 149 (1964). In the District of Columbia Circuit, a five-part test has been established to weigh the balance of factors in favor of or against retroactivity. Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d 380 (D.C.Cir. 1972); Clark-Cowlitz Joint Operating Agency v. FERC, supra. The factors are as follows:

(a) Case of First Impression. In an adjudicatory decision, if a party has been responsible for establishing a new groundrule, this factor favors retroactive application of the new groundrule in that adjudication lest the party be denied the fruits of its own labor. This factor does not apply to the new "auction mechanism" groundrule, established in a rulemaking process for which no individual party has been singularly responsible.

(b) Abrupt Departure Rather Than Filling a Void Under the Former Groundrules. The new auction mechanism is a total

departure from the previous groundrules. This factor militates against retroactivity.

(c) Extent of Reliance on Former Groundrules. The extent has been enormous, dating back 13 to 17 years, a virtually unbelievable length of time for citizens to wait while a government agency processes their license applications. This factor militates against retroactivity.

(d) Extent of Burden of Retroactive Order on the Parties. The burden, likewise, has been enormous and virtually unbelievable. Indeed, these cases appear to be unique in the total replacement of one regulatory program by another one, after such an inordinate passage of time, ending with the parties purchasing their licenses at full market value. This factor militates against retroactivity.

(e) Statutory Interest Favoring Retroactive Application of New Groudrules. There is none. In a statute born in the federal budget interests, it is inconceivable that the limited amounts of moneys that would be derived from auctions of the subject frequencies are a relevant and meaningful part of the statutory scheme. It is fair to say that the Balanced Budget Act of 1997 is a neutral factor regarding retroactive use of the auction mechanism to the cases of the moving parties.

26. The score card is Factor (a) not applicable; Factors (b), (c) and (d), each clearly and strongly adverse to retroactivity; and Factor (e), providing no counterveiling statutory reason to favor retroactivity.

27. The Commission's attempted rationale for its decision to apply the auction mechanism retroactively is, essentially, that it is too difficult and burdensome for it correct the comparative criteria in light of the decision in Bechtel v. FCC, 10 F.3d 875 (D.C.Cir. 1993), and, even if that were done, this would likely spawn further litigation. Of course, selecting and implementing the auction mechanism also will likely spawn further ligitation. And, the claimed difficulty and burden in adjusting its comparative criteria are not reasoned decisionmaking, for two reasons:

(a) The Commission and its predecessor agency, the Federal Radio Commission, have been successfully awarding licenses for various types of communications uses for 72 years since 1927. These agencies have been able to devise and implement regulatory mechanisms geared to the public interest which, with rare exceptions, have been found to be lawful. On those occasions when a given aspect of the agency's work has been found wanting, the Commission has corrected the deficiency and continued on with its business. So, too, it should have been with regard to the December 1993 court decision in the Bechtel case, which struck down a portion of only one of eight comparative criteria. Since then, thoughtful comments by various interested parties have been submitted to the Commission, available for its guidance, in no fewer than three rulemaking proceedings. Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5475 (1993), Second Further Notice of Proposed Rulemaking, 9 FCC Rcd. 2821 (1994) and the

instant rulemaking proceeding. This agency knows how to conduct rulemaking proceedings. During the six years since 1993, the Commission has been able to conduct to a successful conclusion literally hundreds of rulemaking proceedings including complex issues in the telephone, broadcasting, satellite, telecommunications, cable, captioning, disabilities and other fields. The agency's six-year paralysis on this relatively narrow issue cannot reasonably be defended.

(b) At the very same time and in the very same document in which the Commission professes an inability to correct its criteria for these long-standing comparative proceedings for new station licenses, the Commission provided a correction of the criteria for comparative proceedings regarding renewal of license applications, advising the parties to make their cases on grounds of relevance to the public interest under the statute. First Report and Order, 13 FCC Rcd. at 16004-6. In effect, this has returned those parties to the comparative common law extant in several decades prior to adoption of the agency's policy statement in 1965, Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393, during which time the majority of the nation's new broadcast station licenses were successfully established in an effective and efficient manner.

Statute and Agency Action Violate Due Process of Law

28. The provision of the Balanced Budget Act of 1997 authorizing the Commission to dispose of the subject cases by auction, and the agency's determination to do so, bring into play

the due process provisions of the Fifth Amendment of the Constitution. While in the enactment of social and economic legislation, Congress has broad powers to determine the utility of providing for retroactive application of federal statutes, such statutes offend due process if retroactive effect of the legislation is "arbitrary and irrational." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1975). As a general concept, in determining whether a retroactive statute crosses the line into a violation of due process, the cases contrast the nature of the social and economic purpose served by the legislation and the nature of the frustration of expectations of parties harmed by the retroactivity. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960).

29. An example of retroactive legislation struck down as "arbitrary and irrational" is the refusal of the courts to uphold retroactive application of federal gift taxes to parties who made gifts prior to enactment of the statute or to reasonable notice of the prospect of enactment of the statute. Welch v. Henry, 305 U.S. 134 (1938) and cases cited in that opinion. While these cases were handed down in the 1930's, they remain good law under the "arbitrary and irrational" standard of the landmark Turner Elkhorn decision. Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 733 (1984).

30. Welch v. Henry has direct application here. There, the social and economic purpose was to raise funds through taxes to

support the common weal. Here, the social and economic purpose of the Balanced Budget Act of 1997 is to raise funds through auctions to support the common weal. While income, estate, property and most other taxes may be applied retroactively, Welch v. Henry struck down retroactive application of federal gift taxes on the premise that, while citizens have no alternatives to other forms of taxation, the decision to make a gift is a purely voluntary act for which a retroactive tax is an arbitrary and irrational frustration of the reasonable expectations of the party who engaged in that voluntary act. So, too, here. The decision of the moving parties, to make application for a federal license, was a voluntary act for which the retroactive requirement of payment of full market value, wiping out 13-17 years of investment and litigation under an entirely different mechanism for securing the license, is an arbitrary and irrational frustration of the reasonable expectations of parties who engaged in that voluntary act.

31. The Commission's arbitrary and capricious retroactive decision, under a statute that also violates due process, is not supported by authorities cited by the Commission in arriving at that decision:

(a) United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), First Report and Order at ¶44, and Reconsideration Order at ¶12, involved a rulemaking proceeding in which the Commission adopted a limit on the number of broadcast stations that could be owned by a single party and, at the conclusion of that rulemaking

proceeding, dismissed a pending application of Storer for acquisition of an additional broadcast station in violation of the new rule. The new rules were adopted in November 1953, several years after the notice of proposed rulemaking was issued, apprising interested parties of the prospect of the limitation. With such advance notice, the Storer application to acquire an additional station, over and above the prospective limit, was filed in August 1953, on the eve of adoption of the limiting regulation. Storer Broadcasting Company v. United States, 220 F.2d 202 (D.C.Cir. 1955). Thus, in filing a last-minute "test case" application to challenge the new regulation, Storer had no equities or reasonable expectations under the principles of administrative and constitutional law applicable to the positions of the moving parties here.

(b) Bowen v. Georgetown University Hospital, supra, Report and Order at ¶44, struck down a Medicare regulation promulgated by the Secretary of Health and Human Services as unauthorized by the governing statute, which allowed certain retroactive adjustments in health care allowances to service providers to suit the facts and circumstances of individual cases, but did not authorize new regulations for the health care allowances that were retroactive across the board. This holding is inapposite. We do not challenge the Commission's action as having been taken without statutory authority; rather, we challenge (a) its arbitrary decision under principles of administrative law and (b) the constitutionality of the statute itself.

(c) The Report and Order appears to rely on Bowen v. Georgetown for the premise that the retroactive auction rule is not unlawful because it does not "impair rights a party possessed when [it] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." In our view, the quoted language describes the plight of the moving parties quite nicely. However, the language is from the Landgraf opinion, discussed next. There is language in Bowen v. Georgetown having relevance here, nonetheless. Both the majority and concurring opinions state and cite precedent to the effect that retroactivity is not favored in the law. 488 U.S. at 208 and at 223. Moreover, the concurring opinion states: "A rule that has unreasonably secondary retroactivity - for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule - may for that reason be 'arbitrary' or 'capricious,' see 5 U.S.C. §706, and thus invalid." [emphasis supplied]. 488 U.S. at 220.

(d) Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994), Report and Order at ¶44, and Reconsideration Order, at ¶12, uses the language relied on by the Commission, to which we are also willing to subscribe, i.e., "whether [a statute] would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," as a definition of retroactivity under the statute there in question. That statute amended the

federal civil rights laws to grant rights to a jury trial and expanded compensatory and punitive damages for conduct such as sexual harassment, and the issue before the court was whether the rights to jury trial and expanded compensatory and punitive damages could be applied retroactively to a lawsuit based on sexual harassment which occurred prior to enactment of the statute.

(e) The court cited the general principle that changes in procedures usually may be applied retroactively and, under that principle, upheld a retroactive right to a jury trial. With regard to the new economic consequences, however, the court came down against retroactivity, employing the language about the changed position of the parties quoted above. Our take on that language, as applied here, is exactly the opposite of the Commission's: Normally, procedural changes in processing and conducting hearings regarding applications for federal broadcast licenses can and have been applied retroactively by the Commission; but a new procedure wiping out all prior investment and requiring the parties to purchase the license at full market value vastly alters the economic consquences of the act of filing the license application in a manner that is akin to the compensatory and punitive damages for actions in Landgraf which did not have any such economic impact at the time they were taken.

(f) Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C.Cir. 1989), Report and Order at ¶44,

involved a comparative proceeding for the award of an instructional television license in which the Commission's comparative criteria were followed as previously announced and relied upon by the applicants, i.e., favoring a local educational applicant over an outside educational applicant. There was no change in the groundrules on that score. The outside educational applicant sought to assert the right to have an evidentiary comparative hearing, rather than an administrative comparative processing of the applications, and the court upheld the Commission's procedure to decide such cases without an evidentiary comparative hearing.

(g) Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987), Report and Order at ¶¶45-46, involved comparative applications for a cellular radiotelephone license for which the groundrules were changed from certain comparative criteria to the use of a lottery mechanism. The court affirmed the Commission's change in the groundrules. The differences between Maxcell and the applications of the moving parties are decisional:

(1) Before the Maxcell party filed its application, the FCC had already given public notice that it might change to the lottery mechanism. The moving parties did not learn of the change to the auction mechanism until more than a decade after they filed their applications.

(2) The change to the lottery mechanism in Maxcell came before the applicant had incurred litigation costs under the

comparative hearing procedure, and thus saved the applicant large sums of money in the prosecution of its application. Here, change has occurred after the moving parties have run the entire guantlet of litigation before the Commission, including its subordinate Administrative Law Judges and Review Board, as well as multiple trips downtown to the Court of Appeals.

(3) In Maxcell, the regulatory change converted the applicant's investment from a prospective hearing procedure to participation in a lottery as a means of winning. In the case of the moving parties, the investment is simply wiped out. Their choices are two, either to walk away from the investment or, in effect, pay twice for the frequency, a governmental form of "double dipping."

(h) Chadmoore Communications, Inc., 113 F.3d 235 (D.C.Cir. 1997), Report and Order at ¶44, involved a party who had duly received the wide-area specialized mobile radio (SMR) license for which it applied. The issue in the case was the validity of a subsequent rule change reducing the time period for completion of construction of the SMR system. On the facts, the court upheld the Commission's rule change as applied to this licensee.

(i) DIRECTV, INC. v. FCC, 110 F.3d 816 (D.C.Cir. 1997), Report and Order at ¶44, involved parties who had duly received the licenses for direct broadcasting to homes from satellites (DBS) for which they had applied. At one point in time, the FCC stated that if certain other DBS channels were reclaimed from another party, the extra DBS channels would be reallocated pro-

rata to these licensees. Instead, the FCC decided to put the reclaimed DBS channels out for auction, and the court affirmed. The complaining licensees got what they applied for. They didn't get any bonus frequencies, for which they must pay the market price if they want them. In all events, these parties would continue owning and operating the DBS channels duly licensed to them. Their investments were not extinguished by statutory or regulatory fiat.

RELIEF REQUESTED

32. The moving parties request that the Commission act to grant a stay of the effectiveness of the auction rules as applied to their applications, the application of Orion and the applications of other similarly situated parties. The moving parties also request that the Commission act expeditiously in the matter, bearing in mind the rapidly approaching effective date of the new rules and the need for the moving parties to consider seeking a stay from the Court of Appeals if prompt action is not forthcoming at the agency level.

Respectfully submitted,

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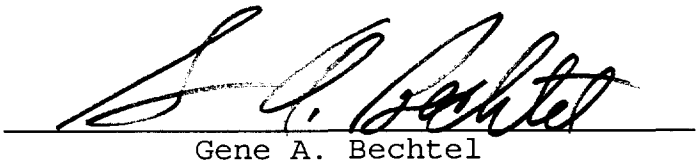

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May 10, 1999

CERTIFICATE OF SERVICE

I certify that copies of the foregoing MOTION FOR STAY have been placed in the mails, first class, postage prepaid, this 10th day of May 1999, addressed to the offices of the following:

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