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

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MAY 14 1999

In the Matter of:)
)
Implementation of Section)
309(j) for Competitive)
Bidding)
)
)
Reexamination of the Policy)
Statement on Comparative)
Broadcast Hearings)
)
)
Proposals to Reform the)
Comparative Hearing Process)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 97-234

GC Docket No. 92-52

GEN Docket No. 90-264

To: The Commission

CONSOLIDATED OPPOSITION TO MOTIONS TO STAY
AND MOTION TO RECUSE FCC COMMISSIONERS

Respectfully submitted,

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May 14, 1999

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SUMMARY

Orion Communications, Limited, and three other applicants for broadcast licenses, filed motions to stay the auctions in their respective proceedings. According to Orion, it will suffer irreparable harm if an auction is conducted because it does not have the necessary funds to participate. The other movants claim they will suffer irreparable harm by having to pay for the license if they are the high bidder.

These arguments must be rejected as wholly insufficient to support a stay. Orion and the other movants only rehash arguments previously made to the Commission that they are opposed to having auctions, either because they could not prevail in an auction, or simply do not want to pay for the licenses. Strongly disagreeing with a Commission action is not a basis for grant of a stay.

The auction rulemaking did exactly what the language of the statute authorized it to do --- conduct auctions for applications filed prior to July 1, 1997. Where an agency rulemaking is consistent with and implements statutory language, the action is reasonable and not an abuse of discretion.

Willsyr requests that Chairman Kennard consider whether to recuse himself because of Senator Jesse Helms' attempt, on behalf of Orion, to extort an agreement not to adopt auctions in the rulemaking. Orion's motion actually complains that the Commission reneged on this illegal agreement with Senator Helms. The other Commissioners should also consider whether to recuse themselves if they have had improper contacts with Senator Helms in this matter.

CONSOLIDATED OPPOSITION TO MOTIONS TO STAY
AND MOTION TO RECUSE

Willsyr Communications, Limited Partnership ("Willsyr"), by its counsel, pursuant to 47 C.F.R. 1.45 (d), hereby submits this consolidated opposition to motions to stay.^{1/} It also submits to the Commissioners a motion for consideration of their recusal.

On May 5, 1999, Orion Communications Limited ("Orion") filed a "Motion for Stay Pendente Lite" of Implementation of Section 309 (j) for Competitive Bidding, MM Docket No. 97-234, rel. August 18, 1998, 13 FCC Rcd 15920, and the Order on Reconsideration, FCC 99-74, rel. April 20, 1999. On May 10, 1999, Jerome Thomas Lamprecht, Susan M. Bechtel, and Lindsay Television, Inc. ("the joint movants") filed a joint motion for stay of the same proceedings.

Orion requests that the Commission stay the auction of the FM broadcast frequency for Biltmore Forest, North Carolina, and for other similarly situated proceedings, pending judicial review of the broadcast auction rulemaking by the U.S. Court of Appeals for the D.C. Circuit. See, Orion Communications, Ltd., et al, v. FCC, Case No. 98-1424, filed September 15, 1998.

The joint movants, Lamprecht, Bechtel, and Lindsay, request the Commission to stay the auctions in Biltmore Forest and in proceedings where they are applicants, pending judicial review of their appeals of the broadcast auction rulemaking. Their appeals are consolidated with that of Orion in the D.C. Circuit. See, Case Nos. 98-1444, 1445, and 1528.

^{1/} Skyland Broadcasting Co., one of the competing applicants in the Biltmore Forest proceeding, joins in opposition to grant of a stay.

Summary of Orion's Arguments

Orion demands that the auction be stayed because it does not have enough money to buy the Biltmore Forest FM frequency at auction, nor can it seriously participate in the auction. See, Orion Motion, pp. 5 and 8. In support, Orion submits the May 5, 1999, affidavit of Betty Lee, one of its principals and its Acting Chief Executive Officer. According to Mrs. Lee, Orion and its principals have "expended virtually all [their] financial resources ... [and] ... simply lack the financial resources at this point to take a realistic part in an auction process." See, Betty Lee Affidavit, p. 2.

In its motion, Orion also rehashes arguments that it had previously made in 1998 in opposition to the broadcast auction rulemaking. It, moreover, submits for the first time the May 5, 1999, Declaration of Chera L. Sayers. According to Ms. Sayers, the Commission's 1998 broadcast auction rulemaking and the regulatory flexibility analysis, contained therein, rely on fallacious economic assumptions. See, Sayers Declaration, pp. 2 and 4.

Summary of the Joint Movants Arguments

The joint movants contend that they would be irreparably harmed if they participated in an auction and had to pay money for a license they had initially believed would be awarded for free. Moreover, the joint movants contend that if they were the high bidder in an auction and the Courts later invalidated the auction they would be irreparably harmed because there is no clear mechanism for refund of the auction bid funds.

Willsyr's Arguments in Opposition to the Motions to Stay

(a) No Standing to File at the Commission

Orion and the joint movants have no standing to file a motion to stay at the Commission. They have had pending at the U.S. Court of Appeals for the D.C. Circuit since at least September 15, 1998, petitions for review of the broadcast auction rulemaking. See, Consolidated Case Nos. 98-1424, 1444, 1445 and 1528. Orion's and the joint movants' appeals of the rulemaking are now before the Court, not the Commission. See, 47 U.S.C. 402 (c).

Orion and the joint movants should have filed a protective motion to stay at the Commission in August or September 1998 before taking a petition for review to the Court. No facts or circumstances have changed since that time, nor did the Commission make any substantive changes to the broadcast auction rulemaking on reconsideration. Orion and the joint movants are in effect asking the Commission for reconsideration of an order in which they declined to seek reconsideration. Such litigation tactics violate 47 U.S.C. 402 (c) and 405, which prohibit a party from seeking at the same time both review before the Court and reconsideration or other action before the Commission.

Orion's and the joint movants' motions to stay should also be dismissed or denied because they merely rehash arguments previously made to the Commission which were rejected. To the extent that Orion raises new arguments, such as the Sayers' economic analysis of the efficiency of broadcast auctions, the motion to stay should

be dismissed or denied. Orion could have raised this argument in the rulemaking or on reconsideration. It has presented no reason why the Sayers declaration could not have been presented sooner. Thus, Orion failed to present such an argument at the proper time and has thus waived the right to present it to the Commission. See, 47 U.S.C. 405 (a)(2).

(b) Motion to Recuse

In conjunction with the broadcast auction rulemaking, Willsyr filed a motion to recuse on February 25, 1998. Therein, it requested that Chairman William Kennard recuse himself from the broadcast auction rulemaking as it pertained to the Biltmore Forest FM frequency and other similarly situated proceedings.

The motion to recuse resulted from the improper intervention of U.S. Senator Jesse Helms into the rulemaking proceeding. At the behest of Orion and its highly-paid Capitol Hill lobbyists (which includes Orion's co-counsel in the instant motion for stay), Senator Helms placed a hold on the Senate confirmation vote for Mr. Kennard to become Chairman of the Commission.

In return for releasing the hold, Senator Helms extorted (or attempted to extort) on behalf of Orion a promise from Mr. Kennard to keep the Biltmore Forest FM frequency from being auctioned and to thereafter assist Orion in obtaining the frequency through a comparative process in which it would be favored. See, Congressional Record, pp. S11308-11310, October 29, 1997. This is the same relief that Orion seeks in the motion to stay.

Willsyr hereby renews its motion to recuse, filed February 25, 1998, and requests that Mr. Kennard recuse himself from consideration of the motions to stay. Orion is seeking in the motion to stay the same relief that Senator Helms demanded from Mr. Kennard on behalf of Orion in return for allowing him to become Chairman of the Commission. See, Home Box Office Inc. v. FCC, 567 F.2d 9, 54-55 (D.C. Cir. 1977); American Public Gas Ass'n v. FPC, 567 F.2d 1016, 1069, n. 104 (D.C. Cir. 1977). If Mr. Kennard is not recused, he is at risk for violation of 18 U.S.C. 201, which carries both civil and criminal penalties.

Willsyr also requests that the other Commissioners disclose whether they or their staff members have had any contact with Senator Helms, his staff members or his representatives, or any other persons, directly or indirectly, as to the merits of the broadcast auction rulemaking and as it pertains to Orion or to the Biltmore Forest FM frequency (or any other similarly situated proceeding). This would include any discussions with Mr. Kennard and his staff as to Senator Helms' demands to assist Orion. If the Commissioners, or their staff members, have had any such contacts, they should disclose these matters and determine whether to also recuse themselves from consideration of Orion's motion to stay.

(c) No Strong Likelihood of Success on Appeal has Been Demonstrated

In order to obtain a stay, a movant must demonstrate a strong likelihood of prevailing in its appeal or petition for review. See, Washington Metropolitan Area Transit System v. Holiday Tours,

Inc., 559 F.2d 841 (D.C. Cir. 1977). Orion and the joint movants have failed to make such a showing.

According to Orion and the joint movants, they have a strong likelihood of prevailing in their petition for review because the Commission had the "discretion" to adopt comparative hearings, instead of auctions, but irrationally adopted auctions. However, Orion's and the joint movants' arguments are confused and wholly fallacious.

Congress authorized the Commission to adopt auctions to resolve broadcast proceedings which were commenced prior to July 1, 1997, and where Initial Decisions had been issued. No other selection method is authorized and comparative hearings are not even mentioned. See, 47 U.S.C. 309 (j)-(1). Indeed, the Conference Report, at p.573, and legislative history for this statute states that the Commission is required to have auctions in such proceedings. See, Congressional Record, p. S11309.

The canard that the Commission had the "discretion" and even a Congressional mandate to adopt comparative hearings, instead of auctions, was concocted by Senator Helms as a result of a prolonged lobbying campaign by Orion's Capitol Hill operatives, which includes its co-counsel in the instant motion to stay.

In Mr. Kennard's confirmation hearings to be Chairman, Senator Helms asked whether in his opinion the Commission had the "discretion" to conduct comparative hearings, instead of auctions, in cases such as Biltmore Forest. Mr. Kennard opined that "the

statutory language suggests that the Commission has the discretion to use comparative hearings," although the Conference Report states that auctions are "required." See, Responses of William E. Kennard to Post-Hearing Questions Submitted by Senator Conrad Burns on Behalf of Senator Jesse Helms, dated October 6, 1997, Congressional Record, p. S11309.

This tentative and equivocal response was made by Mr. Kennard under threat of a hold on his confirmation vote to be Chairman if Senator Helms was displeased. Senator Helms was apparently not entirely pleased with this response and then placed a hold on Mr. Kennard's confirmation vote.

In a letter to Senator John McCain, dated October 21, 1997, Senator Helms asserted that "the FCC contends that it interprets [Section 309 (j)] as giving [it] the authority to decide whether [cases such as Biltmore Forest] be judged on the basis of the comparative hearing process" and that he believes this is the proper interpretation. Moreover, Senator Helms stated that if the Courts question his interpretation, he wants legislation swiftly enacted to overturn such decision. See, Congressional Record, p. S11309-11310.

In a letter to Senator Helms, dated October 23, 1997, Senator McCain stated that in his opinion any language in the Conference Report, or legislative history, requiring auctions [in cases such as Biltmore Forest] should be disregarded as not binding. Moreover, Senator McCain stated that in the unlikely event that the

Courts misconstrue the statute [Section 309(j)], he will enact legislation to overturn the decision. See, Congressional Record, p. S11310.

In releasing, on October 29, 1997, the hold on Mr. Kennard, Senator Helms either mischaracterized his October 6, 1997, written response, or simply told Mr. Kennard what his response should have been. According to Senator Helms, "Mr. Kennard clearly feels the FCC can conduct [comparative] hearings on this small group [cases such as Biltmore Forest]. See, Congressional Record, p. S11309.

Thus, the canard that the FCC has the statutory discretion to conduct comparative hearings in Biltmore Forest and a Congressional mandate to do so is supported by no more than two U.S. Senators --- one being Senator Helms who was intensely lobbied by Orion on this issue to coerce Mr. Kennard into helping it obtain a grant through a comparative hearing and the other being Senator McCain who apparently went along with this charade in order to coax Senator Helms into releasing his hold on Mr. Kennard.

The actual opinion of Senator McCain on the issue of comparative hearings is expressed in a letter from him to then Chairman Reed Hundt, dated January 9, 1997. Therein, Senator McCain explicitly directed the Commission not to use comparative hearings to resolve any pending applications because Congress was to soon enact legislation authorizing the use of auctions for these pending applications. See, McCain letter, dated January 9, 1997.

In any event, the personal opinions of only two U.S. Senators,

and an FCC Chairman (and even the whole FCC), regardless of how legitimate those opinions may be, do not form a valid basis for determining the intent of Congress. This intent must be determined by the language of the statute and the legislative history. See, Chevron v. NRDC, 467 U.S. 837, 842-843 (1985).

If there is any doubt that comparative hearings were not authorized or intended by Congress in cases such as Biltmore Forest, it should be dispelled by the recent rejection by Congress of legislation introduced by Senator Helms to require the Commission to conduct comparative hearings in cases such as Biltmore Forest and to prohibit auctions. This rejected legislation that was authored by Senator Helms precisely mirrors the arguments of Orion in its petition for review and in its motion for stay. See, attached copy.

In the broadcast auction rulemaking, which Orion seeks to have overturned by the Courts as an abuse of discretion, the Commission did exactly what Congress authorized it to do in the statute with respect to pre-July 1, 1997, applications --- conduct auctions. Where a Federal agency follows the exact language of a statute in promulgating a rulemaking, as a matter of law there can be no abuse of discretion by the agency. See, Energy West v. FMSHC, 40 F.3d 457, 460 (D.C. Cir. 1994), an agency's action is reasonable if based upon a permissible construction of the statute in question.

The joint movants contend that the broadcast auction legislation is unconstitutional as a denial of "due process" under

the Fifth Amendment. However, that is not a proper matter for the Commission to consider. Moreover, a denial of "due process" because of the application of statutory law is not a compelling basis for grant of a stay in view of the possible availability of the award of monetary damages at a later date.

(d) No Irreparable Injury has Been Demonstrated

Orion claims that it would be irreparably injured if the auction of the Biltmore Forest FM frequency was held prior to completion of judicial review of the broadcast auction rulemaking. According to Orion, it does not have the financial resources to participate in the auction. Because it is now operating under interim authority for the Biltmore Forest FM frequency and the auction winner would receive the permanent license, Orion contends that its existing business as the interim operator would therefore be lost, thus constituting irreparable injury.

Orion's argument of injury is confused and wholly fallacious. Only if an applicant other than Orion was the auction winner and the auction rulemaking was upheld on judicial review would Orion lose its existing business as the interim operator. However, if the auction rulemaking is upheld on review as legally valid, Orion would suffer no legally cognizable loss or harm.

Orion has only a temporary interim authorization for the Biltmore Forest FM frequency which is expressly subject to termination upon a lawful grant of the permanent license, by whatever means. Orion took the interim authorization with full

knowledge that it might not be the permanent licensee, regardless of whether such permanent grant was by auction, comparative hearing, or some other procedure. See, Orion Communications, Ltd. v. FCC, 131 F.3d 176 (D.C. Cir. 1997).

If Orion does not participate in the auction for the Biltmore Forest FM frequency (or participates), but is not the high bidder, and the broadcast auction rulemaking is subsequently invalidated on judicial review, it would suffer no harm whatsoever. Orion would retain the interim authorization until a permanent licensee is selected by means other than an auction.

A motion for relief by Orion might only be appropriate, if at all, where the auction winner demanded that Orion cease interim operations prior to the completion of judicial review of the broadcast auction rulemaking. That scenario has not yet occurred and Orion has presented no evidence that it would occur. If that scenario does subsequently become likely, Orion should then request relief from the Commission or the Courts.

Orion and the joint movants would arguably suffer some injury if they participated in an auction and paid for the permanent license. However, this injury would not be "irreparable harm" if the broadcast auction rulemaking was upheld on judicial review. Orion and the joint movants would simply have paid more for the frequency than they had anticipated upon filing of their application in the 1980's and would still have the opportunity to seek redress from the U.S. Government for any damages or claims.

If the rulemaking was invalidated on appeal, Orion and the joint movants would suffer no irreparable harm or injury because the auction bid funds would then presumably be subject to return. No showing has been made that the U.S. Treasury would be legally entitled to the funds or would not return the funds pursuant to the Court decision invalidating the auction.

Orion's actual argument for stay of the auction is that because it is unable or unwilling to participate in the auction it is unfair for another one of the competing applicants for the Biltmore Forest FM frequency to obtain the permanent license. However, if the broadcast auction rulemaking is upheld on judicial review, Orion would suffer no legally cognizable injury or harm from its own failure to participate in a legally valid process. On the other hand, if the rulemaking is invalidated, then Orion is in no worse a situation than if the auction never took place.

It appears that Orion is very fearful that the broadcast auction rulemaking will be upheld on judicial review and thus it will have lost out on its only remaining opportunity to obtain the permanent license. However, such a well-grounded fear by Orion undercuts any argument that its petition for review of the rulemaking has a strong likelihood of success, which is one of the rationales for grant of a stay.

Self-serving and undocumented pleas of poverty, or self-imposed restrictions on participation in a Commission proceeding, must not be considered as a legitimate reason to allow an applicant

to obtain a perceived tactical or litigation advantage against other competing applicants. Rather, such tactics must be considered as what they are --- an abuse of process. Orion only wants to participate in a selection procedure in which it is guaranteed to win and wants to delay or stop any other procedure.

(e) Grant of a Stay Would Harm the Other Competing Applicants

Grant of a stay of the auction would harm the competing applicants in the Biltmore Forest FM proceeding, such as Willsyr and Skyland, because Orion is now operating on the frequency under interim authority. This interim authority is to terminate upon a lawful grant of the permanent license. The Commission has repeatedly represented to the U.S. Court of Appeals that it will expeditiously grant a permanent license in that proceeding. See, Orion Communications, Ltd. v. FCC, 131 F.3d 176.

Orion's motion for stay of the auction is a thinly veiled attempt to prolong its interim operation as long as possible and thus to make as much money as possible from its temporary authorization. This is an abuse of process by Orion which should not be countenanced by the Commission. The public interest is best served by the quickest possible resolution of the proceeding for the permanent license for the Biltmore Forest FM frequency, which is now going into its thirteenth year of litigation.

(f) Orion has Forfeited Its Privilege to Participate in the Auction

Because Orion has stated, under penalty of perjury, that it can not or will not participate in the auction for the Biltmore

Forest FM frequency, it must now abide by its representations, or otherwise be disqualified as a Commission licensee. If Orion does not have the necessary funds to seriously bid in the auction, as it claims, its participation would constitute an abuse of process. The auction is open only to serious bidders, not to spoilers.

On the other hand, if Orion does actually have, or obtains the necessary funds, its participation in the auction would constitute misrepresentation and lack of candor with respect to its instant motion to stay as a deceitful and misleading attempt to obtain a perceived tactical or litigation advantage in the broadcast auction rulemaking on judicial review.

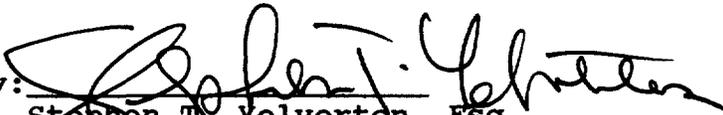
Under either of the above two scenarios --- abuse of process or deceit --- Orion would not possess the requisite character qualifications to be a Commission licensee.

Conclusions

WHEREFORE, in view of the foregoing, Willsyr requests that the Commission dismiss or deny Orion's and the joint movants' motions to stay the auction in the Biltmore Forest FM proceeding, and other similarly situated proceedings. Willsyr also requests the Commissioners to consider whether their recusal would be required.

Respectfully submitted,

WILLSYR COMMUNICATIONS,
LIMITED PARTNERSHIP

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May 14, 1999

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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
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January 9, 1997

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JAN 28 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The Honorable Reed E. Hundt
 Chairman
 Federal Communications Commission
 1919 M Street, N.W.
 Washington, DC 20554

Dear Chairman Hundt:

In 1993 the United States Court of Appeals for the D.C. Circuit invalidated one of the principal comparative criteria used in assigning new television and radio licenses. You noted this fact in your recently-released statement, "The Hard Road Ahead -- An Agenda for the FCC in 1997," and you proposed several possible alternatives that the Commission might use in its selection process instead, including the remaining comparative criteria, programming proposals, lotteries, and auctions. You further stated that, in the absence of legislation authorizing the Commission to assign broadcast licenses by auction, the Commission would be required to select from among the remaining alternatives.

I am writing to request that the Commission take no action on new rules until Congress considers legislation, which I intend to introduce in the near future, that will authorize the Commission to auction these licenses.

In my judgment it would be unconscionable for the Commission to give away new television and radio licenses without a guarantee that the public would receive the benefits to which it is entitled for use of its property. It would be particularly unfortunate if the Commission were to reverse earlier decisions and decide to distribute these licenses either by lottery or on the basis of programming proposals. Lotteries have proven to be an indefensible way to assign spectrum, and programming proposals have been found to lead to very difficult enforcement issues if the licensee's programming performance fails to meet its prior promises.

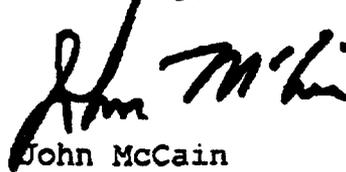
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The Honorable Reed E. Hundt
January 9, 1997
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The legislation I will introduce shortly will give the Commission the authority to use auctions to assign licenses formerly assigned through the comparative hearing process. The Commerce Committee will hold hearings on this legislation within the next few months. Given the fact that similar legislation was passed by both Houses of Congress in the Balanced Budget Act of 1995, vetoed for other reasons by the President, I expect this legislation to move quickly. Therefore, although I understand that a number of applications will remain pending in the interim, I do not believe this interim period will add significantly to the length of time this matter has already been before the Commission for consideration. I therefore hope that the Commission will take no action on new rules until Congress votes on this legislation.

Sincerely,



John McCain
Chairman

JM:pbs

cc: The Honorable James H. Quello
The Honorable Rachelle B. Chong
The Honorable Susan Ness

Senator STEVENS, Senator BROWNBACK, Senator HELMS, and others about Mr. Kennard's ability and willingness to re-examine and change policies of the FCC that we believe misinterpret the law and harm consumers. These concerns are only heightened by the very public way in which the administration has sought to involve itself in the deliberations of this supposedly independent regulatory agency.

Obviously, I do not agree with Mr. Kennard on many issues. For example, he believes that the FCC can and should tell broadcasters what kinds of programming they must present. I vehemently disagree. He believes that the FCC's current policies on telephone competition are working. I vehemently disagree. I am also troubled by the fact that, when asked, he was unable to specify any particular issue with which he might have disagreed with the FCC's current chairman—despite the fact that the FCC had disposed of thousands and thousands of issues during his tenure as its general counsel. That did not bode well for the independence of his approach to governing the FCC.

Mr. President, I am going to vote in favor of his confirmation, and I will tell you why. Mr. Kennard has an unblemished reputation for intelligence and integrity, and I find him to be an individual with whom I believe we can work in an atmosphere of mutual candor and respect.

In the final analysis, Mr. President, I believe it is neither reasonable nor necessary that all members of the Senate endorse the current policies of the FCC or Mr. Kennard's personal policy predictions. It is much more important that the Senate understand how difficult the issues are that Mr. Kennard is going to be called upon to decide, and that we undertake to work closely and collaboratively with him in resolving them. I give you my promise, as chairman of the Commerce Committee, to exercise the committee's oversight responsibility exactly and continuously, and I know the members of the committee are as committed to this task as I am.

On this basis, Mr. President, I am pleased to support the confirmation of William E. Kennard as Chairman of the Federal Communications Commission.

Mr. President, I reserve the balance of my time.

Mrs. FEINSTEIN addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from California is recognized.

Mrs. FEINSTEIN. I thank the Chair.

The ACTING PRESIDENT pro tempore. Who yields time to the Senator?

Mr. HOLLINGS. Mr. President, I yield such time as is necessary to the distinguished Senator from California.

The ACTING PRESIDENT pro tempore. The Senator from California is recognized.

Mrs. FEINSTEIN. Mr. President, I thank the ranking member of the committee and I also thank the chairman of the committee.

I was very pleased to hear the chairman's statement that it is his belief that Mr. Kennard possesses an "unblemished reputation" for candor and integrity. I appreciate his comments and believe they have been well stated.

As California's Senator, I am particularly pleased to rise in support of the President's nomination.

Bill Kennard has very strong California roots. He was born in Los Angeles. He graduated with honors from my alma mater, Stanford University. He then attended Yale Law School.

Bill Kennard's family also has strong California roots. His father, Robert Kennard, now deceased, was a very well-regarded architect in the Los Angeles area. He formed the largest continuously operating African-American architectural practice in the western United States and also served as the founding member of the National Organization of Minority Architects.

His mother, I want this body to know, is also a distinguished person. She grew up in the great Central Valley of California. She received a master's degree in bilingual education and has worked in the field of bilingual education in Los Angeles.

The President's nomination is, in fact, a historic one. Following his confirmation, he will be the first African-American to serve as FCC Commissioner in the history of the United States. He is well prepared for the challenges ahead of him. He has a broad telecommunications background in both the public and the private sector and an impressive range of experiences that, I believe, will serve him well and serve the Nation well.

Since 1993, as the chairman mentioned, Bill Kennard has served as FCC general counsel. He has represented the Commission before the courts and served as its principal legal advisor. In that capacity, he has defended the commission well.

Bill Kennard was a partner in the Washington law firm of Verner, Lipfert, Bernhard, McPherson & Hand, specializing in communications law. He has served as assistant general counsel of the National Association of Broadcasters.

I also know that he has been involved in the needs of his community here in Washington and has served on the board of a nonprofit homeless shelter.

With this committee's leadership, the Congress was able to pass the most comprehensive communications legislation since passage of the 1934 Communications Act, upgrading our telecommunications law to address modern telecommunications needs.

The 1996 act sought to develop a regulatory framework that provides the benefit of competition for consumers, spurs the development of new products and reduces costs, while it also removes unnecessary regulatory barriers.

Congress has set the stage for a new telecommunications era, and we need to ensure that that law is implemented properly and that it works fairly for

consumers. I think that, as FCC general counsel, Bill Kennard has the experience to help see these reforms through.

I happen to believe he will be an independent and a strong voice, yet responsive to the concerns that the distinguished chairman has pointed out. I am pleased to add a California voice and to support this distinguished nominee.

I thank the Chair and I yield the floor.

Mr. HELMS addressed the Chair. The ACTING PRESIDENT pro tempore. The Senator from North Carolina is recognized for 5 minutes.

Mr. HELMS. I thank the Chair and I thank the managers of the bill.

Mr. President, we have been working with Senator MCCAN and Senator HOLLINGS and their staffs and, of course, William Kennard. I met with him for some time in my office. Mr. Kennard is the nominee to be Chairman of the Federal Communications Commission, as you know. Now, all of us—and I think it is fair to include Mr. Kennard—want to rectify an awkward and unjustifiable situation that has developed in the Federal Communications Commission process of awarding broadcast licenses. Specifically, in this case, a well-known and highly respected and popular broadcasting executive in Asheville, NC, was curiously disqualified in his application for an FM frequency in the Asheville area. There was a lot of resentment in the public about that.

What happened, Mr. President, was that this gentleman, Zeb Lee, of Asheville, and 13 other groups, had applied for the FM frequency when it became available in 1967. The Commission's comparative hearing process, in effect at that time, was used to determine which group would be the most qualified for the frequency.

Zeb Lee had run station WSKY-AM in Asheville for 45 years, during which time he did the play-by-play for about 4,000 high school football games, and by sponsoring such public interest things as an Elvis Presley concert in 1955, which I would not have listened to, but most people did want to hear it. But he made so many innovations in broadcasting that he became just a household word, in terms of his name. He is enormously popular to this day.

Well, Mr. President, in 1969, a 20-day hearing was held during which an FCC administrative law judge disqualified most of the other applicants because the judge ruled that they either lacked experience, didn't have transmitter facilities ready to go, or were basing their application purely on provisions favoring minorities—women and others. The judge found for the Lees, ruling in their favor on May 4, 1990. The judge found that the Lees were the most qualified, citing their stewardship of the AM station and Mr. Lee's commitment of involvement in the day-to-day management of the station. The FCC then favored active involvement by owners in the day-to-day operations

of a radio station, as opposed to passive investors who would not be active managers. I think that is the way to go, as a former broadcaster.

In any case, Mr. President, in addition to the first ruling in favor of Zeb Lee and his people, on April 8, 1991, the FCC Review Board affirmed the administrative law judge's ruling. And then on February 28, 1992, the FCC released its first decision favoring the Lees and a second decision also favoring the Zeb Lee application was released, I believe, on November 23, 1992.

So on June 14, 1993, the FCC released a third ruling favoring the Lees.

Well, Mr. President, you might say, "Why is HELMS going to speak today talking about this nominee and this situation in Asheville, NC?"

The FCC granted a construction permit to the Lees on April 30, 1993, following which they began the construction process. So it went through a series of regulatory twist and turns in which the Lees complied with every order and requirement issued by the FCC and the administrative law judge, who stipulated that Mr. Lee must dispose of his AM station as a condition for acquiring that FM license—which Mr. Lee did. Amazingly, on June 18 of this year, the FCC which had reversed itself on June 2, forced the Lees off the air.

Zeb Lee has asked the U.S. Court of Appeals to examine the manner in which the FCC handled his application, which led to his being taken off the air. The court will shortly issue a decision in the near future.

Mr. President since April 30, 1993, the U.S. Court of Appeals in the Bechtel case of December 17, 1993, struck down the "comparative process" that had been used to determine allocations of radio and television frequencies. The court directed the FCC to come up with new comparative standards. The Lees and about 25 to 30 other people were affected by this decision.

But their cases have been frozen ever since. Additionally, a provision in the Balanced Budget Act of 1997, which went into effect July 1, required that all radio and television frequencies be subject to auction. This provision concerned us because Zeb Lee's case and another 25 to 30 cases were in the pipeline and could be subject to auction which nobody anticipated.

I find no fault with the provision in the balanced budget legislation, but it crept in the back door on Mr. Lee and the others.

So, to get to the meat of the coconut, Mr. President, I submitted questions to Mr. Kennard through Senator Burns' Commerce Communications Subcommittee about all of this. I ask unanimous consent that the nominee's responses be printed in the RECORD at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HELMS. I thank the Chair.

Senators should note that Mr. Kennard clearly feels the FCC can conduct hearings on this small group and class of applicants using new comparative criteria.

In any event, Mr. President, I then consulted and wrote to the able chairman of the Senate Commerce, Science, and Transportation Committee, Mr. MCCAIN, seeking assurance that Senator MCCAIN now agrees that the provisions in the Balanced Budget Act of 1997 do not prohibit the FCC from using the comparative process in these 25 or 30 cases.

I ask unanimous consent that copies of my letter and Senator MCCAIN's response be printed in the RECORD at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 2.)

Mr. HELMS. I thank the Chair.

Mr. President, I have been given assurances satisfactory to me by Mr. Kennard that he will, within statute and regulation, work in good faith with me and others to resolve the problems the Bechtel decision caused.

I was very impressed when Mr. Kennard came to my office and met with me about 3 weeks ago. I appreciate his voluntary assurance that he will work with us on the Zeb Lee case. Therefore, Mr. President, I support the nomination, and I am going to ask for the yeas and nays. I hope that he will be confirmed unanimously by the Senate.

EXHIBIT 1

RESPONSES OF WILLIAM E. KENNARD TO POST-HEARING QUESTIONS SUBMITTED BY SENATOR CONRAD BURNS ON BEHALF OF SENATOR JESSE HELMS

1. As you know, the recent budget legislation included a provision that appear[s] to require the FCC to apply auction procedures to pending applications for radio stations. These provisions were reportedly aimed at resolving the applications that have been in limbo since the Bechtel case struck down a part of the FCC's rules governing comparative license application proceedings. Please clearly state your views in response to the following questions:

a. In your opinion, is the FCC now required to apply these auction provisions to all pending application cases, or does the FCC have discretionary authority not to handle pending cases through this auction approach?

In the Balanced Budget Act of 1997, Congress required the FCC to use auctions to resolve all future comparative broadcast proceedings involving commercial stations. For pending applications, the statute states that the Commission "shall have the authority" to use auctions. The Conference Report states that this provision "requires" the Commission to use auctions for pending cases. The Commission will be determining in a rulemaking proceeding implementing the Balanced Budget Act of 1997 how it should proceed with these pending cases. The statutory language suggests that the Commission has discretion to use comparative proceedings for pending cases.

b. While most of the pending comparative cases had not gone through a hearing before an administrative law judge, and had at least an initial decision issued, a relatively small number of these cases had in fact been de-

ecided under the old rules by an ALJ and in some cases decisions made by the full Commission, although these decisions may have been on appeal. In those cases, the parties often had spent many years and hundreds of thousands of dollars to advance their applications under the old rules. Do you believe that it would be more equitable not to apply auction procedures to the cases which were far along in the process, where the applicants had played in good faith under the old rules, and to instead have those cases decided using any existing hearing record pursuant to such special rules as the Commission might adopt for deciding them?

I do believe that the Bechtel decision has caused unfairness to many applicants who have had further processing of their applications delayed and, as a result of that court decision, will necessarily have their applications processed under new procedures. I am quite sympathetic to their predicament. That is why the Commission argued to the court in Bechtel that the court's decision should only apply to new cases. Unfortunately the Commission was not successful and the court rejected this argument. As noted above, the issue of what those procedures will be, that is, whether some or all pending applications should be auctioned or decided pursuant to some new, yet-to-be developed criteria, will be a subject of the Commission's rulemaking proceeding implementing the Balanced Budget Act of 1997. The Commission certainly may consider as part of that rulemaking proceeding any arguments that particular classes of pending applicants should be treated differently.

c. The U.S. Court of Appeals in the Bechtel case ordered the Commission to issue new comparative rules. Although the Commission never formally adopted such new rules, its staff, including your office, prepared draft rules to respond to the Court's order. Please summarize how those draft rules would have dealt with pending cases, and comment on whether those drafts might be suitable and readily adaptable for use in resolving at least those pending cases that had reached the point where an initial decision had been issued based on a hearing record.

The FCC staff presented a draft order to the Commission earlier this year. In that draft, the staff recommended that pending hearing cases be resolved by a lottery pursuant to section 309(l) of the Communications Act. The Balanced Budget Act of 1997 eliminated the Commission's authority to use lotteries for these cases, so the staff proposal is no longer an option.

EXHIBIT 2

U.S. SENATE.

Washington, DC, October 21, 1997.

Hon. JOHN MCCAIN,
Chairman, Senate Committee on Commerce,
Science, and Transportation, Washington,
DC.

DEAR JOHN: My folks have conducted numerous discussions with your good people about the FCC treatment of Zeb Lee, a long-time Asheville broadcaster, in response to Lee's attempt to secure an FM radio station, (Zab and approximately 25 to 30 other applicants were left stranded in this regulatory process by the Bechtel court decision.)

Additionally, I understand these 25 to 30 applicants are not affected by the provision requiring the auctioning of all radio and television licenses that was included in the Balanced Budget Act of 1997, which went into effect July 1 of this year.

The FCC contends that it interprets this provision as giving the Commission the authority to decide whether these 25 to 30 applicants be judged on the basis of the comparative hearing process. John, I do hope that you agree that this is a proper interpretation.

Furthermore, in the future if the courts question this interpretation for these applicants, I do hope that you will reaffirm this interpretation and move related legislation swiftly through the Senate.

Many thanks, John.
Sincerely,

JESSE

U.S. SENATE, COMMITTEE ON
COMMERCE, SCIENCE, AND
TRANSPORTATION

Washington, DC, October 23, 1997.

Hon. JESSE HELMS,
U.S. Senate,
Washington, DC.

DEAR JESSE: I am aware of your concern over whether Section 302(a) of the Balanced Budget Act would permit the Federal Communications Commission to use comparative hearings where mutually-exclusive applications have been filed for initial licenses or construction permits for commercial radio and television stations. As a principal proponent of this part of the legislation, I am happy to have this opportunity to respond to your question.

Section 302(a) specifically states that, with respect to competing applications filed before July 1, 1997, the Commission "shall have the authority to conduct" auctions. Therefore, the Commission's authority to conduct auctions in these situations is clearly and explicitly permissive, not mandatory. Moreover, the statute contains no provision affecting the Commission's existing authority to hold comparative hearings, although it does explicitly repeal the Commission's authority to conduct lotteries. Read together under long-established principles of statutory interpretation, there can be no doubt that these provisions: (1) permit, but do not require, the use of auctions to select initial licenses for commercial radio and television stations; and (2) that the Commission is (a) permitted, but not required, to use comparative hearings to select such licenses or permittees in cases where it determines that auctions should not be used, but (b) is not permitted to use lotteries to select licenses or permittees for any service.

As to the impact of legislative history (conference reports, floor statements, and other such collateral material), it is a basic tenet of statutory interpretation that where, as here, the letter of the law is unambiguous on its face, legislative history cannot be read to override it. Therefore, any such statements that appear inconsistent with the clear terms of the statute cannot be interpreted to contradict it or to call it into question.

Finally, in the unlikely event that any future court opinion misconstrues the statute, I will do whatever is necessary to secure the passage of legislation that will restate the terms of the statute as reflected in this letter.

I sincerely trust this will answer your questions fully. I would be pleased to provide you with anything further you might wish on this issue at any time you feel it would be helpful.

Sincerely,

JOHN MCCAIN,
Chairman

Mr. HELMS. Mr. President, if it is in order and agreeable to the manager of this nomination, I ask for the yeas and nays.

The ACTING PRESIDENT pro tempore. Is there a sufficient second?
There is a sufficient second.

The yeas and nays were ordered.

Mr. HELMS. I thank the Chair. I thank the manager.

I yield the floor.

Mr. MCCAIN addressed the Chair.

The ACTING PRESIDENT pro tempore. For the information of the Senator from Arizona, he has about 3½ minutes.

Mr. MCCAIN. Thank you, Mr. President.

Mr. President, I thank the Senator from North Carolina for his cooperation on what is a very important issue with one of his constituents, and one of great importance to him. I am grateful for his cooperation and that of his staff in resolving it.

I reserve the remainder of my time.

Ms. MOSELEY-BRAUN. Mr. President, I strongly support the nomination of William Kennard to serve as Chairman of the Federal Communications Commission, and I urge all of my colleagues to do the same.

There is perhaps no industry that has undergone more rapid or greater change than the telecommunications industry. In terms of technology, ownership, and opportunities, the communications industry has literally undergone a revolution. These changes will create opportunities for consumers, existing companies, and new entrants. In the coming years, the FCC will face enormous challenges as it attempts to cope with these changes and finishes implementing the provisions of the Telecommunications Act of 1996.

No one is more prepared for that challenge than Bill Kennard. He has demonstrated exceptional leadership and mastery of the issues during his 4 years as general counsel of the FCC; and his many years as a telecommunications lawyer. When I think of Mr. Kennard, I think of something that Jean-Claude Paye, former Secretary General of the Organization for Economic Cooperation and Development, said of the changing times in which we live. He said that societies concerned about their economies ought to look to their fraying social fabric, as economic growth is the weave of national character. The waft of it, he said, are the people who embrace and master social change.

Bill Kennard is one of those individuals. He will bring to the helm of the FCC not only an understanding of the industry and the economics, but the social and societal implications of the issues that he will address as Chairman of the FCC.

Mr. President, I expect great things from Bill Kennard and I look forward to working closely with him as he steers the telecommunications industry into the 21st century. I commend the President for choosing such a qualified and competent individual for this duty, and I hope that every one of my colleagues will support his nomination.

I thank the managers of this nomination, and I yield the floor.

Mr. HUTCHINSON. Mr. President, I rise today in support of the nomination of William E. Kennard to the Federal Communications Commission (FCC).

The telecommunications industry has seen incredible technological advances made over the last two decades. As a result, the responsibilities and scope of the FCC have increased dramatically. Today, it is more important than ever for FCC Commissioners to be able to respond and adapt to these changes in a timely manner.

Recently, the FCC issued a regulation that will have a profound impact on the trucking industry nationwide. While ordinarily one would not think of an FCC action having an adverse impact on trucking companies, such is not the case in this situation. On October 9, the FCC issued a regulation implementing a provision of last year's Telecommunications Act, which directed the FCC to provide for adequate compensation of pay phone operators. The new FCC regulation ordered long-distance companies to pay payphone owners 28.4 cents per call for each call to a toll-free number unless the payphone owner and the long-distance company have a contract specifying a different rate. The charge applies to both customer toll-free numbers and to company access numbers, including those on prepaid calling cards. The charge became effective immediately.

Long-distance carriers, in turn, are passing this charge along to their customers. The carriers are not limited to a set charge and as a result the amount being charged varies depending on the carrier.

Pay phones are the life line between the Nation's 3.2 million truck drivers and their home offices. A driver will call in numerous times during the day and in most cases will talk no longer than 2 minutes. Nevertheless, under this new rule, the trucking company will be charged each time a driver calls in.

Arkansas has been fortunate to have a significant trucking industry based in our State. Some of the largest trucking companies in the Nation are headquartered there. This new regulation will have a devastating effect on their business costs. For instance, in the case of J.B. Hunt Trucking, it is estimated that this new regulation will increase the company's phone bill by approximately \$200,000 a month. This will equate to \$2.1 million annually.

Smaller trucking firms have also contacted me and said their phone bills are projected to double under this new rule. A small business is completely unable to absorb an increase of this magnitude.

When it comes to using payphones, the trucking industry is virtually a captive consumer. There is no real alternative and no option to avoid paying what is, in effect, a very expensive tax.

Mr. President, we need to explore alternatives to provide some relief to this industry. I will be contacting the FCC Commissioners to work with them on this problem and I would encourage my colleagues to do the same.

The ACTING PRESIDENT pro tempore. Who requests time?

AMENDMENT NO. _____

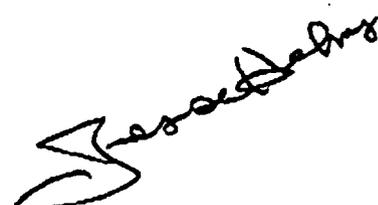
Calendar No. _____

Purpose: Relating to the granting of certain licenses and permits for the use of electromagnetic spectrum.

IN THE SENATE OF THE UNITED STATES—105th Cong., 2d Sess.

S. _____

[INSERT TITLE HERE]



Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. HELMS

Viz:

- 1 At the appropriate place in the bill, insert the follow-
- 2 ing:
- 3 **SEC. ____ . GRANTING OF CERTAIN LICENSES AND PERMITS**
- 4 **FOR THE USE OF ELECTROMAGNETIC SPEC-**
- 5 **TRUM.**
- 6 (a) PROHIBITION ON USE OF COMPETITIVE BID-
- 7 DING.—Notwithstanding any other provision of law, the
- 8 Federal Communications Commission may not grant a li-
- 9 cense or permit for the use of electromagnetic spectrum
- 10 through the use of a system of competitive bidding if—

1 (1) the Commission received mutually exclusive
2 applications for the license or permit before June
3 30, 1997;

4 (2) the Commission had conducted an initial
5 hearing on such applications before the date; and

6 (3) the decision to grant the license or permit
7 was pending with the Commission as of that date.

8 (b) COMPARATIVE PROCESS.—

9 (1) REQUIREMENT.—Not later than 90 days
10 after the date of enactment of this Act, the Commis-
11 sion shall prescribe regulations to establish a com-
12 parative process for the granting of licenses and per-
13 mits covered by subsection (a).

14 (2) ELEMENTS.—The comparative process
15 under paragraph (1) may only take into account in-
16 formation contained in the existing hearing records
17 with respect to the applications involved.

18 (c) GRANT THROUGH COMPARATIVE PROCESS.—

19 (1) IN GENERAL.—Not later than 180 days
20 after the date of enactment of this Act, the Commis-
21 sion shall grant the licenses and permits covered by
22 subsection (a).

23 (2) REQUIREMENTS.—In granting such licenses
24 and permits, the Commission shall—

1 (A) utilize the comparative process pre-
2 scribed under subsection (b); and

3 (B) take into account only ~~upon~~ informa-
4 tion contained in the existing hearing records
5 with respect to the applications involved.

DECLARATION

I, Sharan A. Harrison, hereby declare, under penalty of perjury, as follows:

That, I am the General Partner of Willsyr Communications, Limited Partnership, which is an applicant before the Federal Communications Commission ("FCC") for a construction permit for a new FM broadcast station in Biltmore Forest, North Carolina, in MM Docket No. 88-577.

That, Willsyr filed comments and reply comments before the FCC in Notice of Proposed Rulemaking ("NPR"), in MM Docket No. 97-234, GC Docket No. 92-52, and GEN Docket No. 90-264, rel. November 26, 1997.

That, the NPR is considering the adoption of rules which would govern the selection of the permanent licensee in the Biltmore Forest proceeding, which has been pending since 1987.

That, Willsyr requests Chairman William Kennard to recuse himself from participation in the NPR with respect to the adoption of rules which would govern the selection of the permanent licensee in the Biltmore Forest proceeding.

That, this request for recusal is based upon information obtained from the Congressional Record, October 29, 1997, pp. S11308-11310, and related materials, including numerous press reports, which indicate that U.S. Senator Jesse Helms (R-NC) placed a hold on the nomination of Mr. Kennard to be Chairman of the FCC for the express purpose of obtaining an agreement from him to take official action at the FCC to assist and to facilitate the grant of the application of Orion Communications Limited ("Orion") for

construction permit for the Biltmore Forest FM station in NH Docket No. 88-577. The official action by Chairman Kennard, which was demanded by Senator Helms to release the hold on his nomination, included placing in the NPR a request for comments as to whether the FCC should decide the Biltmore Forest proceeding on the basis of a frozen 10-year old record and comparative hearings, instead of auctions.

That, it appears that Senator Helms, as consideration for the release of the hold on the nomination, further expects Mr. Kennard to act in his official capacity as Chairman to adopt rules in the NPR which would give preferential treatment to the application of Orion and which would result in its grant of the Biltmore Forest license.

That, in order to prevent political interference, or the appearance of any impropriety, in adopting rules in the NPR, which would ultimately resolve the Biltmore Forest proceeding, Chairman Kennard should recuse himself from the NPR. He has already recused himself from the Biltmore Forest proceeding because of Senator Helms' intervention and political pressure on behalf of Orion.

That, such recusal by Mr. Kennard would also prevent a violation of 18 U.S.C. 201 which prohibits a public official, or person selected to be a public official, from receiving anything of value in which he is not legally entitled, in return for giving preferential treatment, or special favors, in the performance of his official duties.

That, in view of the intense political pressure that Senator

Helms applied to Mr. Kennard in order to obtain preferential treatment for Orion by the FCC and to obtain its grant, Willeyr moreover requests that Commissioners Michael Powell, Gloria Tristani, and Harold Furchtgott-Roth disclose whether they received any solicitations from Senator Helms, or any one else, or ex parte contacts with respect to the grant of the application of Orion, or to give it preferential treatment in the NPR. If so, they should determine whether to recuse themselves from the NPR.

That, in MediaWeek, January 5, 1998, p. 19, Commissioner Susan Ness is quoted as "concerned that auctions, while quick and efficient, ignore the equities that already exist in some of the outstanding radio license cases, including Lee's [Orion]. Accordingly, Commissioner Ness should disclose all the ex parte contacts and political solicitations that she has had with respect to the application of Orion, and then determine whether to recuse herself from the NPR.

I, hereby declare that the foregoing is true and correct to the best of my knowledge and belief, and that Willeyr's motion to recuse is filed in good faith and not for the purpose of delay.

This the 25th day of February, 1998.

Sharon A. Harrison
Sharon A. Harrison,
General Partner
Willeyr Communications,
Limited Partnership

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney, do hereby certify that on this 14th day of May, 1999, I have caused to be filed with the Secretary of the Federal Communications Commission an original and fourteen copies of the foregoing "Consolidated Opposition to Motions to Stay and Motion to Recuse FCC Commissioners" and copies were served by U.S. Mail, postage pre-paid, on the following offices and interested persons:

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