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

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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses | ) | MM Docket No. 97-234 |
| | ) | |
| Reexamination of the Policy Statement on Comparative Broadcast Hearings | ) | GC Docket No. 92-52 |
| | ) | |
| Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases | ) | GEN Docket No. 90-264 |

**REQUEST FOR CLARIFICATION AND/OR RECONSIDERATION**

Snyder Hill Broadcasting, Inc. ("Snyder Hill"), by its counsel, herewith submits its request for clarification in the above-captioned proceeding. In support whereof, the following is stated:

1. On October 13, 1998, Snyder Hill filed a petition for reconsideration in the above-captioned proceeding.

2. In the order adopting its new auction rules the Commission determined that it would not consider petitions to deny such as those that are currently pending in the Ithaca proceeding until after an auction is held. As indicated, Snyder Hill requested reconsideration of that decision. In its order on reconsideration, the Commission essentially declined Snyder Hill's request. *Memorandum Opinion and Order*, MM Docket No. 97-234, FCC 99-74, released April 20, 1999 (hereafter "M,O&O"), at para. 14 - 18.

3. The instant pleading seeks clarification on several aspects of that ruling. Most significantly, clarification is sought regarding the timing for making a determination as to basic qualifications in circumstances where no hearing is required to make that judgment. In the M,O&O, the Commission stated, at para. 16: "the public interest would be best served by not delaying the commencement of the auction to litigate potentially irrelevant issues, and that deferring these issues conserves the resources of the private litigants as well as of the Commission, thereby expediting service to the public." This statement serves as the basis for denying Snyder Hill's petition for reconsideration. While the statement appears to be applicable to certain aspects of Snyder Hill's request, it does not appear to apply at all to one very specific issue that is raised in the Ithaca television proceeding. Namely, it does not apply to the issue raised in the Ithaca proceeding relating to the filing of a technically defective application by Snyder Hill's sole competitor.

4. In the Ithaca television proceeding, issues have been raised regarding the false certification of site availability and financial qualifications of the competing applicant. Paragraph 16 of the M,O&O makes it clear that the Commission will entertain petitions relating to false certifications after the auction, and Snyder Hill can and will avail itself of this opportunity should the unqualified bidder win at the auction. The Commission notes in para. 16 that "pending applicants who filed their applications before the adoption of competitive bidding procedures should carefully consider the impact of auction rules prescribing penalties in the event of default or disqualification." The Commission is apparently encouraging self-policing of its rules. In any event, the Commission's holding that deferral of such hearings may conserve resources and expedite service applies in cases where litigation would be required.

5. It is noted for the record, nonetheless, that it would be grossly unfair in such a case if Snyder Hill were required to bid at the auction and pay the amount bid if it subsequently proves to be the only qualified applicant. It is requested that where an applicant is successful in disqualifying a competitor (where the result is the elimination of all other competition for a channel), the surviving applicant should be awarded the permit without having to pay the amount bid since the bid was induced by the participation of an unqualified applicant.[1] To do otherwise would undermine the Commission's logic in deferring the bidding since the ultimate winner would not experience the conservation of resources, upon which the Commission relies in its ruling. Indeed, the opposite would be the effect since a pre-auction hearing would render the need for the auction moot and eliminate the necessity for a sole surviving applicant having to bid for the frequency. An applicant should not have to bid against an unqualified bidder, causing the amount bid to be artificially inflated, while at the same time having to expend its resources to litigate the qualifications of an unqualified (and thus ineligible) bidder.

6. More significantly, there is no justification whatsoever in the Commission's holding for deferring a determination that an applicant is not qualified in cases where such a determination does not require a hearing. Just such a case is presented in the Ithaca television proceeding. In that proceeding, Snyder Hill has filed a motion to dismiss the competing application because the application does not provide for a City Grade signal over any part of the city of license – Ithaca, NY. Under the rules existing at the time the applications were filed in this proceeding, the competing application of William M. Smith

[1] In the alternative, the winner in such circumstance should be required to pay no more than the minimum bid received at the auction and that amount should be reduced by the amount of any penalties paid by the disqualified applicant.

(File No. BPCT-941107KG) was defective and should never have been accepted for filing. The applicant did not place a City Grade contour over any part of its city of license and did not request a waiver of the rules. The rules also provided that such an application was to be dismissed if inadvertently accepted for filing. This is a matter that does not require litigation. The Commission is more than able to run the study to determine whether the application is defective; indeed, the Commission was required to conduct such a study. It is not appropriate for the Commission to ignore the requirement to comply with its own rules simply because it now has chosen to change the rules, particularly when the rationale behind the new rules is inapposite. The simple engineering determination of whether an application meets the City Grade coverage requirement does not require litigation among the parties. It requires only an engineering determination by the Commission.

7. The fact is that the Commission will avoid unnecessary litigation, conserve resources, and facilitate prompt initiation of service to the public by rendering a pre-auction determination regarding issues such as that present in the Ithaca case which do not involve litigation but involve only routine engineering analysis. Indeed, the Commission's new rules recognize the need to conduct some degree of routine analysis in determining whether an application should be permitted to proceed to auction. In the *First Report and Order* in MM Docket No. 97-234, 13 FCC Rcd 15920 (1998) (*First Report and Order*), at para. 145, 146, the Commission stated:

> 1. ***Amendment of Short-Form Applications.*** To encourage maximum bidder participation in broadcast auctions, we will, in accordance with the Part 1 auction rules, provide applicants whose timely-filed short-form applications are substantially complete, but which contain minor errors or defects, with an opportunity to correct and resubmit their applications prior to the auction. However, applicants will not be permitted to make any major changes to their applications after the initial

> filing deadline (*i.e.*, the close of the filing window), and any application that does not contain the requisite certifications will be dismissed with prejudice and may not be resubmitted. *See* 47 C.F.R. § 1.2105(b)(1). Major amendments include changes in ownership of the applicant that would constitute a change of control, changes in an applicant's size that would affect eligibility for any designated entity provisions, and changes in the license service areas identified in the short-form applications on which the applicant intends to bid. *See* 47 C.F.R. § 1.2105(b)(2). For auctions of broadcast services, we will construe "changes in the license service areas" to encompass changes in the engineering information submitted with short-form applications in non-table services, changes of the vacant allotments specified in short-forms in the FM and television services, or changes in any preferred site coordinates submitted with short-forms in the FM service. Thus, changes in the engineering submissions accompanying a short-form will be regarded as major changes, and cannot be made after the initial filing deadline. [f.n. omitted] Minor amendments include typographical corrections, those reflecting ownership changes or formation of bidding consortia specifically permitted under the anti-collusion rule (*see infra* ¶ 158), and those making other changes not identified as major.
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> 2. After reviewing the short-form applications, the Bureaus will issue a public notice listing all applications containing minor defects, and applicants will be given the opportunity to cure and resubmit defective applications. On the date set for submission of corrected applications, applicants who on their own discover minor errors in their applications also will be permitted to file corrected applications. Following a review of the corrected applications, we will proceed to determine which of the short-form applications accepted for filing are mutually exclusive. *See infra* ¶¶ 149-153.

As indicated in the above, "any application that does not contain the requisite certifications will be dismissed with prejudice and may not be resubmitted."

8. In the Ithaca case, Smith cannot certify that he is "technically qualified," as required by the short form, because his application does not place the required City Grade signal over the city of license. Nevertheless, Smith could file a false certification, win the bid and file a minor amendment to correct the problem. If Snyder Hill elected not to litigate after the auction, the Commission would be stuck with awarding the permit to an applicant that submitted a false certification. Where the value of a facility is great enough,

this policy will encourage applicants to file false certifications in the hope of being able to get away with it. There is simply no public interest basis for creating such a dilemma for applicants, and certainly the Commission's rationale to date (avoidance of litigation) does not serve as such a basis. To the contrary, the policy serves to create just one more element for litigation – the issue of whether an applicant has made a false certification on the short form.

9. This potential problem can easily be avoided by providing for screening against such defects prior to the auction. Where a technical issue can be resolved without a hearing prior to the auction, the Commission should render a ruling on the issue raised. Indeed, all parties benefit from such a procedure. The Commission is benefited because it need not deal with the far more involved issue of a false certification that would have to be resolved in a post-designation hearing. The public is benefited because it will ultimately result in a more expeditious initiation of service that would otherwise be hampered by post-designation litigation over false certifications. Even the applicant with the alleged defect is benefited since it will at least know in advance whether the Commission considers its application defective before it has to tender a substantial sum of money to participate in the auction (which it might well forfeit as a result of a disqualification hearing). Using the Commission's own rationale (conserving resources and insuring prompt initiation of service), an exception to the Commission's rules as currently adopted is required. The Commission can, should, and must rule on technical defects prior to designation when requested to do so by one of the parties or as deemed appropriate by the staff.[2] Since the

[2] Where the Commission cannot make a judgment on an issue without first holding a hearing, the Commission would simply issue an order stating that fact and deferring its decision pending post-auction procedures. This would assure the most efficient use of Commission resources since the Commission

Commission has to date not considered this aspect of how the rules are to operate, clarification and/or reconsideration is respectfully requested.

10. Related to the above, the Commission needs to be aware of the possible consequences of a failure to revise the rules as requested. The new rules provide for applicants (particularly FM applicants) to specify coordinates when they file a short form application. These coordinates are to receive protection *vis a vis* subsequently filed applications that may be in conflict. (*First Report and Order*, para. 142). In certain instances, analog TV applications are affected by this provision. (*Id.* at para. 143). However, the Commission has not made any provision for dealing with an application that specifies coordinates that clearly could not be used. For example, an applicant could file for a station in Hometown, USA and specify coordinates that are 30 miles away and technically could never be utilized because of the City Grade signal contour rule. In doing so, that applicant could keep applicants for other communities in other proceedings from specifying their desired coordinates despite the fact that the protected coordinates are technically deficient due to the City Grade signal rule. In such cases an affected party should be able to petition the Commission to analyze the coordinates specified when it can be shown that the coordinates cannot be utilized in conformance with the City Grade signal rule (or other technical requirements). The Commission's rules cannot be devoid of common sense. The Commission must require provisions for dealing with technical issues such as the City Grade contour rule so as to protect the integrity of its rules as a whole. To do otherwise would be to invite abuse of the system. Technical issues that can be

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would always have the option of deferring action if the decision was too complicated or could not be made without a hearing.

resolved on paper without a hearing should be considered prior to the auction so as to avoid potential abuses by unscrupulous applicants.

11. Similar examples might be seen in the case of a foreign applicant that does not qualify under the citizenship requirement. It would serve no known purpose to permit such an applicant to proceed to an auction when it can be demonstrated on paper that the applicant does not meet basic qualifying requirements. Rarely would proof of citizenship require anything more than a paper submission by the applicants. Clearly, provision must be made for permitting motions to dismiss prior to auction in cases where the disqualifying issue can be decided without the need for a hearing. The above are certain to be only a few of the kind of issues that might be raised in the future. There is no need to put in jeopardy the whole auction process when this obvious flaw in the system can be easily cured. Clarification is required so that applicants will know how to treat obvious defects in applications, particularly when those defects can be resolved without recourse to a hearing by the Commission.

WHEREFORE THE PREMISES CONSIDERED, it is respectfully requested that the Commission grant clarification and/or reconsideration as discussed hereinabove and entertain motions to dismiss prior to auction pertaining to issues that can be resolved without a hearing, including technical issues such as City Grade coverage where applicable.

Respectfully submitted,

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By _____
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May 19, 1999

CERTIFICATE OF SERVICE

James L. Oyster hereby certifies that he has sent a copy of the foregoing pleading by first class U.S. mail, postage prepaid, on or before the 19th day of May, 1999, to the following:

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