Before the
FEDERAL COMMUNICATIONS COMMISSION

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

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To: The Commission

Opposition to Motion for Stay

Biltmore Forest Broadcasting FM, Inc. ("BFBFM"), by its attorneys, hereby opposes the motion for stay filed in this proceeding by Jerome Thomas Lamprecht, Susan M. Bechtel and Lindsay Television, Inc. ("Joint Movants"). Because the motion does not meet the high threshold required to stay the effect of an administrative action, it should be denied.

BFBFM is one of five competing applicants for a radio station to serve Biltmore Forest, North Carolina. One of the other competing applicants is Orion Communications, Ltd. ("Orion"). Because Joint Movants' motion embraces Biltmore Forest as well as the other markets in which comparative proceedings have been held, its motion will directly affect BFBFM. At the outset, it is important to understand the privileged status which Orion has been accorded in the overall licensing scheme. Orion was awarded a construction permit for a radio station in Biltmore Forest on the basis of criteria which

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have since been declared irrational, arbitrary and capricious. It has nevertheless been invested with the right to continue operating the station on some sort of quasi-permanent basis until the Federal Communications Commission ("Commission" or FCC") finally awards the station to a qualified applicant.

During the long limbo which has blanketed the licensing process since 1993, Orion has been shielded from any scrutiny of its basic qualifications as a licensee, despite mounting evidence of a host of malefactions and misrepresentations and a chronic disregard for the Commission's rules and the laws of the United States.

At the same time, Orion has been permitted – in contravention of every pertinent precedent and every principle of fair dealing – to operate the station on a profit-making basis, thus accumulating a cash advantage in the auction which the other competing applicants have been denied. BFBFM recognizes that the Commission's hands are partially tied in this matter by the rulings of the D.C. Circuit Court ("Court") which required Orion to be returned to the air, but nothing in the Court's orders or decisions precluded the Commission from fashioning rules which would maintain fairness in the proceedings to grant a permanent license. The fact that Orion is operating a profit-making facility while this proceeding drags on gives it every incentive to prolong the process as long as possible and to thus delay its own day of reckoning.

Before turning to the specifics of the elements necessary to justify a stay, one brief point may be made. Joint Movants' entire thesis seems to be predicated on the expectation that they would win any comparative hearing based on comparative criteria. This conclusion is far from certain since there is no telling how they would fare in any new comparative evaluation. There is also no basis for their belief that a comparison could be made on the basis of the hearing record to date. There is no rational reason to believe that the hearing record assembled on the basis of one set of comparative criteria would serve to cover an entirely different set of criteria; in fact, the opposite is far more likely. Thus, the premise of

Joint Movants' motion – that their investment to date would pay off in a comparative context but would be wasted in an auction context – is fallacious.

JOINT PETITIONERS HAVE FAILED TO DEMONSTRATE COMPLIANCE THAT A STAY IS WARRANTED

The well-settled elements necessary to justify a stay have clearly not been met here. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit System v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

1) Joint Movants have demonstrated no likelihood that they will succeed on the merits. The Commission has spent some nine years trying to devise new comparative criteria which will pass judicial muster. While it is not clear to BFBFM that new, valid criteria could not have been devised, it is certainly clear that the FCC spent a lot of time and effort unsuccessfully attempting to do just that. In the end, they decided that the anticipated delay in attempting to come up with new criteria did not outweigh any public interest benefit to be gained by developing suspect criteria of limited application and merit. This is especially true in Orion's case since the record shows that Orion's principal owner (now deceased) had made plans to sell the station immediately after Orion took title to it. What is the point of a time-consuming and expensive comparison of applicants if one of them is just going to flip it if it is the preferred one? Given the Commission's history of attempting to come up with new criteria, the extraordinary length of time which has already been consumed in these cases, and the change in the law by Congress, there is no likelihood whatsoever that the Court would require the Commission to come up with new comparative rules which would then be subject to attack by whomever came out on the short end.

2) Joint Movants have not shown even the slightest "irreparable harm" to themselves or anyone else if the auction is not stayed. The harm, if any, is entirely reparable. If the auction process is ultimately upheld by the Court, of course, there will have been no harm whatsoever in letting the auction

go forward. If the Court ultimately decides to overturn the Commission's auction Order in some way that negates the auction, the cases would simply return to the status quo ante. The applicants would have gone through some procedures, but no one would have lost any substantive rights or property rights. Joint Movants suggest that an auction winner that pays its winning auction bid and is then divested of the license as a result of court reversal could lose its payment. The Commission has never taken that position. See, for example, Auction of C, D, E, and F Block Broadband PCS Licenses, DA 99- 375, rel. Feb. 24, 1999, at page 4 (Commission will return payments made by winning bidders if the licenses bid for are later determined not to be available due to subsequent court action). Indeed, it is hard to believe that retention of the payments by the Commission under such circumstances could be anything but a compensable taking under the Fifth Amendment.

3) Though Joint Movants blithely assert that there will be no harm to other interested parties, the reverse is quite obviously the case. The applicants in the Biltmore Forest proceeding would be prejudiced grievously by any delay in the auction. As BFBFM has pointed out to the Commission and the Court, every day that goes by with Orion being permitted to generate cash through station operations prejudices the ability of the other applicants to compete fairly in the auction. Orion is being permitted to garner the very wherewithal to win the auction.

The harm to the other applicants is substantial, direct and material, going to the very heart of the integrity of the auction itself. Delaying the auction by granting a stay merely exacerbates a situation that is already grossly prejudicial. Perhaps equally fundamentally, any delay in these already - prolonged cases is necessarily harmful to all of the applicants. As Joint Petitioners cogently demonstrate, these cases have consumed the better part of two decades. Any tactic which would now add a year or two to the process must be intolerable to the litigants who have been trapped in these cases unable to get on with their lives, unable to get their day in court. Because the auctions can proceed on a parallel track with the appeal of the Commission's rulemaking Order, holding the auction will likely expedite resolution of these cases by a matter of years.

4) The public interest lies decisively in the direction of bringing these hoary proceedings to a close by the swiftest, fairest means possible. BFBFM does not subscribe entirely to the Commission's auction procedures and, indeed, will be seeking appellate review of some aspects of the Commission's auction Orders. The fact nevertheless remains that bringing an end to this litigation is of utmost importance, not just for the litigants but for the communities involved who have had to endure either a lack of radio service or a rump service which could never be secure in its own permanence. Any remedy imposed later by the Court of Appeals can take place in the context of an auction which has already occurred without harm to anyone. The auction, if there is to be one, should go forward as soon as possible.

Joint Movants' motion should be denied.

Respectfully submitted,

Biltmore Forest Broadcasting FM, Inc.

By _____

Donald J. Evans
Its Counsel

May 17, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have on this 17th day of May, 1999 served copies of the foregoing Opposition to Motion for Stay by first-class mail, postage prepaid, on all parties of record on the attached list.

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