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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

REPLY TO OPPOSITIONS TO
MOTION FOR STAY

1. Jerome Thomas Lamprecht, Susan M. Bechtel and Lindsay Television, Inc. (the "moving parties") reply to oppositions to their motion for stay filed by Biltmore Forest Broadcasting FM, Inc. ("Biltmore") and Willsyr Communications, Limited Partnership ("Willsyr").

2. Willsyr, at 3, challenges the Commission's jurisdiction to entertain the motion because of the pendency of appeals by the moving parties. However, Rule 18 of the Federal Rules of Appellate Procedure, supplemented by Rule 18 of the local rules of the District of Columbia Circuit, provide that a petitioner "must ordinarily move first before the agency for a stay pending review of its decision" or else make a showing that "moving first before the agency would be impracticable." Our motion is filed

in compliance with Rule 18.

3. The oppositions do not detract from our showing of grounds for the requested stay under the four relevant factors:

I.

Harm to the moving parties

4. The moving parties described their posture as highly unusual, if not unique, in the annals of stay motions in that, after many, many years of litigating their applications for broadcast licenses under one regulatory program for which the winning party was rewarded for the most superior public interest presentation, they are now faced with an entirely new and revolutionary program under which they must purchase the frequencies at full market value. To add insult to injury, if a stay is not issued, the moving parties must be prepared to bid and make their payments within a brief period of time, i.e., commencing as early as September, long before they can have their day in court.

5. Neither Biltmore nor Willsyr addresses this fundamental unfairness that is central to the motion for stay. Biltmore, at 4, expresses the view that the moving parties are only being subjected to a few procedures. Willsyr, at 11, indicates that the moving parties are only having to pay more for the licenses that they thought they would. Neither cites a comparable stay motion case denying the requested relief under facts and circumstances that remotely resemble equities of the moving parties here.

6. One of the harms to the moving parties, if a stay is not

issued, is the uncertainty of getting a refund of auction moneys paid into the government, upon a subsequent reversal by the court. Willsyr, at 10-12, and Biltmore, at 3-4, both say "no problem," Willsyr without explanation except to indicate we can sue someone for damages, Biltmore citing a recent FCC ruling and alluding to the taking provision of the Fifth Amendment.

7. The recent FCC ruling, Auction of C, D, E, and F Block Broadband PCS Licenses, DA 99-375, dated February 24, 1999, warrants some analysis. It is a public notice that is not signed by anyone, although the names and telephone numbers of people to contact are provided in the last paragraph. We learn that it is issued by the Wireless Telecommunications Bureau only by reading the fine print of the text. It relates to an established auction program so that parties who initially decided to participate in the program were aware that auction moneys were involved. Moreover, going into the auctions in question (called "Auction No. 22"), the parties were advised that certain of the frequencies were the subject of court appeals by previous winners (who defaulted on their payments) and might be taken away from the new parties if the previous winners prevailed in their litigation.

8. One might have hoped that refunds to the new parties participating in the auctions, whose frequencies were thusly taken away from them, would receive a refund in the normal course, without further thought or question. Not so. According to this unsigned public notice, the agency left open the question

of whether the new bidders would ever get their money back. Then, after further deliberation, according to this document, a decision has been made to refund the money paid by the new bidders for frequencies they didn't get, but without any interest on the money for the period of time in which they were held by the government. Was this beneficent decision made because of the inherent unfairness to the parties who paid money at full market value for frequencies they don't have?

9. Not at all. In the language of the public notice, "Retaining payments under the circumstances could have a chilling effect on participation in Auction No. 22 and would therefore undermine our efforts to encourage more efficient use of the spectrum." That is to say, if the FCC didn't decide to refund the money, it would be more difficult to get parties to participate in Auction No. 22 or in other auctions, which the Commission encourages, because they lead to a more efficient use of the spectrum. The refunds were approved because they implemented agency policy having nothing to do with fairness to the parties.

10. In the instant case, there is no such regulatory motivation to refund the money. The Commission has a captive group of auction players and by statute the agency cannot promote participation by anyone else. The only motivation is to be fair to parties who participated in non-auction proceedings for many, many years and now have been blindsided by auctions which none of them anticipated and none, except the richest parties with the

weakest public interest presentations, wants. The mindset reflected in this unsigned public notice bears out the concern in our stay motion, that a refund of auction moneys, upon a court reversal here, is not free from doubt.

11. To be sure, refusal to refund moneys in that circumstance can result in a lawsuit, probably under the taking clause of the Fifth Amendment. But, a constitutional lawsuit under the Tucker Act in the Court of Claims and Federal Circuit Court of Appeals, added to the more than a decade of litigation already endured before this agency and the District of Columbia Circuit Court of Appeals, is no reasonable antedote to the harm that would be sustained by the moving parties from refusal to grant a stay here.

II.

Presence of serious legal questions requiring court review

12. Biltmore, at 3, makes an unuseful conclusionary statement that there is no likelihood the court will require the Commission to employ comparative criteria, sans any discussion of the arguments in our motion - that the Commission has found it acceptable to employ comparative criteria in long-standing renewal-challenge cases, that governing federal administrative law militates against retroactive imposition of the auction mechanism to the long-standing new-station cases of the moving parties and that the statutory basis for that retroactivity violates constitutional principles of due process.

13. Willsyr, at 6-10, makes two arguments, one, that the statutory authorization for use of auctions is mandatory, not

permissive, and two, that the will of Congress is clear and accordingly the court will have no choice but to affirm the Commission's action. Neither argument is valid.

14. The statute, on its face, is permissive, i.e., "...the Commission shall...have the authority to conduct a competitive bidding proceeding..." 47 U.S.C. §309(l). Under principles of statutory construction, in view of this clarity, it is not appropriate to consider the legislative history. Even so, the the legislative history materials cited by Willsyr and attached to its pleading confirm that a mandate to employ auctions to the exclusion of comparative consideration was not intended.

15. The argument that the appellate court has no choice but to affirm, because the will of Congress is clear, is based on Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) and Energy West Min. v. Federal Mine Saf. & Helath Com'n, 40 F.3d 457 (D.C.Cir. 1994). Chevron stands for the principle that agencies and reviewing courts must give effect to a statute that is clear and unambiguous. Energy West is one of a long line of appellate court cases citing and applying this Chevron principle. Our arguments are in full accord with this principle. We accept that Congress clearly and unambiguously authorized the Commission to employ auctions. But, neither Chevron nor Energy West involved a statute as present here - albeit clearly and unambiguously worded - that authorizes retroactive application of a new law or regulation. For that, there are two relevant lines of precedent, both reflecting a historical and strong theme that

the law does not favor retroactivity.

16. One is the line of precedent that, when the statutory retroactive authorization is permissive, the courts will review the agency's choice of action between retroactive and nonretroactive alternatives under a standard of reasonableness and fairness in balancing the respective interests advanced or harmed by the retroactivity. The motion of the moving parties, at 14-18, developed this administrative law precedent, including citations to SEC v. Chenery, 332 U.S. 194 (1947); Clark-Cowlitz Joint Operating Agency v. F.E.R.C., 826 F.2d 1074 (1987); and City of Chicago v. Federal Power Commission, 385 F.2d 629 (D.C.Cir.), cert. denied, 390 U.S. 945 (1967). Willsyr has not acknowledged or responded to our analysis and argument of this point. Neither has Biltmore.

17. Second is the line of precedent that the statute - again, albeit clearly and unambiguously worded - is unconstitutional as a violation of due process under the Fifth Amendment. The motion of the moving parties, at 18-26, developed this constitutional law precedent, including citations to Welch v. Henry, 305 U.S. 134 (1938); Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717 (1984); with a review of cases relied on by the Commission in its decision at issue, including United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988); and Landgraf v. USI Film Products, 511 U.S. 244 (1994). Willsyr has not acknowledged or responded to our analysis and argument of

this point either. Neither has Biltmore.

III.
Harm to other parties

18. Our motion argued that we are not aware of any other applicants who would undertake to bid and acquire a license, and construct and operate a station, while the lawfulness of the auction process is in litigation before the court. While Biltmore, at 4, and Willsyr, at 13, profess to be harmed by the requested stay pendent lite, neither made a commitment of its willingness to do so.

IV.
Public interest considerations

19. In three of the four situations referred to in the motion of the moving parties (Middletown, Maryland, Selbyville, Delaware, and Biltmore Forest, North Carolina), the broadcast station, whose frequency is in question, has been in operation serving the public for a number of years. In the fourth situation (Charlottesville, Virginia), there is pending before the Commission a settlement proposal amongst the applicant parties and the National Radio Astronomy Observatory that currently precludes the commencement of operation but, upon approval of the settlement, operation may be inaugurated without any further comparative proceedings. Accordingly, the public interest is being served and staying the auction proceedings pending consideration of the appeals will not alter continuation of that service.

20. We made this point in our motion. Biltmore, at 4, and

Willsyr, at 13, complain about the ongoing operation of the broadcast station in Biltmore Forest. However these parties may, from a private point of view, look upon that court-approved station operation by their competitor, activation and use of a new broadcast frequency has always been an acknowledged public interest objective. Biltmore and Willsyr do not challenge the public interest served by continuation of station operations in Middleton and Selbyville, or the specialized situation at Charlottesville.

21. Biltmore opposes the stay, at 5, on the ground that bringing the selection process to the earliest possible conclusion serves the public interest and going forward with the auctions is the quickest way to do that. However, in the very next sentence, Biltmore says that it "does not subscribe entirely to the Commission's auction procedures and, indeed, will be seeking appellate review of some aspects ofthe Commission's auction Orders." Unless we are missing something, when that appeal is taken, for which the petition for review must be filed within a few weeks, Biltmore should be asking the Commission and/or the court for a stay order as well.

Respectfully submitted,

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May 25, 1999

CERTIFICATE OF SERVICE

I certify that copies of the REPLY TO OPPOSITIONS TO MOTION FOR STAY have been placed in the mails, first class, postage prepaid, this 25th day of May 1999, addressed to the offices of the following:

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