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DISPATCH

Before the
Federal Communications Commission
Washington, D.C. 20554

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 Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

ORDER

Adopted: June 30, 1999 **Released: July 2, 1999**

By the Commission: Chairman Kennard not participating and issuing a statement.

1. By this order, we deny the requests filed May 5, 1999 and May 10, 1999, respectively, by Orion Communications Limited (Orion) and jointly by Jerome Thomas Lamprecht (Lamprecht), Susan M. Bechtel (Bechtel) and Lindsay Television, Inc. (Lindsay) (joint movants) for a limited stay pending judicial review of the Commission's *First Report and Order*, 13 FCC Rcd 15920 (1998), recon. denied, FCC 99-74 (rel. April 20, 1999). The moving parties are pending applicants in comparative broadcast cases, who prosecuted their applications through a Commission decision and at least one court appeal before Congress enacted legislation authorizing the Commission to decide such cases by auction instead of by comparative hearings. For the reasons set forth below, we find that the parties have not shown that proceeding with the auction scheduled for September 28, 1999 will result in irreparable harm or that they have otherwise satisfied the requirements for a stay under *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958) (*Virginia Jobbers)*, as revised by *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (*WMATA*). We also dismiss the procedurally deficient request to recuse FCC Commissioners filed by Willsyr

Communications, Limited Partnership (Willsyr).[1]

BACKGROUND

2. The Commission has traditionally resolved mutually exclusive applications for new full service commercial radio and television stations by comparative hearings pursuant to the comparative criteria set forth in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). In recent years, however, most cases focused on the integration criterion, which presumed that an owner integrated into the day-to-day management of the proposed station would provide better service. This central criterion was held to be arbitrary and capricious and therefore unlawful by the D.C. Circuit in *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1994). Thereafter, the Commission stayed the adjudication of comparative broadcast cases pending the resolution of the questions raised by *Bechtel.*[2]

3. Congress in the Balanced Budget Act of 1997 amended the Communications Act to permit the Commission to use either auctions or the comparative hearing process to resolve the frozen *Bechtel* cases. Specifically, Section 309(l) provides that the Commission "shall have the authority to conduct a competitive bidding proceeding pursuant to subsection [309](j)" in comparative broadcast cases involving competing applications filed before July 1, 1997, and that if the Commission does conduct a competitive bidding proceeding, it "shall treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding." In implementing the statute, the Commission determined in the *First Report and Order* and reaffirmed on reconsideration that auctions will be fairer and speedier for all pending comparative broadcast cases even for those cases that were designated for hearing and were litigated at least through an Initial Decision by an Administrative Law Judge.[3] It cited the lengthy delays experienced with the comparative process and particularly its tendency to produce time-

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[1] The following pleadings are also pending before the Commission: (a) Consolidated Opposition To Motions For Stay And Motion to Recuse FCC Commissioners, filed May 14, 1999, by Willsyr Communications; (b) Opposition to Motion For Stay, filed May 17, 1999, by Biltmore Forest Broadcasting FM, Inc.; (c) Reply To Opposition and Motion For Leave to File Reply, filed May 25, 1999, by Jerome Thomas Lamprecht, Susan M. Bechtel and Lindsay Television; (d) Reply To Biltmore Forest Broadcasting FM's Opposition and Motion For Leave To File Reply, filed May 25, 1999, by Orion Communications Ltd.; (e) Reply To Willsyr Communications Limited Partnership's Opposition and Motion To Recuse FCC Commissioners, and Motion For Leave To File Reply, filed May 25, 1999, by Orion Communications Ltd.; and (f) Consolidated Oppositions to Motions for Leave to File Replies, filed June 1, 1999, by Biltmore Forest Broadcasting FM, Inc.

[2] *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), *modified,* 9 FCC Rcd 6689 (1994), *further modified.* 10 FCC Rcd 12182 (1995).

[3] *First Report and Order,* 13 FCC Rcd at 15940-42 ¶¶ 52-58; *Order on Reconsideration,* FCC 99-74 ¶ 8.

consuming litigation over matters of questionable public interest significance. The first commercial broadcast auctions are scheduled to begin September 28, 1999.[4]

STAY REQUESTS

4. Each of the parties is a pending applicant in a frozen hearing case that, with one exception,[5] has been scheduled to be included in the September 28 auctions.[6] Each filed comments in this rulemaking proceeding and, instead of seeking reconsideration, filed a notice of appeal with the D.C. Circuit immediately following the Commission's adoption of the *First Report and Order*.[7] Resolution of the pending court appeals was delayed pending Commission consideration of petitions for reconsideration of the auction rules. By its order of April 15, 1999, the Commission disposed of the petitions for reconsideration. Orion is a pending applicant for a new FM station on Channel 243A in Biltmore Forest, North Carolina, and, by virtue of the D.C. Circuit's decision in *Orion Communications Ltd. v. FCC*,[8] it is the interim operator on that station pending resolution of the permanent licensing proceeding for Biltmore Forest. The joint movants, Bechtel, Lindsay, and Lamprecht, are pending applicants for broadcast stations in Selbyville, Delaware, Charlottesville, Virginia and Middletown, Maryland, respectively.

5. Orion requests that, pending judicial review, the Commission stay the auctions for the Biltmore Forest proceeding and other similarly situated comparative broadcast proceedings in which an Initial Decision was issued by June 30, 1997. A second motion, filed by Bechtel, Lindsay and Lamprecht, seeks a stay pending judicial review of the auction rules as they pertain to their particular applications, Orion's Biltmore Forest application, and the applications of other similarly situated parties. The motion notes that Commission approval of the universal settlement

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[4] *Public Notice: Closed Broadcast Auctions Scheduled for September 28, 1999* (Report No. AUC-99-25-A), DA 99-940 (WTB/MMB May 17, 1999) (Appendix A).

[5] Lindsay is an applicant for a new television station in Charlottesville, Virginia. That hearing proceeding has not been scheduled for auction, however, due to the pendency of a settlement agreement filed by Lindsay and the only competing applicant, Achernar Broadcasting Company.

[6] *See Public Notice,* DA 99-940, at Appendix A. For each hearing case scheduled for auction orders have been issued that identify the qualified bidders, and state whether there are any qualifying issues requiring post-auction resolution. *Jerome Thomas Lamprecht*, FCC 99-92 (rel. May 12, 1999) (Middletown, Maryland); *Liberty Productions*, FCC 99I-11 (OGC May 12, 1999) (Biltmore Forest, North Carolina); *Anchor Broadcasting Limited Partnership*, FCC 99I-10 (OGC May 12, 1999) (Selbyville, Delaware).

[7] *Orion Communications, Ltd., et al. v. FCC*, No. 98-1424 (D.C. Cir. filed Sept. 15, 1998). The co-petitioners include: (1) William Benns (U.S.Ct.App. Case No. 98-1434); (2) Susan M. Bechtel (U.S.Ct.App. Case No. 98-1444); (3) Lindsay Television Inc. (U.S.Ct.App. Case No. 98-1445); and (4) Jerome Thomas Lamprecht (U.S.Ct.App. Case No. 98-1528).

[8] 131 F.3d 176 (D.C. Cir. 1997).

proposed in the Charlottesville, Virginia proceeding would moot Lindsay's concern.

6. Orion and the joint movants submit that a stay is warranted under *Virginia Jobbers* and *WMATA*. A stay, they urge, will not result in substantial harm to any competing applicant or to the public, particularly since an interim operator is already on the air in three of the proceedings. The joint movants in particular are unaware of any competing applicant in any of these cases that is willing and prepared to go to auction immediately and proceed with the construction of the station while the lawfulness of the auction procedures is pending before the court. Orion, having expended over $500,000 in prosecuting its application through the comparative hearing process and several court appeals, states that it lacks the funds to participate seriously in the auction.[9] The loss of this entire investment, as well as the termination of its interim operating authority, is alleged to constitute irreparable harm. Orion and the joint movants also base their claim of irreparable harm on the lack of any mechanism under the statute or the auction rules to compensate pending applicants in hearing cases for their substantial prosecution expenses under the comparative process that are assertedly wiped out now that the applicants must purchase the frequency at fair market value. According to the joint movants, there are serious questions as to the constitutionality of the statute and the lawfulness of the Commission's implementation of that statute, and a stay is therefore appropriate under *WMATA*, given the allegedly strong showing of irreparable harm and the absence of any harm to the public interest or other interested parties if a stay is granted.

7. A strong likelihood of prevailing on the merits is also claimed by Orion. The abrupt shift in regulatory scheme cannot withstand a hard look, Orion asserts, particularly given the Commission's disparate treatment of comparative renewal proceedings. The decision to proceed with comparative hearings in the renewal cases assertedly belies the Commission's claims regarding the difficulty of deciding the few hearing cases through the comparative hearing process after *Bechtel*. Stressing that the court invalidated only one comparative factor, Orion challenges the prediction that auctions will be speedier than comparative hearings and asserts that these cases can be expeditiously resolved based on the existing hearing records. As to the fairness of using auctions in these cases, Orion disputes the Commission's finding that auctions are not particularly unfair because the auction price is likely to reflect the similar, past expenses incurred by all eligible auction participants. Citing *Fresno Mobile Radio v. FCC,* 165 F.3d 965 (D.C. Cir. 1999), Orion asserts that this analysis is flawed because an auction bid will reflect expected future gains, rather than previous costs. To support this claim, Orion also relies on the May 5, 1999 declaration under penalty of perjury of economist Chera L. Sayers.

8. Oppositions were filed by two competing applicants for Biltmore Forest, Biltmore Forest FM, Inc. (BFBFM) and Willsyr Communications, Limited Partnership (Willsyr). BFBFM and Willsyr, joined by Skyland Broadcasting (also a Biltmore Forest applicant), oppose both motions, urging that the Commission's auction rules are consistent with the statute and that, in any event, Orion and the joint movants have not demonstrated irreparable harm absent a stay or

[9] Attached to Orion's Motion for Stay *Pendente Lite* is the May 5, 1999 Statement under penalty of perjury of Orion principal Betty Lee stating that Orion's legal fees and costs are in excess of $500,000.

a strong likelihood of prevailing on the merits. And, given that Orion's temporary operating authority will terminate only upon the grant of a permanent FM license for Biltmore Forest, BFBFM and Willsyr urge that staying the auction rules would harm the other competing applicants for the permanent license. In reply, Orion and the joint movants dispute the contention that they have not met the requirements for a stay. Orion in particular asserts that, by virtue of its interim operation, it faces greater harm than the other applicants for Biltmore Forest.[10]

DISCUSSION

9. We will deny both motions for stay. To warrant a stay of an administrative action, the parties must make a convincing showing that: (1) they will suffer irreparable harm if a stay is not granted; (2) they are likely to prevail on the merits of their court appeal; (3) a stay would not harm other interested parties; and (4) a stay would serve the public interest. The most significant of these factors is irreparable harm.[11] Under any formulation of the test, the stay motions must be denied because they are not supported by a convincing showing on any of the four prongs.

10. The parties' allegations of harm are deficient in several respects. To justify a stay, the alleged harm must be great, imminent, and certain to occur *unless* the stay is granted; the harm must also be irreparable.[12] Instead the parties rely on past injury, in the form of nonreimbursable expenses incurred in prosecuting their applications through the comparative hearing process. That injury -- whatever its relevance to the merits of the underlying court appeals -- would not be alleviated by postponing the auction until after the court has reviewed the lawfulness of our auction procedures for these hearing cases. Thus, contrary to the parties' assertions, the absence of a mechanism for recouping these past expenditures does not constitute irreparable harm or otherwise support staying the auctions pending judicial review.

11. Additionally, the parties allege future harm which is certain to occur only if the court upholds the use of auctions to resolve these cases and if the auction in a particular proceeding results in another applicant securing the license or in the applicant making significant additional payments to secure the license. The allegation that the switch to auctions wipes out their considerable investment of time and money in prosecuting their applications through the comparative hearing process is purely hypothetical, however. For the reasons set forth in the

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[10] Attached to Orion's Reply is a declaration under penalty of perjury dated May 24, 1999 and signed by Orion principal Betty Lee reflecting that Orion lost incalculable advertising revenues and market share, as well as valuable employees after the rescission of its interim operating authority in June 1997 until its reinstatement in mid-January 1998.

[11] *Wisconsin Gas Co. v. F.E.R.C.*, 756 F.2d 669, 673-74 (D.C. Cir. 1985).

[12] *Id.* at 673 (internal citations omitted) ("[T]he injury must both be certain and great; it must be actual and not theoretical . . . the party seeking injunctive relief must show that 'the injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm'").

First Report and Order, it is uncertain that an applicant who formulated its comparative proposal based on the pre-*Bechtel* criteria would have a better chance of prevailing in a comparative hearing than in an auction,[13] or that the winning bidder would end up paying more for the license if it were awarded by auction than it would pay in additional litigation costs if the Commission proceeded with comparative hearings in these cases.[14] And, as in the case of the past expenditures, the parties have not explained how the extent of the potential loss would by affected by postponing the auction until after the lawfulness of the auction procedures are considered by the court.

12. The parties have also failed to show that any harm resulting from conducting the scheduled auctions before the completion of judicial review would be irreparable. In the event that the court overturns our auction rules, as Orion and the joint movants confidently predict, the Commission would, of course, take appropriate steps to effectuate the court's decision. The movants assert that an auction prior to judicial review would require significant changes in their positions which could not be undone if they prevailed in court. But they do not specify what changes would be required or explain why the hearing applicants could not be returned to the *status quo ante* if the auction procedures were invalidated by the court.

13. To the extent that cash outlays are required to participate in the auction, all such funds would be refunded to unsuccessful bidders upon the close of the auction, and to winning bidders if the court ultimately determined that these cases should not have been resolved by auction. Such refunds are appropriate as a matter of fairness and are consistent with our practice in prior auctions.[15] And, while the movants theorize that a decision to forego auction participation would jeopardize an applicant's right to participate in post-auction proceedings involving the auction winner, the *First Report and Order*, 13 FCC Rcd at 15956 ¶ 98, is clear that an applicant is entitled to participate unless it has requested the dismissal of its application, or its application has been finally denied or dismissed by the Commission. The parties are also concerned that applicants electing not to bid in the auction must forego various settlement opportunities. Our anti-collusion rules, however, generally preclude settlements among applicants for full service broadcast facilities after the date for filing short-form applications in any event, and if the auction results were overturned by a later court decision, applicants who did not participate in the auction would have the same rights as other competing applicants to enter into settlements/mergers with other applicants. Only if the court agreed with our decision to resolve such cases by auction would such opportunities be irretrievably lost. In that event, however, the movants, having had their day in court (and having failed to convince the court that auctions are improper in the hearing cases), will have no cause to complain further.

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[13] *First Report and Order*, 13 FCC Rcd at 15936 ¶ 42.

[14] *Id.*, at 15942 ¶ 58, recognizing that additional, significant costs are unavoidable whether the Commission uses auctions or the comparative hearing process for these cases.

[15] *See, e.g.*, *Auction of C, D, E, and F Block Broadband PCS License*, DA 99-375 (rel. Feb. 24, 1999) (the Commission will return payments made by winning bidders if the licenses bid for are later determined to be unavailable due to a subsequent court action).

14. Finally, we agree with Willsyr that Orion is not entitled to claim irreparable harm, absent a stay, because it faces the loss of its ongoing business as the interim operator for Biltmore Forest. Whether the permit for Biltmore Forest is awarded by auction or by comparative hearing, Orion's current operating authority "will expire upon notification to the Commission that the successful applicant for permanent authority for that frequency is ready to commence operations."[16] That notification, however, will not occur until another applicant for Biltmore Forest has won the auction and is prepared to commence station operations. Significantly, the Commission's rules accord three years for the construction of an FM station and provide that the construction period may be extended where the construction permit is subject to further judicial or administrative appeal.[17] As a result, the court may complete its review of the pending court appeals before Orion's interim authority expires. And, in any event, the Commission would again reinstate Orion's interim operating authority if the court ultimately ruled that the use of an auction to select the licensee for Biltmore Forest was unlawful. If the underlying court appeal is *unsuccessful*, of course, potential harm to Orion in terms of a shorter interim operation is not a basis to grant the requested stay.

15. Having concluded that the parties have not made a convincing showing that they will be irreparably harmed, we turn briefly to the remaining prongs of the *Virginia Jobbers* test for grant of a stay. The second prong is the likelihood of the moving parties prevailing on the merits of the underlying court appeal. To justify a stay, the parties rely principally on arguments already considered by the Commission. For all of the reasons stated in the *First Report and Order* and the *Order on Reconsideration,* we believe that the Commission properly implemented the statute, and that the use of auctions to resolve all pending comparative broadcast cases neither involves a deprivation of due process nor is impermissibly retroactive. The moving parties are, therefore, unlikely to prevail on the merits.

16. The third prong involves an assessment of the likely harm to other interested parties if the stay is granted. Whether a stay would harm any competing applicant in these cases is disputed. The joint movants claim any harm to interested parties is purely hypothetical, since they are unaware of any applicant in the four proceedings that is prepared to proceed immediately with the auction and construction of the station. This falls far short of the affirmative demonstration of no harm to others required to justify a stay. And, in any event, the motions for stay are opposed by three competing applicants for Biltmore Forest urging that a stay would unnecessarily prolong Orion's interim operation to their detriment. Whatever the impact of a stay on the competing applicants in those cases in which an interim operator is already providing

[16] *Orion Communications Ltd.*, 13 FCC Rcd 5642 ¶ 4 (1998).

[17] *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes (Report and Order)*, 13 FCC Rcd 23056, 23090 ¶¶ 83-84 (1998) Under the revised procedures, the Commission will toll the construction permit during any periods that the permit is subject to administrative or judicial review.

service to the public,[18] we agree with BFBFM and Willsyr that the public interest would be best served by resolving all the hearing cases as quickly as possible. Allowing the auctions and the court appeals to proceed along parallel tracts would, in our view, be the most expeditious approach here. Accordingly, we find that Orion and the joint movants have also failed to demonstrate, as required under the fourth prong of *Virginia Jobbers*, that staying the auction pending judicial review would serve the public interest. Consistent with our representation to the court in *Orion Communications Ltd. v. FCC* that we would expedite the resolution of the permanent licensing proceeding so as to avoid any prejudice to the other applicants and to promote the public interest generally, we will deny the stay requests.

17. Finally, we dismiss as procedurally deficient Willsyr's request to recuse FCC commissioners. In its Opposition to the stay requests, Willsyr contends that Orion now seeks the same relief that Senator Helms assertedly requested during the confirmation hearings of Chairman Kennard and Commissioners Tristani, Powell and Furchtgott-Roth (that is, that the Biltmore Forest proceeding be decided by a comparative hearing). Based on that circumstance, Willsyr has requested that the Chairman and the three Commissioners recuse themselves from consideration of Orion's Motion for Stay. Additionally, Willsyr seeks to renew its February 28, 1998 Motion To Recuse FCC Commissioners, which had requested the Chairman's recusal from the rulemaking proceeding and the other commissioners' recusal from both the rulemaking and the Biltmore Forest proceeding. To support both requests, however, Willsyr relies upon the same contentions that were rejected earlier.[19] To the extent that Willsyr thus renews its earlier recusal motion, Willsyr effectively seeks reconsideration of the Commission's August 6, 1998 denial of the earlier recusal motion, and its request must be dismissed because it was filed beyond the 30-day period specified in 47 U.S.C. § 405 for petitions for reconsideration.[20] Moreover, Willsyr's request for recusal concerning Orion's motion for stay is also procedurally deficient in that it is an affirmative request for relief that is improperly set forth in a responsive pleading. In any

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[18] The grant of a stay would certainly prolong the interim operation because it would delay the process of selecting a permanent licensee. But, as noted in paragraph 14 above, proceeding with the auctions before the court has completed its consideration of the parties' appeals would not necessarily result in termination of the interim operation prior to a court decision. Even in the absence of a stay, the court litigation may end before the auction winner is prepared to commence operation.

[19] *First Report and Order*, 13 FCC Rcd at 16007-08 ¶¶ 215-18, 16052 (Separate Statement of Chairman William E. Kennard declining to recuse himself from the rulemaking proceeding). Out of an abundance of caution, the Chairman had previously recused himself from the adjudicatory licensing proceeding involving Biltmore Forest and more recently has declined to participate in one discrete aspect of this rulemaking proceeding that pertained solely and specifically to that adjudicatory proceeding. *See Order on Reconsideration*, FCC 99-74 (rel. Apr. 20, 1999) (Statement of Chairman William E. Kennard).

[20] Section 405(a) of the Communications Act provides that petitions for reconsideration must be filed within 30 days after the public notice of the underlying order. The *First Report and Order* was released August 18, 1998.

event, since Willsyr's latest recusal request relies on essentially the same material previously presented to the Commission, the reasons that warranted denial of Willsyr's February 28, 1998 Motion To Recuse FCC Commissioners would likewise warrant denial of any relief here.

ORDERING CLAUSES

18. ACCORDINGLY, IT IS ORDERED, That the Motions For Leave To File Reply, filed May 25, 1999, by Orion Communications Limited and the Motion For Leave To File Reply To Oppositions To Motion For Stay, filed May 25, 1999, by by Jerome Thomas Lamprecht, Susan M. Bechtel and Lindsay Television ARE GRANTED, and that the following pleadings ARE ACCEPTED: (1) Reply to Biltmore Forest Broadcasting FM's Opposition To Orion's Motion for Stay Pendente Lite, filed May 25, 1999, by Orion Communications Limited; (2) Reply To Willsyr Communications Limited Partnership's Opposition to Orion's Motion For Stay Pendente Lite And To Willsyr Communications Limited Partnership's Motion To Recuse FCC Commissioners, filed May 25, 1999, by Orion Communications Limited; and (3) Reply To Oppositions To Motion For Stay, filed May 25, 1999, by Jerome Thomas Lamprecht, Susan M. Bechtel and Lindsay Television.

19. IT IS FURTHER ORDERED, That the Motion For Stay Pendente Lite, filed May 5, 1999, by Orion Communications Limited and the Motion For Stay, May 10, 1999, by Jerome Thomas Lamprecht, Susan M. Bechtel and Lindsay Television ARE DENIED.

20. IT IS FURTHER ORDERED, That the Consolidated Opposition To Motions To Stay And Motion To Recuse FCC Commissioners, filed May 14, 1999, by Willsyr Communications, Limited Partnership IS DISMISSED as set forth in paragraph 17, above.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

I earlier recused myself from participating in an adjudicatory licensing proceeding involving the license for a new FM station in Biltmore Forest, North Carolina. However, I declined a request to recuse myself from participating in the general rulemaking proceeding that developed the auction rules that are the subject of the motions for stay addressed in this order.[1] One of the motions before us was filed by one of the applicants for the Biltmore Forest license. Out of an abundance of caution, and although recusal is not mandated in these circumstances, I have recused myself from consideration of this order.

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[1] *See Statement of Chairman William E. Kennard Regarding Request For Recusal*, 13 FCC Rcd at 16052.