

ORIGINAL

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 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 Licensees

Reexamination of the Policy Statement
on Comparative Broadcast Hearings

Proposals to Reform the Commission’s
Comparative Hearing Process to Expedite
the Resolution of Cases

MM Docket No. 97-234
DEC 14 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

GC Docket No. 95-52

GEN Docket No. 90-264

To: Chief, Wireless Telecommunications Bureau
Chief, Mass Media Bureau

PETITION FOR DECLARATORY RULING

I. INTRODUCTION

Pursuant to Section 1.2 of the Commission’s Rules, 47 C.F.R. § 1.2, Anchor Broadcasting Limited Partnership (“Anchor”) hereby requests that the Commission issue a declaratory ruling that Anchor is temporarily exempt from paying the balance due on the winning bid that it submitted in the recently completed Closed Broadcast Auction (“Auction”). Anchor placed this winning bid on the construction permit for a new FM station at Selbyville, Delaware. Anchor contends that it should not have to pay the balance due on its bid until the U.S. Court of Appeals for the District of Columbia Circuit resolves certain litigation challenging the Commission’s authority to grant this construction permit. In the alternative, Anchor requests that the Commission, pursuant to Section 1.3 of its Rules, 47 C.F.R. § 1.3, waive Section 73.5003(c) of its Rules, 47

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C.F.R. § 73.5003(c), thereby temporarily suspending the requirement that Anchor pay the balance of the winning bid. In support hereof, Anchor states as follows:

1. At the Auction, Anchor placed the winning bid for a construction permit to build a station that would broadcast on Channel 250A at Selbyville, Delaware ("Selbyville Permit"). Section 73.5003(c) requires parties like Anchor that have won construction permits or licenses for broadcast facilities through a Commission auction, to "pay the balance of its winning bid in a lump sum within ten (10) business days after release of a public notice announcing" that the Commission is prepared to award such permits or licenses. If, however, a petition to deny is filed against the long-form application submitted by a winning bidder, Commission rules delay the payment required by Section 73.5003(c) until the Commission considers and disposes of such petition. Therefore, under the current rules, and assuming no petitions to deny are filed against Anchor's long-form application for the permit, Anchor will be required to pay the balance of its winning bid within ten business days after the Commission releases a public notice announcing such payments are due.

2. Although no petition to deny may be filed, Anchor's interest in the Selbyville Permit is not vested, and cannot vest, until ongoing litigation in the U.S. Court of Appeals for the District of Columbia Circuit is resolved. As described in detail below, this litigation involves two claims made by one of the losing applicants for this license. This same losing applicant likely would have otherwise filed a petition to deny. This party may rely on the court proceeding instead of taking further action at the FCC. The effect of the pending court action is the same as the filing of a petition to deny, i.e., the lack of finality. First, this applicant claims that the Commission does not have statutory authority to allocate the Selbyville Permit by auction. Second, this applicant claims that the Commission improperly terminated the comparative hearing proceeding by which the

Selbyville Permit was originally to be allocated. Anchor's interest in the permit will not fully and completely vest, and Anchor will not hold this permit free and clear of encumbrances, until and assuming that this litigation is concluded in the FCC's favor.

3. Anchor contends that its position is legally indistinguishable from that of a winning bidder whose long-form application has been challenged by a petition to deny. Accordingly, Anchor believes that, like a winning bidder whose long-form application has been challenged by a petition to deny, it should not be required to pay the balance on its winning bid until after all challenges to its interest in the permit have been finally decided.

II. BACKGROUND

4. Anchor was one of several parties that filed mutually exclusive applications for the Selbyville Permit nearly 15 years ago. Of these several parties, only two other applicants, Susan M. Bechtel ("Bechtel") and Galaxy Communications, Inc. ("Galaxy"), remain involved in this proceeding today.

5. The Commission initially decided this case in Anchor's favor using its comparative hearing criteria and awarded the construction permit to Anchor. *See Anchor Broadcasting Limited Partnership*, 6 FCC Rcd 721 (1991). Bechtel appealed this decision to the U.S. Court of Appeals for the District of Columbia Circuit, challenging the Commission's use of "integration of ownership and management" as one of the primary criteria for deciding comparative hearing cases. The Court found that the Commission had not provided sufficient explanation as to why it continued to use this criterion, and thus remanded the matter to the FCC for further review. *See Bechtel v. F.C.C.*, 957 F.2d 873 (D.C. Cir. 1992) (*Bechtel I*).

6. On remand, the Commission considered, but ultimately rejected, Bechtel's arguments, and again awarded the construction permit to Anchor. *See Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992), *modified* 8 FCC Rcd 1674 (1993) (rejecting petitions for reconsideration). In March 1993, over six years ago and nearly seven years after submitting its initial application for the Selbyville construction permit, Anchor built the station and began providing service to the public. The station has continued to operate to this day. In the course of building and operating the station, Anchor has invested nearly \$1 million, and has expended substantial amounts of time, money and energy to participate in the ongoing litigation generated by this case.

7. Bechtel once again appealed the Commission's decision to the D.C. Circuit. This time, the Court found the Commission's continued use of the integration preference arbitrary and capricious, and thus unlawful. As such, the Court remanded the case to the Commission for reconsideration without use of the integration criterion. *See Bechtel v. F.C.C.*, 10 F.3d 875 (D.C. Cir. 1993) (*Bechtel II*).

8. In light of the D.C. Circuit's decision in *Bechtel II*, the Commission elected to discontinue its use of comparative hearings to allocate broadcast construction permits, and froze any proceedings then underway until it could devise an alternative method for making such allocations. *See FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), *modified* 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995). The Commission also initiated a proceeding to obtain comment on the issues raised by the court in *Bechtel II*. *See Second Further Notice of Proposed Rulemaking*, 9 FCC Rcd 2821 (1994).

9. While this proceeding was pending at the Commission, Congress passed the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), which required, *inter alia*, that the Commission use competitive bidding to decide among mutually exclusive applications for broadcast licenses that were filed on or after July 1, 1997. For applications filed before July 1, 1997, Congress gave the Commission authority to use competitive bidding at its discretion, so long as only those parties with applications on file be permitted to participate in the auction. The Commission ultimately adopted the use of competitive bidding for allocating all new broadcast permits, including those cases where, like here, the applications in question were initially filed prior to July 1, 1997. *See Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC 15920 (1998) ("First Report and Order").

10. Bechtel objected to the Commission's decision to choose among mutually exclusive applications filed before July 1, 1997 by auction, and so returned to the D.C. Circuit for a third time, filing an appeal of the First Report and Order on September 21, 1998. *See Bechtel v. FCC*, No. 98-1444 (D.C. Cir. filed Sept. 21, 1998) ("*Bechtel III*"). Bechtel further objected to the Commission's decision to terminate the Selbyville comparative hearing proceeding, and forward the Anchor, Bechtel and Galaxy applications to the Mass Media Bureau for processing under the Commission's competitive bidding procedures. *See In re Applications for Construction Permit for a New FM Station on Channel 250A in Selbyville, Delaware*, Order, 14 FCC Rcd 7633 (1999). Accordingly, Bechtel appealed this Order to the D.C. Circuit. *See Bechtel v. Federal Communications Commission*, No. 99-1212 (D.C. Cir. filed June 8, 1999). The D.C. Circuit subsequently consolidated these cases with several other challenges to the Commission's auction plan. The final briefs in these cases are due on March 24, 2000, and oral argument is scheduled for May 24, 2000.

11. The Commission's Closed Broadcast Auction began on September 28, 1999. Only Anchor and Galaxy placed bids for the Selbyville Permit; Bechtel filed a short-form application (FCC Form 175), but did not participate in the auction. On October 7, 1999, in the 24th round of the auction, Anchor placed what turned out to be the high bid for the Selbyville permit -- \$210,000. *See Closed Broadcast Auction No. 25 Closes*, Public Notice, DA 99-2153, Attachment A at 2 (rel. Oct. 12, 1999).

III. DISCUSSION

A. Petition for Declaratory Ruling

12. Anchor believes that its circumstances are legally indistinguishable from those faced by winning auction bidders whose bids are challenged by petitions to deny. Accordingly, the Commission should issue a declaratory ruling clarifying that its auction payment deadline does not apply to Anchor because of the pending *Bechtel III* case.

13. When the Commission first adopted its auction rules, it decided that successful bidders would not have to tender payment of winning bid amounts until the grant of the application was "final" (*i.e.*, all petitions to deny and other challenges to the application were resolved). See 47 C.F.R. § 1.209(a). The Commission's reasoned that it was premature to require payment until it could determine the bona fides of the applicant and its application. This reasoning makes particular sense in the context of auctions, like the Closed Broadcast Auction, where the Commission requires winning bidders to tender full payment on a winning bid up-front in one lump sum, rather than on an installment payment plan as was permitted in certain earlier auctions.

14. In formulating these auction rules, the Commission did not consider a situation where, as in Anchor's case, the property of the Commission's auction process and therefore the

results of the auction have been challenged at the U.S. Court of Appeals. Certainly, Anchor faces the same risk and uncertainty as an applicant that has a petition to deny filed against its auction-winning application -- that is, an adverse decision by the Court could result in the reversal of the Commission's grant of Anchor's auction-winning application. Requiring Anchor to tender its auction under these circumstances would be unjust.

15. Moreover, the Commission has an obligation to treat all similarly situated applicants in the same manner. Compelling Anchor to pay its winning bid prior to the resolution of all challenges concerning the grant of its application would be treating Anchor's application differently from all other auction-winning applicants that face challenges to the grant of their applications.

16. Therefore, a declaratory ruling providing that payment of the remainder of Anchor's winning bid amount is not due until final resolution of the challenges affecting grant of its application is appropriate.

B. Petition for Waiver

17. Based on the foregoing, Anchor believes that the Commission should issue a declaratory ruling deferring Anchor's obligation to pay the remainder of its winning bid until the challenges to the grant of its application are finally resolved. If, however, the Commission disagrees with Anchor's reasoning and elects not to issue such a ruling, Anchor submits that its circumstances merit a waiver of the applicable Commission rules.

1. Legal Standard for Waiver of the Commission's Rules Under 47 C.F.R. § 1.3.

18. Section 1.3 of the Commission's Rules states that "[t]he provisions of [47 C.F.R.] may be suspended, revoked, amended or waived for good cause shown, in whole or in part, at any time by the Commission" 47 C.F.R. § 1.3. The D.C. Circuit has interpreted this standard to

require that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest." *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1970); see also *High Tech Communications Services, Inc. Request for Waiver of Section 90.905 of the Commission's Rules Market: EA174A*, Order, DA 99-1788, at ¶ 5 (rel. Sept. 2, 1999); *Request of Licensees in the 218-219 MHz Service for Waiver of the Five-Year Construction Deadline*, Order, 14 FCC Rcd 5190, at ¶ 8 (1999).

2. *Anchor Presents Special and Unique Circumstances Sufficient to Merit a Waiver.*

19. The foregoing procedural history of Anchor's efforts to secure the Selbyville permit shows the uncommon, and perhaps even unique, circumstances faced by Anchor in this proceeding. Anchor filed its initial application for the Selbyville permit over 13 years ago; the Commission twice decided to grant the permit to Anchor; each time, the Commission's decision to grant the permit to Anchor was challenged in court before the grant became final; Anchor built and continues to operate the station; litigation over the permit remains pending in the D.C. Circuit; Anchor submitted the high bid for the permit in the recent Auction. Although there are other parties similarly situated to Anchor that have been involved in the application process for some time, and that had initial grants of the permits at issue challenged before the grants became final, none of these applicants prevailed in the recent auction, and thus none faces a looming payment deadline.

20. Anchor's position compares favorably with those of other petitioners that have recently received waivers of auction-related rules from the Commission. For example, in *High Tech Communications Services, Inc. Request for Waiver of Section 90.905 of the Commission's Rules*

Market: EA174A, Order, 1999 FCC LEXIS 4238, DA 99-1788 (Sept. 2, 1999), the Commission agreed not to penalize the petitioner for failing to include late payment fees when submitting the balance due on certain 800 MHz SMR licenses won at auction. The Commission found that the situation at issue was sufficiently unique because certain amendments to the pertinent rule had taken effect between the close of the auction and the balance payment due date. *See id.* at ¶ 5. Similarly, in *Application of Pinpoint Communications*, Order, 1999 FCC LEXIS 1624, DA 99-718 (rel. Apr. 15, 1999), the Commission excused the petitioner's failure to timely file its post-auction long-form application for certain LMDS licenses. The Commission found that because petitioner was a small company with only one employee responsible for tracking filing deadlines, and because that employee was distracted and preoccupied by family concerns at the time this filing deadline occurred, petitioner's failure to meet the deadline constituted a sufficiently unique situation to permit waiver of the filing deadline and reinstate the petitioner's late-filed application. Like these petitioners, Anchor's faces an uncommon, even unique set of circumstances, and as such there is little danger that granting Anchor a waiver will create an exception that will swallow the rule.

3. *A Waiver in This Narrow Instance will Serve the Public Interest.*

21. Granting Anchor's limited request for waiver will serve the public interest. First, granting such a waiver would cause no harm to the public interest. Second, a waiver would promote one of the underlying purposes of Section 73.5003(c).

22. As an initial matter, allowing Anchor to withhold temporarily its final payment will not cause any harm to the public interest. To date, Anchor has met every obligation imposed on it by the FCC and has met each deadline associated with this auction, including all deadlines for submission of the deposit and initial down payment. Anchor has every intention of paying the

balance remaining on its winning bid, and plans to do so in a similarly timely manner once it has received clear title. This request for a waiver is not a ploy by Anchor to defer or avoid its payment responsibilities and thereby undermine the fairness and integrity of the Commission's auction process. Anchor has built the station and has been broadcasting to serve under the Selbyville residents since 1993. Anchor thus has every incentive to protect its investment in the station by fulfilling its payment obligations. If Anchor is permitted to pay at the conclusion of the D.C. Circuit litigation, rather than ten days after the close of the petition to deny period, at most the government will lose a few months' interest on any funds ultimately paid by Anchor.

23. In addition, allowing Anchor to defer its final payment would promote one of underlying goals of the Commission's auction payment rules. In drafting Section 1.2109(a) of its Rules, the generally applicable rule upon which Section 73.5003(c) is based, the Commission balanced the costs and benefits of allowing deferred payment for permits or licenses subject to a petition to deny. In doing so, the Commission noted "the risk and uncertainty that would be imposed on an applicant if it were required to make its full auction payment while a petition against its application was still pending and could potentially result in denial of the application." *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, Third Report and Order and Further Notice of Proposed Rule Making, 13 FCC Rcd 374, at ¶ 99 (1997). The Commission plainly decided to relieve winning bidders whose applications are challenged of these risks and uncertainties. Here, Anchor faces a pending petition against its application that could result in Anchor losing the Selbyville permit. Anchor's position is indistinguishable from that of a bidder facing a petition to deny. As such, Anchor should receive similar relief from the Commission's payment deadlines, until the risk and uncertainty in Anchor's position is resolved.

VI. CONCLUSION

24. Based on the foregoing, the Commission should issue a declaratory ruling that Anchor need not comply with the final payment requirements of Section 73.5005(c), and instead must submit the balance due on its net winning bid after the conclusion of litigation over the license here at issue pending at the U.S. Court of Appeals for the D.C. Circuit. If Commission finds otherwise, which it should not, Anchor's situation plainly merits that the Commission issue a temporary waiver of Section 73.5005(c) for the same duration.

Respectfully submitted,

ANCHOR BROADCASTING LIMITED PARTNERSHIP

A handwritten signature in black ink, appearing to read "Scott C. Cinnamon", is written over a horizontal line. The signature is stylized and cursive.

Thomas A. Hart, Jr.

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December 13, 1999

CERTIFICATE OF SERVICE

I, Scott C. Cinnamon, of the law firm of Shook, Hardy & Bacon, do hereby certify that I have on this 14th day of December, 1999 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Petition for Waiver**" to the following:

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