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**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 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: The Commission**

## APPLICATION FOR REVIEW

Booth, Freret, Imlay & Tepper, P.C. (BFITPC), a communications law firm, for itself and on behalf of certain of its AM radio broadcast clients, and pursuant to Section 1.115 of the Commission's Rules, hereby respectfully requests that the Commission review and modify certain portions of the *Memorandum Opinion and Order* (the "March 2000 MO&O"), DA 00-445, released by the Chief of the Mass Media Bureau in the captioned rulemaking proceeding on or about March 1, 2000. The March 2000 MO&O denied a Petition for Reconsideration filed by BFITPC, asking that the Commission reconsider its decision to prohibit the resolution of mutual exclusivity between and among applicants for new AM broadcast stations by means of engineering amendments

filed after the submission of short form (Form 175) applications. As good cause for its Application for Review, BFITPC states as follows:

1. Certain clients of BFITPC are licensed broadcasters or applicants for new or modified AM Broadcast stations. They are directly interested in, and directly affected by, the means by which the Commission intends to resolve mutual exclusivity between and among competing applicants for new and major change AM broadcast construction permits. Certain of the Firm's clients were participants in this proceeding (See, e.g. the *First Report and Order* in that proceeding, FCC 98-194, released August 18, 1998, at footnote 112), on the subject of resolving mutual exclusivity between and among broadcast applicants for new or major change AM facilities.

2. In the *First Report and Order* in this proceeding, the Commission, by way of implementing the anti-collusion rule for broadcast auction participants, held (contrary to specific statutory obligations) that some applicants who file mutually-exclusive short-form applications in response to broadcast auction windows are precluded from eliminating the exclusivity by means of amendments to engineering data submitted with their short-form application following the short-form filing deadline. See, the *Notice of Proposed Rule Making*, 12 FCC Rcd. at 22393-94; *First Report and Order*, 13 FCC Rcd at 15981. However, the Commission did permit, and affirmed in an April 20, 1999 *Memorandum Opinion and Order*, FCC 99-74 (the April 1999 MO&O), the ability of applicants to file technical amendments which would resolve mutual exclusivity between or among AM broadcast applicants for major change facilities and applicants for new AM stations. In the April 1999 MO&O, the Commission discussed the extent to which this authority should be extended to

mutually-exclusive applicants for new AM facilities, and determined that such was not necessary, despite the wording of Section 309(j)(6)(E) of the Balanced Budget Act, which provides that nothing in the use of competitive bidding shall be construed to relieve the Commission of the obligation "to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means" to avoid mutual exclusivity. Furthermore, the legislative history of the Budget Act specifically admonished the Commission about its obligations under Section 309(j)(6)(E) by emphasizing that:

> notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.

Conference Report at 527.

3. On or about June 2, 1999, BFITPC filed a Petition for Partial Reconsideration of the April 1999 MO&O, asking that the Commission revise its procedures to permit an opportunity for technical amendments which resolve mutual exclusivity between applicants for new AM construction permits. The MO&O denied BFITPC's Petition, charging that the petitioners offered "no new facts or arguments warranting reconsideration." In sole support for this assertion, the March 2000 MO&O refers to a discussion in the prior April 1999 MO&O at ¶¶57-67.

4. Contrary to the assertion in the March 2000 MO&O, BFITPC's Petition raised new issues and arguments warranting substantive consideration. The aforementioned

discussion in the April 1999 MO&O (at ¶¶57-67) noted that the Commission had decided to permit technical amendments to resolve mutual exclusivity between applications for new facilities and mutually exclusive applications for major modifications of existing broadcast facilities. However, it did not attempt to distinguish those circumstances from those of mutually exclusive applicants for new AM stations where the exclusivity could be resolved by technical amendments. Accordingly, BFITPC's Petition showed that the Commission failed to provide sufficient justification for the different treatment, as the rationale to permit amendment of mutually exclusive applications for major modifications of existing broadcast facilities and new AM facilities also supports allowing technical amendment of competing applications for new facilities only. Furthermore, BFITPC's Petition demonstrated that this is particularly so in the unique AM broadcast context where applications are most often not "like kind." Finally, BFITPC's Petition argued that the distinction between the treatment of broadcast applicants for new, and major change AM facilities is arbitrary and inconsistent with statutory authority. Nevertheless, these new arguments were never considered by the Commission.

**Different treatment of broadcast applicants for new, and major change AM facilities is arbitrary and violates applicable statute.**

5. The April 1999 MO&O, at paragraph 58, noted – for the first time in this proceeding – that, in implementing competitive bidding in the AM broadcast context, the Commission will, post-filing of new or major change AM applications, allow engineering

amendments as a means of resolving mutual exclusivity between or among major change applicants, and between applicants for new construction permits and major change applicants. It would not, however, permit technical amendments to resolve mutual exclusivity between or among applicants for new construction permits. This is not only completely arbitrary and unfair; it is also inconsistent with the plain language of Section 309(j)(6)(E) of the Communications Act of 1934, as amended, and as clearly explained by the applicable Conference Report.

6. The Commission permits the filing of short-form applications in a broadcast auction window. During this period, an applicant may invest a substantial amount of money in planning, and in engineering and legal costs, to determine the technical feasibility of such a project. Purely fortuitously, another applicant may file an application for the same frequency at a proposed location perhaps several hundred miles away. The applications, once filed, may initially be mutually exclusive due to technical considerations at the time of filing, but with minor technical amendments, both might very well be grantable, and no mutual exclusivity need exist. Such grants might provide multiple first transmission services, a principal goal of Section 307(b) of the Communications Act of 1934. Settlements of mutually-exclusive AM applications by technical amendments which accommodate all applicants have in the past been routinely conducted. The Commission, however, has decided, notwithstanding the uniqueness of the AM assignment mechanism, to preclude technical amendments between or among these applicants under all circumstances, ostensibly to preclude collusion.

7. First of all, it is impossible to suggest that there would be collusion between or among mutually-exclusive applicants for new AM broadcast stations, potentially several hundred miles apart, to any greater extent than there would be collusion between or among applicants for major change AM facilities. The distinction makes no sense. Secondly, the prohibition of any technical amendments in order to resolve mutual exclusivity denies an opportunity to those who have invested significant time, effort and money, since only one of the applications may be granted. Even a *de minimus* overlap between applications for facilities perhaps hundreds of miles apart would require an auction, no matter how minor an amendment would be necessary in order to eliminate the exclusivity.

8. Most importantly, the Commission cannot interpret Section 309(j)(6)(E) to permit an auction where simple technical amendments could disprove or resolve the exclusivity. That mandate states that nothing in the use of competitive bidding shall "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." The Commission must therefore permit technical amendments at some point by mutually-exclusive applicants for new AM broadcast stations in order to allow the applicants to eliminate the exclusivity that would otherwise trigger an auction.

9. Unique to the AM broadcast service applicants proposing different cities of license necessitate a Section 307(b) analysis prior to an auction. Technical amendments could resolve any exclusivity, and thus eliminate the delay and administrative burden of

conducting a Section 307(b) analysis. The *First Report and Order* stated, at paragraph 120 (in relevant part), as follows:

> After consideration...we conclude that, our competitive bidding authority under Section 309(j) should be implemented in a way that accommodates our statutory duty under Section 307(b) to effect an equitable geographical distribution of stations across the nation. Congress specifically directed that the requirements of Section 307 should not be affected by the use of competitive bidding. *See, 47 U.S.C. §309(j)(6)(B).* Thus, our obligation to fulfill the Section 307(b) statutory mandate endures. The Commission and the courts have traditionally interpreted Section 307(b) to require that we identify the community having the greater need for a broadcast outlet as a *threshold* determination in any licensing scheme, for to decide otherwise would subordinate the "needs of the community" to the "ability of an applicant for another locality." *FCC v. Allentown Broadcasting Corp.* [349 U.S.] at 361-362 (footnote omitted). We conclude that our rules should incorporate a similar threshold Section 307(b) analysis to determine whether particular applications are eligible for auctions. Specifically, for AM applications, a traditional Section 307(b) analysis will be undertaken by the staff prior to conducting auctions of competing applications....

10. Indeed, permitting technical amendment of mutually-exclusive AM broadcast applications in order to resolve the mutual exclusivity, and to permit grant of more than one application, facilitates Section 307(b) goals as enunciated by the Commission. The Commission always favors the grant of more than one application where possible, and resolution of mutual exclusivity by technical amendment permits the greater number of grants of applications. By contrast, the arbitrary refusal of the Commission to permit elimination of mutual exclusivity by technical amendment invariably results in one grant, through the auction process, rather than two.

Therefore, Booth, Freret, Imlay & Tepper, P.C. respectfully requests that the Commission grant its Application for Review, and revise its April 1999 *Memorandum Opinion and Order* in accordance with the foregoing. Specifically, the Commission must revise its procedures to permit an opportunity for technical amendments which resolve mutual exclusivity between or among applicants for new AM construction permits. Only by doing so can the Commission comply with the Section 309(j)(3)(E) obligations imposed on it by the Communications Act.

Respectfully submitted,

**BOOTH, FRERET, IMLAY & TEPPER, P.C.**

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March 20, 2000