

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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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	)	MM Docket No. 97-234
	)	
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 95-52
	)	
	)	
Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264
	)	

To: Chief, Audio Services Division, Mass Media Bureau  
Reference No. 1800B3-TSN

**PETITION FOR RECONSIDERATION**

Pursuant to Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, Anchor Broadcasting Limited Partnership (“Anchor”) respectfully requests that the Audio Services Division (the “Division”) reconsider its denial of Anchor’s Petition for Declaratory Ruling (“Petition”). In the Petition, Anchor asked the Commission temporarily to exempt Anchor from paying the balance due on the winning bid that it submitted in the recently completed Closed Broadcast Auction (“Auction”) or, alternatively, to waive Section 73.5003(c) of the Commission’s Rules, 47 C.F.R. § 73.5003(c), with respect to Anchor, thereby briefly suspending the requirement that Anchor pay the balance of its winning bid.

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## **I. The Earlier ASD Decision**

1. On March 9, 2000, a letter ruling from the Division ("Letter Ruling") rejected Anchor's Petition. In the Letter Ruling, the Division concluded that Anchor's position is not equivalent to that of an applicant facing a petition to deny, and thus Anchor should not receive the same relief from its auction payment obligation that a party faced with a petition to deny would receive pursuant to 47 C.F.R. § 1.2109(a). The Division further found that the pending Orion litigation presented no more risk and uncertainty to Anchor than to any other broadcast applicant that participated in the competitive bidding process. Accordingly, in order to treat all applicants equally in light of Anchor's request, the Division concluded that it would have to delay final payments in virtually all of the broadcast auctions until the litigation terminated.

## **II. Anchor is Similarly Situated to Parties Faced with Petitions to Deny**

2. In the Letter Ruling, the Division distinguished a petition to deny, where an auction-winning applicant's alleged misconduct provides a basis for challenging the applicant's fitness to hold a license, from Anchor's position, where no such challenge to Anchor's qualifications has been made. The Division notes that unlike an applicant faced with a petition to deny, Anchor faces no risk of having its application dismissed as a result of an adverse ruling.

3. Like an applicant faced with a petition to deny, however, Anchor cannot be certain that it will ever receive the permit for which it placed the highest bid. It seems unreasonable, then, that Anchor should have to submit full payment, when an applicant faced with a petition to deny need not do the same. Certainly, if Anchor were to submit payment but ultimately did not receive the permit, the Commission would be forced to refund Anchor's payment. The same procedure could be applied an applicants faced with a petition to deny. The Commission could have decided

to require such applicants to pay in full, with the promise of a refund if the Commission ultimately granted the petitions against them and dismissed their applications. In crafting Section 1.2109(a), however, the Commission elected a different approach -- tolling the payment requirement until the risks and uncertainties concerning the permit had been resolved. Anchor's case merits the same treatment.

4. The Division attaches undue significance to the fact that, if the Orion litigation produces an unfavorable result, Anchor will still have a viable application, unlike an applicant against whom the Commission grants a petition to deny. This distinction does not seem germane to the issue of whether an applicant should be required to submit payment without knowing for certain that it will get what it's paying for. It is true that, unlike a petition-to-deny loser, Anchor would someday get another chance to win the permit. But the Commission shouldn't (and presumably wouldn't) retain Anchor's payment until that next chance comes around. Accordingly, Anchor reiterates its contention that it is similarly situated to an auction-winning applicant faced with a petition to deny. The FCC cannot vest good title in Anchor's authorization until the Orion case is favorably resolved, and thus Anchor should receive relief from payment obligations.

### **III. The Orion Litigation Impacts Only a Few Applicants, Not All Auction Participants**

5. In the Letter Ruling, the Division also concluded that the Orion litigation presents the same risk to Anchor as it presents to all, or nearly all, participants in the auction – specifically that a ruling in the petitioners' favor would force the Commission to set aside all of the grants made pursuant to that Auction. Accordingly, the Division found that if it gave Anchor the relief requested

in the Petition, it would have to delay final payment from all auction winners until the Orion litigation has terminated, treating all Auction 25 winners as similarly situated.<sup>1</sup>

6. The Division has overestimated the scope of the Orion litigation. Petitioners in that case fit within a very narrowly defined class. Each petitioner participated in a fully-litigated comparative proceeding. Each petitioners' case had advanced through at least an initial decision by an administrative law judge, only to be "frozen" by the Commission in light of the D.C. Circuit's invalidation of the integration criterion in Bechtel II. By the Commission's own count, "fewer than ten" such cases survived to be decided by competitive bidding. See First Report and Order, 13 FCC Rcd 15920, 15936 (1998); Memorandum Opinion and Order, 14 FCC Rcd 8724, 8727 (1999). The Orion petitioners represent six of these fewer than ten cases.<sup>2</sup>

7. The Orion petitioners don't contest the Commission's implementation of competitive bidding for broadcast services generally. They only contest competitive bidding as applied to their specific circumstances (*i.e.*, cases already adjudicated to at least an initial decision before Bechtel II). The Orion Petitioners argue, *inter alia*: that the Commission inequitably disregarded the time and resources invested by the Petitioners in the comparative hearing process; that the Commission was obliged to construct a new comparative hearing process to reconsider their cases, rather than place those cases in an auction; that the Commission arbitrarily eliminated certain licensee qualifications and allowed previously disqualified applicants to participate in the auctions; and that

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1. The D.C. Circuit has consolidated the Bechtel, Orion, and certain other cases into a single case, with Orion as the named petitioner.

2. As previously noted, the facts of Anchor's case are unique as well. Unlike any other applicant, Anchor won both in a comparative hearing and at auction. Anchor has also been operating the Selbyville station under a non-final authorization for several years.

the statutory and administrative enactments that implemented competitive bidding violated the petitioners' rights to due process of law and deprived the petitioners of property interests without just compensation. See Brief for Joint Petitioners at 1-2, *Orion v. FCC*, No. 98-1424 and consolidated cases, (D.C. Cir. filed Sept. 21, 1998). The Orion Petitioners seek relief only for applicants in mutually exclusive proceedings that were already subject to evidentiary hearings, findings of fact, conclusions of law, and initial decisions. They do not seek to upset any more than that small handful of cases. Moreover, Anchor is the only party seeking this temporary relief from its payment obligations, and thus the impact of the Commission's decision need only extend to Anchor's application, and not even to all those auction winners who participated in comparative hearings, let alone to all auction participants.

8. As such, the uncertainty and risk generated by the Orion case are not borne by all applicants equally, but instead fall disproportionately on those applicants, like Anchor, whose cases were first litigated to a decision under the pre-Bechtel II standards, and then subjected to auction. If the Orion Petitioners prevail before the D.C. Circuit, it is highly unlikely that the court would invalidate the Commission's broadcast auction rules generally. It is far more likely that the court would invalidate the competitive bidding process as applied to the licenses specifically of interest to the Orion Petitioners, and require the Commission to allocate those "fewer than ten" licenses in some other manner. Anchor faces substantially more uncertainty and risk than almost every other winning bidder, and thus deserves a temporary reprieve from its payment obligations until the D.C. Circuit conclusively determines the status of the Anchor's permit.

#### **IV. Anchor Seeks Limited Relief**

9. Anchor seeks an extension of its payment deadline only until the Orion case concludes. The case is nearing completion. The parties and intervenors submitted their final briefs on March 24, 2000. Oral argument in the case is scheduled for May 19, 2000. The court could hand down a decision as early as July 2000, and thus Anchor would receive little more than a three-month deferral of its payment deadline. This relatively minor accommodation by the Commission seems a reasonable cost for mitigating the risk and uncertainty faced by Anchor, and preventing the administrative nightmare of refunding payment for an authorization that was reversed on appeal.

#### **V. Conclusion**

9. In light of the foregoing, Anchor asks the Division to reconsider its rejection of Anchor's Petition for Declaratory Ruling, and to find instead that Anchor need not comply with the final payment requirements of Section 73.5005(c) until the Orion litigation concludes. 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,

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April 10, 2000

## CERTIFICATE OF SERVICE

I, Scott C. Cinnamon, of the law firm of Shook, Hardy & Bacon, do hereby certify that I have on this 10th day of April, 2000 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Petition for Reconsideration**" to the following:

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