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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In the Matter of	)	MM Docket No. 95-31
	)	
Reexamination of the Comparative Standards for Noncommercial Educational Applicants	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: The Commission

PETITION FOR RECONSIDERATION

Lay Catholic Broadcasting Network (LCBN), by its attorney, and pursuant to 47 U.S.C. §405 and Sections 1.106 and 1.429 of the Commission's Rules, hereby respectfully submits this Petition for Reconsideration of that portion of the ***Report and Order*** in the above-entitled matter, FCC 00-120, released April 21, 2000, published in the Federal Register June 8, 2000, 65 Fed. Reg. 36375, 2000 WL 727592, which requires non-commercial educational applicants on FM Channels 221 through 300 to be subjected to an auction proceeding. As noted herein, this result of Docket 95-31 clearly violates an unambiguous Act of Congress, and is patently illegal. In support whereof, the following is shown:

1. LCBN is a California non-profit corporation. It is an applicant for FM Channel 244A (96.7 MHz) allocated to Healdsburg, California, approximately 60 miles north of San

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Francisco (File No. BPH-19960111M5, Facility ID #79032). LCBN's application at Healdsburg is mutually-exclusive with approximately nine other applicants. LCBN's application was filed on FCC Form 340, and LCBN seeks to operate on Channel 244A at Healdsburg as a non-commercial, educational FM station.

2. This "Petition for Reconsideration" is filed within 30 days of the date of publication on FCC 00-120 in the Federal Register, and as such it is timely filed.

3. FCC 00-120 was adopted by a 3 to 2 vote. Commissioners Furchtgott-Roth and Tristani dissented on the very issue on which LCBN seeks reconsideration. These two Commissioners found that 47 U.S.C. §309(j)(2)(C) precludes the FCC from holding auctions in cases where commercial and non-commercial stations are vying for the same channel. Because their dissent presents the legal argument upon which FCC 00-120 must be reversed, either at the FCC or in a circuit court of appeals, LCBN adopts as its own the language of that dissent, and presents it below:

> We would have found that Section 309(j)(2)(C) of the Communications Act precludes us from using competitive bidding to award a broadcast license to a noncommercial educational broadcast or public broadcast station to operate on a commercial channel. We believe that Congress' mandate is clear: the Commission lacks authority to employ auctions to issue licenses to such stations, regardless of whether they operate on a reserved or

on a commercial frequency. Since the statute is clear on its face, we are obligated to give it effect.[1]

The specific exemption to our competitive bidding authority in section 309(j)(2)(C) provides that such authority "shall not apply to licenses or construction permits issued by the Commission . . . for stations described in section 397(6) of this title." Section 397(6), in turn, defines the terms "noncommercial educational broadcast station" and "public broadcast station" as "a television or radio broadcast station which . . . under the rules and regulations of the Commission . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association" or "is owned and operated by a municipality and which transmits only noncommercial programs for education purposes."

Nothing in section 309(j)(2)(C) limits its reach to licenses issued for noncommercial and public broadcast stations *on reserved channels*. The statute makes no distinction between licensees granted to section 397(6) stations to operate on reserved spectrum and licensees granted to such entities to operate on unreserved spectrum; the prohibition on the licensing of these stations pursuant to auctions is, in this regard, unqualified. The Commission simply has no competitive bidding authority when it comes to licenses issued for stations described in Section 397(6).

Similarly, nothing in section 397(6) limits the definition of noncommercial educational and public broadcast stations to those operating on reserved channels. Rather, section 397(6) defines the stations exempt from auctions under section 309(j)(2)(C) in terms of the station's *eligibility* under Commission rules to be licensed as a noncommercial educational or public broadcast station. Commission rules do not require broadcast stations to operate only on reserved bands in order to be eligible for status as a noncommercial educational or public broadcast station.[2] To the contrary, our rules specifically address the situation in which

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1 *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

2 *See* 47 C.F.R. § 73.503.

noncommercial educational stations are licensed to operate on unreserved channels.[3]

Had Congress intended to limit the exemption for noncommercial educational and public broadcasters from competitive bidding to cases in which such broadcasters were applying for reserved frequencies, we believe that Congress would have done so explicitly. Indeed, prior versions of both the House and Senate bills expressly provided for an auction exemption limited to "channels reserved for noncommercial use," but those limitations were eliminated prior to passage.[4] Where Congress deletes limiting language from a bill prior to enactment, it may be presumed that the limitation was not intended.[5] We would not read this limitation back into the statute.

The majority's reasoning to the contrary is unpersuasive. Although the majority tries to paint itself as caught between two "conflicting statutory directives," para. 106 (juxtaposing sections 309(j)(1) & (j)(3)(C) with section 309(j)(2)(C)), this characterization of section 309 is just not tenable. The statutory language is not in equilibrium, leaving the Commission free to choose one side or the other, but clearly weighs in favor of exempting NCEs from auctions across the board.

The directive in section 309(j)(1) to auction all mutually exclusive applications, on which the majority places such reliance, is by its clear terms subject to the exemptions set forth in the very next subsection. That subsection, of course, includes the exemption for noncommercial stations. *See* 309(j)(1) ("If . . . mutually exclusive applications are accepted for any initial license or construction permit, then, *except as provided in paragraph (2),* the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding. . . .). Section 309(j)(1) is simply not an order to auction all mutually exclusive applications, as the majority suggests, and cannot be relied upon as such. Furthermore, the directive in section 309(3)(C) is simply to "seek to promote" – not to accomplish at all costs, and surely not

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[3] *See* 47 C.F.R. § 73.513.

[4] *See* H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1); S. 947, 105th Cong., 1st Sess., § 3001(a)(1).

[5] *See Russello v. United States*, 464 U.S. 16, 23-24 (1983).

where inconsistent with the actual statutory scheme – recovery of the value of spectrum made available for commercial use.

On the other side of the scale, there is section 309(j)(2)(C), which follows immediately the mandate to auction mutually exclusive applications except in certain situations. It provides that one of those situations is where "licenses or construction permits [are] issued by the Commission for stations described in section 397(6) of the Act." This exemption speaks *specifically* to the question of how to treat NCE applicants in a mutually-exclusive application situation. Accordingly, under the canon of construction that the specific governs the general, *see, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), we think it should trump whatever directives one might find in sections 309(j)(1) and (2)(C). As explained above, however, section 309(j)(1) is not an absolute mandate to auction all commercial spectrum and the hortatory "seek to promote" language of section (j)(C)(3) must give way to the mandatory language of the statutory exemption for NCEs.

4. In ***Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694, 702-03 (1984), the Supreme Court enunciated the principle that where an Act of Congress is unambiguous on its face, "that is the end of the matter; for the court, as well as the [administrative] agency, must give effect to the unambiguously expressed intent of Congress". 47 U.S.C. §309(j)(2)(C) is unambiguous; it commanded that applications for non-commercial stations not be subjected to FCC auctions.

5. Therefore, FCC 00-120 illegally forces applicants such as LCBN into an FCC auction. If the FCC wants to lawfully allow commercial and non-commercial broadcasters to resolve these cases, it could devise a solution such as

allowing a period, as the FCC did in December, 1997 and January, 1998, for settlement of cases where *laissez faire* settlements (either by merger or by cash compensation, or both) can be allowed. However, the auction resolution devised in FCC 00-120 is illegal. LCBN objects to its application at Healdsburg being subjected to an auction, and it intends to seek judicial reversal of any FCC action which dismisses its application because it did not participate in such an auction.

WHEREFORE, Lay Catholic Broadcasting Network urges that this Petition for Reconsideration **BE GRANTED.**

Respectfully submitted,

LAY CATHOLIC BROADCASTING NETWORK

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