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August 23, 2001

Via Electronic Filing

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: MM Docket No. 95-31
Ex Parte Notice

Dear Ms. Salas:

Pursuant to Section 1.1200, et seq., of the Commission's Rules, Station Resource Group on behalf of National Public Radio, Inc. ("NPR"), the Corporation for Public Broadcasting ("CPB"), the Association of America's Public Television Stations ("APTS"), and the Media Access Project ("MAP"), hereby notifies the Commission that an ex parte presentation, consisting of the attached document, was made to the Office of General Counsel, the Chief, Mass Media Bureau and other FCC staff on Monday, August 20, 2001. The document outlines a proposal concerning the impact of the recent NPR v. FCC decision on the upcoming FM broadcast auction.

Please direct any questions regarding this matter to the undersigned at (202) 513-2050.

Respectfully submitted,

John Crigler

cc: Jane E. Mago
Roy Stewart

ISSUING NEW BROADCAST CONSTRUCTION PERMITS FOR NON-RESERVED CHANNELS

Overview

In awarding broadcast construction permits for spectrum not specifically reserved for noncommercial educational ("NCE") use, the Commission's authority to conduct an auction among competing applicants is limited by an express exception for applicants proposing to construct an NCE station. 47 U.S.C. § 309(j). The recent decision construing this aspect of the Commission's auction authority clarifies that the exemption is "based on the nature of the station that ultimately receives the license, not on the part of the spectrum in which the station operates," thus preventing the Commission from holding auctions for licenses issued to NCEs to operate in the nonreserved spectrum. Nat'l Pub. Radio, Inc. v. FCC, 254 F.3d 226, U.S. App. LEXIS 14811, *7 (D.C. Cir. 2001).

In the interest of developing a fair, efficient, and transparent process for deciding among competing commercial and noncommercial (NCE) applicants for non-reserved spectrum, a broad range of public broadcast interests recommends adoption of a system of comparing the relative need for new commercial or NCE service to the area that is the subject of mutually exclusive applications. Such a process derives from the statutory framework for over-the-air broadcasting embodied in Section 307(b) of the Communications Act: the allocation of licenses so "as to provide a fair, efficient, and equitable distribution of radio [including television] service" across the Nation. The process we envision extends the Section 307(b) mandate by assuring a "fair, efficient, and equitable" distribution of commercial and NCE service.

An approach predicated on Section 307(b) of the Act is entirely consistent with the Commission's auction authority under Section 309(j). Thus, a preliminary assessment is utilized to determine whether a particular geographic area that is the subject of applications proposing mutually exclusive commercial and NCE services has a greater need for commercial or NCE service. If this assessment concludes in favor of commercial service, the Commission would conduct an auction among all entities proposing other-than-NCE service pursuant to Section 309(j)(1). If, on the contrary, the assessment concludes in favor of NCE service, the existing comparative point system would be used to decide among any applicants proposing mutually exclusive NCE service. In this way, the preliminary need assessment assures the awarding of construction permits among mutually exclusive applicants according to "the nature of the station that ultimately receives the license."

In practical terms, the first step in a "fair distribution" process would be to isolate those contests in which all the applicants have applied to construct a commercial station and those in which all the applicants have applied to construct an NCE station. The existing auction rules would govern the former; the comparative standards process would govern the latter.

With respect to applications for full power stations, the next step would be to identify those contests in which at least one applicant is proposing commercial service and one applicant is proposing NCE service. In such contests, the processing rules would require the applicants to submit geographic and population data relevant to a showing of the relative need for commercial or NCE service in the area for which service is proposed. An applicant proposing an NCE service might also demonstrate the need for such service based on technical, terrain, or other

matters limiting the availability or functionality of the reserved spectrum in a given area. As an alternative, the applicant proposing NCE service might first be required to demonstrate the absence of equivalent reserved spectrum, although public broadcasters question whether such a showing would meaningfully diminish the number of instances in which a "fair distribution" analysis is required. Under either alternative, a "fair distribution" analysis should consider the number of NCE services in the market and the ratio of NCE to commercial services. In those cases in which there is a greater need for NCE service, the comparative point system for reserved spectrum applications would be used to decide among competing applicants that are proposing NCE service. A determination of greater commercial need would result in an auction to resolve the spectrum contest.

With respect to FM translators, the Commission should consider a priority system such that fill-in translator applications would prevail over other translator applications and applications to replace a recently displaced translator would prevail over new translator applications. At each priority level, a single remaining NCE or commercial applicant would receive the construction permit. If multiple NCE or commercial applicants remained, the Commission would utilize the comparative standards or auction process, respectively. If the foregoing process did not result in a clear winner, the Commission would conduct a fair distribution analysis as outlined above.

Finally, with respect to television translator applications, the Commission should utilize a process to favor translator applications proposing to replace an analog translator with a digital translator. If there were multiple such NCE and commercial replacement translator applications, the Commission would conduct a fair distribution analysis as outlined above.