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Re: Channel 41, Coos Bay, Oregon
File No. BPCT-970805KN
Facility ID No. 89710

Dear Counselors:

This letter addresses a Petition to Deny ("Petition") filed by Gary Stevens ("Stevens") against the application of Todd P. Robinson, d/b/a Pacific Bay Broadcasting ("Robinson"), for authority to construct and operate a new television station on Channel 41 at Coos Bay, Oregon. Robinson was the high bidder for Channel 41 in the Commission's Closed Broadcast Auction No. 25 ("Auction"). Stevens was the only other bidder for the Coos Bay station. Stevens claims that Robinson should have been ineligible to participate in the auction because his application was defective as originally filed, and subject to dismissal prior to the auction. Stevens requests that the Commission set aside the results of the auction and award him the permit for Channel 41.

Background. In 1987, the Commission imposed a freeze on the creation of new conventional television allotments and on the acceptance of applications for vacant television allotments in order to preserve spectrum for high definition television and advanced television service.[1] The Freeze Order affected each of the top 30 television markets. Despite the freeze, the Commission recognized that new television channels could be allotted to affected communities in the top 30 television markets (including Coos Bay, a suburb of Portland, one of the top 30 markets) if certain restrictions were imposed in the allocation orders that limited the areas within which the transmitter sites for the proposed channels could be located. In 1990, Channel 41 was allotted to Coos Bay with the restrictions that any application filed for the channel must specify at least a 175 mile separation to Portland, and provide a site restriction of 12.2 kilometers (7.6 miles) south.[2]

[1] *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 FR 28346 (released July 29, 1987) ("*Freeze Order*").

[2] *In the Matter of Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Coos Bay, Oregon*), 5 FCC Rcd 999 (MMB 1990) ("*Allotment Order*").

In July 1996, the Commission announced that it would no longer accept applications for any vacant NTSC allotment, but it provided an additional period (until September 20, 1996) to file such applications.[3] Stevens timely filed his application for Channel 41 at Coos Bay on September 20, 1996. However, the staff returned his application after it determined that the application did not comply with the distance restrictions specified in the Allotment Order. Stevens filed a petition for reconsideration on November 6, 1996, and on March 27, 1997, the staff granted his petition, stating that its previous calculations had been in error. The Commission accepted Stevens' application for filing on June 13, 1997, by Public Notice, which established July 30, 1997 as the date by which any competing applications were required to be filed against it.[4] Two mutually exclusive applications were timely filed on July 30, 1997, one by Robinson (File No. BPCT-970805KN) and a second by Mollywanna, LLC (File No. BPCT-970730KU).[5] Although the competing applications did not meet the same distance restrictions, the staff did not dismiss them.

On August 5, 1997, President Clinton signed the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), which expanded the Commission's auction authority under Section 309(j) of the Communications Act of 1934 to include mutually exclusive applications for certain types of broadcast services.[6] Except for certain pending applications, and for categories of broadcast service expressly exempted from the Commission's auction authority, the Act required the Commission to use auctions to resolve mutually exclusive applications for construction permits for commercial broadcast stations. On November 26, 1997, the Commission released a *Notice of Proposed Rulemaking*, proposing new rules and procedures to implement its new auction authority.[7] Among other issues, the *NPRM* stated that the Commission intended to amend its application processing and review procedures to relax the standards for filing amendments to broadcast applications. On August 18, 1999, the Commission released its *First Report and Order*,[8] which provided new procedures allowing applicants for new facilities and for major changes to liberally correct previously fatal defects in their applications. In accordance with these new procedures, Robinson, after winning the

[3] *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service (Sixth Further Notice)*, 11 FCC Rcd 10968, 10992 (1996).

[4] *Public Notice, TV Broadcast Applications Accepted for Filing and Notification of Cut Off Date*, Mimeo No. 74657.

[5] Mollywanna, LLC became ineligible to participate in the auction because it did not submit the required upfront payment. The application will, therefore, be dismissed.

[6] 47 U.S.C. § 309(j).

[7] *Implementation of Section 309(j) of the Communications Act, Notice of Proposed Rulemaking*, MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, 12 FCC Rcd 22363 (1997) *("NPRM")*.

[8] *First Report and Order*, MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, 13 FCC Rcd 15920 (1998), *on recon.*, 14 FCC Rcd 8724 (1999) ("*Reconsideration Order*").

auction, amended his pending application on November 12, 1999, thereby complying with the distances required by the Allotment Order.

Discussion. Stevens argues that Robinson's application should have been dismissed long before the Commission held the auction because it was technically defective as originally filed. However, the Commission expressly rejected the argument that it should address issues regarding the acceptability of an application prior to an auction. Specifically, the Commission stated:

> We will not, prior to the auction, review the long form applications previously filed by the pending applicants, nor will we accept amendments to these previously filed long forms. In addition, before the auction we will not consider petitions to deny already filed, or accept additional petitions against pending applications, or consider any questions raised in such petitions relating to the tenderability or acceptability of the pending long form applications. [9]

The Commission explained that the public interest would best be served by not delaying the commencement of an auction to litigate potentially irrelevant issues.[10] Furthermore, it determined that deferring these issues would conserve the resources of the private litigants as well as of the Commission, thereby expediting service to the public.[11]

Stevens also argues that the language of Section 309(j), the auction statute, prohibits Robinson's participation in the auction because his application was purportedly not acceptable for filing. Section 309(j) provides that, "The Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding …[i]f…mutually exclusive applications are *accepted* for any initial license or construction permit." (emphasis added).[12] Based on this language, Stevens contends that his application was the only one *acceptable* and, therefore, an auction was not permissible under the statute. Contrary to Stevens's claims, Section 309(j) did not require the dismissal of Robinson's application. Stevens misconstrues the Act as requiring

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[9] *First Report and Order* at 15951. In its *Reconsideration Orde*r, 14 FCC Rcd at 8732, the Commission rejected similar challenges to its decision to defer consideration of basic qualifications issues until after the auction. For example, the Commission was not persuaded by a petitioner's argument that conducting an auction before resolving a petition to deny against the only other applicant violates due process and is contrary to the requirements of Section 309(j)(1). The Commission also declined to institute pre-auction procedures to verify the bona fides of certain pending applications.

[10] *Reconsideration Order* at 8732.

[11] *Id.*

[12] The mutually exclusive applications of Stevens and Robinson are subject to the Commission's mandatory auction authority set forth in Section 309(j)(1). The Commission determined that the pending group of applicants subject to Section 309(j)(1) include those situations where one broadcast application was filed before July 1, 1997 *(i.e.*, Stevens) and the other mutually exclusive application(s) is filed on or after that date (*i.e.*, Robinson).

applications to be acceptable for filing in order to participate in an auction. The language of the Act, however, speaks of applications that are accepted, not acceptable. The Act does not establish any prerequisite for acceptability, which is left to the Commission's complete discretion. In the *Reconsideration Order*, the Commission reiterated that Section 309(j)(1) accords it with the discretion to resolve acceptability either before or after an auction, and reaffirmed its decision to defer this determination until after an auction. Accordingly, the Commission was well within its statutory authority to include in the auction an application such as Robinson's.

Stevens likewise contends that because Robinson's application was defective as originally filed, it could not be amended under our new procedures. We find this argument unpersuasive, and conclude that Robinson was entitled to file a corrective amendment under our new processing rules. In the *First Report and Order*, the Commission modified its application procedures to assist winning bidders in resolving Commission concerns relating to their technical proposals or other matters contained in their long form applications. Specifically, the Commission adopted "a more lenient approach toward the processing of defective broadcast applications for new facilities and major changes, employing staff deficiency letters, and permitting multiple corrective amendments, if necessary."[13] The Commission concluded that such applications "will no longer be immediately returned for defects pertaining to completeness or technical or legal acceptance criteria, without ample opportunity to correct the deficiency."[14] The Commission noted that, unlike its old procedures, "the new processing standards for broadcast long-form applications will enable applicants for new facilities and for major changes to avoid dismissal and to liberally correct heretofore fatal defects in application information."[15] Robinson has fully complied with the Commission's new procedures for amending his long form application.

Stevens next alleges that even if the Commission's new procedures are applicable, the long form applications to which they apply are those containing engineering and other data being filed for the first time by auction winners. In other words, the new processing rules apply only to an auction winner who did not have a pending long form application on file prior to winning the auction. We disagree. With respect to Section 309(j) applicants, the Commission stated that "following the close of the auction, a winning bidder will, if a new applicant, be required to submit a complete long-form application, and, *if a pending applicant, be required to make any necessary amendments to its pending long form."* (emphasis added). [16] Clearly, the Commission was referring to two separate classes of applicants--those filing long forms for the first time, and those with pending long forms, like Robinson.

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[13] *First Report and Order* at 15986.

[14] *Id.*

[15] *Id.* at 15987.

[16] *Id.* at 15961.

Moreover, Stevens' assertion that the Commission's new processing rules do not apply to applicants like those in the Coos Bay proceeding, "whose long form applications were initially filed long before auctions to award frequency were ever considered," is simply wrong.[17] In fact, the Commission expressly stated that its general competitive bidding procedures, with minor exceptions, apply to Section 309(j) applicants.[18] It is also worth noting that Robinson filed his application for Channel 41 only six days prior to the date that Congress enacted the Balanced Budget Act on August 5, 1997, which authorized the Commission to grant broadcast licenses by auction. This legislation was enacted before Robinson's application was listed on public notice as tendered for filing and before staff processing would have occurred. Therefore, it can not legitimately be argued that Robinson's application was filed long before auctions to award frequency were ever considered.

Stevens also claims that the application of our new procedures to pending long form applicants would retroactively and improperly change the Commission's filing rules. However, as a matter of law it is well settled that changes in procedural rules may be applied in cases arising before their promulgation without raising concerns about retroactivity.[19] In any event, our processing rules do not meet the test commonly used to determine whether a rule has retroactive effect, because they do not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[20] Stevens does not complain that our new procedures increased his liability for past conduct or imposed new duties with respect to completed transactions. Nor could they have impaired a right possessed by Stevens, because none vested on the filing of his application. Instead, our new procedures reduce a party's liability for filing a defective application, by allowing the applicant to correct defects that were previously subject to automatic dismissal.

Stevens finally argues that the Commission is violating its mandate to treat applicants equally and fairly by applying different standards of review to the two mutually exclusive applications. In analyzing an allegation of disparate treatment, "Courts have long held that an agency must provide an adequate explanation before it treats similarly situated parties differently."[21] As explained in detail below, when the mutually exclusive

[17] Reply to Opposition at page 4.

[18] *First Report and Order* at 15958.

[19] *See Landgraf v. USI Film Products*, 511 US 244, 275 (1994) (*citing Ex parte Collett*, 337 US 55, 71 (1949)).

[20] *See Bowen v. Georgetown University Hospital*, 488 US 204 (1988). *See also Chadmoore Communications, Inc. v. FCC*, No. 96-1061 (D.C. Cir. May 20, 1997) (upholding the denial of an application for an extension of the construction period based on a subsequently adopted rule disallowing such extensions, because no right to an extension vested upon the filing of the application)).

[21] *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997) *(citing Petroleum Communications, Inc*. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994)).

applications of Robinson and Mollywanna were filed, both were subject to an application processing freeze, which suspended the processing of these applications.

The Commission traditionally used comparative hearings to decide among mutually exclusive applications for commercial broadcast services. To determine which of several applicants would best serve the public, the Commission developed a variety of comparative criteria, including the "integration" of ownership and management, which presumed that a broadcast station would offer better service to the extent that its owner(s) were involved in the station's day-to-day management. However, in *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir 1993), the United States Court of Appeals for the District of Columbia Circuit held that the "continued application of the integration preference is arbitrary and capricious, and therefore unlawful." As a result, on February 25, 1994, the Commission issued a *Public Notice* announcing a freeze on various aspects of its processes until it determined what action it would take in response to *Bechtel ("Application Processing Freeze").* The Commission subsequently decided not to appeal the decision. However, in order to permit the continued authorization of broadcast service consistent with *Bechtel*, on August 4, 1994, the Commission narrowed the scope of the application processing freeze to include only mutually exclusive applications.

Because Stevens' application was the first one filed for the Channel 41 permit, the staff proceeded to process it, as the *Bechtel* decision and application processing freeze did not apply to singleton applications. When Robinson and Mollywanna filed their mutually exclusive applications on July 30, 1997, the application processing freeze required suspension of the processing of these applications. The application processing freeze was imposed precisely because the Commission had no authorized method of selecting between mutually exclusive applicants. Indeed, the Coos Bay proceeding was effectively frozen until the Commission was granted auction authority under Section 309(j) to resolve the competing applications. Therefore, the Commission was not required to conduct an acceptability review of Robinson's application when it was originally filed as it did for Stevens' application. The comparable treatment advanced by Stevens would strip the Commission of any flexibility to bring its informed discretion to bear in accommodating changes in policy made in accordance with judicial and congressional mandates.

Conclusion. Accordingly, for the reasons stated above, having failed to raise a substantial and material question regarding the qualifications of Robinson, the petition to deny filed by Gary Stevens **IS DENIED**. Robinson's application will be granted by Public Notice, once all applicable post-auction requirements have been satisfied.

Sincerely,

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau