

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Settlements in Comparative
Broadcast Proceedings

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1996;

Released: April 26, 1996

By the Commission:

1. This order denies a Petition for Partial Reconsideration and/or Clarification of the *Public Notice, FCC Waives Limitations on Payments to Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy*, 10 FCC Rcd 12182 (1995), filed by John W. Barger and August Communications Group (Petitioners) on October 16, 1995.¹ It also denies an Emergency Request for Immediate Declaratory Ruling filed by Gene A. Bechtel on December 1, 1995, and dismisses a Motion for Extension of Settlement Deadline filed December 13, 1995 by Grass Roots Radio, Inc.²

2. By its *Public Notice*, the Commission waived two of its rules, 47 C.F.R. §§ 73.3523(b)(1) and 73.3525(a)(3), which limit the terms for settlement among applicants competing for broadcast facilities, for a 90 day period. The Commission took this action to facilitate amicable resolution of various proceedings that are currently subject to a freeze imposed by the Commission in response to *Bechtel v. FCC*, 10 F. 3rd 875 (D.C. Cir. 1993), where the court concluded that the "integration of ownership into management" criterion used by the FCC to decide among competing applicants was unlawful.

A. Petition for Partial Reconsideration and/or Clarification

3. Petitioners ask the Commission to adjudicate all pending qualifications issues, even if they are not dispositive and, after such adjudications, to provide a 90-day period in each such case where settlements could be filed without regard to the settlement payment limits. As Petitioners note, under the Commission's present policy implementing a freeze in response to *Bechtel*,³ disqualification issues regarding applicants in comparative proceedings are for the most part not being adjudicated. Petitioners argue that the Commission's well-intentioned suspension of the settlement cap will not have the desired effect of bringing applicants to the settlement table absent adjudication of such disqualification issues and that, because the dockets of

the Administrative Law Judges and Review Board are not currently crowded, their time and talents can be utilized to adjudicate pending disqualification issues. Petitioners further argue that this would not be a wasteful activity inasmuch as the qualifications of applicants must be established before they are entitled to consideration under whatever revised comparative criteria may be ultimately adopted by the Commission and that these adjudications would clear the dockets for immediate comparative consideration of the remaining applicants under new criteria when the Freeze is lifted. They also contend that the adjudication of pending disqualification issues, coupled with a continuation of the settlement cap waiver on a case-to-case basis, would provide a setting and motivation highly conducive to the resolution of many such frozen proceedings. Thus, Petitioners request that the Commission direct the ALJs and Review Board to proceed with partial decisions on qualification issues in cases pending before them, and then, upon completion of such procedures, grant a 90 day waiver of the limitations on payments to dismissing applicants in all of those cases.⁴

4. O'Day states that any future resolution of comparative hearings is subject to possible congressional action and adoption by the Commission of new criteria. It argues that allowing all applicants, including those subject to basic qualifying issues, to participate in settlements will avoid expenditure of resources by the Commission and applicants on matters that would otherwise be rendered moot. Petitioners dispute's assumption that congressional action will have an impact on frozen comparative proceedings, and reiterate their view that proceeding with adjudication of basic qualification issues will foster settlements.

5. The Commission has addressed this matter previously. Specifically, in *Modification of FCC Comparative Proceedings Freeze Policy*, 9 FCC Rcd 6689, 6690 (1994), we stated that

proceedings will not be bifurcated to adjudicate the basic qualifications of some of the applicants, where their disqualification would leave unresolved comparative issues involving other applicants, even if those other applicants contemplate entering into a settlement. If, however, the parties actually file a request for approval of a settlement, which is contingent upon resolution of specified basic qualifying issues, such issues will be adjudicated.

We agree with Petitioners that settlements may provide public interest benefits. Nevertheless, rather than devoting resources to matters that may never have any decisional significance, we continue to believe that the better approach is to encourage qualified applicants to resolve their differences conditioned on favorable resolution of any such qualifying issues. Under these circumstances, we conclude that the Petition for Partial Reconsideration and/or Clarification should be denied.

¹ An Opposition was filed November 20, 1995 by Broadcasting, Ltd., and a Reply was filed by Petitioners on December 4, 1995.

² Comments in Support of Motion for Extension of Settlement Deadline and a Supplemental Certificate of Service were filed December 13, and 14, 1995, respectively, by Maniac Communications, Ltd.

³ See *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), and *Modification of FCC Comparative Proceedings Freeze Policy*, 9 FCC Rcd 6689 (1994).

⁴ We note that the Review Board has been eliminated, effective March 29, 1996. See FCC 96-4, released January 23, 1996.

B. Emergency Request for Immediate Declaratory Ruling

6. The Emergency Request for Immediate Declaratory Ruling urges that we should state that a prevailing applicant in a universal settlement under the 90 day *Public Notice* waiver period need not adhere to any divestiture proposal that had been submitted for consideration as part of the comparative process. Asserting that settlement figures for cases subject to the *Public Notice* may approach the commercial market value of the proposed station, the Request argues that the monetary value of such existing broadcast interests may well be needed to fund a settlement and start up costs for the new station. Noting that there is at least one situation in which the relief requested is a condition precedent to a settlement, the Request contends that allowing prevailing applicants to withdraw from divestiture proposals could also facilitate settlement of other frozen comparative cases.

7. Notwithstanding the Request's contentions, we are not persuaded that the public interest would be served by allowing applicants settling pursuant to the *Public Notice* to depart from divestiture proposals that they have made in connection with pending applications. We find nothing in the court's *Bechtel* opinion undermining the continuing validity of diversity considerations as an appropriate basis for choosing among competing applicants. Moreover, 47 C.F.R. § 73.1620(g), which now requires, *inter alia*, a report one year after grant of any deviation from comparative proposals relating to diversification of the media of mass communication, stemmed in part from concerns that a policy relieving successful settling applicants of such commitments could facilitate gamesmanship and encourage abuse and cynicism about the integrity of the comparative process. See *Proposals to Reform the Comparative Hearing Process to Expedite the Resolution of Cases*, 5 FCC Rcd 4050, 4052 ¶ 15 (1990), and 6 FCC Rcd 157, 160 ¶ 22 (1991), *petition for recon. pending*. In this regard, we are concerned that the existence of such a divestiture pledge might conceivably affect the parties' positions in any settlement negotiations that may be undertaken. For these reasons, we have concluded that it would not serve the public interest to permit applicants taking advantage of the *Public Notice* to withdraw unilaterally from a promise that was designed to gain an advantage in the comparative proceeding by offering to foster the diversification of the media of mass communications.

C. Motion for Extension of Settlement Deadline

8. Grass Roots seeks an extension until January 16, 1996 of the deadline for the filing of settlements pursuant to the *Public Notice*. Inasmuch as this agency was closed due to the lack of appropriations and because of a weather emergency for virtually all of the period of time in question, the Motion for Extension of Settlement Deadline has been rendered moot. It will be dismissed without prejudice to the filing of a request, supported by a good cause showing, for leave to file late by any appropriate parties entering into such a settlement agreement in a specific case.

9. ACCORDINGLY, IT IS ORDERED, That the Petition for Partial Reconsideration and/or Clarification filed by John W. Barger and August Communications Group on October 16, 1995 and the Emergency Request for Immediate Declaratory Ruling filed by Gene A. Bechtel on December 1, 1995 ARE DENIED and the Motion for Extension of Settlement Deadline filed December 13, 1995 by Grass Roots Radio, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary