

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

MM Docket No. 87-314

In the Matter of

Amendment of Sections 1.420 and  
73.3584 of the Commission's Rules  
Concerning Abuses of the  
Commission's Processes

#### MEMORANDUM OPINION & ORDER

Adopted: May 24, 1991;

Released: June 7, 1991

By the Commission:

1. The Commission has before it a petition filed by the Law Offices of Dean George Hill, P.C. ("Hill" or "petitioner") seeking clarification or partial reconsideration of the *Report and Order* adopted in the above-captioned proceeding.<sup>1</sup> Hill asks the Commission to create an exception in the allotment context to the limitation on settlement payments that we imposed in the *Report and Order*. The National Association of Broadcasters ("NAB") has filed an opposition, to which Hill has offered a reply. For the reasons discussed below, the Commission finds that the Hill petition should be denied.

#### BACKGROUND

2. In the *Report and Order* adopted in this proceeding, we limited the amount and type of consideration that may be paid for the withdrawal of an expression of interest in allotment proceedings. Specifically, we prohibited any consideration in excess of the legitimate and prudent expenses incurred in preparing and filing the expression of interest. We determined that our prior policy of approving unrestricted settlements in allotment cases created an incentive to file competing expressions of interest for the purpose of extracting a profit from the settlement rather than for the legitimate purpose of prosecuting an application. To enforce our limitation on settlement payments, we imposed certain disclosure and certification procedures for the withdrawal of expressions of interest in FM and TV allotment proceedings.<sup>2</sup>

3. Petitioner asks the Commission to create an exception to the settlement limitation promulgated in the *Report and Order*. Specifically, Hill proposes that a party who files or plans to file a counterproposal in an allotment rulemaking case be allowed to pay more than legitimate and prudent expenses to a previously-filed party in return for the withdrawal its proposal. Hill believes this

scenario has no potential for abuse because neither party possesses an incentive to file in the hopes of turning a profit on the settlement. According to Hill, the first filing party would not file simply on the off-chance that someone might later file and make a lucrative settlement offer. Similarly, Hill argues that the second filer has no incentive to file a sham proposal for settlement purposes because that filer would continue to be prohibited from collecting more than legitimate and prudent expenses in return for withdrawing its proposal. Hill contends that by granting previously-filed parties the flexibility to structure settlements, the Commission would promote spectrum efficiency. Moreover, petitioner argues that this approach is equitable; the prior filer is fairly compensated for foregoing a business opportunity, while the subsequent filer is granted an opportunity to obtain a valuable item.

4. NAB opposes the creation of "a seniority system," whereby filers of earlier expressions of interest may recover more than legitimate and prudent expenses when approached by subsequent filers. First, NAB argues that parties could manipulate the system so that it would be difficult for the Commission to know whether it was the prior or subsequent filer who actually initiated the settlement offer. Second, NAB claims that such an exception might create a "land-rush"-type atmosphere, with parties rushing to "stake their claim" by being the first to file an expression of interest. Such an atmosphere, according to NAB, would encourage the filing of expressions of interest by parties who have little interest in building a station, but who only want the ability to set a settlement price.

5. In reply, Hill terms NAB's first point a "red herring" since the identity of the party initiating settlement discussions is irrelevant; the only party eligible to receive monies in excess of expenses would be the prior-filing party. In response to NAB's "land-rush" argument, petitioner asserts that it is unrealistic to believe that a prior-filing party would expend the time and money to file a proposal to amend the table of allotments in the mere hopes that someone might file a competing expression of interest and be willing to negotiate a cash settlement.

#### DISCUSSION

6. After careful consideration of the petition, we conclude that our policy of limiting settlement payments in allotment proceedings should not be altered. We believe that anyone in the position to anticipate that another party will file a petition to create a particular allotment or to upgrade an existing station may abuse Hill's proposed seniority filing system. In other words, someone who learns that another party is interested in a particular allotment or upgrade may file a conflicting petition first, knowing that the interested party intends to file and is susceptible to settlement demands. Hill's proposal thus would encourage "races to the courthouse" between speculative filers and filers with *bona fide* interests in upgrading existing stations or building new stations in unserved or underserved communities.

<sup>1</sup> *Report and Order* in MM Docket 87-314, 5 FCC Rcd 3911 (1990).

<sup>2</sup> The limitation on allotment proceeding settlement payments was one of several restrictions imposed in the *Report and Order*

as part of a comprehensive effort to eliminate the potential for parties to abuse Commission processes. See generally *Report and Order*, 5 FCC Rcd 3911 (1990).

7. Moreover, the speculative filer could take advantage of Hill's proposed exception even if this filer lacks definite information that another party intends to file. The filer could ascertain, through research, that an existing licensee would benefit by upgrading its station. Under Hill's approach, such a filer could place himself in a position to reap a settlement windfall by filing a conflicting allotment proposal and then offering to withdraw that proposal so that the licensee would not be precluded from upgrading its station. In such situations, the speculative filer's costs and risks associated with filing are minimal compared to the benefit that he may gain from settlement.

8. As the above discussion indicates, Hill's proposed exception would create incentives to file speculative petitions for settlement purposes. We continue to believe that the public interest is served by prohibiting the payment of profitable consideration in return for the withdrawal of expressions of interest in allotment proceedings, regardless of the order in which parties file proposals.

9. Accordingly, IT IS ORDERED THAT the "Petition for Clarification or, Alternatively, Petition for Reconsideration" filed by the Law Offices of Dean George Hill, P.C., IS DENIED.

10. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary