



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
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FCC WAIVES LIMITATIONS ON PAYMENTS TO DISMISSING APPLICANTS IN UNIVERSAL SETTLEMENTS OF CASES SUBJECT TO COMPARATIVE PROCEEDINGS FREEZE POLICY

The FCC announces today that it will waive 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, effective upon release of this Public Notice. This action will 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). In Bechtel, the United States Court of Appeals for the District of Columbia Circuit concluded that the "integration of ownership into management" criterion used by the FCC to decide among competing applicants was unlawful. Moreover, as the Commission has previously noted, the court's analysis raises questions potentially bearing on other comparative criteria as well. Reexamination of the Policy Statement on Comparative Broadcast Hearings, 9 FCC Rcd 2821 (1994).

Following Bechtel, the Commission announced that it would stop processing applications and adjudicating hearing cases involving mutually exclusive proposals for new broadcast facilities and comparative renewal proceedings while it examined its comparative criteria.¹ The Supreme Court's recent decision in Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523(1995), is also pertinent to the Commission's analysis of those criteria. In Adarand, the Court held that all government actions based on race, such as the minority ownership credit given in FCC comparative proceedings, should be subjected to strict scrutiny and would be upheld only if they serve a compelling governmental interest and are narrowly-tailored to serve that interest. The Commission anticipates that it will take some time to assess the significance of the Adarand decision on its comparative criteria.

¹FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994), and Modification of FCC Comparative Proceedings Freeze Policy, 9 FCC Rcd 6689 (1994).

The rules that will be temporarily waived limit payments that can be made among applicants seeking to settle mutually exclusive broadcasting proposals. The Commission adopted these rules to decrease the potential that applicants would abuse the Commission's processes. The Commission recognizes that many applications that are subject to the freeze on comparative proceedings were filed during a lengthy period of time when the applicants could have had no reasonable expectation of profiting from their proposals. The delays in proceedings stemming from the courts' rulings have caused hardship to those applicants and also disserved the public interest by impeding the initiation of new broadcast services. Given the additional fact that these pending applicants could not have foreseen the ramifications of those two sweeping court rulings, it does not appear that waivers of the limitations heretofore imposed on settlement agreements would either reward improper speculation or encourage the filing of abusive proposals in the future. Under these circumstances, the Commission has concluded that it would be appropriate to grant a 90 day waiver of the provisions of 47 C.F.R. §§ 73.3523(b)(1) and 73.3525(a)(3).

The Commission underscores its continuing strong support for the rules limiting payments in application settlement cases. Its temporary limited waiver of those provisions must not be construed to indicate in any way a lessening of support for these rules and their underlying purposes. It is only because of the extraordinary circumstances outside the control of the litigating parties that the Commission waives these rules for a short period. The Commission also notes that this limited waiver will not undermine the purpose of the rules to the extent that parties with competing applications pending filed and prosecuted those applications with no expectation that the rule would not fully apply. Therefore the rule already has inhibited applications of the type sought to be inhibited. In recognition of the totally unforeseen circumstances now facing parties, we temporarily waive the rule with regard to pending applications solely to facilitate settlements that will benefit the public interest through increased service.

In sum, any agreement filed by or before the ninetieth day after the release of this Public Notice that provides for a universal settlement of applications now on file in proceedings which are subject to the comparative freeze will not need to comply with the requirements of either: (1) Section 73.3523(b)(1), precluding any payment to dismissing applicants in comparative renewal proceedings prior to the Initial Decision stage of the hearing, so long as the parties to any such agreement fully comply with the provisions of Section 73.3523(c); or (2) Section 73.3525(a)(3), precluding payments to dismissing applicants for new broadcast facilities in excess of their legitimate and prudent expenses. Therefore, applicants in comparative renewal proceedings prior to the Initial Decision

stage of the hearing will be limited to out-of-pocket expenses while no such limitation will be placed on applicants for new broadcast facilities.

While we believe that a limited waiver period of our settlement requirements for pending applicants competing for broadcast facilities is appropriate under these circumstances, we emphasize that applicants for renewal proceedings must submit settlement agreements that incorporate only legitimate and prudent expenses. As such, settlement terms for these applicants will be scrutinized to make certain they are consistent with the public interest and supporting documentation may also be requested to substantiate any declarations for these expenses. Any settlement agreements submitted in accordance with this Public Notice may be approved by the Commission (or the staff under delegated authority), Review Board, or ALJ, if they are consistent with all other pertinent regulatory requirements.

Action by the Commission September 12, 1995: Chairman Hundt, Commissioners Quello, Ness and Chong, with Commissioner Barrett dissenting and issuing a statement.

For further information contact: John I. Riffer at (202) 418-1756.

DISSENTING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Public Notice Waiving Limitations on Payments to Dismissing Applications that are Now Subject to the Comparative Freeze

By this Public Notice, the Commission has determined to alleviate the backlog of comparative hearing matters for renewal and new service applications by waiving the settlement rules for a ninety (90) day period. While I understand the Commission's apprehension about the pending cases and the impact of the freeze on these applications resulting from the Bechtel and Adarand decisions, I must dissent in this decision as I believe that parties will now be permitted to circumvent the public interest.

The Commission's adoption of the prohibition against "green mail" was developed as a means of ensuring that only those parties that were interested in providing new services or that had mounted a legitimate challenge to the renewal of a broadcast license would be subject to the comparative hearing process. I supported the Commission's original decision because of my concern that new service to consumers would be delayed by parties whose sole purpose was to garner monies through the comparative hearing process.¹ I also supported the decision to apply the prohibition to the mutually exclusive renewal applications as the Commission began to recognize that, in certain instances, unsubstantiated challenges levied against broadcasters with sound records was fostering an environment that heaped undue financial burdens on licensees.² I still believe this to be the case today and am certain that the nature of the settlements that are filed at the Commission during the ninety (90) day waiver period, particularly with respect to the renewal applications, will confirm my suspicions.

To that end, I am convinced that the Commission's well-intentioned "quick fix" approach to reduce the backlog of comparative hearing matters will result in some very unsettling circumstances that the prohibition against "green mail" sought to curtail. Therefore, I am persuaded that the best strategy for reducing the pending matters, and the one I believe to be more

¹ See Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits, 6 FCC Rcd 2901 (1991) (Separate Statement of Commissioner Andrew C. Barrett).

² See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, 5 FCC Rcd 3902 (1990) (Concurring Statement of Commissioner Andrew C. Barrett).

consistent with the public interest, would have been to address the issues that have arisen as a result of the courts' decisions with respect to the comparative hearing process in a rulemaking proceeding rather than for the Commission to resort to a bandage approach for dispensing these mutually exclusive applications. As a result, I sincerely believe that I have no choice but to dissent in this matter. To do otherwise would, in my view, not only violate the public trust but also be contrary to the public interest. Finally, I also believe that our action will not eliminate the potential abuses to our comparative hearing process. As such, I fear that our action today will simply serve the interests of a few individuals.