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Reply Comments of National Bar Association and the National Association of Black Owned Broadcasters

J. Clay Smith Jr.

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	MM Docket No. 90-263
	)	
Amendment of Section 73.3525	)	
of the Commission's Rules	)	
Regarding Settlement Agreements	)	
Among Applicants for	)	
Construction Permits	)	

To: The Commission

REPLY COMMENTS OF NATIONAL BAR ASSOCIATION AND THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS

National Bar Association and the National Association of Black Owned Broadcasters, Inc. by its attorneys, hereby submits a Reply to Comments filed in response to the Commission's Notice of Proposed Rulemaking, FCC 90-193 (released July 2, 1990) ("NPRM") in the above-captioned proceeding. The National Bar Association ("National Bar") was founded in 1925, and is an organization comprised of approximately 25,000 African-American lawyers throughout the United States. The National Bar actively engages in civil rights litigation in the pursuit of justice for the rights of African-Americans and other minorities. For the past 40 years, National Bar has participated in the formulation of telecommunications policy, particularly as such policies relate to minority ownership of and employment in telecommunications facilities. The National Association of Black Owned Broadcasters ("NABOB") is the trade association representing the interests of the 180 commercial radio and 18 commercial television stations across the country owned by African-Americans. NABOB has two

principle objectives: to increase the number of African-American owners of radio and television stations, and to improve the business climate in which African-American owned radio and television stations operate.

1. In the NPRM, the Commission solicited comments on its proposal to impose limitations on payments that can be made to settle cases involving competing applicants for new broadcast stations, or for proposed modifications to facilities of existing stations. As the National Bar and NABOB are most interested in this policy to the extent that it affects minority ownership of broadcast facilities, these Comments will specifically address the Commission's proposal to limit settlement payments in comparative hearing cases for new FM and television facilities.

2. National Bar and NABOB generally favor the Commission's interest in placing limits on settlement amounts. Such a policy, if implemented in the comparative hearing process for new stations, comports with the public interest in that it would significantly reduce, if not albeit eliminate, non bona fide applicants from applying for new facilities. This would further ensure that construction permits for new facilities would be issued to the most qualified applicants, i.e. those applicants qualified under the standards of the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965) ("Policy Statement") and interpretive cases.

3. As correctly noted by Comments of Black Citizens for a Fair Media (filed Sept. 14, 1990) ("BCFM Comments") the public interest is harmed by unlimited recovery in two major ways:

(i) comparative factors are not considered in settlement cases, thus an applicant with the greatest financial resources succeeds in buying out bona fide applicants; and

(ii) creates economic incentive to file competing applications for potential pay off in settlement, and not for purpose of obtaining license, and constructing and operating the station.

BCFM Comments, p. 5.

4. As further noted by BCFM, a result of a limit on settlement payments will be to discourage the filing of "sham" applications. A reduction in the filing of sham applications would logically streamline the process, decrease the number of motions filed by and against competitors engaged in comparative proceedings, and very likely encourage the merger of the comparatively strongest applicants in a proceeding.[1/]

5. In addition, the Commission cannot overlook the fact that prosecuting a broadcast application for a new facility is not only a long, arduous process, but in practical terms it is financially straining in that it typically requires that parties retain the services of legal counsel that specialize in these types of proceedings, as well as retain a broadcast engineer to complete the technical portions of the application in a manner satisfactory to both the Commission and the Federal Aviation Administration. In some instances, those applicants

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1/ In accordance with the Policy Statement, a comparatively strong applicant is one with no attributable media interests, and who proposes to integrate principals who are 1) local residents, 2) involved in the affairs of the proposed community of license, 3) has past broadcast experience, and 4) proposes minority and/or female ownership.

comparatively superior to others in a proceeding, are also least likely to have the financial wherewithal to afford to effectively and vigorously prosecute and defend an application in a large, multi-party proceeding. That is, much of an applicant's funds are directed towards prosecuting the application, that in some instances funds intended for building and operating the proposed facility are depleted prior to termination of the proceeding.[2/] Thus, a limit on settlement payments would benefit would-be minority entrepreneurs by helping to preserve their financial resources for construction and operation of their proposed facilities, rather than in prosecuting and defending their broadcast proposals in lengthy, protracted litigation.

6. The comments of the National Association of Broadcasters ("NAB Comments") assert that the Commission should "prohibit recovery of any expenses" in comparative hearings for new stations. While the position of NAB supports an absolute prohibition on recovery of expenses in order to prevent abuse of the existing process, the National Bar and NABOB are concerned that such a sweeping policy might discourage applicants with limited financial resources from applying for new facilities for fear of not being able to recoup any of the expenses related to the prosecution of their application. While National Bar and

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2/ On September 26-27, 1990, the Commission conducted a conference in conjunction with the Howard University Small Business Development Center and the National Telecommunications Information Agency entitled "Communications and Minority Enterprise in the 1990's." At the workshops conducted during the two-day conference, the issue of obtaining financing for telecommunications businesses was an issue that was raised repeatedly by conference attendees.

NABOB can appreciate NAB's position that the Commission take the profit margin out of the comparative hearing process altogether, the interests of those applicants that can garner sufficient funds to construct and operate their proposed facilities, but that do not have deep pockets to "play hard-ball in the process" must be protected. The end result of NAB's position is that financially modest applicants would be discouraged from participating in the hearing process since it would leave them with no prospect of recovering their investment should their application be dismissed.

7. American Women in Radio and Television ("AWRT") "opposes any caps on settlement payments prior to a release of the hearing designation order and prior to payment of the hearing fee." AWRT Comments at 2. In that vein, AWRT "proposes a 60-day waiting period following issuance of the HDO during which time applicants focus solely on settlement." Id. at 3. Hearing fees and notices of appearance would be due after that period. National Bar and NABOB oppose AWRT's proposal as it does not fully serve to take the profit-margin out of the comparative process for new FM stations. The hearing process does not truly commence until notices of appearance and hearing fees are filed by parties wishing to pursue the construction permit. If the Commission were to designate a period of time for parties to focus on settlement, it should be after the filing of notices of appearance. Moreover, AWRT's proposal of instituting a multiplier that would be applied toward expenses is a proposal to be considered, but is somewhat troubling in that it may result in

discouraging less wealthy applicants from participating in proceedings, and encouraging wealthy applicants to stay in a proceeding with the prospect of financially straining smaller applicants out of the competition.

Conclusion

For the foregoing reasons, the National Bar Association and the National Association of Black Owned Broadcasters, Inc. support efforts by the Commission to limit settlement payments to competing applicants for new facilities, to that of expenses related to the prosecution of the application, in all phases of the comparative proceeding.

Respectfully submitted,

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Dated: October 15, 1990

CERTIFICATE OF SERVICE

I, Renee Gray, certify that on this 15th day of October, 1990, copies of the foregoing "REPLY COMMENTS OF NATIONAL BAR ASSOCIATION AND THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS" were hand-delivered to the following:

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