

**FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

DA 01-539

March 1, 2001

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In re: Application to Participate in an FCC Auction  
New AM Station, Johnstown, Colorado,  
1250 kHz (Auction No. 32, MX Group AM28)  
File No. BNP-2000127ACD  
Fac. ID No. 122512

Dear Mr. Imlay:

We have under consideration: (1) an October 10, 2000, amendment to the above-referenced January 2000, FCC Form 175, Application to Participate in an FCC Auction and the associated technical information<sup>1</sup> for a new AM broadcast station construction permit in Johnstown, Colorado (“Johnstown application”) filed by Jeffrey N. Eustis (“Eustis”); and (2) a November 17, 2000, petition for partial reconsideration of the public notice which listed Eustis’s Johnstown application as mutually exclusive with another application in AM Auction No. 32, MX Group AM28.<sup>2</sup> For the reasons set forth below, we dismiss the amendment and deny the petition for partial reconsideration.

*Background.* Eustis timely filed the Johnstown application during the AM auction filing window.<sup>3</sup> The Johnstown application was not identified as a singleton application in the September 22,

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<sup>1</sup> The technical information consists of Section I and the Section III-A Tech Box of FCC Form 301, Application for Construction Permit. The technical information permits the staff to determine mutual exclusivities between applicants. See 47 U.S.C. § 309(j); 47 C.F.R. §§ 1.2105, 73.3571, 73.5002(a); *AM Auction Filing Window and Application Freeze; Notice and Filing Requirements Regarding January 24 – 28, 2000 Window for Certain AM Construction Permits; Notice Regarding Freeze on the Acceptance of AM Minor Change Construction Permits from December 24, 1999 to January 21, 2000, Public Notice*, 14 FCC Rcd 19490 (1999) (“*AM Filing Window Public Notice*”).

<sup>2</sup> *AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction; Settlement Period for Groups which Include Major Modification Applicant; Filing period for Section 307(b) Submissions, Public Notice*, DA 00-2416 (October 27, 2000) (“*MX Public Notice*”). The other application in Auction No. 32, MX Group AM28, was filed by Jeffrey B. Bate for a construction permit in Mesquite, Nevada on 1250 kHz (File No. BNP-20000128ACL) (“*Mesquite application*”).

<sup>3</sup> See *AM Filing Window Public Notice*, 14 FCC Rcd 19490 (1999); *AM Auction Filing Window and Application Freeze Extended to February 1, 2000, Public Notice*, 15 FCC Rcd 1910 (2000); *AM Auction Remedial Filing*

2000, public notice which listed the singleton applications filed during the AM auction filing window.<sup>4</sup> On October 10, 2000, Eustis filed a technical amendment to his Johnstown application, proposing to reduce nighttime power from 0.5 kilowatt to 0.35 kilowatt. On October 27, 2000, the *MX Public Notice* identified the mutually exclusive applications filed during the AM auction filing window and announced that Eustis's Johnstown application was mutually exclusive with the Mesquite application. In his November 17, 2000, petition for partial reconsideration of the *MX Public Notice* Eustis asserts that his Johnstown application is not mutually exclusive with any other application and should be considered as a singleton. Eustis contends that the *MX Public Notice* should be amended to delete MX Group AM28 which lists the Johnstown and Mesquite applications as mutually exclusive and that those applications should be identified as singletons and granted.

*Discussion. Application Amendment.* After the initial application filing deadline, applicants are not permitted to make any major changes to their engineering proposals.<sup>5</sup> Therefore, Eustis's October 10, 2000, technical amendment, which proposes a major change to his Johnstown application, must be dismissed.<sup>6</sup>

*Mutual Exclusivity.* Eustis asserts that the staff has changed the procedures for evaluating mutual exclusivity between AM applications and that the new, unpublished procedures were implemented without prior public notice, public comment, and formal adoption in violation of the Administrative Procedure Act, 5 U.S.C. § 553. Eustis argues that the rules do not prohibit the grant of the Johnstown and Mesquite applications, and therefore, that the staff erroneously determined that the two proposals are mutually exclusive. However, we find that the staff properly determined that the Johnstown and Mesquite applications are mutually exclusive.<sup>7</sup> In this case, grant of either application would preclude the grant of the other, since impermissible nighttime interference would result.<sup>8</sup>

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*Window, Notice and Filing Requirements Regarding July 31-August 4, 2000 Remedial Filing Window for AM Auction, Public Notice*, 15 FCC Rcd 12,766 (2000).

<sup>4</sup> *AM Auction No. 32 Non-Mutually Exclusive Applications; Mass Media Bureau Announces Form 301 Application Deadline and Ten-Day Petition to Deny Period, Public Notice*, 15 FCC Rcd 18004 (2000).

<sup>5</sup> *See Implementation of Section 309(j) of the Communications Act -- Competitive bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, First Report and Order*, 13 FCC Rcd 15920, 15976 ("Broadcast Auction First Report and Order"); *see also AM Filing Window Public Notice*, 14 FCC Rcd at 19497; 47 C.F.R. §§ 1.2105, 73.3571(h)(1)(iii), 73.5002.

<sup>6</sup> *See, infra*, footnotes 3 and 5. Additionally, settlement or technical resolution between mutually exclusive applicants in MX Groups that include only applications for construction permits for new stations, such as Auction No. 32, MX Group AM28, is not permitted. *See MX Public Notice*, DA 00-2416 (October 27, 2000); *see also* 47 C.F.R. §§ 1.2105(c), 73.5002; *Orion Communications Limited v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

<sup>7</sup> *Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations by Random Selection (Lottery), Notice of Proposed Rulemaking*, 4 FCC Rcd 2256, 2265, fn 4 (1989).

<sup>8</sup> *See* 47 C.F.R. § 73.182.

The Commission adopted new AM interference standards, which became effective April 19, 1992, in full compliance with the Administrative Procedure Act.<sup>9</sup> Currently, an application for a new AM broadcast station or for a major change in an authorized AM broadcast station must show that objectionable interference will not result to an authorized station. 47 C.F.R. §§ 73.37, 73.182. Nighttime interference is considered objectionable if it would increase the 25 percent root-sum-square (RSS) night limit of another station. *Id.* The *AM Improvement Report and Order* classifies a station whose interference contribution is below the 25 percent RSS limit as a low interferer, and states in pertinent part that “a new station may be authorized only if it qualifies as a low interferer with respect to any other station on the same or first adjacent channel.” *AM Improvement Report and Order*, 6 FCC Rcd at 6295-6296.

Eustis argues that the new AM nighttime interference rules only protect the 25 percent RSS night limit of existing stations, construction permits, and applications past cutoff and do not protect concurrently-filed applications for new stations.<sup>10</sup> Eustis confuses acceptability and mutual exclusivity. An “acceptable” application provides required protection to all existing authorizations and cut-off applications. Thus, any application filed in a window is “acceptable” with regard to all other applications filed in a window. Under long-established precedent,<sup>11</sup> mutual exclusivity considers applications sequentially to determine whether grant of one would preclude grant of the second.<sup>12</sup> Therefore, two applications for new AM stations are considered mutually exclusive if either enters the 25 percent exclusion RSS limit of the other. If we did not apply the 25 percent RSS standard to AM auction applicants as Eustis proposes, the resulting interference would be contrary to the Commission’s goal of “improving the AM service by reducing or restricting increased interference.” *AM Improvement Report and Order*, 6 FCC Rcd at 6295. In essence, it would permit two new AM stations to cause unacceptable interference to each other, and prohibit the exact same interference in any other application context. We reject this approach as contrary to fundamental processing rules and to the goals set forth in the *AM improvement Report and Order*.

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<sup>9</sup> See *In the Matter of Review of Technical Assignment Criteria for the AM Broadcast Service, Notice of Inquiry*, 2 FCC Rcd 5014 (1987); *Notice of Proposed Rulemaking*, 5 FCC Rcd 4381 (1990); *Order Extending Comment and Reply Comment Period*, 5 FCC Rcd 5897 (1990); *Order Extending Time for Filing Reply Comments*, 5 FCC Rcd 7726 (1990); *Report and Order*, 6 FCC Rcd 6273 (1991) (“*AM Improvement Report and Order*”), *recon granted in part and denied in part*, 8 FCC Rcd 3250 (1993); 56 Fed. Reg. 64862 (Dec. 12, 1991); 57 Fed. Reg. 11689 (April 7, 1992).

<sup>10</sup> Prior to April 19, 1992, we considered two AM proposals to be mutually exclusive if the first station entered and raised the 50 percent nighttime RSS limit of the other to the extent that the second station could not comply with the city coverage requirement of 47 C.F.R. § 73.24(i).

<sup>11</sup> See, e.g., *Ashbacker v. FCC*, 326 U.S. 327, 328, 330 (1945); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Mediaone Group, Inc., Transferor, to AT&T Corp. Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9893 (2000); *Brainerd Broadcasting Co.*, 38 FCC 1195, 1197 (1965); *Empire State Broadcasting Corporation, et. al.*, 2 FCC Rcd 2793 (Chief, Audio Services Division, Mass Media Bureau 1987); *United Educational Broadcasting, Inc., et. al.*, 7 FCC Rcd 6210, fn1 (Chief, Audio Services Division, Mass Media Bureau 1992). See also 47 C.F.R. §§ 21.31, 22.131, 24.431, 90.7, 101.45.

<sup>12</sup> We have applied the interference standards set forth in 47 C.F.R. §§ 73.37, 73.182 only to determine which applications are mutually exclusive. Determinations regarding the acceptability and grantability of these applications will not be made prior to auction. See 47 C.F.R. §§ 73.3571(h)(1)(ii); see also *Broadcast Auction First Report and Order*, 13 FCC Rcd at 15978-15979; *AM Filing Window Public Notice*, 14 FCC Rcd at 19494.

*Conclusion.* For the foregoing reasons, the October 10, 2000, amendment to the Johnstown application filed by Jeffrey N. Eustis IS DISMISSED. Additionally, the November 17, 2000, petition for partial reconsideration of the October 27, 2000, public notice which identified the Johnstown application filed by Jeffrey N. Eustis as mutually exclusive with another application IS DENIED.

Sincerely,

Roy J. Stewart, Chief  
Mass Media Bureau

cc: Jeffrey B. Bate