



**FEDERAL COMMUNICATIONS COMMISSION**  
**445 12<sup>th</sup> Street, S.W.**  
**Washington, D.C. 20554**

DA 04-3913  
December 16, 2004

***In Reply Refer to:***  
**1800B3-TSN**

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Re: New (AM), Bixby, Oklahoma  
Facility ID No. 122557  
File No. BNP-20000128ACS

New (AM), Abilene, Texas  
Facility ID No. 122511  
File No. BNP-20000201AFN

KGYN(AM), Guymon, Oklahoma  
Facility ID No. 65152  
Application for Major Modification  
File Nos. BMJP-20000201AEH  
BMJP-20020426AAJ

**Auction No. 32**  
**MX Group AM 27**

Dear Counsel:

We have before us Sharon Berlin Ingles's ("Ingles") January 17, 2003, Petition to Deny the Form 301 application for major change to AM broadcast station KGYN(AM), Guymon, Oklahoma ("Application"), filed April 26, 2002, by TELNS Broadcasting Company, Inc. ("TELNS").<sup>1</sup> We also have before us Powell Meredith Communications Company's ("PMCC") January 21, 2003, Petition to Deny TELNS's application. Additionally, on April 29, 2003, Ingles filed a Petition to Deny TELNS's April 11, 2003, amendment to its Application. Ingles and PMCC filed applications for new AM broadcast stations at, respectively, Bixby, Oklahoma,<sup>2</sup> and Abilene, Texas,<sup>3</sup> both of which are mutually exclusive ("MX") with TELNS's Application to change KGYN's community of license from Guymon to Oklahoma City, Oklahoma, to change its transmitter site, modify its antenna system, and increase its daytime power to 50 kW.<sup>4</sup>

As discussed below, we grant in part the Petitions to Deny TELNS's Form 301 application, and order that the applications of TELNS, Ingles, and PMCC proceed to competitive bidding.

**Background.** In a staff decision dated March 27, 2002 ("Staff Decision"), we found a dispositive preference under Section 307(b) of the Communications Act of 1934, as amended, for TELNS's major modification application over both Ingles's and PMCC's proposals for new AM stations. Specifically, we determined that TELNS proposed to serve 1,739,548 persons within its 0.5 mV/m contour (after deducting the population that would lose KGYN service at Guymon), and 1,627,372 persons within its 2 mV/m contour. In comparison, we found that Ingles would have provided 0.5 mV/m service to 1,213,670 persons and 2 mV/m service to 936,885 persons under her proposal. We found this difference to be dispositive. The PMCC proposal would have resulted in 0.5 mV/m service to 165,250 persons and 2 mV/m service to 146,629 persons, all in well-served areas. Thus, we found that TELNS's proposal merited a dispositive Section 307(b) preference over the other two proposals. Accordingly, we directed TELNS to file a complete Form 301 for its major modification, indicating that we would dismiss Ingles's and PMCC's applications upon grant of a construction permit to TELNS.

Both Ingles and PMCC filed petitions for reconsideration of the Staff Decision. Both argued, *inter alia*, that because daytime-only AM station KTLV, Midwest City, Oklahoma, must surrender its license for TELNS to prosecute its Application, the staff should have considered and deducted the population losing KTLV service in its Section 307(b) analysis.<sup>5</sup> Ingles and

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<sup>1</sup> TELNS filed an Opposition to Petitions to Deny January 31, 2003, and Ingles filed a Reply to Opposition to Petition to Deny February 14, 2003. TELNS filed an opposition to Ingles's April 29, 2003, Petition to Deny on May 9, 2003, with Ingles filing a reply May 22, 2003.

<sup>2</sup> BNP-20000128ACS.

<sup>3</sup> BNP-20000201AFN.

<sup>4</sup> BMJP-20000201AEH.

<sup>5</sup> In its original Section 307(b) Showing, filed February 28, 2001 ("TELNS February 307(b) Showing"), TELNS stated: "The KGYN(AM) modification is permissible since KTLV(AM), Midwest City, Oklahoma, a daytime-only station that would receive interference from KGYN(AM)'s modified facilities, plans to surrender its license." (continued next page)

PMCC estimated the number of persons who would lose daytime service upon the surrender of KTLV's license to be 660,362 (2 mV/m) and 897,994 (0.5 mV/m).<sup>6</sup> PMCC additionally argued that the staff failed to consider that PMCC could amend its proposal to eliminate mutual exclusivity, and challenged the staff's allowance of a corrective amendment to Ingles's application. In a staff decision dated August 9, 2002 ("Reconsideration Decision"), we found that, because KTLV was to surrender its license as part of an interference reduction arrangement ("IRA") with TELNS, population loss pursuant to such an IRA would be factored in the analysis of the IRA, and considered in the context of a full legal and technical application analysis. We also determined that our rules precluded PMCC's proposed untimely major amendment to eliminate mutual exclusivity, notwithstanding that the rules allowed Ingles to file a corrective amendment when it was apparent that a typographical error caused her to list erroneous coordinates in one part of her Form 175 application.<sup>7</sup> Neither Ingles nor PMCC elected to seek Commission review of the staff's Section 307(b) determination, opting instead to file the instant Petitions to Deny.

**Discussion.** *Section 307(b) Analysis:* Although in its Section 307(b) submission TELNS mentioned KTLV's "plans" to surrender its license, in calculating population coverage under its proposal it did not deduct the number of people that would lose daytime service when KTLV surrenders its license, nor did it initially disclose the existence or the specifics of the IRA

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TELNS February 307(b) Showing at 2 n.6. TELNS went on to note that station KEBC(AM), Oklahoma City, Oklahoma, planned to relocate to Midwest City to replace the transmission service lost when KTLV(AM) surrenders its license. However, in neither the TELNS February 307(b) Showing nor an amended Section 307(b) showing filed by TELNS November 26, 2001 ("TELNS November 307(b) Showing") did it include the population that would lose service from the surrender of the KTLV(AM) license, nor did the attached engineering exhibits contain such information. The most information provided was this statement: "As shown in the attached engineering exhibit, even after taking into account the loss of service from changing KGYN(AM)'s community of license from Guymon to Oklahoma City, and the cancellation of the license for KTLV, the net increase in the population served by the daytime service from KGYN will be almost three-quarters of a million people." TELNS February 307(b) Showing at 11; TELNS November Section 307(b) Showing at 12. Again, however, while TELNS set forth a figure of 741,876 as being the population receiving service after deducting the population losing KGYN and KTLV service, the attached engineering showings do not disclose how it determined this number, nor does it specify whether that figure states the population in the 2 mV/m or 0.5 mV/m contours, or even whether it states daytime or nighttime service.

TELNS filed a complete Form 301 on April 26, 2002, per the staff's direction in the Staff Decision (File No. BMJP-20020426AAJ). TELNS attached to that application a letter from First Choice Broadcasting, Inc. ("First Choice") and Clear Channel Broadcasting Licenses, Inc. ("CCBL"), dated April 25, 2002, stating that as of that date First Choice and CCBL were filing an application for consent to the assignment of the KTLV license from First Choice to CCBL, and stating the intent to surrender the KTLV license prior to commencing operations of the new KGYN facilities at Oklahoma City. Subsequent to the Reconsideration Decision, TELNS filed an amendment to its complete Form 301 application, to which it attached a summation of the IRA between TELNS and CCBL, and providing a technical showing regarding the alleged interference reduction benefits to be realized under the IRA.

<sup>6</sup> Engineering Statement of Clarence M. Beverage, Exhibit No. 2 to Ingles's Petition for Reconsideration, at 3. PMCC did not set forth a calculation, but instead repeated TELNS's unexplained figure of 741,876 persons receiving new service when the loss of KTLV is factored in. *See supra* note 5.

<sup>7</sup> The Commission recently held that it will not waive its rules merely to allow an applicant in an MX group to file an untimely technical amendment to eliminate mutual exclusivity. *Robert E. Combs*, 19 FCC Rcd 13421, 13428-30 (2004).

(although it contended that the move to Oklahoma City would reduce nighttime interference to nine other stations, permitting them collectively to provide additional nighttime interference-free service to over 300,000 persons). As noted above, we concluded in the Reconsideration Decision that such factors are properly considered as part of a full legal and technical application analysis on the prevailing application. Now that TELNS's application is before us, as are Ingles and PMCC's petitions to deny, we agree with petitioners that the dispositive Section 307(b) determination for Oklahoma City must be re-evaluated in light of its full Form 301 application and especially the proposed surrender of the KTLV(AM) license pursuant to the IRA. After reviewing our prior determination in this light, we find that none of the proposals merits a dispositive Section 307(b) preference, based upon the parties' submissions.

A full examination of the merits of an IRA is undertaken upon evaluation of the post-307(b) or post-auction complete Form 301. The determination of whether an IRA serves the public interest is distinct from a Section 307(b) public interest determination and involves a different analysis.<sup>8</sup> In the *Mutually Exclusive Public Notice*, we did not specifically direct TELNS to disclose details of its IRA. However, we recognize (and agree with Ingles) that often certain details of an IRA will be germane to a threshold Section 307(b) analysis,<sup>9</sup> especially where, as here, the IRA requires surrender of an existing station license. Although KGYN proposes new AM service to a large population in and near Oklahoma City, those within the KTLV service area (which is entirely encompassed by the proposed new KGYN service area) will also lose a daytime service to accommodate the new KGYN service. It is, as Ingles insists, reasonable to "subtract" these persons in determining the service impact of TELNS's proposal, although as noted below it is also reasonable to take into account the fact that those persons will also gain new nighttime service. In future AM auctions, then, when seeking Section 307(b) showings from AM applicants, we will require that applicants disclose the existence of any agreements that would have an impact on the areas and populations gaining or losing service, including but not limited to IRAs or other agreements that would require existing facilities to modify and decrease service or surrender their licenses. This Section 307(b) showing must include the areas and populations losing service due to the surrender of licenses or modification of facilities pursuant to such agreements. For now, we evaluate the facts before us.

As before, we note that none of the applicants proposes first or second aural service, or first local transmission service. We must therefore evaluate the proposals under Priority (4) of the *FM Assignment Policies*, "other public interest matters."<sup>10</sup>

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<sup>8</sup> See *Policies to Encourage Interference Reduction Between AM Broadcast Stations*, 5 FCC Rcd 4492 (1990).

<sup>9</sup> See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses ("Broadcast First Report and Order")*, 13 FCC Rcd 15920, 15964-65 (1998); *recon denied*, 14 FCC Rcd 8724 (1999); *modified*, 14 FCC Rcd 12541 (1999).

<sup>10</sup> See *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982) ("*FM Assignment Policies*"). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). The priorities set forth in *FM Assignment Policies* are also used in evaluating applicants for new AM stations. *Alessandro Broadcasting Co.*, 99 F.C.C.2d 1 (Rev. Bd. 1984).

Staff analysis shows that TELNS's Oklahoma City proposal would provide 0.5 mV/m daytime service to 1,748,861 persons, net of the population losing KGYN service at Guymon. However, when deducting the 805,098 persons currently receiving 0.5 mV/m daytime service from KTLV(AM), TELNS would provide a net new AM 0.5 mV/m daytime service to 943,763 persons. TELNS would provide new 2.0 mV/m daytime service to 829,922 persons, when deducting both those losing KGYN service at Guymon and KTLV(AM) service. In comparison, Ingles would provide new AM daytime 0.5 mV/m service to 1,205,190 persons, and new 2.0 mV/m service to 936,850. Thus, Ingles would provide daytime service to a greater number of persons.

However, because the loss of KTLV(AM) would result only in the loss of a daytime-only service, it is reasonable to evaluate the nighttime interference-free ("NIF") service proposed by both TELNS and Ingles. Ingles proposes to serve 291,612 persons within her NIF contour, compared to 960,121 within TELNS's proposed NIF contour. TELNS thus will provide a new NIF service to over three times as many persons as Ingles.

Oklahoma City, Bixby (a community adjacent to Tulsa), and Abilene are already provided abundant reception service.<sup>11</sup> Given this fact, in addition to the fact that TELNS's superior nighttime proposal balances Ingles's superior daytime service proposal, we cannot say that any of the communities merits a dispositive Section 307(b) preference. Accordingly, we find that the applicants in MX Group AM 27 should proceed to an auction at the first opportunity.<sup>12</sup>

*Challenges to TELNS application and amendments:* Pursuant to our direction after our initial Section 307(b) determination in its favor, TELNS filed a full Form 301 application on April 26, 2002. In response to staff deficiency letters regarding its full Form 301 application, TELNS filed amendments addressing technical deficiencies and typographical errors. We dismiss Ingles's challenge to those amendments as premature. For the same reasons, we dismiss Ingles's Petition to Deny to the extent that she argues that TELNS's original auction application violates Sections 73.24(i) and 73.182 of our rules. As we pointed out in the Reconsideration Decision, our pre-auction application analysis is limited to identifying those applications that are mutually exclusive to one another, and not to perform acceptability or grantability analyses.<sup>13</sup>

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<sup>11</sup> We consider five or more services to be "abundant." *Family Broadcasting Group*, 53 RR2d 662 (Rev. Bd. 1983), review denied, FCC 83-559 (Nov. 29, 1983); see also *Bay City, Brenham, Cameron, Centerville, Edna, Ganado, Giddings, Harker Heights, Hearne, LaGrange, Matagorda, New Ulm, Point Comfort, Rollingwood, Rosenberg, and Seadrift, Texas*, 10 FCC Rcd 3337 (1995).

<sup>12</sup> Although PMCC's application will proceed to auction with TELNS and Ingles's, we reject PMCC's contention that, had we decided to award a dispositive Section 307(b) preference to Ingles, PMCC should be allowed to amend its auction application to eliminate mutual exclusivity with Ingles's proposal. See *Robert E. Combs*, supra note 7. We further note that, in this MX group, PMCC already had an opportunity to resolve its mutual exclusivity by amending its engineering submission by February 28, 2001, but did not do so. See 47 C.F.R. § 73.5002(c); *Public Notice*, "AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction – Settlement Period for Groups Which Include a Major Modification Applicant – Filing Period for Section 307(b) Submissions," 15 FCC Rcd 20449 (MMB/WTB), *filing period extended*, 15 FCC Rcd 24644 (MMB/WTB 2000).

<sup>13</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15978-79 (1998).

Such challenges should properly be made once the winning auction bidder files its full Form 301 application.

*Real party in interest allegations:* Ingles alleges that Clear Channel Communications (“Clear Channel”) was an undisclosed real party in interest behind TELNS since 2000. Ingles presents the following facts in support of its contention: Clear Channel is the current time broker of KGYN(AM); KGYN(AM)’s Website is maintained by Clear Channel; TELNS has disclosed in the KGYN(AM) ownership report that it entered into an Asset Purchase Agreement and various related agreements with Clear Channel on April 26, 2002; and a Clear Channel executive engaged in settlement discussions with Ingles for dismissal of her Bixby application, during the settlement window in Auction No. 32.<sup>14</sup> TELNS does not deny the factual allegations, but contends that the facts do not support dismissal of its application for an undisclosed real party in interest. In particular, TELNS states that it disclosed its relationship with Clear Channel in its Form 175 application for Auction No. 32, and that in its dealings with Clear Channel it has not surrendered control over KGYN(AM)’s programming, personnel, or finances.<sup>15</sup>

We agree with TELNS that Ingles has not demonstrated a substantial and material question of fact as to Clear Channel’s being the real party in interest behind TELNS’s auction application. We evaluate allegations of real party in interest in the same way as we do allegations of unauthorized transfer of control: We employ a “tripartite, fact-based test for control within the meaning of Section 310(d) of the Act.”<sup>16</sup> Specifically, we examine whether the licensee has retained the right to determine basic policies over programming, personnel, and finances of the station.<sup>17</sup> None of the facts cited by Ingles raises a question of whether Clear Channel has assumed the right to determine those basic policies for KGYN; moreover, the mere fact that a TBA exists is not sufficient to raise such a question.<sup>18</sup> The fact that a Clear Channel executive participated in settlement discussions likewise does not raise a question regarding TELNS’s control of basic station policies. In any event, TELNS alleges that its president, J. Edwin Smith, Jr., was also actively involved in settlement discussions with one of PMCC’s principals. Thus, we find no merit to Ingles’s allegations regarding Clear Channel’s alleged status as real party in interest.

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<sup>14</sup> Ingles’s January 17, 2003, Petition to Deny at 6-8. *See supra* note 12 (settlement window).

<sup>15</sup> TELNS’s January 31, 2003, Opposition to Petitions to Deny at 7-9.

<sup>16</sup> *WGPR, Inc.*, 10 FCC Rcd 8140, 8146 (1995), *vacated on other grounds sub nom, Serafyn v. F.C.C.*, 149 F.3d 1213 (D.C. Cir. 1998).

<sup>17</sup> *WGPR, Inc.*, 10 FCC Rcd at 8142; *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534, 8543 (1997); *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981).

<sup>18</sup> *See, e.g., American Music Radio*, 10 FCC Rcd 8769, 8771 (1995) (“The existence of a time brokerage or local marketing agreement will not constitute an unauthorized transfer of control under Section 310(d) of the Act unless the contract vests a disproportionate degree of control in the broker.” (citing *Roy R. Russo*, 5 FCC Rcd 7586, 7587 (MMB 1990)). *See also Solar Broadcasting Company, Inc.*, 17 FCC Rcd 5467, 5488-89 (2002) (existence of local marketing agreement of long duration for which broker paid substantial amount of purchase price under pending purchase agreement was insufficient to raise substantial and material question of fact regarding unauthorized transfer of control).

**Conclusion.** For the foregoing reasons, then, Ingles's and PMCC's Petitions to Deny ARE GRANTED IN PART AND DISMISSED IN PART. Ingles's Petition to Deny the April 11, 2003, Amendment to TELNS's application IS DISMISSED AS MOOT. TELNS's April 26, 2002, Form 301 application for major change to KGYN(AM), as amended, IS RETURNED AS INADVERTENTLY ACCEPTED FOR FILING. The applications of TELNS, Ingles, and PMCC shall be scheduled for a subsequent auction, the date of which will be announced by Public Notice.

Sincerely,

Peter H. Doyle, Chief  
Audio Division  
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