



**Federal Communications Commission
Washington, D.C. 20554**

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DA 09-2393

In Reply Refer to:

1800B3-JWR

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In re: **AM Broadcast Auction Group 84 MX
Group 84-91**

Black Hawk, South Dakota
Facility ID No. 160981
File No. BNP-20040130ARV

Orchard Homes, Montana
Facility ID No. 161341
File No. BNP-20040130AQP

Gentlemen:

This letter refers to the Petition for Reconsideration ("Petition") filed November 30, 2007, by Jet Fuel Broadcasting ("Jet"), one of two mutually exclusive ("MX") applicants in AM Broadcast Auction 84 MX Group 84-91.¹ Jet's petition was directed against the action taken in the October 31, 2007, Audio Division letter finding a dispositive preference for the application of Bott Communications Inc. ("Bott") under Section 307(b) of the Communications Act of 1934, as amended (the "Act").² For the reasons set forth below, we dismiss the Petition as an interlocutory appeal under Section 1.106(a)(1) of the Commission's Rules (the "Rules").³

Background. Jet and Bott filed mutually exclusive applications for new AM stations in Orchard Homes, Montana, and Black Hawk, South Dakota, respectively, during the filing window for AM Broadcast Auction 84. The mutual exclusivity would normally be resolved by a competitive bidding

¹ Bott Communications, Inc. filed an Opposition to the Petition for Reconsideration on December 13, 2007, and Jet filed a Reply to that Opposition on January 28, 2008.

² 47 U.S.C. § 307(b). *Bott Communications, Inc. and Jet Fuel*, Letter, Ref. No. 1800B3-LAS/JP (MB Oct. 31, 2007) (the "Letter Order").

³ 47 C.F.R. § 1.106(a)(1).

process.⁴ However, in the *Broadcast First Report and Order*, the Commission determined that the competitive bidding procedures should be consistent with its statutory mandate under Section 307(b) of the Act to provide a “fair, efficient, and equitable” distribution of radio services across the nation.” To this end, the Commission directed the staff to undertake a traditional Section 307(b) analysis prior to conducting an auction for mutually exclusive AM applications.⁵ The Commission also noted that the FM allotment priorities fulfill its obligation under Section 307(b), and would apply in making a Section 307(b) determination regarding mutually exclusive AM applications before auction.⁶

In this case, while both Jet and Bott claimed to provide a first local transmission service to their respective communities and both claimed Priority(3) under the applicable allotment priorities, the *Letter Order* awarded a dispositive preference under Section 307(b) to Bott after examining the criteria set forth in *Faye and Richard Tuck* (“*Tuck*”).⁷ Because here each applicant’s new AM station’s 5 mV/m contour would cover a significant portion of an Urbanized Area, we did not automatically award a first local service preference to either applicant. Rather, we used the *Tuck* criteria as a guideline in determining whether each applicant’s proposed community had an identity distinct from the Urbanized Area, and therefore was entitled to consideration for a first local service preference. In this case, we found that Jet did not show that a majority of the eight *Tuck* factors regarding independence from Missoula had been met. Indeed, we concluded that the “preponderance of the evidence” strongly suggested a dependence of Jet’s proposed community of license, Orchard Homes, on the Missoula Urbanized area. On the other hand, the *Letter Order* found that a preponderance of the evidence submitted by Bott supported the conclusion that Black Hawk is independent of Rapid City. We therefore determined that Bott’s proposal was entitled to a dispositive Section 307(b) preference.

The *Letter Order* explained that Bott would continue in the application process by filing a complete FCC Form 301 application (the “long form application”) within 60 days, pursuant to the procedures set forth in the Rules,⁸ and that the staff would then conduct a complete legal and technical analysis of the application. Further, the *Letter Order* indicated that the staff would issue a Consolidated Database System (CDBS)-generated Public Notice announcing the acceptance for filing of the Bott application, and petitions to deny the application would be due within 10 days after the release of the relevant Public Notice. The *Letter Order* also noted that the staff would dismiss the application filed by Jet only upon action taken on the Bott application.

Jet sought reconsideration of the Section 307(b) procedures as applied in the *Letter Order* and the preference awarded to the Bott application. Subsequently, Bott filed its complete Form 301 application

⁴ See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920 (1998) (“*Broadcast First Report and Order*”); *recon. denied*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999); *modified*, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

⁵ *Broadcast First Report and Order* at 15964-65.

⁶ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local transmission service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). The FM allotment priorities were first applied to Section 307(b) determinations in mutually exclusive AM proceedings in *Alessandro Broadcasting Co.*, Decision, 56 RR 2d 1568 (Rev. Bd. 1984).

⁷ *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988).

⁸ FN8. See 47 C.F.R. §§ 0.401(b), 1.1104, 1.1109, 73.5005(d), and 73.3512.

("Long Form 301") on December 21, 2007.⁹ As discussed below, Bott's Long Form 301 has not yet been placed on Public Notice as accepted for filing.

Discussion. We find that Jet's Petition is procedurally improper. Section 1.106(a)(1) of the Rules generally prohibits the filing of petitions for reconsideration of interlocutory actions.¹⁰ The *Letter Order* was an interlocutory action. It did not grant, dismiss or deny either of the referenced mutually exclusive applications. Moreover, the *Letter Order* does not involve an adverse ruling with respect to Jet's further participation in the proceeding. In this regard, we note that Bott's Long Form 301 has not yet been placed on Public Notice as accepted for filing. If, and when, such Public Notice is issued, Jet will have an opportunity to raise the objections contained in its instant Petition in a timely petition to deny Bott's Long Form 301.

In keeping with the Commission's efforts to reduce the administrative burdens at the initial stages of the auction process, while balancing the goals of public participation and the expeditious institution of new broadcast service, in the *Broadcast First Report and Order*, the Commission clearly defined the timeframe in which it would entertain pleadings in the auctions environment. No pre-auction pleadings were contemplated.¹¹ Allowing the filing of both petitions for reconsideration of Section 307(b) determinations and petitions to deny will result in the duplication of efforts on the part of all participating parties, including Commission staff. We find that requiring that all arguments be advanced in one pleading is more efficient than a bifurcated procedure.¹² We are mindful that Section 4(j) of the Act states that the Commission may conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice.¹³

⁹ See File No. BNP-20071221ACG.

¹⁰ 47 C.F.R. § 1.106(a)(1). The rule is clear that, with one noted exception that is clearly inapposite, the Commission or delegated authority will only entertain petitions requesting reconsideration of a final action. The rule exception is that "a petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding." Petitions of "other interlocutory actions will not be entertained." *Id.*

¹¹ The Bureau follows similar procedures in the noncommercial educational ("NCE") application processing context. See, e.g., *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6102 ("our selection is 'tentative' because petitions to deny may be filed against the applicant tentatively selected pursuant to these point system determinations") and n.227 ("The staff's practice, in NCE comparative cases decided on Section 307(b), has been to require that any petitioner or objector resubmit its objection within the 30-day period established for the filing of petitions against the tentative selectee. See, e.g., *Jacqueline Dearing*, Letter, 21 FCC Rcd 6211 n.8 (MB 2006)."). Citing this precedent, the staff recently dismissed a petition for reconsideration of an NCE Section 307(b) determination as a procedurally improper appeal of an interlocutory determination. *State of Oregon*, Letter, 23 FCC Rcd 11576 (MB 2008).

¹² Under the comparative hearing system, in modifying its rules to strictly limit appeals from interlocutory rulings to those categories specifically authorized in 47 C.F.R. § 1.301(a), the Commission explained, "[the new rules] will expedite the conduct of hearing proceedings, . . . by cutting down on hearing delays occasioned by appeals which should be deferred pending action on the merits, and by freeing the Review Board to spend its resources on the other matters coming before it." *Practice and Procedure*, 20 RR 2d 1613, 1615 (1970). In prior auction proceedings, our experience bears out the inefficiency in considering multiple pleadings, and confirms that such a practice has not been conducive to the effective transaction of Commission business, and has imposed unnecessary delays on successful applicants.

¹³ 47 U.S.C. § 4(j).

Conclusion/Action. Accordingly, Jet Fuel Broadcasting's November 30, 2007, Petition for Reconsideration of the *Letter Order* IS DISMISSED pursuant to Section 1.106(a)(1) of the Commission's Rules.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Bott Communications, Inc.