

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re Applications of	)	
	)	
ROMAR COMMUNICATIONS, INC.	)	File No. BNP-19971126AH
For a Construction Permit for a New AM Station	)	Facility ID No. 89232
at Lansing, New York	)	
	)	
and	)	
	)	
KM COMMUNICATIONS, INC.	)	File No. BNP-20000201AEY
For a Construction Permit for a New AM Station	)	Facility ID No. 122482
at South Hill, New York	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 19, 2004**

**Released: November 23, 2004**

By the Commission:

1. We have before us a September 12, 2002, Application for Review filed by KM Communications, Inc. ("KM"). KM and Romar Communications, Inc. ("Romar") filed mutually exclusive ("MX") applications for AM broadcast construction permits at, respectively, South Hill and Lansing, New York. For the reasons set forth below, we grant the Application for Review and direct the Media Bureau ("Bureau") to schedule KM's and Romar's applications for auction.

2. **Background.** KM and Romar filed mutually exclusive applications in the filing window for AM Broadcast Auction No. 32,<sup>1</sup> which were designated MX Group AM 8. Subsequently, pursuant to the Commission's direction in the Commission's *First Report and Order* for AM broadcast auctions, the Bureau requested the parties submit information sufficient to allow an evaluation of the respective applications under Section 307(b).<sup>2</sup> After evaluating the applicants' responsive submissions, the Bureau determined that both applicants proposed new stations that would serve the Ithaca, New York, Urbanized Area, and thus neither was entitled to a Section 307(b) preference for proposing first local service to their respective proposed communities of license.<sup>3</sup> The Bureau further held that the difference in population

<sup>1</sup> See *Public Notice*, "AM Auction Filing Window and Application Freeze," 14 FCC Rcd 19490 (MMB/WTB 1999).

<sup>2</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, 15965 (1998), *recon denied*, 14 FCC Rcd 8724, *modified*, 14 FCC Rcd 12541 (1999).

<sup>3</sup> See *Letter to KM Communications, Inc. and Romar Communications, Inc.*, Ref. No. 1800B3-JWR (MMB Aug. 7, 2001) ("2001 Staff Decision"), *set aside and reversed*, *Letter to KM Communications, Inc. and Romar Communications, Inc.*, Ref. No. 1800B3-JWR (MB Apr. 26, 2002) ("April Staff Decision"), *recon. denied*, *Letter to Jeffrey L. Timmons, Esq., and A. Wray Fitch III, Esq.*, Ref. No. 1800B3-TSN (MB Aug. 13, 2002) ("August Staff Decision"). See also *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) ("*FM Assignment Policies*"). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural

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coverage between the two proposals was not so significant as to warrant a dispositive Section 307(b) preference under Priority (4), other public interest matters.<sup>4</sup> Thus, the Bureau concluded that the two applicants should proceed to auction.

3. Subsequently, the Bureau afforded KM and Romar the opportunity to submit amended Section 307(b) information.<sup>5</sup> KM relied on its previous submission, while Romar filed a new Section 307(b) showing. Based upon this information, the Bureau set aside the 2001 Staff Decision. It found again that both applicants were not sufficiently independent of the Ithaca Urbanized Area to warrant a finding that either would provide first local service.<sup>6</sup> However, based upon Romar's amended Section 307(b) showing, which included adjusted population coverage data, the Bureau determined that Romar would serve a significantly larger population than KM, and thus was entitled to a dispositive Section 307(b) preference under Priority (4).<sup>7</sup> The Bureau denied KM's petition for reconsideration in the August Staff Decision, holding that the Bureau, in conducting a traditional Section 307(b) analysis, must evaluate proposals under Priority (4), which includes comparing the differences in populations to be served between the two proposals.<sup>8</sup>

4. **Discussion.** KM presents two arguments on review. First, it contends that since the Bureau found both Lansing and South Hill to be interdependent with the Ithaca Urbanized Area, it necessarily found that both applications proposed the same community, and thus the two mutually exclusive proposals should have gone to auction pursuant to our direction in the *Broadcast First Report and Order*. Second, KM argues that the Bureau erred in awarding a Priority (4) preference to Romar for proposing service to the greater population, rather than to KM's proposal to serve the more populous community of South Hill. We do not reach KM's second argument because, as discussed below, we agree with KM that the two mutually exclusive proposals should proceed to competitive bidding.

5. In considering applications for broadcast facilities, Section 307(b) provides that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."<sup>9</sup> Fundamentally, Section 307(b) involves an assessment of community radio service needs. As a practical matter, particularly in the context of AM broadcast auctions, "Section

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service, (3) First local 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.*, 56 RR 2d 1568 (Rev. Bd. 1984).

<sup>4</sup> 2001 Staff Decision at 3.

<sup>5</sup> See *Letter to KM Communications, Inc., Romar Communications, Inc., and Mr. Robert L. Vinikoor*, Ref. No. 1800B3-TSN (MMB Oct. 22, 2001). This letter bore OMB Control No. 3060-0996.

<sup>6</sup> April Staff Decision at 4.

<sup>7</sup> *Id.*

<sup>8</sup> August Staff Decision at 3.

<sup>9</sup> 47 U.S.C. § 307(b).

307(b) is normally invoked only when competing applicants specify separate communities, and it becomes necessary to determine which community has the greater need for a new station.”<sup>10</sup>

6. Because KM and Romar specified separate communities in their applications, the Bureau performed the required threshold determination under Section 307(b), pursuant to our established procedures for AM broadcast auction applicants.<sup>11</sup> However, staff analysis indicated that while both applicants propose first local service to the specified communities, both South Hill and Lansing are located within the Ithaca Urbanized Area.<sup>12</sup> We do not blindly award a first local service preference to proposed communities located in well-served urbanized areas, or where granting the preference would lead to an anomalous result.<sup>13</sup> Before awarding a first local service preference, then, as part of its Section 307(b) analysis the staff must evaluate the proposed community’s relationship to the urbanized area, in accordance with the standards set forth in *Tuck*.<sup>14</sup>

7. In *Tuck*, the Commission set forth a framework for applying the *Huntington* doctrine.<sup>15</sup> That doctrine is a limited exception to the usual Section 307(b) presumption that every community needs at least one local transmission service. The Commission in *Tuck* summarized the doctrine as follows:

In those exceptional cases . . . where competing applications are filed for separate communities that are dependent upon, and contiguous to, a central city, and the applicants propose sufficient power to serve the entire metropolitan area, we treat that entire metropolitan area as one community for section 307(b) purposes. (citations omitted) Under these circumstances, we presume that the need for local self-expression in an ostensibly separate community will be adequately met by a broadcast facility licensed to serve any one of the competing communities. (citation omitted) Accordingly, we award none of the competing communities dispositive section 307(b) preference, and we base

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<sup>10</sup> *Seattle Public Schools*, 4 FCC Rcd 625, 643 (Rev. Bd. 1989). See also *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362 & n.4, 75 S.Ct. 855, 858 & n.4, 99 L.Ed. 1147 (1955) (under Section 307(b), when mutually exclusive applicants seek to serve different communities, the Commission first determines which community has the greater need for additional services, and then determines which applicant can best serve that community’s need); *Faye and Richard Tuck*, 3 FCC Rcd 5374, 5376 (1988) (“*Tuck*”). Cf. *Salter Broadcasting Co.*, 8 F.C.C.2d 1042, 1045 (Rev. Bd. 1967) (in case between eight applicants for AM stations at St. Louis, Missouri, although “the Commission does not ordinarily designate a specific Section 307(b) issue in proceedings involving mutually exclusive applicants for the same community,” given specific facts of case, Section 307(b) issue can be broadened to encompass comparison between applicants for St. Louis).

<sup>11</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15964-65.

<sup>12</sup> 2001 Staff Decision at 2.

<sup>13</sup> See, e.g., *RKO General, Inc.*, 5 FCC Rcd 3222, 3223 (1990) (Review Board’s award of dispositive Section 307(b) preference in comparative renewal proceeding of San Francisco station KFRC(AM), to applicants proposing to categorize station as first local service at Richmond, California, reversed because it would lead to “anomalous result” as it did not “deal realistically with the relationship between Richmond and the metropolitan area and the coverage proposed by the applicants [identical to that of existing KFRC] might appear to condone an artificial and unwarranted manipulation of the Commission’s policies.”).

<sup>14</sup> See *supra* note 10.

<sup>15</sup> *Huntington Broadcasting Co. v. F.C.C.*, 192 F.2d 33 (D.C. Cir. 1951).

our selection among the mutually exclusive applicants on the standard comparative criteria rather than section 307(b) considerations.<sup>16</sup>

After applying the *Tuck* analysis, the Bureau found that both KM and Romar's proposals would provide principal community service to the entire Ithaca Urbanized Area.<sup>17</sup> The Bureau also found, correctly, that both South Hill and Lansing were interdependent with the Ithaca Urbanized Area.<sup>18</sup> Because we agree with the Bureau that neither South Hill nor Lansing is sufficiently independent to warrant a first local service preference under Section 307(b), under *Tuck* it follows that presumptively the service needs of Ithaca will be met by a facility licensed to either of the competing communities. We must therefore treat the Ithaca Urbanized Area as one community for Section 307(b) purposes. Thus, having awarded neither Lansing nor South Hill a dispositive Section 307(b) preference, under *Tuck* selection then proceeds to the next phase of the process. Unlike in *Tuck*, however, selections are now made through competitive bidding rather than by applying standard comparative criteria.

8. We are faced, then, with the unprecedented situation, at least in the AM broadcast auction context, in which the Section 307(b) analysis revealed that two applicants have, in effect, applied for AM construction permits serving the same community. Had KM and Romar, in their original auction filing window applications, both specified Ithaca as the community of license, the Bureau would have foregone a Section 307(b) analysis and the two mutually exclusive applicants would have proceeded directly to auction.<sup>19</sup> In fact, in another Auction No. 32 MX group, two applicants each specified Taos, New Mexico as their community of license; the Bureau designated these applications to proceed directly to auction without a Section 307(b) analysis.<sup>20</sup> Because the applicants in MX Group AM 8 specified separate communities, however, the Bureau undertook the Section 307(b) analysis, only to determine that both applicants effectively applied for new AM broadcast stations serving the Ithaca Urbanized Area.

9. In the *Broadcast First Report and Order*, we stated that once the staff has undertaken the threshold Section 307(b) analysis, "if no Section 307(b) determination is dispositive (or if more than one application remains for the community with the greater need), the applicants must then be included in a subsequently scheduled auction."<sup>21</sup> In this case of first impression, the Section 307(b) determination is non-dispositive insofar as it resulted in two applications for the Ithaca Urbanized Area. In such a case, where the staff concludes that all mutually exclusive applications serve the same urbanized area, the staff should not continue the Section 307(b) analysis by proceeding to a Priority (4) evaluation.<sup>22</sup> This

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<sup>16</sup> 3 FCC Rcd at 5376. See also *North Texas Radio, Inc.*, 11 FCC Rcd 8531, 8535 (1996) (selection among competing applicants proposing communities that are dependent upon, and contiguous to, a central city, should not be based on a Section 307(b) preference "because all applicants are likely proposing to serve the metropolitan area" – selection based instead on the standard comparative criteria).

<sup>17</sup> 2001 Staff Decision at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* See also *supra* note 10.

<sup>20</sup> See *Public Notice*, "AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction," 15 FCC Rcd 20449, 20453, 20455 (MMB 2000) ("*Mutually Exclusive Public Notice*") (MX Group AM 30 consisted of mutually exclusive AM applications ineligible for settlement and for which no Section 307(b) showing was required).

<sup>21</sup> 13 FCC Rcd at 15965.

<sup>22</sup> Generally, there are three ways in which mutually exclusive applicants for a new AM broadcast station proceed to auction. The first is where applications proposing two separate communities undergo a Section 307(b) analysis, and

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approach is consonant with that enunciated in *Tuck*, as well as with the statutory directive to grant construction permits pursuant to our competitive bidding procedures.<sup>23</sup>

10. **Conclusion.** For the foregoing reasons, KM's Application for Review IS GRANTED IN PART. The Media Bureau IS HEREBY ORDERED to set the above-captioned mutually exclusive applications of KM and Romar for auction, the date of which will be announced by subsequent Public Notice.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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no dispositive differences emerge between the communities or proposals. The second is where the applicants propose different communities and multiple applicants propose the community found to have the greater need. In this situation, the applicants proposing the community with greater need will proceed to auction, and the remaining applicants will be dismissed. *See, e.g., Public Notice*, "Auction of Construction Permits for New AM Broadcast Stations – 5 Qualified Bidders," DA 02-3214 (MB/WTB Nov. 22, 2002) (in MX Group AM 20, three Las Vegas, Nevada area AM applicants sent to auction, while mutually exclusive applicant for new AM station at Boise, Idaho was not). The last situation is the one presented in this case: the only mutually exclusive applicants in a group effectively propose the same community of license. *See, e.g., Mutually Exclusive Public Notice, supra* note 20.

<sup>23</sup> 47 U.S.C. § 309(j)(1) (when mutually exclusive applications are accepted for initial licenses or construction permits, Commission shall grant license or construction permit to qualified applicant through competitive bidding, except for limited exceptions set forth in Section 309(j)(2)). *See also Broadcast First Report and Order*, 13 FCC Rcd at 15924 (under the Balanced Budget Act of 1997, "we find that, except for certain pending applications that are subject to Section 309(l), our auction authority is mandatory, rather than permissive, for all full power commercial radio and analog television stations.").