

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
SHARON BERLIN INGLES) File No. BNP-20000128ACS
For a New AM Broadcast Station) Facility ID No. 122557
at Bixby, Oklahoma)
and)
POWELL MEREDITH COMMUNICATIONS) File No. BNP-20000201AFN
COMPANY) Facility ID No. 122511
For a New AM Broadcast Station)
at Abilene, Texas)
and)
TELNS BROADCASTING COMPANY, INC.) File No. BMJP-20000201AEH
For a Major Modification to Station KGYN(AM),) Facility ID No. 65152
Guymon, Oklahoma)

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 2008

Released: May 22, 2008

By the Commission: Commissioner Copps concurring and issuing a statement.

I. INTRODUCTION

1. We have before us an Application for Review filed on January 12, 2005, by Sharon Berlin Ingles ("Ingles").1 Ingles seeks review of the decision of the Media Bureau ("Bureau") dated December 16, 2004 (the "Staff Decision"),2 in which the Bureau found that none of the three above-captioned applicants in Mutually Exclusive ("MX") Group 27 of AM Broadcast Auction 32 merited a dispositive preference under Section 307(b) of the Communications Act of 1934, as amended (the "Act").3 This conclusion reversed the Bureau's earlier determination awarding a dispositive Section

1 We also have before us the January 27, 2005, Opposition to Application for Review of TELNS Broadcasting Company, Inc. ("TELNS") (the "Opposition"), and Ingles' February 3, 2005, Reply to Opposition to Application for Review.

2 19 FCC Rcd 24093 (MB 2004).

3 47 U.S.C. § 307(b) ("Section 307(b)").

307(b) preference to TELNS's application to make certain technical modifications to Station KGYN(AM), and to change that station's community of license from Guymon to Oklahoma City, Oklahoma. Accordingly, the Bureau directed that the Ingles and TELNS applications, along with the mutually exclusive application of Powell Meredith Communications Company ("PMCC") for a new AM broadcast station at Abilene, Texas, proceed to competitive bidding.⁴ For the reasons set forth below, we deny the Application for Review.

II. BACKGROUND

2. In its First Report and Order implementing the Congressional mandate to award broadcast construction permits through competitive bidding,⁵ the Commission determined that the competitive bidding procedure should be consistent with its statutory mandate under Section 307(b) of the Communications Act of 1934, as amended, to provide a "fair, efficient, and equitable" distribution of radio services across the nation.⁶ To that end, the Commission determined that the staff would undertake a traditional Section 307(b) analysis prior to conducting an auction for mutually exclusive applications.⁷ 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.⁸

3. Ingles, TELNS, and PMCC filed mutually exclusive applications to participate in Broadcast Auction No. 32 for new AM broadcast stations or major modifications to AM broadcast stations.⁹ Ingles proposed a new AM station at Bixby, Oklahoma.¹⁰ PMCC proposed a new AM station at Abilene, Texas.¹¹ As noted above, TELNS proposed to change the community of license of Station KGYN(AM) from Guymon to Oklahoma City, Oklahoma, relocate and modify its transmission facilities, and increase its daytime power to 50 kilowatts.¹² The three applications were designated MX Group AM

⁴ PMCC's application was subsequently dismissed at the applicant's request on April 26, 2005.

⁵ *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, 15965 (1998) ("*Broadcast First Report and Order*"), *recon denied*, 14 FCC Rcd 8724, *modified*, 14 FCC Rcd 12541 (1999).

⁶ 47 U.S.C. § 307(b).

⁷ 13 FCC Rcd at 15964-65.

⁸ *See Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC2d 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.*, Decision, 99 FCC2d 1 (Rev. Bd. 1984). Moreover, the Bureau specifically stated that the *FM Assignment Policies* would be applied in AM Auction No. 32. *AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 15 FCC Rcd 20449, 20451 (MMB/WTB) ("*Mutually Exclusive Public Notice*"), as extended by *AM Auction No. 32 Mutually Exclusive Applicants – Settlement Period and Section 307(b) Filing Period Extended to February 28, 2001*, Public Notice, 15 FCC Rcd 24644 (MMB/WTB 2000). *See also, e.g., Powell Meredith Communications Company, Victor A. Michael, and Alvin Lou Media, Inc.*, Memorandum Order and Opinion, 19 FCC Rcd 12672, 12673 (2004).

⁹ *See AM Auction Filing Window and Application Freeze*, Public Notice, 14 FCC Rcd 19490 (MMB/WTB 1999).

¹⁰ File No. BNP-20000128ACS.

¹¹ File No. BNP-20000201AFN.

¹² File No. BMJP-20000201AEH.

27. Initially, the Bureau awarded TELNS a dispositive preference under Section 307(b) of the Act, finding that its proposal to move KGYN(AM) to Oklahoma City would provide new reception service to a substantially larger population than would Ingles's Bixby proposal, thus meriting a preference under Priority (4) of the Commission's allotment priorities.¹³ The Bureau upheld its decision on reconsideration, despite Ingles' and PMCC's contention that, in evaluating the population to be served under the TELNS proposal, the Bureau should have deducted the population served by daytime-only Station KTLV(AM), Midwest City, Oklahoma, which would surrender its license to accommodate TELNS's proposal. The Bureau held that the removal of KTLV(AM) was part of an interference reduction arrangement, which was more properly evaluated in the context of TELNS's subsequently-filed complete Form 301 application, rather than its auction filing window Form 175 application.¹⁴

4. TELNS subsequently filed its complete Form 301 application and, in petitions to deny that application, Ingles and PMCC each renewed their challenges to the dispositive Section 307(b) finding for TELNS, based on the service population net of the lost KTLV(AM) daytime service population.¹⁵ In the Staff Decision, the Bureau agreed, granting the petitions to deny in part, and noting that, in future cases, applicants are expected to disclose in their Section 307(b) showings "the existence of any agreements that would have an impact on the areas and populations gaining or losing service."¹⁶ In re-evaluating TELNS's Section 307(b) preference, the Bureau determined that, while TELNS's proposal would provide new nighttime interference-free service to significantly more people than Ingles' proposal, Ingles would provide new daytime service to more people than TELNS when the KTLV(AM) service losses are included in the analysis. Because the Bureau could not conclude that any of the communities merited a dispositive Section 307(b) preference, it returned TELNS's Form 301 application as having been inadvertently accepted for filing, and directed that the three applications in MX Group AM 27 proceed to competitive bidding.¹⁷

III. DISCUSSION

5. In her Application for Review, Ingles raises three issues. First, she contends that the Bureau did not perform a proper Section 307(b) analysis because it did not consider all of the information that she included in her Section 307(b) submissions.¹⁸ Second, she argues that the TELNS application "was not acceptable for filing and should have been dismissed from consideration in this proceeding."¹⁹ Finally, Ingles restates her demand that we investigate her contention that Clear Channel Communications ("Clear Channel") is the real party in interest behind Station KGYN(AM) and TELNS's Auction No. 32 application regarding that station.²⁰

¹³ *Letter to Sharon Berlin Ingles, Powell Meredith Communications Company, and TELNS Broadcasting Company, Inc.*, Decision, Ref. No. 1800B3-TSN, at 3 (MMB Mar. 27, 2002). See *FM Assignment Policies*, 90 FCC2d at 91.

¹⁴ *Letter to Sharon Berlin Ingles, Powell Meredith Communications Company, and TELNS Broadcasting Company, Inc.*, Decision on Reconsideration, Ref. No. 1800B3-TSN, at 2-3 (MB Aug. 9, 2002).

¹⁵ Ingles filed a Petition to Deny on January 17, 2003. PMCC filed a Petition to Deny on January 21, 2003.

¹⁶ 19 FCC Rcd at 24096.

¹⁷ *Id.* at 24099.

¹⁸ Application for Review at 6-16.

¹⁹ *Id.* at 17.

²⁰ *Id.* at 18-20.

6. Ingles's contention that the Bureau failed to perform a complete Section 307(b) analysis stems from a single parenthetical phrase in the Staff Decision. In context, the Bureau stated as follows:

Oklahoma City, Bixby (*a community adjacent to Tulsa*), and Abilene are already provided abundant reception service. 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.²¹

Ingles concludes, from the five italicized words in the above-quoted passage, that the Bureau inferred that "the community of Bixby is nothing more than a bedroom community of Tulsa."²² She then devotes 11 pages of her 20-page Application for Review to explain the civic, cultural, religious, social, and commercial attributes of Bixby.²³ Ingles argues that the Bureau's failure to consider these civic attributes was prejudicial to Bixby and to her application to serve that community.

7. We find, however, that Ingles has misinterpreted the Bureau's Staff Decision finding in this regard. The parenthetical phrase to which Ingles points merely stated a fact: Bixby is adjacent to the larger community of Tulsa, and because of this proximity, its residents receive radio service from more than five stations. It does not follow that the Bureau questioned Bixby's status as a community for allotment purposes. Indeed, because Bixby already has an FM station licensed to it, the Commission has already determined that it is a licensable community.²⁴

8. Ingles' contention that the Bureau did not consider fully her Section 307(b) showing is also without merit. The Commission directed the Bureau in broadcast auction cases to perform a "traditional Section 307(b) analysis."²⁵ The Bureau's request for Section 307(b) information²⁶ offered the applicants maximum flexibility to advance their applications based upon each applicant's individual circumstances. In this case, the Bureau ultimately found that TELNS's proposal would provide superior

²¹ 19 FCC Rcd at 24097 (emphasis added).

²² Application for Review at 7.

²³ *Id.* at 5-16.

²⁴ Station KJMM(FM) was first licensed at Bixby in 1995 (File No. BLH-19950112KA). See *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, First Report and Order, 100 FCC2d 1332 (1985) (allotting Channel 287A at Bixby).

²⁵ *Broadcast First Report and Order*, 13 FCC Rcd at 15965.

²⁶ In both the *Mutually Exclusive Public Notice* and the *Letter to Sharon Berlin Ingles, Powell Meredith Communications Company, and TELNS Broadcasting Company, Inc.*, Letter, Ref. No. 1800B3-TSN (MMB Oct. 22, 2001) ("October Section 307(b) Request"), the Bureau requested the following information from all applicants: "(1) the area and population within the proposed 2 mV/m and 0.5 mV/m contours; (2) the number of stations licensed to the proposed community of license; (3) the number of stations providing protected service to the proposed community of license; (4) the population (according to the latest Census data) of the proposed community of license; (5) a description of the civic, cultural, religious, social and commercial attributes of the proposed community of license; and (6) any other information deemed relevant." *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451; October Section 307(b) Request at 2. This list, however, was not meant to be exhaustive, but rather illustrative of information considered relevant in various Section 307(b) analyses. Moreover, the relative importance of these factors will vary depending upon the proposal.

nighttime service, while Ingles proposed daytime service to a greater population, and thus that no dispositive difference emerged between the parties. There was no dispute that any of the three communities in MX Group AM 27 was a licensable community deserving of local transmission service. However, while the implementation of the Commission's competitive bidding authority under Section 309(j) of the Act accommodates the agency's statutory duty under that Section to effect an equitable geographic distribution of stations,²⁷ it does not mandate a dispositive Section 307(b) finding in all MX groups. Often, no community merits a dispositive preference after a Section 307(b) analysis, and in such cases, the staff must resolve the application conflict through the auction authority granted by Congress. Thus, given the facts of this case, we cannot find that the Bureau erred in concluding that Bixby was not entitled to a dispositive preference based on its civic, cultural, religious, social, and commercial attributes.

9. Ingles next reiterates her argument that the Bureau should not even have performed a Section 307(b) analysis of TELNS's application because it was not acceptable for filing due to alleged violations of Sections 73.24(i) and 73.182 of the Commission's Rules.²⁸ We disagree. In establishing competitive bidding procedures for the broadcast service, the Commission made clear that the staff is not to perform an analysis of the acceptability or grantability of applicants' auction filing window applications. That analysis occurs at the close of the auction, and is limited to the winning bidder.²⁹ The Commission discussed at length, and rejected, an argument virtually identical to Ingles's in *Powell Meredith Communications Company, Victor A. Michael, and Alvin Lou Media, Inc.*³⁰ We see no need to revisit the issue here. We do, however, affirm the Bureau's determination that AM broadcast applicants must disclose, in their Section 307(b) showings, the existence of any agreements that would have an impact on the areas and populations gaining or losing service, including but not limited to interference reduction arrangements or other agreements that would require existing facilities to modify and decrease service or surrender their licenses. The Section 307(b) showings must also include the areas and populations losing service due to the surrender of licenses or modification of facilities pursuant to such agreements.

10. Finally, Ingles restates her contention that Clear Channel is the real party in interest behind KGYN(AM) and TELNS's application, and that this relationship warrants Commission "scrutiny."³¹ As in her Petition to Deny, Ingles cites four bases for her allegation: (1) Clear Channel brokers the time of KGYN(AM); (2) Clear Channel controls the KGYN(AM) Web site; (3) Clear Channel and TELNS entered into an Asset Purchase Agreement and other agreements in April 2002, contemplating the possible purchase of KGYN(AM) by Clear Channel; and (4) in December 2000, a principal of Clear Channel attempted to negotiate a settlement here in exchange for Ingles' dismissing her

²⁷ 47 U.S.C. § 309(j)(6)(B). In this regard, the Commission determined that the Section 307(b) analysis is a threshold analysis, to be undertaken by the staff prior to conducting auctions of competing applications. *Broadcast First Report and Order*, 13 FCC Rcd at 15965.

²⁸ 47 C.F.R. §§ 73.24(i), 73.182. See Application for Review at 17-18.

²⁹ *Broadcast First Report and Order*, 13 FCC Rcd at 15979.

³⁰ 19 FCC Rcd 12672, 12674-75 (2004) (in establishing broadcast auction procedures, Commission decided to limit pre-auction application review to a determination of mutual exclusivity and not grantability or acceptability of technical proposals; while such an approach might result in applicants with unacceptable proposals participating in auctions, deferring such review until after auctions would minimize potential for delay and promote the deployment of new broadcasting service to the public as expeditiously as possible, in keeping with the statutory objective underlying our competitive bidding authority).

³¹ Application for Review at 19.

subject Bixby application. In response, TELNS reiterates its earlier contention that the facts alleged by Ingles do not establish that Clear Channel is a real party in interest, *i.e.*, has assumed the right to determine KGYN(AM)'s basic policies over programming, personnel, and finances.³²

11. We agree with TELNS and the Bureau that the facts which Ingles has presented are not sufficient to raise a substantial and material question of whether Clear Channel has assumed control over KGYN(AM)'s basic policies over programming, personnel, and finances. The record shows that Clear Channel has held an option to purchase KGYN(AM) since 2000, and has brokered time on that station. Neither fact, however, compels the conclusion that TELNS has relinquished control of the station to Clear Channel.³³ Likewise, that Clear Channel copyrighted the material on KGYN(AM)'s website relating to Clear Channel's brokered programming does not evidence an assumption of control by Clear Channel.³⁴ We further agree with the Bureau that Clear Channel's assisting TELNS's principals in attempting to negotiate a settlement, given Clear Channel's disclosed possible future interest in KGYN(AM), fails to raise a substantial and material question that Clear Channel ultimately controlled the station's basic policies over programming, personnel, or finances.

IV. ORDERING CLAUSE

12. For the foregoing reasons, the Application for Review filed by Sharon Berlin Ingles IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³² Opposition at 6-8. *See also* Staff Decision, 19 FCC Rcd at 24098. In determining whether there has been an unauthorized transfer of control, we employ a tripartite, fact-based test for control within the meaning of 47 U.S.C. § 310(d). *See WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8142-46 (1995), *vacated on other grounds sub nom, Serafyn v. F.C.C.*, 149 F.3d 1213 (D.C. Cir. 1998); *Choctaw Broadcasting Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8538-39 (1997).

³³ *See, e.g., American Music Radio*, Memorandum Opinion and Order, 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."); *Solar Broadcasting Company, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 5467, 5488-89 (2002). *See also Manahawkin Communications Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 342, 348-49 (2001), and cases cited therein ("Standing alone, an unexercised option does not represent a relinquishment of control.").

³⁴ The Commission found that Web site statements, in light of a joint sales agreement between Clear Channel and the station owner, were insufficient to raise a substantial and material question of abdication of station control, in the (perhaps unfortunately named) case of *Secret Communications II, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 9139, 9148-49 (2003). *See also Hispanic Broadcasting Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 18834, 18848 n.74 (2003).

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

*In re Applications of Intermart Broadcasting Pocatello, Inc. and Intermart Broadcasting Twin Falls, Inc.,
File Nos. BPH-19970724M1 and BPH-19970731MX; and In re applications of Sharon Berlin Ingles,
Powell Meredith Communications Company and TELNS Broadcasting Company, Inc., File Nos. BNP-
20000128ACS, BNP-20000201AFN, and BMJP-20000201AEH*

I write separately to note my ongoing concern—which I first raised in 2001 in connection with the *Sinclair-Glencairn* matter—about the Commission’s approach to the type of “real party in interest” allegations raised in these cases. The question is whether a person other than the applicant will be in a position to *actually or potentially* control the operation of the applicant’s station. In making that determination, the Commission historically has examined whether the applicant has retained control over the station’s basic policies regarding programming, personnel, and finances.

It is not so much the standard itself but the *application* of the standard that gives me pause. These cases seem to have an air of unreality about them. They involve a wide range of potentially significant relationships—from the funding of auction bids to Local Marketing Agreements to Asset Purchase Agreements. Yet short of a written statement from the applicant stating “I hereby surrender control over my station’s programming, personnel and finances,” one gets the feeling that almost no combination of factors would cause this Commission to bat an eye.

It was not always so. In the past, the Commission has attached significance to the types of relationships at issue here. While I concur in the results based on the specific and limited facts before us, parties should be on notice that similar relationships could lead to a different result in the future. These cases are fact-specific and I, for one, will continue to approach them in that manner.