

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

In the Matter of)	
)	
JEFFREY B. BATE)	File No. BNP-20000128ACK
)	Facility ID No. 122537
For a New AM Broadcast Station)	
at St. George, Utah)	
)	
and)	
)	
ANDREW JOHNSON)	File No. BNP-20000201ADP
)	Facility ID No. 122413
For a New AM Broadcast Station)	
at Winchester, Nevada)	

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 2008

Released: May 22, 2009

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

I. INTRODUCTION

1. We have before us the August 1, 2002, Application for Review of Jeffrey B. Bate (“Bate”) of the July 3, 2002, decision on reconsideration of the Media Bureau (the “Bureau”) awarding a dispositive preference to the competing proposal of Andrew Johnson (“Johnson”) for a new AM station at Winchester, Nevada.¹ Johnson filed an August 16, 2002, Opposition to Application for Review, with Bate filing a Reply September 4, 2002.² For the reasons discussed below, we deny the Application for Review.

¹ *Letter to Jeffrey B. Bate and Andrew Johnson*, Ref. No. 1800B3-TSN (MB July 3, 2002) (“Reconsideration Decision”).

² Bate also filed a December 23, 2002, Supplement to Application for Review (“December Supplement”) and a May 28, 2003, Supplement to Application for Review (“May Supplement”). Both call attention to other pending applications for new AM transmission services in the Las Vegas Urbanized Area. Of the six listed AM facilities, however, only one, KBET(AM), Winchester, Nevada, had been issued a construction permit as of the date of the May Supplement (the KXXX(AM) construction permit was issued September 15, 2003). We need not consider the other listed proposals for Section 307(b) purposes, as they have not received permits. *Santee Cooper Broadcasting Co.*, 99 F. C. C. 2d 781, 784-85 (Rev. Bd. 1984), *recon. denied*, 100 F. C. C. 2d 469 (Rev. Bd. 1985), *modified on other grounds sub nom. Women’s Broadcasting Coalition, Inc.*, 59 R. R. 2d 730 (1986), *aff’d*, 812 F.2d 1443 (D.C. Cir. 1987) (per curiam). Additionally, KBET(AM) which, according to Bate, accommodates Winchester’s “need” for AM transmission service (*see* May Supplement at 2), is permitted to Diamond Broadcasting, a company 100 percent owned by Bate. Moreover, Bate neglects to point out a noncommercial educational (“NCE”) construction permit at St. George, Utah, granted to Casper Learning FM, Inc. on November 8, 2002. In the May Supplement Bate also fails to note that Educational Media Foundation was granted a construction permit for an NCE station at

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II. BACKGROUND

2. Bate and Johnson filed mutually exclusive (“MX”) applications for new AM broadcast stations during the January-February 2000 filing window for AM Broadcast Auction No. 32 (“Auction 32”).³ Bate proposed a new AM station on 1490 kHz at St. George, Utah,⁴ while Johnson proposed a new AM station on 1500 kHz at Winchester, Nevada.⁵ The two applications were designated MX Group AM 33. In accord with the Commission’s *First Report and Order* implementing broadcast auctions,⁶ the Bureau requested amendments to the parties’ applications, providing supplemental information relating to the “fair, efficient, and equitable distribution of radio service” under Section 307(b) of the Communications Act of 1934, as amended (the “Act”).⁷ After both Bate and Johnson filed Section 307(b) amendments, the Bureau made the required threshold determination under Section 307(b).⁸ Neither Bate nor Johnson proposes either a first or second aural service. Although Johnson claimed to provide first local transmission service at Winchester, Bate challenged that claim, and the Bureau agreed with Bate that Winchester was not sufficiently independent of the Las Vegas Urbanized Area to warrant a first local service preference under Section 307(b).⁹ Thus, neither Bate nor Johnson proposes first local transmission service at his respective community. Therefore, the staff analyzed the applications under Priority (4) of the *FM Assignment Policies*, other public interest matters, finding that Winchester was

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St. George on March 25, 2003. NCE facilities are counted for Section 307(b) purposes. *See, e.g., Valley Broadcasters, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 2785, 2788 (1990) (“*Valley Broadcasters*”); *Faribault, Blooming Prairie, Northfield and New Prague, Minnesota*, Memorandum Opinion and Order, 7 FCC Rcd 3937, 3939 (MMB 1992) (“*Faribault*”). Therefore, St. George has two transmission services not noted by Bate. Additionally, station KUNF(AM) is licensed at Washington, Utah, in the St. George Urbanized Area.

³ *See* “AM Auction Filing Window and Application Freeze,” Public Notice, 14 FCC Rcd 19490 (MMB/WTB 1999).

⁴ File No. BNP-20000128ACK.

⁵ File No. BNP-20000201ADP.

⁶ *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. granted in part and denied in part*, 14 FCC Rcd 8724, *modified*, 14 FCC Rcd 12541 (1999).

⁷ 47 U.S.C. § 307(b) (“Section 307(b”). *See* “AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction,” Public Notice, 15 FCC Rcd 20449 (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 Broadcast First Report and Order*, 13 FCC Rcd at 15964-65 (mandating threshold Section 307(b) analysis of mutually exclusive AM auction applications).

⁸ The Bureau applied the priorities set forth in *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. 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 applications in *Alessandro Broadcasting Co.*, 99 F. C. C. 2d 1 (Rev. Bd. 1984). The Bureau specifically stated that the priorities set forth in *FM Assignment Policies* would be applied in Auction 32. “AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction,” Public Notice, 15 FCC Rcd 20449, 20451 (MMB/WTB 2000).

⁹ *See Letter to Mr. Jeffrey B. Bate and Mr. Andrew Johnson*, Ref. No. 1800B3-TSN (MMB May 8, 2001) (“*2001 Section 307(b) Decision*”).

entitled to a dispositive Section 307(b) preference based on the greater population to be served under Johnson's proposal.¹⁰

3. By letter dated October 22, 2001, the Bureau sent each applicant a second request for Section 307(b) amendments to the parties' applications.¹¹ In the October Section 307(b) Request, the Bureau offered both applicants in MX Group AM 33 the opportunity to submit either a new Section 307(b) amendment or, at their option, a letter stating their desire to rely on a previously filed amendment.¹² Bate submitted a new Section 307(b) showing, while Johnson chose to rely on his prior showing. The Bureau re-evaluated the proposals, and concluded that Winchester was still entitled to a dispositive Section 307(b) preference.¹³ The Bureau denied reconsideration in the Reconsideration Decision.¹⁴

III. DISCUSSION

4. In his Application for Review, Bate contends that the staff action was not in accord with Commission precedent in that it did not focus on the respective needs of St. George and Winchester for additional service. Specifically, Bate argues that we must consider the totality of various factors and not just the population that will receive new service. In this regard, Bate states that St. George has a larger population than Winchester (49,663 compared to 26,958 persons according to the 2000 U.S. Census) and a faster growth rate based on a comparison of the 1990 and 2000 U.S. Censuses. Bate also claims that St. George receives "current protected service from only 14 existing aural services," whereas Winchester, according to Bate, receives "protected aural service currently from 33 existing stations."¹⁵ After contending that Winchester is "a mere appendage" of Las Vegas, Bate concludes that St. George is larger and more developed than Winchester, and thus has a greater need for an additional aural broadcast service.

5. We deny the Application for Review. We uphold the Bureau's finding that the Johnson application is entitled to a dispositive Section 307(b) preference because the Johnson proposal will serve a substantially larger number of persons. Specifically, Johnson proposes to serve 1,340,944 persons within his 0.5 mV/m contour and 1,327,925 persons within his 2 mV/m contour, while the Bate proposal would yield 0.5 mV/m service to 99,701 persons and 2 mV/m service to 83,461 persons.

6. The Bureau correctly considered the respective needs of St. George and the Las Vegas Urbanized Area for additional service. Both communities receive abundant service.¹⁶ Because of this,

¹⁰ *Id.*

¹¹ *Letter to Mr. Andrew Johnson and Mr. Jeffrey B. Bate*, Ref. No. 1800B3-TSN (MMB Oct. 22, 2001) ("October Section 307(b) Request"). The October Section 307(b) Request bore OMB Control No. 3060-0996.

¹² October Section 307(b) Request at 2-3.

¹³ *See Letter to Mr. Andrew Johnson and Mr. Jeffrey B. Bate*, Ref. No. 1800B3-TSN (MMB Mar. 8, 2002) ("2002 Section 307(b) Decision"). Johnson had previously filed a complete Form 301 application on June 6, 2001, File No. BNP-20010606AAP.

¹⁴ *See supra* note 1.

¹⁵ Application for Review at 8.

¹⁶ We consider five or more primary aural services to be "abundant." *Family Broadcasting Group*, Decision, 53 R. R. 2d 662, 667 (Rev. Bd. 1983), *review denied*, FCC 83-559 (Dec. 1, 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*, Memorandum Opinion and Order, 10 FCC Rcd 3337, 3337 (1995).

Bate's contention regarding the putative difference in the number of reception services does not override the significant difference in the number of persons who will receive new service.¹⁷ Bate cites no authority wherein a dispositive Section 307(b) preference was awarded based solely on a disparity in the number of primary aural services received between already abundantly served communities. Bate does cite *Faribault*,¹⁸ a Bureau-level decision in which a more populous community with fewer local transmission services, receiving fewer full-time reception services (10), received a Priority (4) preference over a less-populous community with one more local transmission service, and more full-time reception services (14). However, Bate's reliance on *Faribault* proceeds from the faulty premise that St. George is to be compared with the less-populous Winchester. As previously stated, Bate had successfully argued that Winchester was interdependent with the Las Vegas Urbanized Area and, therefore, the staff determined that Johnson's proposal did not merit a Priority (3) preference for providing first local transmission service. Thus, the staff agreed with Bate¹⁹ that, for the purpose of applying Priority (3) to the Winchester proposal, we should consider all stations licensed in the Las Vegas Urbanized Area. We reject, however, Bate's inconsistent argument that the Commission should consider only *Winchester's* population when examining the difference between St. George and Winchester under Priority (4). Rather, the appropriate comparison is between the St. George Urbanized Area²⁰ and the Las Vegas Urbanized Area, which had a 2000 population of 1,314,357, over 20 times that of the St. George Urbanized Area. Because the proper comparison is between St. George and Las Vegas, and because the Las Vegas Urbanized Area is far more populous than the St. George Urbanized Area, the *Faribault* case is distinguishable on its facts.

7. Notwithstanding this sizeable population difference, Bate contends that St. George is relatively underserved because Winchester receives aural reception service from two to three times the number of stations that St. George receives, and Las Vegas has four times as many local transmission services.²¹ Again, however, we fail to see how an Urbanized Area with five percent of the population of the Las Vegas Urbanized Area is "underserved" when it has one-third the reception services and one-fourth the local transmission services of the larger Urbanized Area. Additionally, while Bate points out that St. George's population grew at five times the rate of Winchester's,²² as discussed above the comparison to Winchester rather than the Las Vegas Urbanized Area is inappropriate. The Las Vegas Urbanized Area grew from its 1990 Census population of 697,348 to 1,314,357 in 2000, an 88 percent increase, compared to a 74 percent increase in the population of St. George.²³

¹⁷ See, e.g., *Greenup, Kentucky and Athens, Ohio*, Report and Order, 6 FCC Rcd 1493, 1495 (1991) ("*Greenup*") (population advantage presumptively best serves public interest).

¹⁸ See *supra* note 2.

¹⁹ Application for Review at 3.

²⁰ The St. George Urbanized Area was designated for the first time in the 2000 Decennial U.S. Census, with a population of 62,630. See <http://www.census.gov/geo/www/ua/ua2k.txt> (accessed February 24, 2006).

²¹ Bureau analysis shows eight broadcast stations licensed or permitted in the St. George, Utah Urbanized Area (St. George and Washington, Utah), with 32 broadcast stations licensed or permitted to communities in the Las Vegas Urbanized Area.

²² Application for Review at 10. The town of St. George's population rose from 28,502 in 1990 to a 2000 population of 49,663, a 74 percent increase. As pointed out in note 20, *supra*, it is not possible to calculate the population increase in the St. George Urbanized Area, which did not exist in 1990.

²³ See *supra* note 22.

8. Further, the Commission directed the Bureau in broadcast auction cases to perform a “traditional Section 307(b) analysis,”²⁴ which includes Priority (4).²⁵ The Commission has concluded that it is appropriate in certain cases to accord significant weight to simple net differences in the number of persons newly served by each proposal when comparing proposals under Priority (4).²⁶ Moreover, Bate concedes that “the Commission has long recognized the need for a flexible approach to allotment proceedings where circumstances warrant.”²⁷ The Bureau’s request for Section 307(b) information²⁸ offered applicants maximum flexibility to advance their applications based upon each applicant’s individual circumstances. In this case the Bureau did, in fact, consider the other information submitted in the parties’ amendments as part of its Priority (3) analysis.²⁹ The Bureau concluded that neither applicant should receive a dispositive Priority (3) preference. In its Priority (4) analysis, the Bureau determined that the disparity in population to be served was so significant (at least a thirteen-fold difference in daytime service) as to warrant a dispositive preference for the Johnson proposal. Given these facts, we find no error in the Bureau’s determination that Winchester should receive a dispositive Section 307(b) preference.

IV. CONCLUSION

9. For the foregoing reasons, Bate’s Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁴ *Broadcast First Report and Order*, 13 FCC Rcd at 15965.

²⁵ Although Bate concedes that this case does not involve a comparison under Priority (3), first local transmission service, he nonetheless begins his analysis by pointing out that St. George has a larger population than Winchester. Application for Review at 5. However, the relative sizes of communities is dispositive only when comparing proposals to provide first local transmission service to those communities. See, e.g., *Blanchard, Louisiana and Stephens, Arkansas*, Memorandum Opinion and Order, 10 FCC Rcd 9828 (1995); *Cornwall Broadcasting Corp.*, Decision, 89 F.C.C.2d 704 (Rev. Bd. 1982).

²⁶ *Greenup*, *supra* note 17. Additionally, while *Greenup* provided a methodology for mitigating or outweighing a population advantage, 6 FCC Rcd at 1495, Bate did not provide information sufficient to apply the *Greenup* analysis.

²⁷ Application for Review at 7.

²⁸ In both the *Mutually Exclusive Public Notice* and the 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 facts of each proposal.

²⁹ See 2001 Section 307(b) Decision, *supra* note 9, at 2-3. See also 2002 Section 307(b) Decision, *supra* note 13, at 2.

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

Re: *Applications of Jeffrey B. Bate for a New AM Broadcast Station at Mesquite, Nevada and Jeffrey Eustis for a New AM Broadcast Station at Johnstown, Colorado, File Nos. BNP-20000128ACL and BNP-20000127ACD; and Applications of Jeffrey B. Bate for a New AM Broadcast Station at St. George, Utah and Andrew Johnson for a New AM Broadcast Station at Winchester, Nevada, File Nos. BNP-20000128ACK and BNP-20000201ADP*

You'll never hear a bad word about localism. Everyone claims to want it. Everyone recognizes that it is one of the core values of our broadcasting system, woven into the very DNA of the Communications Act. Even broadcasters do not dispute the obligation to serve their local communities—although they assert that additional government regulation is unnecessary because localism is their ace-in-the-hole against services like satellite radio and the Internet.

For something as universally acclaimed as localism, the question is why don't we have more of it? Why do we see more national play lists, outsourced news, and homogenized entertainment? The answer is perhaps not surprising: follow the money or, more accurately, the stock price. Some big media companies—and I stress the word *some*—believe that doing those things can improve their bottom line and thereby impress Wall Street. Unfortunately, over the past quarter century, the FCC has given the green light to such business plans by loosening its structural ownership rules and failing to hold broadcasters accountable for serving their local communities during license renewal.

But that is far from the end of the FCC's complicity. Consolidation and cost-cutting are one way for broadcasters to try to impress Wall Street. Another is to maximize the size of the potential audience they can sell to advertisers. That has led many broadcasters to try to move as close to urban areas as the FCC will allow—even if the stations are ostensibly licensed to serve a more rural community. Too often, the FCC has willingly enabled such urban migration to an excessive degree. While standing alone these actions may seem relatively minor, over time they have taken a real toll.

These particular cases deal with the allotment process for new AM radio licenses. To effectuate our statutory obligation "to provide a fair, efficient, and equitable distribution of radio licenses," the Commission applies a series of priorities to determine whether a dispositive preference should be awarded to one proposal over another. If no dispositive preference is awarded, the mutually exclusive applications proceed to auction. As it happens, very few mutually exclusive AM station applications have proceeded to auction since the Commission began using these procedures for AM stations in 2000. The Commission generally manages to avoid an auction by awarding a dispositive preference—typically under the catch-all priority for "other public interest matters."

Here's where the Commission stacks the deck in favor of urban applicants. It awards a dispositive preference to the applicant that proposes to serve the greatest number of people. In these cases, the applicant for Johnstown, CO wins over the applicant for Mesquite, NV because Johnstown is located near the urban areas of Fort Collins and Denver. Similarly, the applicant for Winchester, NV wins over an applicant for St. George, UT because Winchester is part of the Las Vegas metropolitan area and thus serves more people than the St. George proposal.

The bottom line is that urban markets win over rural markets almost every time.¹ The rural applicant never even gets the chance to bid at auction because the urban applicant is awarded a dispositive preference. This approach is contrary to the Commission's obligation under Section 307(b) to distribute broadcast licenses equitably among the states and local communities, as well as Congress' policy judgment that mutually exclusive broadcast applications generally be resolved by auction.

The good news is that relief could be on the way. I am pleased that my colleagues recently joined with me to adopt the Rural Radio Service Notice of Proposed Rulemaking.² This proceeding will enable us to undertake a long overdue examination of our radio allotment and assignment criteria. I hope this review will move forward quickly. It's time to end the localism bait-and-switch and make sure that our rules match our rhetoric.

¹ There is a potential preference for very rural communities that currently receive the signals of four or fewer radio stations (regardless of the communities those stations are licensed to). Communities that receive five or more radio services are considered "abundantly served." Thus, for allotment purposes, the Commission does not distinguish between a community that receives five stations and a community that receives fifty. That is in sharp contrast to the factor of population served, discussed above, where the Commission favors applicants that propose to serve more people, even where the differences are relatively small.

² *Policies to Promote Rural Radio Service and Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, FCC 09-30, (rel. Apr. 20, 2009).

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *Applications of Jeffrey B. Bate for a New AM Broadcast Station at Mesquite, Nevada and Jeffrey Eustis for a New AM Broadcast Station at Johnstown, Colorado, File Nos. BNP-20000128ACL and BNP-20000127ACD; Applications of Jeffrey B. Bate for a New AM Broadcast Station at St George, Utah and Andrew Johnson For a New AM Broadcast Station at Winchester, Nevada. File Nos. BNP-20000128ACK and BNP20000201ADP.*

As the Commission strives to live up to the mandate of Section 307(b) of the Communications Act “to provide a fair, efficient, and equitable distribution of radio licenses” throughout the country, we should acknowledge that our current licensing and allotment regime needs improvement. The practice of awarding dispositive preferences in Section 307 (b) determinations can sometimes be reduced to a mere population count, which invariably benefits the more urbanized areas. Thus, in case after case, the applicant that proposes to serve the bigger population wins. So in the two instant cases, Johnstown-Fort Collins-Denver, Colorado wins over Mesquite, Nevada; and Winchester-Las Vegas, Nevada wins over St. George, Utah.

Nevertheless, I approve these items, because, on balance, other factors argue in favor of today’s decisions. For example, Johnstown has only one local transmission service – an AM station, while Mesquite has three – three FM stations. In the other case, the population differential between the daytime service areas is at least thirteen-fold.

However, I still have significant concerns with the Commission practice of according substantial weight to population over other factors. This practice not only disadvantages broadcasters attempting to provide local service in rural or less populated areas, but it also undermines our localism goals and the clear congressional objective to award broadcast construction permits through auctions and competitive bidding.

In the future, perhaps we should consider whether second local service should be given more weight in our analysis, or whether our analysis should de-emphasize new reception service to already abundantly served populations and give greater consideration to disparities in transmission service between competing communities. Considering these and other modifications to our radio licensing process and allotment criteria should enable us to get closer toward achieving the goals of Section 307(b).