

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

In the Matter of )
JEFFREY B. BATE ) File No. BNP-20000128ACL
) Facility ID No. 122539
For a New AM Broadcast Station )
at Mesquite, Nevada )
and )
JEFFREY EUSTIS ) File No. BNP-20000127ACD
) Facility ID No. 122512
For a New AM Broadcast Station )
at Johnstown, Colorado )

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. The Commission has before it Jeffrey B. Bate's ("Bate") August 1, 2002, Application for
Review of the Media Bureau's ("Bureau") June 26, 2002, decision ("Reconsideration Decision")
awarding a dispositive preference to a competing AM proposal for a new AM station at Johnstown,
Colorado.<sup>1</sup> Jeffrey N. Eustis ("Eustis") filed an Opposition to Application for Review. For the reasons
discussed below, we deny the Application for Review.

II. BACKGROUND

2. Bate and Eustis filed mutually exclusive ("MX") applications for new AM broadcast
stations during the January-February 2000 filing window for Broadcast Auction No. 32.<sup>2</sup> Bate proposed a
new AM station on 1250 kHz to serve Mesquite, Nevada,<sup>3</sup> while Eustis proposed a new AM station on
1250 kHz to serve Johnstown, Colorado.<sup>4</sup> The two applications were designated MX Group AM 28. In

<sup>1</sup> Jeffrey B. Bate and Jeffrey N. Eustis, Letter, Ref. No. 1800B3-TSN (MB June 26, 2002).

<sup>2</sup> See AM Auction Filing Window and Application Freeze, Public Notice, 14 FCC Rcd 19490 (MMB/WTB 1999).

<sup>3</sup> File No. BNP-20000128ACL.

<sup>4</sup> File No. BNP-20000127ACD.

accord with the Commission's *First Report and Order* implementing broadcast auctions,<sup>5</sup> the Bureau requested amendments to the parties' applications, containing 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 ("Section 307(b)").<sup>6</sup> After both Bate and Eustis filed Section 307(b) amendments, the Bureau made the required threshold determination under Section 307(b), using the Commission's established priorities for such determinations.<sup>7</sup> Neither Bate nor Eustis proposes either first or second aural service, nor do they propose first local transmission service to their respective communities. Therefore, the staff utilized Priority (4) of the *FM Assignment Policies*, other public interest matters. Initially, the Bureau found that neither applicant was entitled to a dispositive Section 307(b) preference, and both were directed to proceed to auction.<sup>8</sup>

3. By letter dated October 22, 2001, the Bureau sent a second request for Section 307(b) amendments to the parties' applications.<sup>9</sup> In the October Section 307(b) Request, the Bureau offered both applicants in MX Group AM 28 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.<sup>10</sup> Both parties timely submitted new Section 307(b) showings. Based upon the applicants' new amendments, the staff determined that the Eustis proposal would serve a significantly larger number of persons, and therefore was entitled to a dispositive Section 307(b) preference.<sup>11</sup> The Bureau denied reconsideration in the Reconsideration Decision.<sup>12</sup>

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<sup>5</sup> *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*, 14 FCC Rcd 8724, *modified*, 14 FCC Rcd 12541 (1999).

<sup>6</sup> 47 U.S.C. § 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).

<sup>7</sup> See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 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 FM allotment priorities were first applied to Section 307(b) determinations in mutually exclusive AM applications in *Alessandro Broadcasting Co.*, Decision, 99 F.C.C.2d 1 (Rev. Bd. 1984), *aff'd sub nom*, *New Radio Corp. v. F.C.C.*, 804 F.2d 756 (D.C. Cir. 1986), *review denied*, 2 FCC Rcd 112 (1987). The Bureau specifically stated that the priorities set forth in *FM Assignment Policies* would be applied in AM Auction No. 32. *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451.

<sup>8</sup> See *Jeffrey B. Bate and Jeffrey N. Eustis*, Letter, Ref. No. 1800B3-JWR (MMB June 22, 2001).

<sup>9</sup> *Jeffrey B. Bate and Jeffrey N. Eustis*, Letter, Ref. No. 1800B3-TSN (MMB October 22, 2001) ("October Section 307(b) Request"). The October Section 307(b) Request bore OMB Control No. 3060-0996.

<sup>10</sup> October Section 307(b) Request at 2-3.

<sup>11</sup> See *Dan Alpert, Esq. and Christopher D. Imlay, Esq.*, Letter, Ref. No. 1800B3-JWR (MMB Apr. 10, 2002). Eustis subsequently filed a complete Form 301 application on April 26, 2002, File No. BNP-20020426AAF.

<sup>12</sup> See *supra* note 1.

### III. DISCUSSION

4. *Section 307(b)*. 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 Mesquite and Johnstown for additional service. Specifically, Bate argues that we must consider not only the population that will receive service, but various other factors as well. In this regard, Bate states that Mesquite has a larger population than Johnstown (9,389 compared to 3,827 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 Johnstown receives a total of 37 aural services, because of its close proximity to Fort Collins and Denver. Mesquite, according to Bate, is served by only 15 reception services. After arguing that Johnstown is practically geographically non-existent as a community, comprising only 0.43 square miles, Bate concludes that Mesquite is significantly larger and more developed than Johnstown, and thus has a greater need for an additional aural broadcast service.

5. We deny the Application for Review, finding the Bureau did not err in concluding the Eustis application is entitled to a dispositive Section 307(b) preference. We uphold the Reconsideration Decision based upon the fact that the Eustis proposal will serve a substantially larger number of persons. Specifically, the Eustis proposal will serve 59,557 persons within the 2 mV/m contour and 211,443 persons within the 0.5 mV/m contour. In comparison, the Bate proposal will serve 9,394 persons within the 2 mV/m contour and 55,001 persons within the 0.5 mV/m contour. The difference in the respective nighttime interference-free contours also is decisionally significant. The Eustis proposal for Johnstown will serve 4,895 within the 14.4 mV/m contour while the Bate proposal would serve 2,734 persons within the 9.2 mV/m contour.

6. The Bureau correctly considered the respective needs of Johnstown and Mesquite for additional service. Both Johnstown and Mesquite receive abundant service.<sup>13</sup> Because both communities are well served, 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.<sup>14</sup> Bate cites no authority wherein a dispositive Section 307(b) preference was awarded based solely on a disparity in the number of aural services between already well-served communities. Bate does cite *Faribault, Blooming Prairie, Northfield and New Prague, Minnesota*,<sup>15</sup> a Bureau-level decision in which the staff determined that a more populous community with fewer local transmission services and fewer reception services should receive a Priority (4) preference over a less-populous, better-served community. However, while Johnstown has a smaller population than Mesquite and receives more aural services, Mesquite has more local transmission services than Johnstown. Specifically, Johnstown's only local transmission service is KHNC(AM), while Mesquite has three licensed FM stations: commercial station KVEG(FM), and noncommercial educational FM stations KEKL(FM) and KAIZ(FM).<sup>16</sup> Thus, even if

<sup>13</sup> We consider five or more services to be "abundant." *Family Broadcasting Group*, Decision, 53 R.R.2d 662 (Rev. Bd. 1983), *review denied*, FCC 83-559 (Nov. 29, 1983); *see also Bay City, Brenham, Cameron, Centerville, Edna, Ganado, Giddings, Harker Heights, LaGrange, Matagorda, New Ulm, Point Comfort, Rollingwood, Rosenberg, and Seadrift, Texas*, Memorandum Opinion and Order, 10 FCC Rcd 3337 (1995).

<sup>14</sup> *See, e.g., Greenup, Kentucky and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493 (1991) ("*Greenup*") (population advantage presumptively best serves public interest).

<sup>15</sup> Memorandum Opinion and Order, 7 FCC Rcd 3937, 3939 (MMB 1992) ("*Faribault*").

<sup>16</sup> At the time Bate filed his Application for Review, KEKL(FM) had just received a construction permit, and KAIZ(FM)'s application for construction permit was pending. KEKL(FM) was licensed on November 9, 2005, and KAIZ(FM) received its license on March 7, 2006.

*Faribault* were binding authority for the proposition that a more populous community, with fewer transmission and reception services than a less populous one, merits a dispositive Section 307(b) preference, the facts here are distinguishable from those in *Faribault*.

7. Further, the Commission directed the Bureau in broadcast auction cases to perform a “traditional Section 307(b) analysis,”<sup>17</sup> which includes Priority (4).<sup>18</sup> The Commission has concluded that it is appropriate in certain cases to use simple net differences in the number of persons newly served by each proposal when comparing proposals under Priority (4).<sup>19</sup> Moreover, Bate concedes that “the Commission has long recognized the need for a flexible approach to allotment proceedings where circumstances warrant.”<sup>20</sup> In requesting the Section 307(b) information it did,<sup>21</sup> the Bureau offered applicants maximum flexibility to advance their applications based upon each applicant’s individual circumstances. In this case, the Bureau found the differences in population to be served were so significant (at least a threefold difference in daytime service) as to dictate a dispositive Section 307(b) preference for Eustis. Given the facts of this case, we cannot conclude that the Bureau erred in resolving the Section 307(b) issue based on population coverage disparities.

8. *Mutual Exclusivity*. In his Application for Review, Bate cites Eustis’s earlier argument questioning whether the Johnstown and Eustis proposals were mutually exclusive. Bate characterizes this as “a legitimate question [that] remains pending in this proceeding.”<sup>22</sup> We disagree. The Bureau rejected Eustis’s argument in a decision dated March 1, 2001.<sup>23</sup> Neither Eustis nor Bate filed a timely Petition for Reconsideration or Application for Review of this decision. Bate may not now resurrect this issue in an

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<sup>17</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15965.

<sup>18</sup> 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 Mesquite has a larger population than Johnstown. 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).

<sup>19</sup> *Greenup*, *supra* note 14. 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.

<sup>20</sup> Application for Review at 4.

<sup>21</sup> 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 proposal.

<sup>22</sup> Application for Review at 8.

<sup>23</sup> *Christopher D. Imlay, Esq.*, Letter, 16 FCC Rcd 4832 (MMB 2001).

untimely manner.<sup>24</sup> In any event, we have already rejected a similar argument regarding the proper application of the AM interference standards in determining mutual exclusivity among window-filed AM applications.<sup>25</sup>

#### IV. CONCLUSION

9. For the foregoing reasons, Jeffrey B. Bate's August 1, 2002, Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>24</sup> See 47 C.F.R. §§ 1.106(f) (petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action), 1.115(d) (application for review of action taken pursuant to delegated authority shall be filed within 30 days of public notice of such action).

<sup>25</sup> See *Nelson Enterprises, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 3414 (2003).

**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.<sup>1</sup> 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.<sup>2</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> *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).