

determined by competitive bidding procedures.⁷ However, in the *Broadcast First Report and Order*, the Commission determined that the broadcast competitive bidding procedures should be consistent with its statutory mandate under Section 307(b) of the Communications Act of 1934⁸ to provide a “fair, efficient, and equitable” distribution of radio services across the nation. In an October 27, 2000, Public Notice, the Bureau directed that mutually exclusive applicants, including the captioned MX Group AM 23 applicants, file amendments to their applications addressing the respective merits of their applications under Section 307(b),⁹ specifically indicating that the Bureau would utilize the criteria set forth by the Commission in *Revision of FM Assignment Policies and Procedures*.¹⁰ The Bureau made the required threshold determination under Section 307(b), utilizing the Commission’s established priorities for such determinations.¹¹

3. Originally, Pamplin’s and Kidd’s proposals were mutually exclusive with a previously filed application for a minor modification to KEX(AM), Portland, Oregon, filed by Citicasters Co.¹² The Bureau dismissed Citicasters’s application, and further found a dispositive preference for Pamplin’s Jacksonville proposal under Priority (3) of the *FM Assignment Policies*, for proposing first local transmission service at Jacksonville.¹³

Group AM 23. However, Citicasters requested we dismiss its application, eliminating mutual exclusivity between its application and Interstate’s and Pamplin’s. Interstate thereby became a “singleton,” and Kidd and Pamplin remained as the only mutually exclusive applications in MX Group AM 23. *Letter to Terry F. Berman, Esq., and Dennis J. Kelly, Esq.*, Ref. No. 1800B3-JR (MB Mar. 28, 2002) (“Staff Decision”), at 2.

⁷ 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, 14 FCC Rcd 8724 (1999), modified, 14 FCC Rcd 12541 (1999).

⁸ 47 U.S.C. § 307(b) (“Section 307(b)”).

⁹ See *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451-52. The Public Notice established December 29, 2000, as the deadline for filing Section 307(b) supplements. The deadline was later extended to February 28, 2001. *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).

¹⁰ *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451. See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC2d 88 (1982) (“*FM Assignment Policies*”).

¹¹ See *FM Assignment Policies*, 90 FCC2d at 91-93. Those priorities are: (1) provision of first fulltime aural service; (2) provision of second fulltime aural service; (3) provision of first local transmission service; and (4) other public interest matters, with co-equal weight being given to Priorities (2) and (3). *Id.* at 91. The Bureau utilizes the priorities set forth in *FM Assignment Policies* when evaluating applicants for new AM stations. *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 *FM Assignment Policies* would be applied in AM Auction No. 32. *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451.

¹² File No. BP-19990624AB.

¹³ *Marissa G. Repp, Esq., Eve J. Klindera, Esq., Dennis J. Kelly, Esq., and Terry F. Berman, Esq.*, Letter, Ref. No. 1800B3-JR (MMB June 26, 2001). The Bureau directed Pamplin to file Form 301 within 30 days of release of the letter. Pamplin filed Form 301 on July 23, 2001. File No. BNP- 20010723ABC.

4. By letter dated October 22, 2001, the Bureau sent a second request for Section 307(b) amendments to the parties' applications.¹⁴ In the October Section 307(b) Request, the Bureau offered both applicants in MX Group AM 23 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.¹⁵ In response to the October Section 307(b) Request, Kidd submitted a new Section 307(b) showing, while Pamplin requested that the Bureau consider its previously filed submission. Based upon the new information, the March 28, 2002, staff decision ("Staff Decision") set aside the former Priority (3) determination and found that Kidd persuasively demonstrated Jacksonville's interdependence with the Medford-Ashland, Oregon Urbanized Area.¹⁶ On this basis, the Bureau concluded that that Pamplin's Jacksonville proposal was not entitled to preference as a first local transmission service under Priority (3). However, the staff also found that Pamplin proposed to serve significantly more persons than Kidd,¹⁷ and thus found that Pamplin's Jacksonville proposal was entitled to a dispositive Section 307(b) preference under Priority (4).

5. Kidd petitioned the Bureau for reconsideration of the Staff Decision, contending that the staff had "confused" transmission service with reception service, and that Kidd's Truckee proposal should be favored as providing second local transmission service at Truckee.¹⁸ The Bureau disagreed, finding that both Medford-Jacksonville and Truckee had abundant aural reception service (i.e., more than five reception services),¹⁹ and that there was at least one local transmission service licensed or permitted to each community. Under these circumstances, the Bureau held that the superior population coverage proposed by Pamplin outweighed the benefit of a second local transmission service at Truckee.²⁰

III. DISCUSSION

6. As in its Petition for Reconsideration, Kidd again contends that the Bureau erred by "confusing" reception service with local transmission service.²¹ Kidd also argues that the Review Board's decisions in *WHW Enterprises, Inc.*,²² *Babcom, Inc.*,²³ and *Valley Broadcasters, Inc.*,²⁴ require that Kidd's

¹⁴ *Dennis J. Kelly, Esq., and Terry F. Berman, Esq.*, 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.

¹⁵ October Section 307(b) Request at 2-3.

¹⁶ *Terry F. Berman, Esq., and Dennis J. Kelly, Esq.*, Letter, Ref. No. 1800B3-JR (MMB Mar. 28, 2002).

¹⁷ Pamplin proposed to serve 207,514 persons within its 2 mV/m contour and 364,294 within its 0.5 mV/m contour. Kidd's proposal would have served 27,471 persons within the 2 mV/m contour and 317,281 in its 0.5 mV/m contour. Additionally, Pamplin proposed nighttime interference-free service to 77,975 persons, compared with such service to 9,416 under Kidd's proposal.

¹⁸ Petition for Reconsideration at 3-4.

¹⁹ See *Family Broadcasting Group*, Decision, 93 FCC2d 771, 779 (Rev. Bd. 1983), *review denied*, FCC 83-559 (Nov. 29, 1983) (five or more primary aural services considered "abundant").

²⁰ Reconsideration Decision at 4.

²¹ Application for Review at 4.

²² Decision, 89 FCC2d 799 (Rev. Bd. 1982), *aff'd in part, rev'd in part on other grounds, remanded*, *WHW Enterprises, Inc. v. F.C.C.*, 753 F.2d 1132 (D.C. Cir. 1985), *opinion after remand*, 1 FCC Rcd 295 (1986).

²³ Memorandum Opinion and Order, 27 FCC2d 437 (Rev. Bd.), *remanded*, 31 F.C.C.2d 425 (1971).

²⁴ Decision, 104 FCC2d 1549 (Rev. Bd. 1986), *review denied*, 5 FCC Rcd 2785 (1990) ("*Valley Broadcasters*").

proposal to provide second local transmission service at Truckee be awarded a dispositive Section 307(b) preference over Pamplin's proposal for an additional local transmission service in the Medford-Ashland Urbanized Area.²⁵

7. We find nothing in the record to support Kidd's contention that the Bureau "confused" reception and transmission services. The Bureau correctly found that the areas to be served by both Kidd's and Pamplin's proposals already enjoyed abundant reception service,²⁶ and properly declined to make a Section 307(b) determination based on the relative number of reception services in the areas to be served by the two proposals. Rather, the Bureau addressed squarely Kidd's central contention, *viz*, whether provision of a second local transmission service warrants a dispositive Section 307(b) preference. The Bureau concluded it did not,²⁷ and we find no error in its conclusion.

8. In directing us to award broadcast construction permits through competitive bidding, Congress stated that the adoption of such procedures did not affect Section 307 of the Communications Act.²⁸ Accordingly, as noted above, our AM broadcast auction procedures provide for a threshold Section 307(b) analysis before applicants are scheduled to participate in auctions.²⁹ The Commission did not prescribe the exact procedures to be utilized by the Bureau in conducting such an analysis. It did, however, state that, as in past Section 307(b) proceedings, "comparisons of the radio needs of the respective communities will be made by examining factual data submissions such as the area and populations that would gain or lose service from the competing proposals, the availability of other primary service to such area and populations, and particular community attributes."³⁰

9. In both the *Mutually Exclusive Public Notice* and the October Section 307(b) Request, the Bureau announced it would utilize the priorities set forth in *FM Assignment Policies* when making its Section 307(b) evaluation of Auction No. 32 applications.³¹ Although *FM Assignment Policies* includes a priority for applicants providing first local transmission service, there is no such priority for applicants proposing a second local transmission service. Second local transmission service is properly considered under Priority (4), "other public interest matters."³² Moreover, none of the cases Kidd cites in its

²⁵ Application for Review at 3.

²⁶ Reconsideration Decision at 2.

²⁷ *Id.* at 3.

²⁸ *Broadcast First Report and Order*, 13 FCC Rcd at 15964 (quoting 47 U.S.C. § 309(j)(6)(B)).

²⁹ *Broadcast First Report and Order*, 13 FCC Rcd at 15964.

³⁰ *Id.* at 15965 n.115.

³¹ *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451 and n.10; October Section 307(b) Request at 2 n.3. The Bureau has applied the *FM Assignment Policies* in making Section 307(b) determinations among applicants for AM broadcast stations, pursuant to *Alessandro Broadcasting Co.*, *supra* note 11.

³² See, e.g., *Bear Lake and Honor, Michigan*, Memorandum Opinion and Order, 14 FCC Rcd 8799, 8801 (1999) ("[T]he Commission has previously determined that, in implementing the requirement of Section 307(b) of the Communications Act 'to provide a fair, efficient, and equitable distribution of radio service' among the States, a first local transmission service is more important than other public interest matters, such as a second local service or an upgrade of existing service."). A Priority (4) analysis is more flexible than a Priority (3) determination, and the Bureau may consider some or all of a number of factors, including population coverage. See, e.g., *FM Assignment Policies*, 90 F.C.C.2d at 92 n.8. See also, e.g., *Greenup, Kentucky and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493 (1991) ("*Greenup*") (population advantage presumptively best serves public interest).

Application for Review involve interpretations of the *FM Assignment Policies*, especially since all but one antedates those policies. The cases are therefore inapposite.³³ Because the Bureau gave ample notice that it would utilize the *FM Assignment Policies*, those cases provide no support for Kidd's claim of a dispositive preference for second local transmission service. Given that the Commission in the *Broadcast First Report and Order* made no mention of instituting new or different priorities, such as second local service, but did state that "the area and populations that would gain or lose service from the competing proposals" would be considered, we find that the Bureau's Section 307(b) analysis was not in error. In view of Truckee's proximity to the Reno, Nevada Urbanized Area and the fact there is abundant reception service available to Kidd's proposed service area,³⁴ we agree with the staff that the proposed second local transmission service at Truckee should not be favored under Priority (4) over service to a substantially larger number of persons.³⁵

10. We disagree with Kidd's contention that the Bureau "failed to notice" the *Valley Broadcasters* case.³⁶ The Review Board in *Valley Broadcasters* found that Valley Broadcasters, Inc. ("Valley") was entitled to a dispositive Section 307(b) transmission preference for providing a "first competitive nighttime local outlet" to the proposed community of license – the finding on which Kidd relies.³⁷ However, the Commission did not affirm the Review Board's decision in *Valley Broadcasters* based upon the finding that Valley would provide a first competitive transmission service.³⁸ Rather, the Commission found that "Valley's proposal will provide a first [reception] service to five times as many persons as [competing applicant's] proposal, nearly twice as many persons with a second service and more than three times as many persons with a third service."³⁹ In other words, Valley would have prevailed under Priorities (1) and (2), provision of first and second aural reception service, rather than the Priority (4) finding of a second local transmission service. Additionally, as noted above, the Bureau announced before Auction No. 32 that it would use the *FM Assignment Policies* priorities in its Section

³³ See *supra* notes 22-24. Although *Valley Broadcasters*, *supra* note 24, was decided after *FM Assignment Policies*, it does not cite or discuss those policies and for that reason is inapposite. See discussion at ¶ 10 of the text.

³⁴ See *supra* note 19.

³⁵ Kidd also cites a footnote from *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870, 4873-74 n.25 (1989) ("*FM/TV Modification*"). The cited footnote is appended to a discussion of licensees who propose changing their community of license without changing the location or power of their facilities. We agree with the Bureau that this language does not support Kidd's position. In *FM/TV Modification* the Commission was not addressing allotment priorities for new broadcast stations, but rather was providing a procedure under which existing FM and television licensees could change their communities of license in rulemaking proceedings without risking loss of their authorizations to competing applicants.

³⁶ See *supra* note 24.

³⁷ 104 FCC2d at 1561.

³⁸ Because the Commission determined, for the first time, that noncommercial educational ("NCE") stations should be considered in a Section 307(b) transmission service analysis, and because NCE station KSVR(FM), Mount Vernon, Washington, was disregarded by the Review Board both due to its NCE status and its 18-watt power, subsequently increased to 100 watts, the Commission concluded that there was insufficient record evidence to resolve the factual question as to whether Valley's proposal would have brought first competitive nighttime service to Mount Vernon. However, the Commission determined this question of fact was irrelevant, as it based its ultimate decision on a reception service analysis. 5 FCC Rcd at 2788.

³⁹ 5 FCC Rcd at 2788.

307(b) determinations.⁴⁰ Kidd's reliance on the Review Board decision in *Valley Broadcasters*, then, is erroneous.

IV. CONCLUSION

11. For the foregoing reasons, Kidd's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁰ See *supra* note 31.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Emmetsburg, Sanborn and Sibley, Iowa, and Brandon, South Dakota, MM Docket No. 01-65, et al.; Applications of Kidd Communications for a Construction Permit for a New AM Station at Truckee, California, Pamplin Broadcasting-Oregon, Inc. for a Construction Permit for a New AM Station at Jacksonville, Oregon, File Nos. BNP-20000201AFK and 20000131ABP; Royce International Broadcasting Co., Application for a New AM Broadcast Station at Folsom, California, File No. BP-19970829AA, et al.

I have discussed previously the need to revisit our radio allotment priorities in order to ensure that we are meeting our statutory obligation to provide “a fair, efficient, and equitable distribution of radio licenses.”¹ Section 307(b) means that rural as well as urban communities are entitled to a fair distribution of service. I am concerned, however, that our existing allotment rules may unduly favor urban applicants by awarding, for instance, a dispositive preference to proposals that serve the greater number of people—even if that number is relatively small. The end result is that rural applicants often never even get the chance to bid at auction because the urban applicants are awarded a dispositive preference, typically under the catch-all priority for “other public interest matters.”

I am pleased that my colleagues have agreed to examine our radio allotment and assignment criteria as part of the recently released Rural Radio Service Notice of Proposed Rulemaking.² In the meantime, these cases adhere to current precedent and I therefore accept the results.

¹See 47 U.S.C. § 307(b); See also *Concurring Statement of Commissioner Michael J. Copps, In 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, and In re 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.*

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).

**CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *Applications of Kidd Communications for Construction Permit for a New AM Station at Truckee, California and Pamplin Broadcasting-Oregon, Inc. for a Construction Permit for a New AM Station at Jacksonville, Oregon, File Nos. BNP-20000201AFK and BNP-20000131ABP; In the Matter of Royce International Broadcasting, Co., Application for a New AM Broadcast Station at Folsom California and KM Communications*

I concur in the two items captioned above, because I question whether a “dispositive” preference in our Section 307(b) determination should have been awarded based solely on the population differential between the competing applications. As I have said before, 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 307(b) 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. Each of these factors should have been considered in the matter concerning Truckee, California and Jacksonville, Oregon; and Folsom and Elk Grove, California, respectively.

Accordingly, I concur in the items and I am pleased the Commission is re-examining our licensing and allotment process to ensure that we are meeting our statutory obligation to distribute radio service throughout the United States in a fair, efficient and equitable manner.