

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

In the Matter of)	
)	
ROYCE INTERNATIONAL	)	File No. BP-19970829AA
BROADCASTING, CO.	)	Facility ID No. 92905
)	
Application for a New AM Broadcast Station)	
at Folsom, California)	
)	
and)	
)	
KM COMMUNICATIONS, INC.	)	File No. BNP-20000201AEV
	)	Facility ID No. 122461
Applications for New AM Broadcast Stations	)	File No. BNP-20000201AFA
at Fowler and Elk Grove, California	)	Facility ID No. 122485
)	
and)	
)	
JAMES K. ZAHN	)	File No. BP-19970815AC
	)	Facility ID No. 88192
Application for a New AM Broadcast Station)	
at Clovis, California)	
)	
and)	
)	
SUSQUEHANNA RADIO CORP.	)	File No. BNP-20000131AEZ
	)	Facility ID No. 122481
Application for a New AM Broadcast Station)	
at Folsom, California	)	File No. BMP-19960830AD
	)	Facility ID No. 51188
Application for a Minor Change in the Facilities of)	
Station KTCT(AM), San Mateo, California)	

MEMORANDUM OPINION AND ORDER

Adopted: September 24, 2008

Released: May 22, 2009

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

I. INTRODUCTION

1. The Commission has before it (1) an Application for Review filed by Susquehanna Radio Corp. (“SRC”), applicant for a new AM broadcast station at Folsom, California and for the minor

modification of the facilities of Station KTCT(AM), San Mateo, California,¹ and (2) a Petition for Reconsideration and Request for Expedited Consideration (“Petition for Reconsideration”) filed by James K. Zahn (“Zahn”), applicant for a new AM station at Clovis, California.² SRC’s and Zahn’s applications were determined to be mutually exclusive with the applications of: Royce International Broadcasting Co. (“Royce”) for a new AM station at Folsom, California,³ KM Communications, Inc. (“KM”) for new AM stations at Elk Grove, California, and Fowler, California,⁴ Kidd Communications for a new AM station at Sparks, Nevada,⁵ Pamplin Broadcasting-Washington, Inc. for a new AM station at Union Gap, Washington,⁶ and Horizon Broadcasting Group for a new AM station at Prineville, Oregon.⁷ These nine applications were filed during the January-February 2000 filing window for AM Broadcast Auction No. 32,⁸ and were collectively designated MX Group AM 17.⁹

2. SRC and Zahn request review of the Media Bureau’s (“Bureau”) 2003 staff decision¹⁰ in which the Bureau, in part: (1) awarded KM’s application for a new AM station at Elk Grove, California, a dispositive preference under Section 307(b) of the Communications Act of 1934, as amended (the “Act”);¹¹ (2) denied SRC’s Petition for Partial Reconsideration and Contingent Request for Special Relief, pertaining to the staff’s 1999 decision to designate Royce’s then-pending KIOQ(AM) major

¹ SRC filed its Application for Review on November 17, 2003. We received the following additional pleadings with respect to SRC’s Application for Review: (1) Opposition to Application for Review, filed December 2, 2003, by Royce International Broadcasting Company (“Royce”); (2) Opposition to Application for Review, filed December 2, 2003, by KM Communications, Inc. (“KM”); (3) Reply to Opposition of Royce, filed December 17, 2003, by KM; (4) Reply to Opposition of Royce, filed December 18, 2003, by SRC; and (5) Reply to Opposition of KM, filed December 18, 2003, by SRC.

² Zahn filed his Petition for Reconsideration on November 17, 2003. KM filed an Opposition to the Petition for Reconsideration on December 2, 2003. Zahn filed a Reply on December 19, 2003.

³ File No. BP-19970829AA.

⁴ File Nos. BNP-20000201AFA and BNP-20000201AEV.

⁵ File No. BNP-20000201AFL.

⁶ File No. BNP-20000131ABW.

⁷ File No. BNP-20000128ABH.

⁸ *AM Auction Filing Window and Application Freeze*, Public Notice, 14 FCC Rcd 19490 (MMB 1999); *AM Auction Filing Window and Application Freeze Extended to February 1, 2000*, Public Notice, 15 FCC Rcd 1910 (MMB 2000) (“*AM Auction 32 Window Notice*”).

⁹ *AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 15 FCC Rcd 20449 (MMB/WTB 2000) (“*Mutually Exclusive Public Notice*”), 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).

¹⁰ *Letter to Royce International Broadcasting Co., et al.*, Ref. No. 1800B3-TSN (MB October 16, 2003) (the “*Staff Decision*”).

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

modification application as an application for a new station;¹² and (3) denied Zahn's Motion to Dismiss KM's Form 175 auction applications for new AM stations at Elk Grove, California, and Fowler, California.¹³

3. Because the issues raised by SRC and Zahn are related, the Bureau has referred Zahn's Petition for Reconsideration to the Commission, pursuant to Section 1.106(a)(1) of the Commission's Rules,¹⁴ for resolution in conjunction with SRC's Application for Review. We accept the referral of the Petition for Reconsideration so that all the issues related to MX Group AM 17 in AM Auction No. 32 can be resolved together. For the reasons discussed below, we deny the Application for Review and the Petition for Reconsideration.

II. BACKGROUND

4. Grant of a broadcast application for a new AM station is generally determined by competitive bidding procedures.¹⁵ In the *Broadcast First Report and Order*, however, the Commission determined that the broadcast competitive bidding procedures also must take into account the Commission's statutory mandate under Section 307(b) of the Act to provide a "fair, efficient, and equitable" distribution of radio services across the nation.¹⁶ Accordingly, in the *Mutually Exclusive Public Notice*, released October 27, 2000,¹⁷ the Bureau requested, *inter alia*, amendments to the parties' applications containing supplemental information relating to the fair, efficient, and equitable distribution of radio service under Section 307(b). All of the applicants in MX Group AM 17 filed amendments in response to the *Mutually Exclusive Public Notice*.¹⁸ The Bureau then proceeded to make the required

¹² *Letter to Royce International Broadcasting Co.*, Ref No. 1800B3-JR (MMB February 9, 1999) ("*February 9, 1999, Staff Decision*").

¹³ The staff had evaluated all nine applications under Section 307(b). In addition to the actions referenced above, the *Staff Decision* determined that the Pamplin Broadcasting-Washington, Inc. proposal for Union Gap, Washington, the Kidd Communications proposal for Sparks, Nevada, and the KM proposal for Elk Grove, California were entitled to dispositive Section 307(b) preferences. The three applicants were directed to file FCC Form 301 long-form applications.

¹⁴ See 47 C.F.R. § 1.106(a)(1) ("Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission.")

¹⁵ 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 ("*Broadcast First Report and Order*"), 13 FCC Rcd 15920, 15964-65 (1998); *recon. granted in part and denied in part*, 14 FCC Rcd 8724 (1999); *modified*, 14 FCC Rcd 12541 (1999).

¹⁶ 47 U.S.C. § 307(b).

¹⁷ See *Mutually Exclusive Public Notice*, *supra* n. 9, 15 FCC Rcd at 20451-52.

¹⁸ The Bureau sent a second request for amendments to the parties' applications, addressing Section 307(b) issues, by letter dated October 22, 2001. See *Letter to Royce International Broadcasting Co., et al.*, Ref. No. 1800B3-TSN (MMB October 22, 2001). The October 2001 Section 307(b) request bore OMB Control No. 3060-0996. All applicants in MX Group AM 17 responded to the October 2001 307(b) request, asking that the Bureau consider their already-filed 307(b) amendments.

threshold determinations under Section 307(b), using the Commission's established priorities for such determinations.¹⁹

5. The Bureau found, in part, that KM's Elk Grove proposal and SRC's and Royce's Folsom proposals would provide first local service to their respective communities.²⁰ Because each of these first local transmission service proposals would serve the entire Sacramento Urbanized Area, the staff evaluated each proposal under the guidelines set forth in *Faye and Richard Tuck*²¹ and determined that each was entitled to consideration as a first local service. The *Staff Decision* also found that both Elk Grove and Folsom are abundantly served. The Bureau then explained that when there are competing proposals, and each proposes a first local transmission service to two well-served communities, a Section 307(b) preference is given to the proposal to serve the more populous community.²² Based upon the applicants' Section 307(b) amendments, which included adjusted population data, the Bureau determined that the station in Elk Grove would serve a larger population than that in Folsom and, accordingly, that KM was entitled to a dispositive Section 307(b) preference over SRC and Royce.²³ Therefore, the Bureau directed KM to file a complete Form 301 application, and stated that upon grant of the Elk Grove construction permit to KM, it would dismiss, *inter alia*, Zahn's application for a new AM station at Clovis, California, SRC's application for a new AM station at Folsom, California, and SRC's application for a minor modification of Station KTCT(AM), San Mateo, California.

6. The Bureau also denied SRC's Petition for Partial Reconsideration and Contingent Request for Special Relief ("Petition").²⁴ In its Petition, SRC had requested that the Bureau reconsider and reverse its prior decision to designate Royce's then-pending major modification application for Station KIOQ(AM) as an application for a new station.²⁵ SRC also argued that Royce's application should be dismissed due to the alleged failure to protect KTCT(AM)'s licensed facilities.²⁶ The Bureau

¹⁹ See *Revision of FM Assignment Policies and Procedures*, Report and Order, 90 FCC 2d 88 (1982), *recon. denied*, 56 RR 2d 448 (1984) ("*FM Assignment Policies*"). The Commission's service priorities when making a Section 307(b) determination are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Priorities (2) and (3) are given equal weight. These priorities were first applied in Section 307(b) determinations in the AM context by the Review Board in *Alessandro Broadcasting Co.*, Decision, 56 RR 2d 1568 (Rev. Bd. 1984). The Bureau explicitly stated that the FM Assignment Policies pursuant to Section 307(b) would be applied in AM Auction No. 32. See *Mutually Exclusive Public Notice*, *supra* n. 9, 15 FCC Rcd at 20451.

²⁰ See *Staff Decision*, *supra* n. 10 at 5.

²¹ *Faye and Richard Tuck, Inc., KBEC*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) ("*Tuck*").

²² See *Blanchard, Louisiana and Stephens, Arkansas*, Memorandum Opinion and Order, 10 FCC Rcd 9828, 9829 ("*Blanchard*").

²³ See *supra* n. 13.

²⁴ See *Staff Decision*, *supra* n. 10 at 6-8.

²⁵ See SRC Petition at 11.

²⁶ In its Petition, SRC also contended that it should be afforded a Section 307(b) advantage with respect to KTCT(AM) that would be comparable to the relief the February 9, 1999, Staff Decision granted to Royce with respect to KIOQ(AM). The Bureau denied this request, and SRC did not seek review of this decision.

refused to reconsider the re-designation of Royce's major change application, explaining that the Commission had already analyzed the relative positions of the Royce and KTCT(AM) applications and concluded that both were properly included in MX Group AM 17.²⁷ The Bureau also rejected SRC's argument that Royce's application was technically deficient and should be dismissed, explaining that, under the Commission's broadcast auction rules, the staff does not examine an applicant's technical submission prior to an auction except to the extent necessary to determine mutual exclusivity and to comparatively evaluate proposals under Section 307(b).²⁸ The Bureau clarified that issues relative to whether Royce's application fully protected KTCT(AM) would appropriately be raised only in connection with Royce's complete Form 301 application.

7. Finally, the Bureau denied Zahn's Motion to Dismiss KM's Form 175 applications for new AM stations at Fowler and Elk Grove, California.²⁹ Zahn argued that KM's two pending applications were inconsistent and thus must be dismissed.³⁰ The Bureau determined it was inappropriate to address this issue at that time and reiterated that "[i]n order to resolve these proceedings as expeditiously as possible, we consider technical issues only to the extent necessary to determine mutual exclusivity and to make determinations under 307(b)."³¹

8. On review, SRC challenges: (1) the Commission's two-phase auction procedures, in which we defer reviewing an applicant's technical and legal qualifications until the second phase, the long-form application stage; (2) the staff's Section 307(b) analysis and subsequent determination that KM's Elk Grove proposal merited a Section 307(b) preference; and (3) the Bureau's refusal to reverse its February 1999, decision to re-designate Royce's KIOQ(AM) major modification application as an application for a new AM station. On reconsideration, Zahn reiterates its arguments that KM's applications are inconsistent and should have been dismissed pursuant to Section 73.3518 of the Commission's Rules.

III. DISCUSSION

9. **Two-Phase Auction Procedures.** We reject SRC's contention that the staff should have subjected the short-form applications to acceptability and grantability reviews. SRC's proposal, which has previously been thoroughly debated, and ultimately rejected, by the Commission, is inconsistent with the Commission's competitive bidding procedures. Section 309(j) of the Act requires that the Commission promote the "rapid deployment of new technologies, products and services for the benefit of the public. . ."³² The Commission's two-phase competitive bidding procedures are designed to effectuate this Congressional mandate and to ensure the efficient award of broadcast construction permits. In the first phase, AM applicants file a short-form application (FCC Form 175), along with limited

²⁷ See *Royce International Broadcasting Company*, Memorandum Opinion and Order, 18 FCC Rcd 16059 (2003) ("*Royce International*").

²⁸ See *Broadcast First Report and Order*, *supra* n. 15, 13 FCC Rcd at 15974.

²⁹ See *Staff Decision*, *supra* n. 10 at 8.

³⁰ See Zahn Motion to Dismiss at 2 (citing 47 C.F.R. § 73.3518).

³¹ *Staff Decision*, *supra* n. 10 at 8.

³² 47 U.S.C. § 309(j)(3)(A).

engineering data to enable the staff to determine mutual exclusivities.³³ During this short-form application phase, the staff does not consider basic qualification issues or engage in pre-auction processing of the technical data, beyond the review necessary to determine mutual exclusivity and to make necessary determinations under Section 307(b). In the second phase, the winning applicants are required to submit long-form applications, which are fully reviewed by the staff for legal and technical acceptability.

10. On review, SRC acknowledges that the staff properly adhered to these well-established procedures, but argues that the procedures themselves are flawed. Specifically, SRC asserts that the staff should review the applications for basic legal and technical acceptability at the short-form stage, before conducting the Section 307(b) analysis. Such pre-auction review, according to SRC, would have resulted in the dismissal of two applications in MX Group AM 17: (1) KM's Elk Grove application, which, SRC argues, is technically unacceptable because it would cause prohibited interference to both the daytime and nighttime licensed facilities of KTCT(AM); and (2) Royce's Folsom application, which, SRC asserts, is riddled with problems, including its failure to protect KTCT(AM)'s licensed facilities. According to SRC, the dismissal of these "patently ungrantable applications" in the short-form stage would have simplified and accelerated this proceeding and resulted in a "far more efficient and fundamentally fair" resolution of this case.³⁴

11. SRC's proposal that staff conduct a pre-auction acceptability review has previously been considered, and rejected, by the Commission when it established the current broadcast auction procedures.³⁵ The Commission found that such pre-auction review would not simplify or accelerate proceedings, as SRC avers, but would instead complicate and delay proceedings. The Commission explained that "the time and expense entailed in adjudicating fully all unresolved issues relating to the

³³ AM applicants are required to file Section I and Section III-A Tech Box of FCC Form 301, Application for Construction Permit. By submitting the Form 175 short-form application, which requires various certifications as to the legal, technical, financial, and other qualifications of the applicant, applicants declare, under penalty of perjury that "all matters and things stated in [the] application and attachments, including exhibits, are true and correct." See FCC Form 175.

³⁴ SRC Application for Review at 3, 7. In its Engineering Statement, SRC also claims that the staff did not properly apply interference standards to establish mutual exclusivity between the applications. Specifically, SRC contends that the staff should not assume that applications filed during the window that enter into the 25 percent root-sum-square ("RSS") of another window-filed application are mutually exclusive. See 47 C.F.R. § 73.182(k) (providing that the RSS methodology should be applied for the "calculation of nighttime interference for non-coverage purposes." In order to limit the number of interfering signals that must be taken into account, a "25 percent exclusion method" is used in making the calculations. By this method, the staff is able to determine which applications will cause unacceptable nighttime interference to other stations.). According to SRC, applications which enter the RSS calculation of other applications are only mutually exclusive if the ability of one of the facilities to provide principal community interference free service is also eliminated. We disagree. The staff properly applied the relevant AM interference rules (47 C.F.R. §§ 73.37, 73.182, 73.187) in making its mutual exclusivity determinations. See, e.g., *Nelson Enterprises, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 3414 (2003).

³⁵ The Commission recognized that limiting pre-auction analysis of all filed applications to a determination of mutual exclusivity could result in "applicants, whose technical proposals are unacceptable, participating and perhaps prevailing in an auction" and, therefore, the Commission considered but rejected an alternate approach that would involve pre-auction processing of submitted technical data. See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, Notice of Proposed Rulemaking, 12 FCC Rcd 22363, 22391 (1997).

basic qualification issues as to all pending applicants would greatly exceed any additional delay that might result from the eventual disqualification of a winning bidder. For these reasons, we find that deferring consideration of basic qualifying issues until after the auction is fairer and ultimately more efficient than resolving any issues relating to the basic qualifications of all pending applicants, only one of which will be the winning bidder.³⁶ Accordingly, the Commission chose to defer the acceptability and grantability review until the long-form stage.³⁷ Such a process comports with our statutory objective as well as our efforts to reduce the administrative burdens at the initial stages of the auction process, avoid unnecessary delay in the initiation of service, and encourage applicants to participate in the process.³⁸

12. Despite this clear mandate, SRC contends that the current auction procedures result in the selection at the short-form stage of proposals from “unqualified” applicants, such as, according to SRC, KM’s Elk Grove proposal. If the procedures are not rectified in the manner advocated by SRC, it warns that a “processing disaster looms.”³⁹ We find SRC’s concerns unfounded. Section 309 of the Act requires that licenses be granted via competitive bidding only to “qualified” applicants,⁴⁰ and the Commission’s rules and processes accordingly weed out or discourage unqualified applicants in several ways. For example, winning applicants whose long-form applications cannot be granted for legal or technical reasons are subject to default payments.⁴¹ During the long-form application stage, the staff thoroughly reviews each application, and if an application is found to be defective, it will be denied or dismissed. At this stage, we also provide ample opportunity for parties to challenge the legal and technical qualifications of an applicant.⁴² We do not and will not, however, consider challenges, such as SRC’s misplaced attacks on the Royce and KM applications, at the short-form stage of the proceeding for the reasons previously stated by the Commission.⁴³

13. Our decision not to conduct a pre-auction qualification review of all broadcast auction applicants was upheld on appeal by the U.S. Court of Appeals for the District of Columbia Circuit.⁴⁴ That

³⁶ See *Broadcast First Report and Order*, *supra* n. 15, 13 FCC Rcd at 15951.

³⁷ *Id.* at 15953.

³⁸ *Id.* at 15979. The “statutory objective” is found in 47 U.S.C. § 309(j)(3)(A).

³⁹ SRC Application for Review at 9.

⁴⁰ See 47 U.S.C. §§ 309(j)(1) and (j)(5). The statute accords the Commission discretion to make the determination as to basic qualifications to hold a license either before, or after, the auction.

⁴¹ 47 C.F.R. § 1.2109(c) (winning auction bidder who is found unqualified or who defaults on auction payments is liable for default penalties set forth in Section 1.2104(g)(2)); see also *Broadcast First Report and Order*, *supra* n. 15, 13 FCC Rcd at 15979.

⁴² See 47 C.F.R. § 73.5006 (establishing procedures for filing petitions to deny against long-form applications).

⁴³ KM filed its long-form Elk Grove application on December 16, 2004. The application was accepted for filing on December 23, 2004, and petitions to deny were due by January 3, 2005. We note that SRC had the opportunity to challenge KM’s application at this stage, but did not file a petition to deny or any other opposition.

⁴⁴ *Orion Communications Ltd. v. FCC*, 221 F.3d 196, No. 98-1424, slip op. (D.C. Cir. June 13, 2000) (“We also find nothing arbitrary and capricious in the FCC’s decision to decline to pursue unresolved claims that applicants had not met the filing requirements in place at the time they filed their application, as well as its decision to evaluate the

(continued...)

procedure has also been recently challenged by broadcast applicants and explained and affirmed by the full Commission.⁴⁵

14. SRC further argues that the Bureau has violated its *Ashbacker* rights.⁴⁶ In *Ashbacker*, the Supreme Court held that under Section 309(a) of the Act, in cases in which there are two *bona fide* mutually exclusive applications for a license, the Commission may not grant one application without considering the competing application.⁴⁷ Short-form applications to participate in auctions, however, are governed by Section 309(j), which relates to the Commission's competitive bidding authority, not the procedural requirements of Sections 309(a) or 309(e) or the *Ashbacker* doctrine.⁴⁸ Thus, there is no right to a hearing at the short-form application stage. The Bureau's 307(b) analysis, a "threshold" determination, also does not trigger the right to a hearing.⁴⁹ SRC's argument is, therefore, misplaced.⁵⁰

15. **Section 307(b) Determination.** SRC argues that even if the auction procedures are tenable, the Bureau still erred in granting a dispositive Section 307(b) preference to KM's Elk Grove proposal. Specifically, SRC contends that the Bureau erred in considering in its Section 307(b) determination attributes of the *city* of Elk Grove, which KM proffered in response to the *Mutually Exclusive Public Notice*. In February 2000, when KM filed its Elk Grove proposal, the community of Elk Grove was a Census Designated Place ("CDP"). Subsequent to this initial filing, however, Elk Grove became incorporated, a fact KM noted in its Section 307(b) amendment. SRC asserts that the Bureau should have only considered the attributes of the Elk Grove CDP, not the newly incorporated city of Elk Grove, because "[i]t is well established that comparative credit cannot be given for changes occurring after an application has become 'frozen' for comparative purposes."⁵¹

16. We recognize that there are situations, such as in the comparative hearing context, in which it is well established that an applicant is prohibited from reporting any new information that would

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qualifications of only the winning bidder. Petitioners have offered us no persuasive reason to question the FCC's conclusion that both decisions were justified by its desire to avoid unnecessary litigation.").

⁴⁵ See *Powell Meredith Communications Company*, Memorandum Opinion and Order, 19 FCC Rcd 12672 (2004); *Winstar Broadcasting Corp.*, Order on Reconsideration, 20 FCC Rcd 2043 (2005).

⁴⁶ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) ("*Ashbacker*").

⁴⁷ *Id.* at 333. The Communications Act requires a comparative hearing only when "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding" 47 U.S.C. § 309(e); see also *Hispanic Information & Telecommunications Network, Inc.*, 865 F.2d 1289 (D.C. Cir. 1989).

⁴⁸ See *Elleron Oil Co. and WVI Partners, Inc.*, Order, 13 FCC Rcd 17246, 17251-52 (WTB 1998).

⁴⁹ See, e.g., *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (holding that the Commission has the statutory authority to prescribe threshold eligibility standards and to dismiss without a hearing applications not meeting such requirements).

⁵⁰ We note again that SRC had the opportunity to challenge KM's application when it was accepted for filing, but chose not to oppose it. See n. 43, *supra*.

⁵¹ SRC Application for Review at 11.

enhance its comparative position after a “snap-shot” date established for the application.⁵² This is not such a situation. SRC’s reliance on one comparative hearing case and one *Notice of Proposed Rulemaking*⁵³ in support of the proposition that comparative credit cannot be given for changes occurring after an application has become frozen, is misplaced. The current situation is not a comparative hearing, but an auction proceeding, governed by distinct rules and procedures.

17. Moreover, traditionally, in examining fair distribution pursuant to Section 307(b) of the Act, proposals are analyzed as of the date the 307(b) information is requested. In AM Auction No. 32, the Bureau proactively solicited supplementary information from the applicants, including the number of stations providing protected service to the applicant’s proposed community of license and the population of the community of license, according to the latest Census data.⁵⁴ The Bureau, accordingly, properly evaluated KM’s updated and current information regarding the community of Elk Grove, including its new status as an incorporated city, in making its Section 307(b) determination.

18. SRC also asserts that the Bureau’s Section 307(b) analysis was flawed because it failed to reflect and distinguish the respective attributes of the communities of Elk Grove and Folsom, but simply distinguished the communities by comparing their populations. We disagree and find no error in the Bureau’s Section 307(b) analysis and award of a dispositive preference to Elk Grove, the more populous community. The Bureau determined that both: (1) the competing Elk Grove and Folsom applications would provide first local service; (2) Elk Grove and Folsom are located within the Sacramento Urbanized Area, but are independent communities, entitled to consideration as a first local service,⁵⁵ and (3) Elk Grove and Folsom are abundantly served.⁵⁶ When comparing two or more proposals, each of which contemplates first local transmission service under Priority (3) to two well-served communities, it is well-settled Commission policy to compare the relative populations of the communities and award the Section 307(b) preference to the more populous community.⁵⁷ Folsom’s 2000 Census population was 51,884,

⁵² See, e.g., *Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5084-85, *recon. denied*, 17 FCC Rcd 13132 (2002) (subsequent history omitted). The “snap-shot” date is a set date used for purposes of comparing applications. The “snap-shot” date is employed to provide a level competitive field for applicants, with their qualifications all compared as of the same time.

⁵³ *Angeles Broadcasting Network*, Memorandum Opinion and Order, 59 RR 2d 752 (1985) and *Proposals to Reform the Comparative Hearing Process to Expedite the Resolution of Cases*, Notice of Proposed Rulemaking, 5 FCC Rcd 4050 (1990).

⁵⁴ See *Mutually Exclusive Public Notice*, *supra* n. 9, 15 FCC Rcd at 20451.

⁵⁵ Because we do not blindly award a first local service preference to proposed communities located in well-served urbanized areas, the staff evaluated the proposed communities’ relationship to the Sacramento Urbanized Area, in accordance with the standards set forth in *Tuck*. See *Staff Decision*, *supra* n. 10 at 5; see also *Tuck*, *supra* n. 21, 3 FCC Rcd at 5376.

⁵⁶ See *Staff Decision*, *supra* n. 10 at 5. We consider five or more services to be “abundant.” *Family Broadcasting Group*, Decision, 53 RR 2d 662 (Rev. Bd. 1983), *review denied*, FCC 83-559 (Nov. 29, 1983); see also *LaGrange and Rollingwood, Texas*, Memorandum Opinion and Order, 10 FCC Rcd 3337 (1995).

⁵⁷ See *Blanchard*, *supra* n. 22, 10 FCC Rcd at 9829 (when comparing first local service proposals for two well-served communities, the Commission bases its decision on a straight population comparison between the communities, even when the population differential is as small as 38 persons); *Genoa, Mt. Morris, and Oregon, Illinois*, Report and Order, 14 FCC Rcd 10727 (1999).

while that for Elk Grove was 59,984.⁵⁸ The staff, therefore, awarded the dispositive Section 307(b) preference to Elk Grove, the more populous community.

19. SRC argues that the relative populations of the proposed communities of license are only dispositive under *Blanchard* if a “meaningful distinction” could not be made on other grounds, such as by comparing the communities’ respective attributes.⁵⁹ Accordingly, SRC asserts that the staff should have attempted to compare and distinguish Elk Grove and Folsom based on non-population factors. In *Blanchard*, however, the Commission stated that “in a choice among competitive counterproposals both involving Priority 3 (first local service), the Commission has uniformly made the decision based on population difference and a comparison of reception services. And, where it has found that neither community falls below a threshold level of reception services, the Commission has based its decision on a straight population comparison.”⁶⁰ Accordingly, we find no error in the Bureau’s consideration of population to award the 307(b) preference to Elk Grove. The staff’s 307(b) analysis is consistent with *Blanchard* and its progeny.⁶¹

20. **Re-Designation of Royce Major Modification Application.** Finally, SRC devotes much discussion in its Application for Review to the history of Royce’s construction permit for KIOQ(AM) and the Bureau’s February 1999, decision to convert Royce’s major modification application for KIOQ(AM) into an application for a new AM station at Folsom, California. SRC argues that, if the Bureau instead had dismissed Royce’s modification application, it could have granted SRC’s KTCT(AM) minor modification application, without subjecting it to competing applications during the AM Auction No. 32 auction filing window. This, however, is not the case. Even if we were to reverse the Bureau’s decision, this would not avail SRC or change the resolution of MX Group AM 17 in Auction No. 32.

21. In 1987, Royce acquired the construction permit for KIOQ(AM), Folsom, California.⁶² The initial permit, granted in 1984, gave the permittee 18 months to construct the station. Under the rules in effect at the time, however, the Bureau granted extensions for any circumstance beyond the permittee’s control that prevented the timely construction of broadcast facilities, provided that the permittee was taking steps to resolve the problem and to complete construction.⁶³ Accordingly, after acquiring the permit, Royce received seven consecutive construction extensions because of what Royce described as

⁵⁸ KM cited a Sacramento Area of Council of Governments estimate of 72,687 for Elk Grove’s population, but conceded that the actual Year 2000 population was in the order of only 50,000 people. U.S. Census data for Elk Grove was limited because the city incorporated on July 1, 2000, after the April 1, 2000 Census Day. Accordingly, the 2000 Census population total of 59,984 for Elk Grove is based upon the Elk Grove CDP. The Bureau, however, also noted that while the Census did not provide a figure for the newly incorporated Elk Grove City, the evidence presented indicated that it would be higher than the 59,984 reported for the Elk Grove CDP. See *Staff Decision*, *supra* n. 10 at 6.

⁵⁹ SRC Application for Review at 12.

⁶⁰ *Blanchard*, *supra* n. 22, 10 FCC Rcd at 9829.

⁶¹ See *supra* n. 57.

⁶² File No. BP-810710AC. The permit was initially issued to Folsom Radio, Inc. An application to assign the permit to Royce (File No. BAP-861118EA) was granted December 31, 1986.

⁶³ See 47 C.F.R. § 73.3534 (1998).

the “interminable litigation” before the local zoning authority concerning its request to construct at the original KIOQ(AM) site.⁶⁴

22. In the 1998 *Streamlining Report and Order*, the Commission lengthened the construction period for all initial construction permits to three years and modified and limited the standards under which it would grant extensions to broadcast construction permits.⁶⁵ Under the new procedures, the Commission chose not to extend construction permits because of protracted zoning proceedings.⁶⁶ Because of this policy change, Royce’s construction permit for KIOQ(AM) would have expired, without further opportunity for extension, on February 16, 1999. Accordingly, on January 19, 1999, Royce filed a request to process its pending major modification application for KIOQ(AM) as an application for a new AM station at Folsom, California. In its request, Royce argued that (1) although the delay in construction resulting from the zoning proceedings was a factor beyond its control under the former rules pertaining to extension requests, the Commission’s decision in the *Streamlining Report and Order* to no longer consider zoning problems outside a permittee’s control mandated cancellation of its permit, and (2) its August 29, 1997, modification application,⁶⁷ which sought to move the station to a new site and escape the zoning litigation at the original KIOQ(AM) site, had not received timely consideration. The Bureau granted Royce’s request on February 9, 1999, re-designating the KIOQ(AM) major change application as an application for a new AM broadcast station.⁶⁸ On review, SRC asserts there was no rational basis for the conversion of the modification application to one for a new station and that the staff should have instead dismissed the application.⁶⁹

⁶⁴ See, e.g., File No. BMP-941110DB (extending the permit from March 27 to September 27, 1995).

⁶⁵ See *Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056 (1998) (“*Streamlining Report & Order*”), recon. granted in part and denied in part, 14 FCC Rcd 17525 (1999).

⁶⁶ The Commission concluded that the three-year construction period “provides ample time to complete [the zoning] process and construct the station or choose a new site free from zoning difficulties.” *Streamlining Report & Order*, 13 FCC Rcd at 23091. The three-year construction period is only “tolled” for certain limited encumbrances: acts of God, administrative and judicial review of a permit grant, failure of a condition precedent on the permit, or judicial action related to necessary local, state, or federal requirements. See 47 C.F.R. § 73.3598(b).

⁶⁷ File No. BMP-970829AA.

⁶⁸ See *February 9, 1999, Staff Decision*, supra n. 12.

⁶⁹ On review, SRC reiterates that Royce’s major modification application for KIOQ(AM) should have been dismissed due to violation of the Commission’s inconsistent application rule. Specifically, SRC argues that Royce’s 1997 application to modify the KIOQ(AM) construction permit conflicted with its 1996 KIOQ(AM) modification application (File No. BMP-960907AA), which was the subject of an application for review, and thus still pending and undecided. The purpose of the inconsistent application rule (47 C.F.R. § 73.3518) is to prevent the waste of staff resources by processing two applications which cannot both be granted. See, e.g., *Premier Broadcasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 867 (1992). In its February 9, 1999, decision, the staff granted Royce’s request to withdraw its application for review of the staff’s denial of its 1996 modification application. Accordingly, as the staff adequately explained, because Royce’s 1996 modification application was no longer subject to processing, Section 73.3518 was not violated because staff resources were not expended processing inconsistent modification and new station applications.

23. Even assuming, *arguendo*, that we reversed the Bureau's re-designation decision, this would not change the resolution of MX Group AM 17 in Auction 32.⁷⁰ SRC's speculative theorizing of what "could have been" is irrelevant. As explained in the *Staff Decision*, dismissal of the Royce application would *not* have resulted in a grant of the SRC KTCT(AM) minor modification application. SRC filed this application seeking to change the nighttime antenna system of KTCT(AM) on August 30, 1996. At that time, an AM minor change application remained subject to mutually exclusive proposals until the staff disposed of the application.⁷¹ In 1999, the Commission modified its rules to extend first come/first served processing to applicants for minor changes to AM facilities.⁷² Pending minor change applications, such as the KTCT(AM) application, that were mutually exclusive with any other application as of the *Tech I* effective date (May 21, 1999) were to be handled under the Commission's competitive bidding procedures.⁷³ The KTCT(AM) application was not just mutually exclusive with Royce's application. It was also mutually exclusive with another new station application that had never been cut off – Zahn's application for a new station at Clovis, California.⁷⁴ Accordingly, even if the staff had dismissed Royce's application, the KTCT(AM) application was still mutually exclusive with Zahn's application, and thus subject to inclusion in the first AM auction.⁷⁵

24. **Inconsistent Application Rule.** Section 73.3518 of the Rules (the "Inconsistent Application Rule")⁷⁶ prohibits the filing of inconsistent or conflicting applications by, on behalf of, or for the benefit of, the same applicant. The Inconsistent Application Rule was promulgated in the comparative hearing context because of "concern that processing and hearing applications which cannot all be granted because of the limits of the multiple ownership rules may waste the Commission's

⁷⁰ We recognize that the Bureau currently prohibits the reclassification of modification applications as new station applications. Such reclassification would enable applicants to warehouse spectrum and circumvent the Commission's three-year construction deadline. *See, e.g., V.I. Stereo Communications Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14249 (2006). On rare occasions in the past, however, the staff has reclassified a pending application from modification of an existing station to an application for a new station. While we do not condone this practice, we nevertheless uphold the staff's February 9, 1999, re-designation decision in light of the unique circumstances of this particular case, which arose during the time the staff was transitioning to the new and more stringent construction period rules. We direct the Bureau, however, to continue its current policy barring reclassification of modification applications as new station applications.

⁷¹ 47 C.F.R. § 73.3571(a) (1996).

⁷² *See 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, Report and Order, 14 FCC Rcd 5272 (1999) ("*Tech I*").

⁷³ *Id.* at 5284; *see also Royce International*, *supra* n. 27, 18 FCC Rcd at 16062.

⁷⁴ The Royce and Zahn applications were both filed in August 1997. File Nos. BMP-19970829AA and BP-19970815AC.

⁷⁵ *See Royce International*, *supra* n. 27, 18 FCC Rcd at 16064 ("the staff properly included the KTCT Application with the other mutually exclusive applications in MX Group AM 17."). As discussed above, the Bureau properly awarded the Section 307(b) preference to KM's Elk Grove application over, *inter alia*, SRC's KTCT(AM) minor change application, Zahn's Clovis application, and Royce's and SRC's Folsom applications. The dismissals will not preclude the applicants from re-filing. In the AM broadcast service, unsuccessful applicants may always re-apply in a future auction filing window. Indeed, AM minor change applications are not limited to filing windows, but may be filed at any time. *See* 47 C.F.R. § 73.3571(f).

⁷⁶ 47 C.F.R. § 73.3518.

resources, unfairly prejudice other applicants, and delay service to the public.”⁷⁷ The primary purpose of the Inconsistent Application Rule is to expedite application processing procedures by avoiding “the disruption of having two inconsistent applications contemporaneously being studied by the staff.”⁷⁸

25. The submission of KM’s two short-form applications for new AM stations at Fowler and Elk Grove, California in the AM Auction No. 32 filing window does not frustrate the policy of administrative effectiveness promulgated by Section 73.3518. As we have explained, under the Commission’s broadcast auction rules, the staff does not engage in a pre-auction study of applications for technical acceptability and grantability.⁷⁹ The full legal and technical review is not performed until the filing of the complete Form 301 long-form application.⁸⁰ Accordingly, because KM’s short-form applications were not yet subject to processing, Section 73.3518 was inapplicable at this stage.

26. For this reason, during the initial short-form Form 175 stage of the AM auction process, we place no limit on the number of short-form proposals a single applicant may file during the window.⁸¹ Section 73.3518 does not apply, and has never applied, to short-form applications in the auction context. This is not the type of situation the Inconsistent Application Rule has proscribed.⁸² Accordingly, the Bureau did not err in refusing to dismiss KM’s short-form proposals based on the alleged violation of the Inconsistent Application Rule and then considering both KM’s Elk Grove and Fowler proposals in the Bureau’s Section 307(b) analysis.

27. In contrast, once an applicant files a long-form application, it becomes necessary to apply the procedural protections of Section 73.3518 to avoid expending Commission resources on processing two long-form applications if both cannot be granted. Accordingly, during this later stage in AM Auction 32, the Bureau specifically warned applicants that the submission of the complete Form 301 application may violate the Inconsistent Application Rule and directed applicants that had previously filed Form 301

⁷⁷ *William H. Hernstadt*, Memorandum Opinion and Order, 56 RR 2d 948, 949 (1984); *see also Valley Broadcasting Co.*, Memorandum Opinion and Order, 58 RR 2d 945 (1985).

⁷⁸ *KKAP Broadcasting Company*, Decision, 38 RR 2d 752, 753 (1976); *see also Big Wyoming Broadcasting Corp.*, Memorandum Opinion and Order, 63 RR 2d 981 (1987); *Atlantic Radio Communications, Inc.*, Hearing Designation Order, 6 FCC Rcd 4716 (1991); *Jersey Shore Broadcasting Corp. v. FCC*, 37 F.3d 1531, 1537 (D.C. Cir. 1994) (“*Jersey Shore*”) (“[t]he inconsistent application rule exists primarily to protect Commission resources and processes.”).

⁷⁹ *See Broadcast First Report and Order*, *supra* n. 15, 13 FCC Rcd at 15979.

⁸⁰ *Id.*

⁸¹ *See AM Auction 32 Window Notice*, *supra* n. 8. Similarly, in the FM auction context, there is no limit on the number of FM construction permits an applicant may select to pursue during the initial Form 175 filing window. *See, e.g. Auction of FM Broadcast Construction Permits Scheduled for March 7, 2007*, Public Notice, 21 FCC Rcd 12957 (MB 2006).

⁸² Zahn cites *Jersey Shore* in support of its argument that Section 73.3518 dictates the dismissal of KM’s short-form auction applications. Zahn’s reliance on *Jersey Shore*, however, is misplaced since unlike this case, *Jersey Shore* addressed complete Form 301 applications in the comparative hearing context.

applications covering the same facilities for which new or major change technical proposals were submitted in the auction window, to request dismissal of the prior-filed applications.⁸³

28. Zahn argues, however, that if the *Staff Decision* is not reversed, it will encourage applicants to file specious applications all over the country without regard to whether the proposals are actually feasible.⁸⁴ We find Zahn's concerns unfounded and unpersuasive. As we have explained, we have ample tools at our disposal to discourage unqualified applicants from participating in the auction process.⁸⁵ Such tools afford adequate safeguards against applicants filing applications for speculative purposes.

IV. ORDERING CLAUSE

29. Accordingly, IT IS ORDERED, that the Application for Review filed by Susquehanna Radio Corp. IS DENIED, and the Petition for Reconsideration filed by James K. Zahn IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁸³ See, e.g., *AM Auction No. 84 Singleton Applications*, Public Notice, 19 FCC Rcd 22569 (MB 2004).

⁸⁴ Zahn Petition at 4.

⁸⁵ See *Broadcast First Report and Order*, supra n. 15, 13 FCC Rcd 15979; see also 47 C.F.R. §§ 1.2104(g)(2), 1.2107(b), 1.2109(c).

**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.