

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

In the Matter of)	
)	
FIRESIDE MEDIA)	File No. BNP-20040130APQ
)	Facility ID No. 161135
Application for a New AM Broadcast Station at Kirbyville, Missouri)	
)	
and)	
)	
COLLEEN R. MCKINNEY)	File No. BNP-20040130AUA
)	File No. BNP-20091023ABH
Application for a New AM Broadcast Station at Braham, Minnesota)	Facility ID No. 160612
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 2013

Released: April 12, 2013

By the Commission: Commissioner McDowell not participating.

1. The Commission has before it the Application for Review (“AFR”), filed by Fireside Media (“Fireside”), applicant for a new AM broadcast station at Kirbyville, Missouri. Fireside seeks review of the Media Bureau’s August 26, 2009, decision awarding a dispositive preference,¹ under Section 307(b) of the Communications Act,² to Colleen McKinney’s (“McKinney”) mutually exclusive application for a new AM broadcast station at Braham, Minnesota.

2. Fireside cites no factual or legal errors in the Bureau’s finding that Braham is more populous than Kirbyville, and thus that McKinney’s proposal merits a dispositive preference under Section 307(b).³ Instead, Fireside argues that the distance between the two proposals mandates grant of both, and that the two applicants should have been allowed to resolve any interference issues.⁴ Fireside raised these arguments in its November 21, 2007, Petition for Reconsideration of the Bureau’s October 22, 2007, letter granting a dispositive Section 307(b) preference to the then-mutually exclusive application of RAMS II for a new AM broadcast station at Wyoming, Minnesota.⁵ As noted in the *Staff Decision*, RAMS II subsequently withdrew its application.⁶ Accordingly, in the *Staff Decision*, the Bureau dismissed that application and, therefore, also dismissed as moot Fireside’s Petition for

¹ *Fireside Media and Colleen R. McKinney*, Letter, Ref. No. 1800B3-TSN (MB Aug. 26, 2009) (“*Staff Decision*”).

² 47 U.S.C. § 307(b).

³ See *Staff Decision* at 2-4.

⁴ AFR at 2-3.

⁵ *Rams II, Fireside Media, and Colleen R. McKinney*, Letter, Ref. No. 1800B3 LAS/JP (MB Oct. 22, 2007) (“October Letter”). RAMS II’s application was File No. BNP-20040130BCQ.

⁶ *Staff Decision* at 2.

Reconsideration of the October Letter.⁷ Fireside failed to seek reconsideration or review of that pleading's dismissal. For this reason, the Commission need not consider these arguments here.⁸

3. Even if we were to consider Fireside's arguments on the merits, we find them to be unpersuasive as an alternative and independent basis for our decision. The two remaining proposals would cause nighttime interference to each other under well-established Commission engineering standards, precluding the grant of both applications.⁹ Moreover, our Rules prohibit auction filing window applicants from discussing or negotiating settlement agreements.¹⁰ The narrow exceptions, such as that for groups containing noncommercial educational ("NCE") applicants cited by Fireside,¹¹ are not likely to compromise the competitiveness of the auction process because NCE applicants, unlike Fireside and McKinney, may not participate in auctions.¹² Thus, prohibiting a technical resolution or settlement in a mutually exclusive application group such as this was not arbitrary and capricious, as Fireside contends. Rather, it is based on the Commission's due consideration of the policies underlying our congressionally mandated broadcast auction authority.¹³ Fireside's remaining argument, criticizing the Bureau's failure to consider McKinney's challenge to its financial qualifications,¹⁴ is without merit. As noted in the *Staff Decision*, because Fireside did not prevail in the Section 307(b) analysis, its financial qualifications are not at issue.¹⁵

4. Upon review of the AFR and the entire record, we conclude that Fireside has failed to demonstrate that the Bureau erred. The Media Bureau, in the *Staff Decision*, properly decided the matters raised, and we uphold its decision for the reasons stated therein.

⁷ *Id.*

⁸ See 47 C.F.R. § 1.115(c).

⁹ McKinney's Braham proposal would enter the 50 percent exclusion root sum square nighttime limit of Fireside's proposed Kirbyville facility. As such, McKinney's proposal would be a high-level interferer to Fireside's, and under the Commission's Rules the two proposals are considered to be mutually exclusive. See Note to 47 C.F.R. § 73.3571; *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2580-84 (2011).

¹⁰ 47 C.F.R. § 1.2105(c).

¹¹ AFR at 2-3; see 47 C.F.R. § 73.5002(d); *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 20 FCC Rcd 10563, 10564-65 (MB/WTB 2005).

¹² See *Reexamination of the Comparative Standard for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6702 (2003), *recon. granted in part on other grounds*, Memorandum Opinion and Third Order on Reconsideration, 23 FCC Rcd 17423 (2008).

¹³ AFR at 3-4. Further, the Commission and the courts have determined that the public interest and the integrity of the auction process do not require us to allow unilateral post-Form 175 filing deadline technical amendments designed merely to resolve mutual exclusivity, even if doing so would result in multiple awards of construction permits. *Robert E. Combs*, Memorandum Opinion and Order, 19 FCC Rcd 13421, 13426 (2004), *recon. dismissed*, Order on Reconsideration, 20 FCC Rcd 17238 (2005), citing *Bachow Communications, Inc. v. F.C.C.*, 237 F.3d 683, 691 (D.C. Cir. 2001).

¹⁴ AFR at 4-5.

¹⁵ *Staff Decision* at 4 n.16.

5. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,¹⁶ and Section 1.115(g) of the Commission's Rules,¹⁷ the AFR IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁶ 47 U.S.C. § 155(c)(5).

¹⁷ 47 C.F.R. § 1.115(g).