

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

In the Matter of)	
)	
JET FUEL BROADCASTING)	File No. BNP-20040130AQT
)	Facility ID No. 161347
Application for a New AM Broadcast Station at Lolo, Montana)	
)	
and)	
)	
RAMS III)	File No. BNP-20040130BNE
)	File No. BNP-20100726AMH
Application for a New AM Broadcast Station at Springville, Utah)	Facility ID No. 161249
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 2014

Released: February 20, 2014

By the Commission:

1. The Commission has before it the June 24, 2010 Application for Review (“AFR”), filed by Jet Fuel Broadcasting (“JFB”), applicant for a new AM broadcast station at Lolo, Montana. JFB seeks review of the Media Bureau’s May 25, 2010, decision awarding a dispositive preference,¹ under Section 307(b) of the Communications Act of 1934, as amended,² to the RAMS III (“RAMS”) mutually exclusive application for a new AM broadcast station at Springville, Utah.

2. In its AFR, JFB disputes the staff’s denial of its claimed first local transmission service proposal at Lolo, maintaining that the relocation of an existing FM station to that community that occurred after JFB had filed its application in the 2004 AM Auction 84 (“Auction 84”) filing window³ should not have undermined JFB’s first service claim.⁴ Contrary to JFB’s contention, the Bureau’s decision did not turn upon the subsequent relocation of the FM station to Lolo. The Media Bureau made clear in the *Staff Decision* that, even disregarding the move of the FM station to Lolo and assuming the legitimacy of JFB’s proposed first local service at that community, the JFB application would still not have prevailed over RAMS’s proposal to provide first local transmission service at the more populous community of Springville.⁵ Where, as here, applicants propose first local transmission service at two or

¹ *Christopher D. Imlay, Esq., et al.*, Letter, Ref. No. 1800B3-TSN (MB May 25, 2010) (“*Staff Decision*”).

² 47 U.S.C. § 307(b).

³ Station KDXT(FM), formerly licensed at Victor, Montana (File No. BLH-20080208ADZ).

⁴ AFR at 1.

⁵ Springville’s 2000 Census population of 20,424 was six times that of Lolo’s 2000 population of 3,388. The magnitude of the population difference is even greater using 2010 Census figures (29,466 for Springville to 3,892 for Lolo).

more separate communities, and listeners in each of the communities receive five or more aural services,⁶ the Commission awards a preference to the community with the larger population.⁷ We therefore affirm the Media Bureau's rejection of this argument.

3. JFB further argues that the 589-mile distance between the two proposals mandates grant of both, and that RAMS's Springville proposal is "highly overpowered and causes nighttime interference."⁸ It also contends that the two applicants should have been allowed to "harmonize" their engineering to resolve any interference issues.⁹ We also find these arguments to be unpersuasive. The two proposals would cause nighttime interference to each other under well-established Commission engineering standards, precluding the grant of both.¹⁰ With regard to JFB's demand that it now be allowed to "harmonize" its engineering with RAMS's proposal by way of settlement, JFB acknowledges that, since the original mutually exclusive ("MX") group of 116 applicants included its and RAMS's proposals, it was already afforded such a limited settlement opportunity.¹¹ As the Public Notice listing those applicants and announcing the three-month settlement window clearly stated, the window constituted a limited exception to our rules prohibiting auction filing window applicants from discussing or negotiating settlement agreements.¹² We reject JFB's demand for an additional settlement opportunity because, although the applicants in the MX groups were listed in the *Auction 84 Settlement Public Notice*,¹³ JFB did not ascertain the specific applications with which it was in conflict until after the settlement window had closed.¹⁴

⁶ Both communities are well served by at least five full-time aural services. *See Family Broadcasting Group*, Decision, 93 FCC 2d 771, 779 (Rev. Bd.), *rev. denied*, FCC 83-559 (1983) (Commission considers areas that receive five or more services to be abundantly served).

⁷ *See, e.g., Blanchard, Louisiana and Stephens, Arkansas*, Memorandum Opinion and Order, 10 FCC Rcd 9828 (1995) (decision based on population difference of 38 people); *Cameron and Hackberry, Louisiana*, Report and Order, 20 FCC Rcd 16267 (MB 2005) (decision based on population difference of 266 people).

⁸ AFR at 2.

⁹ AFR at 2-3.

¹⁰ JFB's Lolo proposal would enter the 25 percent exclusion root sum square nighttime limit of RAMS's proposed Springville facility. As such, JFB's proposal would be a mid-level interferer to RAMS'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). As for JFB's allegation that RAMS's proposal is "highly overpowered," the staff bases its analyses on the proposals presented, rather than on what certain applicants might unilaterally consider to be more appropriately powered proposals by competing applicants. Here, RAMS proposes a non-directional 10 kW (day) 0.57 kW (night) Class B AM facility, which is well within the allowed power limits for that class. 47 C.F.R. § 73.21(a)(2).

¹¹ AFR at 2-3. The original 116-application group was designated MX Group 84-39. After certain parties arrived at settlements or technical resolutions during the settlement window period (*see AM Auction No. 84 Mutually Exclusive Applicants Subject To Auction – Settlement Period Announced for Certain Mutually Exclusive Application Groups; September 16, 2005 Deadline Established for Section 307(b) Submissions*, Public Notice, 20 FCC Rcd 10563 (MB 2005) ("*Auction 84 Settlement Public Notice*"), as extended by *Auction No. 84 Settlement Period and Section 307(B) Submission Deadline Extended to October 31, 2005*, Public Notice, 20 FCC Rcd 14492 (MB 2005)), MX Group 84-39 was divided into sub-groups; JFB's and RAMS's proposals were two of 11 applications in sub-group 84-39F. *See AM Auction No. 84, MX Group 84-39 Reconfigured Due to Settlements and Technical Resolutions; Subgroups Listed*, Public Notice, 24 FCC Rcd 12099 (MB 2009).

¹² *Auction 84 Settlement Public Notice*, 20 FCC Rcd at 10564 ("Once this settlement window is completed, the anti-collusion restrictions will again take effect for [the listed] applicants.") *citing* 47 C.F.R. §§ 1.2105(c), 73.5002(d).

¹³ *Auction 84 Settlement Public Notice*, 20 FCC Rcd at 10570-73.

¹⁴ AFR at 3.

4. In this regard, JFB complains that the MX group noted in the Public Notice was “mammoth in size, making it extremely difficult for any precise two applicants to know that they should work with each other specifically to resolve prospective engineering conflict, when such resolution could conceivably pose new conflict, or maintain existing conflict, with yet another applicant.”¹⁵ In point of fact, many of the applicants listed in the Public Notice were able to reach settlements. Furthermore, the Auction 84 settlement window did not create new mutual exclusivities between proposals, as JFB suggests. Rather, the efforts of those applicants listed in the Public Notice that, unlike JFB, chose to negotiate, reach and file settlements or technical resolutions during the window actually eliminated certain application conflicts, thus enabling the largest MX group in Auction 84 to be broken down into smaller sub-groups. The RAMS and JFB proposals were mutually exclusive at all relevant times, and JFB’s failure to propose a technical resolution or attempt a settlement during the designated settlement window period does not justify opening a second. Our congressional auction mandate does not require us to continue making exceptions to the auction rules prohibiting applicant communications,¹⁶ in the hope that parties that did not reach settlements or technical resolutions in the first instance might do so later. The Commission and the courts have determined that the public interest and the integrity of the auction process do not require us to allow post-Form 175 technical amendments designed to resolve mutual exclusivity.¹⁷

5. Upon review of the AFR and the entire record, we conclude that JFB 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.

6. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,¹⁸ and Section 1.115(g) of the Commission’s Rules,¹⁹ the AFR IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁵ *Id.*

¹⁶ *See generally* 47 U.S.C. § 309(j).

¹⁷ *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) (while Section 309(j)(6)(E) of the Act “affirms Congress’ view that statutory competitive bidding authority does not wholesale replace ‘engineering solutions, negotiation . . . and other means’ to *avoid mutual exclusivity*; it does not, as appellants would have it, forbid resort to competitive bidding unless no other means to *resolve* mutual exclusivity are available.” (emphasis in original)).

¹⁸ 47 U.S.C. § 155(c)(5).

¹⁹ 47 C.F.R. § 1.115(g).