



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to:

1800B3-TSN

Ruby Radio Corporation
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In re: **Broadcast Auction No. 84**

Scott Powell

New(AM), Elko, Nevada
Facility ID No. 161099
File No. BNP-20041029AJL

Application for Construction Permit

Dear Counsel:

We have before us the January 5, 2005, Petition to Deny ("Petition") the above-noted application of Scott Powell ("Powell") for a new AM broadcast station at Elko, Nevada.¹ The Petition was filed by Ruby Radio Corporation ("Ruby"), licensee of KHIX(FM), Carlin, Nevada. As explained below, we deny Ruby's Petition, and grant Powell's application.

Powell filed a Form 175 short-form application proposing a new AM station at Elko during the filing window for AM Broadcast Auction No. 84 ("Auction 84").² Because his Elko proposal was not mutually exclusive with any other Auction 84 applications, it was deemed a "singleton," and Powell was directed to file a complete Form 301 long-form application for Elko.³

¹ File No. BNP-2004029AJL.

² *AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

³ *AM Auction No. 84 Singleton Applications – Media Bureau Announces Form 301 Application Deadline and Ten-Day Petition to Deny Period*, Public Notice, 19 FCC Rcd 16655 (MB 2004).

In its Petition, Ruby alleges that Powell's business partner, Amy Meredith, sent Ruby's president, Ken Sutherland, an unsolicited e-mail dated December 26, 2004, in which she purported to offer the "rights" to, *inter alia*, Powell's yet-to-be-granted Elko permit.⁴ Ruby argues that "well settled" Commission policy dictates that construction permits should be granted only to qualified applicants who have a *bona fide* intent to construct the facilities they propose and to render a broadcast service.⁵ Ruby concludes that, because Powell's agent offered the rights to the Elko permit shortly after the long form application was filed (and before it was accepted for filing), Powell has demonstrated a lack of *bona fide* intent to construct and operate the facilities. Accordingly, Ruby urges that the application be denied.

There is no longer a flat prohibition against for-profit sale of construction permits acquired pursuant to competitive bidding procedures.⁶ Rejecting the traditional rationale for prohibiting such for-profit sales of unbuilt facilities, namely, that to do so would encourage spectrum speculation, the Commission explained:

Our concern with spectrum speculation in an auction environment, where there are strict bidding and payment requirements and where the winning bidder has paid fair market value for an authorization, is minimal. We also believe that the competitive bidding process itself, where the permittee may be required to make a substantial front end payment, provides a strong impetus for timely station construction. Even in cases where a commercial permit is not issued pursuant to an auction, *e.g.*, because only one application was filed for a frequency and therefore the application was granted as a "singleton," we believe it is appropriate to eliminate reimbursement restrictions. Applicants holding these permits would have been potentially subject to the auction process. Moreover, our concerns about speculation will be at a minimum where an auction fails to attract a single competing proposal. Even assuming that "singleton" commercial station permittees do not have the same impetus to build quickly in order to recoup auction expenditures, we believe that the automatic cancellation and forfeiture provisions adopted in this *Report and Order* . . . will provide sufficient incentives to construct authorized facilities promptly.⁷

In this case, Powell appears to be offering to assign an unbuilt (and, indeed, un-awarded) construction permit for an amount not limited to Powell's expenses in prosecuting the application for the permit. We note that Ruby provides no evidence that Powell has succeeded in finding a buyer for the Elko permit. Thus, there is no evidence to contradict the Commission's observation that anyone interested in acquiring "singleton" facilities obtained in an open AM auction filing window would presumably have filed a competing auction window application. Moreover, even if Ruby is correct that Powell lacks a *bona fide* intent to construct its proposed new AM station at Elko, and in fact fails to construct that station, the construction permit will be canceled in three years in accordance with our strict broadcast station construction and automatic permit cancellation requirements.⁸

⁴ Ruby attaches a printout of the e-mail exchange between Meredith and Sutherland as Exhibit "A" to the Petition.

⁵ Petition at 2, citing *Calhoun County Broadcasting Company*, Memorandum Opinion and Order, 57 R.R.2d 641 (1984).

⁶ *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056 (1998), *recon. granted in part*, 14 FCC Rcd 17525 (1999) ("*Non-Technical Streamlining*").

⁷ *Non-Technical Streamlining*, 13 FCC Rcd at 23071.

⁸ See 47 C.F.R. § 73.3598.

We observe, however, that Ruby's concerns do not lack merit merely because they arise here in an auction context. When the Commission in *Non-Technical Streamlining* noted its "minimal" concern for the possibility of spectrum speculation, this did not necessarily mean that the Commission implicitly condoned such speculation. It concluded only that such speculation was unlikely, given the risks and expenses associated with prosecuting auction applications. As recently as two years prior to releasing *Non-Technical Streamlining*, the Commission re-affirmed that "[c]onstruction permits are granted only to qualified applicants in reliance upon their *bona fide* intention to place the proposed station on the air and to provide broadcast service."⁹ The Commission went on to state that this policy was established "to preclude the use of broadcast authorizations as a means of obtaining financial gain without rendering the broadcast service which, alone, justifies grant of the permits."¹⁰ The auction process itself is designed to further the Commission policy of promoting rapid deployment of broadcast service to the public.¹¹ The evidence provided by Ruby, namely, the Meredith e-mail offering two AM stations for sale before obtaining their permits (and referencing five other full-power AM stations and an FM translator that, presumably, were on offer as well) could be viewed as an attempt by Powell to profit from yet-unawarded permits without any intent to construct the facilities. However, as noted above, Powell and Meredith's success in selling these permits is by no means guaranteed. Thus, we think that, rather than grant Ruby's Petition, the better course is that followed in *Silva* and *Zaragoza and Tongier*, that is, to reserve consideration of these questions until such time, if any, as Powell or his affiliates attempt to assign any permits they may obtain.

Accordingly, Ruby's Petition to Deny IS DENIED. Powell's application for a construction permit for a new AM station at Elko, Nevada IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁹ *TRMR, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 17081, 17087 (1996).

¹⁰ *Id.* (quoting *Assignment and Transfer of Construction Permits*, 33 Fed. Reg. 12678 (Sept. 6, 1968)). See also *Richard R. Zaragoza, Esq. and John Tongier, Esq.*, Letter, 14 FCC Rcd 1732, 1742-43 (MMB 1998) ("*Zaragoza and Tongier*") (reiterating principle that when reviewing assignment of a broadcast construction permit, "the terms of the arrangements between parties and the totality of the facts and underlying circumstances must be reviewed to determine whether the facts reflect a permittee's intention to construct the station or are more reflective of an up-front sale with consummation postponed until after the station goes on the air," citing *William L. Silva, Esq.*, Letter, Ref. No. 1800B3-MFW (MMB July 24, 1995) ("*Silva*"), review denied sub nom. *Choctaw Broadcasting Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 8534 (1997), in which the Mass Media Bureau concluded from sale documents and the lack of any concrete steps toward station construction that an assignor permittee lacked intention to construct).

¹¹ See 47 U.S.C. § 309(j)(3)(A). See also *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15935 (1998), on recon. Memorandum Opinion and Order, 14 FCC Rcd 8724, on further recon. Memorandum Opinion and Order, 14 FCC Rcd 14521 (1999).