

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In re Applications of	)	
	)	
GREEN VALLEY BROADCASTERS, INC.	)	File No. BNP-20000201ADK
	)	Facility ID No. 122407
For a New AM Broadcast Station	)	
at Sahuarita, Arizona	)	
	)	
and	)	
	)	
NELSON MULTIMEDIA, INC.	)	File No. BNP-20000201AGY
	)	Facility ID No. 122544
For a New AM Broadcast Station	)	
at Las Vegas, Nevada	)	
	)	
and	)	
	)	
KEMP COMMUNICATIONS, INC.	)	File No. BNP-20000201AFX
	)	Facility ID No. 122525
For a New AM Broadcast Station	)	
at Las Vegas, Nevada	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 25, 2004**

**Released: July 16, 2004**

By the Commission: Commissioners Copps and Adelstein concurring and issuing a joint statement.

1. The Commission has before it the July 26, 2002, Applications for Review filed by Green Valley Broadcasters, Inc. ("Green Valley"), applicant for a new AM broadcast station at Sahuarita, Arizona,<sup>1</sup> and by Nelson Multimedia, Inc. ("Nelson"), applicant for a new AM broadcast station at Las Vegas, Nevada.<sup>2</sup> Green Valley's and Nelson's applications were determined to be mutually exclusive ("MX") with the application of Kemp Communications, Inc. ("Kemp") for a new AM broadcast station at Las Vegas, Nevada.<sup>3</sup> The three applications were filed during the window for AM Broadcast Auction No.

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<sup>1</sup> File No. BNP-20000201ADK.

<sup>2</sup> File No. BNP-20000201AGY. Nelson and Green Valley are commonly owned entities. Larry and Pamela Nelson hold 97.5% of Green Valley's voting stock as joint tenants, as well as 78% of Nelson's voting stock. The two entities also share common officers, and are represented by the same law firm.

<sup>3</sup> File No. BNP-20000201AFX.

32, and were designated MX Group AM 4.<sup>4</sup> Green Valley and Nelson request review of the Media Bureau's ("Bureau") June 26, 2002, staff decision ("Staff Decision")<sup>5</sup> in which the Bureau dismissed Nelson's application, and awarded Kemp's application a dispositive preference under Section 307(b) of the Communications Act of 1934, as amended.<sup>6</sup> For the reasons discussed below, we deny the Applications for Review.

2. **Background.** In the *Mutually Exclusive Public Notice* released October 27, 2000,<sup>7</sup> 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). Kemp and Green Valley filed amendments pursuant to the *Mutually Exclusive Public Notice*, but the Bureau did not receive an amendment from Nelson.<sup>8</sup> By letter dated October 22, 2001, the Bureau sent a second request for Section 307(b) amendments to the parties' applications.<sup>9</sup> In the October Section 307(b) Request, the Bureau offered all three applicants in MX Group AM 4 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 Section 307(b) amendment.<sup>10</sup> The October Section 307(b) Request also contained the following statement:

The staff will dismiss, without further processing, the short-form application submitted during the AM Auction No. 32 filing window of any applicant that fails to file, by November 26, 2001, either an amendment addressing the Section 307(b) criteria, or a letter request to consider its previous submission. *See* 47 C.F.R. § 73.3568(a)(1).<sup>11</sup>

3. In response to the October Section 307(b) Request, Kemp timely submitted a revised Section 307(b) showing, while Green Valley timely requested we consider its earlier amendment as its Section 307(b) submission. Nelson submitted a letter indicating that it wished to rely on its earlier Section 307(b) submission; however, as noted above, Nelson had not previously filed a Section 307(b) amendment.<sup>12</sup> Nelson did not file such an amendment until March 14, 2002, over three months after the

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<sup>4</sup> *Public Notice*, "AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction," 15 FCC Rcd 20449 (MMB 2000) ("*Mutually Exclusive Public Notice*"), extended by *Public Notice*, "AM Auction No. 32 Mutually Exclusive Applicants – Settlement Period and Section 307(b) Filing Period Extended to February 28, 2001," 15 FCC Rcd 24644 (MMB 2000).

<sup>5</sup> *Letter to Green Valley Broadcasters, Inc., et al.*, Ref. No. 1800B3-TSN (MB June 26, 2002).

<sup>6</sup> 47 U.S.C. § 307(b) ("Section 307(b)").

<sup>7</sup> *See supra* note 4.

<sup>8</sup> Nelson states it "believes" it filed such an amendment. *See, e.g.*, Nelson Application for Review at 2.

<sup>9</sup> *Letter to Green Valley Broadcasters, Inc., Kemp Communications, Inc., and Nelson Multimedia, Inc., from Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau*, Ref. No. 1800B3-TSN (MMB Oct. 22, 2001) ("October Section 307(b) Request"). The October Section 307(b) Request bore OMB Control No. 3060-0996.

<sup>10</sup> October Section 307(b) Request at 2-3.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> Nelson submitted a letter dated November 23, 2001, and signed by Mr. Larry Nelson, Nelson's president, requesting that we consider its "already filed" Section 307(b) submission, presumably filed in response to the *Mutually Exclusive Public Notice*. *See supra* note 4. The Bureau has no record of ever having received the "already  
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deadline set forth in the (second) October Section 307(b) Request.<sup>13</sup> The cover letter was submitted by Nelson's counsel, Jerrold Miller, Esq., and the attached amendment was signed by John Neely, Esq., Nelson's and Green Valley's vice president and Green Valley's counsel.<sup>14</sup> In its March 14, 2002, submission, Nelson stated it was "unable to verify" whether it had previously submitted a Section 307(b) showing, also requesting a waiver of the filing deadline if necessary.<sup>15</sup>

4. In the Staff Decision, the Bureau dismissed Nelson's application for failure to respond to the October Section 307(b) Request. Additionally, to the extent Nelson sought waiver of the November 26, 2001, submission deadline, the Bureau found no special circumstances warranting waiver.<sup>16</sup> The Bureau then performed a Section 307(b) analysis of the competing Kemp and Green Valley applications, finding that neither proposed first or second aural service or first local service, and therefore evaluating the applications under Priority (4) of our assignment priorities.<sup>17</sup> The Bureau concluded that, due to the substantially larger number of persons served, Kemp's proposal should be awarded a dispositive Section 307(b) preference over Green Valley's.<sup>18</sup> The Bureau instructed Kemp to file a complete Form 301 application, indicating that Green Valley's application would be dismissed upon grant of a construction permit to Kemp.<sup>19</sup>

5. **Discussion.** *Mutual exclusivity of applications:* Both Green Valley and Nelson argue that Green Valley's application is not mutually exclusive with either Nelson's or Kemp's, and therefore none of the parties should have been required to submit Section 307(b) information. Nelson and Green Valley argue that the Bureau erroneously relied on Section 73.182 of our rules,<sup>20</sup> which requires

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filed" submission from Nelson. Mr. Nelson filed an identical letter, also dated November 23, 2001, as president of Green Valley, requesting that we consider Green Valley's original February 28, 2001, Section 307(b) submission.

<sup>13</sup> October Section 307(b) Request at 3.

<sup>14</sup> Mr. Neely also signed Green Valley's original February 28, 2001, Section 307(b) submission as vice president of that corporation.

<sup>15</sup> *Letter to William F. Caton, Acting Secretary, from Jerrold Miller, Esq.* (Mar. 14, 2002), at 2.

<sup>16</sup> Staff Decision at 3.

<sup>17</sup> *See Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982) ("*FM Assignment Policies*"). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). The priorities set forth in *FM Assignment Policies* are also used in evaluating applicants for new AM stations. *Alessandro Broadcasting Co.*, 99 FCC 2d 1 (1984). The Bureau specifically stated that the priorities set forth in *FM Assignment Policies* would be applied in AM Auction No. 32. *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451.

<sup>18</sup> *Id.* at 4-5.

<sup>19</sup> *Id.* at 5. Kemp timely filed its complete Form 301 application July 26, 2002 (File No. BNP-20020726ACT). In the Staff Decision the Bureau also denied Kemp's Petition to Dismiss the Nelson and Green Valley applications. Kemp argued that, because Nelson and Green Valley have common owners and officers and are represented by the same law firm, they should be considered the same applicant and thus, under 47 C.F.R. § 73.3518, should have been prohibited from filing inconsistent, mutually exclusive applications. Kemp does not seek review of the Bureau's denial of its Petition to Dismiss.

<sup>20</sup> 47 C.F.R. § 73.182.

applicants to protect existing stations but does not, in their view, apply to applicants for new stations.<sup>21</sup> However, we have already rejected this same argument made by both parties, and find no reason to revisit our decision in this regard.<sup>22</sup> The three applications are mutually exclusive, and the Bureau properly sought Section 307(b) information.

6. *Dismissal of Nelson application:* Nelson argues that its application was improperly dismissed. It claims that it “believes it did provide the information requested by the Commission in response to the Bureau’s request, but the Commission is unable to locate its submission, and Nelson has not been able to provide proof thereof.”<sup>23</sup> Nelson further contends that the October Section 307(b) Request gave no indication that the Bureau had not received the information Nelson believed it submitted, and that “[f]airness and equity required the Bureau” to have advised Nelson that it had not received any prior Section 307(b) information.<sup>24</sup> Finally, Nelson claims that “at worst there was one instance of missing a deadline,” and that therefore there is insufficient reason to dismiss its application for failure to prosecute.<sup>25</sup>

7. We reject Nelson’s contentions. First, Nelson’s subjective belief as to whether it submitted 307(b) information in response to the Bureau’s *Mutually Exclusive Public Notice* is immaterial. The Commission’s Office of the Secretary routinely provides parties with date-stamped copies of filed documents upon request at the time of filing. Despite this, however, at no point has Nelson produced a date-stamped copy of a filed 307(b) submission to demonstrate that its belief is accurate. The Commission generally requires such evidence before it will reinstate an application dismissed for failure to respond to a request for information.<sup>26</sup> Second, Nelson cites no authority for its proposition that “fairness and equity” imposed on the Bureau an obligation to inform Nelson of Nelson’s failure to submit Section 307(b) information. Upon receipt of the October Section 307(b) Request, it was incumbent upon Nelson to determine whether it needed or desired to submit information. Moreover, Nelson had not one but two opportunities to submit such information, in February 2001 pursuant to the *Mutually Exclusive Public Notice*, and again in November 2001 pursuant to the October Section 307(b) Request. In fact, the October Section 307(b) Request gave Nelson the opportunity to correct its failure originally to submit Section 307(b) information in February 2001. Given Nelson’s apparent uncertainty over whether it had submitted such information in February 2001, it bore the burden of re-submitting its Section 307(b) information in November 2001.<sup>27</sup> Thus, it is incorrect to assert, as Nelson has, that there was “at worst

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<sup>21</sup> See Nelson Application for Review at 4-5; Green Valley Application for Review at 3-4.

<sup>22</sup> *Nelson Enterprises, Inc.*, 18 FCC Rcd 3414 (2003). Neither Green Valley nor Nelson sought reconsideration or court review of *Nelson Enterprises, Inc.*

<sup>23</sup> Nelson Application for Review at 2.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> *Id.* at 6-7, citing *Comuni-Centre Broadcasting, Inc. v. F.C.C.*, 856 F.2d 1551 (D.C. Cir. 1988) (“*Comuni-Centre*”).

<sup>26</sup> See, e.g., *Mableton Broadcasting Co., Inc.*, 8 FCC Rcd 7020 (Rev. Bd. 1993) (dismissal of application overturned when petitioner filed affidavits indicating all documents had been filed, attaching stamped copies of filed documents).

<sup>27</sup> It should be noted that the Bureau, in the October Section 307(b) Request, set forth the option of relying upon earlier submissions as a convenience to applicants who had, in some cases, already submitted lengthy Section 307(b) amendments. Thus, an applicant that was confident it had already submitted Section 307(b) information, and which did not want to re-file, need not have done so. However, this in no way prevented any applicant from re-submitting  
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one instance of missing a deadline” – it missed two deadlines.<sup>28</sup> Further, because both Nelson and Green Valley are commonly owned, and are represented by the same law firm, and because Green Valley timely submitted Section 307(b) information, Nelson presents no valid reason for its failure to do so.<sup>29</sup> Lastly, the Commission has determined that the effective and expeditious dispatch of the Commission’s business is, in itself, an integral part of the public interest.<sup>30</sup> We therefore find no error in the Bureau’s dismissal of Nelson’s application for failure to meet a clearly articulated deadline.

8. We also reject Nelson’s contention that the court’s decision in *Comuni-Centre* suggests that the Bureau erred in dismissing Nelson’s application. In *Comuni-Centre*, the court upheld the Commission’s dismissal of Comuni-Centre’s application for failure to prosecute, after it failed timely to file proposed findings of fact and conclusions of law in a comparative hearing. Nelson urges that we may only dismiss its application based on “a pattern of casual and dilatory conduct.”<sup>31</sup> However, while the *Comuni-Centre* court found such a pattern of misconduct in that case, it did not state that such a pattern was necessary before dismissing an application for failure to prosecute. Indeed, the court cited with approval Commission rules stating that untimely submission of requested information can be a ground for dismissal.<sup>32</sup> Additionally, the court noted that the Administrative Law Judge had specifically advised Comuni-Centre of the consequences of its failure to file proposed findings.<sup>33</sup>

9. Likewise, in this case, the Bureau clearly advised applicants of the consequences of failure to submit Section 307(b) information. In both the *Mutually Exclusive Public Notice* and the October Section 307(b) Request, the Bureau stated that it would dismiss without further processing the application of any applicant that failed to file a response thereto. Although Nelson filed a letter requesting that we consider his (non-existent) prior submission, the fact is that as of the November 26, 2001, deadline, Nelson had failed to provide any information with which the Bureau could perform the required Section 307(b) analysis.<sup>34</sup> Under Section 73.3568(a)(1) of our rules (cited in the *Mutually*

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or amending its Section 307(b) showing and, as noted in the text, afforded a second chance to any applicant that either failed to submit such information originally or was uncertain as to whether it had submitted such information.

<sup>28</sup> Nelson Application for Review at 6-7.

<sup>29</sup> This fact likewise precludes a finding of “special circumstances” necessary to justify a waiver of the submission deadline. See, e.g., *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest,” citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969). See also *Melody Music, Inc. v. F.C.C.*, 345 F.2d 730, 732 (D.C. Cir. 1965) (Commission must explain reasons for treating similarly situated applicants differently).

<sup>30</sup> *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986) (“Hillebrand”).

<sup>31</sup> 856 F.2d at 1555; Nelson Application for Review at 6-7.

<sup>32</sup> 856 F.2d at 1554 n.21, 1556 and n.39. See also 47 C.F.R. § 73.3568(a)(1) (“Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal.”).

<sup>33</sup> 856 F.2d at 1556 and n.37.

<sup>34</sup> *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses* (“Broadcast First Report and Order”), 13 FCC Rcd 15920, 15964-65 (1998); *recon denied*, 14 FCC Rcd 8724 (1999); *modified*, 14 FCC Rcd 12541 (1999).

*Exclusive Public Notice* and the October Section 307(b) Request), failure to respond to a request for additional information will be cause for dismissal.<sup>35</sup> The Bureau thus acted properly in dismissing Nelson's application.

10. *Section 307(b) determination:* Green Valley, in its Application for Review, argues that the Bureau erred in finding a dispositive Section 307(b) preference for Kemp's Las Vegas proposal. Specifically, Green Valley contends that the Bureau failed to evaluate correctly the respective needs of Sahuarita and Las Vegas for an additional local service. Green Valley asserts that Commission precedent dictates that a second local/first competitive service at Sahuarita is to be preferred over a twentieth local service at Las Vegas.

11. In this case, we agree with the Bureau that the significant difference in respective populations receiving service warrants a dispositive Section 307(b) preference for the Kemp Las Vegas proposal. Specifically, Green Valley proposes to serve 439,500 persons in the daytime and 20,122 at night, compared to Kemp's Las Vegas proposal, which would serve 836,318 persons in the daytime and 520,241 at night.<sup>36</sup> We recognize that Green Valley proposes a second local transmission service at Sahuarita, a community of 3,242 persons according to the 2000 U.S. Census. However, the *FM Assignment Policies* do not set forth a specific Section 307(b) priority for a second local service.<sup>37</sup> Instead, a second local transmission service would be considered under Priority (4), other public interest matters. In view of Sahuarita's proximity to the Tucson Urbanized Area and the fact there are in excess of five aural services available to Sahuarita and Green Valley's proposed service area,<sup>38</sup> there is no reason to favor a second local transmission service at Sahuarita under Priority (4) over additional service to a substantially larger number of persons.

12. Green Valley cites *Women's Broadcasting Coalition, Inc.*<sup>39</sup> and *Beacon Broadcasting*<sup>40</sup> in support of its argument that Section 307(b) favors grant of its application over Kemp's. However, those cases do not support Green Valley's contention that a second local service to Sahuarita is entitled to a Section 307(b) preference, because both decisions hinged upon the presence of relatively small "quiet villages" with only marginal need for local transmission services. The Commission determined in *Beacon Broadcasting* that Fairforest, South Carolina, as a "minimally" qualified "licensable" community, was not entitled to consideration as a first local service under Priority (3). In fact, the Commission specifically stated that its decision "was limited to the particular circumstance where an applicant proposes to serve a community aptly described as a 'quiet village' and it has no applicability to other cases where service is proposed for a clearly established, separate and distinct community with palpable political, economic, social and other needs."<sup>41</sup> Thus, in the particular circumstances before it, the

<sup>35</sup> 47 C.F.R. § 73.3568(a)(1).

<sup>36</sup> The daytime populations listed are those encompassed within each proposal's 0.5 mV/m contour.

<sup>37</sup> See *supra* note 17.

<sup>38</sup> We consider five or more services to be "abundant." *Family Broadcasting Group*, 53 RR2d 662 (Rev. Bd. 1983), *rev. denied* FCC 83-559 (Nov. 29, 1983), see also *LaGrange and Rollingwood, Texas*, 10 FCC Rcd 3337 (1995).

<sup>39</sup> 59 RR2d 730 (1986), *aff'd without opinion sub nom. Plantation Broadcasting Corp. v. F.C.C.*, 812 F.2d 1443 (D.C. Cir. 1987).

<sup>40</sup> 2 FCC Rcd 7562 (1987), *aff'd sub nom. New South Broadcasting Corp. v. F.C.C.*, 879 F.2d 867 (D.C. Cir. 1989).

<sup>41</sup> 2 FCC Rcd at 7563.

Commission found only that proposed second local service could be favored over first local service at a community with “tenuous characteristics.”<sup>42</sup> There is no contention in this case that Las Vegas, Nevada, is a “quiet village,” thus *Beacon Broadcasting* is inapposite. Similarly, *Women’s Broadcasting Coalition* stands only for the proposition that the Commission may rebut the Section 307(b) presumption that every community of appreciable size is entitled to a local transmission service, when the population of that community is very small.<sup>43</sup> The Commission thus determined that proposed first local service at Bluffton, South Carolina, with a population of 541 persons, did not merit a dispositive Section 307(b) preference over proposed second local service at the larger community of Hilton Head, South Carolina. *Women’s Broadcasting Coalition* is thus also distinguishable from the case before us.

13. In a footnote Green Valley states that what it claims was “the policy enunciated in *Beacon [Broadcasting]*” was also applied in *Elijah Broadcasting Corp.*<sup>44</sup> That case is also distinguishable from the present case. *Elijah Broadcasting* also involved competing proposals for first local services – at Reston, Virginia, and Walkersville, Maryland. Consistent with prior decisions,<sup>45</sup> the Review Board determined that the larger community of Reston (with a population of 40,093 persons, compared to Walkersville’s population of 3,200) had a greater need for a first local service. The fact that the Walkersville proposal would have served more persons (472,800 vs. 409,208) did not override the Section 307(b) benefit of a first local service to the larger community.<sup>46</sup> This determination was reinforced by the fact the populations receiving additional service already received in excess of five aural services; however, contrary to Green Valley’s assertion, *Elijah Broadcasting* does not stand for the proposition that “overall population within the coverage area is ignored when such population is presently well served.”<sup>47</sup> When comparing two or more proposals for first local transmission service (which is not the case here), size of the community is almost always the deciding factor.<sup>48</sup>

14. Green Valley also contends that the Bureau’s action was inconsistent with *Greenfield and Del Rey Oaks, California*.<sup>49</sup> This case, too, is distinguishable and does not support Green Valley’s contention of staff error. In *Greenfield*, the staff denied a proposal by Troposphere Broadcasting L.P. (“Troposphere”), the permittee of KSEA(FM), Greenfield, California, to substitute FM Channel 300A for Channel 300B at Greenfield, reallocate Channel 300A to Del Rey Oaks, California, and modify the unbuilt

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<sup>42</sup> *Id.*

<sup>43</sup> *Santee Cooper Broadcasting Company of Hilton Head, Inc.*, 99 F.C.C.2d 781, 786-91 (Rev. Bd. 1984), *aff’d*, *Women’s Broadcasting Coalition*, *supra* note 39.

<sup>44</sup> 3 FCC Rcd 5148 (Rev. Bd. 1988), *remanded*, 5 FCC Rcd 5350 (1990). Green Valley Application for Review at 8 n.7.

<sup>45</sup> See, e.g., *West Liberty and Richwood, Ohio*, 6 FCC Rcd 6084 (MMB 1991); *Three Oaks and Bridgman, Michigan*, 5 FCC Rcd 1004 (MMB 1990).

<sup>46</sup> See also *Blanchard, Louisiana and Stephens, Arkansas*, 10 FCC Rcd 9828, 9829 (1995) (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).

<sup>47</sup> Green Valley Application for Review at 13.

<sup>48</sup> See *supra* note 45.

<sup>49</sup> 11 FCC Rcd 12681 (MMB 1996) (“*Greenfield*”).

KSEA(FM) permit to specify operation on Channel 300A at Del Rey Oaks.<sup>50</sup> Troposphere first contended that the move to Del Rey Oaks would provide first local service to that community, compared to second local service at Greenfield. The staff disagreed, finding that Del Rey Oaks was not sufficiently independent of the Seaside-Monterey Urbanized Area to warrant a first local service preference under Priority (3).<sup>51</sup> The staff further concluded that granting Troposphere's request to move KSEA(FM) to the Seaside-Monterey Urbanized Area would not result in a preferential arrangement of allotments. Although the reallocation proposal would have resulted in additional service to a number of persons, it would have required KSEA(FM) to downgrade, and the gain in service would be to areas already abundantly served.<sup>52</sup> Also, the original KSEA(FM) allotment at Greenfield proposed a fourth reception service to over 3,000 persons and fifth reception service to over 8,000. Because the staff in *Greenfield* was determining whether to allow an existing permittee to move its facility to a different community, that case involved a different analysis than the instant case. In contrast, at issue here is an evaluation of two separate proposals for new facilities to serve two different communities. As noted above, our *FM Assignment Policies* do not provide a priority for a new second local transmission service.<sup>53</sup> *Greenfield* thus does not support Green Valley's contention. We find no error in the Bureau's award of a dispositive preference to Kemp under Priority (4) of the *FM Assignment Policies*.<sup>54</sup>

15. **Conclusion.** For the foregoing reasons, the Application for Review filed by Nelson Multimedia, Inc. IS DENIED, and the Application for Review filed by Green Valley Broadcasters, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>50</sup> Significantly, this request was filed and decided pursuant to *Modification of FM and TV Authorizations to Specify a New Community of License* ("Community of License"), 4 FCC Rcd 4870 (1989), *recon. granted in part* 5 FCC Rcd 7094 (1990). *Community of License* permits the modification of a station authorization to specify a new community of license if the proposed reallocation will result in a preferential arrangement of allotments.

<sup>51</sup> *Greenfield*, *supra* note 49, 11 FCC Rcd at 12683-84.

<sup>52</sup> *Id.* at 12685.

<sup>53</sup> *See supra* note 17.

<sup>54</sup> We need not discuss at length Green Valley's contention that the Bureau's action is contrary to the policies enunciated by the court of appeals in *Pasadena Broadcasting Co. v. F.C.C.*, 555 F.2d 1046 (D.C. Cir. 1977) ("*Pasadena Broadcasting*"), as that case is clearly distinguishable. In *Pasadena Broadcasting* the Commission originally awarded a Section 307(b) preference to Los Angeles over a mutually exclusive proposal for first local service at Newport Beach, California, citing the larger populations to be served by the Los Angeles proposals. In reversing this determination, the court favored the first local service proposal. The subsequently adopted Priority (3) of *FM Assignment Priorities* echoes *Pasadena Broadcasting's* holding that first local service proposals should be preferred over proposals merely complementing "preexisting local operations." *Id.* at 1050. Again, however, Green Valley does not propose first local service at Sahuarita, and *Pasadena Broadcasting* does not stand for the proposition that an applicant merely proposing the community with fewer local transmission services is to be favored.



**JOINT STATEMENT OF  
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN  
CONCURRING**

*Re: Green Valley Broadcasters, Inc., For a New AM Broadcast Station at Sahuarita, Arizona et al., Memorandum Opinion and Order; Nelson Enterprises, Inc., For a New AM Broadcast Station at Plano, Illinois et al., Memorandum Opinion and Order; and Robert E. Combs, For a Construction Permit for a New AM Station at Boise, Idaho, Memorandum Opinion and Order*

Section 307(b) directs the Commission to distribute licenses across the nation to ensure the “fair, efficient, and equitable distribution of radio service.” In circumstances of mutually exclusive AM or FM applications, the Commission uses assignment priorities established in 1982 to effectuate Section 307(b)’s objectives. While the first three priorities are more straightforward, the fourth priority embodies a catch-all “other public interest matters.”

We are concerned that in practice this priority has devolved into a raw population comparison where the applicant seeking to serve the larger, more urban area nearly always wins irrespective of the number of stations already serving each community. While service to a greater population is an important criterion under our public interest examination, we have concerns when it becomes the sole criterion. As a general public interest priority, an applicant should have a chance to convince us that there are other compelling reasons – beyond mere population – to award its proposal a dispositive preference. In a handful of cases the Commission has entertained other showings to discount the raw population totals, yet that process requires applicants to undertake complicated and costly engineering calculations, straining the resources of both applicants and the Commission.

We believe there are ways to simplify the process and ensure rural applicants an opportunity to compete on a more even footing. We urge that in the near future the Commission will give some thought to reevaluating its allocation policies, and in particular its treatment of the public interest assignment priority. It is vital that the Commission provide all applicants – whether seeking to serve rural or urban America – an effective process to achieve the distribution goals set forth by Congress.