

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

In re Applications of)	
)	
NELSON ENTERPRISES, INC.)	File No. BNP-20000201AHC
)	Facility ID No. 122551
For a New AM Broadcast Station)	
at Plano, Illinois)	
)	
and)	
)	
D&E COMMUNICATIONS)	File No. BNP-20000128ABF
)	Facility ID No. 122396
For a New AM Broadcast Station)	
at Baxter, Minnesota)	

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 May 13, 2002, Application for Review filed by Nelson Enterprises, Inc. (“Nelson”), applicant for a new AM broadcast station at Plano, Illinois.¹ Nelson’s application was determined to be mutually exclusive (“MX”) with the auction filing window application of D&E Communications (“D&E”) for a new AM broadcast station at Baxter, Minnesota.² Both applications were filed during the window for AM Broadcast Auction No. 32, and were designated MX Group AM 25.³ Nelson requests review of the Media Bureau’s (“Bureau”) April 8, 2002, staff decision (“Staff Decision”)⁴ in which the Bureau awarded D&E’s application a dispositive preference under Section 307(b) of the Communications Act of 1934,⁵ and stated that Nelson’s application would be dismissed upon award of a construction permit to D&E. For the reasons discussed below, we deny the Application for Review.

¹ File No. BNP-20000201AHC.

² File No. BNP-20000128ABF.

³ *Public Notice*, “AM Auction Filing Window and Application Freeze,” 14 FCC Rcd 19490 (MMB/WTB 1999) (“*AM Auction Public Notice*”), as extended by *Public Notice*, “AM Auction Filing Window and Application Freeze Extended to February 1, 2000,” 15 FCC Rcd 1910 (MMB/WTB 2000).

⁴ *Letter to Nelson Enterprises, Inc., and D&E Communications*, Ref. No. 1800B3-JWR (MB Apr. 8, 2002).

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

2. **Background.** In a *Public Notice* released October 27, 2000,⁶ the Bureau requested amendments to the parties' applications, containing supplemental information relating to the "fair, efficient, and equitable distribution of radio service" under Section 307(b). Both Nelson and D&E timely filed amendments pursuant to the *Mutually Exclusive Public Notice*. Initially, the Bureau determined that neither application was entitled to a dispositive Section 307(b) preference, and both were directed to proceed to auction.⁷ By letter dated October 22, 2001, the Bureau sent a second request for Section 307(b) amendments to the parties' applications.⁸ In the October Section 307(b) Request, the Bureau offered both applicants in MX Group AM 25 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 amendment.⁹ Both parties again timely responded: D&E submitted a new Section 307(b) showing, while Nelson indicated its desire to rely upon its prior Section 307(b) submission. The Bureau made a new Section 307(b) determination and, in the Staff Decision, found that D&E's proposal at Baxter was entitled to a dispositive Section 307(b) preference.¹⁰

3. **Discussion.** *Mutual exclusivity of applications:* Nelson argues that the two applications in MX Group AM 25 are not mutually exclusive with each other, and that therefore neither applicant should have been required to submit Section 307(b) information. Nelson contends that the Bureau erroneously relied on Section 73.182 of the Commission's rules,¹¹ which requires applicants to protect existing stations but does not, in Nelson's view, apply to applicants for new stations.¹² However, we rejected this argument in a separate *Memorandum Opinion and Order*, after Nelson previously challenged the Bureau's determination that its Plano application and D&E's Baxter application were mutually exclusive.¹³ We find no reason to revisit our decision in this regard. The applications are mutually exclusive, and the Bureau properly sought Section 307(b) information.

⁶ *Public Notice*, "AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction," 15 FCC Rcd 20449 (MMB/WTB) ("*Mutually Exclusive Public Notice*"), as 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/WTB 2000).

⁷ *Letter to Nelson Enterprises, Inc., D&E Communications, KCBR-AM Limited Partnership, and Kleven Broadcasting Co. of Minnesota*, Ref. No. 1800B3-JWR (MMB June 26, 2001).

⁸ *Letter to Green Valley Broadcasters, Inc., Kemp Communications, Inc., and Nelson Multimedia, Inc.*, Ref. No. 1800B3-TSN (MMB October 22, 2001) ("October Section 307(b) Request"). The October Section 307(b) Request bore OMB Control No. 3060-0996.

⁹ October Section 307(b) Request at 2-3.

¹⁰ Staff Decision at 3-4. D&E subsequently filed a complete Form 301 application, File No. BNP-20020508AAN.

¹¹ 47 C.F.R. § 73.182.

¹² See Application for Review at 6-7.

¹³ *Nelson Enterprises, Inc.*, 18 FCC Rcd 3414 (2003) ("*Nelson Enterprises*"). In *Nelson Enterprises*, we denied Nelson's application for review of the Bureau's determination that its Plano application was not a "singleton," or non-mutually exclusive, application. *Public Notice*, "AM Auction No. 32 Non-Mutually Exclusive Applications, Mass Media Bureau Announces Form 301 Application Deadline and Ten-Day Petition to Deny Period," 15 FCC Rcd 18004 (MMB 2000). In the Application for Review currently before us, Nelson also accuses the Bureau of attempting to "dictate when the Commission shall act" on its prior application for review of the Bureau's mutual exclusivity determination. Application for Review at 10. Nelson bases its claim on a statement in the Staff Decision that Nelson's prior application for review "will be factored into the ultimate disposition of Nelson's application." Staff Decision at 2 n.2. Nelson urges that we "repudiate the Bureau's statement, and act promptly on Nelson's
(continued...)"

4. *Section 307(b) determination*: Nelson contends that the Bureau “erred by considering population coverage of well-served areas as a determinative Section 307(b) consideration when proposals for new stations are involved, as is the case here.”¹⁴ According to Nelson, the correct standard to be applied is “the need of [the] respective communities for new service.”¹⁵

5. Neither Nelson nor D&E proposes either first or second aural service, nor do they propose first local transmission service to their respective communities.¹⁶ Therefore, the Bureau properly considered their applications under Priority (4), “other public interest matters.”¹⁷ It found that D&E would serve ten percent more listeners, based on a comparison of the respective parties’ proposed 0.5 mV/m daytime contours. The Bureau further found that D&E would serve 24,616 persons in its nighttime interference-free contour, compared to 6,942 persons to be served under Nelson’s proposal.¹⁸ The Bureau found these differences to be dispositive, justifying a Section 307(b) preference for D&E’s proposal.¹⁹

6. We find no error in the Bureau’s use of population coverage, i.e., the number of people covered by a given signal contour, to award a Section 307(b) preference under Priority (4). While Nelson protests that the Bureau cited only Bureau-level case precedent in support of its action, the Commission has approved the use of simple net differences in the number of persons newly served by each proposal when comparing proposals under Priority (4).²⁰ We recognize that *Greenup* involved channel substitutions and upgrading existing service rather than proposals for new service. However, the Commission directed the Bureau in broadcast auction cases to perform a “traditional Section 307(b) analysis,”²¹ which includes Priority (4), and *Greenup* and similar cases involved a comparison of

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applications for review.” Application for Review at 10. We find no impropriety in the Bureau’s statement, which we read only as the Bureau’s reassurance to Nelson that its then-pending application for review would be given due consideration. In any event, this argument is moot in light of our holding in *Nelson Enterprises*.

¹⁴ Application for Review at 7-8.

¹⁵ *Id.* at 8.

¹⁶ 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 full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters.” Co-equal weight is given to Priorities (2) and (3). 90 F.C.C.2d at 91. The priorities set forth in *FM Assignment Policies* are also used in evaluating applicants for new AM stations. *Alessandro Broadcasting Co.*, 99 F.C.C.2d 1 (Rev. Bd. 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.

¹⁷ *FM Assignment Policies*, 90 F.C.C.2d at 91.

¹⁸ Staff Decision at 3-4.

¹⁹ *Id.* at 4.

²⁰ See, e.g., *Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991), *appeal dismissed sub nom, WATH, Inc. v. F.C.C.*, No. 91-1268 (D.C. Cir. Sept. 26, 1991) (“*Greenup*”).

²¹ *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses, First Report and Order*, 13 FCC Rcd 15920, 15965 (1998) (“*Broadcast First Report and Order*”), *recon denied*, 14 FCC Rcd 8724, *modified*, 14 FCC Rcd 12541 (1999).

proposals under Priority (4).²² Thus, *Greenup* and such cases recognize a rebuttable presumption that, under Priority (4), a proposal serving a greater number of persons “would best serve the public interest.”²³ Given this, the Bureau did not err in applying a Priority (4) analysis based on a population advantage, especially given Nelson’s admission that “there are many more than five services throughout the proposed service areas.”²⁴ Until such time, if any, as we modify the pre-auction Priority (4) Section 307(b) public interest analysis for mutually exclusive AM applications, the Bureau may continue to utilize population differentials in its evaluation.

7. Nelson cites *Beacon Broadcasting*²⁵ in support of its argument that Section 307(b) favors grant of its application over D&E’s. However, *Beacon Broadcasting* is distinguishable, because in that case the Commission held that Fairforest, South Carolina, as a “minimally” qualified “licensable” community, was not entitled to consideration as a first local service under Priority (3). 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.”²⁶ Thus, contrary to Nelson’s assertion, *Beacon Broadcasting* does not disavow population coverage as a criterion under Section 307(b), or state that population coverage in well-served areas is disregarded as a factor in the Section 307(b) analysis. *Beacon Broadcasting* established only that second local transmission service could be favored over first local transmission service at a “quiet village” with “tenuous characteristics.” In this case, however, neither community is a “quiet village,” and neither applicant proposes a first local service. *Beacon Broadcasting* is therefore inapposite.²⁷

8. Nelson also cites *Blanchard, Louisiana and Stephens, Arkansas*,²⁸ *Cornwall Broadcasting Corp.*,²⁹ and *Genoa, Mt. Morris, and Oregon, Illinois*,³⁰ for the proposition that “[i]n general, the most important factor in deciding [between] two communities having the same level of existing service is population [of the community].”³¹ This is incorrect. These cases stand for the

²² See, e.g., *Seabrook, Huntsville, Bryan, Victoria, Kenedy, and George West, Texas*, 10 FCC Rcd 9360, 9362 (1995) (in the absence of a showing involving comparison of gain areas adjusted for number of reception services as described in *Greenup*, 6 FCC Rcd at 1495, Commission will continue to first consider the raw population differential).

²³ *Greenup*, 6 FCC Rcd at 1495.

²⁴ Application for Review at 4.

²⁵ 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).

²⁶ 2 FCC Rcd at 7563.

²⁷ We also note that in *Beacon Broadcasting* the difference in the respective population coverage totals was not sufficient to support a Section 307(b) preference for one of the proposals.

²⁸ 10 FCC Rcd 9828 (1995) (“*Blanchard*”).

²⁹ 89 F.C.C.2d 704 (Rev. Bd. 1982).

³⁰ 14 FCC Rcd 10727 (MMB 1999).

³¹ Application for Review at 8. We note that both Baxter and Plano each currently have one local radio transmission service. However, while WWVI(AM) at Baxter is owned by Tower Broadcasting Corp., Plano’s existing service, (continued...)

proposition that when comparing proposals, each of which contemplates *first local transmission service* under Priority (3), we compare the relative populations of the communities.³² Likewise, Nelson's citation of *Cloverdale, Point Arena, and Cazadero, California*³³ does not support its contention that even small differences in populations of communities suffice to find a Section 307(b) preference in favor of a larger community. *Cloverdale* involved two non-mutually exclusive but related allotment proposals: one proposing first local transmission service at either Cloverdale or Cazadero, California (a Priority (3) comparison), and one proposing re-allotment of first competitive service at Cloverdale versus allowing the first competitive service to remain at Point Arena, California (a Priority (4) comparison). The Bureau in *Cloverdale* examined community populations only when comparing proposed first local service at Cloverdale and Cazadero.³⁴ In making the Priority (4) evaluation between competitive services at Cloverdale and Point Arena, the Bureau focused on the signal gain and loss areas rather than the difference between the two communities' populations.³⁵ Thus, while Nelson attempts to use *Cloverdale* to support its argument that community populations should be the sole criterion used in a Priority (4) evaluation, that criterion was used only in the non-analogous Priority (3) portion of *Cloverdale*. We therefore find Nelson's argument unpersuasive, and find the Bureau decided the Section 307(b) issue correctly.

9. **Conclusion.** For the foregoing reasons, the Application for Review filed by Nelson Enterprises, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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WSPY-FM, is also owned by Nelson. Both Nelson's and D&E's proposed service areas are abundantly served. *See supra* note 24.

³² *See, e.g., Blanchard*, 10 FCC Rcd at 9830 (when comparing proposals for first local service under Priority (3) to two well-served communities, under "long standing precedent" [e.g., *Northweye, Cuba, Waynesville, Lake Ozark, and Eldon, Missouri*, 7 FCC Rcd 1449 (MMB 1992); *West Liberty and Richwood, Ohio*, 6 FCC Rcd 6084 (MMB 1991)], the Commission examines the proposals giving substantial weight to the populations of the communities to be served, even when the population differential is as small as 38 persons).

³³ 15 FCC Rcd 17927 (MMB 2000) ("*Cloverdale*").

³⁴ *Id.* at 17928.

³⁵ *Id.*

**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.