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**Re: AM Auction 84
MX Group 84-168**

KQNM(AM), Milan, New Mexico
Facility ID No. 22391
File No. BMJP-20040129AFO

New(AM), Snowflake, AZ
Facility ID No. 160271
File No. BNP-20040129AHU

New(AM), Peralta, New Mexico
Facility ID No. 160574
File No. BNP-20040130AIR

New (AM), Tesuque, New Mexico
Facility ID No. 161187
File No. BNP-20040130BPT

**Applications for New AM Broadcast
Station Construction Permits and Major
Modification to AM Facilities**

Dear Applicants:

We have before us four mutually exclusive (“MX”) applications for AM broadcast station construction permits. Cibola Radio Company (“Cibola”) seeks to change the community of license and facilities of station KQNM(AM), Milan, New Mexico, to Rio Rancho, New Mexico.¹ KM Communications, Inc. (“KMC”) proposes a new AM station at Snowflake, Arizona.² Bret D. Huggins (“Huggins”) proposes a new AM station at Peralta, New Mexico.³ RAMS III proposes a new AM station at Tesuque, New Mexico.⁴ These applications were included in MX Group 84-168 in AM Auction 84.

We also have before us a Joint Request for Approval of Settlement, filed October 31, 2005, by RAMS III, Cibola, and KMC (“Joint Request” and “Settlement Agreement”). Pursuant to the Settlement Agreement, RAMS III agrees that its application will be dismissed, in exchange for reimbursement of its out-of-pocket expenses by KMC and Cibola. As discussed below, we grant the Joint Request, approve the Settlement Agreement, and dismiss the RAMS III application.⁵

Background. In a *Public Notice* released June 15, 2005,⁶ we requested amendments to the parties’ applications, containing supplemental information relating to the fair, efficient, and equitable distribution of radio service under Section 307(b) of the Communications Act of 1934, as amended (the “Act”).⁷ In the Auction 84 Section 307(b) Public Notice, MX Group 84-168 was listed as a Category I MX Group, meaning that the members of the group were eligible for settlement due to the fact that Cibola sought a major change to its station. Category I applicants were required to file by the deadline set forth therein a settlement agreement, an engineering solution resolving all mutual exclusivities, or a Section 307(b) showing. Each of the above-referenced applicants, except for RAMS III, timely submitted a Section 307(b) amendment, and we evaluate those submissions as part of the competitive bidding process.

The Commission’s procedures for selecting among mutually exclusive AM auction window applicants involve a Congressionally mandated competitive bidding process.⁸ However, Congress also

¹ File No. BMJP-20040129AFO.

² File No. BNP-20040129AHU.

³ File No. BNP-20040130AIR.

⁴ File No. BNP-20040130BPT.

⁵ We note that some of the parties engaged in a dispute regarding a joint supplement to the Section 307(b) showings filed December 23, 2008, by KMC and Cibola. Huggins filed a Reply on January 7, 2009, and (after filing a January 21, 2009, motion for extension of time), KMC and Cibola filed a Joint Opposition to Huggins’s Reply on January 28, 2009. We dismiss these pleadings as unauthorized.

⁶ *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 Section 307(b) 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).

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

⁸ See 47 U.S.C. § 309(j); *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order (“Broadcast

directed that the competitive bidding authority would not affect the operation of, *inter alia*, Section 307 of the Act.⁹ In the *Broadcast First Report and Order*, when establishing competitive bidding rules consistent with its statutory mandate under Section 307(b) to provide a “fair, efficient, and equitable” distribution of radio services, the Commission determined that the staff would undertake a traditional Section 307(b) analysis prior to conducting an auction for mutually exclusive AM applications.¹⁰ The Commission has also determined that its FM allotment priorities fulfill its obligation under Section 307(b), and will apply in a Section 307(b) analysis of mutually exclusive AM applications before auction.¹¹

Discussion. *The Settlement Agreement.* After careful consideration of the Settlement Agreement, and the attached declarations and affidavits, we find that approval of the Settlement Agreement would serve the public interest and expedite the provision of new AM service. The applicants have complied with the provisions of Section 311(c)(3) of the Act, and Section 73.3525(a) of the Rules.¹² We further find that none of the parties filed their respective applications for the purpose of reaching or carrying out the Settlement Agreement¹³ and that no consideration, other than as provided by the Settlement Agreement, has been directly or indirectly paid or promised. Accordingly, we dismiss the RAMS III application.

Republication. Since the applicants propose to serve different communities, the parties have demonstrated that dismissal of the RAMS III application would not unduly impede the objectives of Section 307(b) of the Act. Accordingly, we will not require republication under Section 73.3525(b) of the Rules.¹⁴

Section 307(b) Status of the Remaining Applicants. At the time the applications in MX Group 84-168 were filed, and in his October 31, 2005, Section 307(b) showing, Huggins claimed that he proposed first local transmission service (Priority (3)) at Peralta, a Census Designated Place of 3,750 population located near the Albuquerque Urbanized Area. In its October 28, 2005, Section 307(b) showing, KMC claimed that it would provide first aural reception service (Priority (1)) to 240 persons, and second aural reception service (Priority (2)) to an additional 93 persons. KMC (with support from Cibola) also claimed that its proposal is entitled to a preference as providing second local transmission service at Snowflake. Cibola claims, in its October 31, 2005, Section 307(b) showing, that its proposed move of

First Report and Order”), 13 FCC Rcd 15920 (1998); *recon denied*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999); *modified*, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

⁹ 47 U.S.C. § 309(j)(6)(B).

¹⁰ *Broadcast First Report and Order*, 13 FCC Rcd at 15964-65.

¹¹ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 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 FM allotment priorities were first applied to Section 307(b) determinations in mutually exclusive AM proceedings in *Alessandro Broadcasting Co.*, Decision, 56 RR 2d 1568 (Rev. Bd. 1984). See also *Romar Communications, Inc. and KM Communications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 23128, 23129-30 (2004) (“*Romar*”) (using *FM Assignment Policies* to evaluate competing applications).

¹² See 47 U.S.C. § 311(c)(3); 47 C.F.R. § 73.3525(a).

¹³ See 47 C.F.R. § 73.3525(a)(2).

¹⁴ 47 C.F.R. § 73.3525(b). See *Mobile Broadcasting Service, Inc.*, Memorandum Opinion and Order, 91 FCC 2d 1209 (1982); *Waterman Broadcasting Corp. of Texas*, Memorandum Opinion and Order, 10 FCC 2d 712 (Rev. Bd. 1967) (rule designed to preclude the artificial removal of a demand, evidenced by the filing of an application, for a local outlet of self-expression by private agreement among the applicants).

station KQNM(AM) to Rio Rancho, New Mexico, would provide a second local transmission service (Priority (4)) at that community.¹⁵ Because of Huggins's Priority (3) claim, and because his proposed facility would cover more than 50 percent of the Albuquerque Urbanized Area, on August 13, 2007, the staff requested that he submit an additional showing addressing the factors set forth in *Faye and Richard Tuck*,¹⁶ to assist in determining whether Huggins was entitled to claim a first local transmission service at Peralta, rather than an additional transmission service in the Albuquerque Urbanized Area. Huggins responded on September 18, 2007. However, as noted by KMC, a construction permit for a new AM station at Peralta was granted to Guardian Communications, Inc. on August 14, 2008.¹⁷ As a result, Huggins's application no longer qualifies under Priority (3), thus his *Tuck* showing is no longer relevant. Huggins therefore (like KMC and Cibola) proposes a second local transmission service at its proposed community of license.¹⁸

KMC relies principally on two arguments to support its comparative claims. First, KMC contends that it is entitled to a dispositive Section 307(b) finding because it proposes a second local transmission service at Snowflake. We note that the *FM Assignment Priorities* do not include, and have never included, a priority for second local / first competitive transmission service. As noted above, however, both Huggins and Cibola also propose second local transmission service at their respective communities of license. Thus, KMC's proposal cannot be distinguished on this ground.

Second, KMC claims that it will provide first reception service (Priority (1)) to 240 people in a 352 square kilometer area, second reception service (Priority (2)) to 93 people in a 785 square kilometer area, and service to "underserved" areas (third, fourth, and fifth reception services) to a total population of 31,509 in a total area of 13,364 square kilometers. It further contends that virtually all of the population to be covered by Huggins's proposal is well served by more than five services. Huggins argues that the 333 persons to receive first or second reception service under KMC's proposal are *de minimis*, especially in light of the large difference in overall populations to be served under the competing proposals. KMC challenges the case law Huggins cites in support of its opposition to KMC's claim, distinguishing the cited cases on the ground that they are FM allocations cases involving moves or expansions of existing stations, rather than new station facilities.

KMC challenges Huggins's cited cases for the proposition that its proposed first and second reception service to approximately 300 persons is *de minimis*. However, it cites no precedent that supports its claim that service to these small populations would be sufficient to trigger Priorities (1) or (2). Additionally, staff analysis indicates that the white area KMC claims in its proposal would also be

¹⁵ Station KQTM(FM) is already located at Rio Rancho.

¹⁶ Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) ("*Tuck*").

¹⁷ File No. BNP-20071212AAY. See *Broadcast Actions*, Public Notice, Report No. 46803 (MB Aug. 19, 2008).

¹⁸ We reject KMC's selective citation of *Moncks Corner, Kiawah Island, and Sampit, South Carolina*, Memorandum Opinion and Order, 15 FCC Rcd 8973, 8982-83 (MMB 2000) ("*Moncks Corner*"), and similar cases, for the proposition that, "[w]hen comparing communities under priority (4), the more populous community is generally preferred." *Moncks Corner*, 15 FCC Rcd at 8982-83. Such a citation ignores the immediately preceding language, "Moreover, since LMC will be providing the first local service to *Kiawah Island* [citation omitted] and SB will be providing the first local service to *Sampit, South Carolina*, both proposals will be treated under the fourth priority [sic] of [*FM Assignment Policies*]." *Id.* (emphasis added). Competing applications for first local service are compared under Priority (3), and only when performing such a Priority (3) comparison has our consistent practice been to award a dispositive Section 307(b) preference to the more populous community. See *Blanchard, Louisiana and Stephens, Arkansas*, Report and Order, 10 FCC Rcd 9828, 9829 (1995) (when comparing first local transmission 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).

served by station KRVZ(AM), Springerville, Arizona, based on a recently granted modification to that station.¹⁹ The same staff analysis shows that KMC's proposal would now serve no white area, would provide second reception service to 240 persons, and would provide third, fourth, and fifth reception service to 7,018 persons, rather than the 31,509 KMC claims.²⁰ The Commission has previously held that a population of approximately 500 should be treated as *de minimis* for purposes of applying Priority (1).²¹ Accordingly, we find that the population to be provided second reception service by KMC is insufficient to merit a dispositive finding under Priority (2). None of the remaining three applicants proposes first local transmission service under Priority (3), and each proposes second local transmission service. We must continue our evaluation under Priority (4), other public interest matters.

In making Section 307(b) analyses in AM auction cases under Priority (4), we have favored the applicant proposing the greatest population coverage.²² The following table summarizes the information provided by the applicants about the populations served by their proposals:

Applicant	Community	Day 2.0 mV/m	Day 0.5 mV/m	NIF
KMC	Snowflake, AZ	169,450	231,913	4,950
Huggins	Peralta, NM	726,095	894,748	14,422 ²³
Cibola	Rio Rancho, NM	Not provided	614,826	n/a
Cibola	Rio Rancho, NM (net of existing population served)	Not provided	589,018	

¹⁹ File No. BP-20090429AAN. The station KRVZ(AM) licensee, Country Mountain Airwaves, LLC, proposed to modify the station facilities to specify operation on 1370 kHz, and increase the daytime power. The modification application was granted August 12, 2009. *See Broadcast Actions*, Public Notice, Report No. 47050 (MB Aug. 17, 2009).

²⁰ This is not meant to suggest exaggeration on KMC's part, but rather takes into account station modifications granted subsequent to the filing of KMC's application.

²¹ *See, e.g., Elba Development Corporation (KQTV-TV)*, Supplemental Decision, 1 FCC Rcd 773, 774-75 (Rev. Bd. 1986).

²² *See, e.g., Robert E. Combs*, Memorandum Opinion and Order, 19 FCC Rcd 13421, 13424 (2004), *recon. denied*, 20 FCC Rcd 17238 (2005). *See also Rocky Mount, North Carolina*, Memorandum Opinion and Order, 8 FCC Rcd 6206, 6207 (MMB 1993) (“[T]he provision of additional reception service to 21,584 persons, including a third, fourth and fifth full-time reception service to a total of 3,673 persons does not present sufficiently compelling public interest benefits to outweigh the public interest benefit accruing from the provision of a new reception service to a total of 45,931 persons...”); *Okmulgee, Nowata, Pawhuska, Bartlesville, and Bixby, Oklahoma, and Rogers, Arkansas*, Report and Order, 10 FCC Rcd 12014, 12016 (MMB 1995) (“*Okmulgee*”) (merely stating that a proposal would provide a fourth, fifth, sixth, or seventh service to a certain number of people did not suffice to discount greater raw population service differential of over 100,000; party wishing to make such a challenge must use the methodology prescribed in *Greenup, Kentucky, and Athens, Ohio*, Report and Order, 2 FCC Rcd 4319 (MMB 1987)). Here, KMC does no more than the unsuccessful opponent in *Okmulgee*, merely listing the numbers of underserved listeners to be served without engaging in a *Greenup* analysis.

²³ Huggins shows 18.1 mV/m as the nighttime interference-free contour; staff analysis found 11.5 mV/m to be the proper contour.

The table below summarizes the staff's analysis of the populations to be served by the applications in this group:

Applicant	Community	Day 2.0 mV/m	Day 0.5 mV/m ²⁴	NIF
KMC	Snowflake, AZ	72,526	127,315	4,950
Huggins	Peralta, NM	731,453	793,985	23,169
Cibola	Rio Rancho, NM	628,772	700,256	n/a ²⁵
Cibola	Rio Rancho (net of existing population served)	611,346	671,090	n/a

As the above tables show, Huggins's proposal would cover over six times the daytime population of KMC's proposal, and over four times the nighttime interference-free population to be covered by KMC. Cibola's proposal, while more comparable to Huggins's proposed daytime coverage, would provide no nighttime coverage. KMC, as discussed above, claims to propose "white" and "gray" area service, as well as new reception service to underserved populations (those receiving a third, fourth, or fifth reception service). We note, however, that while KMC originally claimed that almost a quarter of the population receiving new service under its proposal was underserved, as discussed above KMC's underserved population coverage is now 23 percent of its original claim. This constitutes 10 percent of its daytime 2.0 mV/m coverage and less than six percent of its daytime 0.5 mV/m coverage. Given the vast differential in reception service between Huggins's and KMC's proposals,²⁶ we therefore find that Huggins's Peralta proposal merits a dispositive Section 307(b) preference. For these reasons, Huggins will continue in the application process by filing a complete FCC Form 301 application.²⁷

²⁴ Pursuant to 47 C.F.R. § 73.182(d), the AM groundwave signal strength necessary to provide primary service to communities with populations of 2,500 or more persons is 2 mV/m, and the AM groundwave signal strength necessary to provide primary service to communities with populations less than 2,500 persons is 0.5 mV/m. Thus, when counting the population within an AM daytime 2 mV/m field strength contour, all communities, regardless of size, are included, but when counting the population within an AM daytime 0.5 mV/m field strength contour, communities with populations of 2,500 or more persons that are located inside the 0.5 mV/m contour but outside the 2 mV/m contour must be excluded from the population count. The practical effect of the rule is that an applicant is not recognized as serving the community if it fails to render the specified signal strength intensity to the community. *See Amendment of the AM Broadcast Station Rules with Respect to Signal Coverage Requirements over Community Business and Factory Areas*, Report and Order, 49 FR 23345 (1984) (amending rule to define primary service signal strength requirement based only on a population standard).

²⁵ KQNM(AM) is a daytime-only station, thus does not propose any significant nighttime interference-free coverage.

²⁶ *See supra* note 22.

²⁷ After the FCC Form 301 is filed, the staff will conduct a complete legal and technical analysis. We will issue Public Notices entitled "Broadcast Applications," announcing AM auction applications determined to be acceptable for filing. These notices will be generated by the Consolidated Database System ("CDBS"). Petitions to deny an FCC Form 301 application must be filed within 10 days following release of the Broadcast Applications Public Notice announcing acceptance of the application at issue. *Broadcast First Report and Order* at 15985. The staff will dismiss the applications filed by KMC (File No. BNP-20040129AHU) and Cibola (File No. BMJP-20040129AFO) upon action taken on the application filed by Huggins.

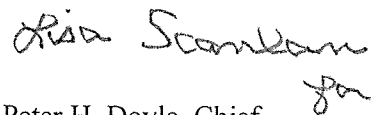
Conclusion: Accordingly, IT IS ORDERED, that the Joint Request for Approval of Settlement IS GRANTED and the associated Settlement Agreement IS APPROVED. The tech box application filed by RAMS III for Tesuque, New Mexico (File No. BNP-20040130BPT) IS DISMISSED. The December 23, 2008, Joint Supplement to the Section 307(b) showings filed by KMC and Cibola, the January 7, 2009, Reply filed by Huggins, and the January 28, 2009, Joint Opposition to Reply filed by KMC and Cibola ARE DISMISSED.

Additionally, IT IS ORDERED, that Huggins, within 60 days of the date of this letter, is to file a complete FCC Form 301 long-form application in connection with his application for a construction permit for a new AM broadcast station at Peralta, New Mexico (File No. BNP-20040130AIR), pursuant to the procedures set forth in the Commission's Rules.²⁸ With his application, Huggins must simultaneously submit the required filing fee for a new commercial AM radio station and an FCC Form 159, Remittance Advice.

The facilities proposed in the FCC Form 301 must comply with all applicable AM rules. Any differences between the tech box proposal filed during the AM Auction No. 84 filing window and the complete FCC Form 301 must be minor changes, as defined by the applicable AM service rules,²⁹ and must not create new application conflicts. In addition, the technical facilities proposed in the FCC Form 301 must maintain (or improve) the level of service, in terms of population, on which the dispositive Section 307(b) preference was based. The complete FCC Form 301 application must be filed electronically through the Media Bureau's Consolidated Database System (CDBS) online electronic forms system. For information regarding electronic application filing, refer to the April 28, 2000, Public Notice, *Mass Media Bureau Implements Consolidated Database System (CDBS) Electronic Filing of FCC Forms 301, 302, 314, 315, 316, and 347*. When filing the complete FCC Form 301, an applicant must select "Long Form Application for AM Auction No. 84" on the Pre-form for Form 301 (Question 2 – Application Purpose). In addition, the CDBS file number previously issued to the tech box submission filed in the AM Auction No. 84 filing window must be entered on the Pre-form in the field "Eng. Proposal File Number." Instructions for use of the electronic filing system are available in the CDBS User's Guide, which can be accessed from the electronic filing website at <http://www.fcc.gov/mb/elecfile.html>. For assistance with electronic filing, call the Audio Division Help Desk at (202) 418-2831.

The staff will return an application not submitted in accordance with the procedures described above. Failure to timely file the complete FCC Form 301 application on or before June 28, 2010, will result in dismissal of the tech box proposal filed during the AM Auction No. 84 filing window for failure to prosecute, pursuant to Section 73.3568 of the Commission's Rules.³⁰

Sincerely,



Peter H. Doyle, Chief
Audio Division
Media Bureau

²⁸ See 47 C.F.R. §§ 0.401(b), 1.1104, 1.1109, 73.5005(d), and 73.3512.

²⁹ *Id.* § 73.3571.

³⁰ *Id.* § 73.3568.