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

In re Applications of	)	
	)	
GENESIS COMMUNICATIONS I, INC.	)	**File No. BMJP-20040128AKY**
Application for Major Change in	)	**MX Group 84-163A**
Licensed Broadcast Station WHOO,	)	**Facility ID Number 54573**
Kissimmee, Florida; Auction 84,	)	
MX Group 84-163	)	
	)	
HAS: 1080 kHz, 10 kW, Daytime at	)	
Kissimmee, Florida (DA)	)	
	)	
REQUESTS: 1080 kHz, 27 kW day,	)	
2 kW night (4 kW critical hours) at	)	
Winter Park, Florida (DA)	)	
	)	
and	)	
	)	
RAMA COMMUNICATIONS, INC.	)	**File No. BNP-20040130AFB**
Application for Construction Permit	)	**MX Group 84-163A**
For New AM Broadcast Station at	)	**Facility ID Number 161019**
Micanopy, Florida	)	

To: The Commission
Via Office of the Secretary
Room TW-A325, 445-12th St. S.W.

APPLICATION FOR REVIEW

Genesis Communications I, Inc., licensee of AM Broadcast Station WHOO, Kissimmee, Florida (Genesis), by counsel and pursuant to Section 1.115 of the Commission's Rules, hereby respectfully submits this Application for Review of the letter decision of the Chief, Audio Division, Media Bureau dated December 9, 2009 (See, 1800B3-BSH-LAS), which dismissed Genesis' January 2, 2009 *Petition for Reconsideration* in the captioned proceeding. Genesis' *Petition for Reconsideration* had challenged the letter decision of the Chief, Audio Division dated December 4, 2008

(1800B3-ATS). That 2008 letter decision found that there was no dispositive Section 307(b) preference in favor of either of the two above-captioned, mutually-exclusive applications, and found that both applications should therefore proceed to auction. Genesis' *Petition for Reconsideration* challenged that determination, asserting that the Winter Park application was clearly deserving of a Section 307(b) preference. The December 9, 2009 Letter Decision of the Audio Division dismissed Genesis' *Petition for Reconsideration*, claiming that the Petition challenged not a final action on the Genesis application, but an interlocutory action, and therefore the *Petition for Reconsideration* was procedurally defective because Petitions for Reconsideration of interlocutory actions do not lie pursuant to 47 C.F.R. § 1.106(a)(1). As this Application for Review is being filed within thirty days of the date of the Audio Division's December 9, 2009 Letter Decision, this Application for Review is timely filed, pursuant to Section 1.115 of the Commission's Rules. Genesis respectfully requests that the Commission review the December 9, 2009 Letter Decision of the Audio Division, Media Bureau; reverse the dismissal of Genesis' January 2, 2009 *Petition for Reconsideration* in the captioned proceeding; and order the Media Bureau to adjudicate the *Petition for Reconsideration* and finally resolve the Section 307(b) determination prior to conducting any auction proceeding in this MX Group.

I. Introduction.

1. The dismissal of the Genesis *Petition for Reconsideration* by the Audio Division is, Genesis would suggest, procedurally improper and in conflict with the Commission's statutory obligation pursuant to Section 307(b) of the Commission's Rules. It also conflicts with the Commission's expressly adopted policy determined in

MM Docket No. 97-234, *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 (1998) ("Broadcast First Report and Order"), *on recon., Memorandum Opinion and Order,* 14 FCC Rcd 8724 (1999), *on further recon., Memorandum Opinion and Order*, 14 FCC Rcd 14521 (1999).

2. Genesis has applied for a major change in the facilities of AM Station WHOO, Kissimmee, Florida, including a change in the community of license from Kissimmee, Florida to Winter Park, Florida and from essentially daytime-only (i.e. Class D) service to fulltime aural service on its existing frequency of 1080 kHz. Rama Communications, Inc. (Rama) on the other hand, applied for a new AM station at Micanopy, Florida.[1] It was Genesis' contention in its Petition for Reconsideration (and it is still Genesis' contention now), that the Audio Division applied an incorrect analysis and standard for determining whether or not either application was entitled to a dispositive Section 307(b) preference; that in this case, standard Section 307(b) criteria are in fact dispositive of the mutual exclusivity between the two applications; and it is unnecessary and improper for the applications to proceed to auction. Genesis urged that application of well-established Section 307(b) criteria clearly dictate a preference for Winter Park, Florida over Micanopy, Florida as the community of license.[2] In effect, what the Audio Division has

[1] Genesis has proposed construction of a modified AM station on 1080 kHz to serve Winter Park, Florida, and to provide full time aural service, and Rama has proposed to construct a new AM station on 1090 kHz to serve Micanopy, Florida. By *Public Notice* issued on June 15, 2005, 20 FCC Rcd. 10563 (MB 2005) the Media Bureau announced that the two captioned applications were mutually exclusive, and established a date for filing showings demonstrating why each applicant's application should be preferred under Section 307(b) of the Communications Act of 1934, as amended.

[2] Among other things, the community of license proposed by Genesis, Winter Park, Florida, has a population *thirty-six times the size* of the demographically insignificant community of Micanopy. Where, as in this case, listeners in each of the proposed communities receive five or more aural services, and where neither applicant proposes to serve any white or gray area, nor proposes a first transmission service, *the Commission has consistently based its decision on a straight population comparison and preferred the*

ordered in its December 9, 2009 Letter Decision dismissing Genesis' Petition for Reconsideration is for Genesis' application specifying Winter Park, Florida to proceed to auction, together with that of Rama specifying Micanopy, Florida, and then, after the resolution of the auction, if Rama is the winning bidder, and after Rama files its long form application and that application is granted, Genesis might be entitled to re-file its Petition for Reconsideration discussing the Section 307(b) non-decision in the form of a Petition to Deny. Thus, as the Audio Division would have it, the Section 307(b) determination of the Audio Division would not be finally determined until well after the auction proceeding has been concluded. This process is flawed conceptually and practically, and the Audio Division's holding that its Section 307(b) determination is a mere interlocutory decision (and thus not subject to a Petition for Reconsideration by Genesis) is plainly wrong. The determination whether one of two communities applied for by the two applicants in this MX Group is to be preferred under Section 307(b) is in fact the end of a process that is to be completed separately and apart from (and prior to) the auction process. It is, as the Commission has held specifically, *a threshold determination* that is to be *resolved* prior to conducting an auction of the two applications. The Commission must process applications in this manner, and in this order, as the only means to discharge its obligation under Section 307(b) of the Communications Act – an obligation that Congress, when it implemented the auction process, expressly retained and preserved.

II. Section 307(b) Determinations Are Not Interlocutory Matters.

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community with the larger population. Indeed, there was a clear Section 307(b) determination to be made in this case.

3. Section 307(b) of the Communications Act, 47 USC §307(b), requires that the Commission "make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Traditionally, in resolving Section 307(b) issues, the Commission compares each applicant's proposed area and population coverage and the relative efficiency of the applicant's proposals, and as well a comparison of community size. This is when there is no white or grey area and where neither applicant proposes a first transmission service to its respective community of license, as is the case with the Winter Park and Micanopy applicants.

4. The Audio Division improperly concluded that neither community should be preferred on the basis of reception service in this case; Genesis' application for Winter Park proposes nighttime service to a significantly larger population than does Rama's application for a new AM station at Micanopy. That aside, because both proposed communities are already amply served by aural reception service, both daytime and nighttime, and given that both communities have local transmission service, this case should have been decided under Priority (4) of the Commission's applicable Section 307(b) criteria, which compares community size. In this respect, Winter Park is the clear Section 307(b) winner. But indeed, the mutual exclusivity should have been resolved under Section 307(b) criteria and not by an auction. The Commission has an obligation to make the statutorily-mandated allocation where possible under Section 307(b) and in this case there is a clear choice, due to the relative size of the communities.

5. Indeed, the Commission has determined that Section 307(b) determinations are *"threshold analyses"* to be conducted (and resolved) before, initially, comparative

hearing proceedings, and now, before auction proceedings. The Commission noted in the *Broadcast First Report and Order* that previously, when mutually exclusive applicants sought authority to construct broadcast stations to serve different communities, the Commission, in the context of the comparative hearing process, implemented the Section 307(b) mandate by first determining which community had the greatest need for additional service, before addressing the comparative qualifications of the applicants. *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). If the 307(b) determination was dispositive, the standard comparative issues were not considered. *See Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046 (D.C. Cir. 1977). The Commission altered this approach for implementing Section 307(b) in the commercial FM and television services by establishing and incorporating in its rules a Table of Allotments for each service. These allotment tables provide for a distribution of channels for specific communities throughout the United States based on fixed mileage separations. The Commission fulfills the 307(b) obligation by making available for licensing only a frequency that has been assigned to a specific community in the Table of Allotments through a rulemaking proceeding. A system of priorities guides the Commission's 307(b) determinations, setting preferences for applicants proposing to establish a station in a nonserved or underserved community.

6. By comparison, AM radio frequencies are allocated on a demand basis, with applicants specifying the desired community and providing engineering exhibits to demonstrate the absence of interference to existing stations. Without an allotment table, mutual exclusivity may occur between AM applicants proposing to serve different communities. If such mutually exclusive AM applications were filed, the Commission

formerly addressed the Section 307(b) considerations in the resultant comparative hearing process, but always as a separate threshold matter; where different communities were specified, the determination of which community is to be preferred was always resolved as a threshold matter before standard comparative criteria between or among applicants was considered. In almost all such cases, the Section 307(b) determination was dispositive.

7. Section 309(j) of the Communications Act sets forth the Commission's authority to award spectrum licenses by competitive bidding. In originally authorizing the Commission's use of competitive bidding to award licenses in subscriber-based services and in subsequently expanding that authority to include broadcast licenses, *Congress did not eliminate or revise Section 307(b) of the Act*. Prior to authorizing (let alone requiring) the use of auctions for broadcast stations, Congress expressly indicated that its grant of auction authority to the Commission should not affect specific provisions of the Communications Act that limit the rights of licensees, or that direct the Commission to adhere to other requirements. In particular, Congress stated that the adoption of competitive bidding procedures does not affect, *inter alia*, Section 307 of the Communications Act. Section 309(j)(6) contains "Rules of construction" and stipulates that "Nothing in this subsection, or in the use of competitive bidding, shall ... (B) limit or otherwise affect the requirements of ... section ... 307 ... of this title ...." 47 U.S.C. §309(j)(6)(B). This provision of Section 309(j)(6) was neither modified nor excised by the 1997 Budget Act.

8. The Commission noted, with respect to FM and television, a community's need for service is assessed in the context of the initial rulemaking proceeding to determine

additions and substitutions to the Table of Allotments. This procedure is unaltered by the implementation of competitive bidding. Furthermore, the Commission held that it has "always required demonstration that a singleton AM applicant seeking to change its community of license complies with ... standards under Section 307(b). However, the discontinuance of the comparative hearing process left the 307(b) analysis for mutually exclusive AM applications "without a venue." Therefore, the Commission held in the *Broadcast First Report and Order,* at Paragraph 120, that:

> After consideration, however, we conclude that, our competitive bidding authority under Section 309(j) should be implemented in a way that accommodates our statutory duty under Section 307(b) to effect an equitable geographical distribution of stations across the nation. Congress specifically directed that the requirements of Section 307 should not be affected by the use of competitive bidding. See 47 U.S.C. §309(j)(6)(B). Thus, our obligation to fulfill the Section 307(b) statutory mandate endures. The Commission and the courts have traditionally interpreted Section 307(b) to require that we identify the community having the greater need for a broadcast outlet as a threshold determination in any licensing scheme, for to decide otherwise would subordinate the "needs of the community" to the "ability of an applicant for another locality." *FCC v. Allentown Broadcasting Corp.* at 361-362. We conclude that our rules should incorporate a similar threshold Section 307(b) analysis to determine whether particular applications are eligible for auctions. Specifically, with respect to AM applications, a traditional Section 307(b) analysis will be undertaken by the staff prior to conducting auctions of competing applications. If the Section 307(b) determination is dispositive, the staff will grant the application proposing to serve the community with the greater need if there are no competing applications for that community, and dismiss as ineligible any competing applications not proposing to serve that community. If no Section 307(b) determination is dispositive (or if more than one application remains for the community with the greater need), the applicants must then be included in a subsequently scheduled auction. This approach is consistent with our established practice in the commercial FM and television services with allotment tables where, as discussed above, the Section 307(b) analysis customarily precedes the licensee selection process. The number of AM applications subject to such a 307(b) staff analysis should be minimal, as there are relatively few instances of mutual exclusivity among AM applications submitted for new stations and major modifications. Moreover,

> this procedure accommodates both Section 307(b) and Section 309(j), and results in a balanced implementation of the two respective sections of the Communications Act.

9. Therefore, what the Commission held was that in all AM cases where two or more applicants propose different communities of license, a traditional Section 307(b) analysis must be conducted "prior to conducting auctions of competing applications." This is the Commission's statutory mandate, and to do otherwise would "'subordinate the needs of the community' to the 'ability of an applicant for another locality'." That is precisely what the Commission decided it could not and would not do, but it is precisely what the Audio Division, Media Bureau is doing by dismissing Genesis' timely Petition for Reconsideration of the threshold Section 307(b) decision. The Audio Division may be tempted to note that in this case, it found, after conducting a "traditional Section 307(b) analysis" no dispositive Section 307(b) preference, and therefore it was authorized to do what it now intends to do: to throw both applications into an auction, and then sort out the Section 307(b) administrative appeal *afterward.* That process is, however, obviously flawed. First of all, the Section 307(b) process is a threshold proceeding and the Section 307(b) issue must be finally resolved before the Media Bureau is authorized to conduct an auction proceeding. The Section 307(b) determination is therefore a separate process and the initial determination by the Audio Division is subject to a petition for reconsideration before there can be an auction. This is because the Audio Division has been instructed to dismiss the application for the non-preferred community or communities under Section 307(b) and if there is a dispositive Section 307(b) determination there can be no auction and one application in this case must be dismissed. Either applicant in this case, therefore, after the Section 307(b) decision is reached, is

entitled to challenge it through a timely filed Petition for Reconsideration or application for review. The December 9, 2009 Letter Decision deprives Genesis of its due process right to challenge the threshold decision, which is dispositive. If Genesis is correct, and the Audio Division has improperly conducted the Section 307(b) analysis in this case (which Genesis staunchly asserts) then the Audio Division would be obligated to dismiss the Micanopy application of Rama, obviating any auction proceeding, and to then process (and perhaps grant) a long-form application of Genesis for Winter Park. The Section 307(b) proceeding is not, therefore, merely an interlocutory proceeding; it is determinative of the outcome of the applications. And therefore the Petition for Reconsideration timely filed by Genesis is not an interlocutory pleading. It seeks reconsideration of an ultimate, dispositive decision by the Audio Division on a separate, threshold determination that is self-contained. Had the Section 307(b) decision been properly made (the precise issue for resolution in Genesis' *Petition for Reconsideration*, it would have been dispositive and would have obviated any subsequent auction process and required the dismissal of the application specifying the non-preferred community or communities.

10. The Commission's staff cannot be allowed to simply bypass, obviate, or give lip service to the Section 307(b) process, no matter how administratively convenient it may be to throw all AM mutually exclusive applications into an auction for resolution. By characterizing the Genesis Petition for Reconsideration as an interlocutory pleading, rather than what it is, the Audio Division is insulating itself from any due process right of an applicant to challenge a Section 307(b) analysis, making the entire Section 307(b) process effectively meaningless. This deprives Genesis of any due process rights to

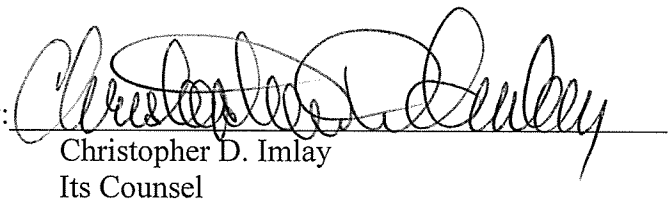
which it is entitled, in order to effectively challenge what should be a dispositive analysis. Worst of all, it does precisely what the Commission decided it could not do: subordinate the "needs of the community" to the "ability of an applicant for another locality." Congress told the Commission that the auction process could not affect the Section 307(b) process, and therefore the entirety of the Section 307(b) process must be completed before an auction process can be initiated, because only then can it be determined whether there is any remaining mutual exclusivity to resolve by auction. There is only one way to do accomplish this, and it is the same way the Commission has resolved mutual exclusivity among AM broadcast applicants for decades: the Section 307(b) process must be resolved, including any and all administrative or judicial appeals, and if a determinative Section 307(b) preference is awardable, as is the case here, the application proposing the non-preferred community must be dismissed, prior to initiating the next step of resolving any remaining mutual exclusivity (of which there would be none in this case) by auction.

Therefore, the foregoing considered, Genesis Communications I, Inc. respectfully requests that the Commission consider the foregoing; review the December 9, 2009 Letter Decision of the Audio Division, Media Bureau; reinstate the Petition for Reconsideration timely filed in this proceeding by Genesis; order the Audio Division to address that Petition for Reconsideration on the merits; and to finally resolve the Section

307(b) determination prior to initiating any auction process for these two applications.

Respectfully submitted,

GENESIS COMMUNICATIONS I, INC.

By: 
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January 6, 2010

CERTIFICATE OF SERVICE

I, Christopher D. Imlay, do hereby certify that I caused to be served, via First Class United States Mail, a copy of the foregoing **APPLICATION FOR REVIEW**, on the following, this 6th day of January, 2010.

Mr. Peter Doyle, Chief * **
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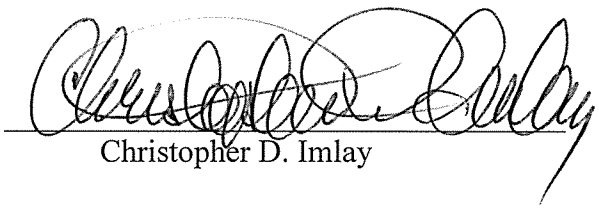

Christopher D. Imlay

* By hand delivery
** By e-mail