



Federal Communications Commission  
Washington, D.C. 20554  
June 27, 2008

*In Reply Refer to:*  
1800B3-BSH/LAS

Scott Powell  
110 Green Meadows  
Abilene, TX 79605

Mainstreet Broadcasting Co., Inc.  
516 Main Street  
Walsenburg, CO 81089

Cleo Broadcasting, LLC  
518 Peoples Street  
Corpus Christi, TX 78401

Re: **AM Broadcast Auction 84  
MX Group 84-151**

Las Cruces, New Mexico  
Facility ID No. 160698  
File No. BNP-20040127ANN

Walsenburg, Colorado  
Facility ID No. 160604  
File No. BNP-20040129AFT

Odessa, Texas  
Facility ID No. 160336  
File No. BNP-20040126AMH

**Applications for New AM Station  
Construction Permits**

Dear Applicants:

We have before us the above-captioned mutually exclusive ("MX") AM construction permit applications. Scott Powell ("Powell") proposes a new AM station at Las Cruces, New Mexico, and Mainstreet Broadcasting Co., Inc. ("Mainstreet") proposes a new AM station at Walsenburg, Colorado. These two applications were designated MX Group 84-151 in AM Auction No. 84, along with a third application for a new AM station at Odessa, Texas, filed by Cleo Broadcasting, LLC ("Cleo").<sup>1</sup> As

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<sup>1</sup> A fourth mutually exclusive application for a new AM station at Casper, Wyoming, also filed by Powell (File No. BNP-20040127ANN), and a fifth mutually exclusive application for a new AM station at Cache, Oklahoma, filed by The Sister Sherry Lynn Foundation (File No. BNP-20040129AFP), were dismissed on January 29, 2007. *See AM Auction No. 84 Mutually Exclusive Applications Dismissed for Failing to File or Untimely Filing of Required Settlement Agreement, Engineering Solution, or Section 307(b) Showing*, Public Notice, 22 FCC Rcd 1055 (MB 2007). The staff found a sixth application for a new AM station at Reno, Nevada, filed by Eastern Sierra

discussed below, we find a dispositive preference for Powell under Section 307(b) of the Communications Act of 1934, as amended<sup>2</sup> (the "Act"), and therefore direct Powell to file its long-form application within 60 days of the date of this letter for a construction permit in Las Cruces, New Mexico.

**Background.** By letter dated April 1, 2008, the staff awarded the Cleo application a dispositive Section 307(b) preference and directed Cleo to file a complete FCC Form 301 application within 60 days.<sup>3</sup> By letter dated May 29, 2008, however, Cleo stated that it would be unable to construct a viable commercial facility at Odessa, Texas, and asked that its tech box application be dismissed. Accordingly, we will dismiss Cleo's tech box application for Odessa, Texas, and consider the two surviving applications in MX Group 84-151.

**Discussion.** *Section 307(b).* The two surviving applications in MX Group 84-151, Powell's and Mainstreet's, remain mutually exclusive. As the mutually exclusive Powell and Mainstreet applications propose new AM stations for different communities of license, we will reevaluate the two remaining applications under Section 307(b) of the Act. In situations such as the one before us, the grant of an application would normally be resolved by a competitive bidding process.<sup>4</sup> However, in the *Broadcast First Report and Order*, the Commission determined that the competitive bidding procedures should be consistent with its statutory mandate under Section 307(b) of the Act to provide a "fair, efficient, and equitable" distribution of radio services across the nation. To this end, the Commission directed the staff to undertake a traditional Section 307(b) analysis prior to conducting an auction for mutually exclusive AM applications.<sup>5</sup> The Commission also noted that the FM allotment priorities fulfill its obligation under Section 307(b), and would apply in making a Section 307(b) determination regarding mutually exclusive AM applications before auction.<sup>6</sup>

Neither of the two remaining applicants proposes a first or second full-time aural service, or qualifies for a priority (3) preference by providing a first local transmission service to their respective community of license. There are currently two radio stations licensed to and one permit issued for Walsenburg, Colorado (population 4,182 persons), and nine radio stations licensed to Las Cruces, New Mexico (population 74,287 persons). Thus, both proposals must be evaluated under priority (4), other public interest matters.

Under priority (4), the Commission has generally favored the provision of service to the greatest number of people.<sup>7</sup> Mainstreet states that its Walsenburg proposal will serve 201,926 persons within its

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Broadcasting ("ESB") (File No. BNP-20040127AAR) to be no longer mutually exclusive with any other application in MX Group 84-151, and directed ESB to file a long form application for a construction permit in Reno, Nevada. See *infra* note 3. On June 10, 2008, ESB filed a long form application (File No. BNP-20080602BQY).

<sup>2</sup> 47 U.S.C. § 307(b).

<sup>3</sup> *Letter to Eastern Sierra Broadcasting, et. al.*, Ref. 1800B3-LAS/JP (April 1, 2008).

<sup>4</sup> See *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"), 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).

<sup>5</sup> *Broadcast First Report and Order* at 15964-65.

<sup>6</sup> See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local transmission 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).

<sup>7</sup> See *Nelson Enterprises, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 13350 (2004) (finding no error in the use of population coverage to award a Section 307(b) preference under priority (4) and endorsing continued use of population coverage differentials in evaluating Section 307(b) analyses in AM auction applications). See also *Greenup, Kentucky and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493, 1497 (1991) ("[U]nder

0.5 mV/m contour, 12,412 persons within its 2 mV/m contour, and will provide nighttime interference-free service to 4,682 persons. Powell states that its Las Cruces proposal will serve 130,849 persons within its 0.5 mV/m contour, 112,192 persons within its 2 mV/m contour, and will provide nighttime interference-free service to 90,889 persons.<sup>8</sup>

Independent population counts by the Commission staff reveal that: Powell's Las Cruces proposal will serve 127,229 persons within its 0.5 mV/m contour, 108,143 persons within its 2 mV/m contour, and will provide nighttime interference-free service to 93,936 persons;<sup>9</sup> and that Mainstreet's Walsenburg proposal will serve 51,963 persons within its 0.5 mV/m contour, 12,648 persons within its 2 mV/m contour, and will provide nighttime interference-free service to 4,481 persons.

We find it in the public interest to give a dispositive Section 307(b) preference under priority (4) to Powell's proposal, which will serve significantly more persons. Accordingly, Powell will be directed to continue the application process by filing a complete FCC Form 301 application.<sup>10</sup>

**Conclusion.** Accordingly, IT IS ORDERED that the tech box application filed by Cleo Broadcasting, LLC for Odessa, Texas (File No. BNP-20040126AMH) IS DISMISSED.

IT IS FURTHER ORDERED that Powell, within 60 days of the date of this letter, is to file a complete FCC Form 301 in connection with its application for a construction permit for a new AM broadcast station at Las Cruces, New Mexico (File No. BNP-20040127ANN), pursuant to the procedures set forth in the Commission's Rules.<sup>11</sup> With its application, Powell must simultaneously submit the required filing fee for a new commercial AM radio station and an FCC Form 159, Remittance Advice.

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priority four, other public interest matters, we will first consider simple net differences in the number of persons newly served by each proposal").

<sup>8</sup> See *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) (detailing the data required in a Section 307(b) submission in order for the staff to evaluate the statutory considerations).

<sup>9</sup> By definition in 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 defined as 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) (Section 73.182(f) specifies the signal levels necessary to render primary service to different types of service areas. Amended rule so that primary service signal strength requirement based only on a population standard); *Tucson Radio, Inc. (KEVT)*, Memorandum Opinion and Order, 35 F.C.C.2d 584 (1972) (*in order to determine the population which a proposed station will be credited with serving*, 47 C.F.R. § 73.182(g) (1972) specified signal strength requirements of 0.5 mV/m for towns with populations under 2,500; 2.0 mV/m for communities with populations between 2,500 and 10,000; and signal strengths of varying higher intensity for city business districts).

<sup>10</sup> 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*, 13 FCC Rcd at 15985. The staff will dismiss the application filed by Mainstreet (File No. BNP-20040129AFT) upon action taken on the application filed by Powell.

<sup>11</sup> See 47 C.F.R. §§ 0.401(b), 1.1104, 1.1109, 73.5005(d), and 73.3512.

The facilities proposed in the FCC Form 301 must comply with all applicable AM rules. Applicants must demonstrate that the proposed facility protects existing stations and earlier filed applications, and that the daytime and nighttime facilities comply with principal city coverage requirements.<sup>12</sup> 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,<sup>13</sup> 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/electfile.html>. For assistance with electronic filing, call the Audio Division Help Desk at (202) 418-2831.

The staff will return applications not submitted in accordance with the procedures described above. Failure to timely file the complete FCC Form 301 application, **on or before August 27, 2008**, 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.<sup>14</sup>

Sincerely,



Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Denise B. Moline, Esq.  
Lee J. Peltzman, Esq.

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<sup>12</sup> See *id.* §§ 73.24, 73.37, and 73.182.

<sup>13</sup> *Id.* § 73.3571.

<sup>14</sup> *Id.* § 73.3568.