



Federal Communications Commission
Washington, D.C. 20554

March 17, 2009

DA 09-610

In Reply Refer to:

1800B3-RBG/LAS

Released: March 17, 2009

Elvis L. Moody
Managing Partner,
M and M Media LLC
101 Christian Lane
Bentonville, Arkansas 72712

Re: **AM Broadcast Auction 84
MX Group 84-64**

Bethel Heights, Arkansas
Facility ID No. 160838
File No. BNP-20040129AKW

Rogers, Arkansas
Facility ID No. 161473
File No. BNP-20040130BCX

**Applications for New AM Station
Construction Permits**

Dear Mr. Moody:

This letter refers to the Petition for Reconsideration ("Petition") filed November 20, 2007, by M and M Media LLC ("M & M"), one of two mutually exclusive ("MX") applicants in AM Broadcast Auction 84 MX Group 84-64.¹ M & M's petition was directed against the action taken in the October 22, 2007, Audio Division letter finding a dispositive preference for the application of Johnson Communications, Inc. ("Johnson") under Section 307(b) of the Communications Act of 1934, as amended (the "Act").² For the reasons set forth below, we dismiss the Petition as an interlocutory appeal under Section 1.106(a)(1) of the Commission's Rules (the "Rules").³

Background. Johnson and M & M filed mutually exclusive applications for new AM stations in Bethel Heights, Arkansas, and Rogers, Arkansas, respectively, during the filing window for AM Broadcast Auction 84.⁴ The mutual exclusivity would normally be resolved by a competitive bidding

¹ Johnson Communications, Inc. filed an Opposition to the Petition for Reconsideration and M & M filed a Reply to that Opposition.

² 47 U.S.C. § 307(b). *Johnson Communications, Inc. and M and M Media LLC*, Letter, Ref. No. 1800B3-LAS/JP (MB Oct. 22, 2007) (the "Letter Order").

³ 47 C.F.R. §1.106(a)(1).

⁴ See *AM New Station and Major Modification Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

process.⁵ 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.⁶ 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.⁷

In this case, the *Letter Order* awarded a dispositive preference under Section 307(b) to Johnson, based upon the finding that Johnson would provide the first local aural transmission service to Bethel Heights, Arkansas (priority (3) of the FM allotment priorities), whereas M & M would provide a fourth local aural transmission service to Rogers, Arkansas (priority (4) of the FM allotment priorities). Under well-settled policy, the establishment of a first local transmission service at Bethel Heights under priority (3) is preferred to a priority (4) proposal. The *Letter Order* explained that Johnson would continue in the application process by filing a complete FCC Form 301 application (the “long form application”) within 60 days, pursuant to the procedures set forth in the Rules,⁸ and that the staff would then conduct a complete legal and technical analysis of the application. Further, the *Letter Order* indicated that the staff would issue a Consolidated Database System (CDBS)-generated Public Notice announcing the acceptance for filing of the Johnson application, and petitions to deny the application would be due within 10 days after the release of the relevant Public Notice. The *Letter Order* also noted that the staff would dismiss the application filed by M & M only upon action taken on the Johnson application.

M & M timely sought reconsideration of the Section 307(b) procedures as applied in the *Letter Order* and the preference awarded to the Johnson application. Subsequently, the Johnson application was accepted for filing on September 18, 2008.⁹ On September 26, 2008, M & M filed a timely petition to deny Johnson’s long form application, raising the same objections to the long form application that it raised in the Petition.

Discussion. We find that M & M’s Petition is procedurally improper. Although we have previously considered petitions for reconsideration of several AM Section 307(b) decisions in the past,¹⁰ we believe that determinations such as the *Letter Ruling* are more appropriately characterized as

⁵ 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).

⁶ *Broadcast First Report and Order* at 15964-65.

⁷ 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).

⁸ See 47 C.F.R. §§ 0.401(b), 1.1104, 1.1109, 73.5005(d), and 73.3512.

⁹ See *Broadcast Applications*, Public Notice, Report No. 26824 (Sep. 18, 2008).

¹⁰ See, e.g., *Aaron P. Shainis, Esq., Jerome Boros, Esq., James A. Koerner, Esq., and Mark N. Lipp, Esq.*, Letter, Ref. No. 1800B3-TSN (MB Aug. 30, 2002); *Jeffrey L. Timmons, Esq., and A. Wray Fitch III, Esq.*, Letter, Ref. No. 1800B3-TSN (MB Aug. 13, 2002).

interlocutory rulings, against which reconsideration petitions do not lie. Section 1.106(a)(1) of the Rules specifically prohibits petitions for reconsideration of interlocutory actions.¹¹

An interlocutory action is an interim determination on a matter involving an application; it does not grant or deny the application.¹² The *Letter Order* was an interlocutory action, not a final ruling on the Johnson application or on the conflicting application in MX Group 84-64. No action was taken on the mutually exclusive applications, nor was either application granted or dismissed upon the release of the *Letter Order*. From a procedural standpoint, this particular AM application proceeding was far from final when the *Letter Order* was issued. At that point, the preferred applicant still needed to file a complete Form 301 application; the staff then needed to perform a technical and legal analysis; the application needed to be placed on a public notice of acceptance in accordance with Section 309(b) of the Act,¹³ and, importantly, a 10-day petition to deny period pursuant to Section 309(d)(1) of the Act¹⁴ would ensue. By expressly describing both the prospective filing period for petitions to deny, as well as all other procedures that must occur before any ultimate action will be taken on the pending applications, the staff underscored the interlocutory nature of the *Letter Order*.

Moreover, the *Letter Order* does not involve an adverse ruling with respect to M & M's further participation in the proceeding. In this regard, we note that M & M has already made its Section 307(b)-related arguments in its timely petition to deny Johnson's application. In keeping with the Commission's efforts to reduce the administrative burdens at the initial stages of the auction process, while balancing the goals of public participation and the expeditious institution of new broadcast service, in the *Broadcast First Report and Order*, the Commission clearly defined the timeframe in which it would entertain pleadings in the auctions environment. No pre-auction pleadings were contemplated.¹⁵ Allowing the filing of both petitions for reconsideration of Section 307(b) determinations and petitions to deny will result in the duplication of efforts on the part of all participating parties, including Commission staff. We find that requiring that all arguments be advanced in one pleading is more efficient than a bifurcated procedure.¹⁶ We are mindful that Section 4(j) of the Act states that the Commission may conduct its

¹¹ 47 C.F.R. § 1.106(a)(1). The rule is clear that, with one noted exception that is clearly inapposite, the Commission or delegated authority will only entertain petitions requesting reconsideration of a final action. The rule exception is that "a petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding." Petitions of "other interlocutory actions will not be entertained." *Id.*

¹² See *Iridium 2GHz LLC*, 18 FCC Rcd 18121, 18122 (IB 2003).

¹³ 47 U.S.C. § 309(b).

¹⁴ 47 U.S.C. § 309(d)(1).

¹⁵ See, e.g., *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6102 ("our selection is 'tentative' because petitions to deny may be filed against the applicant tentatively selected pursuant to these point system determinations") and n.227 ("The staff's practice, in NCE comparative cases decided on Section 307(b), has been to require that any petitioner or objector resubmit its objection within the 30-day period established for the filing of petitions against the tentative selectee. See, e.g., *Jacqueline Dearing*, Letter, 21 FCC Rcd 6211 n.8 (MB 2006)."). Citing this precedent, the staff recently dismissed a petition for reconsideration of an NCE Section 307(b) determination as a procedurally improper appeal of an interlocutory determination. *State of Oregon*, Letter, 23 FCC Rcd 11576 (MB 2008).

¹⁶ Under the comparative hearing system, in modifying its rules to strictly limit appeals from interlocutory rulings to those categories specifically authorized in 47 C.F.R. § 1.301(a), the Commission explained, "[the new rules] will

proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice.¹⁷ Applying this policy in the present case will expedite the initiation of service to the public and conserve resources, without prejudice to M & M. Its arguments will receive full and fair consideration in the analysis of its petition to deny.

Finally, we acknowledge that the action taken herein is a change from past staff AM auction processing practice. However, our experience bears out the inefficiency in considering these multiple pleadings, and confirms that such a practice has not been conducive to the effective transaction of Commission business and has imposed unnecessary delays on successful applicants in prior auction proceedings. On balance, there is no countervailing public interest sufficient to warrant processing procedures that are not in keeping with Section 1.106(a)(1) and the standards enunciated by the Commission in the *Broadcast First Report and Order*.

Conclusion/Action. Accordingly, M and M Media, LLC's November 20, 2007, Petition for Reconsideration of the *Letter Order* IS DISMISSED pursuant to Section 1.106(a)(1) of the Commission's Rules.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Frank R. Jazzo, Esq
John F. Garziglia, Esq.
Johnson Communications, Inc.

expedite the conduct of hearing proceedings, . . . by cutting down on hearing delays occasioned by appeals which should be deferred pending action on the merits, and by freeing the Review Board to spend its resources on the other matters coming before it." *Practice and Procedure*, 20 RR 2d 1613, 1615 (1970).

¹⁷ 47 U.S.C. § 4(j).