Federal Communications Commission
Washington, D.C. 20554
January 24, 2008

In Reply Refer to:
1800B3-LAS/JP

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Re: **AM Broadcast Auction 84**
MX Group 84-145

KTLK(AM), Los Angeles, California
Facility ID No. 19219
File No. BMJP-20040130BAE

Application for Major Change in Licensed AM Station

Easton, California
Facility ID No. 160949
File No. BNP-20040129AMT

Huron, California
Facility ID No. 160556
File No. BNP-20040130BOC

Auberry, California
Facility ID No. 160399
File No. BNP-20040128ANN

Captain Cook, Hawaii
Facility ID No. 160261
File No. BNP-20040127ABN

Applications for New AM Station Construction Permits

Dear Applicants:

We have before us five mutually exclusive AM applications.[1] Citicasters Licenses, LP ("Citicasters") proposes to change the community of license of Station KTLK(AM) from Los Angeles, California, to Downey, California; John Edward Ostlund ("Ostlund") proposes a new AM station at Easton, California; Huron Broadcasting, LLC ("Huron") proposes a new AM Station at Huron, California; La Favorita Broadcasting, Inc. ("Favorita") proposes a new AM Station at Auberry, California; and Hilo Broadcasting, LLC ("Hilo") proposes a new AM station at Captain Cook, Hawaii. These applications were designated MX Group 84-145 in AM Auction 84. As discussed below, we find a dispositive preference for Citicasters under Section 307(b) of the Communications Act of 1934, as amended[2] (the "Act"), and therefore direct Citicasters to file its long-form application within 60 days of the date of this letter for a construction permit in that community.

Background. On June 15, 2005, the Media Bureau released a *Public Notice* containing a list of 802 MX AM Auction No. 84 window-filed Form 301 tech box applications.[3] The *AM MX Public Notice* defined three categories of mutually exclusive ("MX") applications, detailed the filings required for each category, and specified a September 16, 2005, deadline for submitting the required filings to the Commission. This filing deadline was extended to October 31, 2005, because of Hurricane Katrina.[4] MX Group 84-145 was listed as a Category I MX group, eligible for settlement. Category I applicants were required to file a settlement agreement, an engineering solution resolving all mutual exclusivities, or a Section 307(b) showing by the filing deadline. Accordingly, on October 26, 2005, Favorita filed a Section 307(b) showing, on October 28, 2005, Hilo filed a Section 307(b) showing, and on October 31, 2005, Citicasters, Huron, and Ostlund filed Section 307(b) showings. Additionally, on May 26, 2006, Hilo filed a pleading titled "Motion to Sever Application from MX Group" ("Motion").

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[1] The sixth mutually exclusive application in this group filed by First Assembly King's Cathedral and Chapels (File No. BNP-20040130BOH) was 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, 21 FCC Rcd 2912 (MB 2006).

[2] 47 U.S.C. § 307(b).

[3] *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, 22 FCC Rcd 1055 (MB 2007) ("*AM MX Public Notice*").

[4] *See Auction No. 84 Settlement Period and Section 307(b) Submission Deadline Extended to October 31, 2005*, Public Notice, 20 FCC Rcd 14492 (MB 2005).

In situations such as the one before us, the grant of an application would normally be resolved by a competitive bidding 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]

Discussion. *Motion to Sever.* In its Motion, Hilo requests waiver of Section 73.182(k)(2) of the Commission's Rules (the "Rules")[8] and asks that its application be severed from the other applications in MX Group 84-145. Hilo states that its application is only mutually exclusive with Ostlund's proposal and that the prohibited nighttime interference that creates the mutual exclusivity is *de minimis*. Hilo contends that a waiver of the nighttime interference limits is in the public interest because it would allow Hilo's application to be granted, along with at least one other application in MX Group 84-145. Hilo argues that it is willing to accept the *de minimis* amount of interference caused by the Ostlund proposal, in the interest of providing a new AM service to the community of Captain Cook. Hilo also states that the Commission has granted similar waivers in the past.

When an applicant seeks a waiver of the Rules, it must plead with particularity the facts and circumstances which warrant such action.[9] "A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[10] On the basis of the record before us, we find that Hilo has failed to present unique circumstances justifying grant of its Motion.

The *AM MX Public Notice* and the Rules prescribe two procedures to resolve mutual exclusivity: (1) settlement and (2) technical amendment. Waiver of the nighttime interference standards is not an option. Nor do AM processing policies contemplate the voluntary acceptance of interference levels that

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[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] 47 C.F.R. § 73.182(k)(2).

[9] *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968). In addition, Section 73.3566(a) of the Rules provides that requests for waiver "shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof." 47 C.F.R. § 73.3566(a).

[10] *Northeast Cellular Telephone Co. v. FCC,* 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

are otherwise prohibited by the Rules.[11] Hilo's request is fundamentally beyond the scope of the already liberal procedures for resolving application mutual exclusivities in the AM auction context. Moreover, Hilo's cited cases are inapposite, arising in the different context of the multiple ownership rules.

We further note that, as a Category I MX Group, the applicants in MX Group 84-145 were provided the opportunity to resolve their mutual exclusivities through settlement or technical resolution. Hilo could have settled with Ostlund or filed an engineering amendment that eliminated the interference, either of which would have resolved the mutual exclusivity and rendered Hilo's application a singleton. Hilo opted instead to file a Section 307(b) showing by the October 31, 2005, deadline. Seven months after the settlement deadline, Hilo cannot file an extra-procedural motion to resolve the mutual exclusivity through a waiver of the interference limits.[12] The AM auction process works fairly and efficiently when the rules are strictly applied.[13] No AM Auction 84 participant has received similar treatment based on a theory of "minimal" mutual exclusivity.[14] This potential prejudice to applicants that have followed the auction procedures and rules particularly weighs against the grant of Hilo's request.[15] Hilo's application remains mutually exclusive with that of Ostlund and will be evaluated using the Section 307(b) principles applicable to all other MX Groups in AM Auction 84.

Section 307(b) Issues. Both the Citicasters and Ostlund applications propose a first local transmission service to their respective communities and claim priority (3) under the applicable allotment priorities. There is currently one construction permit for an FM station in Captain Cook, Hawaii, Hilo's proposed community of license; one broadcast station licensed to Auberry, California, Favorita's proposed community of license; and one broadcast station licensed to Huron, California, Huron's proposed community of license. Therefore, these three proposals would be considered under priority (4), other public interest matters. Under well-settled policy, the establishment of a first local service at either Downey, California, or Easton, California, under priority (3) is preferred to a priority (4) proposal.

Where, as in this instance, Citicasters' and Ostlund's proposed new AM stations are located in an Urbanized Area or the proposed stations' 5 mV/m contours could cover a significant portion of an Urbanized Area, we do not automatically award a first local service preference. Rather, we have used the criteria set forth in *Faye and Richard Tuck* ("*Tuck*")[16] as a guideline in determining whether the proposed community has an identity distinct from the Urbanized Area, and is therefore entitled to consideration for

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[11] *Nelson Enterprises, Inc. and Green Valley Broadcasters, Inc*, Memorandum Opinion and Order, 18 FCC Rcd 3414 (2003).

[12] *Robert E. Combs*, Memorandum Order and Opinion, 19 FCC Rcd 13421, 13426 (2004) ("[W]e do not liberally entertain rule waivers seeking to extricate certain applications from MX groups, in order to potentially maximize the number of application grants. Our duty to preserve the integrity of our auction process requires the certain and strict application of the auction rules.") ("*Combs*").

[13] *See Mr. Ameer Flippin*, Letter, 20 FCC Rcd 8750 (WTB 2005) (denial of filing deadline waiver request based on benefit to other applicants of reasonable certainty as to the fair and predictable application of auction rules and procedures. Grant of waiver would frustrate Commission goal that auctions proceed in a timely, organized, predictable, and fair fashion).

[14] *Combs,* 19 FCC Rcd at 13426 ("[I]t is fundamentally unfair selectively to allow an applicant to obtain a construction permit outside the auction process, while requiring all other similarly situated applicants to comply with our competitive bidding rules").

[15] *Id.*

[16] *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988).

a first local transmission service. These criteria are: (1) the degree to which the proposed station will provide coverage to the Urbanized Area; (2) the size and proximity of the proposed community of license relative to the central city of the Urbanized Area; and (3) the interdependence of the proposed community of license and the Urbanized Area, utilizing the eight *Tuck* factors.[17] By letter dated August 13, 2007, the staff requested that Citicasters and Ostlund supplement their Section 307(b) showings with information addressing the *Tuck* criteria in order to determine whether their proposals warrant a first local service preference.

Downey proposal: On September 4, 2007, Citicasters provided the requested information, acknowledging that the proposed station at Downey is located in the Los Angeles Urbanized Area and will place a daytime 5 mV/m contour over eighty-seven percent of the Urbanized Area. The record reflects that the population of Downey (107,323 persons) is 2.9 percent of the population of Los Angeles (3,694,820 persons), and Downey is approximately thirteen miles away from the center of the Los Angeles Urbanized Area. However, these facts do not necessarily preclude a finding that Downey warrants a first local service preference.[18] While these two factors are pertinent, they are less significant than evidence substantiating the independence of Downey from Los Angeles.

Citicasters contends that, based on the *Tuck* factors, Downey is independent from Los Angeles. In support, Citicasters submits that United States Census Bureau statistics reflect that approximately eighteen percent of Downey's employed residents work in Downey (factor 1). Citicasters states that Downey is served by its own local weekly newspaper, *The Downey Patriot*, and a web site run by the city government (factor 2). Citicasters submits numerous articles from *The Downey Patriot* and the city's website which indicate that Downey's community leaders and residents perceive their community as being separate from the larger area of Los Angeles (factor 3). Downey has its own local government, consisting of an elected city council which appoints a mayor, and employs a number of functionaries, including a city manager, and city clerk (factor 4). Downey has four exclusive zip codes and post offices, and has a separate phone book from Los Angeles (factor 5). Citicasters states that approximately 2,300 commercial establishments exist within Downey, including grocery markets, banks, restaurants, car dealerships, and numerous retail establishments. In addition, Downey residents are served by at least three hospitals and numerous health care providers (factor 6). Citicasters states that Downey and Los Angeles are in separate advertising markets because Downey residents and businesses use *The Downey Patriot* for their advertising needs (factor 7). Downey maintains its own police, fire, public works, sewer systems, and water supply for its residents. Downey also administers the city's independent public

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[17] The eight factors set forth in *Tuck* are: (1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own local telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services.

[18] *See Bay St. Louis and Poplarville, Mississippi*, Report and Order, 10 FCC Rcd 13144 (MMB 1995) (first local service preference awarded when population difference was only 4.48 percent); *Ada, Newcastle and Watonga, Oklahoma*, Report and Order, 11 FCC Rcd 16896 (MMB 1996) (first local service preference awarded when contour coverage of 85-95 percent of Urbanized Area and population difference of less than 1 percent); *Oraibi, Arizona*, Report and Order, 14 FCC Rcd 13547 (MMB 1999) (first local service preference awarded when contour coverage of 90 percent of Urbanized Area).

schools and library system (factor 8). We find that the preponderance of the evidence submitted supports the conclusion that Downey is independent of Los Angeles. As such, Citicasters' application meets the criteria for a preference under priority (3) of the applicable allotment priorities as a first local transmission service to Downey, California.[19]

Easton proposal: On September 12, 2007, Ostlund provided the requested information,[20] acknowledging that the proposed station at Easton is located in the Fresno, California Urbanized Area and will place a daytime 5 mV/m contour over a significant portion of the Urbanized Area. The record reflects that the population of Easton (1,966 persons) is 0.45 percent of the population of Fresno (427,652 persons), and Easton is approximately eight miles away from the center of the Fresno Urbanized Area. However, these facts do not necessarily preclude a finding that Easton warrants a first local service preference.[21] While these two factors are pertinent, they are less significant than evidence substantiating the independence of Easton from Fresno.

On the key third *Tuck* criterion, Ostlund has not shown that a majority of the eight factors regarding independence have been met. The information provided by Ostlund is not sufficient to outweigh the evidence of Easton's dependence on Fresno. Ostlund states that due to Easton's agricultural characteristics most Easton's residents work outside of Easton (factor 1). Ostlund also states that Easton is served by a local newspaper, *The Twin City Times*, which is published in nearby Riverdale. However, Riverdale is an unincorporated community also located in the Fresno Urbanized Area and Fresno media outlets cover Easton's needs and interests (factor 2). Easton is an unincorporated Census designated place (CDP), thus it does not have its own local government and relies on the city of Fresno and Fresno County for all of its municipal services, including schools, police and fire protection (factors 4 and 8).[22] Easton shares a zip code with parts of Fresno (factor 5). Ostlund states that Easton is home to a medical clinic, an optometrist, a dentist, restaurants, convenience stores, and gas stations that serve the needs of Easton residents (factor 6).

At best, Ostlund has satisfied one of the eight *Tuck* factors.[23] We find that the preponderance of the evidence submitted strongly suggests a dependence of Easton on the Fresno Urbanized Area.[24] Under

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[19] Furthermore, we find that the city of Downey, California, constitutes a community suitable for licensing purposes. *See Arnold and Columbia, California*, Memorandum Opinion and Order, 7 FCC Rcd 6302, 6303 (MMB 1992).

[20] Ostlund also submitted a request for waiver of the filing deadline. We find that no party is prejudiced by the delay in Ostlund's submission and we will consider Ostlund's late-filed submission.

[21] *See* note 18 *supra.*

[22] *See, e.g. Statesville and Clemmons, North Carolina, Iron Gate, Virginia,* Report and Order, 21 FCC Rcd 57 (MB 2006) (factor 8 is not satisfied when community provides no independent municipal services, and instead receives all municipal services from the county).

[23] Ostlund provided information regarding factors 3 and 7, however, the information provided was non-responsive to the criteria required in each factor. As such, these factors neither weigh for or against a finding of independence.

[24] *See e.g., Greenfield and Del Rey Oaks, California*, Report and Order, 11 FCC Rcd 12681 (MMB 1996) (community found to be dependent on larger Urbanized Area, when, despite having a local government, it lacked a local newspaper, independent municipal services, and independent school and library systems).

these circumstances, we cannot credit Easton with a first local transmission service preference under priority (3).[25]

After careful consideration of all five applications, we have determined that the Citicasters proposal is entitled to a dispositive Section 307(b) preference. Additionally, Citicasters has demonstrated that changing Station KTLK(AM)'s community of license from Los Angeles to Downey would result in a preferential arrangement of assignments. Citicasters' proposed major change to Station KTLK(AM) meets the criteria for a preference under priority (3) of the applicable allotment priorities as a first local transmission service to Downey, California. Retaining a thirty-second local service at Los Angeles, the station's current community of license, would be evaluated under Priority (4). Under well-settled policy, the establishment of a first local service at Downey, under priority (3) is preferred to retaining a thirty-second local service under priority (4).[26] For these reasons, Citicasters will be directed to continue the application process by filing a complete FCC Form 301 application.[27]

Conclusion. Accordingly, IT IS ORDERED that Citicasters, within 60 days of the date of this letter, is to file a complete FCC Form 301 in connection with its application for major change to Station KTLK(AM), Los Angeles, California (File No. BMJP-20040130BAE), pursuant to the procedures set forth in the Commission's Rules.[28] With its application, Citicasters 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. Citicasters 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.[29] 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,[30] and must not create new application conflicts.

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

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[25] *See, e.g., Wallace, Idaho and Lolo, Montana*, Report and Order, 14 FCC Rcd 21110, 21113 (1999) (community found to be dependent on larger Urbanized Area when it lacked a local government, independent municipal services, and local media outlets).

[26] *See Dundee and Odessa, New York*, Report and Order, 22 FCC Rcd 13734 (MB 2007) (preferential arrangement of allotments found when community of license change provided first local transmission service to community versus retaining second local transmission service at current community of license).

[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*, 13 FCC Rcd at 15985. The staff will dismiss the applications filed by Ostlund (File No. BNP-20040129AMT); Hilo (File No. BNP-20040127ABN); Favorita (File No. BNP-20040128ANN); and Huron (File No. BNP-20040130BOC) upon action taken on the application filed by Citicasters.

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

[29] *See id.* §§ 73.24, 73.37, and 73.182.

[30] *Id.* § 73.3571.

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) 418-2662.

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 March 25, 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.[31]

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mark N. Lipp, Esq.
Jerrold Miller, Esq.
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[31] *Id.* § 73.3568.