# CITY OF NORWOOD, OHIO

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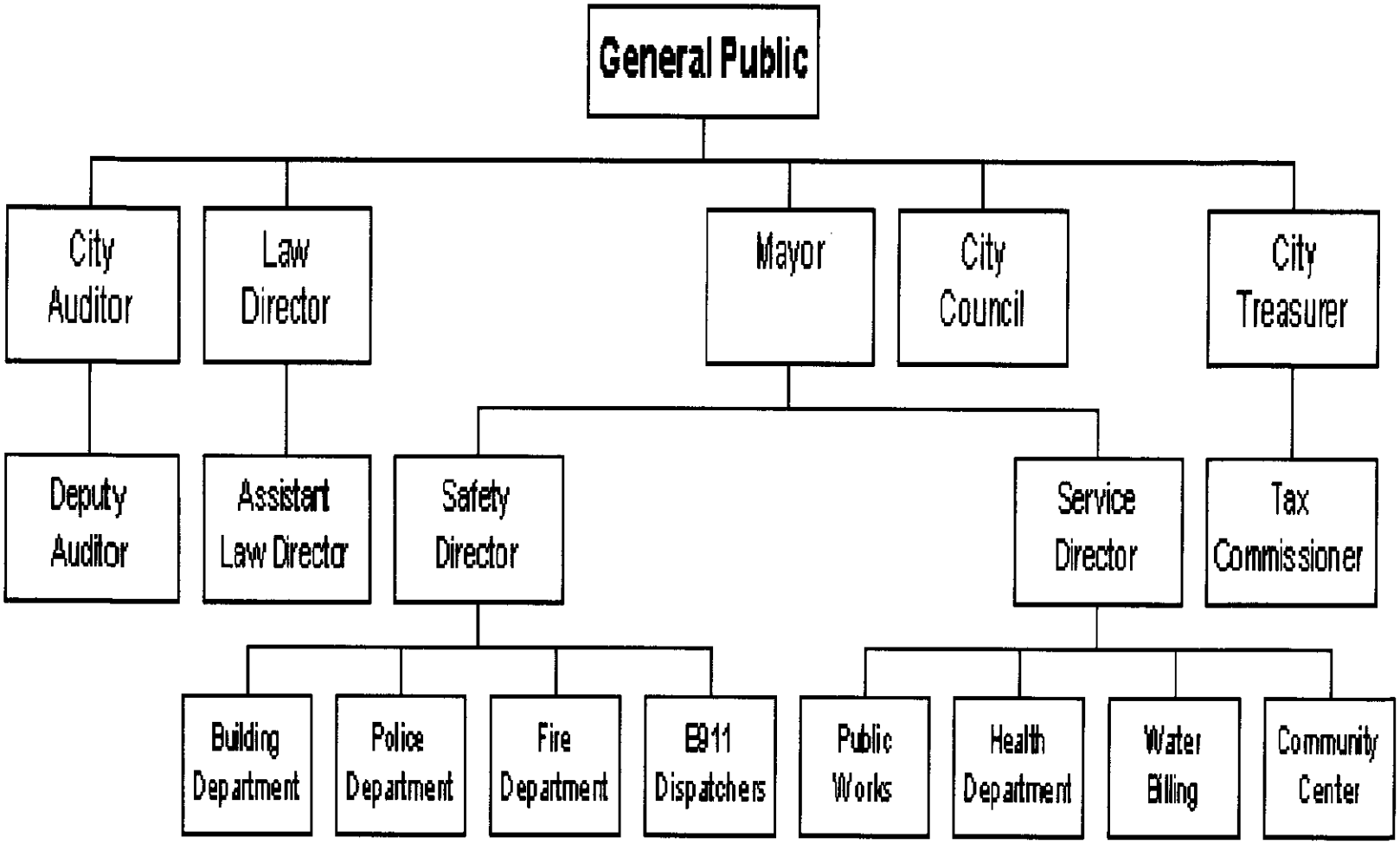
# City of Norwood, Ohio
## Chart of Organization
December 31, 2000



## CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Vinson & Elkins, do hereby certify that on this 9th day of January, 2004, I caused a copy of the foregoing "Petition for Rule Making" to be sent via first-class mail, postage prepaid, to the following:

Blue Chip Broadcasting Licenses II, Ltd.
5900 Princess Garden Parkway
8th Floor
Lanham, MD 20706
(Licensee of WIZF)

John Garziglia
Womble Carlyle Sandridge & Rice, PLLC
1401 Eye Street, N.W.
Washington, D.C. 20005
(Counsel to CBC of Marion County, Inc.)

Lisa M. Balzer (by MRC)
Lisa M. Balzer

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

| | | |
|---|---|---|
| In re Applications of | ) | |
| | ) | |
| ALVIN LOU MEDIA, INC. | ) | File No. BNP-20000201ADT |
| | ) | Facility ID No. 122420 |
| For a New AM Broadcast Station | ) | |
| at Waipahu, Hawaii | ) | |
| | ) | |
| and | ) | |
| | ) | |
| KM COMMUNICATIONS, INC. | ) | File No. BNP-20000201AFD |
| | ) | Facility ID No. 122491 |
| For a New AM Broadcast Station | ) | |
| at Makaha, Hawaii | ) | |

## MEMORANDUM OPINION AND ORDER

**Adopted: January 5, 2004** **Released: January 8, 2004**

By the Commission:

1. We have before us the October 3, 2002, Application for Review filed by Alvin Lou Media, Inc. ("ALM"), applicant for a new AM broadcast station at Waipahu, Hawaii.[1] ALM seeks review of the Media Bureau's ("Bureau") August 30, 2002, staff decision ("Reconsideration Decision")[2] denying reconsideration of the staff's award of a dispositive preference, under Section 307(b) of the Communications Act of 1934,[3] to the application of KM Communications, Inc. ("KMC") for a new AM

[1] File No. BNP-20000201ADT.

[2] *Letter to Mr. Dave Garey and Jeffrey L. Timmons P.C.*, Ref. No. 1800B3-TSN (MB Aug. 30, 2002). In its Application for Review, ALM states that it concurrently "protests, appeals, and seeks rescinding of the FCC MX Group 39 letter Order dated March 12, 2002 and then re-issued March 21, 2002." Application for Review at 1. We reject as untimely any further challenge to the earlier staff decision, especially since ALM timely filed a Petition for Reconsideration that was fully considered by the Bureau in the Reconsideration Decision. ALM also states that its Application for Review "concurrently serves to answer, appeal, and seek rescinding of a Public Notice [ALM] believes to be represented under report # 25329 and released by the FCC September 27, 2002, wherein the [KMC] Makaha 301 application is noticed as 'Accepted for Filing.'" Application for Review at 1 n.1. This pleading is procedurally deficient Any petition to deny KMC's Form 301 application should have been filed in the first instance with the Bureau within ten days of public notice of acceptance of the KMC application. 47 C.F.R. § 73.5006(b). *See also* 47 C.F.R. § 1.44(a) ("Requests requiring action by the Commission shall not be combined in a pleading with requests for action by an administrative law judge or by any person or persons acting pursuant to delegated authority."). ALM may not use an Application for Review of an action taken under delegated authority to serve as a petition to deny an application pending before the Bureau. *See Western Union Telegraph Co.*, 41 F.C.C.2d 232, 232-33 (1973).

[3] 47 U.S.C. § 307(b) ("Section 307(b)").

broadcast station at Makaha, Hawaii.[4] For the reasons discussed below, we deny the Application for Review.[5]

2. **Background.** ALM and KMC filed mutually exclusive ("MX") applications to participate in Broadcast Auction No. 32 for new AM broadcast stations.[6] The two applications, both proposing new AM stations on the island of Oahu, Hawaii, were designated MX Group AM 39. After determining the applications were mutually exclusive, the Bureau requested that the parties file amendments addressing the relative merits of their applications under Section 307(b) of the Communications Act of 1934.[7] After both ALM and KMC filed the requested amendments, the Bureau undertook a threshold Section 307(b) determination pursuant to the Commission's established auction procedures for the AM broadcast service.[8] In its May 4, 2001, staff decision,[9] the Bureau determined that KMC proposed first local service to Makaha, compared to ALM's proposed fourth local service to Waipahu, and thus that Makaha was entitled to a dispositive Section 307(b) preference over Waipahu under the Commission's assignment priorities.[10] The Bureau thus directed that KMC file a Form 301 application, and that ALM's application would be dismissed upon award of a construction permit to KMC.[11] KMC timely filed its Form 301 application June 4, 2001.[12]

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[4] File No. BNP-20000201AFD.

[5] ALM also filed a "Motion for FCC Acceptance of Supplemental Comments and Supplemental Comments" ("Supplemental Comments") with the Office of the Secretary on August 22, 2002. However, the Bureau released the Reconsideration Decision before the Supplemental Comments were received in the Bureau's Audio Division. Although the Supplemental Comments may be treated as a late-filed reply to KMC's opposition to ALM's Petition for Reconsideration, we will grant ALM's motion to accept the Supplemental Comments. As discussed below, ALM makes essentially the same arguments in the Supplemental Comments as in its Application for Review, and thus they need not be considered separately. We also consider KMC's September 4, 2002, Opposition to Motion for Acceptance of Supplemental Comments, and KMC's October 16, 2002, Opposition to Application for Review.

[6] *See Public Notice*, "AM Auction Filing Window and Application Freeze," 14 FCC Rcd 19490 (MMB/WTB 1999).

[7] 47 U.S.C. § 307(b). The Bureau requested Section 307(b) amendments in *Public Notice*, "AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction – Settlement Period for Groups Which Include a Major Modification Applicant – Filing Period for Section 307(b) Submissions," 15 FCC Rcd 20449 (2000), as extended by *Public Notice*, "AM Auction No. 32 Mutually Exclusive Applicants – Settlement Period and Section 307(b) Filing Period Extended to February 28, 2001," 15 FCC Rcd 24644 (2000) (collectively "*Mutually Exclusive Public Notice*").

[8] *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses, First Report and Order*, 13 FCC Rcd 15920, 15964-65 (1998) ("*Broadcast First Report and Order*"), *recon denied*, 14 FCC Rcd 8724, *modified*, 14 FCC Rcd 12541 (1999).

[9] *Letter to KM Communications, Inc. and Mr. Dave Garey*, Ref. No. 1800B3-TSN (MMB May 4, 2001) ("2001 Staff Decision").

[10] The FM assignment 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). *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982) ("*FM Assignment Policies*"). The priorities set forth in *FM Assignment Policies* are also used in evaluating applicants for new AM stations. *Alessandro Broadcasting Co.*, 99 F.C.C.2d 1 (Rev. Bd. 1984), *aff'd sub nom, New Radio Corp. v. F.C.C.*, 804 F.2d 756 (D.C. Cir. 1986), *review denied*, 2 FCC Rcd 112 (1987). The Bureau specifically stated that the priorities in *FM Assignment Policies* would be applied in AM Auction No. 32. *Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451.

[11] 2001 Staff Decision at 3.

3. The Section 307(b) information collection in the *Mutually Exclusive Public Notice* had not been approved by the Office of Management and Budget ("OMB"). Having subsequently obtained approval to collect Section 307(b) information under OMB Control No. 3060-0996, the Bureau sent the parties a second request for Section 307(b) amendments to their applications on October 22, 2001.[13] The Bureau held all processing of KMC's Form 301 application in abeyance pending receipt of any amended Section 307(b) information from the parties. In response to the October Section 307(b) Request, ALM submitted an amended Section 307(b) showing, while KMC requested that the staff consider its previously filed amendment as its Section 307(b) submission. The Bureau re-evaluated the applications based on ALM's amended showing, and once again concluded that Makaha was entitled to a first local service preference under Priority (3) of the *FM Assignment Priorities*.[14] In the 2002 Staff Decision, the Bureau indicated it would resume processing of KMC's already-filed Form 301 application, and again stated it would dismiss ALM's application upon grant of a construction permit to KMC. ALM filed a Petition for Reconsideration April 11, 2002, which was denied in the Reconsideration Decision.

4. **Discussion.** *Section 307(b).* ALM argues that its proposal should have been preferred under Section 307(b), due to its superior population and geographic coverage. It contends that awarding the preference to KMC contradicts Bureau policy and leads to an "anomalous result."[15] As explained below, however, we find that the Bureau correctly decided this issue.

5. The Bureau's award of a dispositive preference to Makaha was based on its application of the *FM Assignment Policies*, whereby first local transmission service to Makaha is preferred over ALM's proposed fourth local service to Waipahu. There are long-standing historical reasons for this preference. The Commission has long recognized that "every community of appreciable size has a presumptive need for its own transmission service."[16] Indeed, the Supreme Court has stated that "[f]airness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece."[17] Further, although ALM argues that it *could* have specified Makaha as its proposed community of license,[18] it did not do so. ALM chose Waipahu as its proposed community of license, a community already served by three local radio stations. KMC, by selecting Makaha as its proposed community of license, is obligated to serve the needs of that community.[19] Accordingly, under our

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[12] File No. BNP-20010604ABC.

[13] *Letter to KM Communications, Inc. and Mr. Dave Garey,* Ref. No. 1800B3-TSN (MMB Oct. 22, 2001) ("October Section 307(b) Request"). The October Section 307(b) Request bore OMB Control No. 3060-0996.

[14] *Letter to KM Communications, Inc. and Mr. Dave Garey*, Ref. No. 1800B3-TSN (MMB Mar. 21, 2002) ("2002 Staff Decision").

[15] Application for Review at 6-9.

[16] *Public Service Broadcasting of West Jordan, Inc.*, 97 F.C.C.2d 960, 962 (Rev. Bd. 1984). *See generally Pacific Broadcasting of Missouri LLC*, 18 FCC Rcd 2291, 2293 and n.15 (2003).

[17] *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (1955).

[18] Application for Review at 6.

[19] *See, e.g., Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691, 15692 and n.3 (1998), *modified*, 14 FCC Rcd 11113 (1999) (Serving the needs and interests of its community is a "'bedrock obligation' of every broadcast licensee," citing *Deregulation of Radio*, 84 F.C.C.2d 968, 977, 982, *on recon.*, 87 F.C.C.2d 797 (1981), *remanded on other grounds sub nom., Office of Communication of the United Church of Christ v. F.C.C.*, 707 F.2d 1413 (D.C. Cir.

assignment priorities, KMC receives a Priority (3) first local service preference, while ALM's proposal would be considered under Priority (4), other public interest matters. Thus, KMC's proposal is preferred to ALM's proposal that would arguably serve a greater population.[20]

6. ALM contends that award of a dispositive preference to Makaha leads to an "anomalous result." Its contention rests on a comparison with the Bureau's action taken in MX Group AM 38, in which ALM also filed an application.[21] However, we find the Bureau correctly distinguished the facts in MX Group AM 38 from those in this proceeding. We conclude that ALM's "anomalous result" argument is without merit.

7. In MX Group AM 38, ALM proposed first local service to Spring Valley, Nevada, an unincorporated Census Designated Place located in the Las Vegas, Nevada, Urbanized Area. Another mutually exclusive applicant, Powell Meredith Communications Co. ("PMCC"), specified Las Vegas as its community of license. The ALM and PMCC applications proposed essentially identical coverage areas, and both would have placed a principal community signal (5 mV/m groundwave contour) over more than 50 percent of the Las Vegas Urbanized Area. Moreover, the staff found that ALM did not provide sufficient evidence that Spring Valley was independent of the Las Vegas Urbanized Area.[22] Accordingly, the staff determined that to award Spring Valley a dispositive Section 307(b) preference for first local service under Priority (3) would condone an anomalous result, and the ALM and PMCC proposals were scheduled for auction.[23]

8. By way of contrast, Makaha is 15 miles from the Honolulu Urbanized Area,[24] and the Bureau found that KMC's proposal would place a principal community signal over less than 1 percent of the Honolulu Urbanized Area, and a primary service signal (2 mV/m) over only 16 percent of the Urbanized Area.[25] In these circumstances a *Tuck* showing was not required to demonstrate that Makaha

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1983), and *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2312 (1960)). *See also* 47 C.F.R. §§ 73.1120, 73.3526(e)(12).

[20] *See Palmetto Communications Company*, 6 FCC Rcd 1527 (Rev. Bd. 1991). *Accord Pasadena Broadcasting Co. v. F.C.C.*, 555 F. 2d 1046, 1050-51 (D.C. Cir. 1977) (first local transmission service to a smaller community is preferred over service merely complementing preexisting local operations at a larger community).

[21] Two applications for review in that MX group, including ALM's, are still pending, and the issues raised therein will be fully addressed in that proceeding.

[22] *See Faye & Richard Tuck, Inc.*, 3 FCC Rcd 5374, 5377-79 (1988) ("*Tuck*").

[23] *Letter to Mr. Dave Garey, Powell Meredith Communications Company, and Mr. Victor A. Michael, Jr.*, Ref. No. 1800B3-TSN (MB Apr. 11, 2002), citing *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990); *Huntington Broadcasting Co. v. F.C.C.*, 192 F.2d 33 (D.C. Cir. 1951). ALM was not a qualified bidder in Auction No. 32. *See Public Notice*, "Auction of Construction Permits for New AM Broadcast Stations – 5 Qualified Bidders," DA 02-3214 (WTB/MB rel. Nov. 22, 2002). Auction No. 32 closed on December 12, 2002. *Public Notice*, "New AM Broadcast Stations Auction Closes – Winning Bidders," DA 02-3450 (WTB/MB rel. Dec. 18, 2002).

[24] Application for Review at 11.

[25] ALM accuses the Bureau of engaging in "clairvoyant reasoning" in its 2002 Staff Decision, when it determined that KMC did not intend to serve the Urbanized Area. We reject this characterization. The Bureau stated only, as a general proposition, that it was "concerned with a situation in which a party proposes a suburban community in or near an Urbanized Area and seeks a preference as a first local service when, in fact, it intends to serve the Urbanized Area." 2002 Staff Decision at 3. However, in both that decision and the Reconsideration Decision, the Bureau merely determined the areas over which KMC's application places a principal community signal. It did not engage in any unwarranted speculation as to KMC's intentions.

was independent of the Honolulu Urbanized Area.[26] Thus, the Bureau correctly distinguished the factual situation from that in MX Group AM 38, in which ALM and PMCC both would serve the Las Vegas Urbanized Area. We do not blindly apply Priority (3) where an applicant proposes a community that is in an Urbanized Area and interdependent with the Urbanized Area, and proposes sufficient power to serve the Urbanized Area.[27] Here, however, KMC places a 5 mV/m groundwave contour over Makaha, without providing such a principal community contour over Honolulu.[28] Without such proposed signal coverage, there is no presumption that KMC proposes to serve the entire Honolulu Urbanized Area. We therefore find no error in the Bureau's conclusion in this regard.[29]

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[26] *See Headland, Alabama, and Chattahooche, Florida*, 10 FCC Rcd 10352, 10354 (MMB 1995) (no *Tuck* showing required when a station located outside an urbanized area does not place a principal community signal over 50 percent or more of the urbanized area).

[27] *Tuck*, 3 FCC Rcd at 5376.

[28] We further reject ALM's contention that the Bureau's award of a dispositive Section 307(b) preference to KMC was based on its service to the Makaha "area" rather than the community itself. Application for Review at 20-21. ALM partially quotes the Bureau's statement that it "concluded that [KMC's] proposed station would principally serve Makaha and the surrounding area, rather than the Honolulu Urbanized Area." Reconsideration Decision at 3. This, contrary to ALM's assertion, does not endorse the award of a construction permit to an "area." KMC's proposed signal will not confine itself to the Makaha community borders but, as a Class B AM facility, will necessarily reach some of the surrounding area as well. By its statement, the Bureau simply underscored that KMC's proposed principal community signal would be limited to Makaha and its surrounding area and would not encompass the greater Honolulu Urbanized Area.

[29] ALM further alleges that, because the Bureau "admitted" in a decision in another MX group that it did not conduct a full legal and technical analysis prior to its Section 307(b) determination, the Bureau's Section 307(b) analysis in MX Group AM 39 is arbitrary and capricious. Application for Review at 10. We reject this contention. ALM confuses the Section 307(b) analysis with a full legal and technical analysis of an application. The Commission directed the Bureau to perform only such pre-auction analysis of AM auction applications as is "necessary to determine the mutually exclusive groups of applications for auction purposes," and not to make any determinations as to acceptability or grantability of an applicant's technical proposal before auction. *Broadcast First Report and Order*, 13 FCC Rcd at 15978-79. In the AM auction context, the Commission also directed the Bureau to perform a Section 307(b) analysis in order to harmonize statutory concerns. The required Section 307(b) analysis, on the other hand, does not involve acceptability or grantability issues, and is performed pre-auction, as a threshold matter, in order to accommodate our statutory duty under Section 307(b) of the Communications Act of 1934. *Id.* at 15964-65. Thus, the fact the Bureau did not perform a full legal and technical analysis in no way indicates that the Section 307(b) determination was incomplete, arbitrary, or capricious.

We further reject ALM's contention that KMC is "dwarfing" its signal at 5 kilowatts, and that ALM's more powerful 10 kilowatt proposal represents a more efficient use of spectrum. KMC proposes a Class B AM facility, which may operate with a minimum power of 0.25 kilowatts up to a maximum of 50 kilowatts. 47 C.F.R. § 73.21(a)(2). KMC's proposed 5 kilowatt operation is within these limits and appears to provide the required coverage of the community of license. Moreover, AM radio frequencies are allocated on a demand basis, with applicants specifying the desired community and facilities that will provide the required level of service to that community while avoiding prohibited interference to other stations. *See, e.g., Broadcast First Report and Order*, 13 FCC Rcd at 15963. An AM radio applicant's specification of its desired facilities amounts to a business judgment, and as a general proposition we will not second-guess that judgment, absent evidence (not present here) that a business decision is allegedly being used to perpetrate a sham. *Victory Media, Inc.*, 3 FCC Rcd 2073, 2075 (1988). Additionally, technical characteristics intrinsic to the AM service, such as ground conductivities, the complexity of directional antenna patterns, and the availability of land for AM antenna systems, make it impractical for the Commission to substitute its judgment for that of the applicant. Further, there is no guarantee that KMC would be able to increase its power after receiving a supposed Section 307(b) benefit from the allegedly "dwarfed" proposal, as ALM suggests. Apart from the fact that no applicant can know what competition it will face from other filing window applicants, there is no way for KMC to know whether its ability to expand its facilities in the future would

9. Finally, ALM accuses the Bureau of "willfully" creating a "lucrative 2-station 'duopoly'" for KMC on Oahu, thereby suppressing the "'other voice' which would be provided to listeners by appropriate preference of [ALM]."[30] During the Auction No. 32 filing window, KMC also applied for a new AM station at Ewa Beach, Hawaii.[31] This application is being processed by the staff, as it was not mutually exclusive with any other Auction No. 32 applications.[32] Moreover, any examination of KMC's Makaha auction filing window application and its Section 307(b) submission for compliance with our radio multiple ownership rules is premature, because the staff does not study applications for acceptability or grantability at this stage. We thus reject ALM's argument as being beyond the scope of the Section 307(b) analysis at issue here. In any event, the staff will fully study KMC's June 4, 2001, Form 301 long-form application for compliance with the Commission's multiple ownership rules. Moreover, an informal objection may be filed against the KMC application at any time prior to staff action on the application. KMC's failure to cure any multiple ownership rule violation that is identified during the staff's grantability review will subject the application to dismissal pursuant to Section 73.3566(a) of the Commission's rules.[33]

10. In summary, we find that the Bureau correctly determined that KMC's proposed first local service to the community of Makaha merited a dispositive Section 307(b) preference over ALM's proposal for fourth local service to Waipahu. ALM has thus failed to raise a substantial and material question of fact on these grounds.

11. *Status of KMC Long Form Application.* ALM contends that the Bureau "improperly kept alive," and erroneously accepted for filing, the long form (Form 301) application filed by KMC, when the Bureau issued the October Section 307(b) Request and awaited responses thereto.[34] These contentions are in error. First, the Bureau suspended processing of KMC's Form 301pending the parties' responses to the October Section 307(b) Request. In fact, the Bureau did not accept KMC's Form 301 application for filing until September 27, 2002, well after the 2002 Staff Decision and the Reconsideration Decision.[35] Second, ALM cites no precedent in support of its contention that KMC's Form 301 was required to be returned. When the Bureau determined that the Mutually Exclusive Public Notice did not comply with the Paperwork Reduction Act ("PRA"),[36] it promptly secured OMB approval to issue the October Section

be limited by prior-filed minor modification applications by existing stations. Thus, there is no reason for the Commission to consider what facilities an applicant *might* have specified in its proposal. For these reasons, the Commission has traditionally compared mutually exclusive AM applicants' actual proposed facilities in performing its Section 307(b) analysis. *See, e.g., Tuck*, 3 FCC Rcd at 5376; *North Texas Radio, Inc.*, 11 FCC Rcd 8531, 8535-37 (1996) (Commission uses applicants' proposals in determining whether coverage of adjacent Urbanized Area is sufficient to invoke *Huntington* doctrine). Finally, the Bureau made clear that it would use applicants' proposed 2 mV/m and 0.5 mV/m contours in making its Section 307(b) determination. *See Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451; October Section 307(b) Request at 2.

[30] Application for Review at 14.

[31] File No. BNP-20000201AFB.

[32] *See Public Notice*, "AM Auction No. 32 Non-Mutually Exclusive Applications – Mass Media Bureau Announces Form 301 Application Deadline and Ten-Day Petition to Deny Period," 15 FCC Rcd 18004 (MMB 2000).

[33] 47 C.F.R. § 73.3566(a).

[34] Application for Review at 14-15.

[35] *Public Notice*, "Broadcast Applications," Report No. 25329 (MB Sept. 27, 2002).

[36] 44 U.S.C. § 3501 *et seq.*

307(b) Request. This provided both ALM and KMC a second opportunity to submit Section 307(b) data. The Bureau then thoroughly evaluated any amended submissions. We reject ALM's allegation that, because the Bureau held the application in abeyance rather than dismissing KMC's Form 301 during this time frame, KMC's application enjoyed "immediate favored status" and its grant was a "foregone conclusion."[37]

12. In any event, the Form 301 filed by KMC was itself an OMB-approved form,[38] and the Bureau was compelled by neither the PRA nor the rules promulgated thereunder to require that the Form 301 be returned and re-filed. Moreover, it would have been administratively inefficient to dismiss that application outright. We therefore reject ALM's contention that the Bureau was "required by law" to dismiss KMC's Form 301 application.[39]

13. We likewise reject ALM's contention that "it is clearly impossible for [ALM] to have (or have had) any semblance of a fair appeal . . . while the FCC continues to actively process the precise matter which is under appeal."[40] We do not require processing to cease while pleadings are being considered, as we have determined that delay in awarding a construction permit frustrates the public interest and denies communities new service.[41] Indeed, we award construction permits even while applications for review or court challenges are pending.[42] We have determined that this procedure is in the public interest, and that no irreparable damage is done because auction payments can be refunded and permit grants rescinded in the event of an adverse ruling to the formerly prevailing applicant.[43]

14. *Request for Stay.* ALM argues that the Bureau's denial of its stay request was arbitrary and capricious. We do not agree. Assuming, *arguendo*, that ALM did address the four criteria for a stay of Commission action in its Petition for Reconsideration, its showing is unpersuasive.[44] The Bureau clearly found that ALM was unlikely to prevail on the merits of its appeal, thus negating the first factor supporting stay. We agree with the Bureau that ALM is not likely to prevail on the merits, and thus find the Bureau properly denied the requested stay. Moreover, as noted above, ALM will not suffer any irreparable harm, because any final action taken with respect to any application in MX Group AM 39 is subject to further administrative and judicial review.

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[37] Application for Review at 15.

[38] FCC Form 301 displays OMB Control No. 3060-0027.

[39] Application for Review at 15.

[40] *Id.* at 16.

[41] *See, e.g., Broadcast First Report and Order*, 13 FCC Rcd at 15985.

[42] *See Abundant Life, Inc.*, 17 FCC Rcd 4006 (2002). *See also Winstar Broadcasting Corp.*, 17 FCC Rcd 6126 (2002).

[43] *See, e.g., Public Notice,* "Auction of C, D, E, and F Block Broadband PCS Licenses, Status of Applications to Participate in the Auction, Clarification of Payment Issue Relating to Licenses Subject to Pending Proceedings," 14 FCC Rcd 5467, 5470 (1999) (Commission will return all payments made by winning bidders forced to surrender their licenses as a result of final determinations reached in pending judicial proceedings).

[44] In order to justify a stay, a party must show (1) that it is likely to prevail upon the merits; (2) that it will suffer irreparable harm absent a stay; (3) that interested parties will not be harmed if a stay is granted; and (4) that the public interest favors grant of a stay. *See Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (1977).

15. While ALM appears again to seek a stay in its Application for Review, we note that this request is procedurally defective. Our Rules clearly state that "[a]ny request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission."[45] ALM has not filed a separate request for stay, and thus any such requests for relief in its Application for Review need not be considered.

16. *Supplemental Comments.* On August 22, 2002, ALM filed a "Motion for FCC Acceptance of Supplemental Comments" and "Supplemental Comments Including Amendment to Original Petition for Reconsideration." While these documents were filed with the Secretary shortly before release of the Reconsideration Decision, the Bureau did not receive them prior to releasing that decision. However, to the extent that ALM, in its Supplemental Comments, complains of delay in the Bureau's handling of its Petition for Reconsideration and "Emergency Motion for Stay," these concerns are moot in light of the Bureau's release of the Reconsideration Decision. The remainder of the Supplemental Comments consists of arguments reiterated in its Application for Review, and we have discussed these arguments above. We thus consider the Supplemental Comments to have been superseded by the Application for Review, and thus need not be considered separately.

17. **Conclusion.** For the foregoing reasons, ALM's Motion for FCC Acceptance of Supplemental Comments IS GRANTED. ALM's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[45] 47 C.F.R. § 1.44(e). *See also Western Union Telegraph Co., supra* note 2.