

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of Application of:	)	
	)	
<b>CLOSED AUCTION OF AM</b>	)	AU Docket No. 13-268
<b>BROADCAST CONSTRUCTION</b>	)	
<b>PERMITS FOR AUCTION 84</b>	)	
<b>SCHEDULED FOR MAY 6, 2014</b>	)	
	)	
<b>Comments of:</b>	)	
	)	
<b>S&amp;B BROADCASTING COMPANY</b>	)	MM-AM84-172
	)	
	)	

To: Office of the Secretary

**COMMENTS AND MOTION TO STAY AUCTION**

S&B Broadcasting Company (“S&B”) hereby files its Comments and Motion to Stay Auction in the Closed Auction 84 Scheduled for May 6, 2014. On October 5, 2007, S&B filed an application for Stony Point, New York on 1700 kHz. S&B’s application is mutually exclusive with the Talkline Communications Corp. application for Monsey, New York, the Alexander Broadcasting, Inc., application for Ramapo, New York, and the Polnet Communications, Ltd. application for the Town of Haverstraw, New York. S&B seeks to stay only that part of Auction 84 that refers to the above referenced mutually exclusive construction permit applications, MM-AM84-172.

Despite the fact that the mutually exclusive applicants proposed to serve four separate communities of license, the FCC did not permit the applicants to submit a Section 307(b) analysis.<sup>1</sup> S&B believes that it has a significant Section 307(b) advantage and that once it is

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<sup>1</sup> 47 U.S.C. §307(b).

permitted to demonstrate that advantage an auction will not be required and S&B's application with be selected as the winning application for Stony Point, New York. The FCC's failure to request a Section 307(b) analysis has materially prejudiced S&B's application.

Accordingly, S&B requests that the FCC stay the action for this construction permit, until the parties have had an opportunity to present their Section 307(b) showings and the FCC has had an opportunity to review the presented analysis and make a dispositive determination on Section 307(b).

### **Background**

On August 22, 2006, the Commission released a *Memorandum Opinion and Order* directing the opening of a limited filing window to permit the filing of applications for a new AM station on 1700 kHz in a community located in Rockland County, New York.<sup>2</sup> On August 30, 2007, the Media Bureau and the Wireless Telecommunications Bureau announced a five-day period, from October 1 to October 5, 2007, for the filing of applications for new AM stations and major modifications to authorized AM stations for Rockland County, New York.<sup>3</sup> Specifically, the FCC required: the station to "serve the critical public safety needs of those residents within the Indian Point [Emergency Planning Zone] EPZ designated by emergency authorities..." *Alexander* at 9972. Accordingly, "applicants must specify a community of license within Rockland County, and the proposed facilities must, at a minimum, provide service to (*i.e.*, place

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<sup>2</sup> *Alexander Broadcasting, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 9968 (2006) ("*Alexander*").

<sup>3</sup> "Supplemental AM New Station and Major Modification Auction Filing Window for Auction 84; Minor Modification Application Freeze; Notice and Filing Requirements Regarding October 1-5, 2007, Window for Certain AM Construction Permit Applications for Rockland County, New York; Notice Regarding Freeze on the Filing of AM Expanded Band Minor Change Construction Permit Applications," Public Notice, 22 FCC Rcd 16217 (2007) ("*Supplemental AM Window Public Notice*").

a daytime 2.0 mV/m strength contour and a nighttime interference free contour over) more than 50 percent of the persons residing in the Rockland County portion of the Indian Point EPZ.” *Id.*

In the *Alexander*, the FCC ordered that any applicant for the construction permit must serve the Indian Point EPZ. However, the FCC in *Alexander* did not abandon the specific requirements of conducting a Section 307(b) analysis. The *Supplemental AM Window Public Notice* cited with approval the *Broadcast First Report and Order*,<sup>4</sup> but did not modify the FCC’s prior determination that a traditional Section 307(b) analysis must be undertaken by the staff prior to conducting auctions of competing applications.<sup>5</sup> Nor is there a need to abandon the requirements of Section 307(b) for an applicant to also serve the Indian Point EPZ. In this case, four applicants filed four applications, which will provide the required service to the Indian Point EPZ, while also proposing to serve four different and distinct communities.

Nonetheless, in “*Supplemental AM Auction 84 Mutually Exclusive Applicants Subject to Auction Settlement Period Announced*” Public Notice, 24 FCC Rcd 12522 (2009) the FCC without prior notice or opportunity for the parties to comment determined that

to ensure that the new AM station will meet the fundamental safety and informational needs of Rockland County residents, applicants filing in the supplemental window were required to specify a community of license in Rockland County, New York. Because the specific geographic and service conditions imposed by the Commission in the *Alexander*

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<sup>4</sup> *Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, MM Docket No. 97-234, *First Report and Order*, 13 FCC Rcd 15920, (1998) (“*Broadcast First Report and Order*”), granted in part and denied in part, *Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999), modified, *Memorandum Opinion and Order*, 14 FCC Rcd 14521 (1999)

<sup>5</sup> See *Broadcast First Report and Order*, 13 FCC Rcd 15920, 15964-65 ¶¶ 117-20. (prior to conducting an auction for the AM service, staff must undertake a traditional Section 307(b) analysis). See also, *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, DA 05-1604, 20 FCC Rcd 10563, 10565-67 (MB/WTB 2005)

*MO&O* fulfill the Section 307(b) statutory mandate, we will not apply a threshold Section 307(b) analysis for the mutually exclusive application group listed in Attachment A to this Public Notice. Accordingly, no applicant listed in Attachment A should submit a Section 307(b) analysis of its respective proposal. Section 307(b) analyses that are submitted will not be considered and will be returned. (footnotes omitted)

S&B believes that this action, in violation of the Section 307(b) and prior Commission precedent, is arbitrary and capricious.

### **Argument**

Section 307(b) states: “In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall 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.”

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 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).<sup>6</sup>

In *Broadcast First Report and Order*, the Commission promulgated the auction procedures for AM allocations. The Commission determined that rather than conducting full technical reviews of all applications prior to an auction, it would examine the technical data in advance only to determine whether applications were mutually exclusive and entitled to a preference pursuant to Section 307(b). In keeping with this directive, the Commission determined the staff would undertake a "traditional Section 307(b) analysis" prior to auction. *Id.* at 15965.

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." ... 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.

Thus, in the instant case, upon identifying the mutually exclusive applications, the FCC should have requested information from applicants regarding the area and population proposed to be served. The FCC could then have had the information to determine if one of the applicants Section 307(b) analysis was dispositive, and granting the application proposing to serve the

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<sup>6</sup> See also H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 253 (1993).

community with the greater need and dismiss other applications as ineligible. *Id.* at 15965.

S&B believes that had the Commission conducted a Section 307(b) analysis, it would have given S&B's application a dispositive preference and there would be no need for an auction.

Congress has drawn a distinction between normal comparative proceedings among various applicants in the same location for the same frequency and a Section 307(b) analysis on mutually exclusive applications for licenses in different communities. As the Supreme Court stated in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333, 90 L. Ed. 108, 113 66 S. Ct. 148, 151 (1945),

Congress has granted applicants a right to a hearing on their applications for station licenses. ... We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.

In this case Congress has granted S&B the right to a paper hearing to determine if S&B should be awarded a dispositive preference. The Commission's decision not to conduct a Section 307(b) analysis was effected without adequate notice to S&B, without proper promulgation under the Administrative Procedure Act, and in violation of the precedent established by *Ashbacker*. A stay of the auction is necessary because this is not a matter that can be remedied after the auction. As the Supreme Court stated in *Ashbacker*, at 330.

We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing. We think that is the case here.

Once the construction permit is awarded per the auction process the facility will no longer be available for a grant unless the auction grant is recalled. Thus any Section 307(b) analysis conducted after the auction would in essence be a hearing for the revocation or modification of an outstanding construction permit or license. Such an outcome is in clear violation of the teachings of *Ashbacker*.

**Conclusion**

Accordingly, the FCC should stay the auction and order the four competing applicants to submit Section 307(b) analysis. The FCC should then review the Section 307(b) showings and determine whether any applicant is entitled to a dispositive preference. If no applicant is entitled to a dispositive preference, then, and only then, the applications should be set for auction.

Respectfully submitted,

By:   
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December 3, 2013

**Certificate of Service**

I, Sherry L. Schunemann, a secretary with the law firm of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Comments and Motion To Stay Auction" was mailed this 3rd day of December, 2013, by First Class U.S. Mail, postage prepaid, to the following:

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