



Federal Communications Commission
Washington, D.C. 20554

March 31, 2008

DA 08-761

In Reply Refer to:

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IHR Educational Broadcasting
PO Box 180
Tahoma, CA 96142

RAMS I
415 North College Street
Greenville, AL 36037

Re: **AM Broadcast Auction 84
MX Group 84-26**

Bend, Oregon
Facility ID No. 160761
File No. BNP-20040130ADH

Deschutes River Woods, Oregon
Facility ID No. 160913
File No. BNP-20040129AUS

**Applications for New AM Station
Construction Permits**

Dear Applicants:

We have before us two mutually exclusive AM applications. IHR Educational Broadcasting (“IHR”) proposes a new AM station at Bend, Oregon, and RAMS I (“RAMS”) proposes a new AM station at Deschutes River Woods, Oregon.¹ As discussed below, we are unable to find a dispositive preference for either of the remaining applicants under Section 307(b) of the Communications Act of 1934, as amended (the “Act”),² and the applications will therefore proceed to auction.

Background. In situations such as the one before us, the grant of an application would normally be resolved by a competitive bidding process.³ 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

¹ A third mutually exclusive AM application filed by Elizabeth H. Erickson was dismissed on March 21, 2006. See *AM Auction No. 84 Mutually Exclusive Applications Dismissed for Either Failing to File or Untimely Filing of Section 307(b) Showing*, Public Notice, 21 FCC Rcd 2912 (MB 2006). Erickson filed a petition for reconsideration of the dismissal on December 26, 2006, which will be acted upon by separate letter.

² 47 U.S.C. § 307(b) (“Section 307(b”).

³ See *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 (1998) (“*Broadcast First Report and Order*”), recon. denied, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), modified, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

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.⁴ The Commission also noted that the FM allotment priorities fulfill the Commission's obligation under Section 307(b), and would apply in making a Section 307(b) determination regarding mutually exclusive AM applications before auction.⁵

Discussion. After careful consideration of both applications, we have determined that neither proposal is entitled to a dispositive Section 307(b) preference. There are currently eleven radio stations licensed to Bend, Oregon, IHR's proposed community of license. Therefore, its proposal would be considered under priority (4), other public interest matters. While RAMS claims a priority (3) preference for proposing a first local transmission service to Deschutes River Woods, Oregon, for the reasons discussed below we find it does not merit a dispositive Section 307(b) preference.

In evaluating RAMS's proposal to provide a first local transmission service, we note that the community of Deschutes River Woods is located in the Bend, Oregon, Urbanized Area ("Bend Urbanized Area"). Where, as in this instance, the proposed new AM station's 5 mV/m contour will 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*⁶ as a guideline in determining whether the proposed community has an identity distinct from the urbanized area, and is therefore entitled to a dispositive preference for proposing a first local service. Those 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 to the urbanized area, utilizing the eight factors enumerated in *Tuck*.⁷ By letter dated June 27, 2006, the staff requested that RAMS supplement its Section 307(b) showing with information addressing the *Tuck* criteria, in order to determine whether its proposal warrants a first local service preference.

On July 24, 2006, RAMS responded to the June 27, 2006, staff letter, contending that a *Tuck* analysis is unnecessary in the instant case and instead relies on its October 31, 2005, Section 307(b)

⁴ *Broadcast First Report and Order*, 13 FCC Rcd at 15964-65.

⁵ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC2d 88 (1982) ("*FM Assignment Policies*"). 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). See also *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 20 FCC Rcd 10563, 10565 and n.16 (MB/WTB 2005).

⁶ Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) ("*Tuck*").

⁷ 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. *Id.* at 5378.

showing, which notes that Deschutes River Woods is listed as a Census Designated Place (“CDP”) by the United States Census Bureau and is, therefore, presumptively a community for licensing purposes. Rather than provide the requested *Tuck* analysis, RAMS states that “it has been the Commission’s policy not to apply *Tuck* to requests for new stations,”⁸ contending instead that we “should follow [the] longstanding policy set forth in the *Suburban Community Policy* decision,”⁹ which antedated *Tuck* by five years.

We disagree with RAMS’s contention that a *Tuck* analysis is inappropriate in this instance. Not only is the community of Deschutes River Woods located within the Bend Urbanized Area, but RAMS’s proposed station will place a 5 mV/m contour over a significant portion of the urbanized area. In such a case, an analysis of Deschutes River Woods’s interdependence with the urbanized area is mandated.¹⁰

We find that RAMS’s contention is facially untenable - that we may not apply *Tuck* in the exact procedural situation from which the *Tuck* case arose, namely, evaluation of competing mutually exclusive applications for new AM stations. In support of its argument, RAMS cites *Nantucket* and *Easton*, two of only a small handful of FM allotment cases in which allocations staff stated it would not apply *Tuck* to cases of proposed new FM allotments.¹¹ None of these cases provide citations to support this statement. Further, none purports to define the entire scope and applicability of the *Tuck* doctrine, yet RAMS attempts to extrapolate “the Commission’s policy” from this limited sampling of staff FM allocations decisions. Notably, in *Easton* the staff stated (and RAMS concedes) that *Tuck* applies “in comparative hearings involving applications.”¹² There is no question that the instant case involves competing applications, and RAMS is undoubtedly aware that competitive bidding procedures have replaced

⁸ RAMS July 24, 2006, letter at 1 (citing *Nantucket, East Harwich, and South Chatham, Massachusetts*, Report and Order, 20 FCC Rcd 3577 (MB 2005) (“*Nantucket*”) and *Easton, Merced, and North Fork, California*, Report and Order, 15 FCC Rcd 5046 (MMB 2000) (“*Easton*”).

⁹ RAMS July 24, 2006, letter at 1-2 (citing *The Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, Report and Order, 93 FCC2d 436 (1983) (“*Suburban Community Policy*”).

¹⁰ See, e.g., *Powell Meredith Communications Co., et al.*, Memorandum Opinion and Order, 19 FCC Rcd 12672, 12673 n.9 (2004) (“*Powell Meredith*”) (citing *Darien, Rincon, and Statesboro, Georgia, etc.*, Report and Order, 17 FCC Rcd 20485, 20486 (MMB 2002) (showing under *Tuck* required when station located outside of an urbanized area proposes to place a principal community signal over 50 percent or more of an urbanized area)). See also *Port Norris, New Jersey, Fruitland and Willards, Maryland, Chester, Lakeside, and Warsaw, Virginia*, Report and Order, 21 FCC Rcd 11449 (MB 2006) (*Tuck* showing required when station proposes to move from community outside an urbanized area to one within an urbanized area) (citing *East Los Angeles, Long Beach, and Frazier Park, California*, Report and Order, 10 FCC Rcd 2864 (MMB 1995), *recon. dismissed*, 13 FCC Rcd 4692 (MMB 1998)).

¹¹ In addition to *Easton* and *Nantucket*, the only other cases that appear directly to address the issue of applying *Tuck* to new versus change of community proposals are *Oak Harbor and Sedro-Woolley, Washington*, Report and Order, 21 FCC Rcd 10029, 10030 n.10 (MB 2006) (stating the policy without citation or explanation), and *Vernon Center and Eagle Lake, Minnesota*, Notice of Proposed Rule Making, 21 FCC Rcd 3940, 3941 n.8 (MB 2006) (citing *Nantucket*).

¹² *Easton*, 15 FCC Rcd at 5050. The staff in that case also stated that “Allocations Branch policy” has precluded the application of *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33, 35 (D.C.Cir.1951) (“*Huntington*”) and *Tuck* to drop-in allotments in urbanized areas. *Id.* By its terms this statement is limited to its factual context. The staff in *Easton* also noted that this issue has “not arisen often due to the difficulty of dropping new allotments into communities located in urbanized areas.” *Id.* This may explain the paucity of authority to support RAMS’s contention.

comparative hearings as the method to select among mutually exclusive applicants for new AM facilities.¹³ Thus, again, it is clear that application of *Tuck* to the instant case is entirely appropriate.

It is equally incongruous for RAMS to state that, instead of *Tuck*, we should follow the earlier *Suburban Community Policy* guidelines. In *Tuck*, the Commission clarified certain aspects of *Suburban Community Policy*, when selecting among competing new AM applicants that specify communities in and near urbanized areas.¹⁴ RAMS's argument provides no basis for repudiating the *Tuck* precedent in this context. The Commission has consistently applied the *Tuck* criteria to mutually exclusive applications for new AM stations.¹⁵

Moreover, *Tuck* is procedurally and factually analogous to the instant case. In *Tuck*, four applicants for new AM stations specified three separate communities in or adjacent to the Dallas, Texas, Urbanized Area. Here, IHR specifies Bend as its proposed community of license, while RAMS specifies Deschutes River Woods, an unincorporated suburb located in the Bend Urbanized Area. Although *Tuck* does not preclude an award of a construction permit to a community within a larger community's urbanized area, the Commission uses the *Tuck* doctrine to determine whether an applicant should receive a dispositive 307(b) preference under priority (3) of the applicable allotment priorities. As the Commission stated in *Tuck*, "[i]n those exceptional cases . . . where competing applications are filed for separate communities that are dependent upon, and contiguous to, a central city, and the applicants propose sufficient power to serve the entire metropolitan area, we treat that entire metropolitan area as one community for section 307(b) purposes."¹⁶ Thus, RAMS's proposal, which claims a priority (3) preference for the Bend suburb of Deschutes River Woods, must be analyzed using the *Tuck* criteria.

¹³ See generally 47 U.S.C. § 309(j); *Broadcast First Report and Order*, *supra* note 3.

¹⁴ See *Tuck*, 3 FCC Rcd at 5374 ("We no longer have a presumption that applicants proposing suburbs of large cities as their communities of license do not intend to serve the needs and interests of those communities. [citing *Suburban Community Policy*, 93 FCC2d at 450-51]. However, it would be naïve for us to ignore that granting a dispositive preference to an applicant proposing first local transmission service near a metropolitan center, without regard to the efficiency of the applicant's proposed use of the spectrum, has the potential to produce anomalous results that would seem to contravene the original statutory mandate of section 307(b) 'to provide a fair, efficient, and equitable distribution of radio service' to 'the several States and communities.'"). *Accord Debra D. Carrigan*, Decision, 100 FCC2d 721 (Rev. Bd. 1985) (in implementing Section 307(b), Commission strives to assure that every separate community of appreciable size has adequate local radio service, while ensuring that broadcast applicants have not manipulated Commission rules and processes to garner a wholly artificial benefit by specifying a small community of license, actually intending to serve a larger, adjacent community), *recon. denied*, Memorandum Opinion and Order, 101 FCC2d 218 (Rev. Bd. 1985), *review denied*, Memorandum Opinion and Order, 104 FCC2d 826 (1986), *aff'd sub nom. Bernstein / Rein Advertising, Inc. v. FCC*, 830 F.2d 1188 (D.C. Cir. 1987).

¹⁵ See, e.g., *Powell Meredith*, *supra* note 10; *Romar Communications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 23128 (2004) ("*Romar*"); *North Texas Radio, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 8531 (1996). RAMS further states that "if the Bureau wants to apply *Tuck* to new AM proposals, in addition to reconciling that decision with *Suburban Community Policy*, it must distinguish the differences between the FM and AM services that warrant application of *Tuck* in one context (AM) but not the other (FM)." RAMS July 24, 2006, letter at 5. We reject RAMS's exaction. As noted in the text, the principles enunciated in *Tuck* were applied by the full Commission to new AM proposals, and that case post-dated and modified *Suburban Community Policy*. No "reconciliation" of those cases is necessary. Moreover, the two cases cited by RAMS were decided, not by the full Commission, but by the former Allocations Branch of the Mass Media Bureau's Policy and Rules Division, and by allocations staff in the Bureau's Audio Division, in FM rulemaking proceedings. See *Easton* and *Nantucket*, *supra* note 8. We need not distinguish between Commission and staff-level precedent. The former controls.

¹⁶ *Tuck*, 3 FCC Rcd at 5376 (citing *Huntington*, 192 F.2d at 35).

RAMS has not provided any evidence addressing Deschutes River Woods's independence from the Bend Urbanized Area under the *Tuck* criteria. In addition to RAMS's proposed signal coverage of more than 50 percent of the Bend Urbanized Area, staff analysis reveals that the population of Deschutes River Woods is 8.9 percent of the population of Bend, and Deschutes River Woods is located 5.6 miles away from the center of the urbanized area. Regarding the third and most important criterion, there is insufficient evidence to indicate that Deschutes River Woods is independent of the larger urbanized area. While Deschutes River Woods is a CDP, and thus a licensable community,¹⁷ it is an unincorporated Bend suburb with no local government and no municipal services. The staff finds no evidence of local media outlets, a ZIP code, or significant commercial establishments identifying themselves with Deschutes River Woods. Consequently, on the record presented, there is no basis to conclude that Deschutes River Woods is independent of the Bend Urbanized Area.¹⁸ Under these circumstances, we cannot credit Deschutes River Woods with a first local transmission service preference under priority (3). Thus, RAMS's application for a new station at Deschutes River Woods is considered an additional service to the Bend Urbanized Area, and therefore, both RAMS and IHR effectively propose to serve the same community.¹⁹

Normally, when two mutually exclusive applicants specify the same community of license in their original auction filing window applications, we would forego the Section 307(b) analysis and the two applicants would proceed directly to auction. A Section 307(b) analysis was necessary in this case because IHR and RAMS specified two different communities. However, in the *Broadcast First Report and Order* the Commission stated that once the staff has undertaken the threshold Section 307(b) analysis, "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."²⁰ Furthermore, the Commission has stated that when the Section 307(b) determination is non-dispositive insofar as it results in two applications for the same urbanized area, the staff should not continue the Section 307(b) analysis by proceeding to a priority (4) (other public interest matters) evaluation.²¹ Instead, the applicants should proceed to auction. We find this approach consistent with both *Tuck* and the statutory directive to grant construction permits pursuant to our competitive bidding procedures.²²

¹⁷ See *FM Assignment Policies*, 90 FCC2d at 101 (to be a licensable community, it is sufficient that the community is incorporated or is listed in the United States Census).

¹⁸ 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).

¹⁹ *Romar*, 19 FCC Rcd at 23131 n.22.

²⁰ *Broadcast First Report and Order*, 13 FCC Rcd at 15965.

²¹ See *Romar*, 19 FCC Rcd at 23131-32.

²² *Id.* See also 47 U.S.C. § 309(j)(1); *Broadcast First Report and Order*, 13 FCC Rcd at 15924, 15964.

Conclusion. Accordingly, IT IS ORDERED that the IHR Educational Broadcasting application (File No. BNP-20040130ADH) and the RAMS I application (File No. BNP-20040129AUS) SHALL PROCEED TO AUCTION, the date of which will be announced by a subsequent *Public Notice*.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Dennis J. Kelly, Esq.
Mark N. Lipp, Esq.