



Federal Communications Commission  
Washington, D.C. 20554

August 21, 2008

**DA 08-1945**

*In Reply Refer to:*

1800B3-TEC

Released: August 21, 2008

Barry P. Lunderville  
195 Main Street  
Lancaster, NH 03584-3035

Re: **AM Broadcast Auction 84  
MX Group 84-45**

New(AM), Kearsarge, New Hampshire  
Facility ID No. 160161  
File No. BNP-20040129AOV

New(AM), Conway, New Hampshire  
Facility ID No. 161077  
File No. BNP-20040130APX

**Application for New AM Station  
Construction Permits**

Dear Mr. Lunderville:

We have before us a Petition for Reconsideration ("Petition") filed by Barry P. Lunderville ("Lunderville") on March 13, 2008, requesting reinstatement of his application (the "Application") for a new AM station at Kearsarge, New Hampshire ("Kearsarge").<sup>1</sup> We also have an Opposition to the Petition for Reconsideration (the "Opposition") filed by Mt. Washington Radio & Gramophone, LLC, ("Mt. Washington") on March 26, 2008. For the reasons stated below, we deny the Petition.

**Background.** Lunderville submitted his FCC Form 175 application on January 29, 2004, during the filing window for AM Auction 84.<sup>2</sup> The staff determined that the Application was mutually exclusive

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<sup>1</sup> File No. BNP 20040129AOV.

<sup>2</sup> See *AM New Station and Major Modification Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

with an application for a new AM station at Conway, New Hampshire, filed by Mt. Washington.<sup>3</sup> These two applications were designated MX Group 84-45 in AM Auction 84.

The Commission previously determined that competitive bidding procedures should be consistent with its statutory mandate under Section 307(b) of the Communications Act of 1934, as amended (the “Act”) to provide a “fair, efficient, and equitable” distribution of radio service.<sup>4</sup> 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.<sup>5</sup> 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 applicants before conducting an auction.<sup>6</sup> Accordingly, the staff directed Lunderville and Mt. Washington to file Section 307(b) showings after designating them as MX Group 84-45 in AM Auction 84.

In Lunderville’s Section 307(b) showing, Kearsarge is described as an “identifiable community that is a sub-division of the Town of Conway.”<sup>7</sup> Lunderville based his claim that Kearsarge was a licensable community on the fact that Kearsarge has a post office, residential areas, and a cemetery, and is noted on maps and road signs.<sup>8</sup> Mt. Washington contested Kearsarge’s community status in its own Section 307(b) showing, arguing that Kearsarge did not have any form of government or a post office offering residential service, among other considerations.<sup>9</sup> After reviewing both of the applicants’ Section 307(b) showings, we dismissed the Application on February 12, 2008, finding that Kearsarge is not a licensable community.<sup>10</sup>

In the Petition, Lunderville challenges the Staff Decision, contending that the staff provided no basis for making its decision because the “test for determining community status under Section 307(b) is

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<sup>3</sup> File No. BNP-20040130APX.

<sup>4</sup> See 47 U.S.C. §307(b); see also *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), *recon denied*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *modified*, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

<sup>5</sup> *Id.* at 15964-65.

<sup>6</sup> 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 weigh 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 *Alejandro Broadcasting Co.*, Decision, 55 RR 2d 1568, 1568 (Rev. Bd. 1994).

<sup>7</sup> See *Letter to Barry P. Lunderville and Mt. Washington Radio & Gramophone, LLC*, Reference 1800B3-LAS/JP (MB February 12, 2008) (“Staff Decision”).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1.

‘not a stringent one.’”<sup>11</sup> Lunderville also claims that, because Kearsarge has churches, businesses, and a post office, it hosts a “distinct community of people,” even if it is unincorporated.<sup>12</sup> Furthermore, Lunderville argues that Mt. Washington filed its Section 307(b) showing late, without explanation, and therefore, its application should be dismissed as untimely.<sup>13</sup>

In its Opposition, Mt. Washington argues that the staff properly dismissed the Application because it considered a totality of determining factors in making its decision rather than just the criteria highlighted by Lunderville.<sup>14</sup> Mt. Washington also disputes Lunderville’s late-filing allegations, stating that the staff had extended the filing deadline.<sup>15</sup>

**Discussion.** The Commission will consider a petition for reconsideration when the petitioner shows either a material error in the original order, or raises additional facts not known or existing at the time of the petitioner’s last opportunity to present such matters.<sup>16</sup> A petition for reconsideration that simply reiterates arguments previously considered and rejected will be denied.<sup>17</sup> We find that Lunderville’s Petition neither demonstrates material error or omission in the Staff Decision, nor raises any material new facts unavailable at the time of the Section 307(b) submission.

*Licensable Community.* Pursuant to Section 307(b) of the Act, the Commission “shall make [the] distribution of licenses . . . among the several States and *communities* as to provide a fair, efficient, and equitable distribution of radio service.”<sup>18</sup> A locale that is incorporated or listed in the census reports is presumptively a licensable community.<sup>19</sup> When a locale meets neither of these criteria, the “key ingredient in determining the existence of a community is the presence of . . . [a geographically] identifiable population grouping.”<sup>20</sup> The principal test for this finding is whether the location’s “residents function as and conceive of themselves as a community around which their interests coalesce.”<sup>21</sup> This may be proven

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<sup>11</sup> Petition at 1 (quoting *Willows and Dunnigan, California*, Report and Order, 10 FCC Rcd 11522, 11523 (MMB 1995) (“*Willows and Dunnigan*”).

<sup>12</sup> *Id.* at 1-2.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> Opposition at 3.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> 47 C.F.R. § 1.106. The petition for reconsideration also must cite the “findings of fact and/or conclusions of law which [the] petitioner believes to be erroneous, and . . . state with particularity the respects in which he believes such findings and conclusions should be changed.” *Id.* § 1.106(d)(2).

<sup>17</sup> *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

<sup>18</sup> 47 U.S.C. § 307(b) (emphasis added).

<sup>19</sup> *See Matagorda, Texas*, Report and Order, 21 FCC Rcd 1736 (MB 2006).

<sup>20</sup> *Fortuna Foothills and Wellton, Arizona*, Memorandum Opinion and Order, 19 FCC Rcd 4619, 4620 (MB 2004).

<sup>21</sup> *See id.*

by direct testimony of residents of the locality and by “indicia of community.”<sup>22</sup> Such indicia include separate municipal services and institutions, or significant political, commercial, social and religious organizations serving the residents. Mere geographic location is insufficient to establish community status.<sup>23</sup> The Commission will weigh all of these factors in determining whether a particular locale is a licensable community.<sup>24</sup>

In the Staff Decision, we determined that Kearsarge was not presumptively licensable because it is neither incorporated nor listed with the U.S. Census.<sup>25</sup> We also found that Kearsarge did not have enough indicia to demonstrate an identifiable population group functioning as a community. To reach this conclusion, we considered a number of factors including, but not limited to, the fact that Kearsarge does not have its own government structure or a post office that offers residential delivery. We also noted that, according to Conway Town Manager Earl Sires (“Sires”), Kearsarge is considered “a lighting precinct wholly located within the incorporated towns of Conway and Bartlett.”<sup>26</sup>

In the Petition, Lunderville offers no direct testimony from the residents of the locality that would suggest that they function and conceive of themselves as a community. Furthermore, Lunderville does not dispute the facts addressed in the Staff Decision. Instead, Lunderville merely argues as he did in his Section 307(b) showing that Kearsarge offers sufficient indicia to be considered a licensable community, as evidenced by “churches, businesses, and a post office with its own zip code.”<sup>27</sup> We find that these indicia alone are insufficient after accounting for other determining factors. First, we reiterate that Kearsarge has no mayor or legislative body. Second, Kearsarge does not have a fire department or schools under its direction. Third, Lunderville does not elaborate on what “businesses” are located in Kearsarge. As Mt. Washington notes, Kearsarge does not have any banks, restaurants, gas stations, or hospitals.<sup>28</sup> We also find that Sires’s description of Kearsarge as simply a political sub-division of Conway and Bartlett is underscored by the fact that residents of the locality pay taxes to these two nearby towns. Taking all of these factors into consideration, we find insufficient evidence to reconsider our prior determination. Therefore, we affirm the determination that Kearsarge is not a licensable community.

*Late Filing.* Contrary to Lunderville’s allegations regarding the timeliness of Mt. Washington’s Section 307(b) showing, we note that on September 5, 2005, the staff extended the applicants’ filing

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<sup>22</sup> *Central Florida Educational Foundation, Inc.*, Letter, 23 FCC Rcd 1695, 1699 (MB 2008).

<sup>23</sup> See, e.g., *Beacon Broadcasting*, Decision, 104 FCC 2d 808 (Rev. Bd. 1986), *modified*, 2 FCC Rcd 3469 (1987), *aff’d sub nom. New South Broadcasting Corp. v. FCC*, 879 F.2d 867 (D.C. Cir. 1989) (specified location must be an identifiable population grouping, separate and apart from all others, and the geographic boundaries of the location must not enclose or contain areas or populations more logically identified or associated with some other location); see also *Hannibal, Ohio*, Report and Order, 6 FCC Rcd 2144 (MMB 1991).

<sup>24</sup> See *Willows and Dunnigan*, 10 FCC Rcd at 11523.

<sup>25</sup> Staff Decision at 2.

<sup>26</sup> *Id.* A lighting precinct or district is often located within another municipality and formed “upon the petition of 10 or more voters” organizing to bring lighting to their streets. See N.H. Rev. Stat. Ann. § 52:1 (2008).

<sup>27</sup> Petition at 1.

<sup>28</sup> Opposition at 4.

deadline to October 31, 2005.<sup>29</sup> Mt. Washington filed its Section 307(b) showing on October 28, 2005. Therefore, Lunderville's argument is without merit because Mt. Washington filed a timely Section 307(b) showing.

**Conclusion.** For the aforementioned reasons, IT IS ORDERED, that the Petition for Reconsideration is DENIED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Stephen T. Yelverton, Esq.  
Mt. Washington Radio & Gramophone, LLC

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<sup>29</sup> *Auction No. 84 Settlement Period and Section 307(b) Submission Deadline Extended to October 31, 2005*, Public Notice, 20 FCC Rcd 14492 (MB/WTB 2005) (“We therefore extend the period . . . to tender Section 307(b) submissions . . . to October 31, 2005”).