



Federal Communications Commission  
Washington, D.C. 20554

September 15, 2008

**DA 08-2099**

Released: September 15, 2008

In Reply Refer to:

1800B3-KD

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**Re: BMP Austin License Company, L.P.  
KXBT(FM), Dripping Springs, TX  
Facility ID No. 40762  
Application for Minor Change  
File No. BPH-20070119AER**

**Petition for Reconsideration of Grant of  
Minor Change Application**

Dear Counsel:

We have before us a Motion for Petition for Reconsideration ("Petition") filed June 20, 2007, by Cameron Broadcasting Company ("Cameron"). Cameron seeks reconsideration of the May 21, 2007, decision of the Audio Division ("Staff Decision")<sup>1</sup> granting an application ("Application") filed by BMP Austin License Company, L.P. ("BMP") for a minor change of Station KXBT(FM), Dripping Springs, Texas ("Station") to move to a new community, and dismissing Cameron's Informal Objection to the Application ("Objection").<sup>2</sup> For the reasons discussed below, we deny the Petition.

**Background.** On January 19, 2007, BMP filed the Application, seeking to relocate the Station from Dripping Springs, Texas, to Bee Cave, Texas. At that time, the Station provided Dripping Spring's sole operational local broadcast service, and Educational Media Foundation held a construction permit for Station KLLR(FM), Dripping Springs, Texas.<sup>3</sup> BMP contended in its Application that its proposal would

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<sup>1</sup> Letter to BMP Austin License Company, L.P. from Rodolfo Bonacci, Assistant Chief, Audio Division, Ref. No. 1800B3 (MB May 21, 2007).

<sup>2</sup> Also before us is BMP's Opposition to Petition for Reconsideration ("Opposition"), to which Cameron filed a reply ("Reply") on July 17, 2007.

<sup>3</sup> See File No. BPED-19980908MC. The construction permit was granted on August 9, 2004.

not implicate the Commission's policy disfavoring elimination of a community's sole local broadcast service, as set forth in *Pacific Broadcasting*,<sup>4</sup> since KLLR(FM) was near completion and was about to go on the air.<sup>5</sup> However, it included in its Application a waiver request to the extent that its proposal ran contrary to any Commission rules or policies. On February 28, 2007, KLLR filed a license to cover application and began operating pursuant to program test authority.<sup>6</sup>

On March 1, 2007, Cameron filed a minor change application to change the community of license for KMIL(FM) (formerly KNVR(FM)) from Cameron, Texas, to Thrall, Texas, claiming that it was mutually exclusive with the Application.<sup>7</sup> On March 13, 2007, Cameron filed an informal objection to the Application, asserting that BMP's reliance on the KLLR construction permit constituted an illegal "backfill" proposal that ran contrary to the Commission's holding in *Pacific Broadcasting*. The Media Bureau ("Bureau") dismissed the Informal Objection on May 21, 2007, concluding that KLLR's commencement of service in Dripping Springs rendered Cameron's argument moot, and granted the Application. Cameron's Petition followed.

In its Petition, Cameron reasserts that the Application's reliance upon KLLR's issued construction permit to ensure continued service in Dripping Springs allegedly constituted an unacceptable "backfill" proposal.<sup>8</sup> It argues that *Pacific Broadcasting* requires the Commission to "reject[ ] such a proposal as completely unacceptable . . . without exception"<sup>9</sup> and that the Application was patently deficient and should have been dismissed. Cameron further claims that BMP engaged in "gamesmanship" by filing an allegedly defective application that effectively blocked consideration of any subsequently-filed applications under the Commission's "first-come/first-served" approach to requests to change the community of license of an existing FM radio station.<sup>10</sup>

In its Opposition, BMP argues that Cameron "seriously mischaracterizes" the Commission's decisions in *Pacific Broadcasting* and that nothing in those cases "specifically and categorically rejected" a backfill proposal that relied on a granted construction permit.<sup>11</sup> Pointing to the fact that the *Pacific II* reconsideration decision specifically contemplates waiver requests, it further argues the Application was appropriately accepted for filing even if the backfill proposal was unacceptable because it did in fact

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<sup>4</sup> See *Pacific Broadcasting of Missouri, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 2291 (2003) ("*Pacific I*"), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 10950 (2004) ("*Pacific II*") (collectively, *Pacific I* and *Pacific II* are referred to herein as "*Pacific Broadcasting*"). In *Pacific Broadcasting*, the Commission directed the Bureau to cease the practice of allowing the "backfill" of new allotments to prevent the removal of a community's sole local transmission service, holding that a vacant allotment is not an adequate substitute for the removal of a community's only operating radio station. A "backfill" proposal is one made to replace an allotment that is being modified or relocated in connection with the change of community of license of an authorized station. See, e.g., *Cheboygan, et al., Michigan*, Request for Supplemental Information, 17 FCC Rcd 20491 (MB 2002).

<sup>5</sup> In its Application, BMP indicated that the construction of KLLR would be completed by February 15, 2007. See Application, Ex. 32 at 2. It also included an affidavit from an officer of Educational Media Foundation attesting to this fact. See *id.* at Attachment 1, Declaration of Joseph C. Miller.

<sup>6</sup> See File No. BLED-20070228ABJ. On March 30, 2007, the Commission granted the application.

<sup>7</sup> File No. BPH-20070301ABS. The application was dismissed on May 21, 2007.

<sup>8</sup> Petition at 5.

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

<sup>10</sup> See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006).

<sup>11</sup> Opposition at 5.

contain such a request.<sup>12</sup> Finally, it asserts that, by the time the Bureau granted the Application, BMP no longer needed the waiver – if it ever did – because KLLR was operating in Dripping Springs.

**Discussion.** We agree with Cameron that BMP’s reliance on the KLLR construction permit constituted an unacceptable backfill proposal.<sup>13</sup> *Pacific Broadcasting* makes clear that “[a] rule making petitioner seeking a change in community of license may do so only if there is another operating station licensed to the community being vacated, or if the proposed backfill involves a *currently licensed and operating station* that can be reallocated to the community being vacated...”<sup>14</sup> However, while the Commission has deemed certain defects fatal to the consideration of an application, BMP’s inclusion of the backfill proposal did not render the Application fatally defective.<sup>15</sup> Defective applications can be accepted for filing if accompanied by an appropriate waiver request, such as the one BMP included in its Application.<sup>16</sup> Indeed, as BMP correctly notes, *Pacific Broadcasting* specifically contemplates the filing of such waiver requests.<sup>17</sup> Moreover, as the Staff Decision properly concluded, any Application defects were cured, prior to the staff’s processing the Application, when KLLR commenced service in Dripping Springs because BMP’s community of license modification would no longer result in the loss of that community’s sole local service.<sup>18</sup>

We also disagree with Cameron’s claim that BMP was engaging in “gamesmanship.” Cameron contends that BMP filed its Application “knowing that it was ungrantable and contrary to FCC rules” thereby blocking consideration of any subsequent mutually exclusive applications.<sup>19</sup> Cameron claims that this tactic effectively “[bought BMP] some time and gave them the artificial and undeserved window of

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<sup>12</sup> Cameron also questions the sufficiency of BMP’s waiver request. However, because we do not reach the merits of the waiver request, we will not consider this issue further.

<sup>13</sup> See *Sells, Willcox, and Davis-Monthan Air Force Base, Arizona*, Memorandum Opinion and Order, 23 FCC Rcd 1242 (MB 2008) (finding that unbuilt construction permits were not adequate replacements for the loss of service that would have resulted from the community of license change, noting that such an approach was similar to the backfill proposals considered and rejected by *Pacific Broadcasting*).

<sup>14</sup> *Pacific I*, 18 FCC Rcd at 2296.

<sup>15</sup> See generally *Maritime Communications*, Third Memorandum Opinion and Order, 18 FCC Rcd 24391, 24398 (2003) (stating that the Commission’s practice with respect to all services is to automatically dismiss applications that fail to comply with signature, filing fee and timeliness requirements); *62 Broadcasting, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 1768 (1989) (applicant which knew it did not have reasonable assurance of the transmitter site at the time it filed its application could not cure fatal defect by amending to specify a new site); *Blue Lake Academy, Inc.*, Letter, 20 FCC Rcd 12066, 12068-69 (MB 2005) (holding that failure to properly incorporate prior to filing a noncommercial broadcast application is a defect that cannot be cured).

<sup>16</sup> See 47 C.F.R. 73.3566(a) (“Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed.”).

<sup>17</sup> *Pacific II*, 19 FCC Rcd at 10958 (holding that any party may “file a request for waiver of the revised backfill policy...”).

<sup>18</sup> See *Jerrold Miller, Esq.*, Letter, 23 FCC Rcd 9362, 9364 (MB 2008) (reinstating application that was previously dismissed for failure to provide daytime protection to co-channel station WOLB(AM), holding that WOLB’s subsequent relocation of its facilities cured the application defect).

<sup>19</sup> See Petition at 6.

several weeks in which to work on bringing its application into compliance . . .”<sup>20</sup> While an applicant may not file a grossly defective and incomplete application as a “mere placeholder,”<sup>21</sup> there is nothing in the record that suggests that BMP filed its Application in bad faith.<sup>22</sup> An inquiry into whether a party intends to obstruct the grant of another application focuses on the intent of the party at the time that its application was filed.<sup>23</sup> Here, Cameron has failed to present any evidence suggesting that the Application was filed for the purpose of blocking competing applications. Indeed, there is no indication that BMP filed the Application for any purpose other than a genuine attempt to change its community of license. The fact that its Application included a waiver request in no way impugns that motive; as noted above, waiver requests are anticipated in this context, and BMP’s waiver request here simply reflects its desire for a successful application. Moreover, there is no evidence demonstrating that BMP was being disingenuous when it stated that KLLR would be operating within the timeframe indicated in its waiver request. This is especially so in light of the fact that, consistent with BMP’s representations in the Application, KLRR(FM) was constructed in February of 2007 and is now licensed and operating.<sup>24</sup> Accordingly, we will not consider this issue further.

**Conclusion.** For the foregoing reasons, the Motion for Petition for Reconsideration filed by Cameron Broadcasting Company on June 20, 2007, IS DENIED.

Sincerely,

Peter H. Doyle, Chief  
Audio Division  
Media Bureau

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<sup>20</sup> *See id.* at 8.

<sup>21</sup> *Aerco Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 24417, 24420 (2003).

<sup>22</sup> *Community Service Broadcasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 5652, 5653 (1992) (holding that the Commission will not infer improper purpose in filing an application without a specific showing of improper motivation). *See also Montrose and Scranton, Pennsylvania*, Memorandum Opinion and Order, 4 FCC Rcd 7799, 7800 (MB 1989) (noting that the Bureau would consider an adequate showing that an application had been filed purely for “tactical” purposes as evidence of bad faith).

<sup>23</sup> *Community Service Broadcasting, Inc.*, 7 FCC Rcd at 5653.

<sup>24</sup> *See note 5, supra.*