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In re: **KVLR(FM), Elgin, Texas**
Facility ID No. 19223
File No. BPH-20090811ACJ

KWNX(AM), Taylor, Texas
Facility ID No. 35647
File No. BP-20090819AHB

**Applications to Change Communities
of License**

Dear Counsel:

We have before us two mutually contingent applications of BMP Austin License Company, L.P. ("BMP"), licensee of Stations KVLR(FM), Elgin, Texas, and KWNX(AM), Taylor, Texas. In the first application, as amended, (the "Sunset Valley Application"),¹ BMP proposes to change the community of license of Station KVLR(FM) from Elgin to Sunset Valley, Texas. In the second application (the "Elgin Application"),² BMP requests to change the community of license of Station KWNX(AM) from Taylor to Elgin, Texas. We also have before us an Informal Objection filed by Munbilla Fort Hood, Ltd. ("MFHL"),

¹ See File No. BPH-20090811ACJ.

² See File No. BP-20090819AHB.

the former licensee of Station KHLE(FM), Kempner, Texas, and various related pleadings.³ For the reasons set forth below, we dismiss the Informal Objection and grant the Sunset Valley and Elgin Applications.

Background. The Sunset Valley and Elgin Applications were filed pursuant to Section 73.3573 of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.⁴ The Sunset Valley and Elgin Applications were also filed pursuant to Section 73.3517(e), which permits FM licensees or permittees to file up to four contingently related applications for minor modification of facilities.⁵ The Sunset Valley Application, as amended, requests the change of community of license for Station KVLR(FM) from Channel 223A at Elgin to Channel 223A at Sunset Valley, Texas, with a change of transmitter site, and the modification of BMP's license to reflect these changes.⁶ To prevent the removal of Elgin's sole, local service, the Elgin Application proposes the change of community of license for Station KWNX(AM), 1260 kHz, from Taylor to Elgin, Texas, without a transmitter site change, as a "back-fill" station.⁷ Further, to accommodate the Sunset Valley Application, BMP requests the issuance of an Order to Show Cause to M&M, former licensee of Station KBey(FM), Burnett, Texas, as to why its license should not be modified to specify Channel 280A in lieu of Channel 223A.⁸ BMP also requests adjustments to the reference coordinates for vacant but unapplied for FM Channels 281C2 at Mason, Texas, and 282A at Santa Anna, Texas, in order to accommodate the use of Channel 280A at Station KBey(FM)'s licensed site.

In support of its Applications, BMP alleges that the reallocations of Stations KVLR(FM) and KWNX(AM) satisfy the requirements for changing a station's community of license because: (1) the proposed use of Channel 223A at Sunset Valley is mutually exclusive with the current use of Channel 223A at Elgin, and the proposed use of 1260 kHz at Elgin is mutually exclusive with the current use of 1260 kHz at Taylor; (2) Elgin will not be deprived of its only local service as KWNX(AM) is concurrently changing its community of license to Elgin; and (3) the provision of a first local service at Sunset Valley (population 365) under FM Priority 3⁹ will result in a preferential arrangement of

³ These pleadings include an Opposition to Informal Objection filed on April 9, 2010, by Border Media Business Trust ("BMBT"), which became the transferee of BMP on March 31, 2010, pursuant to the grant of a transfer of control application, File No. BTC-20090724ABA, and a Motion to Dismiss Informal Objection filed on January 28, 2011, by M & M Broadcasters, Ltd. ("M&M"), the current licensee of Station KHLE(FM), Kempner, Texas, and former licensee of Station KBey(FM), Burnett, Texas.

⁴ 47 C.F.R. § 73.3573.

⁵ See 47 C.F.R. § 73.3517(e).

⁶ As originally filed, the Sunset Valley Application proposed a minor change in Station KVLR(FM)'s licensed facilities on Channel 223A at Elgin, Texas, at a relocated transmitter site. On August 19, 2009, BMP filed a minor amendment to this application, proposing a different transmitter site and a change of community of license to Sunset Valley.

⁷ At the time the Elgin Application was filed, Simmons-Austin, LS, LLC was the licensee of Station KWNX(AM), Taylor, Texas. BMP became the assignee of Station KWNX(AM), pursuant to an assignment of license application, File No BAL-20100415AAG, which was granted on June 17, 2010. The assignment was consummated on August 31, 2010.

⁸ The assignment of Station KBey(FM) from M&M Broadcasters, Ltd. , to Two Way Communication, LLC was consummated August 15, 2011. See Application File No. BAL-20110608ABT.

⁹ The FM allotment priorities are (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). See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988).

allotments over the retention of a second local service at Taylor (population 13,575) under Priority 4.¹⁰ Further, because Station KVLR(FM) proposes to move from Elgin, a community not located in any urbanized area, to Sunset Valley, a community located in the Austin, Texas, Urbanized Area, BMP submits a *Tuck*¹¹ showing and contends that Sunset Valley is sufficiently independent of the Austin Urbanized Area to warrant a first local service preference.¹²

On March 3, 2011, the Commission revised its policies for evaluating proposals to change community of license. When a station's proposed community is located in an urbanized area or the station could, through a minor modification application, cover at least 50 percent of an urbanized area, the Commission established a rebuttable presumption that the application should be treated, for Section 307(b) purposes, as a proposal to serve the urbanized area rather than the named community of license.¹³ This new policy generally applies to any application pending on March 3, 2011, the effective date of *Rural Radio*.¹⁴ Because the Sunset Valley Application was still pending, the staff sent BMP a letter on August 30, 2011, requesting additional information to rebut the urbanized area presumption.¹⁵

On September 29, 2011, BMP submitted a responsive amendment. Therein, BMP requests a waiver of the retroactive application of the *Rural Radio* policies to the coordinated Sunset Valley and Elgin Applications because: (1) similar equitable considerations that led to exempting AM Auction applications apply in this case as the Sunset Valley Application has been pending since August 2009 and the applicant has incurred considerable investment expenses exceeding six figures for legal and engineering expenses in reliance upon the existing procedures; (2) application of the new policies would create additional financial hardship to BMP as it has undergone financial restructuring with a Trustee appointed to run the stations; (3) Commission delays in referring three of the four Mexican concurrences required by the coordinated applications and in requesting a technical amendment to the Elgin Application on March 3, 2011 contributed to the applications not being acted upon prior to the effective date of *Rural Radio*; (4) BMP

¹⁰ BMP alleges that “[t]he proper comparison is between Sunset Valley and Taylor because Taylor is losing a local service (due to the move of KWNX) and Sunset Valley is gaining a local service (due to the move of KVLR). The community of Elgin will retain the same number of local services.” See File No. BPH-20090811ACJ, Attachment 35, Exhibit B, at 2 n.1.

¹¹ See *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374, 5378 (1978) (“*Tuck*”) (establishing eight factors to determine whether a suburban community is independent of a nearby central city).

¹² See File No. BPH-20090811ACJ, Attachment 35, Exhibit B, at 3-6. BMP also states that, at its proposed transmitter site, Station KVLR(FM) would place a 70 dBU contour over more than 50% of the Austin Urbanized Area.

¹³ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order On Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556 (2011), *petitions for recon. pending* (“*Rural Radio*”). The Commission further provided that this presumption may be rebutted by a compelling showing of the independence of the community from the urbanized area, the community's specific need for an outlet for local expression, and the ability of the proposed station to provide that outlet. *Id.* at 2572, ¶ 30.

¹⁴ See *Rural Radio*, 25 FCC Rcd at 2576, ¶ 30, and at 2578, ¶ 39. However, for equitable reasons, the new policies, do not apply to applications for new AM stations or major changes in AM facilities filed in the 2004 AM Auction 84 or to “. . . any non-final FM allotment proceeding, including ‘hybrid’ coordinated application/allotment proceedings, in which the Commission has modified a radio station license or granted a construction permit.” See *Id.*, at 2575, ¶ 33, and at 2576, ¶ 35.

¹⁵ See *Letter to Mark N. Lipp, Esq.*, Reference 1800B3 (MB Aug. 30, 2011) (“*Deficiency Letter*”).

also incurred expenses in negotiating a reimbursement agreement with M&M; and (5) BMP exercised due diligence, contacting the staff on numerous occasions over the past two years concerning the processing delays, the status of the applications, and whether there were any deficiencies that needed to be corrected.¹⁶

Discussion. Retroactivity. The Commission’s policies or rules may be waived only for good cause shown.¹⁷ An applicant seeking a waiver has the burden to plead with particularity the facts and circumstances that warrant such action.¹⁸ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”¹⁹ and must support its waiver request with a compelling showing.²⁰ The Commission may exercise its discretion to waive a policy or rule where the particular facts make strict compliance inconsistent with the public interest.²¹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²² However, waiver of the Commission’s policies or rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.²³

We find that special circumstances and the equities of this case warrant waiver of the application of the *Rural Radio* policies to the pending Sunset Valley and Elgin Applications. Like the AM Auction applications that were exempted from the new policies, BMP’s applications have been pending for several years, and BMP has expended a significant amount of time and money in reliance upon application of the former Section 307(b) policies.²⁴ These include documented legal and engineering expenses, and expenses related to the negotiation of a reimbursement agreement with M&M. We also take into account BMP’s financial condition and note that application of the new policies to this licensee, undergoing financial restructuring, will likely cause additional hardship. Further, we acknowledge that delays in referring three of the four FM assignments or allotments to Mexico and obtaining the concurrences contributed significantly to the applications not being acted upon before the effective date of *Rural Radio*.

Change of Community of License. We next must examine the Sunset Valley and Elgin Applications to determine if they meet the requirements for stations to change their communities of license under the former processing standards. We find that these requirements have been met. Specifically, the grant of the Sunset Valley and Elgin Applications will result in a preferential arrangement of allotments because a first local service to Sunset Valley under FM Priority 3 outweighs

¹⁶ See File no. BPH-20090811ACJ, Attachment 35, Amendment to Section 307(b) Showing, filed on September 29, 2011, at 1-6. BMP is not, however, “. . . challenging the legality of applying the new policy retroactively on a general basis.” *Id.* at 1.

¹⁷ 47 C.F.R. § 1.3.

¹⁸ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987).

¹⁹ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d.*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (“*WAIT Radio*”). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

²⁰ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

²¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

²² *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

²³ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (“*NetworkIP*”); *Northeast Cellular*, 897 F.2d at 1166.

²⁴ See *Rural Radio*, 25 FCC Rcd at 2575, ¶ 33 and at 2576, ¶ 35.

the retention of a second local service at Taylor under lesser Priority 4. Further, we believe that Sunset Valley is sufficiently independent of the Austin, Texas, Urbanized Area to warrant a first local service preference because a majority of the *Tuck* factors are present.²⁵ The Sunset Valley Application will also result in a net gain in 60 dBu service to 760,324 persons and will not create any white or gray areas.²⁶ The loss area will be well served with more than 5 aural services.

Informal Objection. As a final matter, we dismiss MFHL's Informal Objection against the Sunset Valley Application as moot. The gravamen of the Informal Objection was that BMP's proposed use of Channel 280A at Burnett, Texas, specified in its minor amendment to the Sunset Valley Application, conflicted with MFHL's amendment to a minor change application, proposing the substitution of Channel 280A for Channel 295A for its Station KHLE(FM), Kempner, Texas.²⁷ Because MFHL's amendment was filed two days before BMP's minor amendment to the Sunset Valley Application, MFHL contended that its proposal had cut-off protection under the FM processing procedures. However, MFHL subsequently sold Stations KHLE(FM), Kempner, Texas, and KBEY(FM), Burnett, Texas, to M&M. As the new licensee, M&M decided not to pursue the KHLE(FM) application, thereby removing the conflict with the Sunset Valley Application.²⁸ Accordingly, we dismiss MFHL's Informal Objection as moot.

Conclusion and Ordering Clauses. In view of the above, we conclude that the public interest is served by grant of the Sunset Valley and Elgin Applications. Accordingly, IT IS ORDERED that the applications (File Nos. BPH-20090811ACJ and BP-20090819AHB) filed by BMP Austin License Company, L.P. ARE GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁵ Specifically, Factors 1 (extent to which community residents work in the larger metropolitan area rather than the specified community, 3 (whether the community's leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; 4 (local government and elected officials); 5 (zip code and directory); 6 (commercial establishments; health care facilities); and 7 (the community's own municipal services) have been shown with respect to Sunset Valley.

²⁶ File No. BPH-20090811ACJ, Attachment 35, Exhibit B, at 1.

²⁷ See File No. BPH-20080625AAV

²⁸ M&M also entered into an agreement with BMP, consenting to the change in channel for Station KBEY(FM), Burnett, and providing for reimbursement of its expenses. M&M subsequently filed an application, specifying Channel 280A at Burnett. See File No. BPH-20110419ABS. That application was subsequently granted on September 20, 2011, obviating the need for issuance of an Order to Show Cause in this proceeding.