



Federal Communications Commission
Washington, D.C. 20554

August 30, 2011

In Reply Refer to:
1800B3-RFS

Mark N. Lipp, Esq.
c/o BMP Austin License Company, L.P.
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC

Re: KXXS, Elgin, Texas
Facility Identification Number: 19223
File No: BPH-20090811ACJ

Dear Mr. Lipp:

This letter refers to the above-captioned minor change application of BMP Austin License Company, L.P., licensee of Station KXXS, Channel 223A, Elgin, Texas. The application proposes a city of license modification for Station KXXS from Channel 223A at Elgin, to Sunset Valley, Texas, as the community's first local service. For the reasons discussed below, we request amendment of the application to provide additional evidence in support of the proposed modification.

Background. This application was filed pursuant to Section 73.3573(g) of the Commission's Rules, which set forth the requirements for modification of an FM Station license to specify a new community of license without providing an opportunity for competing expressions of interest. Among other requirements, an application for such a minor modification must demonstrate that the proposed change of community constitutes preferential arrangement of allotments.¹ We make this determination using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.² Your client asserts that its application satisfies Priority 3 of the four allotment priorities, because the change of community would provide a first local service for Sunset Valley, Texas.

Discussion. The community of Sunset Valley is located within the Austin Urbanized Area ("UA"). In the *Rural Radio* proceeding,³ the Commission established a rebuttable presumption applicable 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. In such cases, we will treat the application as a proposal to serve the entire urbanized area, rather than as a proposal for local service to the named community of license. Pursuant to the Commission's decision in *Rural Radio*, your client's

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License")*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990).

² *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988). 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).

³ See *Policies to Promote Rural Radio Service and to Streamline Allotment an Assignment Procedures*, Second Report and Order, First Order On Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556 (2011) ("*Rural Radio*").

proposed change of community to Sunset Valley is considered a proposal to serve the Austin UA. Because the Austin UA already has numerous local FM and AM stations, the proposed change of community does not satisfy Priority 3 of the Commission's allotment priorities, first local service.

Our independent engineering analysis indicates that the proposed facility would cover at least fifty percent of the Austin UA, whereas the existing license site of Station KXXS does not cover any part of the urbanized area. In order to satisfy the requirement of Priority 3 of the Commission's allotment priorities, your client may seek Priority 3 status by submitting evidence to rebut the urbanized area presumption established in *Rural Radio*. Such evidence must constitute "a compelling showing (1) that the proposed community is truly independent of the urbanized area, (2) of the community's specific need for an outlet for local expression separate from the urbanized area and (3) the ability of the proposed station to provide that outlet."⁴ The required compelling showing may be based on the existing three-pronged Tuck test to demonstrate independence,⁵ but "the Tuck factors, especially the eight-part test of independence, will be more rigorously scrutinized than has sometimes been the case in the past."⁶ Moreover, in addition to demonstrating independence, a compelling showing requires evidence of the community's need for an outlet for local expression.⁷

Alternatively, you may file a Priority (4) public interest showing, providing a more detailed explanation of the claimed public interest benefits of the proposed reallocation to Sunset Valley in compliance with the *Rural Radio*.

Accordingly, for all of the reasons discussed above, we request that your client amend its application to provide additional evidence sufficient to establish that the proposed change of community of license constitutes a preferential arrangement of allotments, as set forth in Revision of FM Assignment Policies and Procedures, and further clarified in *Rural Radio*.

Pursuant to 47 C.F.R. § 73.3522, "... an applicant whose application is found to meet the minimum filing requirements but nevertheless is not complete and acceptable shall have the opportunity in the 30-day period specified in the FCC staff's deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff." Additionally, 47 C.F.R. § 73.3564 states that "[a]pplications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for amendment." See Appendix B in the Report and Order in MM Docket No. 91-347. This letter constitutes your opportunity for corrective amendment pursuant to 47 C.F.R. § 73.3522.

Sincerely,



Nazifa Sawez
Assistant Chief
Audio Division
Media Bureau

⁴ *Id.* at 2572, ¶ 30.

⁵ 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).

⁶ *Rural Radio, supra*, at 2573, ¶ 30.

⁷ *Id.*