



Federal Communications Commission
Washington, D.C. 20554

February 6, 2006

DA 06-290

In Reply Refer to:

1800B3-ALV

NAL/Acct. No. MB-200641410017

FRN: 0007407919

Lauren A. Colby, Esq.
10 E. Fourth Street
P.O. Box 113
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Re: KXTM(FM), Benavides, Texas
Facility ID No. 28074
File No. BLH-19990719KB
File No. BMPH-20010511AAB
File No. BMPH-20050623ABU
Humberto Lopez, dba Benavides Communications

Applications for Station License and
Minor Modification of Construction Permit

Dear Mr. Colby:

We have before us the captioned applications of Humberto Lopez, dba Benavides Communications ("Lopez") for (1) a broadcast station license for KXTM(FM), Benavides, Texas; (2) a minor modification of the construction permit for KXTM (the "2001 Modification Application"); and (3) a second minor modification of the construction permit for KXTM (the "2005 Modification Application"). We also have before us an Objection and Petition to Dismiss ("Objection"), filed May 21, 2002, by Sound Investments Unlimited, Inc. ("Sound").¹ For the reasons set forth below, we issue a Notice of Apparent Liability to Lopez for operating KXTM at variance from its authorization in violation of Section 73.1620 of the Commission's Rules.² In addition, we grant the Objection to the limited extent indicated, dismiss the 2001 Modification Application, grant the 2005 Modification Application, and grant the license application.

Background

On February 18, 1994, the Commission issued Lopez a construction permit, authorizing the construction of a new Channel 299, Class C2 FM station serving Benavides, Texas with an effective

¹ Lopez filed an Opposition to the Objection and Petition to Dismiss on June 21, 2002, and a Supplement to its Opposition on June 28, 2002. Sound filed a motion for extension of time to respond to the Opposition on July 3, 2002, and a Reply on July 12, 2002. Additionally, Sound filed a Supplement to Informal Objection on May 11, 2005, to which Lopez filed a Response on June 20, 2005, and a Petition for Grant of Applications on July 5, 2005. Because there is no formal petition to deny cycle for informal objections, we will consider all pleadings. *See, e.g., Tabback Broadcasting Company*, 15 FCC Rcd 11899 (2000) ("the limitations on the number and timing of pleadings filed in response to petitions to deny are inapplicable to informal objections").

² 47 C.F.R. § 73.1620.

radiated power (“ERP”) of 50 kW and an antenna height above average terrain (“HAAT”) of 150 meters.³ The permit was initially due to expire on August 18, 1995. The Commission, however, granted Lopez four consecutive construction extensions in light of Lopez’s pending petition for rulemaking to reallocate Channel 299C2 from Benavides to Bruni, Texas. The Commission denied Lopez’s rulemaking petition on January 23, 1998,⁴ and on October 22, 1998, Lopez filed a final construction extension request, explaining that it was proceeding to build the station at Benavides, the original community of license, and that “KXTM will be constructed as promised.”⁵ The Commission granted the extension request and specified that construction must be completed by June 4, 1999.⁶

Thereafter, on July 12, 1999, Lopez filed a minor modification application (the “1999 Modification Application”), seeking Commission consent to operate KXTM at 5 kW ERP with an antenna HAAT of 34 meters. In the application, Lopez explained that while it sought authority to modify the community of license, “the owner of the property where it originally sought to locate its facility lost interest in leasing the site.”⁷ Lopez further explained that although it ultimately completed negotiations with its original site owner, due to the negotiation delays it “has been unable to complete construction of the new, taller broadcast tower referenced in the original application, and has instead initiated operations from a lower elevation, on an existing tower.”⁸

On July 19, 1999, Lopez filed a license application for KXTM, specifying an ERP of 5 kW and an antenna HAAT of 13 meters.⁹ In the license application, Lopez stated that “construction was completed largely in accordance with the construction permit” but referenced the fact that it had also filed a modification application to operate at a lower radiation center than specified in the construction permit.¹⁰ Subsequently, on May 11, 2001, Lopez filed a second modification application (the “2001 Modification Application”) seeking Commission consent to relocate the station to a new tower site and upgrade to Class C2 facilities.¹¹

On May 21, 2002, Sound filed its Objection to the KXTM license application and the 2001 Modification Application. Sound asserts that the license application should be dismissed because Lopez

³ See BPH-19921022MG.

⁴ See *Benavides, Bruni, and Rio Grande City, Texas*, 13 FCC Rcd 2096 (1998).

⁵ See BPH-19981022JA at Exhibit 1.

⁶ The Commission subsequently authorized the extension of many permits to December 21, 2000, and KXTM qualified for the extension. See *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056 (1998), *recon. granted in part and denied in part*, 14 FCC Rcd 17525, 17536 (1999).

⁷ See Cover Letter to BPH-19990712IA.

⁸ *Id.* Lopez further stated that “the station is now operational and available, upon Commission grant of the attached applications, to provide service to the community,” but also inconsistently certified that “construction will commence immediately upon grant of this request.” See BPH-19990712IA at Statement B.

⁹ See BLH-19990719KB.

¹⁰ See Cover Letter to BLH-19990719KB.

¹¹ See BMPH-20010511AAB. The application specifies an antenna HAAT of 78 meters and 50 kW ERP.

failed to construct its facility and commence operations in accordance with its construction permit. Alternatively, Sound argues that if the license application is not dismissed, Benavides should be required to accept a license only for the Class A facility, which it actually constructed during the term of the permit. Further, Sound notes discrepancies between the 1999 Modification Application and the license application and states that the license application cannot be granted until Lopez amends the application to clarify the station's actual antenna height.¹² Finally, Sound argues that the 2001 Modification Application must be dismissed because (1) Lopez cannot modify a construction permit that has expired; and (2) the proposed modification is short-spaced to the permitted facilities of KQBO(FM) (formerly KCTM), Rio Grande City, Texas.¹³

On January 27, 2005, the Commission dismissed Lopez's 1999 Modification Application for failure to amend to demonstrate compliance with the new local radio ownership rules. Lopez subsequently re-filed the application on June 23, 2005 (the "2005 Modification Application")¹⁴ and urged the Commission to grant this application and its license application because this "will enable Station KXTM to continue to serve the public at Benavides, Texas."¹⁵ Thereafter, on July 5, 2005, Lopez requested that the Commission dismiss the 2001 Modification Application and expressed its intention to prosecute only its applications for Class A facilities.¹⁶ Finally, in light of some of the inconsistent information concerning the construction and operation of KXTM, we sent Lopez an inquiry letter on August 29, 2005, directing Lopez to provide clarification concerning the construction and operation of its station.¹⁷ In its September 12, 2005, response to our inquiry letter, Lopez revealed that it constructed KXTM at an antenna HAAT of 34 meters at the coordinates specified in its construction permit and has been operating KXTM at 34 meters HAAT with an ERP of 5 kW continuously from approximately May 30, 1999, until the present.¹⁸

¹² In its Opposition, dated June 21, 2002, Lopez stated that it would file an amendment to correct the discrepancies between the facilities specified in the 1999 Modification Application and the KXTM license application and urged the Commission to grant the applications simultaneously once the amendment was filed. On July 16, 2002, Lopez amended its license application to, in part, specify an antenna HAAT of 32 meters and a downgrade to a Class A station. Despite this amendment, the 1999 Modification Application and the KXTM license application remained inconsistent. For example, the license application specifies an antenna HAAT of 32 meters whereas the 1999 Modification Application specified a HAAT of 34 meters.

¹³ Sound also noted a discrepancy between the coordinates specified in the application and those specified in the antenna structure registration for the proposed new tower. Lopez amended the application on July 17, 2002 and February 19, 2005 to, *inter alia*, correct the tower coordinates and demonstrate compliance with the new local radio ownership rules.

¹⁴ See BMPH-20050623ABU.

¹⁵ Lopez Response to Supplement to Informal Objection at 2.

¹⁶ See Lopez Petition for Grant of Applications at 2.

¹⁷ See Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Lauren A. Colby, Esq., Counsel for Lopez, Ref. 1800B3-ALV (August 29, 2005). In the letter of inquiry, we also noted minor discrepancies between the KXTM license application and the 2005 Modification Application and requested that Lopez file any necessary amendments to ensure that the applications accurately reflect the parameters of KXTM as constructed. On September 16, 2005, Lopez amended its license application to reflect the facilities actually constructed and conform to the parameters specified in its 2005 Modification Application.

¹⁸ See September 6, 2005, Declaration of Humberto Lopez, attached to September 14, 2005, letter from Lauren A. Colby to Peter Doyle.

Discussion

Unauthorized Construction and Operation. Section 73.1620 of the Commission's rules provides, in pertinent part, that program tests may be conducted by permittees, upon completion of construction, so long as the Commission is notified of the program tests and a license application is filed within 10 days thereafter.¹⁹ Moreover, the facilities tested must have been constructed in accordance with the terms of the construction permit and the technical provisions of the application in order to avert air navigation hazards and avoid interference to other broadcast stations.²⁰ Otherwise, the station is subject to revocation of license or permit, or imposition of a forfeiture.²¹

Lopez was authorized by the Commission to construct a Class C2 station with an ERP of 50 kW and an antenna HAAT of 150 meters,²² but instead constructed a Class A station with an ERP of 5 kW and an antenna HAAT of 34 meters without first obtaining Commission consent. Although Lopez attempted to legitimize its unauthorized construction by filing a modification application on July 12, 1999, to reflect the Class A facilities it had constructed, Lopez did not await Commission consent before commencing operations. In fact, as revealed in his response to the recent FCC inquiry letter, Lopez began operating KXTM with Class A facilities on approximately May 30, 1999, almost two months before even seeking Commission authorization for the modification.²³ Moreover, Lopez failed to notify the FCC that it commenced program tests and did not file the required license application until July 19, 1999.

KXTM was not constructed in accordance with the terms of its construction permit. Moreover, Lopez neglected to first obtain Commission authorization to construct facilities that deviated from those described in its underlying permit.²⁴ Accordingly, Lopez violated Section 73.1620 of the Commission's Rules, and the operation of KXTM to this date has been unauthorized.²⁵

We believe that Lopez should be sanctioned for its unauthorized operation, and that a monetary

¹⁹ 47 C.F.R. § 73.1620.

²⁰ See *id.*; 47 U.S.C. § 319(c); *Liability of Equivox, Inc.*, 87 F.C.C.2d 1099 (1981) (“*Equivox*”); *Metro Program Network, Inc.*, 5 FCC Rcd 2940 (1990) (“*Metro*”).

²¹ See 45 U.S.C. §§ 312(a)(2), 319(c), and 503(b)(1)(A) (forfeiture appropriate for willful or repeated failure to comply substantially with the terms and conditions of any permit or other authorization issued by the Commission).

²² See BPH-19921022MG.

²³ See September 6, 2005, Declaration of Humberto Lopez, attached to September 14, 2005, letter from Lauren A. Colby to Peter Doyle.

²⁴ Pursuant to Section 73.1690 of the Commission's Rules, a decrease in operating power, which also results in a change in the authorized station class, may be made only upon grant of specific authority. See 47 C.F.R. § 73.1690(c)(8)(iii).

²⁵ As noted above, Lopez has broadcast from May 30, 1999 until the present at an unauthorized antenna height and power, despite the absence of special temporary authority, or any authority. While its 1999 Modification Application remained pending, Lopez never sought special temporary authority to operate on a temporary basis with non-conforming facilities. See 47 C.F.R. § 73.1635 (providing that special temporary authority must be sought to permit the operation of a broadcast facility for a limited period at variance from its authorization, and that authority must be received prior to the commencement of such operation).

forfeiture should be imposed for the violation.²⁶ Section 503(b) of the Communications Act of 1934, as amended (“the Act”), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully fails to comply with any provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.²⁷ The Commission’s *Forfeiture Policy Statement*²⁸ and Section 1.80 of the Commission’s Rules establish a base forfeiture amount of \$10,000 for construction and/or operation without an instrument of authorization for the service.²⁹ In determining the appropriate forfeiture amount, we must also consider the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”³⁰

In this case, Lopez ultimately conceded that it had not completed construction in accordance with its construction permit,³¹ and thus should have known that it did not qualify for automatic program test authority.³² Lopez operated KXTM for almost two months without notifying the Commission, filing a

²⁶ Although the usual sanction for unauthorized construction is also a forfeiture, we are statutorily barred from issuing a forfeiture for this violation. The Communications Act bars the imposition of a forfeiture on a permittee for violations which occurred more than one year ago. See 47 U.S.C. § 503(b)(6)(B) (providing that a forfeiture cannot be imposed on a person not holding a broadcast station license “if the violation charged occurred more than 1 year prior to the date of issuance of the required notice.”); see also, e.g., *Manahawkin Communications*, 17 FCC Rcd 242, 255 (2001) (“*Manahawkin*”); *California State University at Sacramento*, 14 FCC Rcd 10018 (1999) (cancellation of Notice of Apparent Liability (“NAL”) for unauthorized construction during pendency of application to modify construction permit because more than one year elapsed from date of unauthorized construction and date of NAL). In contrast, although Lopez’s unauthorized operation of KXTM commenced in 1999, the unauthorized operation is an ongoing violation, which has continued until the present. Accordingly, we are not barred by Section 503(b)(6) of the Act from issuing a NAL for this transgression.

²⁷ 47 U.S.C. § 503(b). Section 312(f)(1) of the Act, which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term “willful,” when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by the Act” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). Section 312(f)(2) of the Act also provides that “[t]he term “repeated,” when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(2).

²⁸ *Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17115 (1997) (“*Forfeiture Policy Statement*”), recon. denied, 15 FCC Rcd 303 (1999).

²⁹ *Forfeiture Policy Statement*, 12 FCC Rcd at 17113, Appendix A, Section I; see also 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section I. Base Amounts for Section 503 Forfeitures.

³⁰ 47 U.S.C. § 503(b)(2)(D).

³¹ See Lopez Petition for Grant of Applications at 1 (admitting that “although the permit specified Class C2 facilities, Lopez was only successful in constructing Class A facilities.”). In contrast, in its license application, Lopez initially stated that “construction was completed largely in accordance with the construction permit.” See Cover Letter to BLH-19990719KB. Lopez, however, provided no support for this statement, and its license application, in which it revealed that it constructed the station at a significantly lower antenna height with only one-tenth of the authorized power, belied its own assertion.

³² See 47 C.F.R. § 73.1620(a) (“Upon completion of construction of an AM, FM, TV or Class A TV station in accordance with the terms of the construction permit, the technical provisions of the application, the rules and regulations and applicable engineering standards, program tests may be conducted ...”) (emphasis added).

license application, or requesting permission to operate the modified facilities. Moreover, when Lopez submitted its modification and license applications, it continued to operate KXTM despite the fact that it did not receive staff approval as required. It thus appears that its violations were willful, and the duration of the violation, from May 30, 1999, when Lopez commenced program tests without authorization, until the present, was substantial. We also note, however, that no compounding factors, such as the creation of air navigation hazards or radio interference, were created through either the construction or operation of the nonconforming facility.³³ Taking into consideration these facts and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we believe that the base forfeiture of \$10,000 is appropriate.

Modification Applications and License Application. On July 5, 2005, Lopez requested that the Commission dismiss its 2001 Modification Application to relocate KXTM to a new tower site and upgrade to Class C2 facilities. We will dismiss the 2001 Modification Application. Accordingly, Sound's objection to the 2001 Modification Application is now moot and need not be discussed.

On July 5, 2005, Lopez also urged the Commission to grant its 2005 Modification Application and its license application, which reflect the Class A facilities it actually constructed prior to the expiration of the KXTM construction permit.³⁴ Thereafter, on September 16, 2005, at the request of Commission staff, Lopez amended its license application to conform to its 2005 Modification Application and accurately reflect the parameters of KXTM as constructed.

As noted above, although Lopez correctly filed a modification application to reflect the change in the authorized parameters of KXTM, it completed construction and commenced operation prior to receiving Commission authorization for the change. We note, however, that the usual sanction for unauthorized construction and operation is forfeiture, as opposed to denial of the applications.³⁵ Accordingly, we find that grant of both the 2005 Modification Application and the license application, which will allow Lopez to continue to provide the community of Benavides with its first local service, is consistent with the public interest, convenience, and necessity. Further, in spite of Lopez's initial negligence and ineptitude in adhering to the Commission's Rules and application procedures, we find that Lopez is otherwise qualified to become a Commission licensee. Notwithstanding this conclusion, we find that the imposition of a forfeiture in the amount of \$10,000 for Lopez's unauthorized operation of KXTM is appropriate. Finally, we emphasize that it is incumbent upon Lopez to diligently comply with the

³³ Compare *Triad Broadcasting Company, Inc.*, 96 F.C.C.2d 1235 (1994) ("*Triad*"), *Equivox* and *Metro*, *supra* note 20. In *Triad*, *Equivox*, and *Metro*, the Commission assessed forfeitures of \$20,000 for unauthorized operations, under circumstances where the facilities actually constructed varied substantially from those specified in the applicable authorization and potentially serious hazards to air navigation and radio interference were created by the unauthorized operations. In *Metro*, for example, the facilities were built 25.4 miles from the authorized location; in *Triad*, the licensee increased its power from 34 kW to 100 kW; and in *Equivox*, the licensee changed its antenna location and increased its tower height from 75 feet to 140 feet without permission.

³⁴ Sound states that it does not object to a grant so long as the grant effectuates a downgrade of KXTM to Class A status.

³⁵ See, e.g., *Spectrum Broadcasting Corporation*, 12 FCC Rcd 7724 (1997) (construction of facilities not in accordance with construction permit, and operation of such unauthorized facilities, did not bar grant of pending applications, but did result in issuance of a Notice of Apparent Liability); see also *Equivox*, 87 F.C.C.2d at 1100; *Manahawkin*, 17 FCC Rcd at 255 (granting modification application despite finding that the facilities proposed in the application were constructed without Commission authorization); *Commission Policy Regarding Premature or Nonconforming Construction*, Public Notice (April 27, 1984) (announcing that forfeiture action will be considered in cases of pre-construction or nonconformity between the authorized and actually constructed facilities, and applications to correct deficiencies will be considered).

Commission's Rules and the critical technical specifications in Commission authorizations. We caution Lopez that future violations may result in more substantial forfeiture penalties.

Conclusions/Actions

For the reasons set forth above, IT IS ORDERED, that pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Humberto Lopez, dba Benavides Communications, permittee of station KXTM(FM), Benavides, Texas, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Ten Thousand Dollars (\$10,000) for willfully and repeatedly violating Section 73.1620 of the Commission's Rules, 47 C.F.R. § 73.1620.

IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that within thirty days of the release of this Notice, Humberto Lopez, dba Benavides Communications, SHALL PAY to the United States the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

Payment of the forfeiture may be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. (MB200641410017) and the FCC Registration Number ("FRN") (0007407919) as referenced above. Payment by check or money order may be mailed to the Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, Receiving Bank Mellon Bank, and Account Number 911-6106.

The response, if any, must be mailed to Peter H. Doyle, Chief, Audio Division, Media Bureau, 445 Twelfth Street, S.W., Room 2-A360, Washington, D.C. 20554, and MUST INCLUDE the NAL/Account number (MB200641410017) referenced in the caption of this document.

The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 Twelfth Street, S.W., Washington, D.C. 20554.³⁶

Finally, for the reasons set forth above, IT IS ORDERED that the May 21, 2002, Objection filed by Sound Investments Unlimited, Inc. IS GRANTED to the limited extent indicated herein, IS DISMISSED AS MOOT in part, and IS DENIED in all other respects. Further, the 2001 application for minor modification of the construction permit for KXTM (File No. BMPH-20010511AAB) IS DISMISSED, the 2005 application for minor modification of the construction permit for KXTM (File No. BMPH-20050623ABU) IS GRANTED, and the KXTM license application (File No. BLH-19990719KB) IS GRANTED. The authorizations will follow under separate cover.

³⁶ See 47 C.F.R. § 1.1914.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Barry D. Wood, Esq.