



Federal Communications Commission
Washington, D.C. 20554

March 21, 2008

DA 08-629

In Reply Refer to:

1800B3-IB

Released: March 21, 2008

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Re: KWFA(AM), Tye, Texas
Facility ID No. 40403
File Nos. BP-19870303AG as modified by
BMP-20060803AQI
BMAP-20040130AIG
Petitions for Reconsideration

Dear Counsel:

The Media Bureau ("Bureau") has before it a Petition for Reconsideration ("Petition") dated January 17, 2007, filed by Marlene V. Borman ("Borman"). Borman seeks reconsideration of a December 18, 2006, Decision which denied her request for additional time to construct unbuilt station KWFA(AM), Tye, Texas.¹ For the reasons discussed below we deny reconsideration; dismiss her application to modify the permit; and dismiss an April 20, 2006, petition for reconsideration of the denial of Borman's February 8, 2006, request to expedite that modification application.²

The Bureau granted the KWFA(AM) permit on January 22, 2004, for a three-year term expiring January 22, 2007. Immediately thereafter, the Commission opened the Auction 84 filing window. On January 30, 2004, Borman filed an application for a major change within the window, proposing to change the station's community of license from Tye to Abilene, Texas (the "Abilene Application"). Borman believed that the Abilene Application should be treated as a "singleton," but the staff determined that the application was part of MX Group 84-160, a complex proceeding consisting of 15 mutually exclusive applications. On March 21, 2006, the Bureau denied Borman's February 8, 2006, request for expedited action³ on the Abilene Application as well as her alternative request for tolling of the construction deadline.⁴

¹ See *Dennis J. Kelly*, Letter, Ref. 1800B-IB (MB Dec. 18, 2006) ("Decision").

² One cannot modify a permit that has become a nullity. See *JNE Investments*, Memorandum Opinion and Order, FCC 08-13, __ FCC Rcd __, ¶ 24 (Jan. 18, 2008) (citing *WYCO, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16900, 16904 (2003)). Moreover, the additional petition is identical in many respects to the Petition denied herein.

³ See *Dennis J. Kelly*, Letter, 21 FCC Rcd 2956 (MB 2006) ("*Expedite Denial*"). Borman hoped to become a singleton through the potential grant of settlement agreements filed by two other applicants in late 2005. She was not a party to those agreements. On April 20, 2006, Borman filed a petition for reconsideration of the denial of her request to expedite the Abilene Application.

⁴ See *Expedite Denial* at 2958 (citing *Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541, n.56 (1999) ("*Streamlining MO&O*") and *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167 (2001)).

Borman states that she decided to pursue a minor change in transmitter sites serving Tye upon realizing that the staff would not act on the Abilene Application prior to her construction deadline.⁵ The minor change application, filed on August 3, 2006, was granted on October 24, 2006. Borman requested a waiver of the three-year broadcast construction deadline on December 6, 2006. She argued that she experienced circumstances beyond her control preventing construction, including unspecified changes between the time of her original application and its grant, the staff's allegedly erroneous determination that the Abilene Application was not a singleton, and denial of the request to expedite MX Group 84-160. We denied Borman's waiver request on December 18, 2006, finding that Borman had not shown that construction was encumbered for reasons beyond her control. Absent favorable action on the instant request for reconsideration, the KWFA(AM) construction permit would have expired and forfeited on January 22, 2007.

The Commission will consider a petition for reconsideration when the petitioner shows either a material error in the Commission's original order, or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.⁶ A petition for reconsideration that simply reiterates arguments that were previously considered and rejected will be denied.⁷ We find that Borman's Petition neither demonstrates material error or omission in the Decision, nor raises any material new facts unavailable at the time of her initial waiver request.

On reconsideration Borman identifies the "changed circumstances" preventing construction, to which she obliquely had referred previously. Borman states that by the time the Commission granted her initial construction permit, the landowner would no longer make the tower site available to her.⁸ Borman reiterates arguments that she promptly applied for a new site in the Abilene Application, and that the Commission's failure to act on the Abilene Application amounts to a circumstance beyond her control.⁹ Borman contends that denial of her waiver request conflicts with Section 319(b) of the Communications Act of 1934, as amended, and with case law tying the grant of additional construction time to circumstances beyond a permittee's control, whereas grant of a waiver would arguably serve the public interest.

In adopting the current framework to encourage prompt initiation of service and combat spectrum warehousing, the Commission acknowledged Section 319(b)'s language concerning circumstances beyond

⁵ Borman's minor and major change applications could be pending concurrently because applications to serve different communities are not considered to be conflicting. *See* 47 C.F.R. § 73.3520.

⁶ *See* 47 C.F.R. § 1.106. *See also* *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).

⁷ *See* *WWIZ, Inc.*, 37 FCC at 686.

⁸ It took the Commission considerable time to act on Borman's original Tye proposal because she proposed operations near the U.S. border with Mexico, requiring international coordination, and the Mexican government objected to Borman's initial nighttime proposal. The matter was resolved through government negotiations with Mexico and adjustments to Borman's nighttime proposal. It is well settled that the amount of time an application is pending prior to grant does not justify a construction period in excess of three years after that grant. *See* *Birach Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1416 (2003), *recon. denied*, 20 FCC Rcd 5764 (2005).

⁹ Borman also repeats that she needs a one-year timetable to construct. The broadcast construction period procedures aim to replace time which was lost during encumbrances beyond a permittee's control; the amount of extra time that a permittee may need for other reasons is generally immaterial. *See* *Cram Communications, LLC*, Memorandum Opinion and Order, FCC 08-21, ___ FCC Rcd ___, ¶ 14 (Jan. 18, 2008).

a permittee's control.¹⁰ The Commission stated that its intention "was simply, within the bounds of the statute, to establish an incentive for all applicants to plan construction carefully, even prior to applying for a permit and, once a permit is received, to bring to the construction process the same degree of urgency brought to other business endeavors."¹¹ In that way, the Commission sought to minimize instances in which applicants filed for permits without taking preliminary steps to ensure that they could begin – much less complete—construction. Consistent with the statute, the Commission established the following test for whether a waiver of the three-year construction period is appropriate: whether the permittee was prevented from constructing by rare and exceptional circumstances *beyond its control*.¹² The Commission believed that by doubling the broadcast construction period from 18 months to three years, it had provided permittees with a "built in" safety valve, and that diligent permittees that specified sites suitable for their purpose would, within this longer construction period, be able to overcome delays that might arise.¹³ In the Commission's experience, losses of transmitter site most often stemmed from permittees' own misjudgments in specifying the site. Therefore, such losses and resulting applications for replacement sites would not generally qualify for additional time under the revised three-year construction deadline.¹⁴ Waivers of the three-year construction deadline for site-related construction delays would, however, remain appropriate where the site became unavailable for reasons truly beyond the permittee's control.¹⁵

Borman provides no new evidence on reconsideration that would alter the Bureau's earlier conclusion that her proposed community of license change from Tye to Abilene was voluntary.¹⁶ Her need to change sites appears to be the direct result of her own actions. Assuming *arguendo* that Borman had obtained reasonable assurance of site availability prior to filing her original application, as required, it remained her responsibility to verify the continued validity of that assurance while that application was pending, and to notify the Commission of any significant changes in the information she had provided.¹⁷ Borman presents no information identifying when she learned of the site loss, the extent of her efforts to verify the original site's continued availability, or any attempts to locate alternate sites capable of serving Tye. Borman should have notified us that the site was no longer available prior to permit grant and submitted a minor site amendment while her application was pending. In that manner, her initial permit would have afforded her three years to build at an available site serving Tye. Borman instead allowed the Commission to grant an application for a site she could no longer use. Borman explains that the rules would not have allowed her to make a *major* change to her application prior to grant, but provides no reason

¹⁰ See *Streamlining MO&O*, 14 FCC Rcd at 17537-39; 47 U.S.C. § 319(b) ("... said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by cause not under the control of the grantee.")

¹¹ See *Streamlining MO&O*, 14 FCC Rcd at 17540.

¹² *Id.* at 17541 (emphasis added). See also 47 C.F.R. § 73.3598.

¹³ *Id.* at 17539.

¹⁴ *Id.* at 17538-39.

¹⁵ See, e.g., *WLMB(AM), East Point, GA*, Letter, 18 FCC Rcd 5034 (MB 2003) (forcible taking of site by eminent domain); *Dorann Bunkin, Esq.*, Letter, 21 FCC Rcd 8671 (MB 2006) (cessation of construction during the breeding and migration of endangered species at the transmitter site, as required by local authorities).

¹⁶ See *Expedite Denial*, 21 FCC Rcd at 2958, n.6 (citing *Streamlining MO&O*, 14 FCC Rcd at 17541, n.56 (no tolling of construction deadline for voluntary site changes even for LPTV and DTV permits which, due to circumstances unique to those services, sometimes qualify for tolling not applicable to radio permits)).

¹⁷ See 47 C.F.R. § 1.65; *Streamlining MO&O*, 14 FCC Rcd at 17540 (citing *Arizona Number One Radio*, Decision, 103 FCC 2d 551, 555 (Rev. Bd. 1986) (applicant demonstrated reasonable assurance of site availability by checking with landowner periodically while its application was pending to determine that the site had not become unavailable in the interim)).

why she could not have submitted a *minor* amendment. Following grant of the permit for the lost site that she had specified, Borman made a business decision to address the problem by applying for a major change, potentially subjecting her proposal to mutually exclusive applications.¹⁸ Borman's major change proposal thus became part of a 15-way mutually exclusive group which, due to its complexity and number of issues, would take time to resolve. Borman chose, for over two years, to pursue the Abilene Application exclusively, taking the position that inclusion of that application in MX Group 84-160 was mistaken and advocating expedited action on settlement agreements to which she was not a party. During that time, she took no affirmative steps to advance construction through a minor facility change, an option that remained available to her. When Borman decided to pursue such a minor change in August 2006, only five months remained on her permit. She did not, by permit expiration, achieve even the most basic, preliminary steps toward construction. For example, letters that Borman submits to support her claimed diligence show that, as of several weeks prior to permit expiration, Borman had not yet submitted a flood plan to the local government for approval or initiated local zoning proceedings.¹⁹

As circumstances beyond Borman's control were not the primary cause of her failure to construct, we reject Borman's claim that the Bureau erred by failing to afford her more time on that basis.²⁰ We also reject Borman's contention that the staff's failure to act promptly on the Abilene Application was arbitrary and capricious in violation of the Administrative Procedure Act.²¹ As we have thoroughly explained, Borman's application was one of 15 mutually exclusive applications in a legally and technically complex, "Category I" mutually exclusive group.²² Following Hurricane Katrina, which delayed the group's settlement period, group members filed at least six settlement agreements, several singleton applications to resolve technical conflicts, and numerous requests for application dismissals, all requiring simultaneous analysis.²³ Borman did not show circumstances differentiating this group from others sufficient to take it out of the processing queue, and we found that doing so would have needlessly disrupted the overall

¹⁸ Borman argues that she was extremely prompt in filing the Abilene Application within eight days of the permit grant. The Abilene Application's filing date simply corresponds to the Commission's opening a filing window for major changes. While Borman may have preferred to serve Abilene rather than Tye, the filing of the Abilene Application would have been avoidable had Borman taken appropriate action to notify the Commission of her site loss prior to grant of the underlying permit.

¹⁹ See *Letter from David Todd*, Executive Vice President, Enprotec/Hibbs & Todd, Inc. (Jan. 12, 2007); *Letter from Bob Lindley*, City Engineer, City of Abilene, Texas (Jan. 4, 2006 [sic]); *Letter from Larry Holmes*, Agent, Dalzell Realtors (Jan. 8, 2007). These letters indicate that, by early January 2007, Borman had hired a real estate agent to negotiate with the owners of the site and had completed a flood study, but still needed to file a flood development plan with the City of Abilene for its approval, to seek and obtain a zoning change from agricultural to commercial, and to secure a building permit. See generally *Streamlining MO&O*, 14 FCC Rcd at 17540 (diligent permittees can often mitigate delays by applying for approvals from local authorities prior to the issuance of a construction permit). Borman's Petition also reflects that she had not yet acquired equipment prior to permit expiration. See Petition at 6.

²⁰ Moreover, the "precedent" that Borman cites in support of that claim pre-dates the three-year construction deadline as well as the Federal Communications Commission. See *Richmond Development Corp. v. Federal Radio Commission*, 35 F.2d 883 (D.C. Cir. 1929) (radio broadcaster that originally received a one-month construction period, subsequently extended to four months, was entitled to further time under law then in effect where it had acted in good faith and with diligence, but was prevented from completing construction by causes not under its control).

²¹ See 5 U.S.C. § 706(2)(A).

²² See *Expedite Denial*, 21 FCC Rcd 2956-57. Category I groups include at least one AM major modification application or one noncommercial educational application, and are, therefore, entitled to resolve mutual exclusivities by settlement or engineering solutions prior to proceeding to a Section 307(b) analysis and/or auction.

²³ *Id.*

processing scheme.²⁴ There is nothing inconsistent between this reasoning and the cases that Borman cites for the proposition that the Commission cannot arbitrarily delay action.²⁵

Borman further alleges that the Bureau violated her rights under the Fifth Amendment to the U.S. Constitution by refusing to provide her with additional construction time while simultaneously failing to grant an application that would have enabled construction to proceed. According to Borman, the Bureau's inaction amounts to an unlawful government taking of her property. Borman bases her claim primarily on *Burton v. Wilmington Parking Authority*, which she cites for the proposition that "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them."²⁶ We reject Borman's comparison. First, unlike the civil liberties at issue in that case, there is no constitutional right to action on a broadcast application within a set time frame. Second, the Commission did not abdicate its responsibility to process the Abilene Application; it only declined to give that application a higher processing priority than other applications filed in the same window. Third, and most importantly, the forfeiture of a broadcast construction permit does not amount to an unconstitutional taking of private property.²⁷ Section 301 of the Communications Act provides that no authorization shall be construed to create any right beyond the term, conditions, and periods of the license.²⁸ Since permittees have no property interests in their construction permits, forfeiture of Borman's permit upon expiration of its term could not constitute a "taking."

Accordingly, the January 17, 2007, Petition for Reconsideration filed by Marlene V. Borman IS DENIED. In view of our determination that Borman's construction permit has expired and forfeited, her application for a major modification (File No. BMPA-20040130AIG) and April 20, 2006, Petition for Reconsideration concerning expedited consideration of that application ARE DISMISSED AS MOOT.

Sincerely,

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Chief, Audio Division
Media Bureau

²⁴ *Id.*

²⁵ See *Federal Broadcasting System v. FCC*, 225 F.2d 560 (D.C. Cir. 1955) (Commission's reduction of application backlog by placing 48 singleton applications on agenda for one day was within agency's discretion); *United Detroit Theatres Corp. v. FCC*, 178 F.2d 700 (D.C. Cir. 1949) (Commission exercised reasonable discretion in postponing action on singleton application during investigation of ownership concerns involving numerous applicants).

²⁶ *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). That case held that a private restaurant's refusal to serve an African American patron could be imputed to a State government that owned the building in which the restaurant operated, and thus was addressable as a government action under the Fourteenth Amendment, because the State had failed to affirmatively require its lessees to abide by the same anti-discrimination obligations to which the government itself was subject. The Fourteenth Amendment equal protection holding in *Wilmington Parking Authority* has little bearing on Borman's argument under the takings clause of the Fifth Amendment.

²⁷ See *Streamlining MO&O*, 14 FCC Rcd at 17536-37.

²⁸ See 47 U.S.C. § 301. See also *Mobile Relay Association v. FCC*, 457 F.3d 1, 12 (D.C. Cir. 2006).