



Federal Communications Commission
Washington, D.C. 20554

May 18, 2009

DA 09-1084

In Reply Refer to:

1800B3-IB

Released: May 18, 2009

Jeffrey D. Southmayd, Esq.
Southmayd & Miller
1220 19th Street, NW
Suite 400
Washington, D.C. 20036

In Re: KALD (FM), Caldwell, TX
Facility ID No. 91682
File No. BMPED-20070907AEH

Application for Minor Modification
Petition for Reconsideration

Dear Counsel:

We have before us a petition for reconsideration asking that we reinstate and grant the above-captioned application filed by Houston Christian Broadcasters, Inc. ("HCB") to modify the construction permit for its unbuilt station at Caldwell, Texas. For the reasons set forth below, we deny reconsideration. The underlying permit remains in effect with the existing expiration date of July 20, 2009.

Background. The underlying permit was issued in a proceeding among four mutually exclusive applicants for a new noncommercial educational ("NCE") FM station construction permit. Pursuant to established procedures,¹ the Media Bureau (the "Bureau") examined the applicants' proposals as of a "snap shot" date of June 4, 2001, determined that Philos Broadcast, Inc. ("Philos") was entitled to a decisive preference under Section 307(b) of the Communications Act of 1934, as amended,² and identified Philos as the tentative selectee.³ Specifically, the Bureau concluded that Philos' proposal

¹ See 47 C.F.R. § 73.7002; see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (delegating authority to the Bureau to make 307(b) determinations in NCE cases) (the "NCE Order"), *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001) (the "NCE MO&O"), *partially reversed on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

² 47 U.S.C. § 307(b).

³ See *Houston Christian Broadcasters, Inc., et al.*, Letter, 20 FCC Rcd 12920 (MB 2005). Philos claimed basic eligibility for a Section 307(b) preference using year 2000 census data. KALD's authorized 60 dBu contour would encompass 25,307 people of which 24,566 people would receive an aggregated first and second NCE service.

would provide a first NCE service to 8,063 people, and none of the other applicants could make an equivalent or better showing.⁴ Accordingly, the Bureau identified Philos as the tentative selectee, and on July 20, 2006, awarded the construction permit to Philos. As with all NCE permits awarded by decisive Section 307(b) preference, the permit was issued with a special operating condition, requiring the permittee to maintain the promised service pursuant to Section 73.7002(c) of the Commission's Rules (the "Rules"). HCB, one of the non-prevailing applicants in the group, obtained the permit from Philos by assignment on April 9, 2007. On September 7, 2007, HCB filed the instant application for minor modification, and it amended that application on March 2, 2009. HCB proposed to change the station's transmitter location, effective radiated power, and antenna height, and to upgrade the station from a Class A to a Class C2 facility. On March 25, 2009, the Bureau dismissed the application as unacceptable for filing, finding that the proposed modification would not satisfy the condition placed on the permit as a result of the comparative preference.⁵ HCB seeks reconsideration.

Discussion. Section 73.7002(c) of the Rules provides that for a period of four years of on-air operations, an NCE applicant receiving a decisive Section 307(b) preference must "construct and operate technical facilities substantially as proposed and shall not downgrade service to the area on which the preference was based."⁶ A condition on the KALD(FM) construction permit thus requires HCB's compliance with this requirement. HCB asserts that its application should be deemed to comply with Section 73.7002(c).⁷

HCB proposes to extend KALD(FM)'s service contour to the north, south, and east, while reducing that contour to the west. HCB acknowledges that an area of first NCE service in the western portion of its authorized contour is eliminated and that 2,262 people (approximately 28 percent of the population on which the preference was based) reside in that area according to census information for the year 2000. HCB contends that, although it must maintain service to a requisite number of people, the particular geographic region where the pertinent population resides is immaterial. Thus, HCB argues that any first service loss to the west is ameliorated by its proposed new service to the north and south. Because 2,081 people reside in those northern and southern areas, HCB argues that there is a net first NCE service loss to only 181 people (2,262 minus 2,081). HCB argues that this loss is *de minimis* because it represents only about 2 percent of the first service on which the preference was awarded.⁸ HCB further argues that its proposal will result in no loss at all, and actually in a service gain, if one considers post-snap-shot date changes in the region's service from other authorized radio stations. For example, HCB states that a modification by NCE station KANJ(FM), Giddings, Texas eliminated that station's service to a portion of the new area into which KALD(FM) proposes to expand.⁹ HCB maintains that its proposal, by offering new service to people who lost service from KANJ(FM) and

⁴ Philos was the only applicant to assert that it was entitled to a first service preference.

⁵ *Letter from Arthur E. Doak, Senior Engineer to Houston Christian Broadcasters* (MB Mar. 25, 2009) (the "Dismissal Letter").

⁶ 47 C.F.R. § 73.7002(c); *see also NCE Order*, 15 FCC Red at 7397.

⁷ *See* Exhibit 1 to Application BMPED-20070907AEH.

⁸ HCB also claims gains in second service. Second service information is not decisional in considering whether there has been a downgrade to the area on which KALD's preference was based; the original preference was awarded solely on KALD's first service.

⁹ The KANJ(FM) modification was licensed on June 23, 2006, about a month prior to issuance of the KALD(FM) construction permit.

others, would bring about a net gain of first service to 721 people.¹⁰ Accordingly, HCB submits that the proposed changes in the predicted service contour and population served are permissible and that a finding otherwise would be “nonsensical.”

We disagree. Permittees which received a decisive Section 307(b) preference are not precluded from making minor changes to their proposed stations. Section 73.7002(c) of the Rules, however, explicitly prohibits any changes which will “downgrade service to *the area* on which the preference was based.”¹¹ This provision ensures that applicants which received a comparative preference over others as a threshold matter without consideration of any other comparative qualifications will provide the public with the benefits promised.¹² In addition, the Commission examines competing NCE applicants’ proposals as of a “snap shot” date. In examining levels of new first and second NCE service, the Commission has stated that it will use the snap shot date without consideration of inevitable, subsequent shifts in population and numbers of stations authorized.¹³ Section 73.7002(c) thus focuses on preventing downgrades to *the area* on which the preference was based, rather than on shifting populations and service changes by other stations.

By its terms, Section 73.7002(c) does not, as HCB proffers, allow an applicant the discretion to downgrade so long as the population losing service will be small or would be offset by population elsewhere that would gain service.¹⁴ Nor does it allow applicants to abandon areas on which the preference was based due to subsequent changes in an area’s demographics or in response to actions by other radio stations.¹⁵ Thus, the application form for facility modifications by NCE stations (FCC Form 340) specifically explains that if an NCE applicant receiving a decisive 307(b) preference proposes to downgrade service prior to the expiration of the four-year holding period, the “application is unacceptable.”¹⁶ HCB’s elimination of first NCE service to 2,262 people in the western portion of its authorized contour constitutes a downgrade of service to an area on which a Section 307(b) preference was based in violation of the clear language of Section 73.7002(c) of the Rules.

HCB has not requested a waiver of the rule nor has it presented any unique circumstances or

¹⁰ The 721-person figure is calculated by subtracting 8,063 (the number of people receiving first service based on the snap shot date) from 8,784 (the number of people receiving first service under current conditions). The *Dismissal Letter* cited a claim by HCB that its modification would result in new first and second service to 949 more people than the authorized facilities. That figure represented first service to 721 people plus second service to 228 people.

¹¹ 47 C.F.R. § 73.7002(c) (*emphasis added*). See also *NCE Order*, 15 FCC Rcd at 7398; *NCE MO&O*, 16 FCC Rcd at 5088.

¹² See *NCE Order*, 15 FCC Rcd at 7398.

¹³ *NCE MO&O*, 16 FCC Rcd at 5083. Similarly, changes made after the snap shot date may potentially diminish, but cannot enhance, an applicant’s comparative position. 47 C.F.R. § 73.7003(e).

¹⁴ See *University of Oklahoma, et. al*, Letter, 20 FCC Rcd. 11984 (MB 2005). *Letter to James P. Pappas*, Ref. 1800B3-ALV (MB May 13, 2007) (rejecting subsequent modification application for a new NCE station at Woodward, Oklahoma where permittee that received a first service preference would reduce its new first service population to 14,474 people (a loss of 2,123 people).

¹⁵ See *supra* n.13.

¹⁶ See Question 18 of FCC Form 340 (providing that if an applicant cannot certify that either (1) the proposed modification will not downgrade service to the area on which the Section 307(b) preference was based, or (2) although it proposes to downgrade service, the applicant has provided full service to that area for a period of four years of on-air operations, the application is unacceptable).

compelling public interest reasons to warrant a waiver on our own motion.¹⁷ Accordingly, we affirm our dismissal of the application as unacceptable for filing.¹⁸

IT IS ORDERED that the petition for reconsideration by Houston Christian Broadcasters, Inc. concerning the dismissal of its application (File No. BMPED-20070907AEH) for a minor modification of its construction permit for KALD(FM), Caldwell, Texas IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁷ See *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest,” citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)); see also 47 C.F.R. § 1.3.

¹⁸ 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).