

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Application of)	
)	
PACIFIC BROADCASTING)	File No. BSTA-20010216ABP
OF MISSOURI LLC)	File No. BSTA-20010323ACD
)	Facility ID No. 40798
For Special Temporary Authorization to)	
Operate Station KTKY(FM), Refugio, Texas)	

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 2003

Released: February 11, 2003

By the Commission:

1. We have before us the January 22, 2002, Application for Review filed by Pacific Broadcasting of Missouri LLC (“Pacific”), licensee of broadcast station KTKY(FM), Refugio, Texas.¹ Pacific requests review of the Mass Media Bureau’s (“Bureau”)² December 21, 2001, staff decision (“Staff Decision”)³ denying reconsideration of Pacific’s request for Special Temporary Authorization (“STA”)⁴ to operate KTKY(FM) from the facilities specified in its construction permit to relocate KTKY(FM) to Taft, Texas.⁵ For the reasons discussed below, we deny the Application for Review.

2. **Background.** Pacific filed a Petition for Rule Making December 23, 1998, in which it sought, *inter alia*, the substitution of Channel 293C2 for Channel 291C3 at Refugio, Texas, and reallocation of Channel 293C2 from Refugio to Taft, Texas. Pacific further sought modification of the KTKY(FM) license to specify Taft as its community of license. Finally, Pacific proposed the allotment of Channel 291A at Refugio.⁶ The Bureau issued a *Notice of Proposed Rule Making*⁷ in this matter, and solicited and received comments.

¹ Pacific also filed a Supplement to Application for Review May 22, 2002.

² The Mass Media Bureau became the Media Bureau effective March 25, 2002.

³ *Letter to Pacific Broadcasting of Missouri LLC*, Ref. No. 1800B3-LAS (MMB Dec. 21, 2001).

⁴ File Nos. BSTA-20010216ABP, BSTA-20010323ACD. *See* 47 U.S.C. § 309(f).

⁵ File No. BPH-20000613AAF.

⁶ Previously, Channel 263A had been allotted at Refugio, based on a proposal by WAB Broadcasting. *Refugio, Texas*, 14 FCC Rcd 3922 (MMB 1999).

⁷ *Refugio and Taft, Texas, Notice of Proposed Rule Making*, 14 FCC Rcd 11609 (MMB 1999). Pacific filed its Petition for Rule Making in accordance with 47 C.F.R. § 1.420(i), which allows FM licensees to request a new community of license in a rule making proceeding. *See Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part and denied in part*, 5 FCC Rcd 7094 (1990).

3. In its comments, Pacific recognized that the Commission strongly disfavors community of license modifications that result, as is the case here, in the removal of a community's sole local service. Pacific argued that it should be allowed to commence KTKY(FM)'s operations at Taft before replacement service was initiated at Refugio due to the possibility of delays in the competitive bidding process to award a new construction permit at Refugio. In the *Report and Order* granting Pacific's proposed reallotment, the Bureau rejected Pacific's argument:

The Commission has specifically stated that the public has a legitimate expectation that existing service will continue, and that this expectation is a factor to be weighed independently against the service benefits that may result from reallotting a channel. We have weighed the factors and are granting Pacific's reallotment request because of the public interest benefits of providing first local service to both Taft and Refugio. However, we are *compelled* to condition the reallotment of Channel 293C2 to Taft on activation of a channel at Refugio to insure continued service at Refugio.⁸

4. Pacific did not seek reconsideration or review of the *Refugio R&O*. Pacific subsequently filed an application proposing operation of KTKY(FM) on Channel 293C2 at Taft, Texas, with an increase in effective radiated power to 50 kilowatts, an increase in antenna height above average terrain to 136 meters, and relocation of the transmitter. The Bureau issued Pacific a construction permit on November 2, 2000 (the "Taft Construction Permit").⁹ Consistent with the *Refugio R&O*, the Taft Construction Permit bore the following special operating condition:

Operation of Station KTKY on Channel 293C2 in Taft, Texas, including program test operation pursuant to Section 73.1620, will not be commenced until such time as express authorization from the Commission has been granted. Such authorization will not be granted until a construction permit has been issued for Channel 263A or Channel 291A at Refugio, Texas, and activation of service has been initiated on Channel 263A or Channel 291A at Refugio.

Pacific did not file a written request rejecting this grant as conditioned,¹⁰ nor did it seek reconsideration or review of the staff action.

5. On February 16, 2001, Pacific requested STA to operate KTKY(FM) with the facilities specified in the Taft Construction Permit, stating that it had lost the lease on its Refugio tower site and was unable to negotiate with the site lessor for an extension or a new lease.¹¹ On March 12, 2001, Pacific ceased operation of KTKY(FM), and on March 23, 2001, Pacific requested STA to remove the special operating condition in the now-final Taft Construction Permit and proposed to operate with the newly constructed Taft facilities.¹² Pacific claimed it was unable to find a viable alternate site that would allow

⁸ *Refugio and Taft, Texas, Report and Order*, 15 FCC Rcd 8497, 8499-8500 (MMB 2000) ("*Refugio R&O*") (emphasis added).

⁹ File No. BPH-20000613AAF.

¹⁰ See 47 C.F.R. § 1.110.

¹¹ File No. BSTA-20010216ABP ("February STA Request").

¹² File No. BSTA-20010323ACD ("March STA Request").

continued operation from Refugio. On April 13, 2001, the Bureau denied both STA requests.¹³ Pacific's May 14, 2001, Petition for Reconsideration was denied in the December 21, 2001, Staff Decision. Pacific timely filed its Application for Review on January 22, 2002.

6. **Discussion.** Pacific contends the public interest will be served by deleting the condition specified in both the Taft allocation and construction permit in order to permit STA operations from the Taft site. It points out that the Taft facilities would cover a greater population, and notes that all but approximately 1,000 of the listeners served by KTKY(FM)'s Refugio facilities will receive a 60 dBμ-strength signal. Pacific states it is unable to locate a suitable transmission site that would conform to its current Refugio authorization. It asserts the public is better served by allowing it to use its Taft facilities rather than remain silent.

7. In carrying out the mandate of Section 307(b),¹⁴ the Commission has long recognized that "every community of appreciable size has a presumptive need for its own transmission service."¹⁵ Indeed, the Supreme Court has stated that "[f]airness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece."¹⁶ During the past fifty years, the Commission has developed allocations policies that accord great weight to establishing and preserving first local transmission services. Thus, except in rare cases, we prohibit an FM licensee from changing its community of license if to do so would deprive its current community of license of its sole local service.¹⁷ This is the policy underlying the condition in the Taft Construction Permit.

8. Pacific fails to demonstrate that it has exhausted all possibilities for temporary operation in Refugio. Pacific has provided only conclusory statements regarding its efforts to return KTKY(FM) to the air with alternate facilities. The most detail Pacific provides is in its Supplement to Application for Review, in which it purports to list all registered towers in the Refugio area. It asserts that only one site

¹³ *Letter to James Withers, Pacific Broadcasting of Missouri LLC* (MMB Apr. 13, 2001).

¹⁴ 47 U.S.C. § 307(b).

¹⁵ *Public Service Broadcasting of West Jordan, Inc.*, 97 F.C.C.2d 960, 962 (Rev. Bd. 1984). *See also Utica Observer-Dispatch, Inc.*, 11 F.C.C. 383, 391-92 (1946) ("We regard section 307(b) as contemplating not merely the availability of reception service to communities but also the availability of transmission facilities to such communities in order to provide them, to the extent possible, with their own media for local expression."); *Promulgation of Rules and Regulations Concerning the Origination Point of Programs of Standard and FM Broadcast Stations*, 1 R.R. 91:465, 91:466 (1950) ("There are many communities, however, some of considerable size, which still do not have adequate radio outlets for local self expression. Thus, in recent years transmission service has become an increasingly significant factor in the application of § 307(b); and a considerable number of the Commission's decisions with respect to competing applications have turned upon the question of which proposal would provide the more needed transmission service."); *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 F.C.C.2d 190, 193 (1965) (setting forth policy to discourage AM broadcasters from specifying suburbs as communities of license while intending merely to serve a large nearby urban area, while recognizing that "many developing and deserving suburban communities should be afforded an opportunity to obtain a first local transmission service."); *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982) (making provision of first local transmission service second-highest allotment priority [co-equal with provision of second aural service]).

¹⁶ *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362, 75 S.Ct. 855, 858, 99 L.Ed. 1147 (1955).

¹⁷ *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7096-97 (1990) ("Community of License MO&O").

“complies with the Commission’s requirements regarding STA operation,”¹⁸ and that operations from this site would be prohibitively expensive. Pacific submits no documentation in support of either claim. Pacific had previously stated, without elaboration, that all other options would be too expensive, and in its second STA request concluded that it “has been unable to find any alternative site/tower that can provide even close to duplicate coverage, short of purchasing/leasing land and building the facility from scratch.”¹⁹

9. Because Pacific fails to provide material details of its efforts to find a new site, it has made it impossible for the Commission to evaluate its request meaningfully.²⁰ Moreover, Pacific errs in assuming, apparently, that the only acceptable solutions, for STA purposes, would be to provide “duplicate coverage” or, barring that, to operate from its Taft site, which also would fail to provide “duplicate coverage.” Typically, when stations have been forced off the air involuntarily, they must operate with temporary facilities that provide limited coverage. In these circumstances, a broadcaster’s obligation is to re-initiate some service promptly to its community of license. Authorized service must be initiated within twelve months to avoid the automatic statutory expiration of its license.²¹

10. In responding to the loss of a licensed site, the critical task is not the construction of equivalent or maximum facilities. Thus, the issue is not, as Pacific assumes, whether the reconstruction of its former facilities is feasible or prudent.²² In contrast to the restrictive conditions Pacific has imposed in evaluating its alternatives, the Bureau has traditionally allowed licensees great flexibility in operating from temporary facilities.²³ Pacific has not demonstrated that it considered all possible solutions to its temporary siting problem. For example, Pacific has not shown that it considered installing an antenna atop a tall building or other unregistered structure, e.g., a water tower or a cellular telephone tower, which would enable it to provide principal community service to Refugio. Similarly, Pacific has not indicated that it considered solutions such as a directional antenna, an approach that would provide additional flexibility in locating a feasible site nearer the edge of its coverage area. The Commission would also be receptive to an STA proposal to relocate KTKY(FM) to the “only possible tower” in Refugio, even though, in Pacific’s view, this would result in the loss of service to 30,000 listeners. This would be preferable to the current loss of service to over 70,000 KTKY(FM) listeners because the station is silent.

¹⁸ Supplement to Application for Review at 3. Pacific asserts that we require STA operations to originate from “a tower not specifically built for operation under the STA, and from which operation would not result in contours extended beyond those authorized in the Station’s license.” *Id.* However, the Bureau’s processing standards do not preclude *any* new construction for STA purposes; rather, they only prohibit the issuance of STA for facilities that the licensee intends to use on a permanent basis.

¹⁹ March STA Request at 3.

²⁰ See *State of Oregon*, 16 FCC Rcd 4344, 4345 (2001).

²¹ 47 U.S.C. § 312(g). See also 47 C.F.R. § 73.1740(c). It should be noted that on March 8, 2002, the Bureau granted Pacific STA to operate from the Taft facilities for 24 hours, in order to avoid automatic expiration of the KTKY(FM) license pursuant to Section 312(g). It did so to preserve the status quo of the license, in order to facilitate the Commission’s full consideration of Pacific’s Application for Review.

²² February STA Request at third unnumbered page (alleging expense, impracticality of construction, and uncertainty of timely FAA approval of re-erected KTKY(FM) tower).

²³ See, e.g., *Letter To Brad C. Deutsch, Esq.* (MB Apr. 19, 2002) (approving STA operation with “a single-bay emergency antenna on a short tower near the studio building”); *Letter to Kenneth C. Howard, Jr., Esq.* (MMB Nov. 29, 2000) (STA operation from a temporary location on a rooftop); *Letter to Dennis P. Corbett, Esq.* (MMB June 17, 1999) (temporary operation with emergency antenna mounted on a telephone pole).

11. We also conclude that Pacific's proposed STA operation from Taft would not provide acceptable service to KTKY(FM)'s current community of license. Operation from the Taft site would not provide principal community coverage (70 dBμ) to any part of Refugio. At best, transmitting from the Taft site would provide only a 60 dBμ signal to the majority of KTKY(FM)'s current listeners. Thus, not only would Refugio be deprived of a local transmission service, but its reception service would be significantly degraded. The community of Refugio "has a legitimate expectation that existing service will continue,"²⁴ and this expectation is not met by Pacific's proposed STA operation from Taft.

12. Pacific contends further that the delay in replacement service to Refugio is due in large part to the Commission's postponement of Broadcast Auction No. 37, originally scheduled for February 21, 2001,²⁵ in which one of the Refugio allocations is to be auctioned and for which Pacific has promised to bid. The auction has been postponed indefinitely,²⁶ largely due to uncertainty created by the decision of the United States Court of Appeals for the D.C. Circuit in *National Public Radio v. F.C.C.*²⁷

13. We agree that the Commission's decision to postpone Auction No. 37 has delayed the award of a new construction permit at Refugio. However, it is incorrect to imply, as Pacific has, that absent such delay it would have been able to move to its Taft facilities before STA was needed. Had Auction No. 37 commenced as scheduled in late February 2001, and assuming a reasonably speedy auction, the earliest the Bureau could have issued a new construction permit for Refugio would have been approximately May 2001. Such a permit would initially specify a May 2004, construction deadline.²⁸ This estimate assumes no technical or legal challenges or problems, matters not fully within Pacific's control. Moreover, we cannot assume – as Pacific speculatively claims – that Pacific would prevail at the auction and immediately construct the replacement Refugio facilities. In fact, Pacific recognized the delays inherent in the licensing process when it opposed the very condition at issue here, based on the possibility of delays in the competitive bidding process. Pacific's lease for the KTKY(FM) transmitter site expired March 15, 2001, less than a month after Auction No. 37 was to have commenced, and more than three years before Pacific could reasonably rely on the initiation of service from a replacement Refugio station had the auction been held. Accordingly, we are not persuaded that the postponement of Auction No. 37 has materially affected Pacific's ability to avoid the need for replacement Refugio facilities occasioned by the loss of its original Refugio site. The postponement therefore offers no justification for Pacific's STA request to operate from Taft.

14. We conclude that Pacific's summary rejection of temporary Refugio facility siting options does not justify a departure from the requirements of Section 307(b) of the Communications Act and our precedent construing that provision. We further conclude that the current staff practice of relying on vacant so-called "backfill" allotments to preserve local service as a basis for permitting community of

²⁴ *Community of License MO&O* at 7097.

²⁵ *Public Notice*, "FM Broadcast Auction Scheduled for February 21, 2001," 15 FCC Rcd 18081 (WTB/MMB 2000).

²⁶ *Public Notice*, "Auction Notice and Filing Requirements for FM Broadcast Construction Permits – Auction Rescheduled from February 21, 2001 to May 9, 2001," 16 FCC Rcd 928 (WTB/MMB 2001); *Public Notice*, "Auction for FM Broadcast Construction Permits Postponed Until December 5, 2001," 16 FCC Rcd 5850 (WTB/MMB 2001); *Public Notice*, "FM Auction No. 37 Postponed," 16 FCC Rcd 16479 (WTB/MMB 2001).

²⁷ 254 F.3d 226 (D.C. Cir. 2001).

²⁸ 47 C.F.R. § 73.3598.

license changes by existing stations is not tenable.²⁹ Backfill allotments permit the filing of inherently contingent proposals, and create the potential for the type of problems and resource burdens that led to the codification of the Commission's general prohibition on filing contingent applications.³⁰ We believe there are insufficient benefits in the current backfill process to justify a departure from this policy determination. Moreover, as this case illustrates, the ultimate licensing of a backfill through our auction procedures is both an uncertain and time-consuming process, especially during the current hiatus in broadcast auctions. We are also extremely concerned that the backfill process could lead to intractable spectrum entanglements. For example, our policies do not require construction permit applicants to protect Pacific's formerly licensed facilities that were modified in the *Refugio R&O*.³¹ Thus, permits can be issued today conditioned on the construction and initiation of operations of two distinct facilities, including one for which the permittee will be selected at some unknown future time. Almost inevitably, this will result in more disputes of the kind at issue in this proceeding.

15. Accordingly, we direct the Bureau immediately to cease this practice. Henceforth, a community of license modification proponent may not rely on a new "backfill" FM allotment to "preserve" a community's sole local transmission service. A rule making petitioner seeking a change in community of license may do so only if there is another operating station licensed to the community being vacated, or if the proposed backfill involves a currently licensed and operating station that can be reallocated to the community being vacated, and the backfill reallocation itself complies with local service floor requirements.

16. **Conclusion.** IT IS ORDERED that Pacific's Application for Review IS DENIED. Pacific IS DIRECTED to submit to the Bureau, beginning thirty (30) days from the release date of this Order and every sixty (60) days thereafter, a status report on its efforts to identify a site at which it can resume temporary operations, and promptly to file a request for STA.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁹ A "backfill" allotment is one specifically made to replace a station that is being re-allotted to a new community of license. See, e.g., *Cheboygan, Rogers City, Bear Lake, Bellaire, Rapid River, Manistique, Ludington, Walhalla and Onaway, Michigan*, 17 FCC Rcd 20491 (MB 2002).

³⁰ See 47 C.F.R. § 73.3517.

³¹ *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes, Memorandum Opinion and Order*, 14 FCC Rcd 17525, 17540 n.55 (1999) (licensee has at best an "implied STA" to operate formerly licensed facilities following final order in rule making proceeding modifying facilities).