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March 27, 2009

Christopher D. Imlay, Esq.
Booth, Freret, Imlay & Tepper, P.C.
14356 Cape May Road
Silver Spring, Maryland 20904

Re: KBRN(AM), Boerne, Texas
Claro Communications, LTD
Facility ID Number: 51961
File No. BL-20080729AHP

Dear Counsel:

This letter is in reference to: the above captioned FCC 302-AM, Application for AM Broadcast Station License (the "Application"), to cover construction permit BP-20041220AAR filed by Claro Communications, LTD ("Claro"), licensee of Class D AM broadcast station KBRN(AM), Boerne, Texas, filed July 29, 2008; our November 17, 2008, letter denying Program Test Authority ("PTA") and requesting a curative amendment to the Application within 60 days; Claro's December 1, 2008, request for Special Temporary Authority (the "STA") to operate KBRN(AM) pursuant to Section 73.1615 of the Rules¹ during modification of the KBRN(AM) facilities which was granted on February 12, 2009; and Claro's January 14, 2009, amendment to the Application. For the reasons set forth below, we dismiss the Application as patently defective, declare the KBRN(AM) construction permit expired, and cancel the STA allowing Claro to operate the modified KBRN(AM) facilities pursuant to Section 73.1615 of the Rules.²

Background. On November 14, 2005, Claro was granted a construction permit, File No. BP-20041220AAR (the "Permit"), which authorized changes to the licensed KBRN(AM) operating power, operating hours and antenna system. The Permit specified a construction deadline of November 14, 2008, for the authorized KBRN(AM) facilities. Special Operating Condition 1 of the Permit requires Claro to submit a complete nondirectional and daytime directional proof of performance before program tests for the modified KBRN(AM) facilities are authorized. On July 29, 2008, Claro filed the Application, and indicated therein that KBRN(AM) was operating pursuant to automatic PTA in accordance with Section 73.1620 of the Rules.³ On November 17, 2008, Commission staff sent Claro a letter stating that KBRN(AM) is not eligible for automatic PTA, and denying PTA for the modified KBRN(AM) facilities due to Claro's failure to submit the proofs of performance and other data required by Special Operating Condition 1 of the Permit.⁴ In addition, the Letter gave Claro 60 days in which to file an amendment to the Application

¹ 47 C.F.R. § 73.1615.

² *Id.*

³ 47 C.F.R. § 73.1620.

⁴ *Letter to Gerald Benavides* (the "Letter"), Reference 1800B2-JBS (Nov. 17, 2008).

containing all data required by the Permit, and directed Claro to submit an STA request to permit operation of the modified KBRN(AM) facilities. On December 1, 2008, Claro filed a request for an STA, File No. BSTA-20081201ABD, seeking authorization to operate the modified KBRN(AM) facilities pursuant to Section 73.1615 of the Rules to allow Claro time to obtain and file the required data missing from the Application. The STA, which permits Claro to operate the modified KBRN(AM) facilities in the following modes to take the required directional and nondirectional proof of performance measurements during specified time periods, was granted February 12, 2009:⁵

1) During daytime hours, with a nondirectional antenna and reduced power not to exceed 0.475 kilowatt, for nondirectional proof of performance measurements and as necessary to facilitate the construction work. Operating power must be reduced to 0.25 kilowatt or less during any significant period of time when proof of performance measurements are not being taken.

2) During daytime hours, with the substantially adjusted daytime directional pattern and power authorized by the permit, for final adjustment and proof of performance measurements. Operating power shall be reduced to 0.25 kilowatt or less during any significant period of time when field strength measurements are not being taken.

The STA prohibited nighttime operation of the modified KBRN(AM) facilities.

Despite grant of the STA to enable Claro to obtain and file the required Application data, it failed to submit the missing data.

Discussion. Pursuant to Section 73.151 of the Rules,⁶ the proofs of performance required by Special Operating Condition 1 of the Permit must be submitted with the FCC 302-AM, Application for License, covering the Permit. Although Claro affirmatively certified in the Application that it met all the terms, conditions, and obligations set forth in the Permit,⁷ it did not submit the required proofs of performance nor the other data required to be filed with the Application by Section 73.151 of the Rules,⁸ despite being informed of its failure to submit the required data and given ample opportunity to correct the reported Application defects. Claro's repeated failure to submit the required proofs of performance, which contain the data required for the staff to evaluate the operation of the authorized KBRN(AM) daytime directional antenna system, renders the application patently defective and unprocessable.

Section 73.3566(a) of the Rules directs the staff to dismiss nonconforming applications.⁹ Consistent with this directive, the staff routinely dismisses defective applications,¹⁰ and the Commission has

⁵ *Letter to Christopher D. Imlay, Esq.*, Reference 1800B3-CNM (February 12, 2009).

⁶ 47 C.F.R. § 73.151.

⁷ *Id.*

⁸ In the Application Claro states that "a complete proof was performed on both daytime directional and nighttime non-directional."

⁹ *See* 47 C.F.R. § 73.3566(a).

¹⁰ *See, e.g., KZTY(AM), Winchester, Nevada*, Letter (M.M. Bur. Dec. 21, 2000); *WWRU(AM), Jersey City, New Jersey*, Letter (M.M. Bur. Feb. 15, 2000); and *KAPM(AM), Bakersfield, California*, Letter (M.M. Bur. Oct. 29, 1999). Each of these cases involved a staff dismissal of a defective AM license application without an opportunity to amend. *See also Wauchula Educational Broadcasting Corp.*, Letter, DA 09-237, 24 FCC Rcd ____ (MB Feb. 13, 2009) (affirming dismissal of license application where low power FM applicant failed to file required proof of performance with the application).

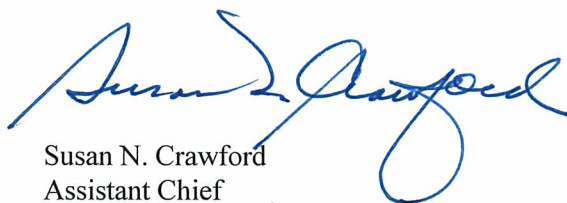
affirmed this practice.¹¹ This rule makes clear that an applicant may not – as attempted by Claro in this case – “file a grossly defective and incomplete application as a mere placeholder and shift to the staff the full burden of ensuring the technical integrity and safety of allegedly constructed facilities.”¹²

Claro filed a seriously deficient application, omitting critical data necessary for evaluating the operation of the KBRN(AM) directional antenna system, and did not supply the missing data when given a further opportunity to do so. The filing of such a patently defective license application does not constitute the timely completion of station construction in accordance with the conditions set forth in the construction permit. To permit such filings would undermine the Commission’s strict construction permit requirements. Accordingly, we find that the KBRN(AM) construction permit, BP-20041220AAR, has automatically expired.

Due to the expiration of the Permit authorizing the modified KBRN(AM) facilities resulting from the applicant’s continued failure to submit all required Application data, it is necessary to cancel the STA permitting operation of the modified KBRN(AM) facilities to take the directional and nondirectional proof of performance measurements during specified time periods. Therefore, Claro is authorized to operate only the licensed (File No. BML-19971125KB) KBRN(AM) facilities.

Conclusions/Actions. For the reasons set forth above, IT IS ORDERED that Claro’s Application for License, BL-20080729AHP, IS DISMISSED as patently defective pursuant to Section 73.3566(a) of the Rules.¹³ Construction Permit BP-20041220AAR for Station KBRN(AM), Boerne, Texas, EXPIRED BY OPERATION OF LAW on November 14, 2008, without further action by the Commission. Special Temporary Authorization BSTA-20081201ABD IS CANCELLED pursuant to Section 73.1635(b) of the Rules.¹⁴ These actions have no effect on the currently licensed KBRN(AM) facilities.

Sincerely,



Susan N. Crawford
Assistant Chief
Audio Division
Media Bureau

cc: Claro Communications, LTD
Gary L. Graham

¹¹ See, e.g., *Bobby Duffy*, Memorandum Opinion and Order, 7 FCC Rcd 1734 (1992) (“the initial finding of acceptability is a provisional determination. When the Bureau later determined that Duffy’s application was not in compliance with Section 73.211 of the Commission’s Rules and was not supported by a grantable waiver request, the application could properly be dismissed.”) See also *Dasan Communications Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 7550, 7551 (1992) n.3; and *Special Markets Media, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 5753, 5754 (1989) (Commission affirms dismissal of application, rejects applicant’s claim that it should have been given a chance to amend).

¹² *Aerco Broadcasting Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 24417, 24419-20 (2003).

¹³ 47 C.F.R. § 73.3566(a).

¹⁴ 47 C.F.R § 73.1635(b).