

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 85-205

In re Applications of

BURWOOD                               File No. BPCT-841127KF  
BROADCASTING  
OF MEMPHIS, LTD.

EAM BROADCASTING               File No. BPCT-850108KZ  
CO. OF MEMPHIS

For a Construction Permit for a New  
Television Station on Channel 50  
Memphis, Tennessee

#### MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1989;      Released: January 27, 1989

By the Review Board: MARINO (Chairman),  
BLUMENTHAL, and ESBENSEN.

1. The Review Board has under consideration a Joint Petition filed August 30, 1988 by Burwood Broadcasting of Memphis, Ltd. and EAM Broadcasting Co. of Memphis requesting that their respective applications for authority to construct and operate a new commercial television station at Memphis, Tennessee on Channel 50 be returned to active status.<sup>1</sup> By earlier *Order*, 2 FCC Rcd 7018 (Rev. Bd. 1987), we had dismissed both applications and granted the mutually exclusive application of Kyles Broadcasting, Ltd., pursuant to a settlement agreement between all of the parties. Petitioners now argue that, under the terms of the Board-approved settlement agreement, the dismissal of their applications was to be effective only upon payment from Kyles to petitioners on or before the 60th day after the Board's *Order* became "final" or no longer subject to administrative or judicial review or reconsideration." Petitioners assert that, to date, Kyles has not made full payment to petitioners, and they contend that reinstatement of their applications, accompanied by rescission of Kyles' Construction Permit, is consistent with controlling precedent, citing *Banks Broadcasting Co., Inc.*, 60 RR 2d 1450 (1986). After receiving two extensions of time to respond to a Petition for Reinstatement (*see note 1*), Kyles filed an opposition to the instant Joint Petition on November 25, 1988; petitioners filed a Reply on December 7, 1988.

2. We will dismiss the Joint Petition for want of jurisdiction. The Board's authority to hear and decide cases is confined by Sections 0.361-0.365 of the Commission's Rules, 47 CFR §0.361-0.365. Those rules empower the Board to act on exceptions to initial and summary decisions and appeals from other rulings of Administrative Law Judges pursuant to Sections 1.301 and 1.302 of the Rules, 47 CFR §1.301 and 1.302. Thereafter, the Board's jurisdiction ceases, subject only to the parties' rights to seek reconsideration within 30 days. *See* Section 405 of

the Communications Act of 1934, as amended, 47 U.S.C. §405; *see also Leflore - Dixie Employee Venture*, FCC 83R-90, released November 8, 1983 (untimely petition to terminate interim operation and authorize new interim licensee dismissed for lack of jurisdiction).<sup>2</sup> Here, our *Order* approving the settlement and terminating the proceeding was released November 23, 1987. No petition for reconsideration was timely sought, nor did we act on our own motion to set aside the *Order* (*see note 2*). Insofar as petitioners argue that, by approving the settlement agreement, the Board implicitly retained jurisdiction over the proceeding and postponed dismissal of the applications until a later date, this is plainly erroneous. The Board's dual actions of dismissing Joint Petitioners' applications and granting Kyle's were unconditional; and petitioners cannot, by virtue of a captive provision in their own agreement, enlarge the Board's jurisdictional reach.

3. Further, reliance on *Banks Broadcasting Co., Inc.*, for authority for reinstatement of the applications is misplaced. In *Banks*, a comparative renewal case involving two licensees and two competing applicants, the Commission, pursuant to a settlement agreement, granted the implicated renewal applications *expressly* subject to assignment of the licenses, and it *explicitly* conditioned dismissal of the two competing applications upon the conclusion of the assignment applications. Unlike here, Commission jurisdiction over the applications involved in the *Banks* settlement was purposely retained, pending formal action on the assignment applications.

4. Finally, even if the Board had jurisdiction to decide the merits of the Joint Petition, it would encounter the well-established Commission policy that "[a]ny breach of [a settlement] Agreement's provision for payment [is] a matter for the parties to resolve in the local courts." *Priscilla L. Schwier*, FCC 88I-094, released September 22, 1988, n.2; *see also McAlister Television Enterprises, Inc.*, 60 RR 2d 1379, 1383-1384 (1986) (Commission does not assume jurisdiction in contractual controversies involving broadcast licensees, recognizing that such matters are generally private in nature and appropriately left to local courts for resolution).

5. ACCORDINGLY, IT IS ORDERED, That the petition for reinstatement of construction permit applications filed August 30, 1988 by Burwood Broadcasting of Memphis, Ltd and EAM Broadcasting Co. of Memphis IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal  
Member, Review Board

#### FOOTNOTES

<sup>1</sup> Based on repeated representations by counsel, up through and including January 1, 1989, that payment to petitioners was anticipated, thereby mooted the Joint Petition, the Board has stayed its hand. *See* Kyles Broadcasting, Ltd.'s motions for extension of time filed September 22 and October 28, 1988, respectively, and its opposition filed November 25, 1988.

<sup>2</sup> Section 405 bars the agency from acting on petitions for reconsideration filed beyond the statutory 30-day period. *See Reuters Ltd. v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986); *see also National Black Media Coalition v. FCC*, 760 F.2d 1297, 1298 (D.C. Cir. 1985)(construing 47 U.S.C. §402 governing appellate jurisdiction: "The [30 days] time limitation is jurisdictional).