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In re: KAHA(FM), Olney, TX
Facility ID No. 164193
South Texas FM Investments, LLC
File No. BLH-20100407ACP

KXME(FM), Wellington, TX
Facility ID No. 164197
South Texas FM Investments, LLC
File No. BLH-20100407ACO

Petitions for Reconsideration

Dear Counsel:

We have before us two separate Petitions for Reconsideration ("Petitions"), filed by you ("Counsel") on behalf of South Texas FM Investments, LLC ("STI"). The first Petition for Reconsideration ("KAHA Petition") seek reconsideration of a February 24, 2011 staff letter in which the Media Bureau ("Bureau") dismissed STI's Application for License ("KAHA License Application") to cover Construction Permit BNPH-20050103AFZ, as modified by BMPH-20100330AEW ("KAHA CP"). The other Petition for Reconsideration ("KXME Petition") seek reconsideration also of a February 24, 2011 staff letter in which the Bureau dismissed STI's Applications for License ("KXME License Application") to cover Construction Permit BNPH-20050103ABG, as modified by BMPH-20100330AEV ("KXME CP"). Both License Applications were submitted by STI, the permittee of the new Stations KAHA, channel 282A at Olney, Texas and KXME, channel 253A at Wellington, Texas. For the reasons set forth below, we dismiss STI's Petitions.¹

Background. *KAHA(FM), Olney, TX.* Pursuant to the KAHA CP's terms, STI was required to finish construction of the station and file a license application to cover the KAHA CP by April 7, 2010. STI filed the KAHA License Application on April 7, 2010.

¹ STI also filed Petitions for Reconsideration to reinstate the construction permits. In seeking reinstatement of the construction permits, STI simply referenced its Petitions regarding the dismissal of the License Applications. Our decision to affirm staff's dismissal of the License Applications means STI's construction permits automatically expire by operation of law.

On June 21, 2010, Commission staff returned the KAHA License Application as unacceptable for filing pursuant to Section 73.3564(a)(1) of the Commission's rules.² Staff deemed the filing unacceptable because STI failed to submit the required directional antenna proof of performance, antenna installation certifications, and radiofrequency radio ("RFR") measurements required by the Special Operating Conditions on the KAHA CP and failed to construct a main studio prior to filing the license application. Staff also denied STI's associated request for waiver of the main studio rule and request for program test authority.

On July 26, 2010, STI submitted a Petition for Reconsideration of the staff's dismissal of the KAHA License Application, a request for reinstatement of the KAHA License Application *nunc pro tunc*, and an amendment to the KAHA License Application purportedly containing the items required by the Special Operating Conditions on the CP. Commission staff promptly reviewed the petition and the amendment to the KAHA License Application. Staff was unable to act on the KAHA License Application because the amendment submitted by STI did not contain all of the items required by the KAHA CP. Accordingly, staff contacted Counsel by telephone and requested an additional amendment, containing the required RFR measurements and a detailed description of the access restrictions in place at the KAHA transmitter site.

On August 18, 2010, STI submitted a second amendment to the KAHA License Application. Commission staff promptly reviewed the amendment and found the data submitted still was not sufficient to assess compliance with all of the Special Operating Conditions on the KAHA CP and the Commission's Rules. Once again, staff contacted Counsel by telephone shortly after receipt of the application amendment and requested another amendment to the KAHA License Application containing the following items:

1. RFR measurements taken with the station operating at full power, *i.e.* 1.00 kilowatt effective radiated power; and
2. Photographs showing the locations of the authorized tower and the fence surrounding it that is required to prevent casual or inadvertent public access to areas in the vicinity of the KAHA transmitting facilities where RFR levels are predicted to exceed general population/uncontrolled maximum permissible exposure limits.

Thereafter, on November 9, 2010, staff wrote Counsel a letter again asking for the RFR measurements and photographs, with a deadline of November 30, 2010 to amend the application. On November 12, 2010 and November 30, 2010, STI filed two more amendments providing additional technical data, including RFR measurements taken at full authorized power. Staff's review of those amendments showed STI did not submit the required photographs showing the location of the KAHA transmitting facilities and the surrounding fence in either of the application amendments. Staff's review also showed that the field strength meter used to take the reported RFR measurements was not of sufficient verifiable accuracy.

Subsequently, in early January, staff contacted Counsel by telephone to again request transmitter site photographs and full-power RFR measurements taken using an accurate and verifiable RFR field strength meter. Staff specified a January 30, 2011 deadline for providing the requested information. On February 3, 2011, Counsel requested an extension of time, for "no later than during the last week of February," to amend the KAHA License Application to provide the required transmitter site photographs and RFR measurements. Staff did not act on that extension request.

² See 47 C.F.R §73.3564(a)(1) ("Applications that are not substantially complete will not be considered and will be returned to the applicant.").

As of February 24, 2011, STI had not submitted an acceptable amendment to the KAHA License Application containing the required information, despite staff's repeated requests and STI's repeated promises to do so. Consequently, pursuant to Sections 0.283 and 73.3568(a)(1) of the Commission's Rules, the Bureau dismissed the KAHA License Application for failure to prosecute.³ As a result, the KAHA CP expired by operation of law on April 7, 2010, and the call sign for Station KAHA was deleted.

On March 17, 2011, STI filed the KAHA Petition and on March 18, 2011, STI filed another amendment with additional measurements and photos, purporting to provide the information initially requested by staff. STI seeks reinstatement and grant of the KAHA License Application.

KXME(FM), Wellington, TX. Pursuant to the KXME CP's terms, STI was required to finish construction of the station and file a license application by April 7, 2010. STI filed the KXME License Application on April 7, 2010.

On May 14, 2010, Commission staff returned the KXME License Application as unacceptable for filing pursuant to Section 73.3564(a)(1) of the Commission's rules.⁴ Staff deemed the filing unacceptable because STI failed to submit the required directional antenna proof of performance, antenna installation certifications, and RFR measurements required by the Special Operating Conditions on the KXME CP and failed to construct a main studio prior to filing the license application. The staff also denied STI's associated request for waiver of the main studio rule and request for program test authority.

On June 17, 2010, STI submitted a Petition for Reconsideration of the staff's dismissal of the KXME License Application, a request for reinstatement of the KXME License Application *nunc pro tunc*, and an amendment to the KXME License Application purportedly containing the items required by the Special Operating Conditions on the CP. Commission staff promptly reviewed the petition and the amendment to the KXME License Application. On July 21, 2010, staff granted the petition and reinstated the KXME License Application. However, staff was unable to act on the KXME License Application because the amendment submitted by STI did not contain all of the items required by the KXME CP. Accordingly, the staff contacted Counsel by telephone and requested an additional amendment to the KXME License Application containing the required RFR measurements and a detailed description of the access restrictions in place at the KXME transmitter site.

On July 26, 2010, STI submitted a second amendment to the KXME License Application. Commission staff promptly reviewed the amendment and found the data submitted still was not sufficient to assess compliance with all of the Special Operating Conditions on the KXME CP and the Commission's Rules. On November 9, 2010, staff issued a letter providing KXME another opportunity to submit the following items:

1. RFR measurements taken with the station operating at full power, *i.e.* 1.00 kilowatt effective radiated power; and
2. Photographs showing the locations of the authorized tower and the fence surrounding it that is required to prevent casual or inadvertent public access to areas in the vicinity of the KXME transmitting facilities where RFR levels are predicted to exceed general population/uncontrolled maximum permissible exposure limits.

³ See 47 C.F.R. §0.283 (conferring delegated authority to Media Bureau to process applications) and 47 C.F.R. §73.3568(a)(1) (failure to prosecute an application is cause for dismissal).

⁴ See 47 C.F.R. §73.3564(a)(1).

On November 12, 2010 and November 30, 2010, STI filed two more amendments providing additional technical data, including RFR measurements taken at full authorized power. Staff's review of those amendments showed STI did not submit the required photographs showing the location of the KXME transmitting facilities and the surrounding fence in either of the application amendments. Staff's review also showed that the field strength meter used to take the reported RFR measurements was not of sufficient verifiable accuracy.

Subsequently, in early January, staff contacted Counsel by telephone to once again request transmitter site photographs and full-power RFR measurements taken using an accurate and verifiable RFR field strength meter. Staff specified a January 30, 2011 deadline for providing the requested information. On February 3, 2011, Counsel requested an extension of time, for "no later than during the last week of February," to amend the KXME License Application to provide the required transmitter site photographs and RFR measurements. Staff did not act on that extension request.

As of February 24, 2011, STI had not submitted an acceptable amendment to the KXME License Application containing the required information, despite staff's repeated requests and STI's repeated promises to do so. Consequently, pursuant to Sections 0.283 and 73.3568(a)(1) of the Commission's Rules, the Bureau dismissed the KXME License Application for failure to prosecute.⁵ As a result, the KXME CP expired by operation of law on April 7, 2010, and the call sign for Station KXME was deleted.

On March 17, 2011, STI filed the KXME Petition and on March 18, 2011, STI filed another amendment with additional measurements and photos, purporting to provide the information initially requested by staff. STI seeks reinstatement and grant of the KXME License Application.

Discussion. In both Petitions, STI argues reconsideration is appropriate because staff may have been unaware of STI's request for additional time to submit the required information by the end of February 2011. Because STI did not receive a response to its extension request, it presumed the request had been granted, which would have allowed STI until the end of February to submit the requested measurements and photographs. STI claims now it was working to get the Commission the requested information by March 2011, when "unexpectedly, without warning" the Commission dismissed both license applications on February 24, 2011.

STI also seeks reconsideration because it was in contact with staff. STI claims the Commission incorrectly dismissed the KAHA and KXME License Applications for failure to prosecute because STI had been in regular contact with staff and had filed numerous amendments, evidencing responsiveness to staff's requests and its intent to prosecute both license applications.

The Commission will consider a Petition for Reconsideration only when the petitioner shows either a material error in the Commission's original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.⁶ As discussed below, STI has not met this test.

⁵ See 47 C.F.R. §0.283 and 47 C.F.R. §73.3568(a)(1).

⁶ See 47 C.F.R. § 1.106, *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), and *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003). It is also appropriate to consider new facts not previously presented when such consideration is required in the public interest. See 47 C.F.R. § 1.106(c)(2).

In both the KAHA and KXME Petitions, STI appears to be relying on its request for an extension of time as evidence of either new circumstances or error by the Commission. STI first presumed the extension had been granted and now presumes staff may not have been aware of the extension request. However, it was STI's error to rely on its own presumptions. Section 1.46 of the Commission's rules clearly states it is our policy that extensions of time may not be routinely granted.⁷ Because neither of the extensions was granted, STI was required to comply with the January 30, 2011 deadline.⁸

Moreover, STI argues since it had been in constant contact with the Commission, it was clear STI intended to prosecute the applications. This argument ignores the fact that staff provided STI numerous opportunities to provide the requested information over the course of almost one year. At some point, staff had to resolve the pending license applications and could not indefinitely wait for STI's compliance with the Special Operating Conditions on the KAHA and KXME CPs. Ultimately, to resolve the pending license applications, staff gave STI a final opportunity to file all the required information by January 30, 2011. STI provides no adequate explanation for its failure to comply with the numerous requests and opportunities to submit the requested information by the specified deadline.

STI has not presented any new facts or raised any material error in the Commission's dismissal of the KAHA and KXME License Applications. We cannot condone STI's failure to provide the appropriate information at the required time. Consequently, staff action was proper in dismissing the license applications. Accordingly, we will deny STI's KAHA and KXME Petitions for Reconsideration.

Finally, we reject STI's proffered amendment to its KAHA and KXME License Applications. As discussed above, the applications were dismissed because of STI's failure to provide information repeatedly requested by staff. Accordingly, STI cannot proffer, after the fact, the requested information and claim it is entitled to reinstatement *nunc pro tunc* of its applications.⁹ Therefore, we will not consider STI's latest amendments of March 18, 2011, which purportedly produced the requested information.

Conclusion. Accordingly, IT IS ORDERED the Petitions for Reconsideration filed by South Texas FM Investments, LLC on March 17, 2011, ARE DENIED. Construction Permit BMPH-20100330AEW for Station KAHA, Olney, Texas and Construction Permit BMPH-20100330AEV for Station KXME, Wellington, Texas EXPIRED BY OPERATION OF LAW on April 7, 2010, without further action by the Commission.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁷ See 47 C.F.R. § 1.46; *Royce International Broadcasting Co.*, 23 FCC Rcd 9010 (2008).

⁸ STI requested an extension until "no later than during the last week of February" to file the amendments to the KAHA and KXME License Applications. Thus, even if STI's presumption was correct, it still failed to comply with its own proposed filing deadline.

⁹ See *Canyon Area Residents*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154 (1999), quoting *Colorado Radio Corp. v. FCC*, 118 F. 2d 24, 26 (D.C. Cir. 1941). The Commission has stated before, "[w]e cannot allow a party to 'sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.'"