



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer To:
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In re: KAQR-LP, Albuquerque, NM
Facility ID No. 193768
Application File No. 0000094995

Informal Objection

Dear Counsel and Objector,

We have before us the referenced application (Application) filed by Albuquerque Hispanic Community Church (AHCC) for a license to cover a construction permit for station KAQR-LP (Station), Albuquerque, New Mexico.¹ Also before us is an Informal Objection (Objection) filed by REC Networks (REC), a letter of inquiry by the Audio Division (Division) of the Media Bureau (Bureau) to Dan J. Alpert, Esq., dated February 4, 2021 (the LOI), AHCC's response to the LOI filed on March 9, 2021 (Opposition), REC's response to the Opposition filed on March 19, 2021 (Reply), and REC's Supplemental Response to the Opposition filed on March 29, 2021 (REC Supplement).² For the reasons

¹ See Application File No. 0000094995 (filed Jan. 3, 2020) (Application). The Application was accepted for filing on January 3, 2020. See *Broadcast Applications*, Public Notice, Report No. PN-1-200107-01 (MB Jan. 7, 2020). The Station is authorized to broadcast on channel 260 (99.9 MHz).

² Motion for Extension of Time, REC Networks, Pleading File No. 0000095105 (filed Jan. 6, 2020); Informal Objection, REC Networks, Pleading File No. 0000097491 (filed Jan. 15, 2020); Letter from Nazifa Sawez, Assistant Division Chief, Audio Division, Media Bureau, to Dan J. Alpert, Esq., Application File No. 0000094995 (Feb. 4, 2021); Response to Letter of Inquiry, Albuquerque Hispanic Community Church, Application File No. 0000094995 (filed March 9, 2021); Response, REC Networks, Application File No. 0000094995 (filed March 19, 2021); Supplement to Response, REC Networks, Application File No. 0000094995 (filed March 29, 2021).

set forth below, we grant the Objection, find that AHCC's construction permit has expired by operation of law and is thereby forfeited, and dismiss the Application.³

Background. AHCC applied for and received a construction permit for a low power FM station on channel 260 at Albuquerque, New Mexico. The permit for the Station was issued on January 3, 2017, with an expiration date of January 3, 2020.⁴ On January 3, 2020, AHCC filed the Application at issue.⁵ The Application, signed by Palbo Fuentes as president of AHCC, certified that the facility was constructed in compliance with all special operating conditions, terms, and obligations described in the construction permit.⁶

In the Objection, REC argues that the Application should be dismissed, and the construction permit forfeited, because the Station was not constructed as described in the construction permit.⁷ Specifically, REC argues that there is no evidence of the authorized antenna or tower structure at the construction permit site and the only signal heard on the authorized frequency is station KMGG-LP, another LPFM station authorized in the Albuquerque area. REC attaches photographs of the authorized construction permit site in support of its assertions.⁸ REC also states that there is no evidence that the Station was even operating from an unauthorized location.⁹

In the LOI, the Division directed NCR to provide documentation demonstrating that the Station has been constructed in compliance with all special operating conditions, terms, and obligations as described in the underlying construction permit.¹⁰ The Division also requested documentation, such as equipment and program testing logs, to demonstrate that the Station is operational, as well as copies of all leases, personnel records (including payroll records appropriately redacted to protect the privacy of individual employees), invoices, bills, checks written or received, credit card charges, wire transfers or deposits of funds relating to the Station's operation.¹¹ Additionally, the Division asked AHCC to include pictures of the Station's studio facilities and transmission facilities, and to provide the Station's exact coordinates, effective radiated power and antenna height above ground level.¹²

In response to the LOI, AHCC provides statements from Ivan Kost (Kost), AHCC's engineer, and Saul Manriquez (Manriquez), a witness, claiming that on January 1, 2020, they and other personnel were

³ Upon expiration, broadcast permits forfeit automatically by operation of law. *See* 47 CFR § 73.3598(e) ("Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission."); *1998 Biennial Regulatory Review, Streamlining of Mass Media Applications – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23091 (1998).

⁴ *See* File No. BNPL-20131112ABR.

⁵ *See* Application.

⁶ *Id.*

⁷ Objection at 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *See* LOI.

¹¹ *Id.*

¹² *Id.*

at the authorized construction permit site (i.e., a church parking lot) with a mobile radio tower, antenna and other equipment, and that the station went on the air for the first time.¹³ AHCC also provides the declarations of four listeners claiming to have heard the Station's broadcast without interference on January 1, 2020.¹⁴ Additionally, AHCC submits photographs of an antenna, a tower structure, and an unidentified studio as proof that the Station's facilities were constructed and operational.¹⁵

In its Reply, REC takes issue with Kost's statement that "[t]he station was built and is operating as it was and is required to do."¹⁶ REC argues that the Station actually was operating 20 meters below what was authorized at the time of operation, and therefore it could be construed that AHCC engaged in unauthorized operation.¹⁷ REC further argues that AHCC used a temporary installation method for the Station, which did not involve an antenna mounted on a pole, tower or other structure that is attached to a durable, non-movable surface and connected to a permanent power source.¹⁸ REC questions whether a temporary installation even took place since, two days after the alleged construction, there was no sign of the Station's facilities.¹⁹ REC also disputes the authenticity of the listener declarations stating that one of the addresses provided (7402 San Pedro Dr. NE) is non-existent, and two of the addresses (7401 San Pedro Dr. NE) do not include the mobile home space numbers and therefore the exact listening location cannot be determined.²⁰ Additionally, REC states that station KMGG-LP, which is authorized to operate on the same channel in the Albuquerque area, is predicted to cause interference at all of the listener home locations.²¹ In light of these circumstances, REC argues that the Application should be dismissed, the construction permit forfeited and the call sign deleted.²² REC further asserts that due to AHCC's

¹³ See Opposition. AHCC states that its Opposition is incomplete and will be supplemented expeditiously. *Id.* However, AHCC has not supplemented its response, and the opportunity to do so has now passed.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Reply at 6. See also Supplement at 3 (stating that even if AHCC actually brought a tower truck to the authorized site and operated it, the evidence shows that on the day after the Application was filed (January 3, 2020), all evidence of a broadcast station was removed, like it never happened).

¹⁷ See Reply at 6. Additionally, REC states that using direction finding equipment, the transmission of KAQR-LP was tracked to American Tower Asset ID 4421, FCC Antenna Structure Registration Number (ASRN) 1056527 (ATC Site), which was an unauthorized site. See Supplement at 2-3, Appendix B (containing links to recordings made near the ATC Site to demonstrate that the "KAQR" transmissions were originating from an unauthorized location) and Appendix E (containing photographs of the alleged unauthorized location).

¹⁸ See Reply, citing 47 CFR § 73.3598(e).

¹⁹ *Id.* at 2. REC submits photographs taken on January 3, 2020, showing the absence of station KAQR-LP facilities at the authorized site. *Id.* at 9-10, Appendices A and B. Additional photographs were taken on March 17 and March 24, 2021, showing the absence of the KAQR-LP facilities at the authorize site or in the immediate vicinity. *Id.* at Appendix B; Supplement at Appendix D. REC also contends that the studio photograph submitted in support of AHCC's Opposition may be a photograph of a studio located in Miami, not Albuquerque. See Reply at 7-8 (displaying studio photograph and drawing attention to Miami skyline in background).

²⁰ *Id.* at 4-5.

²¹ *Id.* REC provides a map showing the overlapping contours of stations KAQR-LP and KMGG-LP. *Id.* at 5.

²² *Id.* at 13.

misrepresentation of facts and the attempt to withhold relevant information from REC and staff, appropriate sanctions should be taken against those involved.²³

Discussion. Section 309(d)(1) of the Communications Act of 1934, as amended (Act), authorizes any party in interest to file a petition to deny any application as long as the petition “contain[s] specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with [the public interest].”²⁴ Informal objections, like petitions to deny, also must allege properly supported facts that, if true, would establish a substantial and material question of fact that grant of the application would be inconsistent with the public interest.²⁵ After reviewing the record, we find that REC has met this burden.

Under section 319(b) of the Act, a construction permit “will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.”²⁶ Section 73.3598(e) of the Rules, which is promulgated pursuant to section 319(b), provides for automatic forfeiture of a permit if construction is not completed by the permit’s expiration date.²⁷ The pertinent application form, FCC Form 2100, Schedule 319, requires an applicant to certify that “the facility was constructed as authorized in the underlying construction permit” and is “in compliance with all special operating conditions, terms, and obligations described in the construction permit.”²⁸

In *Tango* and subsequent decisions, the Commission targeted the recurring abuse of the Commission’s processes by permittees who—when faced with the imminent expiration of a construction permit—have erected makeshift facilities for the sole purpose of applying for a license to cover and then immediately dismantled the facilities upon grant of the license, in some cases to be re-used again soon thereafter for the same purpose.²⁹ The Commission held that implicit in the filing of any facility

²³ *Id.* at 11-13. See also REC Supplement at 3 (arguing that AHCC failed to meet the requests of the LOI by not providing copies of leases, agreements, invoices, bills or anything related to the costs of constructing a broadcast station, and also failed to provide the Station’s exact coordinates, effective radiated power and antenna height above ground level).

²⁴ 47 U.S.C. § 309(d)(1).

²⁵ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197, n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must also contain adequate and specific factual allegations sufficient to warrant the relief requested).

²⁶ 47 U.S.C. § 319(b).

²⁷ See 47 CFR § 73.3598(e).

²⁸ License to Cover for Low Power FM Station Construction Permit Application, FCC Form 2100, Schedule 319, Technical Certifications Section 3, Constructed Facility and Special Operating Conditions Questions.

²⁹ *Tango Radio, LLC*, Memorandum Opinion and Order, 30 FCC Rcd 10564, 10568 (2015) (*Tango*) (stating that temporary facilities are not licensable, in situation where facilities were dismantled shortly after license application filed, no permission obtained from landowner, and evidence adduced of brief “side of the road” operation of a nonconforming antenna); *DTV America Corporation*, Order, 32 FCC Rcd at 9135 (adopting consent decree where facilities were dismantled immediately after license grant and moved to a series of new locations away from rural unserved and underserved areas with low population densities to more densely populated areas); *Dan J. Alpert, Esq.*, Letter, 30 FCC Rcd 4898 (MB 2015) (dismissing license application where facilities were dismantled after less than

application is that the applicant stands “ready, willing, and able” to construct *and* operate as proposed.³⁰ Therefore, a license applicant may not rely on temporarily constructed facilities to satisfy construction requirements; rather, the station facilities must “endure beyond the *de minimis* period necessary for it to file a license application.”³¹ Licensing a facility which is dismantled shortly after a license application is filed is fundamentally inconsistent with this licensing principle. It would be incongruous to conclude that the filing of a license application relieves a permittee – at the very moment it is “ready” to operate – of the parallel obligation of being “able” to operate.

It appears likely, based on the underlying record, that this case involves construction of temporary facilities that were removed shortly after the Application was filed.³² According to AHCC, the Station was constructed on January 1, 2020, at the authorized permit site, and went on the air the same day.³³ Although AHCC submits photographs of a tower supporting an antenna and a broadcast studio to show that the facilities were constructed,³⁴ we are not convinced that the Station was constructed as authorized in the underlying construction permit. The base of the tower appears to be resting on a portable utility trailer and not on a permanent structure, which Manriquez seems to confirm in his statement.³⁵ The property surrounding the equipment is not captured in any of the photographs, and thus, we are unable to ascertain whether these facilities were even temporarily constructed at the authorized permit site. The photograph purporting to show the Station’s studio is also problematic because there is nothing in the picture that identifies KAQR-LP and it is not apparent from the photograph where the studio is physically located.³⁶ Furthermore, AHCC has failed to provide any other documentation demonstrating that the Station has been constructed in compliance with all special operating conditions, terms, and obligations as described in the underlying construction permit. AHCC has also failed to submit, as requested in the LOI, equipment and program testing logs, copies of leases, personnel records, invoices, bills, checks written or received, credit card charges, wire transfers or deposits of funds to demonstrate that the Station is operational.³⁷ Given the lack of evidence demonstrating that the Station was constructed and ready for operation within the meaning of section 319(b) of the Act,³⁸ we find that the construction permit expired

a week, no permission was obtained from landowner, and antenna was not constructed in accordance with the terms of the construction permit) (*Alpert Letter*) .

³⁰ *Pathfinder Communication Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 (2003).

³¹ *Alpert Letter*, 30 FCC Rcd at 4901.

³² As discussed above, the Application was filed on January 3, 2020.

³³ Opposition at 11 (containing Kost’s statement that the Station went on the air at or near 10750 Sunset Gardens Rd SW, Albuquerque, NM 87121). We note that Kost’s statement was not made as a declaration under penalty of perjury and therefore is not reliable. *See, e.g., Rock’n’Roll Preservation Society*, Letter, 23 FCC Rcd 16630, 16638 (MB 2008), *aff’d, Six Applications*, 28 FCC Rcd at 13399-13401 (hearsay statements made in an unsworn declaration were unreliable without corroborating evidence).

³⁴ *See* Opposition at Attachment 1; *but see* REC Reply at 9-10, Appendices A and B (showing the absence of station KAQR-LP facilities at the authorized site on January 3, 2020).

³⁵ *See* Opposition at 2 (including Manriquez’s statement that Station personnel brought the “mobile tower, antenna, and other equipment to the church parking lot located at or near 10750 Sunset Gardens Rd SW, Albuquerque, NM 87121”).

³⁶ *See* Opposition at Attachment 1.

³⁷ *See* LOI.

³⁸ *See* 47 U.S.C. § 319(b). *See also Tango*, 30 FCC Rcd 10564, 10567, para. 6 (“broadcast permittees must, by the construction deadline specified in each construction permit: (1) build in accordance with all terms of the

by operation of law and is forfeited pursuant to section 73.3598(e) of the Rules.³⁹ Accordingly, we dismiss the Application.

Conclusion/Action. For the reasons stated above, IT IS ORDERED that the Informal Objection filed by REC Networks on January 15, 2020, IS GRANTED.

IT IS FURTHER ORDERED, pursuant to section 73.3598(e) of the Commission's rules, 47 CFR § 73.35898(e), that the construction permit (File No. BNPL-20131112ABR) issued on January 3, 2017, to station KAQR-LP, Albuquerque, New Mexico (Facility ID No. 193768) is found to have EXPIRED and been forfeited on January 3, 2020.

IT IS FURTHER ORDERED that the pending Application (Application File No. 0000094995) for station KAQR-LP, Albuquerque, New Mexico is DISMISSED, with the result that the permittee must immediately terminate any operations thereon and the associated call sign KAQR-LP will be deleted.

Sincerely,

Nazifa Sawez
Assistant Chief
Audio Division
Media Bureau

construction permit, and (2) file a license application demonstrating proper construction.”); *Aerco Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 24417, 24419-20 (2003) (*Aerco*) (explaining that “patent omissions in the technically critical proofs of performance” do not allow the staff to “determine whether the terms and conditions of the construction permit have been satisfied and whether the constructed facilities will operate in conformance with the Commission’s rules”).

³⁹ See 47 U.S.C. § 319(b); 47 CFR § 73.3598(e). By submitting and certifying the Application on behalf of the Station, Mr. Fuentes falsely represented that the facility was constructed as authorized and in compliance with all special operating conditions, terms, and obligations described in the construction permit. Mr. Fuentes also falsely certified that the contents of the Application were true, complete, and correct. We caution the Applicant to be attentive to application certifications in the future, because a false statement, even absent an intent to deceive, may constitute an actionable violation of section 1.17 of the Rules. See 47 CFR § 1.17. The Commission may disqualify an applicant or revoke the license of a licensee who deliberately makes misrepresentations or lacks candor in dealing with the agency. *Contemporary Media*, 214 F.3d 187, 196 (D.C. Cir. 2000).