

KOERNER & OLENDER, P.C.

Attorneys at Law
11913 Grey Hollow Court
North Bethesda, MD 20852-5706

Tel. (301) 468-3336
Fax (301) 468-3343

Robert L. Olender *
rolender.law@comcast.net

James A. Koerner
jkoerner.law@comcast.net
*not admitted in MD

April 28, 2008

FILED/ACCEPTED

APR 28 2008

Federal Communications Commission
Office of the Secretary

POSTED

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals, TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Big Island Broadcasting, Inc.
Facility ID No. 164100
Haiku, HI
File No. BLH-20080222ACF

RECEIVED

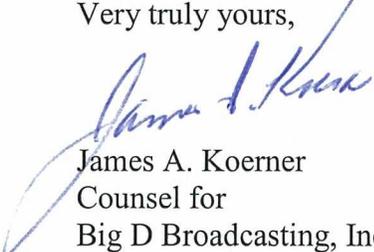
2008 APR 29 P 2:36

Dear Ms. Dortch:

On behalf of Big D Broadcasting, Inc., there are transmitted herewith an original and four (4) copies of a Reply to the Opposition of Big Island Broadcasting, Inc. to the Petition for Reconsideration previously filed by Big D Broadcasting, Inc.

Should additional information be necessary in connection with this matter, please communicate with this office.

Very truly yours,


James A. Koerner
Counsel for
Big D Broadcasting, Inc.

Cc: Will Kemp

ORIGINAL

**Before the
Federal Communications Commission
Washington, DC 20554**

FILED/ACCEPTED
APR 28 2008
Federal Communications Commission
Office of the Secretary

In re Application of)
BIG ISLAND BROADCASTING, INC.) File No. BLH-20080222ACF
Facility ID No. 164100)
Haiku, HI)
For License to Cover Construction)
Permit)

To: FCC Secretary
Attn: Chief, Audio Division, Media Bureau

REPLY TO OPPOSITION

Big D Consulting, Inc. (“Big D”), by its attorneys, hereby submits its Reply to the Opposition (“Opposition”) of Big Island Broadcasting, Inc. (“Big Island”) to Big D’s Petition for Reconsideration with respect to the above-captioned application.¹

Big Island takes issue with Big D’s claim of standing to file the Petition for Reconsideration, although it does not dispute that the grant of the KUHI license application caused Big Island to be “aggrieved”. In fact, being prevented from carrying out a business plan can confer standing on a party.²

Contrary to Big Island’s assertion, Big D never suggested or assumed that the expiration of the Big Island construction permit would delete the Haiku allotment. However, without the KUHI construction permit, Big D would only be required to protect the Haiku allotment, not an

¹ The signature block of the Opposition is dated April 15, 2008. However, the Certificate of Service is dated April 16, 2008. Since Section 1.47(b) of the Rules requires that documents be served *on or before* the day on which they are filed, Big D assumes the Opposition was filed on April 16, and the date for filing this Reply was calculated accordingly.

² See, e.g., *Letter from Peter H. Doyle, Chief, Audio Division to Marissa G. Repp, Esq.*, DA 08-588, March 18, 2008 (status of petitioner as a party accepted without question).

authorized transmitter site. Accordingly, the existence of the Haiku allotment had no bearing upon Big Island's upgrade plans.

Big Island's engineering consultant acknowledges that this frequency (106.5 MHz) may not react the same as the frequency (99.3 MHz) for which the antenna was designed and constructed.³ Despite the fact the actual pattern may be different from the measured pattern for which the antenna was designed, the Opposition contends that this is no big deal since the antenna could have been omnidirectional. However, in this case, it may be a big deal. As *authorized*, the KUHI signal reaches Oahu ever so slightly, thereby precluding Big D from pursuing its upgrade. As *constructed*, the signal may not quite reach Oahu, thereby allowing the planned upgrade to go forward. If the actual pattern is not precisely as authorized in the construction permit, an appropriate modification application should have been filed. Proper dispatch of the Commission's business dictates that stations be constructed as authorized, whether necessary or not.

With respect to the main studio issue raised by Big D, Big Island contends that it was never necessary to have a main studio for equipment tests. In this it is correct. The schedule provided by Byron McCann clearly demonstrates that all of the operation (if any occurred) was prior to the filing of the license application, and none occurred after the license was granted.⁴

Big Island acknowledges that Station KUHI did not conduct program tests, pointing out that they were not necessary since, following equipment tests, the station was "turned off", making program tests unnecessary. It remains "turned off".

When the Commission extended the period of construction for broadcast stations to three years, without providing for extensions of construction permits, one of its purposes was to

³ Opposition, Exhibit One, unnumbered third page of Bromo Communications, Inc. Statement.

⁴ Opposition, Exhibit Three.

eliminate the flood of extension applications.⁵ However, in the same document, the Commission reiterated its “fundamental interests in expediting new service to the public and preventing the warehousing of scarce spectrum....”⁶ At the time of filing the license application, Big Island admits the station was not ready to begin providing service to the public. It had no studio, had no idea where the studio might be located, and had not made plans for staffing a studio.⁷ Big Island “hopes” the process can be completed in six months—coincidentally the maximum length of time for which Special Temporary Authority can be granted—but leaving open the possibility that an extension of the STA may be requested.

Big Island has thus managed to tack on an additional six months, or more, to its construction permit.

With respect to the Special Temporary Authority, Big D submits that it may have been improvidently granted. The minimum operating schedule for broadcast stations is governed by Section 73.1740 of the Rules.⁸ Subsection (a)(4) provides that stations may limit or discontinue operations for certain periods “in the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section...”. Special Temporary Authority to limit broadcast operations is not to be used merely for convenience.

In its STA request, Big Island sought consent to be silent “until it completes the process of location and construction of its main studios and has completed its staffing of the station.” In the Opposition, this became a request to “remain silent until it could complete the *relocation* of its main studio and the staffing of its radio station business.”(emphasis supplied)

⁵ *Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056, 23088 (1999).

⁶ *Id.* at 23093.

⁷ See BLSTA-20080326AFP.

⁸ 47 C.F.R. § 73.1740.

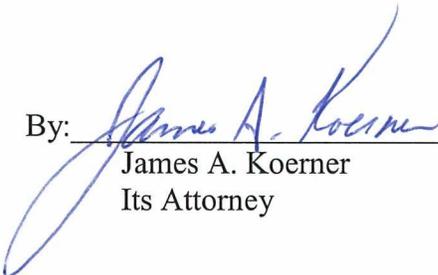
Before Big Island realized that its license application would be opposed, it admitted that it had no main studio, no specified location for a main studio, and no staff. It was seeking silent authority for six (or more) months to complete the construction that should have been completed before it filed its license application. Not a word has been said about the “causes beyond the control of [the] licensee” which necessitated a Special Temporary Authority to be silent. The causes in this instance were completely within the control of the applicant/permittee/licensee.

The only conclusion that can be drawn is that Big Island (1) failed to complete construction of Station KUHI as authorized by its construction permit, (2) may have misrepresented (by commission or omission) in filing its license application, and (3) sought and ultimately was granted Special Temporary Authority which it did not deserve.

Accordingly, Big D requests that the Chief, Audio Division, reconsider the grant of the above-captioned application for license, dismiss the license application, rescind the April 7, 2008 grant of the Special Temporary Authority to remain silent⁹, and declare the KUHI construction permit expired.

Respectfully submitted,

BIG D CONSULTING, INC.

By: 
James A. Koerner
Its Attorney

KOERNER & OLENDER, P.C.
11913 Grey Hollow Court
North Bethesda, MD 20852

Telephone: (301) 468-3336

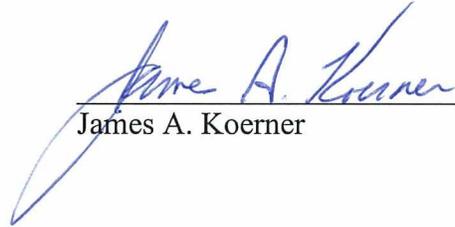
April 28, 2008

⁹ No prior notice or right to a hearing is required for cancellation of STA. 47 C.F.R. § 73.1635(b).

CERTIFICATE OF SERVICE

I, James A. Koerner, do hereby certify that a copy of the foregoing "Reply to Opposition" was served this 28th day of April, 2008 by first-class United States mail, postage prepaid, to the following:

Richard J. Hayes, Jr., Esq.
Post Office Box 200
Lincolntonville, ME 04849



James A. Koerner