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1850 M Street, NW
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Re: KWAI(AM), Honolulu, Hawaii
Radio Hawaii, Inc.
Facility ID Number 54613
File No. BL-20111229ACE
PTA Request 20111229ACF

Dear Counsel:

This letter is in reference to the FCC 302-AM, Application for AM Broadcast Station License (“Application”)¹ to cover construction permit² and the associated request for Program Test Authority (“PTA”),³ filed by Radio Hawaii, Inc. (“RHI”), licensee of Class B AM broadcast station KWAI, Honolulu, Hawaii (“Station”). For the reasons set forth below, we deny the PTA request, dismiss the Application as patently defective, and declare the Construction Permit expired.

Background. On November 14, 2008, the staff granted a Construction Permit authorizing changes to the Station’s licensed transmitter location and operating parameters.⁴ The Construction Permit authorized the Station to share use of a nondirectional antenna system with Stations KNDI(AM), KKEA(AM), and

¹ File No. BL-20111229ACE.

² BP-20080312ADC (“Construction Permit”).

³ 20111229ACF.

⁴ The Construction Permit authorizes Station KWAI(AM) to operate unlimited time on 1080 kilohertz using a nondirectional antenna and 5.0 kilowatts nominal power at a transmitter location described by geographic coordinates 21° 19' 27" North Latitude, 157° 52' 47" West Longitude (referenced to 1927 North American Datum). Station KWAI(AM) is currently licensed to operate unlimited time on 1080 kilohertz using a nondirectional antenna and 5.0 kilowatts nominal power at a transmitter location described by geographic coordinates 21° 17' 41" North Latitude, 157° 51' 49" West Longitude (referenced to 1927 North American Datum).

KREA(AM), Honolulu, Hawaii, and specified a facility construction deadline of November 14, 2011.⁵ Special Operating Condition 3 on the Construction Permit (“SOC 3”) requires RHI to submit data, spurious emission measurements and agreements signed by the four licensees sharing use of the antenna system concerning the installation and maintenance of the filters, traps and other equipment necessary for proper operation of the shared antenna system. Special Operating Condition 4 on the Construction Permit (“SOC 4”) requires RHI to submit a license application to cover the Construction Permit before the permit expires. Special Operating Condition 5 on the Construction Permit (“SOC 5”) requires RHI to submit radiofrequency radiation (“RFR”) measurements showing that the authorized Station KWAI(AM) transmitter site and facilities comply with all FCC RFR guidelines and maximum permissible exposure limits.⁶

Discussion. RHI did not file the Application by November 14, 2011, as required by SOC 4. Accordingly, pursuant to Section 73.3598(e) of the Commission’s Rules (“Rules”),⁷ the Construction Permit expired on that date. Additionally, when it did file the Application on December 29, 2011, RHI did not submit the spurious emissions measurements or all of the common antenna system use and maintenance agreements required by SOC 3, nor did it submit acceptable RFR measurements as required by SOC 5.⁸ RHI’s failure to timely submit all required data necessary for the staff to evaluate the operation of the authorized Station KWAI(AM) facilities 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 affirmed this practice.¹¹ This rule makes clear that an applicant may not – as attempted by RHI 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

⁵ RHI reports in both the Application and the application underlying the Construction Permit that Station KWAI(AM) has been operating at the transmitter site and the facilities specified on the Construction Permit for many years, so no actual construction pursuant to the Construction Permit was necessary.

⁶ 47 C.F.R. § 1.1310.

⁷ 47 C.F.R. § 73.3598(e) (“any construction permit for which construction has not been completed and for which a license application has not been filed shall be automatically forfeited upon expiration without any further affirmative action by the Commission”).

⁸ RHI submitted two of the four required signed licensee agreements and RFR measurements taken at the authorized Station KWAI(AM) transmitter site in September 2005, but those RFR measurements are unacceptable since Station KWAI(AM) was operating unauthorized facilities at the site at that time.

⁹ 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 1539 (2009) (dismissing license application and finding that construction permit had expired by operation of law based on failure to timely submit required AM station proof of performance).

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).

RHI filed a seriously deficient application, omitting critical data necessary for evaluating the operation of the authorized Station KWAI(AM) facilities. 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 will dismiss the Application. In light of that action, we find that the Construction Permit has expired.

Conclusions/Actions. For the reasons set forth above, IT IS ORDERED that Radio Hawaii Inc.'s request for program test authority, 20111229ACF, IS DENIED, and its Application for License, File No. BL-20111229ACE, IS DISMISSED as patently defective pursuant to Section 73.3566(a) of the Rules.¹³ The Commission's database will be amended to reflect that Construction Permit BP-20080312ADC for Station KWAI(AM), Honolulu, Hawaii, EXPIRED BY OPERATION OF LAW on November 14, 2011, without further action by the Commission. This action has no effect on the currently licensed Station KWAI(AM) facilities.

Sincerely,



Susan N. Crawford
Assistant Chief
Audio Division
Media Bureau

cc: Radio Hawaii, Inc.
Mark A. Mueller

¹³ 47 C.F.R. § 73.3566.