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

In re Application of

K. U. T. E., INC.

For Construction Permit
and Waiver of 47 C.F.R. § 73.211(c)
Station KUTE(FM), File No. BPH-851104II
Glendale, California

ORDER

Adopted: November 14, 1986 Released: December 2, 1986

By the Commission: Commissioner Quello concurring in the result.

1. The Commission has before it for consideration an application for review filed on April 29, 1986, by K.U.T.E., Inc., seeking review of the Audio Services Division, Mass Media Bureau's denial (attached hereto) of a petition for reconsideration of the Bureau's dismissal of a request for waiver of 47 C.F.R. § 73.211(c) and of its denial of a construction permit application for Station KUTE(FM), Glendale, California.

2. KUTE's application for review simply restates the arguments made in its petition for reconsideration. We have reviewed the Bureau's action denying that petition and find no error. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), IT IS ORDERED that the application for review IS DENIED.

3. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send by Certified Mail - Return Receipt Requested, a copy of this Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico,
Secretary

APPENDIX

March 17, 1986

Irving Gastfreund, Esq.
Finley, Kumble *et al.*
1120 Connecticut Avenue, Northwest
Washington, D.C. 20036

Re: KUTE, Glendale, California

K.U.T.E., Inc.

Application for Construction
Permit, File No. BPH-790726AO;
Petition for Reconsideration; and
Resubmitted and Amended Application
for Construction Permit,
File No. BPH-851104II

Dear Mr. Gastfreund:

On November 4, 1985, you filed both the instant petition for reconsideration ("petition") and amended application for construction permit on behalf of K.U.T.E., Inc. ("K.U.T.E."), licensee of KUTE-FM, Glendale, California. The underlying application was originally filed on July 26, 1979 by Inner City Broadcasting Corporation ("Inner City"), assignor of the license of KUTE to K.U.T.E. In that application, and in the instant petition and resubmitted application, the parties have sought and continue to seek authority to modify KUTE's licensed facility. The modification sought would allow KUTE to reacquire its former status as a superpower Class B facility and would entail waiver of 47 C.F.R. § 73.211(c), which specifies the maximum power and height limitations for new and existing stations. Prior actions by the Commission's staff--including the return of the subject application--have been based on a holding that Inner City's predecessor in interest, Robert D. Adams ("Adams"), relinquished that status by filing and prosecuting to grant an application specifying reduced operating parameters, albeit ones conforming to the maximum for Class B per 47 C.F.R. § 73.211.

Before addressing the merits of the petition, a factual summary is in order. KUTE's operating parameters were an effective radiated power ("ERP") of 82 kW and a height above average terrain ("HAAT") of 620 feet (189 meters) from 1952 to early 1969. Adams operated the station from a site adjacent to Flint Peak in Glendale, the community of license, by virtue of a lease given by the site owner, the City of Glendale ("the City"). The lease expired in 1968, and the City refused to renew it. Adams attempted to secure nearby sites, but those efforts are said to have failed because of his inability to secure zoning approval for one site and his inability to pay the rent demanded for another. Adams accordingly filed an application for authority to relocate KUTE to Mount Wilson and to radiate 3 kW at 2805 feet (855 meters), parameters somewhat greater than those authorized at the then licensed site.

The Commission's staff returned that application as unacceptable for filing in November, 1968 because superpower stations are prohibited by 47 C.F.R. § 73.211(d), currently § 73.211(c), from increasing their ERP or extending their 1 mV/m contour beyond that of their licensed facilities. The staff letter, Exhibit 3 to your petition, also noted that the application would be acceptable, if resubmitted and amended, *inter alia*, to specify an ERP of 0.670 kW. That power level corresponded to maximum Class B parameters at the time for an HAAT of 2805 feet (855 meters), pursuant to 47 C.F.R. § 73.211(b) and the derating method set forth in the U.S.-Mexican Agreement. That letter also noted that the predicted coverage of the community of license would be more than adequate ("in excess of 3.16 mV/m") in light of the demands of 47 C.F.R. § 73.315.

Rather than seek staff reconsideration or Commission review of that action, Adams filed an application proposing to radiate 0.640 kW from an antenna on Mount Wilson with an HAAT of 2860 feet (872 meters). Your petition alleges that Adams chose this course of action due to the pressing need to relocate KUTE–the City "was literally at the door with a bulldozer as Mr. Adams moved" from his licensed site–and due to the station's poor financial condition and Adams' lack of professional engineering and legal assistance. The Commission's staff granted this latter application on April 23, 1969.

The license of KUTE was assigned to Inner City on February 2, 1979. On July 26, 1979, Inner City filed the underlying application for construction permit by which it sought to increase KUTE's operating parameters at its Mount Wilson site to 10 kW ERP and 2775 feet (846 meters) HAAT. Grant of Inner City's application would have also entailed waiver of § 73.211, and such was requested. On September 25, 1985, the Chief, FM Branch, denied that request and dismissed Inner City's application on the grounds that the application proposed greater than maximum Class B operating parameters in violation of the Rules, and that Inner City's predecessor in interest (Adams) had relinquished KUTE's superpower status. The Branch Chief's letter held that "when KUTE reduced its facilities to Class B maximum, it forfeited the right to increase back to the equivalent of those licensed in the past." The instant petition seeks reconsideration of that holding and of the dismissal of Inner City's underlying application. By means of the resubmitted, amended application, K.U.T.E. seeks authority to operate the station from Mount Wilson with an ERP of 2.36 kW and an HAAT of 850 meters.

In support of K.U.T.E.'s position, you advance the following arguments.

(1) Inner City never *voluntarily* relinquished its grandfathered superpower status. You allege that Adams lacked sufficient funds to retain professional engineering or legal help to contest the staff's return of his original site-change application and that he was forced to undertake an immediate move of the facility. You thus posit that these pressures prevented Adams from exercising a *voluntary* choice;

(2) It is inequitable for KUTE to operate at parameters equal to the maximum for Class B because its reduced-power status precludes it from adequately and competitively serving its community of license. This, you suggest, is contrary to the public interest; and

(3) While the Commission's staff correctly held Adams' original proposal to be "inconsistent with the Commission's Rules," it incorrectly interpreted former § 73.211(d) as evidenced by the Commission's later holding in *Sutro Tower, Inc.*, 32 FCC 2d 826 (1972); and that upon receipt of this incorrect interpretation, Adams reasonably concluded that the only proposal which would be acceptable to the Commission was one which specified minimum Class B facilities.

As to the first of your arguments, we believe that neither the factual record nor the cases you have cited warrant the conclusion that Adams' acts were "involuntary." The three cases you have cited are not controlling, nor do they suggest a conclusion contrary to our prior and present holdings in this factual setting. Furthermore, there is precedent beyond these cases which calls for affirming the Branch Chief's prior holding. Neither *Nation Wide Cablevision, Inc.*, 49 FCC 2d 1138 (1974), *Community Cablevision Corporation*, 50 FCC 2d 988 (1975), nor *Bainbridge Video, Inc.*, 40 RR 2d 1435 (Cab. Bur. 1977) dealt with a broadcaster's site relocation or site relocation entailing an apparent relinquishment of grandfathered, superpower status. Rather, they each involved situations in which a cable system's grandfathered status vis-a-vis the then "may-carry" rules was at issue. None of these cases, we believe, presented fact patterns sufficiently analogous to the instant case to be dispositive.

In both *Nation Wide* and *Community*, the Commission held that a cable system operator could renew carriage of a deleted station when deletion had occurred due to circumstances "beyond the systems' control." The Commission deemed the technical difficulties with reception quality which caused such deletion to be outside the cable systems' ambit of control and, consequently, determined that revived "grandfathered" carriage was appropriate.

However, *Bainbridge* presented the Commission with an argument for grandfathering more analogous to that presented here. Bainbridge sought authority for renewed, grandfathered carriage of a discontinued station, alleging discontinuance to have resulted from its inability to finance nonduplication protection. The Commission held this argument to be predicated upon a "voluntary" discontinuance rather than an "involuntary" deletion and refused grant of grandfathered status.

Clearly, none of these cases but *Bainbridge* speak to the consequences of Commission action prompted by a licensee's *own* actions.[1] All but *Bainbridge* involved external circumstances beyond the cable operator's control. Only *Bainbridge* provides a pattern of alleged economic hardship as in the instant case. There, however, the Commission decided against revival of grandfathered status.

The Commission has not in the past, even in cable grandfathering cases of the type on which you rely, found allegations of economic hardship persuasive.[2] Furthermore, we believe that if Adams could not "carry on his livelihood without the radio license at stake in the proceeding," he could have proceeded on his own behalf, and without professional engineering assistance, in a manner akin to *in forma pauperis*. *Cf.* 47 C.F.R. § 1.224.

Finally, you have not established that the urgency of Adams' move to Mount Wilson was due to circumstances beyond his control. Adams certainly knew in advance the expiration date of his site lease and knew or should have been aware that the lease might not be renewed. Therefore, he could and should have made contingency plans.

In addition, we are not persuaded that Adams exhausted his other available options. Adams could have requested--while contesting the return of his original application, without prejudice to the merits of that matter, and pursuant to 47 C.F.R. § 73.1635--special temporary authorization to operate with parameters the Commission's staff had indicated would be acceptable. Adams did not do so. Rather, Adams acquiesced in the staff action and through his acquiescence that action became final. An applicant who represents himself assumes the risk and cannot rely on inexperience or lack of knowledge of procedure to excuse his conduct or to avoid the consequences of his own actions or inactions. *Western Broadcasting Company*, 1 RR2d 732 (1963); *Garo Ray*, RR2d 399, 405 (1964); *Simon Geller*, 25 RR 828 (1963). In sum, I find no justification for upsetting the Branch Chief's determination that Adams' relinquishment of KUTE's grandfathered status was voluntary.

You next argue that if we do not permit the requested upgrading of KUTE and grant a waiver of § 73.211, we will be acting in a manner inconsistent with the public interest. This argument is premised on an allegation that the station lacks sufficient ERP and HAAT to adequately serve Glendale and effectively compete with any of the 16 other FM stations in the Los Angeles area. Engineering statements appended to your petition allege that 51% of the area of the community of license, in which 50% of Glendale's population resides, is subject to shadowing by terrain obstructions. No showing, however, via measurements per 47 C.F.R. § 73.314, has been made that existing city-grade service is inadequate. Rather, the "Statement of Edward Edison, Consulting Engineer," which is appended to the resubmitted application, relates that KUTE's relative signal strength in central Glendale as computed for the pertinent signal-path depression angle is 7.9 mV/m or 78 dBu. Statement at 2. Assuming, *arguendo*, that this prediction of service is accurate, it describes a signal level fully eight decibels in excess of what 47 C.F.R. § 73.315(a) requires. Even where measurements taken in conformity with § 73.314 show that only 50% of the community of license receives service greater than or equal to 70 dBu, existing city-grade coverage cannot be termed "inadequate." *GreaterMedia, Inc.*, 61 FCC 2d 692 (1976).

Your pleading also contains engineering allegations that KUTE's signal level in central Glendale is lower than the levels of service provided by other FM stations in the area. You fashion an argument based on these allegations that KUTE is entitled to superpower parameters. This argument is of insufficient weight to allow KUTE to reacquire *any* of its former, superpower status. The resulting detriment to the public interest and the need for finality of Commission or staff actions taken so long ago[3] are simply too overwhelming to offset any advantage that would be derived from granting your request. Obviously, private economic considerations cannot enter into our deliberations in such matters.

The Commission has consistently refused to allow stations that have given up part or all of their superpower status (or later applicants for the facilities of lapsed stations) to subsequently reacquire any part of that status. *WHUT Broadcasting, Inc.*, 22 FCC 2d 954 (1970); *Independent Music Broadcasters, Inc.*, 38 RR 2d 1539 (1976); *Peoples Broadcasting Corporation*, 68 FCC 2d 1570 (1978). We have also followed a strong policy, codified in 47 C.F.R. § 73.211(c), of not allowing superpower stations that must make facilities modifications to extend their 60-dBu contours beyond those currently authorized. *WGN Continental Broadcasting Company*, 17 FCC 2d 1009 (1969); *Sutro Tower, Inc., supra*.

This policy has also been followed in noncommercial educational FM contexts. *Moody Bible Institute of Chicago*, 45 RR 2d 109 (1979), which you cite, does not compel a different result. Moody's application BPED-2001 sought to relocate WMBI, an educational FM station with superpower facilities, from its licensed location west of Chicago to the top of the John Hancock Center in that city's downtown area. Moody thereby sought to increase its HAAT from 440 feet (134 meters) to 1290 feet (393 meters), while retaining its licensed ERP of 100 kW. Grant of the application would have increased Moody's 60-dBu contour by more than 57%. By letter of February 6, 1979 (*Moody, supra*), we afforded to Moody a 30-day period within which to amend its application to specify a combination of ERP and HAAT consistent with our maximum-power rules and policies, and one in no event greater than then authorized. Moody failed to so amend, and its application was dismissed by letter of April 28, 1981. Moody thereupon filed a petition for reconsideration. After the termination of rulemaking Docket 20735 by the *Memorandum Opinion and Order*, 50 Fed. Reg. 27954 (1985), we acted upon Moody's petition. In our letter of December 20, 1985, we noted that the *Memorandum Opinion and Order, supra,* had eliminated the previous possibility, per 47 C.F.R. § 73.511 as it formerly read, of granting applications proposing parameters exceeding the power and height maxima set forth in § 73.211. As amended by the Commission's action in Docket 20735, § 73.511 provides to educational applicants no exceptions to the limitations found in § 73.211. Moody's petition for reconsideration was accordingly denied.

Your third and final contention is that the Commission's 1968 action incorrectly interpreted § 73.211(d) (now (c)) and was inconsistent with our later action in *Sutro Tower, Inc., supra*. In subsequent discussions with members of the Commission's staff, you further allege that based upon this erroneous interpretation, Adams reasonably concluded that he was *required* to file for maximum Class B facilities so as to avoid being forced off the air. I disagree. In reviewing the Commission's 1968 action, I find no error in the interpretation of § 73.211(d) (now (c)). The 1968 letter correctly stated that a superpower station "will not be authorized changes in facilities which *extends* the location of the 1 mV/m field strength contour beyond that of the present authorization in any direction." (emphasis added). The clear implication of this statement is that a proposal which would not extend the 1 mV/m contour could be authorized and the fact that the Commission did not affirmatively state this fact does not constitute, as you suggest, an erroneous interpretation of the rule.

Accordingly, I affirm the staff's interpretation and application of § 73.211(d) (now (c)) and find your argument based on *Sutro* inapposite. *Sutro* was decided more than four years after the staff's rejection of Adams' original Mount Wilson proposal. Furthermore, the *Sutro* doctrine has no application here even were it extant in 1968.[4] *Sutro* did, however, articulate Commission policy regarding § 73.211 waivers. We noted there that a general relaxation of the waiver standard would produce chaos, and would ultimately cause other FM licensees across the country to seek to gain or reacquire grandfathered status. Such a result would not only have shaken the entire FM

allocation scheme to its roots, but would also have ultimately violated 47 U.S.C. § 307(b). "[I]t would frustrate our statutory objective to provide a fair, efficient and equitable distribution of radio service throughout the country." *Id.* at 829.

You have failed to show that reconsideration of the prior staff action or grant of the requested waiver of 47 C.F.R. §73.211(c) is warranted. Accordingly, IT IS ORDERED, That the petition for reconsideration filed on behalf of K.U.T.E., Inc., IS DENIED. IT IS FURTHER ORDERED, That the resubmitted and amended application for construction permit, File No. BPH-851104II, of K.U.T.E., Inc., IS RETURNED as unacceptable for filing. Our action here is taken pursuant to authority delegated by 47 C.F.R. § 0.283.

Sincerely,

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Indeed, in those cable cases which do concern requests for Commission action made necessary by cable operators' own business decisions, the Commission has not recognized grandfathering rights or permitted their reacquisition. *See generally Central Plains Cable TV, Inc.*, 51 FCC 2d 904 (1975); *Service Electric Cable TV, Inc.*, 57 FCC 2d 334 (1975); *Clearview TV Cable of Encumclaw*, 64 FCC 2d 897 (1977), *recon. den.*, 69 FCC 2d 1179 (1978); *Lima Cablevision Co.*, 52 FCC 2d 1016 (1974).

[2] *See Lima Cablevision Co., supra,* wherein a cable operator, whose Lima, Ohio system was carrying grandfathered signals, was not permitted to carry otherwise prohibited signals over its system in Elida, Ohio. The operator's allegations of economic hardship were deemed unpersuasive.

[3] *Cf. Inre Petition of Radio Para La Raza,* 40 FCC 2d 1102, 1104 (1973). "The courts have noted a strong policy in favor of administrative finality, and have held that proceedings that have become final will not be reopened unless there has been fraud on the agency's or the court's processes, or unless the result is manifestly unconscionable. *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 64 S.Ct. 997 (1944); *Greater Boston Television Corporationv. FCC,* 463 F.2d 268 (D.C. Cir. 1971); KIRO, Inc. v. FCC, 438 F.2d 141 (D.C. Cir. 1970)." Adams forfeited KUTE's grandfathered, superpower status long ago. That forfeiture is now beyond review in light of the strong policy set forth by Congress in 47 U.S.C. § 405.

[4] Sutro Tower, Inc., a joint tower company formed in the 1960's, sought a declaratory ruling to allow most FM stations serving the San Francisco area already operating from Mount Sutro to use its tower and to allow a limited number of stations not then situated on Mount Sutro to relocate and place their antennas on that tower. The Commission allowed such and granted the relocating stations limited waivers of then § 73.211(d) so as to recenter their 60-dBu contours about Mount Sutro but not to ext end them any further. Grandfathered, superpower stations already situated on Mount Sutro--but not on the company's tower--were permitted to mount their antennas on the tower. However, they were required to reduce their levels of ERP to confine their 60- dBu contours within their previously authorized bounds. As stated earlier, Adams' proposal did not comport with the pertinent Sutro requirements and arose in a markedly different factual setting.