



Federal Communications Commission  
Washington, D.C. 20554

August 9, 2013

**DA 13-1737**  
***In Reply Refer to:***  
**1800B3-CEG**  
Released: August 9, 2013

Richard J. Hayes, Esq.  
P.O. Box 200  
Lincolntonville, ME 04849

James A. Koerner, Esq.  
Koerner & Olender, P.C.  
11913 Grey Hollow Court  
North Bethesda, MD 20852

In re: **KRYL(FM), Haiku, HI**  
Facility ID No. 164100  
File No. BLH-20080222ACF

**Petition for Reconsideration**

Dear Counsel:

We have before us a Petition for Reconsideration (“Petition”) filed by Big D Consulting, Inc. (“Big D”) on March 31, 2008.<sup>1</sup> Big D seeks reconsideration of the grant of the above-referenced application (“Application”) of Big Island Broadcasting, Inc. (“Big Island”) for a license to cover the construction permit (“Construction Permit”) of Station KRYL(FM) (formerly KUHI), Haiku, Hawaii (“Station”), and related responsive pleadings.<sup>2</sup> For the reasons stated below, we deny the Petition.

**Background.** Big Island was the winning bidder for a new commercial FM station on Channel 293C at Haiku, Hawaii, in FM Auction 37.<sup>3</sup> On December 29, 2004, Big Island filed its post-auction long-form FCC Form 301 application, which was granted on February 24, 2005.<sup>4</sup> The Construction Permit authorized directional operation on an existing master antenna shared with several other FM stations. The Construction Permit required, *inter alia*, that Big Island: (1) submit spurious emissions measurements to the Commission before or with the covering Application, and in any case before any program tests commence; and (2) submit a copy of the vertical plane radiation pattern for the beam tilt

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<sup>1</sup> Big D is the licensee of Station KNAN(FM), Nanakuli, Hawaii.

<sup>2</sup> On April 17, 2008, Big Island filed an “Opposition to Bid D Consulting, Inc. Petition for Reconsideration” (“Opposition”). On April 28, 2008, Big D filed a “Reply to Opposition” (“Reply”).

<sup>3</sup> *FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established*, Public Notice, 20 FCC Rcd 1021 (WTB/MB 2004), Attachment A at 3.

<sup>4</sup> File No. BNPH-20041229AAP.

antenna with the Application.<sup>5</sup> On February 22, 2008, Big Island filed the Application and request for program test authority, both of which were granted February 26, 2008.

On March 26, 2008, shortly after its Application was granted, Big Island notified the Commission that it had gone silent on February 29, 2008, and requested special temporary authorization (“STA”) to remain silent until it “complete[d] the process of location and construction of its main studios and . . . staffing of the station” (“STA Request”).<sup>6</sup> The STA Request was granted on April 7, 2008. On January 13, 2009, Big Island reported that authorized operations had resumed on January 12, 2009, and on January 21, 2009, it reported the Station’s new main studio location. On October 18, 2010, Big Island applied for Commission consent to assign the Station’s license to Hochman Hawaii Five, Inc. (“Hoffman”).<sup>7</sup> The assignment application was granted on November 30, 2010, and the parties consummated the transaction on March 3, 2011. The assignment was unopposed.

**Pleadings. Standing.** Big D claims standing to file the Petition on the basis that grant of the Application precluded its plan to upgrade its Station KNAN(FM).<sup>8</sup> Big Island disputes Big D’s standing, arguing that even if the Station had not been constructed, Big D would still have had to protect the Haiku, Hawaii, allotment. In its Reply, Big D clarifies that the Haiku allotment would not affect its plans but protecting the Station’s authorized transmitter site would.<sup>9</sup>

**Engineering issues.** Big D argues that Big Island failed to satisfy the spurious emissions condition because it did not submit actual measurements, only an engineer’s certification that the spurious emissions requirements had been met.<sup>10</sup> Big D also suggests that the antenna proof of performance submitted with the Application is “seriously flawed” because: (1) the introductory narrative refers to Station KLNI as an antenna co-user, whereas Station KLNI is in fact a noncommercial educational FM station licensed to Decorah, Iowa; (2) the notation “99.3 MHz” on the 1997 antenna schematic diagrams indicates that the antenna must have been “designed and constructed” for 99.3 MHz, not KRYL’s operating frequency of 106.5 MHz; and (3) the antenna configuration depicted in the schematic diagrams (specifically, the offset distance between bays) does not correspond to 106.5 MHz.<sup>11</sup>

In its Opposition, Big Island argues—primarily in its engineering exhibits<sup>12</sup>—that its proof of performance is not “seriously flawed.”<sup>13</sup> Specifically, Big Island argues that the Bureau has accepted in the past other spurious emissions certifications in lieu of the underlying measurement data.<sup>14</sup> With respect

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<sup>5</sup> Construction Permit at 2-3.

<sup>6</sup> See File No. BLSTA-20080326AFP, Exhibit 1.

<sup>7</sup> File No. BALH-20101018ACQ.

<sup>8</sup> Petition at 1-2.

<sup>9</sup> Reply at 1-2.

<sup>10</sup> Petition at 3.

<sup>11</sup> Petition at 3-5, Attachment A at 1-2; Reply at 2.

<sup>12</sup> We remind Big Island that an engineer who is neither a party nor legal counsel may not act as legal counsel before the Commission. 47 C.F.R. § 1.23(a). Any argument put forth by such a person may be disregarded. See *Calvary Chapel of Costa Mesa, Inc.*, Letter, 27 FCC Rcd 557, 559 n.13 (MB 2012).

<sup>13</sup> Opposition at 2.

<sup>14</sup> Opposition, Exhibit 1 at 1.

to the accuracy of the proof of performance exhibits, Big Island contends that: (1) “KLNI” is a typographic error for “KLHI,” i.e., Station KLHI-FM, Kahului, Hawaii, which at one time did share the antenna; (2) the annotation “99.3 MHz” is not relevant to the accuracy of the antenna diagrams or of the data submitted for frequency 106.5 MHz; and (3) the depicted configuration is correct, as the antenna has not changed since 1997 and is not specifically configured for any one frequency but rather “constructed to accommodate many frequencies simultaneously.”<sup>15</sup>

Furthermore, Big Island points out that, although necessarily directional because of the existing master antenna design, Station KRYL(FM) never requested processing as a short-spaced station under Section 73.215 of the Rules.<sup>16</sup> Therefore, Big Island argues, slight variations in how different frequencies may react when broadcast by the master antenna are “a moot point”—in fact, there is no requirement for a directional proof of performance to be submitted at all.<sup>17</sup> In its Reply, Big D states that the accuracy of the horizontal patterns is significant even if not required, because “[a]s *authorized*, the [KRYL] 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.”<sup>18</sup>

*Main studio issues.* Big D contends that Big Island’s own admission in the STA Request indicates that the Station did not have a main studio, local or toll-free telephone number, or the required staff at the time the Application was filed.<sup>19</sup> Therefore, Big D concludes, Big Island falsely certified in the Application that it was in compliance with Section 73.1125 of the Commission’s Rules.<sup>20</sup> In response, Big Island states that it used its transmitter site as its studio during equipment testing, as permitted by Section 73.1125 of the Rules.<sup>21</sup> Big Island likewise argues that there is no requirement for a permittee to install toll-free phone service or to staff its main studio during equipment testing, and notes that all intra-island calls on Maui are toll free. Big Island does not state that it had a main studio, telephone line, or staff in place at the time it submitted the Application. In its Reply, Big D acknowledges that it is not necessary to have a main studio for equipment tests, but argues that at the time of filing the license application, Big Island should have been ready to begin providing service to the public. Finally, Big D argues that the STA Request may have been “improvidently granted” because Big Island did not show “causes beyond the control of a licensee [that] make it impossible to adhere to the operating schedule of this section . . .”<sup>22</sup> Rather, Big D argues, Big Island used the STA to extend its construction deadline for its own convenience.

*Program tests.* Big D argues that, without a location or equipment for a main studio, Big Island could not have conducted program tests by the Construction Permit expiration date, which it claims is “fatal” to the Application.<sup>23</sup> Big Island replies that it properly requested program test authority and then

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<sup>15</sup> Opposition, Exhibit 1 at 2-4.

<sup>16</sup> 47 C.F.R. § 73.215.

<sup>17</sup> Opposition, Exhibit 1 at 4.

<sup>18</sup> Reply at 2.

<sup>19</sup> Petition at 5-6.

<sup>20</sup> 47 C.F.R. § 73.1125.

<sup>21</sup> Opposition at 2.

<sup>22</sup> Reply at 3; *see* 47 C.F.R. §73.1740.

<sup>23</sup> Petition at 6.

operated the Station for approximately two-and-a-half days before filing the Application for “equipment test purposes only,” before turning the Station “off” while the Commission considered the Application.<sup>24</sup> After the license was granted, Big Island contends, there was no need for program test authority.

**Discussion.** 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 additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.<sup>25</sup> Big D has not met this burden.

*Standing.* Big D did not file a petition to deny or informal objection prior to grant of the Application. Therefore, under Section 1.106(b)(1) of the Rules, it must demonstrate how its interests were adversely affected by the grant and show good reason why it was not possible to participate in the earlier stages of the proceeding.<sup>26</sup> In this case, Big D has shown that it was adversely affected by the grant of the Application because the grant precluded Station KNAN(FM) from upgrading its facilities.<sup>27</sup> Big D has also shown that its failure to participate earlier in the proceeding is justified by the fact that the Application was granted one day *before* public notice of its acceptance; thus, there was no opportunity to file a petition to deny before grant.<sup>28</sup> Therefore, Big D has standing to petition for reconsideration of the grant of the Application.

*Engineering issues.* Big D has failed to identify any defect with the engineering portion of the Application that would warrant reconsideration. The staff regularly accepts engineer's certifications similar to that submitted with the Application to satisfy the standard special operating condition regarding spurious emissions.<sup>29</sup> We do not require that an applicant using a shared master antenna identify all co-users, and in any case, Big Island's explanation that “KLHI” was a typographic error for “KLNI” is plausible given the similarity between the two call signs and the fact that a mainland station would not likely be operating from a transmitter in Maui. We agree with Big Island that the “99.3 MHz” notation on the original 1997 schematic diagrams does not discredit either the antenna configuration depicted or the performance data produced specifically for Station KRYL(FM). Rather, we properly rely on the antenna manufacturer's sworn statement that the submitted test range measurements were performed for the correct frequency, 106.5 MHz, on February 20, 2008, using a model of the antenna as configured in the schematic diagrams provided.<sup>30</sup> Finally, we find reasonable Big Island's explanation that the antenna

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<sup>24</sup> Opposition at 3.

<sup>25</sup> See 47 C.F.R. § 1.106(c),(d). See also *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).

<sup>26</sup> 47 C.F.R. § 1.106(b)(1).

<sup>27</sup> See *Vincent A. Pepper, Esq.*, Letter, 13 FCC Rcd 16551, 16552 (MMB 1998) (“Here . . . WIKI's interests were adversely affected by the grant of Baldwin's application because such grant precludes WIKI from achieving maximum Class A facilities.”)

<sup>28</sup> The Commission has found that a brief (or, in this case, nonexistent) filing opportunity effectively precludes participation during the initial consideration of an application. See *Mr. David Levandusky*, Letter, 25 FCC Rcd 14172, 14174, n.16 (MB 2010); *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854 (1997).

<sup>29</sup> See, e.g., File No. BLH-20021021ABG, Exhibit 8, “Local Engineer's Statement”; File No. BLH-20030225ABL, Exhibit 10, “Certification of Spurious Emissions.”

<sup>30</sup> Opposition, Exhibit 2, “Engineering Statement,” at 1.

configuration, including the spacing between bays, is not specific to 106.5 MHz, but is designed to work for multiple frequencies.

Just as importantly, any defect in the horizontal radiation pattern—even if shown—would not affect the grantability of the Application or otherwise facilitate Big D’s plans to upgrade. First, the horizontal radiation pattern is not a required exhibit here; only the vertical radiation pattern (showing beam tilt) is required. Second, because Big Island did not request Section 73.215 processing, any modification of Station KNAN(FM) would be subject to the minimum distance separations set out in Section 73.207 of the Rules, not to Station KRYL(FM)’s actual signal contours.<sup>31</sup> Therefore, even if Big D substantiated its allegation that the submitted horizontal radiation pattern is inaccurate, it would not thereby show a defect in the Application or otherwise improve its prospects for upgrading Station KNAN(FM).<sup>32</sup>

*Main studio issues.* Beginning on the date of its license application and continuing thereafter, a station must maintain a main studio: (1) within the station’s community of license; (2) within the principal community contour of any station licensed to the station’s community of license; or (3) within 25 miles of the reference coordinates of the station’s community of license.<sup>33</sup> The permittee or licensee must equip the main studio with production and transmission facilities that meet applicable standards, maintain continuous program transmission capability, and maintain a meaningful management and staff presence.<sup>34</sup> The Commission has defined a minimally acceptable “meaningful presence” as full-time managerial and full-time staff personnel.<sup>35</sup>

In this case, Big Island’s STA Request and Opposition appear to conflict with the above requirement and Big Island’s own certifications in the Application that the Station’s main studio location complied with Section 73.1125 of the Commission’s Rules (the “Rules”).<sup>36</sup> However, given the assignment of the station to Hochman in March 2011, further inquiry at this point into the status of Big Island’s studio facilities at the time the Application was filed or the merits of the STA Request would serve no useful purpose. Assignment of the station to Hochman is now final, Big Island is no longer connected with the Station, and it has no other broadcast interests.<sup>37</sup>

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<sup>31</sup> 47 C.F.R. § 73.207. Similarly, even if Big D were to request Section 73.215 processing, for Station KNAN(FM) proposed upgraded facilities to be short-spaced to Station KRYL(FM), it would still have to protect KRYL’s Class C reference facility (100 kW at 600 meters HAAT), not its directional contour. *See* 47 C.F.R. § 73.215.

<sup>32</sup> In this respect, we note that on August 10, 2009, Big D filed an application for a minor modification of Station KNAN(FM) to move its transmitter site and increase signal coverage, which was granted on February 18, 2011. The construction period is tolled pending resolution of a petition for reconsideration filed by Kona Coast Radio, LLC on March 21, 2011, in associated MB Docket No. 09-189. *See* File No. BPH-20090810ACM.

<sup>33</sup> 47 C.F.R. § 73.1125(a); *see also* *Dan J. Alpert, Esq.*, Letter, 27 FCC Rcd 14836, 14837 (MB 2012).

<sup>34</sup> *Perihelion Global, Inc.*, Forfeiture Order, 23 FCC Rcd 17025, 17027 (EB 2008), citing *Main Studio and Program Origination Rules*, Memorandum Opinion and Order, 3 FCC Rcd 5024, 5026 (1988).

<sup>35</sup> *See Jones Eastern of the Outer Banks, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 3615, 3616 (1991), *clarified*, 7 FCC Rcd 6800 (1992).

<sup>36</sup> 47 C.F.R. § 73.1125.

<sup>37</sup> *See, e.g., Dan J. Alpert, Esq.*, Letter, 23 FCC Rcd 10202, 10211 (MB 2008) (“no useful purpose” in further pursuing allegation that applicant was not financially qualified when it filed its application when the station was subsequently constructed and operated by that entity for nearly 13 years); *William S. Konopnicki*, Letter, 22 FCC Rcd 7745, 7750 n.29 (MB 2007) (further inquiry into allegation that ownership and employment reports were not

*Program tests.* Big Island was required to request program test authority along with the Application.<sup>38</sup> However, it was not required to conduct program tests before grant of the Application. We agree with Big Island that the simultaneous grant of the Station license and program test authority moots any issue with regard to program tests.

**Conclusion/Actions.** For the reasons stated above, IT IS ORDERED that the Petition for Reconsideration filed by Big D Consulting, Inc. on March 31, 2008, IS DENIED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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filed for applicant's other broadcast stations not warranted when those stations had been assigned and the assignments were final).

<sup>38</sup> Construction Permit, Special Operating Condition 1.