

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

In re Application of	)	
	)	
Kemp/Mesquite, Inc.	)	
for Modification of Construction Permit	)	File No. BMPH-980723IA
for Station KVEG(FM), formerly KBJG(FM),	)	
Mesquite, Nevada	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 24, 2000**

**Released: August 11, 2000**

By the Commission:

1. The Commission has before it a March 16, 2000 pleading styled "Petition for Review" filed by Lotus Broadcasting Corp. ("Lotus") which we treat as a timely filed Application for Review.<sup>1</sup> Lotus seeks review of a February 10, 2000, letter ruling by the Chief, Audio Services Division, Mass Media Bureau. That ruling dismissed on procedural grounds Lotus's petition for reconsideration of the staff's grant of the above-captioned application for modification of the KVEG(FM) construction permit. *Letter to Jerome S. Boros, Esq. and Andrew Irving, Esq.*, Ref. No. 1800B3-MFW (Audio Services Division, February 10, 2000). It also stated that Lotus's substantive arguments, which included allegations of lack of candor, would not have raised any substantial and material questions of fact concerning the applicant's qualifications, even had the petition not been dismissed procedurally.

2. Since Lotus did not file a timely informal objection to the modification application, it was required to show good reason in its petition for reconsideration why it was not possible to participate in the earlier stages of the proceeding. 47 C.F.R. § 1.106(b)(1). The staff correctly determined that Lotus had failed to make that showing.

3. In the Application for Review, Lotus also makes a new argument on the merits that a November 23, 1999 letter from the applicant to the Commission lends support to one of its previous allegations of lack of candor concerning Kemp/Mesquite's ability to commence construction immediately and the premise of reasonable site assurance that it believes underlies that certification. Since the referenced letter was not only filed at the Commission but apparently served on petitioner<sup>2</sup> more than two months prior to the staff letter dismissing petitioner's request for reconsideration, petitioner's submission of the letter now rather than in the context of its petition for reconsideration is untimely. *See* 47 C.F.R. § 1.115(c) ("no application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.") In any event, we note that since

<sup>1</sup> Also on file are the following responsive pleadings: Kemp/Mesquite, Inc.'s Opposition to Petition for Review filed on March 29, 2000 and Lotus's Reply to Opposition to Petition for Review filed on April 7, 2000.

<sup>2</sup> Counsel for KVEG(FM) claims that it served the letter, and counsel for Lotus does not dispute the claim in its subsequent pleading.

Kemp/Mesquite had applied for a Bureau of Land Management (“BLM”) permit to use the BLM site, it had, under Commission precedent, taken sufficient action to establish reasonable site assurance. *Warren Price Communications, Inc.*, 5 FCC Rcd 2906, 2908 (1990) (“When a site is controlled by a government agency, a mere willingness by the government agency to entertain a request for the use of the land in question is sufficient to provide reasonable assurance of the site availability.”), *citing Alden Communications Corp.*, 3 FCC Rcd 3937 (1988). The November 23, 1999 letter that Lotus now submits is indicative of nothing more than the fact that Kemp/Mesquite was mistaken in its original belief that all, not part, of its tower was located on BLM property.<sup>3</sup>

4. Accordingly, IT IS ORDERED that, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed by Lotus Broadcasting, Corp., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>3</sup> While Kemp/Mesquite apparently originally believed that the entire proposed tower was on BLM property, in fact “only a small portion of one of the three guy wire anchors” for the tower was on BLM property. Kemp/Mesquite ultimately slightly reconfigured the tower so that it sits entirely on private property and signed a long term lease with the property owner.