

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

LETTER
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Washington, DC 20006-1115

In re: KIQI(AM)
San Francisco, CA
File Nos. BP-20398, BMP-811231AA,
BP-870330AP & BMP-881229AD

Dear Mr. Gammon:

This is in regard to the application for review filed by Oro Spanish Broadcasting, Inc. ("Oro") on May 26, 1988.

Oro is the licensee of KIQI(AM), San Francisco, CA. On April 24, 1980, Oro was granted a construction permit, to modify its then existing daytime-only facility; that permit expired on April 24, 1981 ("1980 construction permit"). Subsequently, on June 1, 1982, the staff granted an application to modify that permit to allow a change of city of license and relocation to Sunnyvale, CA, a decrease in daytime power from 50 kW to 25 kW, and the addition of nighttime power of 10 kW with an expiration date of June 1, 1983 ("Sunnyvale modification"). Thereafter, an extension request was granted and the modified permit was extended to December 15, 1983. Oro did not request further extension of that construction permit. Subsequently, in September 1985, pursuant to Show Cause Order in Docket No. 84-281, the Commission modified the licenses of Class II stations on Canadian clear channels, including KIQI, to expand hours of operation from daytime to unlimited time and to limit nighttime power to 500 W.

Thus matters stood until March 30, 1987 when Oro filed an application seeking modification of its licensed San Francisco facility through an increase of nighttime power to 2 kW by waiver of the 500 W restriction. This March 30, 1987 application noted, referring to Oro's Sunnyvale construction permit, that Oro "earlier held" a permit specifying a nighttime power level of 10 kW. Prior to acting upon Oro's March 30, 1987 application, the staff researched the status of Oro's Sunnyvale permit, found that it had expired and, by letter dated April 30, 1987, cancelled Oro's 1980 construction permit and the 1982 Sunnyvale modification pursuant to Section 73.3599 of the Commission's Rules, citing Oro's failure to file either an application for license to cover the construction or an application for extension of time to construct the permit at any time following the permit's expiration in December 1983. On May 19, 1987, Oro filed a "contingent petition for partial reconsideration" of that cancellation, asserting that Oro was unable to construct its Sunnyvale permit due to zoning problems and that its Sunnyvale

permit should be reinstated to avoid the necessity of waiver since the staff had failed to "declare forfeited" Oro's Sunnyvale construction permit for three and one-half years subsequent to its 1983 expiration. Thus, Oro argued that the Sunnyvale construction permit remained in force until the staff's April 30, 1987 cancellation.

On October 16, 1987, the staff returned Oro's March 30, 1987 license modification application which specified a nighttime power of 2 kW as violative of Sections 73.21(a)(2)(iii) and 73.3571(d)(4), finding no basis for waiver of the 500 W restriction. On November 12, 1987, Oro filed a petition for reconsideration of the staff's October 16, 1987 action; Oro supplemented that petition on March 10, 1988 and December 29, 1988, which petition and supplements are currently pending.

On April 29, 1988, the staff, by letter, denied Oro's "contingent petition for partial reconsideration" finding that:

Oro made no progress toward completing the changes authorized by the [1980] construction permit and [1982] modification, and the permit expired December 15, 1983. Subsequently, the permit and modification were formally cancelled pursuant to our letter of April 30, 1987. Further, your request that we defer cancellation and allow you to treat your pending application as a modification of that permit is meritless, as the permit has already been effectively cancelled and the Commission's rules do not provide for such procedural maneuvering.

On May 26, 1988, Oro filed this application for review. Oro argues that it was unable to construct the Sunnyvale construction permit, due to local citizen opposition and zoning problems. Oro then reiterates its argument that the Sunnyvale construction permit remained in effect because that permit had not been cancelled by the Commission. Oro contends that its March 30, 1987 application for a power increase for its licensed San Francisco facility should be treated as a modification to that Sunnyvale construction permit.

Though we do not take issue with Oro's contention that its Sunnyvale modification did not lapse until April 30, 1987, Oro's argument is unavailing. Oro's contingent petition for partial reconsideration failed to show how the staff erred in cancelling the Sunnyvale construction permit. Oro's Sunnyvale construction permit expired on December 15, 1983; Oro neither applied to extend the permit beyond that date nor sought the permit's reinstatement in the three and one-half years following its expiration. While Oro's contingent petition for partial reconsideration stated that large quantities of time and money were expended in an effort to obtain zoning and other local clearances necessary to construct the facilities authorized by the Sunnyvale construction permit, Oro's showing failed to present any new facts or changed circumstances warranting reconsideration of the staff's determination to cancel the permit. Hence, the staff was fully justified in both cancelling the Sunnyvale construction permit and denying Oro's contingent petition for partial reconsideration. Now Oro's application for review notes that "despite intense efforts to overcome [local] opposition, it proved impossible to obtain zoning for the Sunnyvale facilities." Oro's assertion of "impossibility" raised for the first time in its application for review is improper under 47 C.F.R. § 1.115(c) because it relies on questions

of fact or law upon which the designated authority has been afforded no opportunity to pass. However, even as an assertion of fact in support of an extension application it fails to demonstrate that Oro took all possible steps to resolve its problems and construct the permit. Thus, Oro's Sunnyvale permit was properly cancelled and no basis for its reinstatement has been shown.

Oro's attempt to circumvent the current 500 W limit on the nighttime power of KIQI by belatedly styling its March 30, 1987 application as a "modification" of its Sunnyvale construction permit must fail. The fact that Oro filed a modification application on March 30, 1987 prior to the staff's cancellation of the Sunnyvale construction permit is irrelevant inasmuch as the application specifically sought to increase the nighttime power of the licensed facilities serving San Francisco. The application did not seek to modify the proposed Sunnyvale facilities nor did it propose to change the community of license on the construction permit.

Treating Oro's March 30, 1987 application as a request to modify its existing licensed facility, a waiver of the 500 W limit on the 1010 kHz frequency is necessary. However, Oro has failed to state an adequate basis for grant of such a waiver request. Oro's March 30, 1987 application requested a waiver of the 500 W limit so that KIQI(AM) could provide "for extension of service to 100% of the principal city to be served by the station" and argued that "no constraint on future development of new or higher power stations on the channel in the United States" would result. The staff's letter of October 16, 1987 returning that application noted that the nighttime operation on KIQI(AM) was initiated by Show Cause Order under Docket No. 84-281, a Rule Making instrument which created what were previously unpermitted operations on foreign clear channels and which imposed no coverage requirements on KIQI(AM). In view of this, the staff concluded that no affirmative basis for waiver existed, and returned the application as unacceptable for filing.

Oro's petition for reconsideration fails to demonstrate how the staff erred in denying its waiver request. The petition for reconsideration asserts that the staff erred in failing to take into account the effect of Oro's Sunnyvale construction permit on Oro's waiver request. However, the fact that Oro at one time held a construction permit specifying a nighttime power level of 10 kW in Sunnyvale does not obligate the staff to waive the 500 W limit in San Francisco which was subsequently imposed on the 1010 kHz frequency -- especially where the Sunnyvale permit expired three and one-half years before and was properly cancelled by the Commission. Other than reiterating its assertions that the March 30, 1987 application had no preclusive effect and stating that its waiver was consistent with Commission policy favoring a strengthened AM band, Oro's petition for reconsideration provides no basis for overturning the staff's denial of its waiver request.

Apart from the issues discussed, *supra*, it should be noted that the March 30, 1987 application is otherwise unacceptable as specifying a nighttime power level of 2000 watts since the KIQI(AM) transmitter site is located within the nighttime 2 mV/m contour of KKIS(AM) (effective February 17, 1990, the call letters of KKIS will be changed to KIXA) and any increase in power or signal intensity would only aggravate the existing overlapping of signals generally prohibited by Section 73.37(a) of the Commission's Rules. See *Midwest Television, Inc.*, 2 FCC Rcd 215 (1987). That is, the proposal to increase power at

the presently licensed site is unacceptable whether it is viewed as an application to modify the licensed facilities or as an application to modify the Sunnyvale construction permit.

In light of the above, Oro Spanish Broadcasting Inc.'s application for review IS DENIED. Furthermore, Oro Spanish Broadcasting Inc.'s petition for reconsideration filed on November 12, 1987, as supplemented on March 10, 1988 and December 29, 1988 (BMP-881229AD) IS DENIED.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary