

RECEIVED

MAY 18 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC

In re Applications of)	MM Docket No. <u>93-53</u>
)	
KR PARTNERS)	File No. BPH-911001MB
)	
KES COMMUNICATIONS, INC.)	File No. BPH-911003MH
)	
LORI LYNNE FORBES)	File No. BPH-911004MH
)	
For Construction Permit for a)	
New FM Station on Channel 256C)	
in Waimea, Hawaii)	

To: Honorable Joseph P. Gonzalez
Administrative Law Judge

MOTION TO ENLARGE THE ISSUES AGAINST KES COMMUNICATIONS, INC.

TABLE OF CONTENTS

**KES Was Not Financially Qualified by Virtue of its
Contacts With Superior Financial 3**

Timeliness 9

Requested Documents 9

Before the
Federal Communications Commission
Washington, DC

In re Applications of)	MM Docket No. 93-53
)	
KR PARTNERS)	File No. BPH-911001MB
)	
KES COMMUNICATIONS, INC.)	File No. BPH-911003MH
)	
LORI LYNNE FORBES)	File No. BPH-911004MH
)	
For Construction Permit for a)	
New FM Station on Channel 256C)	
in Waimea, Hawaii)	

To: Honorable Joseph P. Gonzalez
Administrative Law Judge

MOTION TO ENLARGE THE ISSUES AGAINST KES COMMUNICATIONS, INC.

Lori Lynne Forbes ("Forbes"), by her attorney, hereby requests the enlargement of the issues in this proceeding as follows:

To determine whether KES Communications, Inc. was financially qualified at the time it filed its application, and if not, whether it is basically qualified to be awarded the construction permit in this proceeding.

To determine whether KES Communications, Inc. engaged in misrepresentations or lack of candor with respect to its original financial certification, and if so, the effect thereof on KES Communications, Inc.'s basic qualifications to become a Commission licensee.

With respect thereto, the following is stated:

KES filed its application in this proceeding on October 3, 1991. Pursuant to the Commission's Revision of Application for Construction Permit, 4 FCC Rcd 3853, 3858-61 (1989), KES stated that its budget was "\$396,399," and that it was relying upon funding in the

amount of \$400,000 from "Superior Financial Mortgage Lending Services" ("Superior Mortgage") in Pasadena, California in support of its financial qualifications. Attachment 1. KES thus represented that its sole source of funds (see John D. Bomberger, 7 FCC Rcd 5516, 5519 ¶ 11 (Aug. 28, 1992)) would be Superior Mortgage and further, stated in its Petition for Leave to Amend ("Petition") filed on March 22, 1993 that it relied on a letter dated September 23, 1991 in support of its certification. Petition at Attachment 2. See Attachment 2 (copy of letter from Superior Financial). Under the instructions contained in the FCC Form 301, for each entity (that is not a financial institution or equipment manufacturer) that has agreed to provide funds to KES, KES was required to obtain and have available for production a financial statement showing:

All liabilities and current and liquid assets sufficient to meet current liabilities;

Financial ability to comply with the terms of the agreement to furnish funds, purchase stock, extend credit, or guarantee loans; and

Net income after Federal income tax, received for the past two years.

FCC Form 301 Instructions, Page 7. There was no amendment filed to KES's application in the one and one-half years during which its application remained pending awaiting designation for hearing. On March 22, 1993, however, KES resubmitted an amendment previously filed with the Commission on March 10, 1993, whereby KES switched its financial reliance from Superior Mortgage to First Interstate Bank. Petition, Attachment 1. That amendment was accepted for filing by Memorandum Opinion and Order, FCC 93M-155 (April 12, 1993). Subsequently, documents were produced in this proceeding, pursuant both to the Standardized

Document Production Order, 47 C.F.R. § 1.325(c)(1)(v) (all bank letter "and other financing documents"), and the "Request for Production of Documents" submitted by Forbes to KES on April 19, 1993. Specifically, pursuant to both requests, KES was required to produce all "financing documents." No balance sheet or financing statement from Superior Financial was produced by KES.

***KES Was Not Financially Qualified by Virtue of its
Contacts With Superior Financial***

Therefore, under Commission precedent, a financial issue with respect to KES's initial financial qualifications is warranted. Under Commission precedent, prior to submitting a broadcast application, an applicant must initially be financially qualified, or else its application is not acceptable even for tender. Revision of Application for Construction Permit for Commercial Broadcast Stations, 4 FCC Rcd 3853, 3859 ¶ 44 (1989). A broadcast applicant has the burden of establishing its financial qualifications. 47 U.S.C. § 308(b); see Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991). In order to be financially qualified, an applicant must have secured a "present firm intention" from a financing source, future conditions permitting, to provide sufficient funds to construct and operate its proposed station for three months without revenues (Merrimack Valley Broadcasting, Inc., 82 F.C.C.2d 166, 167 (1980); Financial Qualifications Standards for Aural Broadcast Applicants, 68 F.C.C.2d 407, 408 (1987)), and that financing source must have adequate funds to provide the loan. As the Review Board has stated:

This financial test does not turn on the subjective intent of the applicant, but upon a narrower and more objective inquiry to determine if, at the time an applicant certified its financial qualifications, it had reasonable assurance of the required funds from a committed source.

Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc., 8 FCC Rcd 1405 (Rev. Bd. 1993). When an applicant is not relying upon a financial institution, it must have secured the assurances of a source that the source itself is agreeable and able to provide the necessary funds, and the applicant must have received (and have available for Commission review or production) the balance sheet of the entity providing the funds. In the event an applicant was not initially financially qualified, it cannot rely on a later-obtained letter in support of its financial qualifications. Marc A. Albert, 6 FCC Rcd 6235 (Rev. Bd. 1991); Texas Communications Limited Partnership, 7 FCC Rcd 3186, 3187 (1992); Ponchartrain Broadcasting Co., FCC 93-156 ¶ 11 (March 31, 1993).

Applying these principles to this case, KES has not, and cannot demonstrate that its original "source of financing" was adequate to provide it with "reasonable assurance" of financing. As Forbes noted in her "Opposition to Petition for Leave to Amend" filed earlier in this proceeding, "Superior Financial Mortgage Lending Services" is not a financial institution. Superior Financial strictly is a loan placement service. Superior Financial itself does not extend loans, nor does it have the funding to supply loans to its customers. Rather, it simply makes its best efforts in finding a suitable lender for its customers to satisfy their financial needs. This state of affairs has been verified through information provided by a local area banker. As he explained in Attachment 3:

I am a Wholesale Account Executive for First Federal Bank of California, based in Santa Monica, California. I am the bank's representative for the east San Fernando Valley area.

Generally, in the financial services area, there are two types of services that are provided to customers, lending and brokering. "Lenders" provide loans to customers, and "Brokers" market credit requests for their customers to financial institutions. Brokers

gather information concerning [the] financial credibility of their client, such as their credit standing, asset portfolio and debts. Appraisal of the property is done and all of the information is submitted to a lender for credit and collateral underwriting and if acceptable, for funding the loan request. Brokers essentially act as middlemen in the funding process. The determination of whether funding will be made is entirely determined by the lender.

* * *

I am familiar with Superior Financial which is located within my servicing area....To the best of my knowledge, Superior Financial is not a financial institution or direct lender, but rather a loan brokerage service. Its function is to simply package loans for the credit review of an institution or other specialized lender, who then decides whether to fund the request based upon the individual loan package that was submitted.

Attachment 3. This information also was verified by direct contacts with Superior Financial.

As Mr. David Hoxeng states in Attachment 4, he contacted Superior Financial, and was provided the following information:

Mr. Taylor [the President of Superior Financial] explained that Superior Financial has investors and institutions for which they put together deals. I specifically inquired whether Superior Financial would lend money directly to borrowers. Mr. Taylor responded, "I package deals for investors...know what they want. I am not a lender." He stated specifically that if a loan is made by one of the investors or institutions with which Superior Financial deals, Superior Financial charges a fee for setting up the loan, and the loan is then serviced either by the financial institution or investor making the loan, or by a third party on behalf of the institution/investor.

Mr. Taylor also indicated that obtaining financing for a start-up business was rare. He said that if a proposed proprietor had "20-30 years of experience in the same line of work," it was possible that financing could be obtained if the financing projections looked good. Otherwise, financing such a business was not likely.

Attachment 4. This information also has been confirmed with Dunn & Bradstreet. According to the information provided by Superior Financial with Dunn & Bradstreet, Superior Financial

is owned by Mr. Lloyd Taylor, had "starting capital" of \$10,000 in 1989, and "operates as a mortgage broker (100%)." Attachment 5.

As the United States Court of Appeals recently recognized, where an applicant is not relying upon a financial institution for its proposed financing, it must obtain financial documentation of the source's ability to provide the funding or else face disqualification.

Weyburn Broadcasting Limited Partnership v. FCC, 71 R.R.2d 1386, 1392 (D.C. Cir. 1993).

(Rev. Bd. 1993), which curiously, it is again noted, was released just five days prior to the date KES ostensibly "lost" its financing. In Gaines, an applicant's financial qualifications were questioned, and "[i]n accordance with past precedent the ALJ ruled that the designated issue 'included the question of whether [the applicant] had reasonable assurance at the time it filed its [original financial certification],'" citing Shawn Phalen, 5 FCC Rcd 2622 (Rev. Bd. 1990). The applicant in Gaines, as here, was relying upon a "mortgage company" which allegedly was providing a "line of credit" to an applicant in the amount of \$2.5 million. The Review Board recognized that a "mortgage placement company" was not a "recognized financial institution" and that therefore, in order to be financially qualified, the applicant was obliged to demonstrate that "at the time of certification it satisfied itself that the source of funds has sufficient net liquid assets to meet its financial certification." Gaines, FCC 93R-3 at ¶ 30. In finding that the applicant was not financially qualified, the Review Board quoted the presiding judge's analysis with respect to this matter, stating:

The Performance letter must be deemed to be even less than an accommodation letter. Performance simply did not have the capability to make a loan of \$2.8 million [Performance] acted only as a broker....Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), aff'd, 6 FCC Rcd 1893 (1993), has set down guidelines to determine whether a given financial proposal constitutes reasonable assurance of committed sources of funds. [The applicant] has failed to meet any of these guidelines, which the Commission has deemed essential aspects of reasonable assurance of committed sources of funds. The most that can be said of Performance's posture is that it speculated that [it] might be able to secure a \$2.8 million loan, but that did not constitute reasonable assurance.

Gaines, 8 FCC Rcd at 1410 ¶ 31 (emphasis added). The Review Board stated that the "ultimate conclusion that [the applicant] did not have reasonable assurance and is therefore not financially

qualified is fully supported by the factual record and controlling precedent." Gaines, 8 FCC Rcd at 1410 ¶ 32.

In a similar fashion in this case, the information gathered establishes Superior Financial's apparent status as a mere broker (and not a financial institution), and it also suggests that KES has not (and apparently can not), establish that it ever received provide prior to the time it submitted its application to the Commission the financial data the Commission requires from Superior Financial to establish that Superior Financial was capable of providing the loan to which the company itself apparently was "committing." Moreover, other evidence gather by Forbes strongly indicates that the letter from Financial Mortgage itself was a mere "accommodation," insofar as it has been verified by one knowledgeable source that deals with Superior Financial on an ongoing basis and another source that recently approached Superior Financial for a loan that Superior Financial does not itself extend loans or otherwise provide funding, but merely finds loans for its customers as a broker, on a commission basis. If so, for both these reasons, KES did not have ever have what the Commission recognizes as a "reasonable assurance" of financing from a committed source of funds that had the funds necessary to provide to it at the time it filed its application.

Finally, it appears that KES has implicitly acknowledged that it is aware that its original ostensible "source of financing" was not adequate to satisfy the Commission's financial qualifications standards. The Gaines case was released on March 5, 1993. "Coincidentally,"

ago -- and KES attempted to repair its application with a new source that (in contrast to it

Request 1. Copies of all budgets and business plans (formal or informal) prepared with regard to the proposed construction and operation of KES's original proposed station and copies of notes, memoranda, letters, price lists or other information used in conjunction with the preparation of the budgets.

Request 2. Copies of all documents reflecting any assurance or commitment of funds, provision of funds, or agreements or understandings for the purchase of stock or proposed extensions of credit, from any source which KES relied upon in initially certifying to its financial qualifications in conjunction with its application in this proceeding.

Request 3. Balance sheets or financial statements of any person or entity (except financial institutions or equipment manufacturers) KES has relied upon at any time in support of its financial qualifications for its proposed station.

Request 4. Copies of all documents or notes reflecting any oral or written information (including business plans) provided by KES to any person or entity (including proposed lenders or providers of credit) that KES (1) solicited, or (2) relied upon, to establish its eligibility for a loan or extension of credit for its proposed station, and any response or information KES subsequently received in response to such solicitations.

Request 5. For each person or entity (other than financial institutions or equipment manufacturers) who at any time agreed to furnish funds, purchase stock, extend credit, or guarantee loans for KES for its proposed station, (1) his, her, or its balance sheets or financial statements covering the periods of time such agreement to furnish funds, purchase stock, extend credit, or guarantee loans was in effect; (2) all documents establishing his, her, or its ability to furnish funds, purchase stock, extend credit, or guarantee loans (including copies of documents

establishing the accuracy of the information provided on the balance sheets or financial statements, including copies of bank statements, stock certificates, promissory notes, and appraisals); and (3) all documents showing his, her, or its net income after federal income tax for the two year period preceding such agreement to furnish funds, purchase stock, extend credit, or guarantee loans to KES, and for all periods during which the agreement or understanding was in effect; (4) all documents showing any other promises outstanding by such person or entity to provide loans to other persons or entities.

Request 6. All documents showing the willingness of any person or entity to provide endorsements (e.g., guarantees) with respect to any proposed loans or extensions of credit to KES.

Request 7. All documents withdrawing or revoking (or evidencing any withdrawal or revocation of) any oral or written understanding or agreement by any person or entity to provide funds or credit to KES with respect to its proposed station.

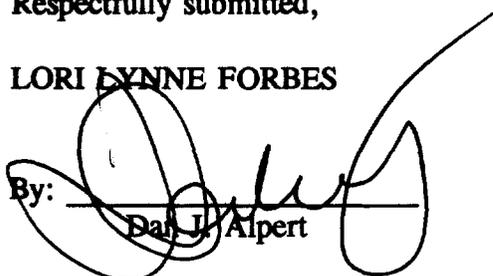
Request 8. For each person or entity who already has supplied funds, purchased stock, extended credit, or guaranteed loans, a copy of the agreement (if any) obligating (or evidencing the willingness of) the person or entity to furnish funds, and documents evidencing the amounts furnished, the terms of repayment (if any), the rate of interest (if any), and security provided (if any).

Request 9. All documents evidencing any attempt (whether successful or unsuccessful) of any funding source KES has relied upon to syndicate (i.e., obtain the participate of additional prospective lenders) any agreement or understanding the funding source may have with KES to for such funding source to furnish funds to KES.

WHEREFORE, it is respectfully the issues in this proceeding be enlarged, and that this Motion to Enlarge the Issues Against KES Communications, Inc. be granted

Respectfully submitted,

LORI LYNNE FORBES

By: 

Dan J. Alpert

1250 Connecticut Ave., N.W.
7th Floor
Washington, DC 20036

May 18, 1993

ATTACHMENT 1

SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

Yes No

2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue.

\$ 396,399.00

3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
Lloyd Taylor President Superior Financial Mortgage Lending Services 77 N. Mentor Avenue Suite 3 Pasadena, CA 91106	(818) 793-3812	Corporate Lender	\$400,000.00

ATTACHMENT 2

**SUPERIOR FINANCIAL
MORTGAGE LENDING SERVICES**

77 N. Mentor Avenue, Suite 3
Pasadena, CA 91106

Telephone (818) 793-3812
Fax (818) 793-3998

September 23, 1991

KAREN SLADE / K E S COMMUNICATIONS, INC.
1148 SO. CITRUS AVE.
LOS ANGELES, CALIFORNIA 90019

Dear Ms. Slade

This letter will confirm the willingness of our institution to provide a loan to you or a corporation controlled by you in the amount of \$ 400,000. to finance the construction and initial operation of your proposed new FM radio station in Waimea, Hawaii, under the following terms and conditions:

Term: (5 years)

Repayment: (Interest only in year one with principal amortized in full over the remaining years in equal installments.)

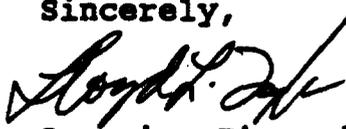
Rate: (12.125 %)

Collateral: Pledge of station assets and of stock if a corporation is the loan applicant.)

We understand that the Federal Communication Commission requires that you have reasonable assurance of the availability of the above described loan. This letter is intended to provide such reasonable assurance but does not constitute a binding commitment on the part of our institution to make the loan. We are familiar with you and your credit history. Our willingness to make such a loan is expressly conditioned upon your receiving all necessary authorizations from the Federal Communications Commission, including the grant of your application for a construction permit in Waimea, Hawaii and is subject at time of disbursement to the following:

1. No adverse changed conditions in the circumstances considered in our decision to make this loan available.
2. A satisfactory credit review.
3. The execution of loan documents (including, without limitation, security and guaranty agreements) all satisfactory to the institution and its counsel in their sole discretion.

Sincerely,



Superior Financial
Lloyd Taylor
President



Steven Malcolm
V.P. Major Lending

ATTACHMENT 3

I, Emed Vallejo, hereby state under penalty of perjury as follows:

I am a Wholesale Account Executive for First Federal Bank of California, based in Santa Monica, California. I am the bank's representative for the east San Fernando Valley area. Below I will summarize our services and our relationship with Superior Financial Mortgage, a mortgage broker located in Pasadena.

Generally, in the financial services area, there are two types of services that are provided to customers. lending and brokering. "Lenders" provide loans to customers, and "Brokers" market credit requests for their customers to financial institutions. Brokers gather information concerning financial credibility of their client, such as their credit standing, asset portfolio and debts. Appraisal of the property is done and all the

ATTACHMENT 4

DECLARATION

I, David Hoxeng, hereby state as follows:

I spoke with Lloyd Taylor, who was identified by the person initially answering the telephone, as President of Superior Financial Mortgage Services ("Superior Financial"), on May 7, 1993.

At that time, I inquired about the possibility of Superior Financial providing financing on two potential deals.

Mr. Taylor explained that Superior Financial has investors and institutions for which they put together deals. I specifically inquired whether Superior Financial would lend money directly to borrowers. Mr. Taylor responded, "I package deals for investors...know what they want. I am not a lender." He stated specifically that if a loan is made by one of the investors or institutions with which Superior Financial deals, Superior Financial charges a fee for setting up the loan, and the loan is then serviced by the financial institution or investor making the loan, or a third party on behalf of the institution/investor.

Mr. Taylor also indicated that obtaining financing for a start-up business was rare. He said that if a proposed proprietor had "20-30 years of experience in the same line of work," it was possible that financing could be obtained if the financing projections looked good. Otherwise, financing such a business was not likely.

I declare under penalty of perjury that the foregoing is true and correct.



David E. Hoxeng

Dated: 5/17/93

ATTACHMENT 5

COPYRIGHT (C) 1990
DUN & BRADSTREET INFORMATION SERVICES

Profiles of more than 1.5 million public and private companies, including history and operations background data for all records and comprehensive financial data for more than 750,000 companies

SUPERIOR FINANCIAL MORTGAGE
PASADENA, CA

PRESS (RETURN) FOR

COMPANY HISTORY & OPERATIONS: COMPANY BACKGROUND, BIOGRAPHICAL
SKETCHES OF KEY OFFICIALS AND A DESCRIPTION OF OPERATIONS

Name & Address:

SUPERIOR FINANCIAL MORTGAGE
77 N MENTOR AVE STE 3
PASADENA, CA 91106

Telephone: 818-793-3812

DUNS Number: 78-772-8443

Line of Business: MORTGAGE BROKER

Primary SIC Code: 6163

Year Started: 1989

Employees Total:	4	Sales:	250,000
Employees Here:	4	Net Worth:	----

HISTORY

04/10/92

LLOYD TAYLOR, OWNER

Ownership acknowledged verbally by Lloyd Taylor, owner, on APR 10 1992.

Business started Nov 1989 by Lloyd Taylor. Starting capital \$10,000 derived from \$10,000 savings.

LLOYD TAYLOR born 1957. 1989-present active here. 1987-1989 vice president with Wong Financial, Los Angeles, CA. Held no financial interest. 1985-1987 employed by Modern Mortgage, Van Nuys, CA. 1983-1986 employed by California State University, Northridge, CA. 1981-1983 employed by Nakamichi USA Corp, Santa Monica, CA. 1977-1981 employed by General Motors, Detroit, MI.

OPERATION

04/10/92

Operates as a mortgage broker (100%). Revenues are derived from commissions or a percentage of loan amount. Sells to general public. Territory : Los Angeles, Orange, Riverside and San Bernardino counties, including mainly Pasadena, Altadena and Los Angeles, CA. Nonseasonal.

EMPLOYEES: 4 including owner.

FACILITIES: Leases 1,500 sq. ft. on second floor of a two story building.

LOCATION: Central business section on side street.

00-00(5BZ /751)

00000

153 111