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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-584
32368

DISPATCHED BY
In re Applications of

KR PARTNERS

KES COMMUNICATIONS, INC.

LORI LYNNE FORBES

For Construction Permit for a
New FM Station On Channel 256C
in Waimea, Hawaii

) MM DOCKET NO. 93-53
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) File No. BPH-911001MB
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) File No. BPH-911003MH
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) File No. BPH-911004MH
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MEMORANDUM OPINION AND ORDER

Issued: September 14, 1993; Released: September 15, 1993

1. Under consideration is the Motion to Enlarge Issues Against KES Communications, Inc., filed by KR Partners (KR) on April 15 1993; the KES Opposition to Motion to Enlarge the Issues, filed by KES Communications, Inc. (KES) on May 5, 1993; the Reply to KES Opposition to Motion to Enlarge the Issues, filed by KR on May 24, 1993; the Motion to Enlarge the Issues Against KES Communications, Inc., filed by Lori Lynne Forbes (Forbes), on May 18, 1993; the Second Motion to Enlarge the Issues Against KES Communications, Inc., filed by KR on May 18, 1993; the Petition for Leave to Amend, filed by KR on May 27, 1993; the Petition for Leave to Amend, filed by KR on August 23, 1993; the Joint Request for Approval of Settlement Agreements, filed by KR, KES, and Ms. Forbes, on August 23, 1993; the Motion for Summary Decision, filed by KR on August 26, 1993; and the Mass Media Bureau's Consolidated Comments on Joint Request for Approval of Settlement Agreements, Petition for Leave to Amend, and Motion for Summary Decision, filed on September 1, 1993.

Motions to Enlarge Issues

2. KR seeks to designate an antenna site availability issue and a related misrepresentation issue against the KES application. In support of its request, it states that KES lacked, and still lacks, a reasonable assurance of the availability of its designated site, and that its statement, to the effect that it did, constituted a misrepresentation to this Commission.

3. The settlement agreements tendered for approval in this proceeding contemplate the dismissal of the KES application. Therefore, whether or not KES has an antenna site is no longer relevant. However, KR's claim that KES deliberately mislead the Commission is still pertinent to a resolution of this matter, since, according to the terms of the agreement, KES' sole principal, Karen E. Slade will acquire a 50 percent equity interest in the surviving applicant.

4. KES submits, as part of its opposition statement, declarations from William G. Brown, the President of Brown Communications, Inc., and from Conrad Loui, the manager of network services for Motorola, the lessee of KES' proposed antenna site. Both affirm Ms. Slade's contention that at the time she signed the KES application, she had a reasonable assurance of the availability of an antenna site. Specifically, they state that there was no bar at that time or at present to erecting a larger tower to accommodate KES' antenna, and that Motorola was and is receptive to the construction of such a tower. As to another point raised by KES, Ms. Slade, in her opposition statement, freely admits that she inadvertently listed Mr. Loui as the owner of the site rather than as owner's agent on the application form. There has not been, however, any showing here that Ms. Slade deliberately sought to mislead the Commission as to Mr. Loui's status. This apparently inadvertent error on the part of Ms. Slade, standing alone, does not, in the Presiding Judge's opinion, warrant the designation of a misrepresentation issue against KES.

5. The Presiding Judge finds, therefore, that KR has failed to show good cause for granting its motion, and it will be denied in its entirety.

6. Ms. Forbes and KR, in separately filed motions, seek the designation of financial qualifications issues and related misrepresentation issues against the KES application. Since KES will be dismissing its application, pursuant to the terms of the settlement agreements submitted here for approval, its financial status is no longer relevant. However, Movants argue that KES sought to deliberately mislead the Commission as to its financial status at the time it filed its application and concealed its alleged lack of sufficient funding from that date to the present. Since, as noted above, it is proposed that Ms. Slade will acquire an equity interest in the surviving applicant, her lack of candor with this Commission or an attempt on her part to deliberately mislead this Commission as to a matter of significance would have a bearing on the suitability of the surviving applicant to be a Commission licensee. Accordingly, it is necessary to reach a determination as to whether or not Movants have raised sufficient questions of fact as to the truthfulness of KES' representations to this Commission to warrant further investigation.

7. Even if we assume that mistakes were made by KES in setting forth the full extent of its anticipated expenses in executing its proposal, there has been no showing of a willful intent on the part of KES or its sole principal to mislead this Commission as to the total costs of its proposal. Similarly, there has been no showing that KES deliberately withheld information which it knew to be relevant as to the nature of the institution which was the designated source of its funding. In the absence of such a showing, no purpose would be served in ordering further inquiry into this matter. Accordingly, both motions will be denied in their entirety.

Motion for Summary Decision and Petition for Leave to Amend

8. KR moves for summary decision in its favor of the financial qualifications issue specified against its application in the Hearing Designation Order, DA 93-239, released on March 16, 1993. KR had previously amended Section III of its application to reflect a cost estimate of \$239,225. On May 27, 1993, KR submitted a further Petition for Leave to Amend, as a matter of right, in response to the designation of the above referenced issue. This amendment updates Section III of KR's application to provide revised cost estimates for KR's proposed station, as well as additional information concerning its earlier revision of KR's cost estimates submitted as part of an earlier amendment filed on June 3, 1992 and received by this Commission. In a further Petition for Leave to Amend, filed on August 23, 1993, KR includes a new financial certification for the contemplated surviving applicant which sets forth the anticipated costs of construction and operation, and the availability of funds in the amount of \$400,000, in the form of a loan commitment from First Interstate Bank, to meet these costs. The Petition also includes a request that the requirements of Section 73.3573(b) of the Commission's Rules be waived in the event that the Commission acts favorably on the joint petition for approval of settlement agreements pending in this proceeding.

9. Based on the information supplied in the amendment filed as a matter of right and in the August 23, 1993 amendment which will be received below, the Presiding Judge concludes that a grant of summary decision in KR's favor is warranted. The surviving applicant has secured a loan commitment from an established financial institution in the amount of \$400,000, which exceeds not only its most recent estimate of \$239,225 for the construction and operation of the proposed station, but its original estimate of \$388,300 as well. There being no longer any question as to surviving applicant's financial qualifications, the relief sought will be granted. Furthermore, the Presiding Judge finds good cause for granting a waiver of the requirements of Section 73.3573(b) of the Commission's Rules, and it will be so ordered.

Joint Request for Approval of Settlement Agreements

10. The parties to this proceeding seek approval of settlement agreements which provide, in pertinent part, for the merger of the KR and KES applications, with KR's principal, Julie K. O'Connor and KES's Karen E. Slade becoming 50 percent equity owners in a newly formed Hawaiian corporation to be called the Hawaii Broadcasting Company, Inc ; and that Ms. Forbes agrees to seek voluntary dismissal of her application in return for a cash payment of \$32,500, which does not exceed the amount of legitimate and prudent expenses which she incurred in preparing, filing, and prosecuting her application.

11. The Presiding Judge finds that the parties to the settlement agreements are in substantial compliance with the requirements of Section 73.3525 of the Commission's Rules. In addition, Petitioners have demonstrated that approval of the tendered settlement agreements would be in the public interest since it would hasten the inauguration of a new FM service in Waimea, Hawaii,

and would save this Commission and the other parties involved additional expenses. The Parties also declare that their respective applications were not filed for the purpose of reaching or carrying out a settlement agreement. Accordingly, the Presiding Judge finds good cause for granting the Joint Request and approving the settlement agreements, and it will be so ordered.

Rulings

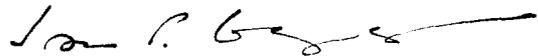
IT IS ORDERED, the Petition for Leave to Amend, filed by KR Partners on August 23, 1993, IS GRANTED, and the amendment IS RECEIVED; and that the requested waiver of the requirements of Section 73.3573(b) of the Commission's Rules IS GRANTED.

IT IS FURTHER ORDERED, that the Motion to Enlarge Issues Against KES Communications, Inc., filed by KR Partners on April 15, 1993, the Motion to Enlarge the Issues Against KES Communications, Inc., filed by Lori Lynne Forbes on May 18, 1993, and the Second Motion to Enlarge Issues Against KES Communications, Inc., filed by KR Partners on May 18, 1993, ARE DENIED; and the Motion to Enlarge Issues Against Lori Lynne Forbes, filed by KR Partners on April 15, 1993, IS DISMISSED as moot.

IT IS FURTHER ORDERED, that the Motion for Summary Decision, filed by KR Partners on August 26, 1993, IS GRANTED, and the financial qualifications issue designated against the KR Partners' application by the Hearing Designation Order, DA 93-239, released on March 16, 1993, IS RESOLVED in KR Partners' favor.

AND IT IS FURTHER ORDERED, that the Joint Request for Approval of Settlement Agreements, filed by KR Partners, KES Communications, Inc., and Lori Lynne Forbes, on August 23, 1993, IS GRANTED, and the settlement agreements ARE APPROVED; that the applications of KES Communications, Inc. (File No. BPH-911003MH) and that of Lori Lynne Forbes (File No. BPH-911004MH) ARE DISMISSED; that the application of Hawaii Broadcasting Company, Inc., formerly KR Partners, for a new FM station on Channel 256C in Waimea, Hawaii (File No. BPH-911001MB) IS GRANTED, and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Joseph P. Gonzalez
Administrative Law Judge