

Oct 31 4 47 PM '96

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

DISPATCHED BY

In the Matter of)	MM DOCKET NO. 96-184
)	
CONCORD AREA BROADCASTING)	
)	
Order to Show Cause Why the License)	
for Station KRHT(AM) Concord, California)	
Should Not Be Revoked)	

Appearances

David Tillotson, Esq. on behalf of Concord Area Broadcasting, Inc. and
Kenneth M. Scheibel, Jr., Esq. on behalf of the Chief, Mass Media Bureau, Federal
Communications Commission.

**SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK**

Issued: October 24, 1996

Released: October 28, 1996

Preliminary Statement

1. By Order to Show Cause and Hearing Designation Order (DA 96-1466)¹ released August 30, 1996 ("OSC"), the Assistant Chief, Audio Services Division, Mass Media Bureau, by delegated authority, directed the Concord Area Broadcasting, Inc. ("Concord") to show cause why the license for Station KRHT(AM), Concord, California (the "Station"), should not be revoked. The following issues were specified: (OSC at ¶ 5.)

- (1) To determine whether Concord Area Broadcasting has the capability and intent to expeditiously resume the broadcast operations of KRHT(AM), consistent with the Commission's Rules;
- (2) To determine whether Concord Area Broadcasting has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules; and
- (3) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Concord Area Broadcasting is qualified to be and remain the licensee of KRHT(AM).

¹ See ERRATUM, released September 9, 1996 correcting DA number from DA 96-184 to DA 96-1466.

2. The OSC placed upon the Mass Media Bureau ("Bureau") both the burden of proceeding with the introduction of evidence and the burden of proof with respect to all the issues. (OSC at ¶ 6.)

3. Presently under consideration are a Motion for Summary Decision ("Motion"), filed on September 20, 1996, by Concord; Supplements, thereto, filed on October 3, 1996, October 21, 1996, and Comments in support of the Motion filed on October 10, 1996, by the Bureau.

Findings of Fact

4. The OSC recited the following facts as the basis for the specification on the issues in this proceeding (OSC at ¶¶ 2, 3 and 4, footnotes omitted.):

Concord suspended broadcast operations on January 31, 1993, due to stated financial difficulties and the loss of the lease for its transmitter site. The licensee indicated that it required special temporary authority to remain silent while it reorganized the licensed entity and found a new transmitter site. On June 1, 1993, the staff granted Concord special temporary authority to resolve its problems.

On May 20, 1996, Concord requested an eighth extension of this temporary authorization, reporting that discussions were continuing with city officials regarding the utilization of city property for KRHT's proposed 5-tower array. On July 19, 1996, Concord's request was approved for a thirty-day period. The authorization indicated that no further extensions were contemplated absent documentation regarding the licensee's lengthy attempts to secure a suitable transmitter site.

On August 15, 1996, Concord requested a ninth extension of its silent authority. This new request establishes that both the city and the owner of a site in Canyon Creek rejected Concord's proposals to relocate KRHT's facilities on their properties. Concord contends, however, that the city administration provided it with two unspecified leads for other sites. However, a letter dated August 14, 1996 from Peter Dragovich, City of Concord Senior Administrative Analyst, does not appear to support this claim. Moreover, KRHT(AM) has been off-air for over three years, is not presently authorized to remain silent, has not shown the likelihood of securing a transmitter site in the near future, and has not demonstrated that broadcast operations can be resumed expeditiously. Consequently, Concord is in apparent violation of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules.

5. In its Motion for Summary Decision, Concord does not dispute the facts quoted above. Rather, Concord relies on the following additional facts to support its Motion.²

6. On September 5, 1996, Corrie Development Corporation, one of the property owners that the City of Concord had suggested that Buerry contact, sent Buerry a letter advising him that it was interested "in leasing a portion of [its] property to relocate your 5 towers and transmitter." (Motion at 6.)

7. On December 3, 1993, the Commission published a tentative list of the stations that had applied to migrate to the expanded AM band. KRHT ranked ninth on this list, virtually guaranteeing it an expanded band frequency if it were to retain this ranking when the final ranking of applicants for the expanded band was released. Following release of the tentative ranking of applicants for the expanded band, Coleman spoke with an official in the FCC's AM Branch and explained that, in light of the difficulties that Concord was experiencing in locating a site at which KRHT's 5-tower array could be constructed, it was Concord's intention if it were ultimately awarded a frequency in the expanded band to turn in its construction permit for the new 5-tower array on its current frequency and only to construct an expanded band facility since a station in the expanded band would operate nondirectionally, requiring far less land and giving Concord much more flexibility, in selecting a transmitter site. (Motion at pp. 6-7.)

8. The staff official advised Coleman that the AM Branch would not object to Concord deferring action on finding a site at which new facilities for KRHT could be constructed until after a final decision was made as to whether Concord would be awarded an expanded band frequency, and this advice was confirmed by the staff action granting Concord's application for reinstatement of its construction permit for KRHT's five tower array wherein Concord had clearly stated its intention to defer efforts to secure a new site for KRHT until a final determination was made as to whether it would be awarded an expanded band frequency. (Motion at 7.)

9. On August 21, 1995, Coleman filed a report concerning steps that Concord had taken to construct the facilities authorized in its construction permit for KRHT's new 5-tower array wherein he reiterated the problems that Concord was experiencing in locating a suitable site for KRHT due to "the relatively large tract of land needed" and "the high level of urbanization in the areas in which the facilities would need to be constructed." In this letter, Coleman also reiterated Concord's decision not to continue to search for a new for KRHT until the Commission made a final determination as to whether KRHT would be awarded a channel in the expanded band. (Motion at 8.)

10. On or about November 1, 1995, Coleman and Concord's FCC counsel met with the Chief of the AM Branch, James Burtle and William Ball, an engineer in the AM Branch, to discuss Concord's problems in securing a suitable site for the facilities specified in KRHT's construction permit and whether Concord should file an application to reinstate its construction permit for the facilities. Concord

² The factual matter contained in Concord's Motion is supported by the declaration under penalty of perjury of Chester P. Coleman, ("Coleman") Concord's Chairman and 50% stockholder (referred to as "Motion at pg. ___") and the specific exhibits cited in the text.

had allowed the permit to expire because the site specified in the construction permit was no longer available and, therefore, Concord would not be able to construct those facilities regardless of the outcome of its application to migrated in the expanded band. Messrs. Burtle and Ball advised Coleman that Concord should file an application to reinstate the expired construction permit, notwithstanding the fact that it had no intention of constructing the facilities, since the construction permit facilities would be used in computing the amount of interference caused by KRHT and, thus, KRHT's priority ranking for an expanded band frequency. (Motion at 9.)

11. Following the meeting with Messrs. Burtle and Ball, Concord filed an application (BP-951103DA) for reinstatement of KRHT's expired permit for its five tower array. This application, which was granted on February 16, 1996, specifically reflected the fact that Concord had no intention of building the facilities if it was awarded an expanded frequency and that Concord did not intend to resume looking for a new site for KRHT until the question as to whether it would be awarded an expanded band frequency was resolved. (Motion at 9-10.)

12. When the Telecommunications Act of 1996 was enacted with the provisions that stations which had been silent for one year would lose their licenses, Concord realized that it would need to locate a site at which KRHT could be placed back on the air before the first anniversary of enactment of the Act. Therefore, Concord renewed its suspended efforts to secure a site at which KRHT's five tower array could be constructed. These efforts consisted of renewing negotiations with the City of Concord concerning the possibility of using the Concord Pavilion site and contacting the owners of several other potential sites. As a result of these renewed efforts, Concord secured reasonable assurance that it could lease property of sufficient size to accommodate KRHT's five tower array from Corrie Development Corporation and from the Leshar Trust. (Motion at 10.)

13. Even before Corrie Development and the Leshar Trust properties had responded to Concord's requests to lease their properties for KRHT, Coleman sent topographical maps of their properties to Hatfield and Dawson and instructed that firm to study the feasibility of the properties as transmitter sites for KRHT. Immediately after being notified that Corrie Development and the Leshar Trust had agreed to lease their properties to KRHT, Coleman instructed Hatfield and Dawson to expedite their review of both sites and to prepare the technical portion of an application for construction permit for one of the sites as soon as a determination is made that one of the sites meets the FCC's technical requirements. (Motion at 11.)

14. On September 20, 1996, Motion was supplemented to reflect that Concord's engineering consultants, Hatfield and Dawson have determined that KRHT can operate from the Leshar Property site referred to in the Motion, in full compliance with the FCC's technical rules and that Hatfield and Dawson are in the process of preparing the technical portion of an application for a construction permit for KRHT to operate from that site.

15. Concord intends to promptly file an application to relocate KRHT to the Leshar Property site with requests for expedited processing of the application and for special temporary authority to allow Concord immediately to install a

single tower so that KRHT can begin operations at reduced power prior to February 9, 1997. (Motion at 11.)

16. Concord notes that at all relevant times Station KRHT has been silent with Commission authorization. Moreover, as reflected in the requests for extensions of KRHT's silence authority, the applications for reinstatement of its construction permit, and the report to the Commission that Coleman filed in August, 1995, the Commission has been kept fully apprised as to the difficulties that Concord faced in securing a new transmitter site and of Concord's decision not to pursue a new transmitter site until a final determination was made as to whether KRHT would be awarded an expanded band frequency. It is also clear from the documents submitted herewith that the Commission gave its tacit approval of Concord's decision to defer finding a new site for KRHT until a final determination was made as to whether KRHT would receive an expanded band frequency when by granting Concord's applications for reinstatement of KRHT's construction permit and Concord's requests for extension of KRHT's authority to remain silent after the Commission was explicitly apprised of Concord's decision in this regard. (Motion at pp. 11-12.)

Conclusions of Law

17. Concord's Motion is filed pursuant to Section 1.251 of the Commission's Rules. This Section requires, inter alia, that the moving party demonstrate, by supporting affidavit or by other materials subject to consideration by the Presiding Judge, that there is no genuine issue of fact for determination at the hearing. In the instant case, Concord indicates that it did not return Station KRHT(AM) to the air during the February 1993 through August 1996 period because Concord, after losing the lease for its transmitter site, expected to migrate to the AM expanded band, and thus suspended its search for a site large enough to support the directional antenna system needed for its existing-band construction permit. An award of an expanded-band construction permit would allow Concord to employ a non-directionalized antenna system, utilizing a smaller site. Concord correctly observes that the lengthy process attending the Commission's finalizing the expanded-band allocation was not a circumstance within Concord's control. Indeed, the Bureau submits that Concord has established that its delay in return the station to the air was reasonable.

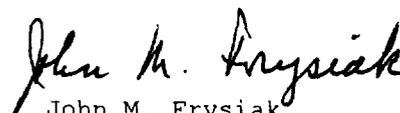
18. The Bureau further submits that, in view of the foregoing, no issue warranting hearing on the matter of revocation of the station's license, or possible violation of Section 73.1740 and/or 73.1750 of the Commission's Rules, any longer exists. The Bureau supports Concord's Motion and joins in its request that the instant proceeding be terminated.

¹ In support of its original STA request on February 26, 1993, Concord submitted the February 18, 1993 eviction notice it received from counsel for its landlord. After acquiring the property through foreclosure, the new owners refused to extend a lease for the use of radio towers on their site.

Accordingly, IT IS ORDERED that the Motion for Summary Decision, filed September 20, 1996, by Concord Area Broadcasting, Inc. IS GRANTED, and issues (1), (2) and (3) ARE RESOLVED in favor of Concord Area Broadcasting, Inc.

IT IS FURTHER ORDERED that the hearing scheduled for January 23, 1997 IS CANCELLED and this proceeding IS TERMINATED.⁴

FEDERAL COMMUNICATIONS COMMISSION



John M. Frysiak
Administrative Law Judge

⁴ In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).