

# KOERNER & OLENDER, P.C.

Attorneys at Law  
11913 Grey Hollow Court  
North Bethesda, MD 20852-5706

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Tel. (301) 468-3336  
Fax (301) 468-3343

FILED/ACCEPTED

DEC 28 2009

Federal Communications Commission  
Office of the Secretary

Robert L. Olender \*  
[rolender.law@comcast.net](mailto:rolender.law@comcast.net)

December 28, 2009

James A. Koerner  
[jkoerner.law@comcast.net](mailto:jkoerner.law@comcast.net)  
\*not admitted in MD

Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals, TW-A325  
445 Twelfth Street, S.W.  
Washington, DC 20554

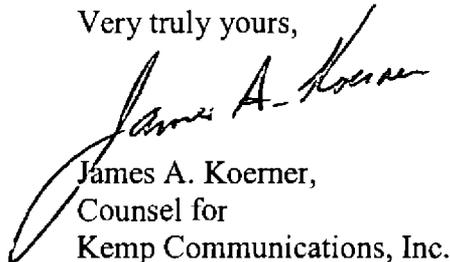
Re: MB Docket No. 09-189  
RM-11564

Dear Ms. Dortch:

On behalf of Kemp Communications, Inc., there are transmitted herewith an original and four (4) copies of its Opposition to Motion for Leave to File Late Comments, directed against the Motion filed by Kona Coast Radio, LLC on December 15, 2009 in the above-referenced proceeding.

Should additional information be necessary in connection with this matter, please communicate with this office.

Very truly yours,

  
James A. Koerner,  
Counsel for  
Kemp Communications, Inc.

Cc: Will Kemp, Esq.

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ORIGINAL

Before the  
Federal Communications Commission  
Washington, DC 20554

FILED/ACCEPTED

DEC 28 2009

Federal Communications Commission  
Office of the Secretary

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MB Docket No. 09-189
FM Broadcast Stations.	)	RM-11564
(Kahuku, Hawaii)	)	

To: Secretary, FCC  
Attn: Assistant Chief, Audio Division, Media Bureau

**OPPOSITION TO MOTION FOR LEAVE  
TO FILE LATE COMMENTS**

Kemp Communications, Inc. ("Kemp"), by its attorneys, hereby opposes the "Motion for Leave to File Late Comments" ("Motion"), filed December 15, 2009 in the above-captioned proceeding by Kona Coast Radio, LLC ("Kona Coast").

Kona Coast is the petitioner in this proceeding, proposing the allotment of FM Channel 296C3 at Kahuku, Hawaii. Kemp filed timely Comments and Counterproposal, advocating that Channel 296C2 be allotted to Kualapuu, Hawaii instead.

Normally, Section 1.45(b) of the Rules<sup>1</sup> provides that oppositions to motions are to be filed within ten (10) days of the filing of the original motion. However, that section assumes that the opponent had actual or constructive knowledge of the original filing. In this case, Kona Coast did not serve Kemp (nor was it required to), and the first inkling Kemp had about the late Kona Coast filing was its posting on the FCC's Electronic

<sup>1</sup> 47 C.F.R. § 1.45(b).

Comment Filing System (ECFS) on December 23, 2009. This Opposition is filed within two (2) business days of such posting, and, therefore, should be considered timely.

The Notice of Proposed Rule Making in this matter was released October 23, 2009, specifying December 14, 2009 as the date for Comments. The Appendix attached to the Notice contained the usual specification that the proponent of a proposed allotment is expected to file comments restating its intentions concerning application and construction. The date for such comments was clearly December 14, 2009.

On December 14, 2009, Kemp filed its Comments and Counterproposal. On the same date, in accordance with current procedures, Kemp also filed a construction permit application, and paid the requisite filing fee (File No. BNPH-20091214AEI).

Kona Coast filed its Comments, along with its Motion, on December 15, 2009, a day after the date required. Section 1.415(d) of the Rules<sup>2</sup> specifically provides that no additional comments may be filed, following the date set for comments, unless specifically requested or authorized by the Commission, neither of which is applicable in this instance.

In the Motion, Kona Coast did not address Section 1.415(d). Nor did it advance any excuse, plausible or implausible, for filing late, such as illness, adverse weather conditions, natural catastrophe, or even delayed mail delivery. Kona Coast simply stated, as a conclusion (albeit erroneous), that the late acceptance would not adversely impact any other proposal. Of the two cases cited by Kona Coast, one comes close to its situation.<sup>3</sup> In *Dulac* no excuse was given, but there was, in fact, no adverse impact on

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<sup>2</sup> 47 C.F.R. § 1.415(d).

<sup>3</sup> *Dulac, Louisiana*, Report and Order, 24 FCC Rcd 10154 (2009).

any other proposal. On the other hand, in *Willows, California*<sup>4</sup> the Commission specifically noted that the comments had been dated and mailed from Willows well in advance of the deadline, but had not arrived in time. In both cases, Section 1.415(d) was cited, and in both cases, no other proposals were impacted.

This presents a different situation. Here, Kemp filed timely Comments and advanced a Counterproposal to the Kona Coast proposal. Accordingly, Kona Coast's late filed Comments do prejudice another proposal. The Commission can be assured that, if Kemp's Comments and Counterproposal had been filed a day late, Kona Coast would be insisting that the filing be dismissed and disregarded as adversely impacting its proposal.

As matters presently stand, Kona Coast has failed to file a timely expression of interest in the Kahuku proposal, but Kemp has filed a timely expression of interest, in the form of a counterproposal, in a Kualapuu allotment. Thus, the Kahuku proposal (assuming no other expressions of interest were timely filed) must be disregarded, and this proceeding should go forward as a single Kualapuu proposal.

Kona Coast is not completely shut out. It is free to participate in any auction proceeding for a Kualapuu allotment, which would be, as demonstrated in Kemp's Comments, a larger community.

Accordingly, Kemp hereby requests that the Motion filed by Kona Coast be denied, that its Comments be dismissed, and that this proceeding go forward as an allotment proceeding for Kualapuu, Hawaii.

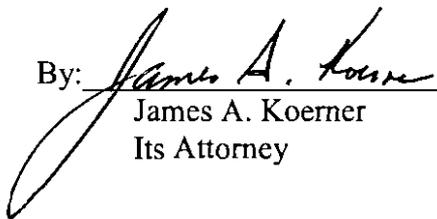
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<sup>4</sup> 11FCC Rcd 9180 (1996).

Respectfully submitted,

KEMP COMMUNICATIONS, INC.

By:

  
James A. Koerner  
Its Attorney

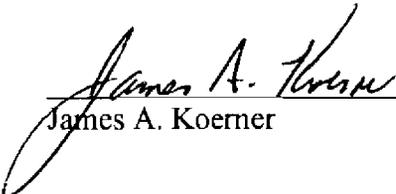
KOERNER & OLENDER, P.C.  
11913 Grey Hollow Court  
North Bethesda, MD 20952  
(301) 468-3336

December 28, 2009

CERTIFICATE OF SERVICE

I, James A. Koerner, do hereby certify that a copy of the foregoing "Opposition to Motion for Leave to File Late Comments" was served this 28<sup>th</sup> day of December, 2009, via first class mail, postage prepaid, upon the following:

A. Wray Fitch, III, Esq.  
Gammon & Grange, P.C.  
8280 Greensboro Drive, 7<sup>th</sup> Floor  
McLean, VA 22102-3807

  
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James A. Koerner