

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

In Re: Applications of

Big Island
Broadcasting
Company, Ltd.

For Authority to Construct Three FM Broadcast Booster Stations	File No. BPFTB-881114TC Keaouhou, Hawaii
	File No. BPFTB-881114TD Puueo, Hawaii
	File No. BPFTB-881114TE Waikii, Hawaii

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: January 25, 1991

By the Commission:

1. The Commission has before it for consideration the above-captioned applications for construction permits for three proposed new FM broadcast booster stations filed by Big Island Broadcasting Company, Ltd. (Big Island); a request for waiver of Sections 74.1231(h), 74.1232(e), 74.1235(c) and, 74.1237(d) of the Commission's Rules; informal objections filed by Sirius Communications, Inc. (Sirius), permittee of station KLUA(FM), Kailua-Kona, Hawaii; a "response" to the informal objections filed by Big Island; and other relevant pleadings.

2. An FM booster station receives the signal of a full service FM station and simultaneously retransmits that signal to areas that are unable to receive satisfactory service from the co-owned full service station due to intervening terrain obstructions. An FM booster station operates on the same carrier frequency as its primary full service FM station and may operate with up to 20% of the maximum permissible effective radiated power for the class of primary station that it rebroadcasts. An authorization for an FM booster station is granted only to the licensee or permittee of the full service FM station whose signal it rebroadcasts and is permitted to serve only areas within the predicted service contour of that station. Big Island is the licensee of station KIPA(FM), Hilo, Hawaii. The three booster stations will be located outside the service contour (1 mV/m, 60 dBu contour) of station KIPA(FM). Hence, Big Island has requested a waiver of the rules.

3. In support of its waiver request Big Island asserts that its original application for a construction permit for a Class C facility was designated for comparative hearing (MM Docket 87-63). It further asserts that it reached a settlement with the other applicant. Upon approval of that settlement agreement, the Administrative Law Judge granted Big Island's application for the Class C facility. However, when the authorization was issued, it specified a

Class C1 facility and not the requested full Class C. Big Island states that it filed a petition for reconsideration because Class C1 facilities would not provide island-wide coverage. At that time Big Island believed it could acquire a site that would permit full-island coverage. After further investigation, Big Island's consulting engineer concluded that a transmitter located at the potential site would not place a city grade signal over any part of Hilo, the city of license. Big Island therefore requested dismissal of its petition for reconsideration. At the same time it continued to search for a suitable site which would permit coverage of the entire island.

4. Big Island now asserts that it cannot locate the transmitter of station KIPA(FM) at a site where it can provide service to more than the limited Hilo area because of the unique terrain of the island of Hawaii. In particular, the island is roughly triangular in shape and consists of five volcanic mountains about 20 miles apart, connected by saddles 3,000 to 7,000 feet high, formed by overlapping lava flows. There are two high mountains located in the middle of the island, Mauna Kea which is approximately 14,000 feet above sea level and Mauna Loa which is 11,000 feet above sea level.¹ However, the University of Hawaii has an observatory located on Mauna Kea. If Big Island were to locate its radio transmitter there, it would interfere with the data being received through sensitive detectors installed on the observatory telescopes. Consequently, it is unable to obtain authorization for use of that site. A potential site on Mauna Loa was located but it is in a national park, where the tower height is restricted to fifty feet above ground level. This would prevent satisfactory broadcast service to Hilo, KIPA(FM)'s city of license. Other sites at high elevations would have similar restrictions.

5. Big Island states that the only alternative is to use a series of boosters to provide the island-wide coverage it contemplated when it filed its Class C application. Since these boosters would extend KIPA's coverage beyond the 1 mV/m service contour of its C1 authorization (but not a hypothetical Class C facility), Big Island seeks a waiver of the rules. Big Island contends that grant of the waiver would serve the public interest. According to its engineering showing, the three boosters will provide the following service: nighttime, a first aural service to 1,346 persons, a second to 426 persons and a third to 11,446 persons;² daytime, a second aural service to 1,329 persons and a third to 2,946 persons. Big Island states that this additional service is essential in view of the many natural disasters that occur on the island and the resulting need for at least one station capable of communicating with the island's entire population. In this respect, it submitted a list of natural disasters that have occurred on the Island of Hawaii between October 1983 and September 1988. These include earthquakes, flash floods, tropical storms, water-spouts and volcanic eruptions. Big Island also submitted documentation from the Federal Emergency Management Agency in San Francisco, California, supporting the notion that the Island of Hawaii is unique within the United States for frequency and diversity of its natural disasters. In addition, Big Island provided letters from Mr. Harry Kim, Administrator, Hawaii County Civil Defense Agency, in support of the proposed boosters. Mr. Kim explains that use of the boosters will expand the reach of station KIPA(FM) "to the entire Island, including many areas which currently receive no radio reception." According to Mr. Kim, the boosters will be "extremely beneficial" to

the districts of Kau and Kona, which currently receive little or no local radio broadcasts when the civil defense system is activated.

6. Sirius objects to the waiver request. It states that other broadcast stations licensed by the Commission and not listed by Big Island in its waiver request are operating in areas where Big Island alleged there was no service. In addition, Sirius asserts that there are outstanding construction permits for new service in other areas where Big Island states there is no service. In support of its contentions, Sirius submits a contour map of the broadcast stations serving the relevant parts of the Island of Hawaii which, in its view, demonstrates that the "claims of KIPA as to these areas being unserved are patently false and incorrect." Sirius also argues that boosters will permit station KIPA(FM) to extend its service contour and circumvent the mileage separation requirements of Section 73.207 which could cause interference to co-channel and adjacent channel stations. Sirius explains that this is so because such assignments are allocated on the basis of mileage separation to station KIPA(FM) and not to the booster stations. In addition, Sirius asserts that waiver of the rules would permit Big Island to provide service outside station KIPA(FM)'s 1 mV/m contour without an opportunity for other applicants to apply for the facilities. It would be more appropriate, according to Sirius, for Big Island to petition for Rule Making to allot new channels to the alleged unserved areas and then file applications for construction permits to build full service stations. Sirius claims that Big Island's attempt to extend its service beyond the 1 mV/m contour of station KIPA is closely related to the issues in MM Docket 88-140³ where licensee efforts to extend service beyond the 1 mV/m contour of the primary station is being considered and a freeze has been imposed on the acceptance of new and major change applications for commercial FM translator stations. In Sirius' view, even if the Commission determines that the waiver requests are "meritorious," action must be deferred pending the outcome of Docket 88-140.

7. Big Island, in its response, denies the allegations and alleges that the engineering studies submitted with its waiver request considered all licensed stations and outstanding construction permits, including those listed by Sirius. In addition, Big Island contends that the contour map submitted by Sirius does not refute the maps submitted by it (Big Island). Big Island continues to assert that grant of its waiver request would serve the public interest.

8. The purpose of FM broadcast booster stations is to provide service to areas within the primary station's predicted service contour that are not served by the signal of the primary station due to intervening terrain obstructions. The booster rules are designed to assure that booster stations operate in a manner that preserves the existing service areas of the full-service stations they retransmit. FM booster stations are not to be used for competitive purposes to expand the service areas of the primary stations they retransmit. Such use would alter the fundamental secondary fill-in service intended for FM boosters. Applicants for waiver of the booster rules must demonstrate that the goal or results to be achieved by the proposal for which the waiver is sought would serve the public interest and that the same results could not be achieved consistent with the rules by any other means. Applicants must also demonstrate that grant of the waiver request would not undermine the goals and policies the rules were designed to promote. The Commission is ob-

ligated to give all waiver requests a "hard look." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). However, an "applicant for waiver faces a high hurdle." *Rio Grande Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968). Applicants requesting waiver of our rules must plead specific facts that demonstrate waiver would serve the public interest.

9. The contour map submitted by Sirius and the contour maps submitted by Big Island show that approximately one-half of the area to be served by KIPA's proposed Puueo booster is presently unserved by any other broadcast station. We thus find no merit in Sirius's allegation that the information submitted by Big Island is false or misleading. Nor do we agree with Sirius's contention that the proposed boosters would cause interference to other FM stations. There is no showing that existing facilities would be adversely affected. Further, if the booster stations were granted and were subsequently shown to cause interference due to modification of existing full service FM stations or new allocations, Big Island would be required to suspend operation. This would be consistent with the secondary nature of boosters, which are not permitted to continue to operate where they cause interference to the direct reception by the public of the off-the-air signal of any authorized broadcast station.⁴

10. Turning to the specific proposals before us, Big Island first asserts that its original intent was to serve the entire island of Hawaii. Big Island supports its contention by stating that it applied for and was granted authorization for Class C facilities which, if centrally located, would have encompassed the island with a 1 mV/m signal and no waiver would have been necessary. However, the centrally located site was only hypothetical and because of island-wide site restrictions, Big Island was unable to meet the minimum antenna height requirements of the rules for Class C facilities. An authorization for Class C1 facilities was therefore issued. We conclude that the intent of a broadcaster to serve a wider area than it is ultimately licensed to serve furnishes no independent basis for waiver of our rules, especially where these rules are specifically intended to limit the broadcaster's ability to extend its signal beyond its authorized service area. We therefore reject this argument as a basis for granting Big Island's waiver requests.

11. Big Island also contends that waiver is necessary because the numerous and severe natural disasters that occur on the Island require that there be one station that can serve all inhabited areas. We do not agree that an unusual number of severe natural disasters requires a single station to cover the entire area. Our experience suggests that broadcasters consistently cooperate to provide disaster information to residents of affected areas. Since there are a number of broadcast stations serving most parts of the Island, we also reject Big Island's second contention as a basis for granting the waiver requests.

12. Finally, Big Island argues that its proposals will provide service to unserved areas. We find that the areas to be served by the Keauhou and Waikii boosters are already receiving service from at least one authorized broadcast facility. Most of the areas covered by these proposed boosters receive coverage from two or more facilities. Therefore, we see no need for Big Island to extend its signal into these particular areas, and reject Big Island's third contention as a basis for granting the Keauhou and Waikii boosters.

13. It is unrefuted, however, that the booster proposed for Puueo will provide a first service to over 1,300 people. Given that fact and the severity of the natural disasters that are known to occur in that area, we find sufficient justification to grant a waiver of the rules to allow Big Island to construct the booster station proposed for Puueo, Hawaii.⁵ In granting this waiver we recognize that the booster station will be used in a manner inconsistent with its established purpose. As noted, booster stations may only be operated within a primary FM station's predicted service area. This helps assure that the booster station is not used by full service FM station permittees or licensees to extend the service contour of their full service stations. More recently we reiterated our concern in this regard. See *In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Boosters Stations and Television Booster Stations*, 2 FCC Rcd. 4625 (1987). We have consistently held that FM booster stations may only be used to fill in terrain-shadowed areas within the service contour of the primary station where the actual coverage of the primary station does not conform to its predicted coverage area. However, we are confronted in the case of the Puueo proposal with a unique combination of circumstances: recurring natural disasters, a small geographically isolated unserved area, no foreseeable prospects for receiving broadcast service from any other source, including a new stand-alone broadcast station, and the lack of any constraints on the introduction of other broadcast services in nearby areas. Given these facts, and the lack of viable alternatives, we will grant this waiver request.

14. Although in Sirius's view it would be more appropriate for Big Island to petition for Rule Making to add new channels for the unserved areas and then file applications for new FM stations, grant of the Puueo booster application will not preclude applications for new full service facilities in the same area. In this regard, applications for new full service FM stations or for modification of existing FM facilities are reviewed without consideration of existing booster facilities. As a secondary service, a booster station must give way to any conflicting full service proposal. Big Island has demonstrated that there is a current need for broadcast service in Puueo. The question before us is whether grant of Big Island's proposal for Puueo will serve the public interest and we have found this to be the case.

15. Accordingly, for the reasons stated herein, the informal objections filed by Sirius Communications, Inc. ARE GRANTED, to the extent indicated above and DENIED in all other respects; the request for waiver of Sections 74.1231(h), 74.1232(e), 74.1235(c) and 74.1237(d) of the Commission's Rules filed by Big Island Broadcasting Company, Ltd., to permit the above-referenced booster stations to operate outside the 1 mV/m contour of station KIPA-FM, IS GRANTED for application BPFTB-881114TD, Puueo, Hawaii and is DENIED for applications BPFTB-881114TC, Keauhou, Hawaii, and BPFTB-881114TE Waikii, Hawaii. The application for Puueo, Hawaii IS GRANTED and the applications for Keauhou, Hawaii and Waikii, Hawaii ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ Big Island indicates that most of the population of the island resides near the coastal areas, with the center of the island being essentially uninhabited.

² None of the areas to be served receive more than four aural services at night.

³ *Notice of Inquiry, In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 3 FCC Rcd. 3664 (1988); *Notice of Proposed Rulemaking, In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd. 2106 (1990); *Report and Order*, FCC 90-375, released December 4, 1990.

⁴ Section 74.1203(a) of the Commission's Rules, 47 CFR 74.1203(a) (1990).

⁵ The Island of Hawaii is covered by an existing Emergency Broadcast System (EBS) plan. Grant of the Puueo booster station will improve this plan by providing emergency information to a larger number of people.