

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

In re Application of

QUINTO  
BROADCASTING  
CORPORATION

File No. BPH-870515NF

For Construction Permit  
for a New FM Station on Channel 281A  
in Tucson, AZ

MEMORANDUM OPINION AND ORDER

Adopted: September 20, 1991 Released: September 27, 1991

By the Commission:

1. The Commission has under consideration the application for review filed on September 30, 1988, by Quinto Broadcasting Corporation ("Quinto"). Quinto seeks reinstatement of the above-captioned application, which was dismissed on August 24, 1988, by the FM processing staff. For the reasons set forth below, we deny the Quinto application for review and hold that its application was properly dismissed pursuant to our FM "hard look" processing rules. *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19,936 (May 13, 1985) ("*FM Processing Order*"), because it failed timely to comply with the antenna height limits imposed by the *Agreement on Radio Broadcasting in the Standard Broadcast Band: Frequency Modulation Broadcasting in the 88 to 108 MHz Band*, Nov. 9, 1972, United States-Mexico, Art. 5, § A(6)(a), 24 U.S.T. 1815, 1830, T. I. A. S. No. 7697, at 16 ("*U.S. - Mexico Agreement*"). Our action herein is consistent with recent court precedent, *Malkan FM Associates v. FCC*, No. 90-1281 (D.C. Cir. June 14, 1991), affirming *Texas Media Group*, 5 FCC Rcd 2851 (1990).

BACKGROUND

2. On May 15, 1987, Quinto filed its application, which specified an effective radiated power ("ERP") of 3 kilowatts ("kW") at an antenna height above average terrain ("HAAT") of 100 meters ("m"). On June 22, 1987, the Commission released a Notice of Tenderability for the Quinto application. Subsequently, on August 27, 1987, Quinto filed an amendment proposing to reduce its ERP to 2.5 kW. On August 24, 1988, the FM processing staff returned Quinto's application because, although the proposed facilities were located within 320 kilometers of the Mexican border and therefore subject to the U.S. - Mexico Agreement, its original proposal did not comply with the antenna height limitations set forth in the Agreement of 3 kW ERP at 300 feet (equivalent to 91 m) HAAT. The staff also returned without consideration Quinto's amendment, because it was untimely and did not contain a showing of good cause for late filing. Quinto now seeks review of the staff's action, arguing that its application was not speculative, was carefully prepared and erroneously specified an

ERP/HAAT combination of 3 kW at 100 m only because of an "ambiguity" created by treaty limits for power and height that differ from domestic limits. Moreover, Quinto notes that it filed a curative amendment before the Commission began processing its application. Quinto concludes that its curative amendment and its underlying application should have been accepted.

DISCUSSION

3. Initially, we note that the U.S. - Mexico agreement unambiguously specifies an antenna height limitation of 3 kW ERP at 300 feet. We reject Quinto's argument that its amendment should have been accepted and considered in evaluating the acceptability of its application. The Commission has previously held that:

[C]ompliance with the ERP and HAAT limitations set forth in [the Agreement] is necessary to finding that an application is acceptable for filing. *See Kerr County*, 4 FCC Rcd 5021, 5022 (1989); *see also Omega Broadcasting Corp.*, 4 FCC Rcd 1450 (1989). It is also well established that amendments addressing the acceptability of an FM application are not permitted beyond expiration of the 30-day period triggered by a Public Notice announcing that the application has been accepted for tender, regardless of how minor or *de minimis* they are. *See [FM Processing]* Order, 50 Fed. Reg. at 19941.

*Texas Media Group*, 5 FCC Rcd at 2852. In affirming the Commission, the Court of Appeals held that the Commission's rules provided legally sufficient notice to applicants that "noncompliance with the antenna height limit in the U.S. - Mexico Agreement would cause return of an application as unacceptable" without a further opportunity to submit a curative amendment. *Malkan FM Associates*, slip op. at 12.

4. It is undisputed that Quinto's amendment of August 27, 1987 was filed after the expiration of the amendment-of-right period in July 1987. We cannot find good cause to accept its late-filed amendment. The Commission's rules provide adequate notice to all commercial FM applicants that, by the expiration of the amendment-of-right period, their applications must comply on their face with the U.S. - Mexico Agreement in order to be acceptable for filing. *Id.* Quinto's failure to do so demonstrates a lack of due diligence. Second, its noncompliance with the U.S. - Mexico Agreement cannot be fairly said to be involuntary, because the choice of ERP and HAAT parameters specified in the application obviously is within the control of the applicant and its agents. *Cf. United Public Broadcasting Co., Inc.*, 57 RR 2d 1605, 1606 (1985) (applicants are responsible for compliance with the rules and may not shift responsibility to others); *RDH Communications, Limited Partnership*, FCC 91-233, adopted July 19, 1991, at para. 5 (same). Finally, we note that a number of applicants for this allotment did comply with the treaty limits. Acceptance of Quinto's late-filed amendment would disrupt the orderly functioning of our processing system and would be unfairly prejudicial to those applicants in this case who have complied with the Commission's FM processing rules and the provisions of the U.S. - Mexico Agreement. *FM Processing Order*, 50 Fed. Reg. at 19941. In sum, Quinto's amendment fails the established test for "good cause" set forth in *Erwin*

*O'Conner Broadcasting Co., Inc.*, 22 FCC 2d 140, 143 (Rev Bd: 1970). See *PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293, 4294 (1988); *Donovan Burke*, 104 FCC 2d 843, 845-46 (1986). Therefore, we deny Quinto's application for review and affirm the staff's dismissal of Quinto's application and amendment.

5: ACCORDINGLY, IT IS ORDERED, That the Application for Review filed on September 30, 1988, by Quinto Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary