

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

In the Matter of)	
)	
Tango Radio, LLC)	File Nos. BLH-20100409ABO; BLH-
)	20100412AAD; and BLH-20100412AAC
Applications for License to Cover Construction of)	
DKNOS(FM), Albany Texas; DKANM(FM),)	Facility ID Nos. 164214; 164213; and 164216
Skyline-Ganipa, New Mexico; and DKKUL-FM,)	
Trinity, Texas)	
)	
and)	
)	
South Texas FM Investments, LLC)	File Nos. BLH-20100407ACP and BLH-
)	20100407ACO
Applications for License to Cover Construction of)	
DKAHA(FM), Olney, Texas, and DKXME(FM),)	Facility ID Nos. 164193 and 164197
Wellington, Texas ¹)	

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 2015

Released: September 21, 2015

By the Commission:

I. INTRODUCTION

1. Before the Commission are Applications for Review of two letter decisions dismissing the captioned license applications (collectively, “License Applications”).² For the reasons set forth below, the Commission affirms the determination by the Media Bureau (“Bureau”) that the underlying construction permits were each automatically forfeited on their respective April 2010 construction deadlines by operation of Section 73.3598(e) of the Commission’s Rules (the “Rules”).³

II. BACKGROUND

2. Initial construction permits for KNOS(FM), KANM(FM), KKUL-FM, KAHA(FM) and KXME(FM) were awarded in October 2005 pursuant to auction procedures. Construction deadlines for each station were extended by 18 months through assignments to “eligible entities,”⁴ including to Tango

¹ The letter “D” reflects that each call sign has been deleted. For ease of reference, however, we will continue to refer to each station by its prior call sign (without the “D”) in text discussing matters that occurred prior to deletion.

² See *South Texas FM Investments, LLC*, Letter, 27 FCC Rcd 14831 (MB 2012) (“*South Texas Letter*”); *Tango Radio, LLC*, Letter, 27 FCC Rcd 14836 (MB 2012) (“*Tango Letter*”) (collectively “*Letter Decisions*”).

³ 47 C.F.R. § 73.3598(e).

⁴ See 47 C.F.R. § 73.3598(a). The “eligible entity” policy was vacated in 2011 by the U.S. Court of Appeals for the Third Circuit. See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 465-71 (3rd Cir. 2011). Thereafter, the Media Bureau suspended the rule. See *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, 26 FCC Rcd 10370 (MB 2011).

Radio, LLC (“Tango”), which acquired the KNOS(FM), KANM(FM) and KKUL-FM construction permits on October 10, 2008. Each Tango permit specified an extended construction deadline and a license application filing deadline of April 10, 2010.⁵ South Texas FM Investments, LLC (“South Texas”), also an eligible entity, acquired the KAHA(FM) and KXME(FM) construction permits on September 16, 2008; each permit specified an extended construction deadline and a license application filing deadline of April 7, 2010.⁶ Tango, South Texas (collectively “Applicants”) and the prior holder of the KAHA(FM) and KXME(FM) construction permits are closely held entities in which related family members hold (or held) ownership interests.⁷ We consolidate these factually similar cases and substantially identical applications for review for joint consideration.

3. The Applicants acknowledged that they filed incomplete license applications on their respective construction/filing deadlines. The subsequent history of each license application is set forth in the underlying Bureau decisions. To summarize briefly, the Bureau returned each of the License Applications as defective and, accordingly, unacceptable due to each Applicant’s failure to demonstrate the satisfaction of a number of Special Operating Conditions set forth on the respective construction permits.⁸ The staff also denied requests for waiver of the main studio rule contained in each License Application and returned the License Applications also due to the Applicants’ admitted failure to construct main studios by the construction deadline.⁹ The Applicants filed Petitions for Reconsideration, together with amendments purportedly containing the requested information concerning the operating conditions. Each amendment also changed the answer to Question III(5) of FCC Form 302-FM, the license application form, concerning main studio location from “no” to “yes,” thereby certifying that the Applicants had completed construction of a Rule-compliant main studio for each station subsequent to the filing of the License Applications. The Bureau reinstated each of the License Applications for further consideration, but in each case found, after reviewing each Applicant’s showing, that the amendments were insufficient to demonstrate construction in accordance with the permit conditions; they did not, for example, provide sufficient RF information. The License Applications remained incomplete despite repeated staff requests for curative amendments and, with regard to each application, the filing of three subsequent deficient amendments.¹⁰ In an early January 2011 telephone conversation with counsel, the Bureau set a deadline of January 30, 2011, for providing the information. On February 3, 2011, after the filing deadline had passed, the Applicants’ counsel requested an extension of time, until “no later than

⁵ See File Nos. BAPH-20080808ACQ; BAPH-20080808ACR; BAPH-20080808ACT.

⁶ See File No. BAPH-20080725ACO; BAPH-20080725ACR. We will refer to the Tango and South Texas construction permits collectively as “Construction Permits.”

⁷ James Falcon assigned the KAHA(FM) and KXME(FM) permits to South Texas, of which his uncle, Eugenio Falcon, Jr., is 20 percent owner. Dr. Antonio Falcon, brother of Eugenio Falcon, Jr. and father of James Falcon is 100 percent owner of Tango, permittee of KNOS(FM), KANM(FM) and KKUL-FM. Although these family relationships do not establish any common attributable interests, the actions of the two companies, which used the same engineering and legal consultants, are very similar and best considered together.

⁸ The applications lacked proof of performance for directional antennas, antenna installation certifications, and radiofrequency (“RF”) exposure measurements. See *South Texas Letter*, 27 FCC Rcd at 14832-33; *Tango Letter*, 27 FCC Rcd at 14837-39.

⁹ See 47 C.F.R. § 73.1125. See, e.g., File No. BLH-20100407ACO, Exhibit 6 (stating with respect to KXME(FM) that, “Due to limited time to build the station, we were unable to establish a main studio location. Therefore, we hereby request a temporary waiver of the main studio requirements.”)

¹⁰ Tango and South Texas submitted amendments with their respective Petitions for Reconsideration during June and July 2010. Tango further amended each of its applications and South Texas further amended the KXME application on July 26, 2010, November 12, 2010, and November 30, 2010. See *Tango Letter*, 27 FCC Rcd at 14837-40; *South Texas Letter*, 27 FCC Rcd at 14833-34. South Texas amended the KAHA application on August 18, 2010, November 12, 2010, and November 30, 2010. *South Texas Letter*, 27 FCC Rcd at 14832.

during the last week of February.”¹¹ The Bureau did not act on that belated request. On February 24, 2011, the Bureau dismissed the License Applications for failure to prosecute pursuant to Sections 0.283 and 73.3568(a)(1) of the Rules and also noted that the construction permits had expired by operation of law on their respective construction deadlines.

4. On March 17 and March 18, 2011, the Applicants filed Petitions for Reconsideration of the dismissals and amendments purporting to provide the requested information.¹² The November 28, 2012 Letter Decisions declined to consider the untimely amendments and denied reconsideration due to the Applicants’ failure to submit the requested curative amendments during the nearly eleven months between the initial License Application filings and their dismissal. The Applicants filed the instant Applications for Review on December 28, 2012. While not a basis for the Letter Decisions or Applications for Review, we note that, as discussed below, after the Applicants had filed the License Applications, the Commission’s Enforcement Bureau (“EB”) visited each of the transmitter sites of the five allegedly constructed stations in either 2010 or 2011, and found no evidence of construction or signal transmission at any of the sites.¹³

III. DISCUSSION

5. **Decision Below.** An Application for Review must establish that Bureau actions either: (i) conflicted with statute, regulation, case precedent or Commission policy; (ii) involved a question of law or policy not previously resolved by the Commission; (iii) involved precedent or policy that should be overturned or revised; (iv) made an erroneous finding as to an important fact; or (v) made a prejudicial procedural error.¹⁴ The Commission will not consider matters raised in an Application for Review upon which the Bureau had no opportunity to pass.¹⁵ Accordingly, we dismiss the following new arguments not presented to the Bureau: (1) that refusal to consider the proffered March 2011 amendments violated a Commission policy allowing liberal corrective amendments post-auction; (2) that dismissal prevents the public’s receipt of service from minority broadcasters; and (3) that dismissal effectuates an impermissible taking in violation of the Applicants’ constitutional due process rights.¹⁶ The Applicants admit that their License Applications, as of the respective construction deadlines, did not contain all of the showings necessary to satisfy the Special Operating Conditions on the permits,¹⁷ and that, by those deadlines, they had failed to construct studios for the stations, in violation of Section 73.1125 of the Rules.¹⁸ Having reviewed the record of this proceeding, we uphold the *Bureau Decisions* to the extent they find that, due to these failings by the Applicants, the permits were automatically forfeited as of their respective

¹¹ *Letter from Dan J. Alpert, Esq. to Marlene Dortch, Secretary, FCC* (dated Feb. 3, 2011).

¹² Although Applicants argue that the License Applications are now complete, even the March 2011 amendments do not demonstrate appropriate RF precautions. Photos provided by the Applicants showed signs warning of the presence of ionizing radioactive material (the type used at nuclear power plants and likely to cause public alarm) rather than RF radiation, which is a non-ionizing radiation subject to different standards and requirements.

¹³ We do not take enforcement action in this case because the factual record is not fully developed.

¹⁴ 47 C.F.R. § 1.115(b)(2).

¹⁵ *Id.* at § 1.115(c). See *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003).

¹⁶ South Texas Application for Review at 12–14, 17; Tango Application for Review at 14–16, 19. The Applicants stated that their authorizations originated from auctions but had not argued that this history provided any basis for additional amendments. Applicants now raise that argument anew, along with a constitutional theory involving taking of property. We dismiss these arguments, upon which the Bureau had no opportunity to pass. See 47 C.F.R. § 1.115(c).

¹⁷ Tango Application for Review at 2–5, South Texas Application for Review at 2–3.

¹⁸ 47 C.F.R. § 73.1125.

construction deadlines pursuant to 47 C.F.R. § 73.3598(e) and therefore the License Applications were moot.¹⁹

6. **Failure to Timely Construct.** We agree with the Bureau that the Construction Permits have been automatically forfeited. The Bureau noted such forfeiture in 2010 when it returned each of the License Applications as defective and, in the *Letter Decisions* now under review, mentioned forfeiture within the ordering clauses. In the interest of a complete record, we will more fully explain the basis for the finding of forfeiture. All broadcast permittees must, by the construction deadline specified in each construction permit: (1) build in accordance with all terms of the construction permit, and (2) file a license application demonstrating proper construction.²⁰ Parties cannot file defective license applications as mere placeholders.²¹ This policy squarely applies here, where the Applicants neither completed construction, satisfied all permit conditions, nor established a basis for additional construction time by the respective deadlines. The Applicants' attempted use of the corrective amendment process to extend their construction deadlines is inappropriate and inconsistent with the Commission's goals of prompt initiation of service and spectrum efficiency.²² We direct the Bureau to reject any such attempts in the future and to consistently enforce Section 73.3598(e) of the Rules.

7. **Temporary Facilities.** It appears likely, based on evidence contained in agency records but not at issue in the *Letter Decisions*, that this case involves construction of temporary facilities that were removed shortly after each respective the License Application was filed. EB field agents visited the four Texas transmitter sites in October 2010 and the New Mexico site in May 2011. At a time when the Applicants were not being fully responsive to the Bureau's requests for operational measurements and photos, EB photographs of each location showed vacant fields with neither broadcast towers, transmission systems, nor studio facilities.²³ The agents monitored the stations' respective frequencies but heard no transmissions. When, as in the case of KKUL-FM, there were non-broadcast antenna structures at other coordinates in the general vicinity, the agents determined that Applicants had no agreement to use those structures.²⁴ With regard to KKUL-FM, the agents also spoke with the owner of a business on adjacent property. The business owner recalled that in approximately August 2010, two men parked on the side of

¹⁹ In light of this holding, we need not address the Applicants' arguments concerning the merits of the Bureau's dismissal of the License Applications due to the Applicants' failure to prosecute them, in violation of Section 73.3568(a)(1) of the Rules. 47 C.F.R. § 73.3568(a)(1).

²⁰ 47 C.F.R. § 73.3598(a) and (e). Section 73.3598(e) provides: "[a]ny construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission." 47 C.F.R. § 73.3598(e).

²¹ See *Aerco Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 24417, 24419-20 (2003).

²² The Commission's deadlines minimize spectrum warehousing by those who do not have the intent or foresight to ensure the prompt conclusion of construction and initiation of service. *Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17539 (1999) ("*Streamlining*"). Where one has not timely constructed or met a permit condition, the timing defect cannot be cured but, rather, one must ask for and justify more time, demonstrating that the failure was the result of a limited number of types of specified causes not under the control of the permittee. See 47 C.F.R. § 73.3598(a) and (b); *Streamlining*, 14 FCC Rcd at 17541. Contractor problems such as those claimed by the Applicants are not a basis for additional time. See *Wendell & Associates*, 17 FCC Rcd at 18580-81.

²³ See File No. EB-10-HU-0066, KKUL-FM (EB Houston Oct. 6, 2010) at 1 ("KKUL-FM Report"); File No. EB-11-HU-0089, DKKUL-FM (EB Houston Oct. 19, 2010); File No. EB-19-DL-0093, KNOS(FM) (EB Dallas Oct. 6, 2010); File No. EB-10-DL-0091, KXME(FM) (EB Dallas Oct. 18, 2010); File No. EB-10-DL-0092, KAHA(FM) (EB Dallas Oct. 6, 2010); DKANM(FM) Report (EB San Diego May 27, 2011).

²⁴ See KKUL-FM Report at 1. The owner of the tower structure closest to KKUL-FM (about 1400 feet north) stated that it had no agreement with Tango to allow broadcast use.

the road about a hundred feet from KKUL-FM's specified location and erected a small temporary tower.²⁵ This person stated that he approached the men and was told they were setting up a temporary station on 98.1 MHz (the authorized frequency of KKUL-FM).²⁶ He stated that he listened to the station for about three hours until the men lowered the antenna and drove away.²⁷ At no time did the Applicants disclose the temporary nature of their construction to the Bureau. The Applicants were not present during the site visits; the agency did not discuss its findings with them or request a response.

8. It appears that some permittees, such as Applicants here, are attempting to circumvent our construction deadlines by erecting facilities, conforming or otherwise, with or without the site owner's permission, *temporarily* — long enough only to file a license application before the underlying construction permit expires. We take this opportunity to caution all permittees that they may not rely on temporarily constructed facilities to satisfy construction requirements and that construction permits associated with temporarily constructed facilities are subject to automatic forfeiture pursuant to Section 73.3598(e) of the Rules.²⁸ We also caution license applicants that false certification of construction, or failure to update license applications to report removal of temporary facilities, will be grounds for enforcement action.²⁹

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to authority granted by section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and sections 1.115(c) and 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(c) and 47 C.F.R. § 1.115(g), that the Application for Review filed by Tango Radio, LLC (File Nos. BLH-20100409ABO, BLH-20100412AAD, and BLH-20100412AAC) concerning dismissal of applications filed by for licenses to cover construction of stations DKNOS(FM), Albany, Texas, DKANM(FM), Skyline-Ganipa, New Mexico, and DKKUL-FM, Trinity, Texas and the forfeiture of the underlying construction permits IS DISMISSED IN PART and DENIED IN PART.

²⁵ The KKUL-FM construction permit specified effective radiated power of 5.3 kW and an antenna height of 87 meters above ground level, so operation with a small temporary antenna clearly would not match the authorized facilities, even if a studio had been constructed and fencing and signage to limit RF exposure were in place. *See, e.g., Great Lakes*, 24 FCC Rcd at 8243-53.

²⁶ KKUL-FM Report at 1. The businessman's recitation of what he was told by the men erecting the tower constitutes hearsay, but it is corroborated by other details of his statement to the field agents, including his report of listening to the temporary station on the specified frequency. Accordingly, we find it to be sufficiently reliable to be considered as admissible evidence. *See, e.g., Southwest Georgia Project for Community Educ., Inc.*, Letter, 26 FCC Rcd 6020, 6024 n.28 (MB 2011).

²⁷ *See* KKUL-FM Report at 1. Similarly, EB found no antenna, fencing, or studio at the KANM site, a roadside intersection on Native American land. There was no indication that the tribal government ever approved a broadcast station on its land. The terrain and vegetation that EB found at the KANM site in May 2011 did not match the photos submitted by Tango in its March 2011 amendment, with differences that went beyond what one might expect during different seasons.

²⁸ As the Bureau recently recognized in another case of temporary construction, the Commission has stated that "implicit in the filing of any facility application is that the applicant stands 'ready, willing, and able' to construct and operate as proposed." *See KCIY(FM), Helendale, CA*, Letter, 30 FCC Rcd 4898, 4901 (MB 2015), citing *Pathfinder Communications Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 (2003).

²⁹ *See* 47 C.F.R. § 1.65; *Lazer Licenses, LLC.*, Memorandum Opinion and Order, 30 FCC Rcd 6357 (MB 2015) (putting future applicants on notice that Section 1.65 requires prompt notification if they dismantle or take a station off the air while seeking a license to cover and that failure to do so raises lack of candor issues). *See also William L. Zawila*, Order to Show Cause, Notice of Opportunity for Hearing, and Hearing Designation Order, 18 FCC Rcd 14938, 14964 (2003) (motive present to misrepresent completion of construction).

10. IT IS FURTHER ORDERED that pursuant to authority granted by section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and sections 1.115(c) and 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(c) and 47 C.F.R. § 1.115(g), that the Application for Review filed by South Texas FM Investments, LLC concerning dismissal of applications (File Nos. BLH-20100407ACP and BLH-20100407ACO) for licenses to cover construction of stations DKAHA(FM), Olney, Texas and DKXME(FM), Wellington, Texas and the forfeiture of the underlying construction permits IS DISMISSED IN PART and DENIED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary