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In Reply Refer to:
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In re: KANM(FM), Skyline-Ganipa, New Mexico
Facility ID No. 164213
Tango Radio, LLC
File No. BLH-20100412AAD

KNOS(FM), Albany, Texas
Facility ID No. 164214
Tango Radio, LLC
File No. BLH-20100409ABO

KKUL(FM), Trinity, Texas
Facility ID No. 164216
Tango Radio, LLC
File No. BLH-20100412AAC

Petitions for Reconsideration

Dear Counsel:

We have before us three separate Petitions for Reconsideration (“Petitions”), filed by you (“Counsel”) on behalf of Tango Radio, LLC (“Tango”). The three Petitions are in connections with: (1) Tango’s Application for License (“KANM License Application”) to cover Construction Permit BNPH-20050103AAZ, as modified by BMPH-20100330ADB (“KANM CP”); (2) Tango’s Application for License (“KNOS License Application”) to cover Construction Permit BNPH-20050103AAX, as modified by BMPH-20100330ADA (“KNOS CP”); and (3) Tango’s Applications for License (“KKUL License Application”) to cover Construction Permit BNPH-20050103AAW, as modified by BMPH-20100330ACZ (“KKUL CP”).

All three Petitions seek reconsideration of a February 24, 2011 staff letter in which the Media Bureau (“Bureau”) dismissed the KANM, KNOS, and KKUL License Applications. All three License Applications were submitted by Tango, the permittee of the new Stations KANM, channel 240A at Skyline-Ganipa, New Mexico; KNOS, channel 255A at Albany, Texas; and KKUL, channel 251A at Trinity, Texas. For the reasons set forth below, we dismiss Tango’s Petitions.¹

¹ Tango also filed Petitions for Reconsideration to reinstate the construction permits. In seeking reinstatement of the construction permits, Tango simply referenced its Petitions regarding the dismissal of the License Applications. Our decision to affirm staff’s dismissal of the License Applications means Tango’s construction permits automatically expire by operation of law.

Background. *KANM(FM), Skyline-Ganipa, New Mexico.* Pursuant to the KANM CP's terms, Tango was required to finish construction of the station and file a license application to cover the KANM CP by April 10, 2010. Tango filed the KANM License Application on April 10, 2010.

On May 19, 2010, Commission staff returned the KANM License Application as unacceptable for filing pursuant to Section 73.3564(a)(1) of the Commission's rules.² Staff deemed the filing unacceptable because Tango failed to submit the required directional antenna proof of performance, antenna installation certifications, and radiofrequency radio ("RFR") measurements required by the Special Operating Conditions on the KANM CP and failed to construct a main studio prior to filing the license application. Staff also denied Tango's associated request for waiver of the main studio rule and request for program test authority.

On June 23, 2010, Tango submitted a Petition for Reconsideration of the staff's dismissal of the KANM License Application, a request for reinstatement of the KANM License Application *nunc pro tunc*, and an amendment to the KANM License Application purportedly containing the items required by the Special Operating Conditions on the CP. Commission staff promptly reviewed the petition and the amendment to the KANM License Application. On June 28, 2010, staff granted the petition and reinstated the KANM License Application. However, staff was unable to act on the KANM License Application because the amendment submitted by Tango did not contain all of the items required by the KANM CP. Accordingly, the staff contacted Counsel by telephone and requested an additional amendment to the KANM License Application containing the required RFR measurements and a detailed description of the access restrictions in place at the KANM transmitter site.

On July 26, 2010, Tango submitted a second amendment to the KANM License Application. Commission staff promptly reviewed the amendment and found the data submitted still was not sufficient to assess compliance with all of the Special Operating Conditions on the KANM CP and the Commission's Rules. Once again, staff contacted Counsel by telephone shortly after receipt of the application amendment and requested another amendment to the KANM License Application containing the following items:

1. RFR measurements taken with the station operating at full power, *i.e.* 1.00 kilowatt effective radiated power; and
2. Photographs showing the locations of the authorized tower and the fence surrounding it that is required to prevent casual or inadvertent public access to areas in the vicinity of the KANM transmitting facilities where RFR levels are predicted to exceed general population/uncontrolled maximum permissible exposure limits.

Thereafter, on November 9, 2010, staff wrote Counsel a letter again asking for the RFR measurements and photographs, with a deadline of November 30, 2010 to submit the information. On November 12, 2010 and November 30, 2010, Tango filed two more amendments providing additional technical data, including RFR measurements taken at full authorized power. Staff's review of those amendments showed Tango did not submit the required photographs showing the location of the KANM transmitting facilities and the surrounding fence in either of the application amendments. Staff's review also showed that the field strength meter used to take the reported RFR measurements was not of sufficient verifiable accuracy.

² See 47 C.F.R §73.3564(a)(1) ("Applications that are not substantially complete will not be considered and will be returned to the applicant.").

Subsequently, in early January, staff contacted Counsel by telephone to again request transmitter site photographs and full-power RFR measurements taken using an accurate and verifiable RFR field strength meter. Staff specified a January 30, 2011 deadline for providing the requested information. On February 3, 2011, Counsel requested an extension of time, for “no later than during the last week of February,” to amend the KANM License Application to provide the required transmitter site photographs and RFR measurements. Staff did not act on that extension request.

As of February 24, 2011, Tango had not submitted an acceptable amendment to the KANM License Application containing the required information, despite staff’s repeated requests and Tango’s repeated promises to do so. Consequently, pursuant to Sections 0.283 and 73.3568(a)(1) of the Commission’s Rules, the Bureau dismissed the KANM License Application for failure to prosecute.³ As a result, the KANM CP expired by operation of law on April 7, 2010, and the call sign for Station KANM was deleted.

On March 17, 2011, Tango filed the KANM Petition and on March 18, 2011, Tango filed another amendment with additional measurements and photos, purporting to provide the information initially requested by staff. Tango seeks reinstatement and grant of the KANM License Application.

KNOS(FM), Albany, Texas. Pursuant to the KNOS CP’s terms, Tango was required to finish construction of the station and file a license application to cover the KNOS CP by April 10, 2010. Tango filed the KNOS License Application on April 10, 2010.

On May 17, 2010, Commission staff returned the KNOS License Application as unacceptable for filing pursuant to Section 73.3564(a)(1) of the Commission’s rules.⁴ The staff deemed the filing unacceptable because Tango failed to submit the required directional antenna proof of performance, antenna installation certifications, and RFR measurements required by the Special Operating Conditions on the KNOS CP and failed to construct a main studio prior to filing the license application. Staff also denied Tango’s associated request for waiver of the main studio rule and request for program test authority.

On June 21, 2010, Tango submitted a Petition for Reconsideration of the staff’s dismissal of the KNOS License Application, a request for reinstatement of the KNOS License Application *nunc pro tunc*, and an amendment to the KNOS License Application purportedly containing the items required by the Special Operating Conditions on the CP. Commission staff promptly reviewed the petition and the amendment to the KNOS License Application. On June 23, 2010, staff granted the petition and reinstated the KNOS License Application. However, staff was unable to act on the KNOS License Application because the amendment submitted by Tango did not contain all of the items required by the KNOS CP. Accordingly, the staff contacted Counsel by telephone and requested an additional amendment to the KNOS License Application containing the required RFR measurements and a detailed description of the access restrictions in place at the KNOS transmitter site.

On July 26, 2010, Tango submitted a second amendment to the KNOS License Application. Commission staff promptly reviewed the amendment and found the data submitted still was not sufficient to assess compliance with all of the Special Operating Conditions on the KNOS CP and the Commission’s Rules. Once again, staff contacted Counsel by telephone shortly after receipt of the

³ See 47 C.F.R. §0.283 (conferring delegated authority to Media Bureau to process applications) and 47 C.F.R. §73.3568(a)(1) (failure to prosecute an application is cause for dismissal).

⁴ See 47 C.F.R. §73.3564(a)(1).

application amendment and requested another amendment to the KNOS License Application containing the following items:

1. RFR measurements taken with the station operating at full power, *i.e.* 1.00 kilowatt effective radiated power; and
2. Photographs showing the locations of the authorized tower and the fence surrounding it that is required to prevent casual or inadvertent public access to areas in the vicinity of the KNOS transmitting facilities where RFR levels are predicted to exceed general population/uncontrolled maximum permissible exposure limits.

Thereafter, on November 9, 2010, staff wrote Counsel a letter again asking for the RFR measurements and photographs, with a deadline of November 30, 2010 to submit the information. On November 12, 2010 and November 30, 2010, Tango filed two more amendments providing additional technical data, including RFR measurements taken at full authorized power. Staff's review of those amendments showed Tango did not submit the required photographs showing the location of the KNOS transmitting facilities and the surrounding fence in either of the application amendments. Staff's review also showed the field strength meter used to take the reported RFR measurements was not of sufficient verifiable accuracy.

Subsequently, in early January, staff contacted Counsel by telephone to again request transmitter site photographs and full-power RFR measurements taken using an accurate and verifiable RFR field strength meter. Staff specified a January 30, 2011 deadline for providing the requested information. On February 3, 2011, Counsel requested an extension of time, for "no later than during the last week of February," to amend the KNOS License Application to provide the required transmitter site photographs and RFR measurements. Staff did not act on that extension request.

As of February 24, 2011, Tango had not submitted an acceptable amendment to the KNOS License Application containing the required information, despite staff's repeated requests and Tango's repeated promises to do so. Consequently, pursuant to Sections 0.283 and 73.3568(a)(1) of the Commission's Rules, the Bureau dismissed the KNOS License Application for failure to prosecute.⁵ As a result, the KNOS CP expired by operation of law on April 7, 2010, and the call sign for Station KNOS was deleted.

On March 17, 2011, Tango filed the KNOS Petition and on March 18, 2011, Tango filed another amendment with additional measurements and photos, purporting to provide the information initially requested by staff. Tango seeks reinstatement and grant of the KNOS License Application.

KKUL(FM), Trinity, Texas. Pursuant to the KKUL CP's terms, Tango was required to finish construction of the station and file a license application to cover the KKUL CP by April 10, 2010. Tango filed the KKUL License Application on April 12, 2010.

On May 7, 2010, Commission staff returned the KKUL License Application as unacceptable for filing pursuant to Section 73.3564(a)(1) of the Commission's rules.⁶ Staff deemed the filing unacceptable because Tango failed to submit the required directional antenna proof of performance, antenna installation certifications, and RFR measurements required by the Special Operating Conditions on the KKUL CP and failed to construct a main studio prior to filing the license application. Staff also denied Tango's associated request for waiver of the main studio rule and request for program test authority.

⁵ See 47 C.F.R. §0.283 and 47 C.F.R. §73.3568(a)(1).

⁶ See 47 C.F.R. §73.3564(a)(1).

On June 11, 2010, Tango submitted a Petition for Reconsideration of the staff's dismissal of the KKUL License Application, a request for reinstatement of the KKUL License Application *nunc pro tunc*, and an amendment to the KKUL License Application purportedly containing the items required by the Special Operating Conditions on the CP. Commission staff promptly reviewed the petition and the amendment to the KKUL License Application. On June 18, 2010, staff granted the petition and reinstated the KKUL License Application. However, staff was unable to act on the KKUL License Application because the amendment submitted by Tango did not contain all of the items required by the KKUL CP. Accordingly, staff contacted Counsel by telephone and requested an additional amendment to the KKUL License Application containing the required RFR measurements and a detailed description of the access restrictions in place at the KKUL transmitter site.

On July 26, 2010, Tango submitted a second amendment to the KKUL License Application. Commission staff promptly reviewed the amendment and found the data submitted still was not sufficient to assess compliance with all of the Special Operating Conditions on the KKUL CP and the Commission's Rules. Once again, staff contacted Counsel by telephone shortly after receipt of the application amendment and requested another amendment to the KKUL License Application containing the following items:

1. RFR measurements taken with the station operating at full power, *i.e.* 1.00 kilowatt effective radiated power; and
2. Photographs showing the locations of the authorized tower and the fence surrounding it that is required to prevent casual or inadvertent public access to areas in the vicinity of the KKUL transmitting facilities where RFR levels are predicted to exceed general population/uncontrolled maximum permissible exposure limits.

Thereafter, on November 9, 2010, staff wrote Counsel a letter again asking for the RFR measurements and photographs, with a deadline of November 30, 2010 to submit the information. On November 12, 2010 and November 30, 2010, Tango filed two more amendments providing additional technical data, including RFR measurements taken at full authorized power. Staff's review of those amendments showed Tango did not submit the required photographs showing the location of the KKUL transmitting facilities and the fence surrounding them in either of the application amendments. Staff's review also showed that the field strength meter used to take the reported RFR measurements was not of sufficient verifiable accuracy.

Subsequently, in early January, staff contacted Counsel by telephone to again request transmitter site photographs and full-power RFR measurements taken using an accurate and verifiable RFR field strength meter. Staff specified a January 30, 2011 deadline for providing the requested information. On February 3, 2011, Counsel requested an extension of time, for "no later than during the last week of February," to amend the KKUL License Application to provide the required transmitter site photographs and RFR measurements. Staff did not act on that extension request.

As of February 24, 2011, Tango had not submitted an acceptable amendment to the KKUL License Application containing the required information, despite staff's repeated requests and Tango's repeated promises to do so. Consequently, pursuant to Section 0.283 and 73.3568(a)(1) of the Commission's Rules, the Bureau dismissed the KKUL License Application for failure to prosecute.⁷ As a result, the KKUL CP expired by operation of law on April 7, 2010, and the call sign for Station KKUL was deleted.

⁷ See 47 C.F.R. §0.283 and 47 C.F.R. §73.3568(a)(1).

On March 17, 2011, Tango filed the KKUL Petition and on March 18, 2011, Tango filed another amendment with additional measurements and photos, purporting to provide the information initially requested by staff. Tango seeks reinstatement and grant of the KKUL License Application.

Discussion. In all three Petitions, Tango claims reconsideration is appropriate because staff may have been unaware of Tango's requests for additional time to submit the required information by the end of February 2011. Because Tango did not receive a response to its extension request, it presumed the request had been granted, which would have allowed Tango until the end of February to submit the requested measurements and photographs. Tango claims now it was working to get the Commission the requested information by March 2011, when "unexpectedly, without warning" the Commission dismissed all three license applications on February 24, 2011.

Tango also seeks reconsideration because it was in contact with staff. Tango claims the Commission incorrectly dismissed the three license applications for failure to prosecute because Tango had been in regular contact with staff and had filed numerous amendments, evidencing responsiveness to staff's requests and its intent to prosecute the license applications.

The Commission will consider a Petition for Reconsideration only when the petitioner shows either a material error in the Commission's original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.⁸ As discussed below, Tango has not met this test.

In all three Petitions, Tango appears to be relying on its request for an extension of time as evidence of either new circumstances or error by the Commission. Tango first presumed the extension had been granted and now presumes staff may not have been aware of the extension request. However, it was Tango's error to rely on its own presumptions. Section 1.46 of the Commission's rules clearly states it is our policy that extensions of time may not be routinely granted.⁹ Because none of the extensions were granted, Tango was required to comply with the January 30, 2011 deadline.¹⁰

Moreover, Tango argues since it had been in constant contact with the Commission, it was clear Tango intended to prosecute the applications. This argument ignores the fact the staff provided Tango numerous opportunities to provide the requested information over the course of almost one year. At some point, staff had to resolve the pending applications and could not indefinitely wait for Tango's compliance with the Special Operating Conditions on the KANM, KNOS, and KKUL CPs. Ultimately, to resolve the pending applications, staff gave Tango a final opportunity to file all the required information for all three license applications by January 30, 2011. Tango provides no adequate explanation for its failure to comply with the numerous requests and opportunities to submit the requested information by the specified deadline.

⁸ See 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003). It is also appropriate to consider new facts not previously presented when such consideration is required in the public interest. See 47 C.F.R. § 1.106(c)(2).

⁹ See 47 C.F.R. § 1.46; *Royce International Broadcasting Co.*, 23 FCC Rcd 9010 (2008).

¹⁰ Tango requested an extension until "no later than during the last week of February" to file the KANM, KNOS, and KKUL License Applications. Thus, even if Tango's presumption was correct, it still failed to comply with its own proposed filing deadline.

Tango has not presented any new facts or raised any material error in the Commission's dismissal of the KANM, KNOS, and KKUL License Applications. We cannot condone Tango's failure to provide the appropriate information at the required time. Consequently, staff action was proper in dismissing the KANM, KNOS, and KKUL License Applications. Accordingly, we will deny Tango's KANM, KNOS, and KKUL Petitions for Reconsideration.

Finally, we reject Tango's proffered amendment to its KANM, KNOS, and KKUL License Applications. As discussed above, the applications were dismissed because of Tango's failure to provide information repeatedly requested by staff. Accordingly, Tango cannot, after the fact, proffer the requested information and claim that it is entitled to reinstatement *nunc pro tunc* of its applications.¹¹ Therefore, we will not consider Tango's latest amendments of March 18, 2011, which purportedly produced the requested information.

Conclusion. Accordingly, IT IS ORDERED the Petitions for Reconsideration filed by Tango Radio, LLC on March 17, 2011, ARE DENIED. Construction Permit BMPH-20100330ACZ for Station KANM, Skyline-Ganipa, New Mexico; Construction Permit BMPH-20100330ADA for Station KNOS, Albany, Texas; and Construction Permit BMPH-20100330ACZ for Station KKUL, Trinity, Texas EXPIRED BY OPERATION OF LAW on April 10, 2010, without further action by the Commission.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹¹ See *Canyon Area Residents*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154 (1999), quoting *Colorado Radio Corp. v. FCC*, 118 F. 2d 24, 26 (D.C. Cir. 1941). The Commission has stated before, “[w]e cannot allow a party to ‘sit back and hope that a decision will be in its favor and, when it isn’t, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.’”