

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

In the Matter of)	
)	
Texas Grace Communications)	File No. BPH-19960201MB,
)	as modified by
Requests to Toll the Period to)	BMPH-19990217IB
Construct Unbuilt Station KRZB(FM))	
Archer City, Texas)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 2005

Released: March 1, 2005

By the Commission:

1. The Commission has before it several pleadings from Texas Grace Communications, permittee of unbuilt station KRZB(FM), Archer City, Texas. Texas Grace seeks both reconsideration and review of two staff letters dated January 29, 2004, which denied its requests for additional construction time.¹ We dismiss Texas Grace's requests as untimely, for the reasons discussed below.

I. BACKGROUND

2. Texas Grace received its initial permit to construct KRZB(FM) on October 7, 1996. In October 2001, the Commission denied Texas Grace's request for additional time to construct, finding that Texas Grace was not entitled to "tolling" under Section 73.3598(b) of the Commission's rules.² The Commission clarified that tolling is appropriate only in the narrow circumstances enumerated in that rule section. It rejected a tolling claim based on health problems of Texas Grace's principal. It also found that KRZB's community of license change from Olney to Archer City, Texas did not create a new station entitled to a new construction period, and rejected encumbrance arguments based on associated rulemaking proceedings.³ Nevertheless, the Commission observed that prior to its clarification therein, "[a] permittee, like Texas Grace, might have concluded that reliance on mere facilities modifications involving frequency or class would be insufficient to trigger tolling, but that a facility change coupled with a community of license change might be treated differently."⁴ To avoid unfairness to Texas Grace, the Commission modified Texas Grace's existing permit, by waiver, to provide it with an additional three years to construct. In so doing, the Commission expressly stated that the construction permit would automatically cancel unless Texas Grace completed construction and filed an application

¹ The Media Bureau has referred the March 8, 2004, Texas Grace petition for reconsideration to the Commission pursuant to 47 C.F.R. § 1.106(a)(1). See paragraph 4, *infra*.

² See 47 C.F.R. § 73.3598(b).

³ See *Texas Grace Communications*, 16 FCC Rcd 19167 (2001) ("*Texas Grace*").

⁴ *Texas Grace*, 16 FCC Rcd at 19171.

to license the authorized facilities by October 26, 2004. Additionally, the Commission advised that Texas Grace would not be eligible for further extension of the October 26, 2004, construction deadline because Texas Grace had already received well in excess of three unencumbered years to construct.⁵

3. In 2003, Texas Grace filed additional requests for tolling, which the staff denied or dismissed. On January 29, 2004, the staff denied reconsideration in two separate letters. The first letter (bearing a staff reference number 1800B3-GDG) found that the staff had properly concluded that Texas Grace was not entitled to an additional six months to construct the station as a result of an alleged error by the Federal Aviation Administration (“FAA”) (“*FAA Reconsideration Denial*”). The second letter (bearing a staff reference number 1800B-IB) affirmed the initial staff determination that Texas Grace was not entitled to an additional 17 months based on events in rulemaking proceedings, including changes in the station’s interference protection (“*Rulemaking Reconsideration Denial*”).⁶ The *Rulemaking Reconsideration Denial* also dismissed as untimely two submissions filed August 21, 2003, (the “*August Submissions*”). The *August Submissions*, similar in many ways, both sought to expand Texas Grace’s 17-month rulemaking-related claim to 23 months following the July 25, 2003, release of a rulemaking order.⁷ The two *August Submissions* differed primarily in that one pleading sought to amend Texas Grace’s petition for reconsideration and the other sought consideration of the same facts as a new tolling request.

4. On February 3, 2004, the staff issued a consolidated Public Notice announcing, among other things, its January 29, 2004 actions on Texas Grace’s various requests.⁸ Applications for Review were due within 30 days of public notice, *i.e.*, by March 4, 2004. On March 8, 2004, Texas Grace filed three documents: an application for review of the *FAA Reconsideration Denial*, an application for review of the *Rulemaking Reconsideration Denial*, and a petition for reconsideration concerning dismissal of the *August Submission* that Texas Grace had intended as a tolling request. On March 19, 2004, Texas Grace submitted amendments to each of these documents.

5. Texas Grace recognizes that each of its filings ordinarily would be considered untimely.

⁵ *Id.* at 19174 n.13.

⁶ One of Texas Grace’s arguments centers on use of staff reference numbers. Such numbers are generic codes that merely aid the Commission’s staff in identifying the originating Division, sub-Division unit, and responsible employee for certain - typically unpublished - decisions. In this case, “1800B” indicates that the Audio Division originated the item. The digit “3” in “1800B3” identifies an FM radio matter in the Audio Division.

⁷ *See Archer City, Texas*, 18 FCC Rcd 15532 (MB 2003) (“*2003 Rulemaking Order*”). Specifically, Texas Grace argues that the three additional years that the Commission granted in October 2001 should not begin to run until September 8, 2003, the effective date of an allotment change made in the *2003 Rulemaking Order*. That change, which Texas Grace supported, amended the Archer City allotment from Class C1 to Class C2 and changed the allotment’s reference coordinates. As we have observed, the prior Class C1 designation of the Archer City allotment arose from Texas Grace’s successful counterproposal in another rulemaking proceeding. *See Texas Grace*, 16 FCC Rcd at 19167 n.2 (citing *Tipton, Mangum, Eldorado and Granite, Oklahoma*; and *Archer City, Texas*, 14 FCC Rcd 21161 (MMB 1999) (“*Oklahoma R&O*”). Although the *Oklahoma R&O* required Texas Grace to file an implementing application by April 17, 2000, it never did so. *Id.*

⁸ *See Broadcast Applications*, Report No. 25664 (Feb. 3, 2004). The public notice summarized the history of KRZB’s application to modify its construction permit and added the following new information: “1/29/04 – Petition for Reconsideration filed 6/9/03 Denied, Petition for Reconsideration and Supplement filed 8/21/03 dismissed as untimely, Ltr action Ref. 1800B3-IB. Petition for reconsideration filed 12/29/03 Denied, Ltr. action, Ref. 1800B3-GDG.”

Nevertheless, Texas Grace argues that its submissions must be considered timely-filed due to alleged defects⁹ in the public notice. Specifically, Texas Grace contends that: (1) the single consolidated notice did not adequately distinguish the separate actions taken on January 29, 2004; (2) the notice did not correctly identify the *Rulemaking Reconsideration Denial* by the staff reference number (1800B-IB) which appeared on the document, but rather by reference number 1800B3-IB (adding a number 3 which was not present on the letter); and (3) the Public Notice, did not give adequate notice of dismissal of the *August Submissions*, because Texas Grace intended one of these submissions to be treated as a new tolling request, but the notice described it as a “Supplement filed 8/21/03.”

6. Based on the alleged defects in public notice, Texas Grace contends that the February 3, 2004, date of public notice should not be used to calculate the deadline for filing petitions for reconsideration and applications for review. Texas Grace suggests that the 30-day deadline should be counted instead from February 9, 2004, the date on which Texas Grace’s proprietor received copies of the decision letters by both mail and fax at the address to which he had asked the U.S. Postal Service to forward his mail. Texas Grace contends that the staff itself attached some significance to the date of Texas Grace’s receipt, by using certified mail, return receipt requested. Texas Grace also relates that the staff viewed receipt of documents by Texas Grace’s sister company important in a different proceeding, in which the staff reissued and redated a decision after learning that the companies’ principal had not received a letter mistakenly addressed to a previous residence. Texas Grace concludes that the filing deadline should be March 10, 2004, and therefore that its March 8, 2004, filings were timely.

II. DISCUSSION

7. Petitions for reconsideration, applications for review, and any supplements thereto must be filed within 30 days of public notice, as that term is defined in Section 1.4(b) of the rules.¹⁰ When, as here, the full text of an action document is not released by the Commission, but a descriptive document entitled “Public Notice” describing the action is released, public notice is given on the date on which the descriptive “Public Notice” is released.¹¹ Thus, under the Commission’s rules, deadlines for filing petitions for reconsideration and applications for review are not dependent in this case upon any person’s receipt of actual notice.¹² The staff’s use of certified mail in this case does not change the first day to be

⁹ At the time that Texas Grace first alleged defects in the Public Notice it had not yet seen that Public Notice because Texas Grace incorrectly expected it to appear in the daily “Broadcast Actions” reports while the staff routinely gives notice of decisions on reconsideration in the daily “Broadcast Applications” reports. Texas Grace thus argued erroneously that the public notice announced only one action taken on January 29, 2004, without specifying whether that action was the *Rulemaking Reconsideration Denial* or the *FAA Reconsideration Denial*. On March 19, 2004, after viewing the public notice, Texas Grace amended its claims.

¹⁰ See 47 C.F.R. § 1.106(f) (petitions of reconsideration); 47 C.F.R. § 1.115(d) (applications for review); 47 C.F.R. § 1.4(b).

¹¹ 47 C.F.R. § 1.4(b)(4).

¹² 47 C.F.R. § 1.4(b)(5). As Texas Grace observes, the staff has discretion to reissue a decision on its own motion if the decision contains a mistake, such as an inaccurate address. No such mistake occurred here, however, and the circumstances do not provide a basis for the staff to reissue decisions that were properly addressed and timely mailed to Texas Grace’s official address of record in Mississippi. Texas Grace acknowledges, and U.S. Postal Service records confirm, that the January 29, 2004, decisions were received at Texas Grace’s official address in Mississippi on February 5, 2004; Texas Grace, however, had requested that the Postal Service temporarily forward all mail to an unofficial address in New York. The Postal Service delivered the forwarded decisions to Texas Grace’s proprietor in New York on February 9, 2004, the same day that he (continued....)

counted for determining the filing deadline for seeking review or reconsideration. The use of certified mail was a mere staff courtesy.

8. Texas Grace has not shown that the Public Notice in the instant case was defective. Texas Grace misconstrues the role of the public notice process in preserving a party's right of review of agency actions. A public notice which initiates the 30-day period for seeking review or reconsideration is "adequate only if it alert[s] interested parties to documents which would allow them to determine whether their interests were implicated."¹³ The instant Public Notice, which identifies letter actions concerning Texas Grace and station KRZB, clearly satisfies this requirement.

9. With respect to exact wording of the notice, the Commission and staff have wide latitude regarding the information included, provided that the notice gives "fair warning" of the scope of the described action.¹⁴ The instant notice accurately reflects that the staff denied reconsideration of two Texas Grace filings dated June 9, 2003, and December 29, 2003, and also dismissed two August 21, 2003, Texas Grace filings as untimely. We reject as meritless Texas Grace's contention that the staff was required to use multiple public notices to dispose of several Texas Grace submissions. Texas Grace's complaint that one internal routing code listed in the public notice did not correspond exactly to the code listed on the letter is equally unpersuasive. The staff's public notice was sufficient to permit someone exercising reasonable diligence to identify and locate the action documents described therein.¹⁵

10. Finally, we address the staff's dismissal as untimely of the *August Submission* characterized by Texas Grace as a "new and separate" tolling request. This filing both repeats arguments raised previously and claims that Texas Grace is entitled to additional time based on the *2003 Rulemaking Order*. To the extent that this filing relies on the *2003 Rulemaking Order*, the dismissal was erroneous. It was timely-filed within thirty days of that *Order*.¹⁶ However, the staff's dismissal of the filing as untimely was harmless error, given that the arguments raised therein were without merit. As the Commission has held previously with respect to this particular construction permit, permittees may not rely on rulemaking proceedings, including those involving changes in allotment reference coordinates, to toll a permit or waive a construction deadline.¹⁷ Moreover, when the Commission waived Section

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contacted the staff to request that the decisions also be sent to him via fax. There is no argument that Texas Grace did not receive the documents.

¹³ *Hispanic Information and Telecommunications Network v. FCC*, 865 F.2d 1289, 1295 (D.C. Cir. 1989).

¹⁴ See *KOLA, Inc.*, 11 FCC Rcd 14297, 14310 (1996) (citing *Ridge Radio Corporation v. FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961)). For example, where the Commission addresses multiple matters in a single action document, a public notice identifying the document and primary action is sufficient. *Id.*

¹⁵ See *Thomas W. Tittle*, 5 FCC Rcd 1196, 1197 (1990) (interested parties must exercise reasonable diligence in reviewing public notices).

¹⁶ See *2003 Rulemaking Order*, 18 FCC Rcd at 15532. However, insofar as the filing additionally attempts to "update and adjust" a November 2002, tolling request which was denied in May 2003, and relies on other matters occurring more than 30 days prior to the request, such as rulings between October 2001 and May 2003, those arguments were untimely. See 47 C.F.R. § 73.3598(c). The other *August Submission*, submitted as an untimely amendment to a Petition for Reconsideration, was properly dismissed as untimely. See 47 C.F.R. § 1.106(f).

¹⁷ See *Texas Grace*, 16 FCC Rcd at 19170-71. Nowhere did the Commission, as Texas Grace suggests, link the running of the additional three-year period to Texas Grace's restoration of the Archer City allotment to Class C2. The *2003 Rulemaking Order's* substitution of channel 248C2 for channel 248C1 occurred because Texas Grace (continued....)

73.3598 and extended Texas Grace's construction deadline to October 26, 2004, the permittee had already received an unencumbered construction period in excess of the three years specified in the rule. On that basis, the Commission advised Texas Grace it would be ineligible for any further extension of the October 26, 2004, construction deadline and that its construction permit would expire automatically on that date unless it had completed construction and timely filed a license application.¹⁸ In these circumstances, no event arising during the additional three-year period that began October 26, 2001, including the release of the 2003 *Rulemaking Order*, constituted a tolling event within the meaning of the rule or provided a basis for a further extension of the permit's expiration date. In accordance with our *Texas Grace* order, the KRZB(FM) construction permit automatically cancelled.

11. In any event, Texas Grace's untimely arguments are without merit. First, it contends that it is entitled to approximately six additional months¹⁹ due to certain FAA problems in 2003 relating to the termination of a 2001 FAA study of the permitted facilities and a 2003 study which Texas Grace states was needed to "facilitate reinstatement of KRZB's tower rights."²⁰ Those problems, however, related to studies which were never required. In 1999 the FAA issued a no hazard determination for the tower specified in the Archer City construction permit. That determination explicitly stated that the no hazard determination would remain in effect until "the date prescribed by the FCC for completion of construction," *i.e.*, October 26, 2004.²¹ This condition, routinely included by the FAA in determinations associated with applications for broadcast station construction permits, establishes that the 1999 no hazard determination was sufficient for construction of the KRZB facilities and that the 2001 FAA study and 2003 restudy of these same facilities were unnecessary. As the FAA stated when it terminated the 2003 study, the expiration date of the FAA's 1999 study "became the same as the FCC expiration" date once the Commission issued the Texas Grace construction permit in 1999, and "[b]y FAA policy, no further study was ever required for this structure."²² The FAA thus terminated the 2003 study after it was advised that Texas Grace held an FCC construction permit. Providing additional time to construct based on difficulties encountered by Texas Grace in obtaining a redundant FAA clearance is clearly unwarranted.

12. Second, Texas Grace contends that it is entitled to a 23-month period starting with grant of the new three-year construction period and ending on the effective date of a staff decision downgrading the Archer City allotment to Class C2.²³ In adopting rules establishing a three-year construction period, the Commission explicitly rejected a request to toll construction periods during "the pendency of petitions

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voluntarily sought and obtained modification of the permit to specify channel 248C1, but then failed to timely file the required implementing application. *See supra* n.7.

¹⁸ *Id.* at 19174 n.13.

¹⁹ The FAA arguments are based on the period June 5, 2003 through November 25, 2003.

²⁰ Application for Review of FAA Matters at ii.

²¹ *Determination of No Hazard to Air Navigation (FAA Aeronautical Study No. 99-ASW-2013-OE)* (Aug. 13, 1999) at 1 (submitted as Exhibit F to Application for Review of FAA Matters).

²² *Termination of Aeronautical Study No. 2003-ASW-3016-OE* (Nov. 25, 2003) at 2 (submitted as Exhibit D to Application for Review of FAA Matters).

²³ *See supra* n.7. The period at issue begins October 26, 2001 and ends September 8, 2003.

for rulemaking affecting a station's frequency and/or class²⁴ Subsequently, the Commission rejected Texas Grace's identical contention in the *Texas Grace* decision.²⁵ Similarly, we conclude that no additional time to construct is warranted based on the rulemaking to restore the Class C2 allotment to Archer City.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that each of the Applications for Review filed by Texas Grace Communications on March 8, 2004, ARE DISMISSED as untimely.

14. IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Texas Grace Communications on March 8, 2004, IS DISMISSED as untimely.

15. IT IS FURTHER ORDERED, that the Amendments to the above-referenced Applications for Review and to the Petition for Reconsideration filed by Texas Grace on March 19, 2004, ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁴ See 1998 Biennial Regulatory Review, *Streamlining of Mass Media Applications, Rules, and Processes*, 14 FCC Rcd 17525, 17538-39 (1999).

²⁵ *Texas Grace*, 16 FCC Rcd at 19170-71.