

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

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| In the Matter of |) | |
| |) | |
| Pamplin Broadcasting, Inc. |) | File No. BNP-20001020AAZ |
| |) | |
| For a Permit to Construct a New |) | |
| AM Station at Reno, Nevada |) | Facility ID No. 129251 |

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2008

Released: January 17, 2008

By the Commission:

I. BACKGROUND

1. The Commission has before it two applications for review and a petition for reconsideration of the grant by the Media Bureau (the “Bureau”) of the above-captioned application of Pamplin Broadcasting, Inc. (“Pamplin”) for a permit to construct a new AM station to serve Reno, Nevada (the “Reno Permit”).¹ Owens One Company, Inc. (“Owens”), KGO-AM Radio, Inc. (“KGO”), and Americom Las Vegas Limited Partnership (“Americom”) each argue in their respective filings that the new station would interfere with, or otherwise negatively impact, their existing AM radio stations.² Also before the Commission is Owens’ December 22, 2003, Petition for Reconsideration³ of a subsequent staff action which tolled the Reno Permit’s three-year construction period.⁴ For the reasons discussed below, we: (a) dismiss Americom’s Petition for Reconsideration of the Permit Decision; (b) deny Owens’ Application for Review of the Permit Decision; (c) deny Owens’ Petition for Reconsideration of the Tolling Decision; and (d) deny KGO’s Application for Review of the Permit Decision.

¹ See *Letter to Natalie G. Roisman, Esq. et al.* (MB Sept. 3, 2003) (the “Permit Decision”).

² Owens is the licensee of KUZZ(AM), Bakersfield, California. It filed its Application for Review on October 9, 2003, claiming that the proposed Reno station would cause prohibited interference to KUZZ(AM). KGO, the licensee of adjacent-channel station KSFO(AM), San Francisco, California, filed its Application for Review on October 9, 2003. It argues that grant of the Reno Permit prevents it from filing an application to upgrade KSFO(AM). Americom, which filed its Petition for Reconsideration on October 9, 2003, states that it is the licensee of KPLY(AM), Reno, Nevada. The Commission’s records indicate, however, that KPLY(AM) is licensed to Lotus Radio Corp., and Americom has not demonstrated that it has any interest in the station. Americom alleges that Pamplin’s proposed station would operate from a site close to KPLY(AM)’s facilities, potentially interfering with KPLY(AM)’s signal. In response, Pamplin argues that all three companies lack standing to challenge the Permit Decision. We need not resolve the standing dispute because, even if we accorded standing to KGO, Owens, and Americom, for the reasons stated *infra*, we would not find their arguments against the issuance of the Reno Permit persuasive. See *Nextel Communications*, Memorandum Opinion and Order, 20 FCC Rcd 13967, 14021 n.335 (2005); *WBBK Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 5906, 5907 n.3 (2000).

³ The staff has referred both petitions for reconsideration to the Commission pursuant to 47 C.F.R. § 1.106(a)(1).

⁴ See *Letter to David L. Rice, Esq.* (MB Dec. 12, 2003) (the “Tolling Decision”).

2. Pamplin submitted its construction permit application on October 20, 2000.⁵ Owens, KGO, and others filed timely petitions to deny, primarily raising interference concerns. Pamplin amended its application on April 4, 2001, adjusting the proposed nighttime pattern in an effort to cure any alleged technical defect. Owens alleged that Pamplin's proposal, even as amended, would cause interference to KUZZ(AM). Owens and KGO also argued that the application, as amended, no longer provided sufficient nighttime coverage to Reno, as required by Section 73.24(i) of the Commission's Rules (the "Rules").⁶ By letter dated June 25, 2002, the staff granted the petitions, in part.⁷ The staff found that Pamplin's amended nighttime interference-free contour would encompass only 63 percent of "the area of Reno," whereas Section 73.24(i) of the Rules requires, in relevant part, 80 percent coverage of the principal community.⁸ The staff provided Pamplin an opportunity to file a corrective amendment and denied the petitions in all other respects, finding that the Pamplin proposal fully protected both KUZZ(AM) and KSFO(AM).

3. Pamplin further amended its application on July 23, 2002 (the "2002 Amendment"), in response to the Deficiency Letter. Pamplin demonstrated coverage to 90.4 percent of Reno's population and asserted that the staff should evaluate nighttime coverage based on population, rather than area. Alternatively, Pamplin requested a waiver of Section 73.24(i), contending that it would be difficult for the station to cover all of Reno because the city is "oddly-shaped." On July 25, 2002, Owens and KGO filed pleadings alleging errors in the Deficiency Letter. Owens' submission included additional interference-related data. On August 14, 2002, KGO also filed an Informal Objection to the 2002 Amendment, arguing that a waiver of the coverage rule should be denied. On June 30, 2003, the staff requested that Pamplin respond to these additional filings.⁹ Pamplin so responded on July 30, 2003, maintaining, *inter alia*, that the submissions by KGO and Owens were procedurally defective because they challenged an interlocutory action, rather than a final action on the underlying application.

4. On September 3, 2003, the staff released the Permit Decision, granting Pamplin's amended application and issuing the Reno Permit. In so acting, the staff dismissed the Owens and KGO pleadings on procedural grounds, but briefly addressed their merits. With respect to nighttime coverage, the staff found that Pamplin's proposed service to 90.4 percent of Reno's population complied with Section 73.24(i) and that a rule waiver was thus unnecessary. The staff further stated that the amended application complied with the Commission's interference standards,¹⁰ and rejected the new data submitted by Owens.

⁵ Pamplin's submission during the AM Auction No. 32 window was not mutually exclusive with any other application, and therefore was processed as a "singleton," without need for an auction.

⁶ 47 C.F.R. § 73.24(i).

⁷ See *Letter to David L. Rice, Esq. et al.* (MMB June 25, 2002) (the "Deficiency Letter").

⁸ See 47 C.F.R. § 73.24(i) (requiring each applicant for an AM facility in the standard (535 – 1605 kHz) band to show that "80% of the principal community is encompassed by the nighttime 5 mV/m contour or the nighttime interference-free contour, whichever value is higher"). Pamplin had claimed 81.9 percent area coverage. See Pamplin's Apr. 4, 2001 amendment, Ex. E-9-2.

⁹ See *Letter to Ellen Mandell Edmundson, Esq.* (MB June 30, 2003).

¹⁰ See Permit Decision at 4 (*citing* 47 C.F.R. § 73.37(a)).

5. On October 9, 2003, Owens and KGO filed timely applications for review of the Permit Decision. On that same date, Americom, which had not participated previously, filed a Petition for Reconsideration of the Permit Decision. On December 8, 2003, Pamplin filed a notification for tolling of the Reno Permit's three-year construction period during the administrative appeals process. The staff granted such tolling in the Tolling Decision. Owens filed a Petition for Reconsideration of the Tolling Decision on December 22, 2003.

II. DISCUSSION

6. Nighttime Community Coverage. KGO contends that Section 73.24(i)'s requirement of 80 percent coverage can be met only by covering 80 percent of a community's geographic area. KGO argues that, if coverage could be measured by population, the Rule would state so explicitly, as do analogous rules in certain non-broadcast services.¹¹ It also attempts to distinguish the cases upon which the staff relied in concluding in the Permit Decision that the Pamplin station satisfied that rule.¹² It contends that the Commission considered population information in *Bay Cities* and *John Hughes* pursuant to waiver requests.¹³ Finally, KGO argues that, "although the *HBK* decision recognizes the concept of 'substantial compliance,' the decision provides no guidance as to whether Pamplin's proposed coverage constitutes substantial compliance."¹⁴ It notes that *HBK* involved a proposal which would provide daytime city grade coverage to 99.5 percent of the community's population and 89.3 percent of its area. KGO concludes, therefore, that the staff's reliance on *HBK* here to establish "substantial" compliance based on 63 percent nighttime area coverage is misplaced.

7. In 1991, the Commission eliminated the requirement that an AM station provide nighttime coverage to its "entire" community and instead imposed the requirement that "80 percent of the principal community [must be] encompassed."¹⁵ Section 73.24(i) does not specify whether this coverage

¹¹ See, e.g., 47 C.F.R. § 24.203(a) (use of population in broadband PCS).

¹² The Permit Decision cited *Bay Cities Communications Corp.*, Memorandum Opinion and Order, 83 FCC 2d 210 (1980) ("*Bay Cities*"); *John R. Hughes*, Memorandum Opinion and Order, 50 Fed. Reg. 5679 (Feb. 11, 1985) ("*John Hughes*"); and *H-B-K Enterprises, Inc.*, Memorandum Opinion and Order, 15 FCC 2d 683 (Rev. Bd. 1968) (subsequent history omitted) ("*HBK*").

¹³ KGO also cites several non-Commission-level FM and TV cases, allegedly involving waivers of coverage rules. See, e.g., *Letter to Rebecca L. Dorch, Esq.*, 9 FCC Rcd 2753 (MMB 1994); *Rosamond Radio, Inc.*, Hearing Designation Order, 7 FCC Rcd 3609 (MMB 1992); *Channel 32 Broadcasting Co.*, Decision, 5 FCC Rcd 7373 (Rev. Bd. 1990); *Sue A. Underwood*, Hearing Designation Order, 3 FCC Rcd 153 (MMB 1987). In addition, KGO argues that Pamplin has not demonstrated grounds for a waiver, such as by documenting the unavailability of other transmission sites. Because we find that a waiver is unnecessary (see *infra* para. 8), we need not address these arguments concerning the adequacy of Pamplin's waiver showing.

¹⁴ KGO Application for Review at 11.

¹⁵ See 47 C.F.R. § 73.24(i); *Review of the Technical Assignment Criteria for the AM Broadcast Service*, Report and Order, 6 FCC Rcd 6273, 6399 (1991) ("*AM Assignment Criteria*"). Prior to 1991, the Commission had a series of AM coverage requirements. For example, former Section 73.24(j) required nighttime coverage of "all residential areas" and, as later revised, of the "entire principal community." See 47 C.F.R. § 73.24(j) (1982) and (1990). Compliance with such a 100 percent coverage standard was sometimes difficult because the propagation characteristics of AM signals require many AM stations to operate at substantially lower power levels and/or with highly directional patterns after sunset. Therefore, the Commission recognized a 90 percent figure as substantial compliance and an 80 percent figure as the minimum level for adequate community coverage. See *AM Station Assignment Standards*, Report and Order, 39 FCC 2d 645, 670 (1973), cited in *John Hughes*, 50 Fed. Reg. at

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requirement is calculated on the basis of only area, only population, or by either method. Since the rule change, the staff has applied an “either area or population” processing standard to determine compliance with the nighttime coverage requirement.¹⁶ This approach conforms to established licensing practice regarding the analogous rule in the FM radio service. The FM non-reserved band city coverage rule, Section 73.315(a), requires that a proposed facility cover “the entire principal community” with a 70 dBu strength signal.¹⁷ The Commission has stated that FM coverage of “at least 80 percent area *or* population” substantially complies with that FM rule.¹⁸ The staff’s approach is also consistent with other AM policies that use an 80 percent standard,¹⁹ and with case law issued under the former AM community coverage rule.²⁰

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5680. The staff, pursuant to a policy of substantial compliance, routinely waived Section 73.24(j) for applicants showing at least 80 percent coverage. In 1991, Section 73.24(j) was replaced with the current Section 73.24(i), which explicitly established the 80 percent coverage requirement. *See AM Assignment Criteria*, Report and Order, 6 FCC Rcd 6273 (1991).

¹⁶ The staff will generally first consider coverage of area because every applicant must submit a contour map illustrating its nighttime coverage in relation to the legal boundaries of the principal community to be served. *See generally* FCC Form 301, Section III-A (AM Engineering), Items 7 and 8. When the map demonstrates area coverage of less than 80 percent, the staff will consider other information supplied by the applicant to demonstrate compliance with the rule, such as coverage of 80 percent of the population. *See, e.g., Letter to Dan Alpert, Esq.*, 21 FCC Rcd 1057 (MB 2006) (dismissal of AM application which proposed nighttime coverage of 62 percent area and failed to demonstrate compliance with Section 73.24(i) in subsequent opportunity for amendment); *Letter to Eve Klindera Reed, Esq.* (MB Jan. 28, 2004) (waiving Section 73.24(i) for applicant proposing nighttime coverage of 26.8 percent area and 29.6 percent population where applicant also showed that 80 percent coverage would not be possible from any location and that 20 other stations were licensed to the community).

¹⁷ 47 C.F.R. § 73.315(a).

¹⁸ *See Minor Changes in Broadcast Facilities*, Report and Order, 12 FCC Rcd 12371, 12380 (1997) (emphasis added).

¹⁹ For example, an 80 percent standard also has been used to determine adequate coverage for purposes of fair distribution of AM facilities among communities. *See AM Station Assignment Standards*, 39 FCC 2d at 669-670. In that context, “inadequate coverage [would be] presumed if less than 80 [percent] of the *population or area* of the community receives an interference free signal” and a power increase by an existing station could be considered favorably if the station’s existing facilities included “less than 80 percent of the *area or population* of the community to which the station is assigned.” *Id.* (emphasis added).

²⁰ Applications with proposals comparable to that of Pamplin here to serve 63 percent area and 90.4 percent population have long been granted without waiver based on substantial compliance principles. *E.g., Wilkes County Radio*, Decision, 10 FCC 2d 622, 623 (Rev. Bd. 1967), *review denied*, 15 FCC 2d 292 (1968), *recon. denied*, 17 FCC 2d 337 (1969) (coverage of 70 percent area and 96 percent population); *KDEF Broadcasting Co.*, Decision, 30 FCC 635, 636 (1961) (coverage of 67.8 percent area and 90.6 percent population). In *HBK*, which was decided at a time when the Commission had a 100 percent coverage requirement, the staff originally sought more information about a station’s nighttime coverage (of 91.7 percent population and 38.3 percent area). *See HBK*, 15 FCC 2d at 686. The staff later determined that the *HBK* applicant was in substantial compliance after the applicant established that the proposed facilities would cover virtually all of the community’s *populated* areas. *See Broadcasting, Inc.*, Decision, 20 FCC 2d 713, 718 (Rev. Bd. 1969).

8. We find that Pamplin's nighttime coverage of 90.4 percent of Reno's population meets the 80 percent threshold of Section 73.24(i). The purpose of the coverage rules is to ensure that local residents receive service.²¹ Thus, the Commission has focused historically on *residential* area, not unpopulated land.²² KGO's insistence that the Commission has always examined area, rather than population, is inconsistent with the agency's longstanding emphasis on coverage of populated areas.²³ Having found that Pamplin's Reno proposal satisfies the rule, we need not address KGO's unfounded contention that the staff erred by granting the application without a rule waiver.

9. **Interference.** Owens renews its claim that Pamplin submitted invalid measurements and attacks the brevity of the staff's dismissal of Owens' arguments.²⁴ It maintains that the staff has not adequately explained how information submitted by Owens was evaluated and how the staff concluded that the proposed station would cause no interference to KUZZ(AM).

10. There is no requirement that the staff's analysis be of a minimum length.²⁵ The Permit Decision concisely explained the staff's determination that, based upon the record, including submitted measurements, the proposed station would meet all Section 73.37(a)²⁶ contour overlap standards and would not interfere with KUZZ(AM). Moreover, the staff had previously explained in the Deficiency Letter why Owens' interference allegations were without merit.²⁷ As noted above, the Permit Decision dismissed Owens' Petition for Reconsideration of the Deficiency Letter on procedural grounds because

²¹ See, e.g., *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 (2004).

²² See *supra* n.16. For example, in *John Hughes*, the Commission ruled that one applicant, Walden, satisfied an 80 percent benchmark for substantial compliance by proposing nighttime coverage to 86.8 percent of the town's *residential* area. See *John Hughes*, 50 Fed. Reg. at 5680. The Commission further found that a second applicant, Dawn, failed to cover much of the community's *non-residential* area and fell short of substantial compliance, but merited a waiver based on coverage of 71.26 percent of the population. *Id.*

²³ "[P]olitical boundaries . . . are not necessarily reflective of urban concentration" and "it is not desirable to require coverage of vacant acreage merely because of the fortuity of political boundaries." *Broadcasting, Inc.*, Decision, 20 FCC 2d 713, 718 (Rev. Bd. 1969) (citing *Manchester Broadcasting Co.*, Decision, 24 FCC 199 (1958)). See also *2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13724 (2003) ("stations serve people, not land").

²⁴ Owens Reply at 2 (citing *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (2000), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

²⁵ See *Wendell and Associates*, Memorandum Opinion and Order, 14 FCC Rcd 1671, 1679 (1998) ("It is clear from the staff's order that it considered [the objector's] pleadings, which is all that was required.").

²⁶ 47 C.F.R. § 73.37(a).

²⁷ See Deficiency Letter at 2. In that letter, the staff considered the interference-related claims made in Owens' March 26, 2001, Petition to Deny, its April 16, 2001, Reply, and additional measurements taken along the 190 degree radial of KIHM(AM), Reno, Nevada, which is located at the same site as the proposed station. The Deficiency Letter also considered information provided by Pamplin. The staff explained that it had averaged winter information with summer information to account for seasonal differences. *Id.* at 3 (citing *United Broadcasting Co., Inc.*, Memorandum Opinion and Order, 1 FCC 2d 555, 559 (1965)).

reconsideration generally does not lie against interlocutory actions.²⁸ Nevertheless, the staff also explained that the additional data which Owens submitted therewith was unpersuasive because Owens failed to provide supporting analysis and maps.²⁹ Under these circumstances, the staff was not required to provide a more detailed explanation.

11. New claims of interference are raised by Americom, which did not participate earlier in this proceeding. Americom states that it was not aware of the potential for interference to KPLY(AM) until the staff issued the Reno Permit, which was conditioned on site users executing an agreement for the installation of traps and filters. Americom contends that the Reno Permit condition reflects a clear potential for interference to KPLY(AM). Pamplin responds that Americom fails to show good cause for failing to participate earlier and that its interference claim is based on conjecture.³⁰

12. A non-party may file a petition for reconsideration if it demonstrates that its interests are adversely affected and that it was not possible for it to have participated earlier.³¹ A petition for reconsideration that relies on facts not previously presented may be granted if consideration of the facts is required in the public interest.³² Americom claims that the outcome of this proceeding could affect KPLY(AM), but does not establish the nature of its interest in that station, which is licensed to Lotus Radio Corp. Nor has Americom shown good reason for its not having participated earlier or that consideration of its arguments is required in the public interest. There were numerous public notices in the course of this proceeding. A would-be petitioner's lack of actual notice of the pendency of a proceeding does not establish good cause for its failure to participate.³³ We therefore dismiss Americom's Petition due to Americom's failure to establish how its interests are adversely affected and that it was not possible for it to have participated earlier in this proceeding. In any event, even aside from this procedural bar to Americom's delinquent participation and even accepting, *arguendo*, Americom's claim that the Permit Decision directly affects KPLY(AM) in light of the condition discussed above, it has not shown that operation of the new Reno station could have an *adverse* affect.

²⁸ See 47 C.F.R. § 1.106(a)(1).

²⁹ See 47 C.F.R. § 73.186.

³⁰ Americom also claims that Pamplin lacked reasonable assurance of site availability, because the land owner, the University of Nevada, had not discussed site use with Pamplin. In response, Pamplin produced a lease between Pamplin and Thomas Aquinas School (the "School"), the licensee of an existing radio station on the site. In view of the School's representations of authority to enter into the lease, we find that Pamplin received reasonable assurance of site availability prior to filing its application. See *Linda E. Krook*, Initial Decision, 2 FCC Rcd 3511, 3514 (ALJ 1987) (reasonable assurance found based on good faith sublease negotiated prior to application, despite post-application protest by the site's land owner). Moreover, on September 1, 2005, Pamplin submitted a signed Declaration dated July 8, 2005, of Ronald S. Pardini, Associate Director of the Nevada Agriculture Experimental Station, a division of the University of Nevada, Reno. Mr. Pardini states that he has been authorized by the University of Nevada, Reno to express the University's willingness to lease the transmitter site to Pamplin.

³¹ See 47 C.F.R. § 1.106(b)(1). See also 47 U.S.C. § 405(a).

³² See 47 C.F.R. § 1.106(c)(2).

³³ See, e.g., *Texas Telecasting, Inc.*, Memorandum Opinion and Order, 52 R.R.2d 150 (1982). Of primary importance among the Commission's notice requirements is the Commission's own issuance of a public notice, which provides sufficient constructive notice to enable timely participation. See *Northwest Broadcasting, Inc.*, Memorandum Opinion and Order, 6 Comm. Reg. (P&F) 685 (1997).

The staff routinely places a site user coordination condition on permits that authorize facility co-location with existing facilities. Contrary to Americom's assertion, the condition is not based on a finding that the new station would likely cause interference to an existing station. Moreover, the engineering statement that Americom submits with its Petition contains no measurements or other support for its interference claims, only an assertion that the facilities of KPLY(AM) and the proposed station are "very near."³⁴ Thus, were we to consider Americom's Petition on the merits, we would deny it.

13. Finally, we note that both our Rules and licensing processes include safeguards to protect nearby AM transmission facilities. For example, any broadcaster proposing to construct a tower near an AM station must perform measurements on the AM pattern before and after construction, and must install and maintain detuning equipment, if necessary.³⁵ Additional conditions designed to prevent intermodulation and spurious emissions also are imposed on a permittee which proposes to co-locate with another AM station. These requirements apply to any tower construction or alteration within 3.2 kilometers of a directional AM station, or within 0.8 kilometers of a nondirectional AM station. Because KPLY(AM)'s transmitter is 13.3 kilometers from the Reno site, well beyond the distance specified in the rule, the Reno permit includes no conditions regarding KPLY(AM). The distance between the two sites makes it unlikely that the Reno permit will affect KPLY(AM)'s operation in any way. In the unlikely event that KPLY(AM) does experience interference from the new Reno station, KPLY(AM) may file a complaint with appropriate supporting documentation.

14. Tolling. The staff tolled the Reno Permit's three-year construction period, finding that the requests for reconsideration and review discussed above had encumbered the Reno Permit since grant.³⁶ Owens argues that Pamplin's December 8, 2003, tolling notification was late-filed and should have been denied on that basis. According to Owens, the tolling notification was due no later than November 10, 2003 – 30 days from the filing of the applications for review and petition for reconsideration of the Permit Decision. Pamplin responds that its notification was not due until December 18, 2003 – 30 days after the completion of the pleading cycles, and that its filing was therefore timely. Pamplin further argues that the tolling rules are nondiscretionary and that construction permits "shall toll" during periods of administrative review, without regard to the date on which a tolling notification is filed.

15. The Commission's Rules provide that a construction period "shall toll" in specific circumstances, including when the grant of the permit is the subject of administrative review, *i.e.*, upon the filing of petitions for reconsideration and/or applications for review of the grant of a construction permit.³⁷ The tolling rule also, however, states unequivocally: "a permittee *must* notify the Commission as promptly as possible and, in any event, within 30 days of any pertinent event" that qualifies for tolling treatment.³⁸ The purpose of the notification requirement is "to ensure ongoing permittee construction diligence and to avoid *post hoc* permittee temporizing."³⁹

³⁴ See 47 C.F.R. § 1.106(e) (requirements for petitions for reconsideration alleging electrical interference).

³⁵ See 47 C.F.R. § 73.1692.

³⁶ See Tolling Decision, *supra* note 4. The Tolling Decision did not address the issue of timeliness.

³⁷ See 47 C.F.R. § 73.3598(b)(ii).

³⁸ See 47 C.F.R. § 73.3598(c) (emphasis added). See also *Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17542 (1999). Similarly, the Commission has

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16. Pamplin's tolling notification was untimely. It was not filed within 30 days of the filing of the applications for review and Petition for Reconsideration, the encumbering events at issue here. We reject Pamplin's arguments that the tolling notification deadline is based on the pleading cycle. The triggering events specified in our rules for tolling based on administrative review are petitions for reconsideration and applications for review.⁴⁰ The close of a pleading cycle is not an independent encumbering event. In such circumstances, we consider whether Pamplin has demonstrated good cause for waiving the 30-day notification provision.⁴¹

17. Pamplin provides no good reason for its late filing and thus has not demonstrated grounds for a waiver.⁴² In similar circumstances, the staff practice has been to consider whether a permit qualifies for tolling on the date 30 days prior to an untimely-filed notification and, if so, to grant tolling as of that date.⁴³ The Tolling Decision, however, erroneously tolled the permit as of the grant date of the construction permit application. Under established practice, Pamplin is entitled to tolling as of November 8, 2003, 30 days prior to its late-filed notification. Owens' position that tolling must be denied in its entirety is without merit. It cites no authority to support its position that, with a late-filed tolling notification, tolling must be denied entirely, even though a tolling event of a continuing nature remains pending. There is no basis to conclude that the Commission intended the revised construction rule to be interpreted in this very strict way.⁴⁴ Thus, we affirm the staff's finding that the Reno Permit qualifies for tolling treatment. However, in view of the clear language in our rules specifying the

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stated that a tolling request that does not contain all required information will be rejected although the permittee might otherwise have qualified for tolling. *Id.* at 17542, n.60.

³⁹ *Birach Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1416 (2003) ("*Birach*"), *recon. denied*, 20 FCC Rcd 5764 (2005).

⁴⁰ See 47 C.F.R. § 73.3598(b)(ii). Similarly, the tolling event for natural disasters and judicial review are, respectively, the occurrence of the relevant act of God and the filing of the judicial cause of action. *Id.* at §§ 73.3598(b)(i) and (ii).

⁴¹ See *Birach*, 18 FCC Rcd at 1416; *Wendell & Associates*, Memorandum Opinion and Order, 17 FCC Rcd 18576, 18579 (2002).

⁴² Pamplin cites several unpublished staff-level cases granting waivers of the three-year construction period for encumbering events that occurred more than 30 days prior to the request. The cited cases date to a time when the staff treated the 30-day notification requirement as primarily a means to assist the permittee's contemporaneous documentation of the encumbering events. The Commission thereafter clarified in the 2003 *Birach* decision that the purpose of the requirement is broader and that requests for waiver of the three-year construction period in Section 73.3598(a) should be filed within the same 30-day period provided in Section 73.3598(c) for tolling requests. See *Birach*, 18 FCC Rcd at 1416. The only post-*Birach* case cited by Pamplin involved a notification filed only six days after the *Birach* decision and was based on an event that occurred prior to that clarification. See *Letter to Rebecca Duke, Esq.*, 18 FCC Rcd 5034, 5036 n.7 (MB 2003). The staff cautioned that the outcome would have been different under other circumstances. *Id.*

⁴³ See, e.g. *Letter to Lauren Colby, Esq.*, 21 FCC Rcd 1260 (MB 2006). That practice is based upon a reasonable reading of Section 73.3598(c), which embodies the 30-day notification requirement, in conjunction with Section 73.3598(b), which recognizes that certain events can continue to prevent construction for considerable periods.

⁴⁴ See *Streamlining of Mass Media Applications Rules and Processes*, Report and Order, 13 FCC Rcd 23056, 23091 (1998).

triggering events for tolling and requiring notification within 30 days of the pertinent event, we find that the staff erred in providing tolling as of the permit grant date. Accordingly, we clarify that once tolling ceases, Pamplin will receive its remaining construction period of two years, nine months, and 26 days, rather than the three-year period that the staff granted. Pamplin must notify the staff when tolling ceases,⁴⁵ which -- barring unforeseen events that would also qualify for tolling -- would occur upon finality in this proceeding. At that time, the staff will calculate a new permit expiration date.

III. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed on October 9, 2003, by Americom Las Vegas Limited Partnership IS DISMISSED.

19. IT IS FURTHER ORDERED that the Application for Review filed on October 9, 2003, by KGO-AM Radio, Inc. IS DENIED.

20. IT IS FURTHER ORDERED that the Application for Review filed on October 9, 2003, by Owens One Company, Inc. IS DENIED and that its Petition for Reconsideration filed on December 22, 2003, IS GRANTED to the extent noted herein and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁵ See 47 C.F.R. § 73.3598(d).