

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

In the Matter of)	
)	
Application of KM LPTV of Chicago-13, L.L.C.)	File No. BDISDTA-20131114BTV
for a Displacement Application for Class A)	Facility ID No. 35092
Television Station WOCK-CD, Chicago, IL)	

MEMORANDUM OPINION AND ORDER

Adopted: June 22, 2017

Released: June 23, 2017

By the Commission:

I. INTRODUCTION

1. The Federal Communications Commission (Commission) has before it an Application for Review (AFR) filed on September 22, 2015 by KM LPTV of Chicago-13, L.L.C. (KM), the licensee of digital Class A television station WOCK-CD, Chicago, Illinois (Station).¹ KM seeks review of the letter decision issued by the Video Division of the Media Bureau (Division) on August 24, 2015 (Letter Decision),² dismissing the above-captioned displacement application (Displacement Application) to change the Station's channel from digital Channel 4 to digital Channel 41. In this decision, we affirm the Division's dismissal of the Displacement Application and dismiss in part and otherwise deny the AFR. We also dismiss, and on alternative and independent grounds deny, KM's claim in its post-AFR filings that we should not auction digital Channel 41 in the broadcast television spectrum incentive auction until dismissal of the Displacement Application becomes final.

II. BACKGROUND

2. WOCK-CD and full-power television station WHBF-TV, Rock Island, Illinois (WHBF-TV) commenced digital operations on channel 4 in June 2009.³ Both WHBF-TV and WOCK-CD claimed to have experienced poor reception due to their operation on a low-VHF channel.⁴ To address

¹ Application for Review filed by KM LPTV of Chicago-13, L.L.C. (Sept. 22, 2015) (AFR).

² Letter from Barbara A. Kreisman, Chief, Video Division, to Aaron Shainis, Esq. (Aug. 24, 2015) (*Letter Decision*).

³ *See id.* at 3. *See* File Nos. BLDVA-20090608ACN (license to cover application for WOCK-CD) and BLCDT 20090618ACW (license to cover application for WHBF-TV).

⁴ The Commission has long recognized the reception difficulties for digital TV broadcasting in the low VHF band. *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order*, 12 FCC Rcd 14588, 14627, para. 82 (1997) ("TV operations on the lower VHF channels 2-6 are subject to a number of technical penalties, including higher ambient noise levels due to leaky power lines, vehicle ignition systems, and other impulse noise sources and interference to and from FM radio service"); *Study of Digital Television Field Strength Standards and Testing Procedures*, Report, 20 FCC Rcd 19504, 19542, para. 82 (OET 2005) (stating that man-made noise on low VHF is caused by devices such as hair dryers, computers, microwave ovens and similar appliances and that the interference can be addressed by making sure such devices are turned off when someone is watching television); *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Notice of Proposed Rulemaking, ET Docket No. 10-235, 25 FCC Rcd 16498, 16511-13, paras. 42-45, 16515-16, para. 54 (2010) (discussing the characteristics that pose challenges for the use of VHF channels in providing digital television service, especially low-VHF channels that are more prone to interference due to background (i.e. "impulse") noise).

the issue, WHBF-TV sought to increase power.⁵ On June 24, 2010, the Division granted WHBF-TV's requested power increase.⁶ WOCK-CD did not challenge WHBF-TV's requested power increase or the Bureau's decision to grant the increase.

3. To address its poor reception, WOCK-CD sought displacement relief to operate on a new channel. While Class A television stations have primary status, they are subject to displacement when a full power television station has used "engineering solutions" necessary to resolve "technical problems" in replicating or maximizing its DTV service areas as part of the DTV transition.⁷ To be eligible for displacement relief, the Commission's rules provide that a Class A station must demonstrate that it is receiving or predicted to receive interference from a DTV station or allotment pursuant to Section 73.623.⁸

4. In March 2010, KM filed a displacement application proposing to change the Station's channel from digital Channel 4 to digital Channel 30.⁹ KM argued that it was entitled to displacement relief because "Channel 4 cannot provide satisfactory TV service" due to "high impulse noise" and because "receive TV antennas are not adequately configured to receive digital TV signals in the low VHF band."¹⁰ The Division denied this application, explaining that the Commission's rules provide that a station can file for displacement relief when it is receiving or is predicted to receive interference from another protected "station" or "service," and rejecting KM's arguments that impulse noise interference or the technical difficulties associated with operations in the low VHF band allow a station to seek displacement relief.¹¹

5. In November 2013, KM filed the Displacement Application at issue here, proposing to change the Station's channel from digital Channel 4 to digital Channel 41 and claiming that it was entitled to displacement relief because it was receiving actual interference.¹² To support this claim, KM provided complaints from 18 viewers concerning the Station's "poor signal."¹³ KM later supplemented the Displacement Application by claiming displacement relief was warranted because it was predicted to

⁵ See *Letter Decision* at 1-2.

⁶ See File No. BPCDT-20100512AFK (granted June 24, 2010); *Letter Decision* at 2.

⁷ 47 U.S.C. § 336(f)(1)(D); *Establishment of a Class A Television Service*, MM Docket No. 00-10, Report and Order, 15 FCC Rcd 6355, 6380-6381, paras. 61-64 (2000) (subsequent history omitted) (*Class A R&O*). A Class A application seeking to change channels for purposes other than displacement relief may be filed only after the Commission issues a Public Notice opening a window. 47 CFR § 73.3572(e).

⁸ 47 CFR § 73.3572(a)(4)(iii).

⁹ Application of KM LPTV of Chicago-13, L.L.C. for a Displacement Application for Class A Television Station WOCK-CD, Chicago, IL, FCC File No. BDISDTA-20100311ABP (March 2010 Displacement Application).

¹⁰ See *id.*, Engineering Statement at 2-3.

¹¹ See Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, to Mr. Marcus Lamb, FCC File No. BDISDTA-20100311ABP (Oct. 31, 2011), at 2 (concluding there was "no authorized station, allotment or other protected station or service threatening KM's use of digital channel 4").

¹² Application of KM LPTV of Chicago-13, L.L.C. for a Displacement Application for Class A Television Station WOCK-CD, Chicago, IL, File No. BDISDTA-20131114BTV (Displacement Application), Justification for Displacement.

¹³ All of the complaints contain the following identical language: "I am finding it very difficult to view WOCK due to its poor signal. I would like to watch the programming (i.e., Korean language) that is carried on WOCK but find it extremely difficult due to the poor signal quality. Are there any plans to improve the signal quality?" *Id.*

receive interference from WHBF-TV.¹⁴ To support its claim of predicted interference, KM submitted maps showing contour overlap between the two stations using the contour overlap method.¹⁵

6. In August 2015, after analyzing KM's predicted and actual interference claims, the Division dismissed the Displacement Application. The Division concluded that the viewer complaints of a "poor signal" were inadequate to demonstrate that the Station was receiving interference from WHBF-TV.¹⁶ The Division also explained that, despite KM's claims, a station's operation on a low VHF channel, in and of itself, does not qualify the station for displacement relief.¹⁷ The Division also rejected KM's contour overlap showing because the Longley-Rice terrain analysis demonstrated no predicted impermissible interference to WOCK-CD from WHBF-TV.¹⁸ Accordingly, the Division dismissed the Displacement Application, determining that the Station did not qualify for displacement relief.¹⁹

7. In the AFR, KM alleges that the *Letter Decision* improperly rejected its contour overlap analysis when determining that WOCK-CD was not displaced.²⁰ KM also contends that regardless of whether the analysis demonstrates predicted interference, the viewer complaints it submitted along with the Displacement Application amply demonstrate that the Station is receiving actual interference.²¹ According to KM, the Division failed to give adequate consideration to those complaints because they failed to use the word "interference."²² KM further claims that the Division has granted other displacement applications filed by stations on low VHF channels without requiring an analysis of any predicted or actual interference.²³

8. On February 16, 2016, KM filed a pleading styled "Notification" asserting that, until the Division's dismissal of the Displacement Application becomes final, it has "certain rights" with respect to digital Channel 41 in Chicago and that the Commission should not take any action inconsistent with those rights, such as auctioning Channel 41 in the broadcast television spectrum incentive auction.²⁴

¹⁴ Displacement Application, Supplement to Displacement Showing, Attachment A.

¹⁵ *Id.* See 47 CFR § 73.623(c)(5)(ii).

¹⁶ *Letter Decision* at 2-3.

¹⁷ *Id.* at 2-3. See Displacement Application, Justification for Displacement.

¹⁸ *Letter Decision* at 3.

¹⁹ *Id.*

²⁰ AFR at 5-7. In the AFR, KM incorrectly cites to 73.625(c)(5)(iii), rather than 73.623(c)(5)(iii). AFR at 5. KM also incorrectly states that the applicable rule for displacement is 47 CFR § 74.787(a)(4). *Id.* at 5-6. Section 74.787(a)(4) applies only to displacement with regard to low power and television translator stations, not Class A stations. The applicable rule for displacement of Class A stations is 47 CFR § 73.3572(a)(4)(iii).

²¹ AFR at 8-10.

²² *Id.* at 8-9.

²³ *Id.* at 9-10 and n.10 and 11.

²⁴ Notification filed by KM LPTV of Chicago-13, L.L.C. (Feb. 16, 2016). On February 24, 2016, KM filed a "Request for Ruling" seeking Commission action on its AFR by February 29, 2016 so as not to impair or extinguish KM's purported rights in Channel 41 in connection with the incentive auction. On March 2, 2016, KM filed a Petition for Emergency Writ of Mandamus with the United States Court of Appeals for the D.C. Circuit, requesting that the Court order the Commission to rule on the instant AFR by March 12, 2016 so that KM would not be prejudiced as a result of the Commission's inaction and forced to participate in the reverse auction on a less desirable channel (*i.e.*, Channel 4 as opposed to Channel 41). *In re KM LPTV of Chicago L.L.C.*, Petition for Emergency Writ of Mandamus, D.C. Circuit No. 16-1079 (Mar. 2, 2016). The Commission opposed KM's Petition for Emergency Writ of Mandamus and on March 11, 2016 the D.C. Circuit denied KM's request. *In re KM LPTV of Chicago L.L.C.*, No. 16-1079 (D.C. Cir. Mar. 11, 2016) (*per curiam*). On December 1, 2016, KM filed a letter stating that it would be willing to accept a UHF channel other than Channel 41 if it would facilitate action on its

(continued....)

III. DISCUSSION

9. We affirm the Division's decision to dismiss the Displacement Application and we dismiss in part and otherwise deny the AFR. As an initial matter, the Displacement Application did not comply with Section 1452(g)(1)(B) of the Spectrum Act,²⁵ which precludes the Commission from reassigning a full-power or Class A station from a VHF channel to a UHF channel after February 22, 2012 unless certain statutory criteria are satisfied. Independent of this conclusion, we find that KM has failed to demonstrate that WOCK-CD is entitled to displacement relief based on (1) predicted interference, (2) actual interference, or (3) claims that the Commission has impermissibly treated similarly situated stations differently.²⁶ We also dismiss, and on alternative and independent grounds deny, KM's claim in its post-AFR filings that the Commission should not auction Channel 41 in the broadcast television spectrum incentive auction until dismissal of the Displacement Application becomes final.

10. Section 1452(g)(1)(B) of the Spectrum Act provides that, from the enactment date of the Spectrum Act (February 22, 2012) until the completion of the incentive auction,²⁷ the Commission "may not . . . reassign a broadcast television licensee from a very high frequency television channel to an ultra high frequency television channel, unless--(i) such a reassignment will not decrease the total amount of ultra high frequency spectrum made available for reallocation under this section; or (ii) a request from such licensee for the reassignment was pending at the Commission on May 31, 2011."²⁸ KM did not acknowledge this provision in its Displacement Application or address whether its reassignment from a VHF channel (channel 4) to a UHF channel (channel 41) would "decrease the total amount of ultra high frequency spectrum made available for reallocation." Moreover, KM could not have made this showing. Grant of the Displacement Application would have added a station to the UHF band, thereby encumbering additional UHF spectrum.²⁹ KM could have sought to relinquish the spectrum usage rights for this UHF channel in the reverse auction, but this would have been a voluntary choice by KM.³⁰

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AFR. See Letter from Aaron P. Shainis, Counsel to KM, to Barbara A. Kreisman, Chief, Video Division (Dec. 1, 2016). Our decision, however, does not turn on the specific UHF channel requested.

²⁵ 47 U.S.C. § 1452(g)(1)(B); Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402 (codified at 47 U.S.C. § 309(j)(8)(G)), 6403 (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012) (Spectrum Act).

²⁶ 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. See 47 CFR § 1.115(b)(2).

²⁷ The incentive auction commenced on March 29, 2016 and closed on April 13, 2017. See *Broadcast Incentive Auction Scheduled to Begin on March 29, 2016*, AU Docket No. 14-252 et al., FCC 15-78, Public Notice, 30 FCC Rcd 8975 (2015); *Incentive Auction Closing and Channel Reassignment Public Notice*; *Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced*; *Final Television Band Channel Assignments Announced*; *Post-Auction Deadlines Announced*, MB Docket No. 16-306, GN Docket No. 12-268, Public Notice, DA 17-314 (WTB Apr. 13, 2017) (*Closing and Channel Reassignment Public Notice*).

²⁸ 47 U.S.C. § 1452(g)(1)(B). The Spectrum Act defines a "broadcast television licensee" as "the licensee of--(A) a full-power television station; or (B) a low-power television station that has been accorded primary status as a Class A television licensee under section 73.6001(a) of title 47, Code of Federal Regulations." 47 U.S.C. § 1401(6). The Displacement Application was filed after May 31, 2011, thus only subsection (g)(1)(B)(i) is relevant here.

²⁹ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6668, para. 228 (2014) (*"Incentive Auction R&O"*) (declining to protect in the repacking process the UHF facilities proposed by VHF stations in pending petitions because it would encumber additional UHF spectrum by adding new stations to the UHF band).

³⁰ Even if KM did decide to voluntarily relinquish its spectrum usage rights, the required incentive payment might have decreased the total amount of UHF spectrum made available for reallocation by increasing the total costs to clear broadcast spectrum.

Assuming KM did not voluntarily relinquish the spectrum usage rights for this UHF channel, the Commission might not have been able to find a new channel for KM in the repacking process without decreasing the total amount of UHF spectrum made available for reallocation.³¹ In all events, KM could not have shown that the proposed reassignment “will not decrease the total amount of ultra high frequency spectrum made available for reallocation under this section.”³² Accordingly, we conclude that the Displacement Application did not comply with Section 1452(g)(1)(B) of the Spectrum Act.

11. Independent of the failure of the Displacement Application to comply with Section 1452(g)(1)(B), we agree with the Division that the Displacement Application should be dismissed because KM failed to demonstrate that WOCK-CD is entitled to displacement relief. Based on the facts presented, we conclude that the Division acted properly in rejecting KM’s claim that it demonstrated displacement relief based on predicted interference. The Commission’s rules provide two alternative ways to predict whether a new or modified full-power station, such as WHBF-TV, will cause impermissible interference to a digital Class A station, such as WOCK-CD: the contour overlap method or the Longley-Rice model.³³ If the Commission were writing on a blank slate, it might be possible for WOCK-CD to use the contour overlap method to attempt to make the requisite predicted interference showing. However, in this case, in 2010 the Division granted WHBF-TV’s request to increase its power. In granting that request, the Division had occasion and did apply the Longley-Rice model in determining that allowing WHBF-TV to operate at increased power would not impermissibly interfere with WOCK-CD. Thus, granting displacement relief to WOCK-CD today based on an alleged impermissible contour overlap with WHBF-TV would be inconsistent with the Division’s prior grant of WHBF-TV’s application to increase power three years earlier based on the Longley-Rice model.³⁴ KM’s Displacement Application offered no basis to revisit the Division’s previous grant of the WHBF-TV application.

12. Indeed, KM concedes that it “has not argued that the Commission incorrectly granted the WHBF-TV Channel 4 application.”³⁵ Moreover, KM explains, it is “not arguing that it should be granted displacement relief solely on the basis of predicted impermissible interference to WOCK.”³⁶ Rather, it argues that the contour overlap showing reinforces the viewer complaints of actual interference it has

³¹ 47 U.S.C. § 1452(g)(1)(B)(i).

³² *Id.*

³³ 47 CFR § 73.623(c)(5). These methods can also be used by a Class A station seeking displacement relief. 47 CFR § 73.3572(a)(4)(iii). The Longley-Rice model has long been recognized as a more accurate method of calculating predicted interference due to the fact that it accounts for actual terrain and other factors that could impact a station’s signal propagation, while the contour overlap method relies on the station’s height above the *average* terrain (HAAT). See *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366, 8388, para. 50 (1999), *affirmed Costa de Oro Television, Inc. v. FCC*, 294 F.3d 123, 129 (D.C. Cir. 2002). In the same way that the contour overlap method is inefficient in predicting interference because it only takes into account HAAT, a station’s Grade B contour is similarly inefficient in predicting reception because it also only takes into account HAAT. See *Costa de Oro Television*, 294 F.3d at 129 (“the Longley-Rice model provides a more accurate representation of a station’s technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis.”) (internal quotes and citations omitted).

³⁴ See File No. BPCDT-20100512AFK (granted June 24, 2010).

³⁵ AFR at 6-7. See *Letter Decision* at 2 (stating that the Division approved of WHBF-TV’s authorized facilities because “the proposed facilities complied with the Commission’s interference protection requirements with respect to all stations entitled to protection”); *id.* at 3 (“Using Longley-Rice, a more accurate interference analysis tool, demonstrates that there is no predicted impermissible interference to WOCK-CD from WHBF-TV.”). KM itself has used Longley-Rice in its applications. See, e.g., File Nos. BPDVA-20090630ADV; BPDVA-20120907AAT; BSTA-20101109AAQ. The Division re-ran the Longley-Rice model in 2015 and confirmed that WHBF-TV does not cause impermissible interference to WOCK-CD.

³⁶ AFR at 7.

submitted.³⁷ We disagree. None of the complaints are from locations within the area of predicted interference using the contour overlap methodology.³⁸

13. At no time in the licensing process did KM claim that WHBF-TV would cause interference to WOCK-CD or contend that the contour overlap methodology would more accurately predict interference from WHBF-TV than the Longley-Rice methodology. From the time when WOCK-CD became licensed on digital channel 4 in June 2009, KM has complained of interference caused by impulse noise, a common problem for stations that operate in the low-VHF band. For reasons KM does not explain, it took nearly three and a half years after WHBF-TV filed an application for license to cover its current facility in June 2010 for KM to request displacement based on actual interference allegedly caused by WHBF-TV.³⁹ In fact, WHBF-TV has been authorized to operate at its now licensed parameters pursuant to Special Temporary Authority since August 2009.⁴⁰ Again, at no time did WOCK-CD ever file an objection based on predicted interference or file a complaint alleging actual interference. Based on the totality of the circumstances, we find the Division acted properly in rejecting KM's claim that it demonstrated displacement relief based on predicted impermissible interference.

14. We also reject KM's claim that it has demonstrated actual interference from WHBF-TV based on viewer complaints.⁴¹ The Commission's rules provide that a Class A station can file for displacement relief when it is receiving or is predicted to receive interference from another protected "station" or "service."⁴² We agree with the Division that the viewer complaints fail to establish that the poor reception of WOCK-CD was caused by interference from another protected station or service, rather than by impulse noise or improper antenna configuration. Contrary to KM's claim, the Division did not discount the viewers' complaints because they failed to use the word "interference." Instead, the Division properly concluded that the viewer letters did not demonstrate a causal link between the poor signals viewers complained of and KM's assertion that WHBF-TV was the source of interference causing poor

³⁷ *Id.*

³⁸ The viewer complaints reference only general geographic areas (e.g., Chicago, IL and Cook County) and in one instance the name of a business, but no address. Division staff placed the viewer complaints on a map by using the geographic centers of the locations listed in each complaint and a location obtained from the Internet for the business listed in one of the complaints. When overlaid with the map provided by KM in its contour overlap showing, each reference point was outside of the area of predicted interference.

³⁹ See File No. BLCDDT-20100629AVD (accepted for filing Jun. 30, 2010 and granted May 13, 2011).

⁴⁰ See File No. BDSTA 20090827ABR. In its AFR, KM contends that the Division "failed to explain" how KM could have objected to the June 2008 WHBF-TV application for a construction permit for post-transition DTV facilities on channel 4 on the basis of actual interference. AFR at 7 (KM mistakenly states that the WHBF-TV application for construction permit was issued in December 2008, which is actually when KM filed its digital construction permit application for channel 4). KM appears to have misread the Division's argument in the Letter Decision, which stated that after both WOCK-CD and WHBF-TV commenced operations on channel 4 in June 2009 "KM did not complain of interference from [WHBF-TV's] operations in 2009 and 2010, nor did it file an objection to the grant of the May 2010 application for a construction permit to permanently increase WHBF-TV's power...." Letter Decision at 3. The Division did not suggest that KM could evaluate whether actual interference occurred at the time WHBF-TV filed its June 2008 construction permit application. However, KM certainly could have known if it was receiving actual interference once WHBF-TV began operating under STA in August 2009 pursuant to what would ultimately become its licensed parameters. KM could have also calculated whether predicted interference might be caused and objected to WHBF-TV's May 2010 construction permit on that basis. See File No. BPCDDT-20100512AFK.

⁴¹ AFR at 8-10

⁴² 47 CFR § 73.3572(a)(4)(iii).

signal quality. KM has failed to provide sufficient evidence to support its assertion that WHBF-TV is in fact a source of interference.⁴³

15. To the extent that KM is relying on impulse noise or improper antenna configuration as the basis for actual interference justifying displacement relief, we agree with the Division that such interference does not qualify a station for displacement relief because the source of the interference is not another protected station or service.⁴⁴ The Commission and the broadcast industry have recognized the challenges faced by broadcasters operating on VHF channels, especially low VHF channels, such as KM's Channel 4.⁴⁵ However, the mere fact that a station is operating on a low VHF channel does not qualify it for displacement relief. Moreover, none of the evidence in the record, including the viewer complaints, provided sufficient information for the staff to determine the cause of the alleged signal quality issues. We affirm the Division's denial of KM's Displacement Application with respect to actual interference.

16. We disagree that KM is entitled to displacement relief based on the Division's grant of allegedly similar displacement applications.⁴⁶ According to KM, the Division has previously granted displacement applications as the result of impulse noise,⁴⁷ and has previously granted displacement applications for VHF channels without analyzing predicted or actual interference at all.⁴⁸ The displacement applications cited by KM are factually distinguishable. Prior to dismissing the Displacement Application, the Division had already determined years earlier when authorizing WHBF-TV (the alleged source of interference here) that the station would not cause interference to WOCK-CD.⁴⁹ In contrast, in the cited cases there was no prior determination of non-interference from the alleged source of interference. In addition, all but one of the cited cases involved an LPTV station, not a Class A

⁴³ While we take every viewer complaint seriously, we must also ensure that the displacement process is not abused and the interference complained of warrants the relief requested. We do not expect viewers to take technical measurements to determine the precise cause of their poor signal quality. To the extent a licensee relies on viewer complaints to support a claim of displacement, however, we do expect viewer complaints to provide sufficient information to allow the staff to determine whether there is a causal link between the poor signal quality and the potential source of interference. Ultimately, it is the obligation of the licensee seeking displacement relief to provide proper technical support for its request for displacement relief. Here, KM failed to provide support for a finding that any actual interference is caused by WHBF-TV.

⁴⁴ 47 CFR § 73.3572(a)(4)(iii). Several months before filing the Displacement Application, KM acknowledged that the poor signals complained of by viewers may be the result of impulse noise or improperly configured receiver antennas. FCC File No. BESTA-20130220AAN, Engineering Statement at 2-3.

⁴⁵ See *supra* note 3.

⁴⁶ See AFR at 9 (citing *Melody Music v. FCC*, 345 F.2d 730 (D.C.Cir.1965)).

⁴⁷ AFR at 8, n.10 (citing Application of River City Broadcasters, Inc., licensee of station KCTU-LD, Wichita, KS, File No. BDISDTL-20081223AAQ and Application of Nave Broadcasting, LLC, licensee of station WKOB-LD, New York, NY, File No. BDISDTL-20100222ACB). We note in the AFR, the aforementioned applications are incorrectly cited as File Nos. BDISDTL-20081223AAQ and BDISDTL-201000222ACD, respectively (*emphasis added*).

⁴⁸ AFR at 9 and n.11 (citing to Application of Budd Broadcasting Co., Inc., licensee of station WTXI-LD, Miami, FL, File No. BDISDTL-20090318AAB; Application of Abacus Television, licensee of station WJKF-CD, Jacksonville, FL, File No. BDISDVA-20121022AAQ; and Application of Ensure Technologies Group, LLC, licensee of station KFIQ-LP, Lubbock, TX, File No. BDISDTL-20090630AAZ). Despite KM's claim, the applicant in WTXI-LD provided a Longley-Rice analysis demonstrating that the source of interference (a full power station) would cause interference, thereby justifying displacement relief. See File No. BDISDTL-20090318AAB, Attachment 1 (WBPB Received Interference).

⁴⁹ See *supra* note 35; *Letter Decision* at 2 ("In its applications, WHBF-TV demonstrated that the proposed facilities complied with the Commission's interference protection requirements with respect to all stations entitled to protection.").

station like WOCK-CD. Requests for displacement relief filed by primary Class A stations present different concerns than such requests filed by secondary LPTV stations.⁵⁰ The one Class A case cited by KM is factually distinguishable because while the station was claiming displacement, the application was also filed as part of the station's efforts to transition from analog to digital operations. Even if the station's request to move its analog operations on a VHF channel to digital operations on a different VHF channel was not proper as a displacement application, it would have been permissible pursuant to the Commission's rules governing the Class A digital transition allowing stations to file for digital companion channels.⁵¹ For the foregoing reasons, we deny KM's claim that it is entitled to displacement relief based on the Division's grant of allegedly similar displacement applications. In addition, the cases relied on by KM are all Division-level decisions, which are not binding on the Commission. The Commission is not bound by staff action, especially action that is inconsistent with the rules. To the extent the Division-level decisions cited by KM are inconsistent with our decision here, they are overruled.⁵² We also dismiss KM's argument on independent procedural grounds because it was not raised before the Division.⁵³

17. Finally, we dismiss KM's claim made in its "Notification" and "Request for Ruling" that it has "certain rights" with respect to digital Channel 41 and that the Commission should not take any action inconsistent with those rights, such as auctioning Channel 41 in the broadcast television spectrum incentive auction, until the Division's dismissal of the Displacement Application becomes final.⁵⁴ We dismiss this claim on two independent procedural grounds. First, because KM's claim was not raised in the AFR or within 30 days of public notice of the Division's action, we dismiss its claim as untimely.⁵⁵ Second, we dismiss this claim because it was not raised before the Division.⁵⁶ On alternative and independent grounds, we deny KM's claim. No station has a "right" to a specific channel such that the Commission is precluded from reassigning or reallocating that channel in connection with the incentive auction.⁵⁷ KM is also wrong to the extent it claims to have a right to be considered a UHF station rather

⁵⁰ As a primary service, Class A stations are entitled to protection from other primary stations (full-power and Class A). Thus, allowing primary Class A stations to move to a new channel as a result of displacement relief impacts the flexibility of other primary stations. Such concerns are not presented when a secondary station changes channels. See *Class A R&O*, 15 FCC Rcd at 6400, para. 114 ("Class A displacement relief applications will be filed as major change applications, given their protected status.").

⁵¹ 47 CFR § 74.787(a)(2).

⁵² See *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008); see also *In the Matter of 159 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at Six Transmitter Sites*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11141, para. 52 (1995) ("When the staff advice is contrary to the Commission's rules, the Commission may still enforce its rules, despite any reliance by the public.") (citing *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991)).

⁵³ 47 CFR § 1.115(c).

⁵⁴ See *supra* note 24.

⁵⁵ 47 CFR § 1.115(d) (an application for review and any supplement must be filed within 30 days of public notice of the action taken).

⁵⁶ 47 CFR § 1.115(c).

⁵⁷ 47 U.S.C. § 1452(b)(1) ("For purposes of making available spectrum to carry out the forward auction . . . the Commission . . . may . . . make such reassignments of television channels as the Commission considers appropriate; and reallocate such portions of such spectrum as the Commission determines are available for reallocation."). We also note that WOCK-CD had only a pending application for Channel 41; it never held a permit or license for Channel 41. See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Second Order on Reconsideration, 30 FCC Rcd 6746, 6784, para. 82 n.309 (2015) ("mere applicants have minimal equities in favor of preservation [in the incentive auction repacking process] considering that they have not acted in reliance on Commission grants, have not made any investment in constructing their requested facilities, and have not begun operating the proposed facilities to provide service to viewers") ("Second

(continued....)

than a VHF station in connection with the incentive auction. While the Commission in the *Incentive Auction R&O* permitted any licensed full power or Class A station that is subject to a non-final license validity proceeding to maintain its auction eligibility until such action is final, this does not apply to KM because KM holds a valid license for a VHF channel and has never held a license for Channel 41.⁵⁸

IV. ORDERING CLAUSES

18. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(c), of the Commission's rules, 47 CFR § 1.115(c), the Application for Review of KM LPTV of Chicago-13, L.L.C. **IS DISMISSED IN PART** for the reasons discussed in paragraph 15 and, in all other respects, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g), of the Commission's rules, 47 CFR § 1.115(g), **IS DENIED**.

19. **IT IS FURTHER ORDERED** that, pursuant to 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 (d), of the Commission's rules, 47 CFR § 1.115(c),(d), the "Notification" and "Request for Ruling" of KM LPTV of Chicago-13, L.L.C. **ARE DISMISSED** for the reasons discussed in paragraph 16 and, alternatively, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g), of the Commission's rules, 47 CFR § 1.115(g), **ARE DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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Recon Order"). See also *Revisions to Parts 2 and 25 of the Commission's Rules, Notice of Proposed Rulemaking and Report and Order*, 27 FCC Rcd 16510, 16553, para. 115 (2012) ("Applicants do not gain any vested right merely by filing an application . . .") (citing *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997); *Hispanic Info. & Telecomms. Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989)).

⁵⁸ *Walker Broad. Co., Inc.*, 31 FCC Rcd 2395, 2403, para. 18 (2016), *aff'd*, *Walker Broad. Co., Inc. v. FCC*, No. 16-1118 (D.C. Cir. 2016) (per curiam) (unpublished). See *Incentive Auction R&O*, 29 FCC Rcd at 6722-23, paras. 362-63 (defining "license validity proceeding" as a proceeding regarding the expiration or cancellation of a license). In the *Second Order on Reconsideration* the Commission clarified that continued eligibility for stations subject to a non-final license validity proceeding only applies to stations "that previously held full power or Class A licenses." *Second Recon Order*, 30 FCC Rcd at 6783, para. 81.