

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

In the Matter of	)	
	)	
International Communications Network, Inc.	)	Facility ID No. 56830
Licensee of Low Power Television Station	)	
KSDY-LD, San Diego, CA	)	
	)	
Application for Class A Television License for	)	File No. BLDTA-20140725ABQ
Low Power Television Station	)	
KSDY-LD, San Diego, CA	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 18, 2017**

**Released: October 18, 2017**

By the Commission: Commissioner Clyburn dissenting.

**I. INTRODUCTION**

1. The Federal Communications Commission (Commission) has before it an Application for Review (AFR) filed on May 4, 2016, by International Communications Network, Inc. (Licensee or ICN),<sup>1</sup> the licensee of low power television station KSDY-LD, San Diego, California (Station or KSDY-LD). ICN seeks review of an April 2016 letter decision<sup>2</sup> by the Media Bureau (Bureau) denying ICN's Petition for Reconsideration (Petition).<sup>3</sup> The Petition sought review of the Video Division's (Division) dismissal of the Station's above-captioned application for a Class A license.<sup>4</sup> In the AFR, ICN contends that the Bureau's decision was contrary to the Community Broadcasters Protection Act of 1999 (CBPA),<sup>5</sup> and that the Bureau's purported failure to evaluate the application for a Class A license was "arbitrary, capricious, and an abuse of discretion."<sup>6</sup> ICN requests on review that the Commission reinstate and grant its application for a Class A license.<sup>7</sup> For the reasons discussed below, we affirm the dismissal of the application and deny the AFR.

**II. BACKGROUND**

2. The CBPA provided "qualifying" low power television (LPTV) licensees an opportunity to convert their secondary status to a then newly created Class A primary status.<sup>8</sup> Under subsection (f)(2)(A), an LPTV station was a "qualifying" LPTV station if during the 90-day period preceding

<sup>1</sup> Application for Review of International Communications Network, Inc. (filed May 4, 2016) (AFR).

<sup>2</sup> *International Communications Network, Inc.*, Letter, 31 FCC Rcd 3336 (MB 2016) (*April 2016 Decision*).

<sup>3</sup> Petition for Reconsideration of International Communications Network, Inc. (filed Nov. 7, 2014) (Petition).

<sup>4</sup> *International Communications Network, Inc.*, Letter, 29 FCC Rcd 11857 (Vid. Div. 2014) (*October 2014 Decision*).

<sup>5</sup> *Community Broadcasters Protection Act of 1999*, Pub. L. No. 106-113, 113 Stat. Appendix 1 at pp. 1501A-594-1501A-598 (1999) (CBPA), codified at 47 U.S.C. § 336(f).

<sup>6</sup> AFR at 2.

<sup>7</sup> *Id.* at 10.

<sup>8</sup> 47 U.S.C. § 336(f)(1)(A).

enactment of the CBPA on November 29, 1999 such station: (1) broadcasted a minimum of 18 hours per day; (2) broadcasted an average of at least three hours per week of programming produced within the market area served by the station or by a group of commonly controlled LPTV stations; and (3) was in compliance with the Commission's requirements for LPTV stations.<sup>9</sup> Alternatively, subsection (f)(2)(B) provided the Commission with the discretion to determine that "the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission."<sup>10</sup> In its Orders implementing the CBPA, the Commission stated that it would exercise its discretion under subsection (f)(2)(B)'s public interest standard only where the deviations from the eligibility criteria provided for in subsection (f)(2)(A) are "insignificant" or where there are "compelling circumstances" such that equity mandates a deviation.<sup>11</sup>

3. In order to be deemed a "qualifying" LPTV station the CBPA required LPTV licensees seeking Class A status to file with the Commission a "certification of eligibility" certifying compliance with the statutory requirements of the CBPA within 60 days following the statute's enactment date—no later than January 28, 2000.<sup>12</sup> The Commission's form entitled "Statement of Eligibility for Class A Low Power Television Station Status" (Statement of Eligibility) required stations to either certify that the station met the three specific eligibility requirements set forth in subsection (f)(2)(A) or explain in an exhibit the extent to which the LPTV station failed to meet the explicit statutory requirements but nonetheless should be deemed a "qualifying" LPTV station pursuant to the public interest standard set forth in subsection (f)(2)(B).

4. Subsection (f)(1)(B) goes on to provide that "[a]bsent a material deficiency, the Commission shall grant certification of eligibility to apply for class A status."<sup>13</sup> If the Commission "grants" a certification of eligibility, the CBPA then requires a "qualifying" LPTV station to file an application for a Class A license.<sup>14</sup> While subsection (f)(6)(A) of the CBPA prohibited the Commission from granting Class A licenses to "qualifying" LPTV stations operating on "out-of-core" channels (channels 52-69), it provided such stations with an opportunity to obtain a Class A license on an in-core channel (channels 2-51).<sup>15</sup>

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<sup>9</sup> 47 U.S.C. § 336(f)(2)(A). The statute also establishes that continuing compliance with the operating rules applicable to full power stations is a qualification for Class A status. 47 U.S.C. § 336(f)(2)(A)(ii) (station must be in compliance with full power operating rules "from and after" the date of its Class A license application).

<sup>10</sup> 47 U.S.C. § 336(f)(2)(B).

<sup>11</sup> *Establishment of a Class A Television Service*, Report and Order, MM Docket No. 00-10, 15 FCC Rcd 6355, 6369, para. 33 (2000) (*Class A R&O*). See also *Establishment of a Class A Television Service*, Memorandum Opinion and Order on Reconsideration, MM Docket No. 00-10, 16 FCC Rcd 8244, 8261, paras. 44-48 (2001) (*Class A Recon Order*).

<sup>12</sup> 47 U.S.C. § 336(f)(1)(B).

<sup>13</sup> *Id.*

<sup>14</sup> 47 U.S.C. § 336(f)(1)(C).

<sup>15</sup> 47 U.S.C. § 336(f)(6)(A); *Class A R&O*, 15 FCC Rcd at 6396-97, para. 103. KSDY-LD was licensed to operate on an out-of-core channel as of the date of enactment of the CBPA and was not licensed to operate on an in-core channel until 2011. See AFR at 3; File No. BLDTL-20110421ABU.

5. The former licensee of the Station, TV-61 San Diego, Inc. (TV-61),<sup>16</sup> timely filed a Statement of Eligibility in January 2000. TV-61, however, did not certify compliance with any of the three explicit statutory eligibility requirements set forth subsection (f)(2)(A). Instead, TV-61 claimed pursuant to subsection (f)(2)(B) that the public interest, convenience, and necessity would be served by treating the station as a “qualifying” LPTV station because of the nature of its programming. In a June 2000 Public Notice, the Mass Media Bureau dismissed TV-61’s Statement of Eligibility together with similar certifications filed by other stations, concluding that the Station was not a “qualifying” LPTV station because it failed to certify compliance with the eligibility criteria in subsection (f)(2)(A) and failed to satisfy the public interest standard in subsection (f)(2)(B).<sup>17</sup> TV-61 did not appeal the Mass Media Bureau’s 2000 decision and that action has now been final for over 16 years.

6. On July 25, 2014, ICN filed the above-captioned application for a Class A license for KSDY-LD. In its Application, ICN acknowledged that TV-61’s Statement of Eligibility was dismissed in 2000; however, it asserted that “unusual and unique circumstances” warranted extension of Class A status to the Station.<sup>18</sup> ICN argued that as the result of its move to an in-core channel assignment in 2011, the Station should now be deemed a “qualifying” LPTV station.<sup>19</sup> ICN certified in the Application that the Station had been operating in compliance with the Class A statutory eligibility requirements. In addition, ICN argued pursuant to subsection (f)(2)(B) that the public interest, convenience, and necessity would be served by treating the station as a “qualifying” LPTV station given the lengthy process the Station underwent to move to an in-core channel, the Station’s minority ownership, and its Spanish-language programming that meets the needs of audiences not served by other stations in its market.<sup>20</sup>

7. In a letter decision dated October 8, 2014, the Division dismissed the Application.<sup>21</sup> The Division found that the Station was not a “qualifying” LPTV station under the statutory criteria in subsection (f)(2)(A) and that ICN failed to present compelling circumstances that satisfy the public

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<sup>16</sup> At the time the Station’s Statement of Eligibility was filed, the Station operated on channel 61 and went by the call sign K61GH. The majority shareholder of ICN, Mr. Maxwell C. Agha, was a minority interest holder in the former licensee of the Station, TV-61. See File No. BTCTTL-20031219ATN, Attachment 2 (disclosing that Mr. Agha was a shareholder and Chairman/CEO of TV-61 since its creation and as the result of stock transfers became the majority shareholder, necessitating the station’s transfer of control). According to Commission records, ICN acquired control of the Station on February 20, 2004.

<sup>17</sup> The Public Notice stated:

The low power television station licensees listed in the attached Appendix have timely filed statements of eligibility. However, these licensees have not certified full compliance with the above statutory programming standards. Rather, they request the Commission to treat them as eligible for Class A status because of the nature of the program service presently provide or intended to be broadcast by their stations ... In view of the foregoing, the Mass Media Bureau concludes that the public interest would not be served by affording Class A status to the LPTV licensees listed in the Appendix. Accordingly, the statements of eligibility filed by these LPTV licensees are materially deficient and are dismissed.

*Dismissal of LPTV Licensee Certificates of Eligibility for Class A Television Station Status*, Public Notice, 15 FCC Rcd 9761 (MMB 2000) (*Class A Public Notice*).

<sup>18</sup> File No. BLDTA-20140725ABQ, Attachment 2 (Application). In ICN’s Application, it responded “No” to the question that it had filed a certification of eligibility on or before January 28, 2000 which had been found to be acceptable by the Commission. *Id.*, Question II.2. ICN stated that “although a timely statement of eligibility was filed on or before January 28, 2000, it was not accepted.” *Id.*, Attachment 2.

<sup>19</sup> ICN maintains that its efforts to find a suitable in-core channel were hampered by the Mexican concurrence process and interference issues related to U.S. government operations. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *October 2014 Decision*, 29 FCC Rcd at 11857.

interest standard in subsection (f)(2)(B).<sup>22</sup>

8. ICN filed a timely Petition alleging that the Division's decision was contrary to the CBPA and that the Division failed to consider the unique facts and circumstances of the case. First, ICN argued that the 2000 *Class A Public Notice* dismissing KSDY-LD's Statement of Eligibility was not an agency action that provided the Station a means to challenge the dismissal.<sup>23</sup> ICN also asserted that all that was required by the CBPA was the "filing" of a certification of eligibility, not "acceptance" of that filing by the Commission.<sup>24</sup> ICN also contended that the Division did not properly apply the CBPA when it failed to take into account that the CBPA precluded ICN from seeking a Class A license until it moved off its out-of-core channel, which did not occur until 2011.<sup>25</sup> ICN argued that even if dismissal of the Station's initial Statement of Eligibility was proper, its minority ownership, diverse programming, and prolonged effort to move in-core warranted its designation as a "qualifying" LPTV station pursuant to the public interest standard under subsection (f)(2)(B), considerations ICN alleges were ignored in the Division's decision.<sup>26</sup>

9. On April 4, 2016, the Bureau denied ICN's Petition, finding that the Division's dismissal of KSDY-LD's January 2000 Statement of Eligibility was proper<sup>27</sup> and that the Division properly applied the CBPA to the facts presented by ICN in its Application.<sup>28</sup> Thereafter, ICN filed the AFR at issue. ICN takes issue with the Bureau's interpretation of the CBPA, claims its predecessor, TV-61, satisfied the CBPA by filing a Statement of Eligibility, and contends that, notwithstanding the dismissal of TV-61's Statement of Eligibility, the Commission should deem the Station a "qualifying" LPTV station pursuant to the public interest standard under subsection (f)(2)(B) and grant ICN a Class A license.

### III. DISCUSSION

10. Upon review of the AFR, we affirm the Bureau's decision and conclude that ICN has failed to demonstrate that the Bureau erred or that its decision was arbitrary, capricious or an abuse of discretion.<sup>29</sup> For the reasons discussed below, we affirm the dismissal of the application and deny the AFR.

11. As an initial matter, we affirm dismissal of the application as an untimely challenge to the Mass Media Bureau's June 2000 dismissal of the Station's Statement of Eligibility. The CBPA required LPTV licensees seeking Class A status to file a certification of eligibility by January 28, 2000.<sup>30</sup> The former licensee of the Station timely filed a Statement of Eligibility claiming it was a "qualifying" LPTV station under subsection (f)(2)(B). The Mass Media Bureau, however, dismissed the Statement of

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<sup>22</sup> *Id.* at 11858.

<sup>23</sup> Petition at 5 n.5. ICN does not raise this argument in its AFR.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.* at 7-8.

<sup>26</sup> *Id.* at 6-7.

<sup>27</sup> *April 2016 Decision*, 31 FCC Rcd at 3338 and n.20 (noting that staff routinely receives petitions for reconsideration of actions taken via public notice and providing examples).

<sup>28</sup> *Id.* at 3339-40 (analyzing the Division's interpretation of the CBPA and applying ICN's arguments to the CBPA's explicit statutory requirements and the alternative public interest standard).

<sup>29</sup> 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).

<sup>30</sup> 47 U.S.C. § 336(f)(1)(B).

Eligibility, a decision the former licensee of KSDY-LD never challenged.<sup>31</sup> As part of the proceeding, ICN has attempted to re-litigate this issue by submitting new facts and arguments well over a decade after the statutory deadline for filing certifications of eligibility. We find no basis to reopen this long-final decision dismissing the Station's Statement of Eligibility, which would be inconsistent with the principle of administrative finality and violate the statutory deadline on seeking reconsideration under Section 405(a) of the Communications Act of 1934, as amended,<sup>32</sup> as well as the deadline for filing a certification of eligibility under subsection (f)(1)(B) of the CBPA.<sup>33</sup>

12. The Bureau's decision is also consistent with Commission precedent and we affirm its decision to deem a station a "qualifying" LPTV station under subsection (f)(2)(B) only when the deviations from the statutory eligibility criteria in subsection (f)(2)(A) are insignificant or when there are compelling circumstances for the deviation.<sup>34</sup> In implementing the CBPA, the Commission declined to exercise discretion under subsection (f)(2)(B) to provide for the ongoing conversion of LPTV stations to Class A status.<sup>35</sup> The Commission stated that the "basic purpose of the CBPA was to afford existing LPTV stations a window of opportunity in which to convert to Class A stations."<sup>36</sup> The Commission explained that exercising its discretion under subsection (f)(2)(B)'s public interest standard only when the deviations from the eligibility criteria in subsection (f)(2)(A) are insignificant or when there are compelling circumstances for the deviation "appropriately balances the interests of these LPTV stations

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<sup>31</sup> *Class A Public Notice*, 15 FCC Rcd at 9761 (dismissing certifications of eligibility, including one filed by the former licensee of KSDY-LD, because they claimed eligibility based on "the nature of the program service presently provided or intended to be broadcast by their stations").

<sup>32</sup> With its July 2014 Class A license application, ICN effectively sought reconsideration of the Bureau's June 2000 dismissal of the Station's Statement of Eligibility. Section 405(a) specifies that an aggrieved party has 30 days to file a petition for reconsideration against a Commission or Bureau action. 47 U.S.C. § 405(a). Such statutory filing period may only be waived where "extraordinary circumstances indicate that justice would thus be served," a showing not even attempted by ICN. *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976); see *NetworkIP, LLC v. FCC*, 548 F.3d 116 at 125-28 (D.C. Cir. 2008) (Where the Commission found that a waiver of a filing deadline would serve the public interest, but not that any special circumstance led to the late filing, the Commission's waiver of the filing deadline was arbitrary).

<sup>33</sup> 47 U.S.C. § 336(f)(1)(B). See *Class A Recon Order*, 16 FCC Rcd at 88250, para. 12 ("The CBPA was signed into law on November 29, 1999; thus, the time for filing a certificate of eligibility ended 60 days later, on January 28, 2000. To comply with the requirements of the statute, parties must have made the requisite submission within the time period specified."); *The Atlanta Channel, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 14541, 14544, para. 9 ("the deadline established in the CBPA is non-discretionary") (2012), *recon. denied*, Order on Reconsideration, 29 FCC Rcd 11848 (MB 2014), *aff'd*, *Beach TV Properties, Inc. v. FCC*, 617 Fed. Appx. 10, 11 (Mem) (D.C. Cir. 2015) (per curiam) (unpublished) ("The statutory deadline at issue in this case is unequivocal: 47 U.S.C. § 336(f)(1)(B) specifies that '[w]ithin 60 days . . . , licensees . . . shall submit to the Commission a certification of eligibility.'" (emphasis in original).

<sup>34</sup> *April 2016 Decision*, 31 FCC Rcd at 3340. See AFR at 6-8 (arguing that the CBPA does not "preclude[] any LPTV from ever gaining Class A status unless that station met the criteria in 1999" and the Bureau's position that KSDY-LD is not eligible for lass A status because ICN failed to demonstrate compelling circumstances "has no foundation in the law.").

<sup>35</sup> See *Class A Recon Order*, 16 FCC Rcd at 8251, para. 18 ("While we may have discretion under Section (f)(2)(B) to determine that other LPTV stations qualify for Class A status, we do not believe that the public interest would be served by the ongoing conversion of LPTV stations to Class A status in the future."). See also *Class A R&O*, 15 FCC Rcd at 6396-97, para. 12 ("the [CBPA] was designed to permit a one-time conversion of a single pool of LPTV applications that met specific criteria before the statute was enacted.").

<sup>36</sup> *Class A Recon Order*, 16 FCC Rcd at 8251, para. 18. See also *Class A R&O*, 15 FCC Rcd at 6361, para. 12 ("The statute itself states its intent to apply to a small number of stations . . . ."); *Class A Recon Order*, 16 FCC Rcd at 8251, para. 17 ("The intent of Congress in enacting the CBPA was to establish the rights of a very specific, already-existing group of LPTV stations.").



against those of full-service TV stations” that would be required to provide interference protection to the new primary Class A service.<sup>37</sup> We find this conclusion applies with no less force today.<sup>38</sup>

13. We agree with the Bureau’s conclusion that ICN has not presented compelling circumstances that would warrant a finding that KSDY-LD is a “qualifying” LPTV station under subsection (f)(2)(B)’s public interest standard. While ICN contends that it provides programming to audiences not adequately served by other stations, including foreign-language programming,<sup>39</sup> the Commission has explained that the “qualification for Class A status is not contingent upon whether [the station] serves a particular audience, but upon whether it meets the eligibility criteria” set forth in the CBPA.<sup>40</sup> The Commission specifically declined to establish a different set of criteria for foreign language stations, such as KSDY-LD, that do not meet the local programming criteria.<sup>41</sup>

14. We also affirm the Bureau’s conclusion that ICN’s efforts to move the Station in-core are not compelling circumstances that would warrant a finding that KSDY-LD is a “qualifying” LPTV station under subsection (f)(2)(B).<sup>42</sup> The CBPA required LPTV licensees seeking Class A status to file a certification of eligibility by January 28, 2000 certifying as to facts occurring during the 90-day period before enactment of the CBPA on November 29, 1999.<sup>43</sup> Under our long-standing approach to implementing the public interest standard under subsection (f)(2)(B),<sup>44</sup> there is no basis for KSDY-LD to be deemed a “qualifying” LPTV station based on the facts ICN presents, which occurred well after this timeframe.<sup>45</sup> In the *Class A R&O*, the Commission cited as examples of “compelling circumstances” natural disasters or interference conflicts that forced the station off the air during the 90-day period *before* enactment of the CBPA.<sup>46</sup> While these examples were not exclusive, we fail to see how ICN’s efforts to

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<sup>37</sup> *Class A Recon Order*, 16 FCC Rcd at 8251, para. 18. *See id.* (“In view of the fact that LPTVs were originally licensed on a secondary basis, and subsequently allowed to convert to Class A status only under the limited eligibility criteria established by the CBPA based on their beneficial past service to the public, we do not believe it is appropriate to expand generally the group of LPTV stations eligible to convert to Class A beyond that established by Congress.”).

<sup>38</sup> The Commission recently rejected requests to allow LPTV stations to upgrade to primary status because of concerns that additional primary stations would hinder the transition of full power and Class A stations to their final channels assigned as a result of the repacking process in connection with the broadcast television spectrum incentive auction. *See Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television and Translator Stations, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, MB Docket No. 03-185, GN Docket No. 12-268, Third Report and Order and Fourth Notice of Proposed Rulemaking, 30 FCC Rcd 14927, 14951, para. 51 (2015).

<sup>39</sup> *See Application*, Exhibit 2; AFR at 4-5.

<sup>40</sup> *Class A Recon Order*, 16 FCC Rcd at 8261, para. 46. Similarly, ICN provides no basis for why its minority ownership qualifies as a “compelling circumstance” justifying its designation as a “qualifying” LPTV station. *See Application*, Exhibit 2; AFR at 3, 10.

<sup>41</sup> *Class A R&O*, 15 FCC Rcd at 6369, para. 34 (concluding that “foreign language stations should have the same eligibility requirements as any other potential Class A station.”). *See Class A Recon Order*, 16 FCC Rcd at 8261, para. 46 (“foreign language stations, like other potential Class A stations, must meet the local programming criteria to qualify for Class A status”).

<sup>42</sup> *April 2016 Decision*, 31 FCC Rcd at 3340.

<sup>43</sup> 47 U.S.C. § 336(f)(1)(B).

<sup>44</sup> *See supra* para. 11 (explaining that the Commission exercises discretion under subsection (f)(2)(B) only when the deviations from the eligibility criteria in subsection (f)(2)(A) are insignificant or when there are compelling circumstances for the deviation).

<sup>45</sup> *See AFR* at 2-4.

<sup>46</sup> *Class A R&O*, 15 FCC Rcd at 6369, para 33.

move the station in-core years *after* enactment of the CBPA are in any way comparable to the Commission's examples or otherwise provide evidence of compelling circumstances that justifies finding the Station is a "qualifying" LPTV station. The date that KSDY-LD moved to its in-core channel or the efforts it undertook to do so have no bearing in determining whether there were compelling circumstances for its deviation from the statutory eligibility criteria in 1999.

15. We reject ICN's claim that subsection (f)(6)(A) is an independent path to Class A status for out-of-core LPTV stations that avoids the need to satisfy the eligibility requirements in subsection (f)(2).<sup>47</sup> While subsection (f)(6)(A) expressly prohibits the grant of a Class A license to an out-of-core LPTV station until it moves in-core,<sup>48</sup> we agree with the Bureau that this provision does not excuse or toll compliance with the statutory eligibility criteria in subsection (f)(2) until the station moves in-core.<sup>49</sup> Stations that sought status as "qualifying" LPTV stations under the CBPA were required to file a compliant certification of eligibility by January 28, 2000, regardless of whether they were operating on an in-core or out-of-core channel.<sup>50</sup> Contrary to ICN's claim, subsection (f)(6)(A) does not require the Commission to grant a Class A license to an LPTV station that moves in-core regardless of whether the station has satisfied the eligibility criteria in subsection (f)(2).<sup>51</sup> Subsection (f)(6)(A) provides that if a "qualified applicant for a class A license is assigned a channel within the core spectrum . . . , the Commission shall issue a class A license simultaneously with the assignment of such channel."<sup>52</sup> KSDY-LD was not a "qualified" applicant for a Class A license when it applied for an in-core channel<sup>53</sup> because the Station's 2000 Statement of Eligibility failed to satisfy the eligibility criteria in subsections (f)(2)(A) or (f)(2)(B), was dismissed, and that dismissal is final.

16. We also reject ICN's claims that it should be deemed a "qualifying" LPTV station because TV-61, the prior licensee of KSDY-LP, filed a certification of eligibility and that acceptance of that certification by the Commission was not a requirement for becoming a "qualifying" LPTV station.<sup>54</sup> The mere filing of a certification of eligibility is not sufficient for a station to become a "qualifying" LPTV station under the CBPA. Subsection (f)(1)(B) provides that "[a]bsent a material deficiency, the Commission shall *grant* certification of eligibility to apply for class A status."<sup>55</sup> In order to "grant" a

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<sup>47</sup> See AFR at 8-9.

<sup>48</sup> 47 U.S.C. § 336(f)(6)(A); see *supra* para. 4.

<sup>49</sup> *April 2016 Decision*, 31 FCC Rcd at 3339.

<sup>50</sup> See 47 U.S.C. § 336(f)(1)(B) (requiring stations to file a "certification of eligibility based on the qualification requirements" set forth in subsection (f)(2)); 47 U.S.C. § 336(f)(6)(A) (providing that the Commission shall provide out-of-core LPTV stations with "the opportunity to meet the qualification requirements for a class A license"); *Class A R&O*, 15 FCC Rcd at 6396, para. 103.

<sup>51</sup> See AFR at 8-9. ICN is wrong when it suggests that LPTV stations operating on out-of-core channels were not able because of "technical considerations" to satisfy the statutory eligibility criteria in subsection (f)(2)(A) during the 90-day period preceding November 29, 1999. See AFR at 9. In fact, the list of stations whose certificates of eligibility were granted include stations that were operating on out-of-core channels at the time. See *Certificate of Eligibility for Class A Television Station Status*, Public Notice, 15 FCC Rcd 9480 (MMB 2000). Even if an out-of-core LPTV station was displaced by a primary licensee, the Commission explained that an interference conflict which forced a station off the air during the 90-day period before November 29, 1999 would qualify as a compelling circumstance justifying a finding that the station is a "qualifying" LPTV station pursuant to subsection (f)(2)(B). *Class A R&O*, 15 FCC at 6369, para. 33. ICN has not alleged that such circumstances explain its failure to meet the statutory eligibility criteria during the 90-day period preceding enactment of the CBPA.

<sup>52</sup> 47 U.S.C. § 336(f)(6)(A) (emphasis added).

<sup>53</sup> File No. BDISDTL-20090609ACJ, granted Jan. 17, 2010.

<sup>54</sup> See AFR at 5-6.

<sup>55</sup> 47 U.S.C. § 336(f)(1)(B) (emphasis added).

station's certification of eligibility, the Commission must review the content of the filing.<sup>56</sup> Consistent with subsection (f)(1)(B), the Commission explicitly required that such certifications "must be approved by the Commission"<sup>57</sup> and adopted a rule providing that only LPTV stations that "have been granted a certificate of eligibility" may apply for a Class A license.<sup>58</sup> Here, the Mass Media Bureau reviewed the Station's Statement of Eligibility and dismissed it, finding that it was "materially deficient" under subsection (f)(1)(B) because it failed to certify compliance with any of the statutory eligibility requirements under subsection (f)(2)(A) and it failed to satisfy the public interest standard under subsection (f)(2)(B).<sup>59</sup> Like the Bureau,<sup>60</sup> we find ICN's argument that the CBPA merely requires the filing of a certification of eligibility "*not* that...[it must be] vetted, proven or even accepted by the Commission"<sup>61</sup> to be an improper reading of the CBPA.<sup>62</sup>

17. 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(g) of the Commission's rules, 47 CFR § 1.115(g), the Application for Review filed by International Communications Network, Inc., **IS DENIED.**

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>56</sup> See *The Atlanta Channel, Inc.*, *supra* n.33 (notwithstanding the fact that the station filed a timely certification of eligibility, dismissal of the certification was proper because the licensee failed to provide the necessary certifications).

<sup>57</sup> *Class A R&O*, 15 FCC Rcd at 6361, para 11.

<sup>58</sup> 47 CF. § 73.3536(c).

<sup>59</sup> *Class A Public Notice*, 15 FCC Rcd at 9761.

<sup>60</sup> *April 2016 Decision*, 31 FCC Rcd at 3339 and n.21 (discussing ICN's "crabbed" reading of the CBPA).

<sup>61</sup> AFR at 6. See Petition at 5.

<sup>62</sup> We also note that ICN now presents new facts and arguments as to why it should be deemed a "qualifying" LPTV station, such as its efforts to move to an in-core channel, thereby undermining its reliance on the previous licensee's certification of eligibility as entitling it to status as a "qualifying" LPTV station. In any event, as discussed above, such new facts and arguments are impermissibly late under the statute. See *supra* para. 11.