

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

South Seas Broadcasting, Inc.)	
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)	
Cancellation of License)	Facility ID 128905
for KBAD-LP)	FRN 0006947618
Channel 30)	
Pago Pago, American Samoa)	
)	
)	
Request for Silent Authority)	LMS File Number: 0000152660
)	

PETITION FOR RECONSIDERATION

South Seas Broadcasting, Inc. (“South Seas”), licensee of KBAD-LP¹, Channel 30, Pago Pago, American Samoa (“the Station”) hereby petitions for reconsideration of the dismissal of the captioned Request for Silent STA. The dismissal appeared on the Commission’s Public Notices of August 6, 2021.² By letter from the Media Bureau dated August 10, 2021, South Seas was advised that its license had been canceled and deleted as of July 13, 2021 (“the Cancellation”).

BACKGROUND

South Seas had been the licensee of the Station since 2005. Between 2003 and July 13, 2021, the Station operated as an analog low power television facility consistent with its native modality. (To aid the Bureau’s visual sense of the Station’s unique geographical setting, a contour map (Longley-Rice) is shown at Attachment 1.) In due course, in the context of the Commission’s DTV transition, South Seas received a digital construction permit (“the Digital CP”) with an expiration date of July 13, 2021.

On July 13, South Seas submitted the above-referenced Request for Silent STA (“the Silent Request”). That submission included an exhibit (“the Explanatory Statement”) describing the extraordinary circumstances that beset the Station since early 2020:

¹ Formerly KKHJ-LP.

² REPORT NO. PN-2-210806-01, 08/06/2021. This Petition for Reconsideration is timely because the 30th day from the dismissal public notice fell on a Sunday (September 5), and Monday (September 6) was a Federal holiday.

South Seas Broadcasting, Inc. requests silent authority for KBAD-LP in Pago Pago, American Samoa due to our inability to implement digital operation by July 13, 2021. **American Samoa has been completely shut down since March, 2020, when all commercial airline flights into and out of the territory were suspended due to the Covid-19 pandemic.** As such, **engineering personnel have been unable to travel to the island in order to install new digital transmission gear.** All equipment is on-hand and ready to install as soon as travel to the territory is permissible. As of July 13, 2021, no date has been announced allowing the resumption of travel. For this reason, we request Special Temporary Authority to remain off-air until the new equipment can be installed.

South Seas acknowledges in retrospect that it should have entitled its submission as a request for extension of its digital construction permit, rather than as a Request for Silent Authority.³ South Seas' president (who undertook the filing *pro se*) was confused about the procedure to follow. But his logic was sound. He knew that it would be impossible to meet the July 13 deadline and he also knew that, beyond July 13, the Station no longer would, absent a waiver, have even analog authority to operate. Thus, his Explanatory Statement included both a justification for extension of the digital CP and a recognition that the Station would have to go dark after July 13 because the analog authority would disappear.

That South Seas' intention was to submit a document that would be a predicate for extending the DTV Permit is clear from the Explanatory Statement. It does not read the way that STA justifications ordinarily read. South Seas did not describe circumstances forcing the Station to go dark (the thought process that any Silent STA Request would include). Rather, the Explanatory Statement only cited the reasons why an extension of the DTV construction deadline was warranted. The exhibit in the Silent Request reads exactly like the exhibit justifying an extension request would read, because South Seas' intention was to extend the DTV Permit and it thought that the Silent STA filing was the proper way to do this.

Had South Seas styled its filing as an application for extension of the DTV Permit (rather than as a request for an STA), it is virtually certain that the application would have been granted. Under 47 CFR 74.788(c)(1)-(2), the Media Bureau has authority to grant an initial extension up to six months. The applicant must show that its need for the additional time is

due to circumstances that are either unforeseeable or beyond the station's control where the station has taken all reasonable steps to resolve the problem expeditiously. Such circumstances shall include, but shall not be limited to: (i) Inability to construct and

³ More precisely, South Seas should have submitted an extension request along with a request for waiver of the original March 15, 2021 deadline. See Public Notice, DA 21-683, released June 11, 2021.

place in operation a facility necessary for transmitting digital television, such as a tower, because of delays in obtaining zoning or FAA approvals, or similar constraints; (ii) The lack of equipment necessary to obtain a digital television signal; or (iii) Where the cost of construction exceeds the station's financial resources.

The circumstances set forth in the Explanatory Statement more than meet the criteria described above. It is difficult to imagine a set of facts that could be more compelling. It was *literally impossible* to complete construction of the DTV facility by the July 13 deadline. Indeed, that impossibility has been in absolute effect *for more than 18 months*, inasmuch as all commercial airline flights into and out of the territory were suspended as of March 2020 because of the pandemic, and have not resumed.⁴

Moreover, *but for* the impossibility of reaching the island, construction of the DTV facility *would have been completed* in advance of the deadline. All conditions required for the realization of that state of affairs were present.⁵ All equipment was and is on hand. Engineering personnel were and are committed.⁶ The only obstacle was that no one who was already present on the island was qualified to make the installation, and the station's location was unreachable by those who were so qualified.

Furthermore, the likelihood that the DTV facility would have been timely built is consistent with all other facts relating to South Seas' behavior with respect to the Station's service to Pago Pago. Since becoming the licensee of the Station sixteen years ago, South Seas has provided the sole alternative commercial television service in American Samoa.⁷

The virtual certainty that construction would have been completed had the island been reachable is reinforced by the pattern of action that South Seas' president has manifested over the several decades of his service as the controlling owner of several FCC licensees – service that has been recognized by his election as a member of the Board of the National Association of Broadcasters.

The vital role the Station plays in this region is well known. If need be, South Seas can supply letters from the American Samoa Department of Homeland Security and other local leaders in support of the preservation of South Seas' ability to continue to serve residents of American Samoa with television programming.

⁴ See <https://www.civilbeat.org/beat/vaccination-now-required-for-travel-to-american-samoa/>.

⁵ As the Explanatory Exhibit relates: "all equipment is on-hand and ready to install."

⁶ There is no one already in American Samoa who was or is qualified to install the subject equipment.

⁷ The only other television stations selling advertising time in American Samoa are owned by the territorial government. The only other privately-owned television station broadcasts a religious format, and is not a direct competitor to KBAD-LP or the government-owned stations.

This is not a situation where, if the Bureau granted an extension, additional extensions would be sought in the future. We bring to the Media Bureau's attention that transportation to the island is due to be re-established as of September 13,⁸ if that date is not pushed back due to the Delta variant. That said, of the two engineers to travel to Samoa for this purpose, one still needs to obtain a passport. The Passport Office is far behind on such requests, and he might not be able to leave until later this fall.. See <https://travel.state.gov/content/travel/en/passports/how-apply/processing-times.html>. In any event, South Seas expects that construction of the DTV facility can be completed as early as late November, or at the outside, by January 13, 2022 (six months from the prior expiration date of the DTV Permit), assuming that the Commission grants the instant Petition within the coming two months.

THE BUREAU HAS THE AUTHORITY TO TREAT THE JULY 13 REQUEST AS A REQUEST FOR EXTENSION OF TIME TO CONSTRUCT

The Media Bureau has the authority to reinstate the Digital Permit and to allow South Seas to complete construction of the DTV facility immediately. It is not uncommon for the Commission to treat a filing of one type as if it were a filing of a different type, when doing so serves the interests of fairness and equity. See, for example:

- ▶ *Requests for Waiver and Review of Decisions of the Universal Service Administrator by Anderson Elementary School, File Nos. SLD-789495, et al., DA 12-796, released May 22, 2012* (“**Although some petitioners did not explicitly request a waiver of the FCC Form 471 application filing window deadline, we treat their requests for review as requests for waiver** because, in each case, USAC denied their funding requests because their FCC Form 471 applications were submitted after the relevant filing window deadline”).⁹
- ▶ *Letter, January 14, 2002, Petition of Nucentrix Spectrum Resources, Inc. for Deferral of Installment Payments, DA 02-41, p. 2* (“Pursuant to the installment payment grace period rules then in effect, a licensee had an automatic 90-day period after the installment payment due date

⁸ <https://www.civilbeat.org/beat/vaccination-now-required-for-travel-to-american-samoa/>, accessed September 7, 2021.

⁹ See also, *Requests for Waiver and Review of Decisions of the Universal Service Administrator by A Special Place, Santa Rosa, CA, File No. SLD-993529 et al., Order and Order on Reconsideration, DA 14-740, released May 29, 2014, n. 4* (“**Although some petitioners did not explicitly request a waiver of the FCC Form 471 application filing window deadline, we treat as requests for waiver** all of the requests for review involving FCC Form 471 applications that were submitted after the relevant filing window deadline”); *Request for Review of the Decision of the Universal Service Administrator by Academy of Math and Science, et al., Schools and Libraries Universal Service Support Mechanism, File Nos. SLD-487009, et al., CC Docket No. 02-6, Order, 25 FCC Rcd 9256 (2010) (Academy of Math and Science Order) (finding special circumstances exist to justify granting waiver requests where the petitioners filed their FCC Forms 471 after the FCC Form 471 filing window deadline).*

during which payment might be submitted (‘non-delinquency period’) with a five percent late fee. If remittance of the missed installment payment and the five percent late fee was not made before the expiration of the non-delinquency period, the rule provided for a second automatic 90-day period in which to remit the payment (‘grace period’). Failure to make a payment by the end of the second 90 day period **results in automatic cancellation of the license**. Nucentrix concedes that it failed to make its request for deferral of payments prior to automatic cancellation of its license. In its Petition, Nucentrix seeks deferral of its installment payments, **which we treat as a request for waiver of the Commission’s Rules regarding late installment payments for MDS licenses**.

► *COVID-19 Telehealth Program*, Order, DA 21-771, released June 29, 2021, n. 2 (Although the requests for additional time were not formal requests for waiver under § 1.3 of our rules, 47 CFR § 1.3, **we treat them as waiver requests** and use the term “requests for waiver” in the Order to describe the emailed requests for additional time to submit Program applications”).

In addition to the above, the Bureau should be cognizant of the unique circumstances of the service area in this case. American Samoa has the highest poverty rate of any state or territory in the United States, with more than 65% of the population below the poverty line.¹⁰ The territory’s per capita income is a mere fraction of that found in the poorest state in the Union.¹¹ Many residents of American Samoa do not have digital sets, and cannot easily afford to acquire them, especially during this time of economic stress.

Further, the spectrum management demands of this territory bear no resemblance to those of the mainland. Accordingly, the policy considerations underlying the conversion to digital television broadcasting on the mainland have no applicability to KBAD-LP and other stations in American Samoa. Indeed, given the unique circumstances that obtain in American Samoa, it would serve the public interest for the Commission to allow KBAD-LP to continue to operate in analog mode during the few weeks before South Seas can complete installation of the new digital facility.

CONCLUSION

The DTV Transition, by definition, has required an immensely complex evolution from an existing state of affairs – the analog world – to a projected state of affairs – the digital world. The effectuation of a change of that scope and scale has not been a matter of fiat policy applied inflexibly across the board. The public interest is too variegated. There are too many circumstances in which the cold, rigid application

¹⁰ Wikipedia article, “American Samoa Locations by Per Capita Income,” accessed 7 September 2021, https://en.wikipedia.org/wiki/List_of_American_Samoa_locations_by_per_capita_income.

¹¹ *Id.*

of a rule would work against, rather than in furtherance of, the public interest values that the Digital Transition is intended to realize.

Put differently, the DTV Transition is not merely ‘one transition’ by the broadcast industry. It is the sum of thousands of transitions by individual broadcasters. For this reason, extensive authority has been delegated to the Media Bureau to make key judgments at countless transition junctions. Sometimes those junctions involve extremely unusual and even unique circumstances, such as the experience of KBAD-LP in the environment of American Samoa during this unique pandemic era. As such, while South Seas Broadcasting did not submit its request for extension of its DTV Permit in the prescribed format, it did request the extension, and the grounds that it presented are *indisputably compelling* in support of an extension of the DTV Permit.

* * *

For these reasons, we ask that the Bureau (1) reinstate South Seas’ request for silent STA and the Station’s underlying license; (2) treat the silent STA request as a request for waiver of the deadline for initiation of digital broadcasts over KBAD-LP and for extension of the DTV Permit, and (4) extend the DTV Permit for a period of six months.

Respectfully submitted,

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ATTACHMENT 1

