



Federal Communications Commission
Washington, D.C. 20554

April 4, 2016

DA 16-349

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International Communications Network, Inc.
160 Thorn Street
Suite 200
San Diego, California 92103

Re: Class A License Conversion Application
KSDY-LD, San Diego, California
Facility ID No. 56830
File No. BLDTA-20140725ABQ

Dear Licensee:

This is in regard to the Petition for Reconsideration (Petition) filed by International Communications Network, Inc. (ICN) on November 7, 2014, seeking reconsideration of the Video Division's (Division) decision dismissing the above captioned application to convert low power television (LPTV) station KSDY-LD (Station or KSDY-LD), San Diego, California to Class A status. ICN requests that the application to convert KSDY-LD to Class A status be reinstated and granted. For the reasons set forth below we deny ICN's Petition.

Background. The Community Broadcasters Protection Act of 1999 (CBPA) provided certain qualifying LPTV licensees an opportunity to convert their secondary status to the new Class A primary status, provided that they satisfied certain statutorily established criteria.¹ Under the CBPA, licensees intending to seek Class A designation were required to file with the Commission a "certification of eligibility based on the qualification requirements [of the Act]" within 60 days following the date of enactment of the CBPA (*i.e.*, no later than January 28, 2000).² An LPTV licensee submitting a certification of eligibility could qualify for Class A status if, during the 90-day period ending November 28, 1999, its station: (1) broadcast a minimum of 18 hours per day; (2) broadcast 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 low power television stations; and (3) was in compliance with the Commission's requirements for LPTV stations.³

Alternatively, under subsection 336(f)(2)(B) of the CBPA, an LPTV station was eligible for Class A status if "[t]he Commission determine[d] that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station." In the order implementing

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

² 47 U.S.C. § 336(f)(1)(B). *See* Mass Media Bureau Implement Communication Broadcasters Protection Act of 1999, Public Notice (MMB, rel. Dec. 13, 1999).

³ 47 U.S.C. § 336(f)(2)(A). The statute also establishes continuing compliance with the operating rules applicable to full power stations as 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).

the CBPA, however, the Commission stated that “[w]e will allow deviation from the strict statutory eligibility criteria [of 336(f)(2)(A)] only where such deviations are insignificant or when we determine that there are compelling circumstances” that warrant deviation.⁴ The Commission’s form entitled “Statement of Eligibility for Class A Low Power Television Station Status” required certifications that the station met the three specific eligibility requirements set forth in subsection 336(f)(2)(A), and it further required that an exhibit or explanation be provided should an LPTV station fail to meet the statutory requirements enumerated in that section yet seek eligibility pursuant to subsection 336(f)(2)(B).

Commission records indicate that the former licensee of the Station, TV-61 San Diego, Inc. (TV-61), filed a timely statement of eligibility for the Station.⁵ In its statement of eligibility TV-61 did not certify compliance with any of the statutory eligibility requirements of subsection 336(f)(2)(A), but rather requested that the Commission treat the station as a qualified LPTV station eligible for Class A status under subsection 336(f)(2)(B) because of the nature of its program service. The Mass Media Bureau found that the Station was not eligible for Class A status under the alternative standard and accordingly dismissed the statement of eligibility.⁶ TV-61 did not file a petition for reconsideration of the dismissal, and that action has been final for over 15 years.

On July 25, 2014, ICN filed an application to convert KSDY-LD to Class A status (Application).⁷ 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.⁸ ICN argued that as an eligible low power station KSDY-LD should be conferred Class A status as the result of its move to an in-core channel assignment in 2011 and the Station’s “time consuming efforts” to locate a suitable in-core channel.⁹ ICN certified in the Application that the Station had been operating in compliance with the Class A statutory requirements and that it is minority owned and meets the needs of audiences not adequately served by other stations, in particular by providing Spanish-language programming.¹⁰

In a letter decision dated October 8, 2014, the Division dismissed the Application.¹¹ The Division found that ICN failed to present compelling or extraordinary circumstances that justified extending Class A eligibility, especially 15 years after passage of the CBPA, where a certification of eligibility for the

⁴ *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*).

⁵ At the time the Station’s certification of eligibility was filed the Station went by the call sign K61GH. ICN acquired control of the Station on February 20, 2004. See FCC File No. BTCTTL-20031219ATN.

⁶ *Dismissal of LPTV Licensee Certificates of Eligibility for Class A Television Station Status*, Public Notice, 15 FCC Rcd 9761 (MMB 2000) (*Class A Eligibility PN*).

⁷ File No. BLDTA-20140725ABQ.

⁸ *Id.*, Exhibit 2.

⁹ See 47 U.S.C. § 336(f)(6)(A) (prohibiting the Commission from granting Class A licenses to qualifying LPTV stations operating on out-of-core channels. Such stations are required to move to an in-core channel prior to completing the process of conversion to Class A status); See *Class A R&O*, 15 FCC Rcd at 6396-97, para. 103. 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. File No. BLDTA-20140725ABQ, Exhibit 2.

¹⁰ *Id.*

¹¹ *International Communications Network, Inc.*, Letter, 29 FCC Rcd 11857 (Vid. Div. 2014) (Letter Decision).

station had never been granted, and where the licensee of the station during the relevant statutory time period did not appeal its dismissal.¹²

In its Petition, ICN alleges that the Division's action was contrary to the CBPA and that the Division's failure to consider the unique facts and circumstances of the case exceeded agency authority and constituted prejudicial error.¹³ As an initial matter, ICN argues that the 2000 Public Notice in which the Mass Media Bureau dismissed a number of statements of eligibility including the Station's was not the sort of agency action that provided the Station a means to challenge the dismissal.¹⁴ ICN asserts that all that was required by the CBPA was the "filing" of a statement of eligibility, not "acceptance" of that filing by the Commission. ICN also contends that the CBPA includes a "savings clause" that permits the Commission to extend Class A status if doing so would be in the public interest, convenience, and necessity.¹⁵ ICN again points to its minority ownership, diverse programming, and prolonged effort to move in-core, facts that according to ICN the Division did not consider in its decision.¹⁶ ICN goes on to argue that the Division failed properly to apply the CBPA and to consider KSDY-LD's prior status as an out-of-core facility. In particular, ICN contends that it was precluded from even asking for Class A status until it moved off its out-of-core channel, which did not occur until 2011.¹⁷

Discussion. Contrary to ICN's assertion, the Public Notice dismissing the Station's statement of eligibility was an official action containing specific legal findings.¹⁸ The staff routinely receives petitions for reconsideration of actions taken via public notice, including denials of applications by staff action. The proper course of action for TV-61 to have taken, especially since out-of-core stations were required to file statements of eligibility,¹⁹ was to file a petition for reconsideration.²⁰ TV-61, however, chose not

¹² *Letter Decision*, 29 FCC Rcd at 11858.

¹³ Petition at 1-2.

¹⁴ *Id.* at n.5; see *Class A Eligibility PN*, 15 FCC Rcd 9761.

¹⁵ Petition at 6-7.

¹⁶ *Id.* at 7; see *supra* notes 9 and 10.

¹⁷ Petition at 7.

¹⁸ *Id.* at n.5. See *Class A Eligibility PN*, 15 FCC Rcd at 9761-62 ("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.").

¹⁹ *Class A R&O*, 15 FCC Rcd at 6396, para. 103 ("We will require LPTV stations on channels 52-59 that are seeking Class A status to have filed a certification of eligibility within the time frame established in the statute (i.e. by January 28, 2000)").

²⁰ Petitions for reconsideration of the public notice were in fact received by the Commission, which the staff individually addressed. See Letter from Barbara A. Kreisman, Chief, Video Services Division, to Louis E. Jenkins, Jr., Great Oaks Broadcasting Corporation (Aug. 11, 2000) (concluding that KANC-LP's loss of its transmitter site satisfied the Commission's standard for granting eligibility in the public interest where a licensee did not meet the statutory criteria); Letter from Barbara A. Kreisman, Chief, Video Services Division, to Mr. Gerald Benavides (Aug. 11, 2000) (concluding that a five-day period of non-compliance by KANG-LP with the statutory criteria was not significant and that the facts set forth in the station's timely filed Statement of Eligibility justified grant under the Commission's public interest criteria.).

to seek review.²¹ As ICN is aware, the Bureau is without authority to waive the statutory 30-day period for filing petitions for reconsideration specified in Section 405(a) of the Communications Act, except where “extraordinary circumstances indicate that justice would thus be served,” a showing not even attempted here.²² At this point the staff, consistent with the CBPA, has already determined that the public interest would not be served by extending Class A status to KSDY-LD, and we will not revisit this determination via a license conversion application filed 14 years after finality. The Commission set forth clearly the specific process that was required to be followed in order to be Class A eligible under the CBPA.²³

We further find that the Division’s interpretation of the CBPA is consistent with both Commission precedent and a plain reading of the statute. As determined by the Commission in the *Class A R&O*, “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.”²⁴ The Commission rejected arguments by commenters that the statute permitted the it to extend the definition of “qualifying low-power station” beyond the 90 days preceding November 29, 1999, finding that “the intent of Congress in enacting the CBPA was to establish the rights of a very specific, already-existing group.”²⁵ ICN contends that “the out-of-core nature of the station’s operation at the time of the window automatically precluded eligibility.”²⁶ This is an incorrect reading of the CBPA. While the CBPA expressly prohibits the granting of a Class A license to a qualified out-of-core LPTV station until it moves in-core,²⁷ it does not excuse or toll the statutory eligibility criteria until a station moves in-core. Therefore, KSDY-LD’s timing for moving in-core is irrelevant for purposes of determining whether it met the statutory eligibility criteria in the 90 days preceding enactment of the CBPA.

²¹ ICN’s argument that all that was required by the CBPA was the timely filing of a statement of eligibility and that the dismissal of the statement was “irrelevant to the analytic framework” established by the Commission in the *Class A R&O*, Petition at 5, is a crabbed reading of the CBPA and inconsistent with *Class A R&O*. See *infra* note 23. In order for a station to be deemed a qualified LPTV station and thereby eligible for Class A status, the Commission must be able to verify that the requirements of the CBPA have been met. Not requiring that a statement of eligibility actually certify compliance with the CBPA would be contrary to the statute itself. See *The Atlanta Channel, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 14541, 14543, para. 6 (2012), *recon. denied*, Order on Reconsideration, DA 14-1460 (rel. Oct. 7, 2014 MB) (notwithstanding that the station filed a timely statement of eligibility, denial of the its application for Class A status was proper because the licensee failed to provide the necessary certifications).

²² *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 Commission found that waiver of a filing deadline would serve a public interest but not that any special circumstance led to the late filing, the Commission’s waiver of the filing deadline was arbitrary).

²³ *Class A R&O*, 15 FCC Rcd at 6361, para. 12 (“To be eligible for a Class A license, an LPTV station must go through several steps. First, it must have filed a certification of eligibility with 60 days of the enactment of the CBPA. Second, the certification of eligibility must be approved by the Commission. Third, it must file an application for a Class A license, as we determine below, within 6 months from the effective date of the Class A rules. And fourth, the license must be granted.”). In this case, the Station failed at step number two. See also *supra* note 19.

²⁴ *Class A R&O*, 15 FCC Rcd at 6361, para. 12

²⁵ *Id.* at 6362, para 12.

²⁶ Petition at 7.

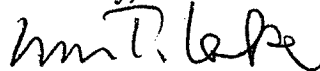
²⁷ 47 U.S.C. § 336(f)(6).

There is no dispute that the Station's statement of eligibility was dismissed by the Commission because, by TV-61's own admission, the Station did not meet any of the three eligibility criteria established by the CBPA. Whether after ICN acquired KSDY-LD in 2004 it voluntarily complied with the other operational requirements of Class A stations has no bearing on whether the station, in the 90 days prior to November 28, 1999, met the criteria established by the CBPA in order to be eligible for Class A status. By operation of the CBPA, as the Commission has interpreted that statute, it could not have met the eligibility criteria by events happening after November 28, 1999.

While the CBPA gives the Commission the discretion to certify eligibility if "the Commission determines that the public interest, convenience, and necessity would be served,"²⁸ ICN fails to recognize that such a determination is wholly within the discretion of the Commission. In the *Class A R&O*, the Commission determined that it would "not accept applications from LPTV stations that did not meet the statutory criteria and that did not file a certification of eligibility by the statutory deadline, absent compelling circumstances."²⁹ The Commission went on to state that it would allow deviation from the specific statutory requirements only "where such deviations are insignificant" or where "there are compelling circumstances, and that in light of those compelling circumstances, equity mandates such a deviation."³⁰ In fact, the Commission specifically declined to establish a different set of criteria for foreign language stations that do not meet the local programming criteria, recognizing that "Congress' intent was to preserve the small class of existing LPTV stations that were providing local programming."³¹ While we commend ICN's diligent efforts to find an in-core channel³² and to serve the local community through its foreign language programming,³³ we affirm the Division's decision that ICN has not presented evidence of compelling or extraordinary circumstances that would justify extending Class A eligibility, especially over 15 years after the statement of eligibility for the station was dismissed without a timely appeal by the former licensee.

For these reasons, the Petition for Reconsideration filed by International Communications Network, Inc. to convert low power television station KSDY-LD, San Diego, California, to Class A status IS HEREBY DENIED.

Sincerely,



William T. Lake
Chief, Media Bureau

cc:

Peter Tannewald, Esq.
Davina Sashkin, Esq.

²⁸ 47 U.S.C. § 336(f)(2)(B). Petition at 6.

²⁹ *Class A R&O*, 15 FCC Rcd at 6361, para 11.

³⁰ *Id.* at 6369, para. 33. Examples of such compelling circumstances included natural disasters or interference conflicts that forced a station off the air during the 90-day period before enactment of the CBPA. *Id.*

³¹ *Id.* at 6369, para. 34. The Commission concluded that "foreign language stations should have the same eligibility requirements as any other potential Class A station." *Id.*

³² Petition at 2-3.

³³ *Id.* at 3-4.