



Federal Communications Commission
Washington, D.C. 20554

July 17, 2015

Eileen Breslin
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RE: Petition for Eligible Entity Status, Lotus Communications Corporation, Stations KPHE-LD, Phoenix, Arizona (Fac. ID 186602), File No. BLDTL-20090326ADB and KHLM-LD, Houston, Texas (Fac. ID 57189), File No. BLDTL-20090630AEZ

Dear Counsel:

This is with respect to the Petition for Eligible Entity Status (“Petition”) filed on July 9, 2015, by Lotus Communications Corporation (“Lotus”), licensee of low power television stations (“LPTV”) KPHE-LD, Phoenix, Arizona and KHLM-LD, Houston, Texas (collectively “Stations”).¹ The Petition requests that the Stations be deemed “eligible facilities” for the following reasons: (1) the Stations should be protected as they were specifically identified by Congress in the Digital Data Services Act (“DDSA”),² which created the LPTV digital pilot project;³ (2) compelling reasons warrant permitting the Stations to convert to Class A status;⁴ and (3) the Stations should otherwise be protected.⁵ For the reasons discussed below, we deny the Petition.⁶

First, Lotus asserts it is entitled to protection because it was specifically identified by Congress in the DDSA.⁷ On June 19, 2015, the Commission released the *Incentive Auction Second R&O* and denied a

¹ Petition for Eligible Entity Status filed by Lotus Communications Corporation (Jul. 9, 2015)(“Petition”).

² Public Law No. 106-554, 114 Stat. 4577 (Dec. 21, 2000) (codified at 47 U.S.C. §336(h)).

³ Petition at 1; *see* Comments of Lotus Communications Corp., MB Docket No. 03-185, et al. (filed Jan 8, 2015)(“Lotus Comments”); Reply Comments of Lotus Communications Corp., MB Docket No. 03-185, et al. (filed Feb. 2, 2015)(“Lotus Reply”).

⁴ Petition at 2.

⁵ *Id.*

⁶ The Petition broadly asserts that the Stations should be deemed eligible facilities for purposes of the incentive auction “for the reasons set forth in comments, dated January 5, 2015[], Lotus filed in the Third Notice of Proposed Rulemaking, MB Docket No. 03-185, GN Docket No. 12-268, ET Docket No. 14-1475 (rel. Oct. 10, 2014)...” *Supra* note 3. The Commission has found that incorporation by reference is not a practice that is permitted under the Commission’s Rules. *See, e.g., Tamara Radio Licenses of Tampa, Fla., Inc., Memorandum Opinion and Order, 25 FCC Rcd 7588, 7589 (2010)*(the Commission should not have to sift through a petitioners prior pleadings to supply reasoning in support of a petitioner’s request). The Eligibility PN specifically states that in a Petition for Eligible Entity Status a licensee “must explain the reason it believes the facility is eligible consistent with the Incentive Auction R&O (e.g., the facility was subject to mandatory or discretionary protection).” *Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form, Public Notice, DA 15-679, p. 2 (rel. Jun. 9, 2015)*. The Licensee has failed fully explain in the Petition why the Stations should be deemed eligible facilities.

⁷ Petition at 1; Lotus Reply at 1-2.

Petition for Reconsideration filed by U.S. Television, L.L.C.,⁸ which alleged that the Commission erred by failing to protect stations that were identified in the DDSA for the LPTV data pilot project.⁹ In support of its decision to deny the Petition for Reconsideration, the Commission stated that “stations authorized to operate under the terms of the DDSA remain secondary in nature...and nothing in the DDSA, the Commission’s order implementing the DDSA, the Commission’s rules, or the Spectrum Act mandates that DDSA stations be protected in the repacking process.”¹⁰ The Commission went on to note that “the pilot program never materialized, and there are no stations that are currently operating under the program to qualify even if we were to decide to extend discretionary protection to them.”¹¹ This is not the appropriate venue for seeking reconsideration of the Commission’s decision.¹²

Second, Lotus contends that the Commission should permit the Stations to convert to Class A status before the incentive auction because of “compelling circumstances.”¹³ The Community Broadcaster Protection Act of 1999 (“CBPA”) provided certain qualifying LPTV stations with primary Class A status.¹⁴ While the CBPA also grants the Commission authority to establish alternative eligibility criteria for LPTV stations seeking Class A designation,¹⁵ in the *Class A MO&O* implementing the CPBA the Commission determined it would only permit deviation from the strict requirements of the CPBA where such deviations were either “insignificant” or for “compelling circumstances.”¹⁶ The Commission found examples of compelling circumstances to include “a natural disaster or interference that forced the station off the air *during the 90 day period before enactment of the CBPA*” (emphasis added).¹⁷ Here, we find the Licensee has failed to demonstrate such compelling circumstances.

Lastly, Lotus broadly asserts that the Stations should simply be included among those facilities that are eligible for protection. The Commission has definitively determined that LPTV stations are not

⁸ Petition for Reconsideration filed by U.S. Television, L.L.C, GN Docket No. 12-268 (Sept. 12, 2014).

⁹ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Second Report and Order on Reconsideration, FCC 15-69, para. 71 (rel. Jun. 19, 2015) (“*Incentive Auction Second R&O*”).

¹⁰ *Id.*

¹¹ *Id.*

¹² See 47 C.F.R. § 1.429(b),(i); 47 U.S.C. § 402(a).

¹³ Petition at 2; Lotus Comments at 6.

¹⁴ *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). For the 90 days prior to enactment of the CBPA, an applicant must have (1) broadcast a minimum of 18 hours per day, (2) broadcast an average of at least 3 hours per week of programming produced within the market area served by the station, and (3) been in compliance with Commission requirements for LPTV stations. 47 U.S.C. § 336(f)(2)(A).

¹⁵ 47 U.S.C. § 336(f)(2)(B).

¹⁶ *Establishment of a Class A Television Service*, MM Docket No. 00-10, Report and Order, 15 FCC Rcd 6355, 6369, para. 33 (2000) (“*Class A MO&O*”).

¹⁷ *Establishment of a Class A Television Service*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 8244, 8261-62, paras. 47-48 (2001), *aff’g*, *Class A MO&O*, 15 FCC Rcd at 6369, para. 33.

eligible for mandatory protection and has declined to use its discretion to extend protection to LPTV stations.¹⁸

Accordingly, for the foregoing reasons the Petition for Eligible Entity Status filed by Lotus Communications Corporation **IS DENIED**.

Sincerely,

A handwritten signature in black ink, appearing to read 'Barbara A. Kreisman', with a long horizontal flourish extending to the right.

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁸ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6673, para. 238; 6674, para. 241 (2014)(finding that repacking protection of LPTV stations is not mandated by the Spectrum Act and declining to exercise discretionary authority to protect LPTV facilities), *aff'd on recon.*, *Incentive Auction Second R&O*, paras. 66-70.