

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

In the Matter of	)	
	)	
Amendment of Section 73.622(b)	)	MM Docket No. 99-277
Table of Allotments	)	RM-9666
Digital Television Broadcast Stations	)	
(Corpus Christi, Texas)	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** October 28, 2004

**Released:** November 5, 2004

By the Chief, Video Division:

1. The Chief, Video Division, Media Bureau, acting pursuant to delegated authority, herein considers Petitions for Reconsideration of the decision granting a change in the digital television channel allotment for KIII-TV, Corpus Christi, Texas from DTV Channel 47 to DTV Channel 8. *See Report and Order, Amendment of Section 73.622(b), Table of Allotments, Digital Broadcast Stations (Corpus Christi, Texas)*, 18 FCC Rcd 23949 (2003) (“*Report & Order*”). The petitions were filed by Channel 7 of Corpus Christi, Inc. (KTOV), licensee of KTOV-LP, Channel 7,<sup>1</sup> and Minerva L. Lopez, licensee of KTMV-LP, Channel 8, Corpus Christi, Texas. Channel 3 of Corpus Christi, Inc. (CCC), licensee of KIII-TV and proponent of the rulemaking to change its DTV allotment to Channel 8, filed opposition pleadings. In addition, because of the interrelated nature of various facilities applications with this rulemaking proceeding, we herein address: Petitions for Reconsideration of a March 22, 2002 letter (Letter Ruling) deferring action on applications for Class A licenses for KTOV-LP and KTMV-LP;<sup>2</sup> Petitions to Dismiss the KTVO-LP and KTMV-LP Class A license applications filed by CCC, which KTOV and Lopez oppose; and, pursuant to the *Report & Order*, the implementing application (BPCDT-20040107AMR) for a construction permit for the

<sup>1</sup> KTOV is the successor-in-interest to the licensee of KTOV-LP, Sound Leasing, Inc. (Sound Leasing), and has continued to prosecute its claims in this proceeding. Unless otherwise noted, we refer to KTOV as the party-in-interest to these proceedings.

<sup>2</sup> *See* Letter, dated March 22, 2002, to CCC of Corpus Christi, Inc., *et al.*, from Hossein Hashemzadeh, Supervisory Engineer, Low Power Television Branch. Therein, the staff dismissed CCC’s petitions to deny the Class A applications of KTOV for Channel 7 (File No. BLTVA-20000905AAE) and Lopez for Channel 8 (File No. BLTVA-20001220ADO). However, because those stations would have to protect CCC’s proposed digital allotment on Channel 8, the Class A applications were held in abeyance pending the outcome of the rulemaking proceeding. Moreover, the staff noted that in the event the requested rulemaking was granted, KTOV and Lopez would have the opportunity to file for displacement relief. In fact, on December 4, 2003, KTOV filed a displacement application (BPTTL-20031204AJX) for KTOV-LP, specifying operation on DTV Channel 49 at Corpus Christi.

digital facilities on DTV Channel 8 for KIII(TV).<sup>3</sup>

2. **Background.** On February 8, 1999, CCC filed a petition for rulemaking to substitute DTV Channel 8 for its allotted DTV Channel 47, and a notice of proposed rulemaking was issued setting a closing comment date of November 16, 1999.<sup>4</sup> After the close of that pleading cycle, KTOV and Lopez filed comments opposing the proposed channel substitution. Moreover, shortly after the closing of the comment period in that rulemaking, on November 29, 1999, Congress enacted the Community Broadcasters Protection Act of 1999 (CBPA), pursuant to which certain eligible low power television stations could be accorded Class A primary station “protected” status.<sup>5</sup> Pursuant to the CBPA, qualified low power stations intending to convert to Class A status were required to submit a statement of eligibility by January 28, 2000. Timely certifications for eligibility were filed on behalf of KTOV-LP and KTMV-LP, followed by applications for Class A licenses.

3. CCC opposed the grant of the KTOV-LP and KTMV-LP Class A license applications. It argued that they could not be granted in light of the rulemaking proceeding to reallocate DTV Channel 8 to Corpus Christi for use by KIII(TV). Specifically, it claimed that its rulemaking petition took priority over the Class A applications. In response, KTOV and Lopez argued that because the rulemaking was still pending and the requested allotment was not made by the date they filed their statements of eligibility, the rulemaking proceeding did not take priority over the Class A applications. In the March 22, 2002 Letter Ruling, we found that the Commission’s processing priorities applicable to CCC’s rulemaking petition established a “cut-off” date against subsequently filed Class A applications, and that, in this case, that cut-off occurred before the effective date of the CBPA and the filing of statements of eligibility pursuant thereto.<sup>6</sup> We therefore concluded that KTOV-LP and KTMV-LP would have to protect the facilities proposed in CCC’s DTV petition. KTOV seeks reconsideration of that decision, arguing that the staff erred by applying the wrong priority system applicable to Class A stations and DTV rulemaking requests. CCC opposes KTOV’s petition, alleging that it is factually incorrect and merely a restatement of previously raised matters which the staff properly resolved. In response thereto, KTOV maintains that the Commission must revisit its decision regarding the priority between Class A-eligible KTOV-LP and CCC’s rulemaking proposal for DTV Channel 8.

4. On November 19, 2003, we released the subject *Report & Order* amending the DTV Table of Allotments to assign DTV Channel 8 to Corpus Christi for use by KIII.

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<sup>3</sup> KTOV filed an Informal Objection to CCC’s application, requesting that action on the construction permit to implement the rulemaking should be deferred pending the outcome of its petition for reconsideration of the *Report & Order*. In light of our action today, that objection is moot.

<sup>4</sup> *Notice of Proposed Rule Making*, 14 FCC Rcd 15242 (1999).

<sup>5</sup> 47 U.S.C. §336(f).

<sup>6</sup> See *Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 5946, 5969 (2001) (*Conversion Order*).

Therein, we did not consider late-filed comments submitted by Sound Leasing and Lopez. Both KTOV and Lopez seek reconsideration of the *Report & Order*.<sup>7</sup> They argue that the staff erred by not considering the late-filed pleadings.<sup>8</sup> They also contend that the Class A license applications should have been given priority over the rulemaking petition and, therefore, absent any engineering necessity to change KIII's facilities, KTOV-LP and KMTV-LP are entitled to protection from its proposed digital facilities whether or not objections were filed. In opposition, CCC argues that these parties are simply trying to re-litigate in the rulemaking proceeding those issues previously considered and properly rejected by the staff in the March 22, 2002 letter regarding the priority to be accorded these proposals.

5. After the *Report & Order* was issued, CCC filed the implementing application for a construction permit for its digital facilities on Channel 8. On May 4, 2004, it filed petitions to dismiss the KTOV-LP and KMTV-LP Class A license applications on the basis that the March 22, 2002 Letter Ruling properly determined that its DTV Channel 8 rulemaking proposal was entitled to a priority over the pending Class A applications.<sup>9</sup> CCC maintains that the KTOV and Lopez should not be permitted to challenge those actions with untimely and rehashed arguments in collateral pleadings. It also states that neither KTOV-LP nor KMTV-LP is meeting the obligations of a Class A station with respect to the maintenance of a public inspection file and the presentation of children's programming. CCC also claims that KTOV's filing of the Channel 49 displacement

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<sup>7</sup> The Community Broadcasters Association (CBA) filed comments in support of KTOV's petition for reconsideration. CCC filed a Motion To Dismiss those comments as unauthorized and untimely. CPB opposes CCC's motion, arguing that it is entitled to file comments in support of a previously filed reconsideration petition. Although there is no requirement that we consider CBA's comments, to the extent that they support generally the arguments advanced by KTOV, they are addressed herein.

<sup>8</sup> KTOV in particular argues that it was unfair and arbitrary for Sound Leasing's opposition comments to be treated as untimely under the circumstances of this case. It maintains that although Sound Leasing filed its initial comments after the deadline for filing pleadings opposing the grant of the rulemaking proposal, it later withdrew those comments "without prejudice," and resubmitted those comments several months later. The resubmitted comments were not formally considered pursuant to Sections 1.415(b) and (d) of the Commission's Rules. In its instant pleading, KTOV offers that Sound Leasing withdrew its initial comments without prejudice "because it believed that it could privately work out its differences with CCC . . . [but when CCC opposed the Class A application, Sound Leasing] was left with no alternative but to defend KTOV-LP's status in any and all applicable forums" which it did by resubmitting its comments opposing the rulemaking proposal. KTOV now argues that in light of public policies favoring settlements among parties, Sound Leasing acted reasonably under the circumstances, and its comments should have been considered. In opposition, CCC states that Sound Leasing's and Lopez' comments were properly dismissed as untimely, that the voluntary withdrawal and resubmission of the initially late-filed comments does not satisfy the prerequisites for acceptable petitions to deny, and if their acceptance would make a mockery of the Commission's filing deadlines. We agree. Nevertheless, because the allegations contained therein are repetitive of those raised elsewhere in this proceeding, they are addressed herein.

<sup>9</sup> CCC maintains that Lopez lacks further standing to participate with respect to the merits of either the rulemaking or the March 22, 2002 because she did not file timely comments or reconsideration petitions. In any event, CCC argues that the Bureau has nevertheless addressed and rejected the gravamen of Lopez' basic claim – that the KMTV-LP Class A application is entitled to protection from the proposed operation of KIII on DTV Channel 8.

application while simultaneously prosecuting its Channel 7 Class A license application violates Sections 73.3517 and 73.3518 of the Commission's Rules with respect to contingent, inconsistent or conflicting applications.

6. KTOV filed an opposition to the petition to dismiss its Class A license application. It rejects CCC's allegation that it is prosecuting inconsistent applications as its Class A license application and its displacement application to operate on Channel 49 are not mutually exclusive, and are not contingent on the grant or dismissal of the other. It states that KTOV-LP is currently licensed on Channel 7, and that it has not applied for two channels at the same time. Rather, KTOV claims that it is entitled to prosecute its Class A application and spectrum rights on Channel 7 without giving up its right to seek displacement relief on Channel 49, especially if the rulemaking *Report & Order* is affirmed forcing KTOV-LP to move to a new channel. In other words, it argues that it has filed a valid request for Class A status for KTOV-LP, and that it may prosecute that request independent of the one channel on which the station finally ends up. Thus, KTOV argues that it is not seeking two different facilities that would cause interference to each other, and that there is nothing to prevent the grant of both applications, one to confer Class A status on KTOV-LP, and the other for an appropriate channel in the event its current operation is displaced.<sup>10</sup>

7. **Discussion.** In essence, the basis of all of KTOV's and Lopez' pleadings and the core issue in this proceeding is the priority accorded CCC's rulemaking versus the applications for Class A status for KTOV-LP and KTMV-LP. That issue was specifically addressed in the March 22, 2002 Letter Ruling, wherein we found that because CCC's rulemaking proposal was effectively "cut-off" prior to the effective date of the CBPA and the filing of statements of Class A eligibility, KTOV-LP and KTMV-LP would be required to protect the channel 8 allotment if the rulemaking petition was granted.

8. KTOV and Lopez argue in their various pleadings that that staff decision improperly ignores that section of the CBPA that requires the Commission to preserve the service areas of low-power stations pending the final resolution of a Class A application.<sup>11</sup> They therefore conclude that because statements of Class A eligibility were on file prior to the resolution of the DTV Channel 8 rulemaking, the Commission was obligated to protect the service areas of KTOV-LP and KTMV-LP in resolving the rulemaking proceeding. Moreover, KTOV in particular argues that the staff misinterpreted the *Conversion Order* to improperly conclude in the March 22, 2002 Letter Ruling that CCC's rulemaking petition should be accorded priority over the Class A statements of eligibility and applications. In its reading, KTOV believes the cited

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<sup>10</sup> KTOV rejects the claim that it does not comply with the children's television programming and public file requirements for Class A stations. It explains that its quarterly issues and programming lists are maintained in a separate folder from the public inspection file, which was inadvertently not made available to CCC's employee who reviewed it. KTOV states that it regrets that error, but certifies that it has properly kept such lists since the date its initial Class A application was filed. We need not resolve those matters here, but they will be examined, as appropriate, in conjunction with our review of KTOV's FCC Form 398, Children Television Programming Report.

<sup>11</sup> 47 U.S.C. §336(f)(1)(C).

provisions of the *Conversion Order* are directed only to the priority between DTV rulemakings and DTV expansion applications, and not between DTV and Class A applications, which it believes are governed by the CBPA. However, the March 22, 2002 Letter Ruling explained only that *Conversion Order* established the cut-off date for pending DTV rulemakings and the protections to be accorded them. In explaining that priority, *Conversion Order* used the example of the priority to be afforded DTV rulemakings and DTV expansion applications. But there is nothing pleaded or apparent that supports KTOV's argument that those protections are limited only to instances involving DTV expansions.

9. In any event, in this specific case, CCC's rulemaking proposal was cut-off and its protections from other applications attached before the CBPA became effective and any Class A rights pursuant to the CBPA accrued to KTOV-LP and KTMV-LP. Therefore, although we do not agree with KTOV's narrow reading of *Conversion Order*, it is the fact that no Class A rights or protections had attached to the Class A applications before the DTV Channel 8 rulemaking was cut-off that prevented the grant of the Class A applications as filed for Channels 7 and 8 at Corpus Christi. Moreover, and as correctly explained in the March 22, 2002 Letter Ruling, that action did not prevent the low power stations to file displacement applications and, therefore, to seek Class A status on a subsequently assigned channel.<sup>12</sup> Nevertheless, and as clearly explained in the March 22, 2002 Letter Ruling, the rulemaking petition was effectively "cut-off" after the close comment deadline, which occurred prior to the effective date of the CBPA, and, therefore, prior to the earliest possible date the low power stations were entitled to the protections claimed by KTOV and Lopez herein. KTOV and Lopez argue that because the rulemaking had not been *resolved* prior to the filing of the statements of Class A eligibility, the language of the CBPA must prevail is simply incorrect, and nothing presented herein warrants a contrary conclusion.<sup>13</sup>

10. For the reasons stated herein, IT IS HEREBY ORDERED That the various objections raised by KTOV and Lopez against CCC's proposed rulemaking and the

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<sup>12</sup> In this regard, we do not agree that KTOV's displacement application for Channel 49 at Corpus Christi is a prohibited contingent, inconsistent or conflicting application. To the extent that KTOV seeks Class A status for KTOV-LP, that determination is based generally on that station's broadcast performance and not the technical parameters of its operations, the pending applications are not *per se* mutually inconsistent or contingent. Upon adoption of the *Report & Order* allotting DTV Channel 8 at Corpus Christi, KTOV was entitled to pursue displacement relief to seek another channel for its operation, without regard to its pending Class A license application. We will consider that displacement application in the ordinary course. In the event that KTOV or Lopez obtain displacement relief, we can then consider their pending Class A applications.

<sup>13</sup> As such, we also reject KTOV's assertion that CCC must demonstrate an "engineering necessity" to infringe upon the service areas of these stations, or that it did not take all necessary and proper steps to protect itself against Class A facilities. Again, the DTV Channel 8 rulemaking was cut-off before KTOV-LP and KTMV-LP were able to claim protection for their individual service areas, and those stations therefore remain, for these purposes, secondary facilities *vis-à-vis* KIII-DT. Moreover, to the extent that CCC's rulemaking proposal and implementing construction permit application comply with city-grade coverage and interference protection requirements, and is otherwise consistent with the Commission's technical standards, we are not persuaded that its DTV Channel 8 proposal raises additional questions or concerns.

implementing construction permit for DTV Channel 8 ARE DISMISSED.

11. IT IS FURTHER ORDERED That the *Report & Order* granting a change in the digital allotment for KIII-DT, Corpus Christi, from DTV Channel 47 to DTV Channel 8 IS AFFIRMED.

12. In addition, review of CCC's application for a construction permit for DTV Channel 8 indicates that it is technically and legally qualified, and that its grant will serve the public interest. Therefore, IT IS FURTHER ORDERED That CCC's application (BPCDT-20040107AMR) for a construction permit for DTV Channel 8 at Corpus Christi IS GRANTED.

13. Finally, in light of the conclusions reached herein, IT IS FURTHER ORDERED That the March 22, 2002 Letter Ruling holding the Class A license applications filed on behalf of KTOV-LP and KTMV-LP will continue to be held in abeyance pending the grant of any displacement relief for the subject stations.

FEDERAL COMMUNICATIONS COMMISSION

Clay C. Pendarvis  
Associate Chief, Video Division  
Media Bureau