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Re: MM Docket No. 01-244; RM-10234
Tyler, Texas
MM Docket No. 01-245; RM-10235
Lufkin, Texas

Dear Licensees:

This is with respect to the application filed by International Broadcasting Network (IBN), seeking review of the *Memorandum Opinion and Order*, 18 FCC Rcd 18497 (2003), which affirmed the Video Division's earlier *Report and Order*, 17 FCC Rcd 19452 (2002), substituting DTV channel 10 for DTV channel 38 at Tyler, Texas, and DTV channel 11 for DTV channel 43 at Lufkin, Texas. CivCo, Inc. (CivCo), the permittee of stations KLTV-DT, Tyler, and KTRE-DT, Lufkin, filed an opposition, to which IBN replied.

Section 1.115(c) of the Commission's rules provides that "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Because we have concluded that IBN has raised new matters in its application for review, we will treat IBN's filing as a further petition for reconsideration.

IBN is the licensee of low power television stations KIBN-LP, KLGV-LP, and KTWC-LP, and those stations have been displaced by the channel substitutions requested by CivCo. IBN now argues, for the first time, that the Video Division incorrectly applied the Commission's rules and policies regarding the impact of DTV channel change requests on low power television stations. According to IBN, the Video Division incorrectly adopted Civco's position that in "a contest between a full power licensee and a low power licensee . . . the full power licensee must win regardless of the evidence, regardless of the

public comments and regardless of the public interest." IBN asserts that because community leaders and thousands of its viewers opposed the channel substitutions, the Video Division's rulings are "arbitrary, capricious, contrary to law and unsupported by the evidence and public comments."

There is no question that the low power television service is secondary to full-service television.[1] In implementing digital television, the Commission affirmed the secondary status of low power television stations, holding that:

> As secondary operations, low power stations must give way to new operations by primary users of the spectrum, including in this case new full service DTV stations operated by existing broadcasters under our DTV implementation plan. While we recognize the important service low power stations provide, we must ensure that our goals for the implementation of DTV are achieved before taking any additional steps to minimize the impact on these secondary operations.

MO&O on Reconsideration of Sixth Report and Order, 13 FCC Rcd 7418, 7461 (1998). The Commission's rules also specifically state that changes in the DTV Table of Allotments may be made "without regard to existing or proposed low power TV or TV translator stations." 47 C.F.R. 74.702(b). In the ongoing DTV proceeding, the Commission did, however, recognize the importance of preserving, to the extent possible, the existing low power television programming service to viewers. Accordingly, displacement relief is available to low power television stations where interference is predicted to or from any allotted DTV facility, and these displacement applications are afforded priority over new station applications or other requests for modification by low power television stations. *MO&O on Reconsideration of Sixth Report and Order*, 13 FCC Rcd at 7565-66.

IBN also argues, for the first time, that it was unable to obtain primary Class A Television status because of CivCo's channel substitution requests, and that "it is inequitable that CivCo be allowed to take unfair advantage of a situation that was the result of its own actions." IBN is incorrect. In the *Report and Order* promulgating rules for the new Class A Television service, the Commission required that qualified low power television licensees file a license application on FCC Form 302-CA within six months of the effective date of the rules adopted in the *Report and Order*. *Establishment of a Class A Television Service*, 15 FCC Rcd at 6362. In reaching this determination, the Commission concluded that a six-month deadline was reasonable, and afforded applicants – like IBN – "who must file displacement applications adequate time to prepare and file their Class A applications consistent with the rules we adopt today." *Id*. By Public Notice, DA 00-2743 (rel. December 5, 2000), that filing deadline was extended until 90 days after release of an Order on Reconsideration of the Report and Order "in order to give eligible LPTV licensees adequate time to prepare and file their Class A applications consistent with any clarifications or rule changes that may be adopted on reconsideration." On April 12, 2001, the Commission released its reconsideration order (16 FCC Rcd 8244), and qualified LPTV stations had until July 12, 2001 to file their Class A applications. In this case, in order to obtain Class A Television status, IBN should have first filed displacement applications for its stations, and then filed a FCC Form 302-CA by the July 12, 2001 deadline, requesting that its displacement facilities be converted to Class A status. IBN apparently chose not to do so.

[1] *See, e.g., In the Matter of the Establishment of a Class A Television Service*, 13 FCC Rcd 6355, 6358 (2000)(low power television stations must yield to facilities increases of existing full-service stations, and to new full-service stations, where interference occurs.)

IBN also repeats arguments initially advanced in its earlier petition for reconsideration. With respect to those arguments, we see no basis to set aside our decision to substitute DTV channel 10 at Tyler and DTV channel 11 at Lufkin. In view of the foregoing, the application for review filed by IBN, and treated as a further petition for reconsideration, IS HEREBY DENIED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau