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In re: **NEW(FM), Aguila, Arizona**
Facility ID No. 170953
File No. BNPH-20070403ACO

Petition for Reconsideration

KVVA-FM, Apache Junction, Arizona
Facility ID No. 1331
File No. BPH-20100817ABA

**Petition for Reconsideration and
Reinstatement *Nunc Pro Tunc***

KDVA(FM), Buckeye, Arizona
Facility ID No. 2750
File No. BPH-20100817AAX

**Petition for Reconsideration and
Reinstatement *Nunc Pro Tunc***

Dear Counsel:

We have before us a Petition for Reconsideration (“Petition”) filed by Entravision Holdings, LLC (“Entravision”) on December 22, 2011, seeking reconsideration of the grant of the above-referenced application of Able Radio Corporation (“Able”) for a new FM station at Aguila, Arizona (“Able Application” or “Application”),¹ and related responsive pleadings.² We also have two Petitions for Reconsideration and Reinstatement *Nunc Pro Tunc* (“Reinstatement Petitions”) filed by Entravision on December 23, 2011, seeking reconsideration of the dismissal of Entravision’s above-referenced applications for minor modifications of the licenses for stations KVAA-FM, Apache Junction, Arizona, and KDVA(FM), Buckeye,

¹ *Able Radio Corporation*, Letter, 26 FCC Rcd 16161 (MB 2011) (“*Letter Decision*”).

² On January 5, 2012, Able filed an Opposition to Petition for Reconsideration (“Able Opposition”). On January 17, 2012, Entravision filed a Reply to Opposition to Petition for Reconsideration (“Entravision Reply”).

Arizona (“Entravision Applications”),³ and responsive pleadings.⁴ For the reasons stated below, we deny the Petitions.

Background. Able was the winning bidder for a new commercial FM station on Channel 297C2 at Aguila, Arizona, in FM Auction 70.⁵ In its original April 3, 2007, post-auction long-form FCC Form 301 application, Able proposed to serve Aguila from an antenna site located at 33° 49’ 53” NL, 113° 1’ 38” WL. On August 10, 2007, Able amended the Application to upgrade and remove the allotment from Channel 297C2 at Aguila to Channel 297C1 at Tonopah, Arizona, with a transmitter site at 33° 49’ 04” NL, 113° 16’ 18” WL.⁶ Subsequently, Able filed a series of minor amendments to the Application’s technical proposal, including a May 5, 2008, amendment specifying service to Tonopah from a location at 33° 48’ 5” NL, 113° 17’ 4” WL (the “May 2008 Site”). On August 17, 2010, Entravision filed an objection to the Able Application (“Informal Objection”). Able then filed an amendment to specify a new transmitter site and change the community of license from Tonopah back to Aguila. The staff denied the Informal Objection and granted the Able Application in a letter decision dated November 29, 2011.⁷ It dismissed the Entravision Applications by a separate staff letter also dated November 29, 2011.⁸

In its Petition, Entravision reiterates its earlier argument that Able lacked reasonable assurance of site availability for the amended May 2008 Site serving Tonopah.⁹ Entravision contends that, under the reasonable assurance policy, once Able has been found to have applied for a transmitter site that lacked reasonable assurance, it was precluded from amending to another site, and we must therefore deny the subsequent site change amendment back to Aguila.¹⁰ In this regard, Entravision argues that auction winners are not treated differently than other applicants: rather, “there is only one class of applicant which must be treated in the same manner.”¹¹ It further asserts that the Commission’s reasonable assurance of site availability requirement applies equally to original applications and all amendments filed thereto, so that the Bureau erred to the extent it did not apply the reasonable assurance policy to the May 2008 Site amendment.¹² Finally, Entravision contends that Able has failed to prosecute its Application by

³ The Able Application was in conflict with the KVVA-FM minor modification application, part of a contingent application group that included the KDVA(FM) minor modification application. As a later-filed application, the KVVA-FM minor modification application was “held in queue” behind the Able Application. When the Able Application was granted, the queue was dissolved and the KVVA-FM minor modification application was dismissed. *Entravision Holding, LLC*, Letter, Ref. No. 1800B3-KT (Nov. 29, 2011) (“*Dismissal Letter*”). This dismissal also resulted in dismissal of the contingent KDVA(FM) application. *Id.*; See 47 C.F.R. § 73.3517(e).

⁴ On January 5, 2012, Able filed an Opposition to Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* against both Reinstatement Petitions. On January 19, 2012, Entravision filed a Reply to Opposition to Petition for Reconsideration and Reinstatement *Nunc Pro Tunc*.

⁵ See *Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction No. 70*, Public Notice, 22 FCC Rcd 6323 (2007), Attachment A at 1.

⁶ See 47 C.F.R. § 73.3573(g), which permits changes in a station’s or application’s community of license by application for a minor modification.

⁷ *Letter Decision*, *supra* note 1.

⁸ *Dismissal Letter*, *supra* note 3.

⁹ Petition at 2-3.

¹⁰ Petition at 6.

¹¹ Petition at 2.

¹² Petition at 4.

“allowing a patently defective application to remain on file for more than two years . . .”¹³ For these reasons, Entravision concludes, the Able Application should be dismissed and the mutually-exclusive Entravision Applications reinstated.¹⁴

Able responds that there is no reason to require the winning bidder in a competitive auction to demonstrate that it has obtained reasonable assurance for the proposed transmitter site, because the competitive bidding process lessens the incentive for insincere application filings.¹⁵ Rather, Able contends, reasonable assurance only becomes relevant in the auction context if a petitioner proves “‘a substantial and material question of false certification’ rising to the level of a misrepresentation” regarding transmitter site availability.¹⁶ This standard is not met here, argues Able, because Able “sought and believed that it had obtained reasonable assurance for the [May 2008 Site]” when BLM directed Able to begin the application process for permission to use the site.¹⁷ Able also argues that the reasonable assurance requirement does not apply to subsequently-filed application amendments, only to the original application.¹⁸ Able cites two principles in support of this proposition. First, the reasonableness standard itself is a liberal one, aimed to promote agency efficiency by deterring frivolous applications. Second, in recognition of the different incentives applicable to auction winners, the Commission has adopted a more lenient approach to processing defective applications of broadcast auction winners.¹⁹ Lastly, Able contends that it duly prosecuted the Able Application and that any delay was primarily due to the need to obtain Mexican concurrence for the allotment.²⁰

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.²¹ Entravision has not met this burden.

Entravision argues that the Bureau erred in not dismissing Able's original Application due to an alleged lack of reasonable assurance of site availability in a subsequently-filed site change amendment. We uphold the *Letter Decision* as in keeping with the Commission's well-established policy of permitting liberal amendments by auction winners to correct application deficiencies.²² Our reasonable assurance of site availability requirement was originally implemented as a deterrent to the filing of frivolous and

¹³ Petition at 9.

¹⁴ Petition at 9; Reinstatement Petition at 3. Entravision's Reply largely restates arguments made in the Petition.

¹⁵ Able Opposition at 4-5.

¹⁶ Able Opposition at 5.

¹⁷ Able Opposition at 5-7.

¹⁸ Able Opposition at 2.

¹⁹ Able Opposition at 2-3.

²⁰ Able Opposition at 8-9.

²¹ See 47 C.F.R. § 1.106(c),(d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

²² *Letter Decision* at 4 (“As present Commission policy permits the ‘liberal’ filing of non-major corrective amendments, we will not dismiss the Able Application due to an alleged lack of reasonable assurance for the May 2008 Site.”)

speculative applications.²³ When we adopted auction procedures for broadcast licenses, the Commission concluded that the competitive bidding process itself would lessen the incentive for insincere application filings.²⁴ Accordingly, the Commission adopted a lenient approach to the processing of defective applications filed by a broadcast auction participant, employing staff deficiency letters and permitting multiple corrective amendments, if necessary.²⁵ Despite Entravision's argument to the contrary, the Commission expressly and deliberately treats auction winners dissimilarly to other, non-auction, applicants. Following the Commission's liberal amendment policy for auction winners, we have properly allowed Able to file multiple amendments. Accordingly, we need not reach the issue of whether Able had reasonable assurance of the May 2008 Site because that issue became moot when Able amended to a new transmitter site.

The cases cited by Entravision are inapposite. In general, they stand for the proposition that, in a comparative hearing context, an applicant was not permitted to file a curative amendment when its originally-proposed site lacked reasonable assurance of site availability.²⁶ Not only is the site at issue here not the originally-proposed site, but the underlying rationale for this policy was specific to the comparative hearing environment. In *Port Huron*, for example, the Review Board rejected a curative amendment, explaining that "where a cutoff period is established, applications must be submitted in substantially complete form before the cut-off date to be entitled to comparative consideration."²⁷ Such concerns are not relevant in an auction context.

Entravision has similarly failed to show any error or omission in the staff's analysis of Able's alleged failure to prosecute its Application.²⁸ The *Letter Decision* noted that after Able filed the Application, it filed a series of amendments, thus demonstrating its ongoing efforts to finalize and perfect its proposal.²⁹ Able also responded to staff correspondence and requests for further information. Moreover, the Commission has long acknowledged that the competitive bidding process itself, in which the winning bidder makes a substantial front end payment, provides a strong impetus for timely station

²³ *Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920, 15963 (1998), *recon. denied*, 14 FCC Rcd 8724 (1999), *aff'd sub nom Orion Communications, Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000) ("Auction Order").

²⁴ *Id.*

²⁵ *Id.* at 15961.

²⁶ *See, e.g., South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 845 (Rev. Bd. 1984) ("[A]n applicant will not be permitted to amend where it did not have the requisite "reasonable assurance" to begin with."); *See also Letter Decision* at 3.

²⁷ *Port Huron*, 4 FCC Rcd at 2535. We note also that the comparative hearing process imposed a greater administrative burden on Commission resources, as staff had to consider multiple, mutually-exclusive applications and pleadings. This led to a stringent overall amendment policy; post-designation amendments were accepted only if they met a six-point good cause test. *See Erwin O'Conner Broadcasting Co.*, Memorandum Opinion and Order, 22 FCC 2d 140, 143 (Rev. Bd. 1970) ("[T]he moving party must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.").

²⁸ *See* 47 C.F.R. § 73.3568(a)(1) ("Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal.").

²⁹ *Letter Decision* at 4.

construction in order to recoup auction expenditures.³⁰ It follows that “[o]ur concern with spectrum speculation in an auction environment, where there are strict bidding and payment requirements and where the winning bidder has paid fair market value for an authorization, is minimal.”³¹ Accordingly, we affirm our earlier finding that Able had adequately prosecuted the Application.

Conclusion/Actions. We find that grant of the Able Application and dismissal of the Entravision Applications were not in error and were consistent with the public interest, convenience, and necessity. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Entravision Holdings, LLC on December 22, 2011, IS DENIED. IT IS FURTHER ORDERED that the Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* filed by Entravision Holdings, LLC, on December 23, 2011 (Apache Junction, Arizona), IS DENIED. IT IS FURTHER ORDERED that the Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* filed by Entravision Holdings, LLC, on December 23, 2011 (Buckeye, Arizona), IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁰ *Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23071 (1998) (subsequent history omitted).

³¹ *Id.*