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In re: **KAZV(FM), Aguila, Arizona**
Facility ID No. 170953
File No. BLH-20171226AAM (License Application)
File No. 20171226AAQ (Program Test Authority)
Matinee Media Corporation

KDVA(FM), Buckeye, Arizona
Facility ID No. 2750
File No. BPH-20171227AAJ

KVVA-FM, Apache Junction, Arizona
Facility ID No. 1331
File No. BPH-20171227AAK
Entravision Holdings, LLC

Informal Objections

Dear Counsel:

We have before us the above-referenced application (KAZV License Application) for a license to cover a construction permit for station KAZV(FM), Aguila, Arizona (KAZV or Station), filed on December 26, 2017, by Matinee Media Corporation (Matinee). We also have before us an informal objection to the KAZV License Application, filed by Entravision Holdings, LLC (Entravision) on January 3, 2018 (KAZV

Informal Objection).[1] In addition, we have before us: (1) the above-referenced modification applications for Entravision stations KDVA(FM), Buckeye, Arizona (KDVA Modification Application), and KVVA-FM, Apache Junction, Arizona (KVVA-FM Modification Application) filed by Entravision on December 27, 2017 (collectively, Entravision Modification Applications), and (2) Matinee's January 19, 2018, informal objection to the KVVA-FM Modification Application (KVVA-FM Informal Objection).[2] For the reasons stated below, we: (1) deny the KAZV Informal Objection; (2) grant the KAZV License Application; (3) grant the KVVA-FM Informal Objection; (4) dismiss the KVVA-FM Modification Application as unacceptable for filing due to failure to protect KAZV under the minimum separation requirements set out in Section 73.207(b)(1) of the Rules;[3] and (5) dismiss the KDVA Modification Application pursuant to Section 73.3517(e) of the Rules because it is contingent on the KVVA-FM Modification Application.[4]

Background. On November 29, 2011, the Audio Division, Media Bureau (Bureau) granted a construction permit to Able Radio Corporation (Able), the winning bidder for a new commercial FM station at Aquila, Arizona.[5] At the same time, the Bureau dismissed two competing modification applications for Entravision stations KVVA-FM and KDVA(FM).[6] Entravision repeatedly challenged the grant of the KAZV Construction Permit—through an informal objection, petition for reconsideration, and application for review—at each stage arguing unsuccessfully that Able had failed to obtain reasonable assurance of site availability at its original site and could not correct this deficiency by later curative amendment.[7] On April 23, 2014, the Commission issued a final disposition of the matter in a memorandum opinion and order denying Entravision's application for review.[8] On December 3, 2015, Matinee acquired the KAZV Construction Permit from Able's trustee in bankruptcy.[9]

KAZV Modification Application. On October 22, 2015, as the proposed assignee, Matinee filed an application to modify the KAZV Construction Permit to specify a new 365-foot guyed tower located

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[1] On January 26, 2018, Matinee filed an opposition to the KAZV Informal Objection (KAZV Opposition). On February 12, 2018, Entravision filed a reply to the KAZV Opposition (KAZV Reply). On March 7, 2018, Entravision filed a supplement to the KAZV Informal Objection (KAZV Supplement). The KAZV Informal Objection is procedurally acceptable, as it was filed before Commission action on the KAZV License Application. *See* 47 CFR § 73.3587.

[2] On January 29, 2018, Entravision filed an opposition to the KVVA-FM Informal Objection (KVVA-FM Opposition). On February 13, 2018, Kona Coast Radio LLC (Kona Coast) filed comments regarding the two Entravision Modification Applications (Kona Coast Comments). The issues raised in the Kona Coast Comments relate primarily to other applications and were disposed of by the Bureau in *John F. Garziglia, Esq*, Letter, Ref. No. 1800B2-RB (MB Apr. 25, 2018) (granting File Nos. BPH-20170620ABH and BLH-20170620ABG). Therefore, they will not be considered further here.

[3] 47 CFR § 73.207(b)(1) (requiring a minimum separation of 117 kilometers between the transmitter site of a proposed Class C3 station from the transmitter site of any of other Class C2 station's facilities or allotment).

[4] *See* 47 CFR § 73.3517(e) ("Dismissal of any one of the related [contingent] applications as unacceptable will result in the dismissal of all the related applications.").

[5] File No. BNPH-20070403ACO (KAZV Construction Permit); *Able Radio Corporation*, Letter Decision, 26 FCC Rcd 16161 (MB 2011) (*2011 Able CP Grant Letter*).

[6] File Nos. BPH-20100817ABA and BPH-20100817AAX; *2011 Able CP Grant Letter*, 26 FCC Rcd at 16161.

[7] *See 2011 Able CP Grant Letter*, 26 FCC Rcd at 16161; *Mark Lipp, Esq.*, Letter Decision, 27 FCC Rcd 15190 (MB 2012); *Able Radio Corporation*, Memorandum Opinion and Order, 29 FCC Rcd 4363 (2014) (*Able Radio MO&O*).

[8] *Able Radio MO&O.*

[9] File No. BAPH-20150508ABJ (granted July 22, 2015. *Broadcast Actions*, Public Notice, Report No. 48539 (MB July 27, 2015)).

between Aquila and Wickenburg, Arizona (KAZV Modification Application).[10] Processing of this application was delayed due to various issues relating to leasing, environmental compliance, Federal Aviation Administration (FAA) compliance, and local zoning. In July 2017, Matinee applied for a "Special Use Permit"—a type of zoning permit—from Maricopa County (County) to build the KAZV tower.[11] In October 2017, while waiting for the Special Use Permit to be processed, Matinee applied for a "Temporary Use Permit" to allow it to construct the KAZV tower before the KAZV Construction Permit expired.[12] On December 6, 2017, Maricopa County issued the Temporary Use Permit, stating that "since the [Special Use Permit] has been applied for, staff will allow this [Temporary Use Permit] for 9 months." [13] The Temporary Use Permit gave Matinee zoning permission to build a 199-foot guyed tower, with the first of two ultimate sets of guy wire stanchions, a generator, a satellite dish, and a 10 by 20 steel container at the base of the tower to house transmission equipment.[14] On December 12, 2017, Bureau staff denied Matinee's request for further tolling and confirmed that the KAZV Construction Permit would expire on December 26, 2017.[15] On December 18, 2017, Matinee amended the KAZV Modification Application to conform to the terms of the Temporary Use Permit, specifying a 150-foot tower. The Bureau granted the amended KAZV Modification Application the same day, December 18, 2017.[16] On December 26, 2017 (the day the KAZV Construction Permit expired), Matinee filed the KAZV License Application and a request for program test authority (PTA).

Entravision Modification Applications. On December 27, 2017, the day after the KAZV Construction Permit expired, Entravision filed the contingent Entravision Modification Applications, which are substantially similar to the modification applications that the Bureau dismissed in 2011. In the Entravision Modification Applications, Entravision requests that: (1) the KVVA-FM license be modified from Channel 296C3 at Apache Junction to Channel 296C3 at Sun Lakes, Arizona, with a change in community of license and transmitter site;[17] (2) the KDVA license be modified from Channel 295A at Buckeye to Channel 294A at Buckeye, at the existing KDVA transmitter site;[18] (3) the license for station KPPV, Prescott Valley, Arizona,[19] be involuntarily modified through an order to show cause procedure to specify Channel 295C2 in lieu of Channel 295A at its existing transmitter site;[20] and (4) the KAZV allotment site (Channel 297C2 at Aguila) be relocated to a site that would be fully spaced to KVVA-FM.

Pleadings. Entravision's primary contention is that the KAZV facilities are impermissibly temporary, in violation of the principle set out in *Tango Radio, LLC,* and related cases that "permittees may not rely on temporarily constructed facilities to satisfy construction requirements and that construction permits associated with temporarily constructed facilities are subject to automatic forfeiture

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[10] File No. BMPH-20151022AFO; *see also* 47 CFR § 73.3517(a) (allowing proposed assignees to file modification applications with permission from the licensee).

[11] KAZV Opposition at 3.

[12] KAZV Opposition at 3.

[13] KAZV Informal Objection, Exh. A, Temporary Use Permit at 2.

[14] KAZV Informal Objection, Exh. A, Temporary Use Permit, Narrative (attachment).

[15] Email from Victoria McCauley, Attorney Advisor, Audio Division, Media Bureau, Federal Communications Commission, to Tom Gutierrez, Counsel for Matinee (MB Dec. 12, 2017).

[16] *Broadcast Actions*, Public Notice, Report No. 49137 (Dec. 21, 2017).

[17] File No. BPH-20171227AAK (KVVA-FM Modification Application).

[18] File No. BPH-20171227AAJ (KDVA Modification Application).

[19] KPPV(FM) is owned by Prescott Valley Broadcasting Co., Inc.

[20] *See generally,* 47 U.S.C. § 316(a); 47 CFR § 1.87.

pursuant to Section 73.3598(e) of the Rules."[21] In support of this argument, Entravision points to the fact that the KAZV License Application was filed "at the last minute" and that the Temporary Use Permit does not provide "permanent authority to operate the broadcast facility."[22] Entravision also argues that Matinee violated the terms of the Temporary Use Permit by building a 150-foot (rather than the permitted 199-foot) tower and by failing to get a Maricopa County building permit, an omission that Entravision compares to a failure to obtain a landowner's permission to construct a broadcast facility.[23] Finally, Entravision alleges that Matinee: (1) failed to file a post-license application ownership report, in violation of Section 73.3615(b)(2) of the Rules;[24] (2) failed to construct a main studio or justify a waiver of the main studio rule, in violation of Section 73.1125[25]; and (3) failed to satisfy Condition #3 of the KAZV Construction Permit, which requires radio frequency (RF) field strength measurements and protective fencing as necessary.[26] Because of these defects, Entravision argues that the KAZV License Application should be dismissed as a "mere placeholder."[27]

In its KAZV Opposition and KVAA-FM Informal Objection, Matinee states that it simply "determined what facilities it believed it could actually construct by the permit expiration date, filed an amendment to the pending [KAZV] Modification Application to propose those facilities, and began making arrangements to have the tower and transmission equipment delivered to the KAZV site during the week prior to the permit expiration date."[28] Matinee confirms that the authorized facilities are "still in place and may be turned on and used to operate KAZV, once program test authority and/or the [License] Application are granted."[29] Matinee acknowledges that it intends in the future to apply to the Commission for approval to increase the height to 408 feet.[30] Pending issuance of the Special Use Permit, however, Matinee anticipates that the Temporary Use Permit will allow it to operate uninterrupted using the permitted facilities.[31] Matinee also explains that it is in the process of obtaining a building permit for the KAZV tower and asserts that it does not anticipate enforcement issues at the local level. Matinee states that it has permission to build from the site owner and urges the Commission to distinguish between reasonable assurance of site availability issues, which are not implicated here, and local zoning and permitting issues, an area "best left to the appropriate local governmental authorities with the expertise and jurisdiction over same."[32]

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[21] KAZV Informal Objection at 2-3 (citing *Tango Radio, LLC*, Memorandum Opinion and Order, 30 FCC Rcd 10564, 10568 (2015) (*Tango*); *DTV America Corporation*, 32 FCC Rcd 9129, 9135 (MB 2017) (*DTV America*).

[22] KAZV Informal Objection at 2-3.

[23] KAZV Informal Objection at 2-3; KAZV Reply at 3 (citing *Dan J. Alpert, Esq.*, Letter, 30 FCC Rcd 4898, 4901-4902 (MB 2015)); Supplement at 2. The Temporary Use Permit states that "[a]pproval of the temporary use is not approval to construct . . . the applicant/owner shall obtain all necessary clearances and construction permits." KAZV Informal Objection, Exh. A, at 3.

[24] KAZV Informal Objection at 4, n.6; 47 CFR § 73.3615(b)(2).

[25] *See* 47 CFR § 73.1125.

[26] KAZV Reply at 5.

[27] KAZV Reply at 5.

[28] KAZV Opposition at 4.

[29] KAZV Opposition at 5. Matinee includes a photograph of the KAZV transmitter and tower. *Id.*, Exh. B, Declaration of William Smith.

[30] KAZV Opposition at 3.

[31] KAZV Opposition at 6.

[32] KAZV Opposition at 7.

Matinee concedes that it did not file an ownership report in conjunction with the KAZV License Application, but states that it filed one a week later, on January 5, 2018, and that its ownership information at the time it filed the KAZV License Application was "essentially unchanged" from the information already on file with the Commission.[33] Matinee argues that at the time it filed the KAZV License Application, a waiver of the main studio rule was warranted because the Commission had adopted an order eliminating that rule, which would become effective less than two weeks after the filing of the KAZV License Application.[34] Finally, Matinee states that it took RF field strength measurements prior to filing for PTA, as required by Condition #3, and that KAZV complies with the Commission's RF guidelines at all locations.[35] On January 29, 2018, Matinee amended the KAZV License Application to include an exhibit certifying compliance with the RF guidelines.[36]

Discussion. Section 319(c) of the Communications Act of 1934, as amended (Act)[37] imposes a stringent standard on challenges to license applications. So long as "all the terms, conditions, and obligations set forth in the application and permit have been fully met," Matinee is entitled, as an applicant for a license to cover a construction permit, to a high degree of protection and a presumption that the public interest determination made during the underlying construction permit proceedings continues in effect unless circumstances have arisen that would make operation of the Station against the public interest.[38] The Commission traditionally is reluctant to designate license applications for hearing in these circumstances and, in most instances, considers the grant of such application to follow almost automatically from the issuance of a construction permit and the completion of construction in accordance therewith.[39] In this case, we find that Entravision has failed to demonstrate that Matinee failed to meet the terms of its permit or that grant of the KAZV License Application would be inconsistent with the public interest, as discussed below.

Temporary construction. In *Tango* and subsequent decisions, the Commission targeted the recurring abuse of the Commission's processes by permittees who—when faced with the imminent expiration of a construction permit—have erected makeshift facilities for the sole purpose of applying for a license to cover and then immediately dismantled the facilities upon grant of the license, in some cases to be re-used again soon thereafter for the same purpose.[40] The Commission held that implicit in the

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[33] KAZV Opposition at 8.

[34] KAZV Opposition at 10.

[35] KAZV Opposition at 9.

[36] KAZV License Application, Exh. 9.

[37] 47 U.S.C. § 319(c).

[38] See 47 U.S.C. § 319(c) (requiring the Commission to issue a license where a construction permit has been granted and it appears that the terms of such permit have been met, and "that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest..."); *Focus Cable of Oakland, Inc.*, Memorandum Opinion and Order, 65 FCC 2d 35, 39-40, para. 11 (1977).

[39] *See, e.g., Meyer Broadcasting Company*, Memorandum Opinion and Order, 65 FCC 2d 438, 441 (1977).

[40] *Tango*, 30 FCC Rcd at 10568 (stating that temporary facilities are not licensable, in situation where facilities were dismantled shortly after license application filed, no permission obtained from landowner, and evidence adduced of brief "side of the road" operation of a nonconforming antenna); *DTV America Corporation*, Order, 32 FCC Rcd at 9135 (adopting consent decree where facilities were dismantled immediately after license grant and moved to a series of new locations away from rural unserved and underserved areas with low population densities to more densely populated areas); *Dan J. Alpert, Esq.*, Letter, 30 FCC Rcd 4898 (MB 2015) (dismissing license application where facilities were dismantled after less than a week, no permission was obtained from landowner, and antenna was not constructed in accordance with the terms of the construction permit) (*Alpert Letter*) .

filing of any facility application is that the applicant stands "ready, willing, and able" to construct and operate as proposed.[41] Therefore, a license applicant may not rely on temporarily constructed facilities to satisfy construction requirements; rather, the station facilities must "endure beyond the *de minimis* period necessary for it to file a license application.[42]

In this case, after delays due to various leasing, environmental review, tower registration, and FAA compliance issues, Matinee encountered local zoning issues that it concluded could not be resolved in time to construct the facilities that it had originally requested in 2015. Therefore, Matinee amended the KAZV Modification Application, requesting and receiving authorization to construct alternative facilities. Matinee built these facilities in accordance with the terms of its authorization and states that it remains ready to operate upon grant of the KAZV License Application (or PTA). Matinee has disclosed that it intends to increase its tower height through an additional modification application in the future, should circumstances permit it to do so.

In *Tango* and related cases, the facilities in question did not—and in fact could not have—remained in operation for more than "long enough to file a license application."[43] Each case relied on facts indicating that long-term operation using the constructed facility would be impossible or very unlikely, such as physical limitations on the durability of the equipment (e.g., an antenna mounted on a vehicle) and/or legal limitations on operating a broadcast facility at the relevant site (e.g., failure to obtain permission from the landowner). Just as significantly, in each case, the temporary facilities were dismantled soon after construction. In this case, by contrast, Matinee obtained the landowner's permission, built a durable, guyed antenna structure conforming to the terms of its construction permit, and maintained the facilities intact and operable after construction.

We find that Matinee's construction pursuant to a short-term local zoning permission does not implicate our prohibition on temporary construction. Although the Temporary Use Permit granted County zoning permission for only nine months (with a possible extension), both the County and Matinee anticipated that the Special Use Permit would be processed within that time so that no interruption in service would be necessary. We note that while one type of zoning permit is called "temporary use" and the other is entitled "special use," neither provides for an indefinite term of operation.[44] We conclude that a local zoning or other permit need not be "permanent" or of indefinite duration to satisfy our licensing requirements. Similarly, a licensee's stated intention to upgrade its facilities in the future does not establish that its existing facilities are inadequate or impermissibly temporary. In fact, we consider that Matinee's plans for future improvements at its licensed site tend to prove, rather than disprove, its long-term commitment to serve its community of license. Nothing in the Commission's decisions in *Tango* and related cases suggests that the Commission intended to disrupt legitimate and reasonable business plans to modify or upgrade an existing and operational facility. Finally, Entravision provides no evidence that Matinee's alleged failure to timely obtain a County building permit would have necessitated that the KAZV tower be dismantled immediately after construction, and in fact the facilities remained in place

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[41] *Pathfinder Communication Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 (2003) (*Pathfinder*).

[42] *Alpert Letter*, 30 FCC Rcd at 4901.

[43] *Tango*, 30 FCC Rcd at 10568 ("It appears that some permittees, such as Applicants here, are attempting to circumvent our construction deadlines by erecting facilities, conforming or otherwise, with or without the site owner's permission, *temporarily—long enough only to file a license application* before the underlying construction permit expires.") (emphasis added).

[44] According to the Maricopa County website, a Special Use Permit is "granted for a specific timeframe subject to periodic status report reviews by the Department." Maricopa County, "Special Use Permit," https://www.maricopa.gov/2108/Special-Use-Permit (last visited May 18, 2018).

while Matinee applied for and received the building permit. For these reasons, we conclude that the Entravision has not demonstrated that the KAZV facilities are or were impermissibly temporary.

Local ordinances. The Commission has long declined to consider issues that are more appropriately resolved by a local court of appropriate jurisdiction.[45] Similarly, we have left compliance and enforcement issues regarding zoning matters to local land use authorities.[46] Therefore, in this case, we reject Entravision's invitation to make a determination regarding Matinee's compliance with Maricopa County ordinances or the terms of the Temporary Construction Permit. Rather, we leave enforcement actions concerning any alleged violations of this nature to the appropriate local authorities.

Ownership reporting. Under Section 73.3615(b)(2) of the Rules, a permittee must file an ownership report on the date that the permittee applies for a station license, unless it has a current and unamended ownership report already on file and certifies that it has reviewed such ownership report and that it is accurate.[47] In this case, although it did not submit the required certification at the time it filed the KAZV License Application, Matinee states that the ownership information that was already on file in connection with purchase of the KAZV Construction Permit was "essentially unchanged" and, in any case, it filed another ownership report on January 5, 2018, two weeks after it filed the KAZV License Application.[48] Although we caution Matinee to be more attentive to ownership reporting requirements in the future, we conclude that its belated certification and filing of an ownership report do not rise to the level that would warrant enforcement action or delay or adverse action on the License Application.

Main studio waiver. Although the main studio rule was still in effect when the KAZV License Application was filed on December 26, 2017, the Commission had already adopted an order eliminating the main studio rule, which became effective on January 8, 2018.[49] Therefore, Matinee's main studio waiver request became moot before the Bureau acted on the KAZV License Application. In these circumstances, we decline to analyze the waiver request merely for the purpose of determining whether or not it would have been granted had it not become moot by virtue of elimination of the main studio rule. Therefore, in keeping with the general principle that an application must be grantable at the time of processing rather than filing, we conclude that the KAZV License Application is grantable without considering the main studio rule argument.[50]

RF compliance. Special Operating Conditions #3-5 establish that automatic PTA does not apply in this case and that PTA must be formally requested. Such a request must include documentation of

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[45] *See, e.g., Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17855 (1997) ("The Commission has traditionally declined to consider such issues where no challenge has been made in state court and the determination is one that is more appropriately resolved by a local court of competent jurisdiction.").

[46] *See, e.g., Artichoke Broadcasting Corporation*, Memorandum Opinion and Order, 10 FCC Rcd 12631, 12633, para. 11 (1995) (noting in the context of a reasonable assurance of site availability issue that "[t]he Commission traditionally has been reluctant to become embroiled in zoning matters, believing that such issues are within the province of, and best resolved by, local land use authorities.").

[47] 47 CFR § 73.3615(b)(2).

[48] KAZV Opposition at 8.

[49] *Elimination of Main Studio Rule*, 82 FR 59987 (Dec. 18, 2017).

[50] *See, e.g., BVM Helping Hands*, Memorandum Opinion and Order, 29 FCC Rcd 6464, 6465, para. 4 (2014) (holding that the Bureau "properly declined to take adverse action based solely on an application's earlier acceptability, when subsequent events [i.e., a change in applicable law] resulted in an acceptable application at the time of processing"); *Hampton Roads Educational Telecommunications Association, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 14906 (MB 2015) (accepting a curative amendment based on changed law and circumstances).

compliance with the Commission's RF guidelines and be submitted at the time of filing the license application. Failure to submit the required documentation at the time of filing the license application precludes grant of PTA but does not constitute a fatal acceptability defect in the initial license application—curative amendments of this type are routinely accepted by processing staff prior to action on the license application. In this case, Matinee submitted RF field strength measurements taken on December 25, 2017, at the same time it filed the License Application. In that RF showing, however, it stated that it was required to provide fencing to create a controlled environment. In a subsequent amendment to the KAZV License Application filed January 26, 2018, Matinee corrected the RF showing text to state that it complied with the uncontrolled RF standard and no fencing was necessary. Given Matinee's submission of the correct RF measurements at the time it filed the License Application, and the subsequent curative amendment of the text, we conclude that Matinee has satisfied Condition #3 of the KAZV Construction Permit and may thus commence program test authority in connection with the grant of the KAZV License Application.

Conclusion/Actions. For the reasons stated above, IT IS ORDERED that the informal objection filed by Entravision Holdings, LLC, on January 3, 2018, IS DENIED and the application for a license to cover filed by Matinee Media Corporation (File No. BLH-20171226AAM) and accompanying request for program test authority ARE GRANTED.

IT IS FURTHER ORDERED that the informal objection filed by Matinee Media Corporation on January 19, 2018, IS GRANTED and the KVVA-FM modification application filed by Entravision Holdings, LLC (File No. BPH-20171227AAK) IS DISMISSED as unacceptable for filing due to failure to meet the minimum distance separations set out in 47 CFR § 73.207(b)(1).

IT IS FURTHER ORDERED that the KDVA Modification Application filed by Entravision Holdings, LLC (File No. BPH-20171227AAJ) IS DISMISSED pursuant to 47 CFR § 73.3517(e) because it is contingent on the KVVA-FM Modification Application.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau