

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

In the Matter of	)	
	)	
Entravision Holdings, LLC	)	Facility ID No. 2750
KDVA(FM), Buckeye, Arizona	)	File No. BPH-20190723AAN
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 25, 2022**

**Released: January 25, 2022**

By the Commission:

1. We have before us an Application for Review (AFR) filed by Prescott Valley Broadcasting Co. Inc. (PVBC), licensee of KPPV(FM), Prescott Valley, Arizona.<sup>1</sup> PVBC seeks review of a Media Bureau (Bureau) decision<sup>2</sup> that denied its Petition for Reconsideration (Petition).<sup>3</sup> This case stems from the Bureau's grant of modification applications for two stations licensed to Entravision Holdings, LLC (Entravision) that required an involuntary channel change by PVBC's station, KPPV(FM). In its AFR, PVBC requests that we reverse the Bureau's decision not to require the use of an escrow account with respect to the reimbursement of PVBC for expenses related to the involuntary channel change.<sup>4</sup> As detailed below, we deny PVBC's AFR.

2. We also consider here an Entravision filing that is related to this proceeding although not tied directly to PVBC's request for an escrow account. Specifically, Entravision has filed a Request for Removal of Special Operating Condition and Issuance of Revised Construction Permit (Request).<sup>5</sup> In this request, Entravision seeks removal of a special operating condition that prevents one of its stations from commencing program tests until KPPV(FM) commences program tests on its new frequency, and also prevents Entravision's station from being licensed until KPPV(FM) is licensed on its new frequency. Given that Entravision's ability to commence program tests is dependent on KPPV(FM)'s involuntary channel change, and given our interest in making all channels available to the public, we address these issues at the same time. As discussed herein, we deny Entravision's Request. However, given the apparent impasse between the parties, we require them to recommence reimbursement negotiations and report to the Bureau regarding their progress in reaching an agreement within 30 days of the release of this *Memorandum Opinion and Order* (Order). If the report reveals that the parties have not reached an

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<sup>1</sup> Application for Review of Prescott Valley Broad. Co. Inc., File No. BPH-20190723AAN (dated Nov. 20, 2020) (AFR).

<sup>2</sup> *Prescott Valley Broad. Co. Inc.*, File No. BLH-19930204KB, Letter Order (MB Oct. 21, 2020) (*Reconsideration Decision*).

<sup>3</sup> Petition for Reconsideration of Prescott Valley Broad. Co. Inc., File No. BPH-20190723AAN (filed Aug. 19, 2020) (Petition).

<sup>4</sup> *Entravision Holdings, LLC, and Prescott Valley Broad. Co. Inc.*, File Nos. BPH-20190723AAN, BPH-20190723AAO, BLH-19930204KB, Letter Order (MB July 21, 2020) (*Letter Order*).

<sup>5</sup> Request for Removal of Special Operating Condition and Issuance of Revised Construction Permit of Entravision Holdings, LLC, File No. BPH-20190723AAN (dated Jan. 6, 2021) (Request). Although the Request was submitted to the Bureau, we consider it here. Doing so will facilitate coordinated resolution of all issues related to this proceeding, and minimize delays.

agreement, we direct the Bureau to take action to resolve any disputes regarding whether an expense is reimbursable and/or appropriate reimbursement amounts.

## I. BACKGROUND

3. On July 23, 2019, Entravision filed an application proposing to upgrade one of its stations—KVVA-FM, Apache Junction, Arizona.<sup>6</sup> Entravision also proposed to move the station's transmitter, and change its community of license to Sun Lakes. To facilitate this, Entravision proposed to move one of its other stations—KDVA(FM)—from Channel 295 to Channel 294.<sup>7</sup> To accommodate KDVA(FM)'s channel change, Entravision requested that we modify KPPV(FM)'s license to specify Channel 295 instead of Channel 294, and committed to reimburse PVBC for the costs of the channel change, consistent with our existing process to allow the substitution of an existing FM radio station's channel at one community, in instances where such change permits the provision of a new or expanded service in another community.<sup>8</sup> We notified PVBC of Entravision's proposal, and ordered PVBC to show cause why KPPV(FM)'s license should not be modified.<sup>9</sup>

4. PVBC opposed modification of the KPPV(FM) license.<sup>10</sup> Among other things, PVBC indicated it could not support modification of the KPPV(FM) license “unless Entravision agree[d] to deposit into an escrow account an estimate of the reasonable costs” that it would incur.<sup>11</sup> In response, Entravision noted its commitment to reimburse PVBC.<sup>12</sup> Entravision also accused PVBC of requesting reimbursement of an amount that far exceeded the total costs cited in Commission precedents, and alleged PVBC had abused Commission processes and filed strike pleadings to delay the channel change.<sup>13</sup>

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<sup>6</sup> File No. BPH-20190723AAO (KVVA Application).

<sup>7</sup> The broadcasting frequency of the station would move from 106.9 MHz to 106.7 MHz. File No. BPH-20190723AAN (KDVA Application).

<sup>8</sup> KVVA Application, Attach. 34 (Comprehensive Allocation Study) at 6; KDVA Application, Attach. 34 (Comprehensive Allocation Study) at 6. *See also infra* para. 15.

<sup>9</sup> *Prescott Valley Broad. Co. Inc.*, File No. BLH-19930204KB, Letter Order (MB Oct. 10, 2019) (*Show Cause Order*).

<sup>10</sup> Comments of Prescott Valley Broad. Co. Inc., File No. BPH-20190723AAO (dated Oct. 28, 2019) (PVBC Comments); Statement for the Record of Prescott Valley Broad. Co. Inc., File No. BPH-20190723AAN (dated Oct. 28, 2019) (PVBC Statement); Opposition to Order to Show Cause of Prescott Valley Broad. Co. Inc., File No. BPH-20190723AAN (dated Nov. 12, 2019) (PVBC Show Cause Opposition).

<sup>11</sup> PVBC Comments at 4; PVBC Statement at 4, PVBC Show Cause Opposition at 4.

<sup>12</sup> Opposition of Entravision Holdings, LLC, File No. BPH-20190723AAO, at 3 (dated Nov. 1, 2019) (Entravision Comments Opposition); Opposition of Entravision Holdings, LLC, File No. BPH-20190723AAN, at 2 (dated Nov. 1, 2019) (Entravision Statement Opposition).

<sup>13</sup> A strike pleading is a pleading filed in bad faith for the primary purpose of blocking, impeding, or delaying the grant of an application. *Radio Carrollton*, Decision, 69 FCC 2d 1139, 1150, para. 24 (1978) (*Radio Carrollton*), *clarified*, 69 FCC 2d 424 (1978), *recon denied* 72 FCC 2d 264 (1979), *aff'd mem. sub nom. Faulkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. Oct. 15, 1980), *cert denied* 450 U.S. 1041 (1981). *See also* Entravision Comments Opposition at 1-2 (characterizing PVBC Comments as “textbook case” of a strike pleading), 5-6 (arguing PVBC's request that Entravision place “\$2.75 million” in an escrow account constituted “an abuse of process”); Entravision Statement Opposition at 2 (incorporating by reference and attaching Entravision Comments Opposition). Entravision's abuse of process and strike pleading allegations were the first in a series of unsubstantiated character-related attacks and insults exchanged by the parties in this highly contentious proceeding. *See, e.g.*, AFR at 11 (stating Entravision's pledge to reimburse PVBC is “meaningless”); Opposition to Application for Review of Entravision Holdings, LLC, File No. BPH-20190723AAN, at 2, 8, 9 (dated Dec. 11, 2020) (Entravision AFR Opposition) (alleging PVBC “saw this proceeding as one in which it could enrich itself at the expense of a more successful and financially secure party” and arguing AFR is a strike pleading); Reply to Opposition to Application for Review of Prescott Valley Broad. Co. Inc., File No. BPH-20190623AAN, at 1, n.1, 2, n.4, 3, n.5, 5, 6, n.10, and

(continued....)

5. On July 21, 2020, the Bureau granted Entravision's applications and issued construction permits for KVVA-FM and KDVA(FM), modified KPPV(FM)'s license to specify operation on Channel 295 instead of Channel 294, and directed PVBC to file an application to implement the KPPV(FM) channel change by October 19, 2020. As is Bureau practice in cases involving involuntary channel changes, the Bureau placed special operating conditions on the permits issued to Entravision that (1) prohibit each Entravision station from commencing program tests on its new channel until the station affected by its move commences program tests on its new channel, and (2) prohibit licensing of each Entravision station on its new channel until the station affected by its move is licensed on its new channel. In addition, the Bureau ordered Entravision to reimburse PVBC for the "reasonable and prudent"<sup>14</sup> costs of changing KPPV(FM)'s channel. The Bureau declined to require Entravision to deposit funds into an escrow account. The Bureau noted that the Commission generally does not require escrow accounts, and stated there was no reason to impose an escrow requirement on Entravision because "the record contain[ed] no evidence calling into question Entravision's financial ability to reimburse PVBC."<sup>15</sup> Lastly, the Bureau rejected Entravision's allegation that PVBC's pleadings were strike pleadings.<sup>16</sup>

6. PVBC filed a minor modification application (KPPV(FM) Application) to implement the KPPV(FM) channel change by the October 19, 2020, deadline set forth in the *Letter Order*.<sup>17</sup> The Bureau granted the KPPV(FM) Application.<sup>18</sup>

7. PVBC also timely filed the Petition, which challenged solely the Bureau's decision not to require Entravision "to deposit funds into an escrow account before PVBC incurs any expenses."<sup>19</sup> Entravision opposed the Petition. Among other things, Entravision again accused PVBC of filing strike pleadings.<sup>20</sup>

8. On October 21, 2020, the Bureau denied the Petition. The Bureau rejected PVBC's claims that (1) it had not set forth adequate reasoning for declining to require an escrow account, and (2)

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7, n.12 (dated Dec. 23, 2020) (PVBC AFR Reply) (characterizing Entravision AFR Opposition as sloppy, accusing Entravision of engaging in "reprehensible and unprofessional behavior" by "impugning PVBC's character," charging Entravision with "stonewalling," obfuscation, disingenuousness, bullying tactics, and intimidation, and questioning Entravision's "trustworthiness").

<sup>14</sup> *Letter Order* at 5. We note that the Bureau has also referred to those expenses for which an accommodating party (*i.e.*, the party whose license was modified pursuant to section 316 of the Act) is entitled to reimbursement as "legitimate and prudent" or "reasonable" costs. *See, e.g., Reconsideration Decision* at 6 ("reasonable costs associated with the channel change" and "reasonable expenses"); *KPVO(FM), Fountain Green, Utah*, Letter Order, 31 FCC Rcd 8916, 8921 (MB 2016) (*KPVO(FM)*) ("legitimate and prudent expenses for reimbursement"); *Dalhart and Perryton, Texas*, Report and Order, 22 FCC Rcd 4201, 4203, n. 7 & para. 10 (MB 2007) (discussing "legitimate and prudent costs in changing channels"); *Cheyenne, Wyoming, and Gering, Nebraska*, Report and Order, 15 FCC Rcd 7528, 7531-32, para. 8 (MMB 2000) (*Cheyenne*) (discussing "legitimate and prudent expenses for reimbursement"); *Colonial Heights, Tennessee*, Memorandum Opinion and Order, 11 FCC Rcd 18079, 18082, para. 11 (MMB 1996) (*Colonial Heights*) ("reasonable costs associated with [the] channel change"); *Castle Rock, Colorado Springs, Frisco, and Salida, Colorado; Raton, New Mexico*, Report and Order, 7 FCC Rcd 7688, 7670, para. 9 (MMB 1992) (*Castle Rock*) (discussing "legitimate and prudent expenses for reimbursement"). We view these phrases as interchangeable with the phrase "reasonable and prudent" and use them accordingly herein.

<sup>15</sup> *Letter Order* at 6.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> Application File No. 0000124846 (KPPV(FM) Application). *See also Applications*, Public Notice, Report No. PN-1-201021-01, at 2 (MB Oct. 21, 2020).

<sup>18</sup> *Actions*, Public Notice, Report No. PN-2-210121-01, at 6 (MB Jan. 21, 2021).

<sup>19</sup> Petition at 1.

<sup>20</sup> Opposition to Petition for Reconsideration of Certain Issues of Entravision Holdings, LLC, File No. BPH-20190723AAN, at 1, 6 (dated Aug. 24, 2020).

equitable considerations supported an escrow requirement.<sup>21</sup> The Bureau found unpersuasive PVBC's argument that it should revisit its stance regarding the establishment of escrow accounts given what PVBC characterized as a litany of cases where an accommodating party had expended significant funds but was never reimbursed.<sup>22</sup> Specifically, the Bureau noted that PVBC cited only two cases in support of this argument and found those two cases were distinguishable.<sup>23</sup> The Bureau also disagreed with PVBC's claim that equitable considerations support an escrow requirement, noting there is no imbalance of bargaining power between the parties and citing the special operating conditions in the construction permits granted to Entravision as sufficient protection for PVBC.<sup>24</sup> In addition, the Bureau rejected Entravision's allegation that the Petition was a strike pleading.<sup>25</sup>

9. PVBC timely filed the AFR on November 20, 2020. PVBC asserts that the Bureau failed to "provide sufficient reasoning" to reject its escrow account request.<sup>26</sup> PVBC repeats a number of arguments made in the Petition, and contends the Bureau failed "to properly consider the arguments advanced by PVBC."<sup>27</sup> It also asserts that, contrary to the Bureau's finding, the precedents cited by PVBC in the Petition are not distinguishable.<sup>28</sup> Entravision opposed the AFR. Among other things, Entravision argues that the AFR is procedurally defective, and again accuses PVBC of filing strike pleadings.<sup>29</sup> PVBC replied, arguing that Entravision has not been negotiating in good faith and asserting there was no nefarious intent associated with the filing of the AFR.<sup>30</sup>

10. *Request and Reimbursement Negotiations.* On January 6, 2021, Entravision filed the Request asking that we remove the special operating condition from its construction permit for KDVA(FM).<sup>31</sup> Entravision states that it has been nearly one and a half years since it filed its initial channel change applications, cites delays caused by PVBC's opposition to the *Show Cause Order* and PVBC's subsequent filing of the Petition and the AFR (both of which Entravision characterizes as frivolous), and states it "has no idea whether or when PVBC will . . . commence construction," and no idea "when it will complete construction of its modified facilities."<sup>32</sup> Entravision contends that PVBC has only an implied STA to operate KPPV(FM) on its old channel.<sup>33</sup> As a result, Entravision asserts KPPV(FM) is entitled to no protection on that channel from operating stations, construction permits,

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<sup>21</sup> *Reconsideration Decision* at 3, 4.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 5-6.

<sup>26</sup> AFR at 1.

<sup>27</sup> *Id.* at 5-8.

<sup>28</sup> *Id.* at 8-10.

<sup>29</sup> Entravision AFR Opposition at 9.

<sup>30</sup> PVBC AFR Reply at 9.

<sup>31</sup> Request at 3.

<sup>32</sup> *Id.* at 2. Entravision also asserted that it had no idea whether or when the KPPV(FM) Application would be granted due to a red light hold placed on the KPPV(FM) Application. *Id.* The Commission subsequently removed the hold and granted the KPPV(FM) Application, rendering Entravision's arguments regarding how long it could take for the Commission to grant the KPPV(FM) Application moot. Accordingly, we need not consider those arguments herein nor do we consider any responses PVBC made to those arguments.

<sup>33</sup> Request at 1, citing *Liberian Broad. of Dallas License, LLC*, Letter Order, 27 FCC Rcd 4765 (MB 2010) (*Liberian*).

pending applications or subsequently filed applications.<sup>34</sup> Entravision argues we should therefore remove the special operating condition from the KDVA(FM) construction permit.<sup>35</sup>

11. PVBC submitted a letter opposing the Request (PVBC January 14<sup>th</sup> Letter). PVBC characterizes the Request as an attempt by Entravision to “end run” its reimbursement obligations.<sup>36</sup> PVBC alleges that grant of the Request would result in interference to over 300,000 listeners and, therefore, would not be in the public interest.<sup>37</sup> PVBC also alleges that Entravision has failed to “abide by” its commitment to reimburse PVBC for its expenses, and repeats its arguments for establishment of an escrow account.<sup>38</sup> Finally, PVBC argues that KPPV(FM)’s operations on its old channel are pursuant to its license, which PVBC asserts remains “fully valid,” not pursuant to an implied STA.<sup>39</sup>

12. Entravision responded, affirming its commitment to reimburse PVBC.<sup>40</sup> Entravision argues that, even if the special operating condition were removed, it would remain obligated to reimburse PVBC.<sup>41</sup> Entravision disputes PVBC’s interpretation of the implied STA precedents.<sup>42</sup> Entravision also asserts that the PVBC January 14<sup>th</sup> Letter is “yet another strike pleading.”<sup>43</sup>

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<sup>34</sup> *Id.* at 1-2.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> Letter from Mark B. Denbo, Counsel, Prescott Valley Broad. Co. Inc., to Marlene H. Dortch, Secretary, FCC, File No. BPH-20190723AAN, at 1 (dated Jan. 14, 2021) (PVBC January 14<sup>th</sup> Letter). PVBC also asserted that section 319(a) of the Communications Act of 1934, as amended, prohibited PVBC from constructing the facilities proposed in the KPPV(FM) Application prior to grant, and alleged that the *Show Cause Order* indicated international coordination with Mexico for KPPV(FM)’s channel change would be required. *Id.* at 3, n.3; Letter from Mark B. Denbo, Counsel, Prescott Valley Broad. Co. Inc., to Marlene H. Dortch, Secretary, FCC, File No. BPH-20190723AAN, at 4 (dated Jan. 22, 2021) (PVBC January 22<sup>nd</sup> Letter); Letter from Mark B. Denbo, Counsel, Prescott Valley Broad. Co. Inc., to Marlene H. Dortch, Secretary, FCC, File No. BPH-20190723AAN, at 2 (dated Feb. 3, 2021) (PVBC February 3<sup>rd</sup> Letter). Entravision disputed this claim. Letter from Barry A. Friedman, Counsel, Entravision Holdings, LLC, to Marlene H. Dortch, Secretary, FCC, File No. BPH-20190723AAN, at 2-3 (dated Jan. 15, 2021) (Entravision January 15<sup>th</sup> Letter); Letter from Barry A. Friedman, Counsel, Entravision Holdings, LLC, to Marlene H. Dortch, Secretary, FCC, File No. BPH-20190723AAN, at 1, n.1 (dated Jan. 25, 2021) (Entravision January 25<sup>th</sup> Letter). Grant of the KPPV(FM) Application rendered moot the question of whether international coordination was required. Accordingly, we need not consider PVBC’s and Entravision’s assertions regarding international coordination.

<sup>37</sup> PVBC January 14<sup>th</sup> Letter at 4.

<sup>38</sup> *Id.* As evidence that Entravision does not plan to reimburse it, PVBC cites Entravision’s rejection of a request for reimbursement that it transmitted to Entravision on November 6, 2020. *Id.* at 4-5.

<sup>39</sup> *Id.* at 6.

<sup>40</sup> Entravision January 15<sup>th</sup> Letter at 1. PVBC and Entravision subsequently submitted additional letters to the Commission, which repeated their earlier arguments. *See* PVBC January 22<sup>nd</sup> Letter; Entravision January 25<sup>th</sup> Letter; PVBC February 3<sup>rd</sup> Letter; Letter from Barry A. Friedman, Counsel, Entravision Holdings, LLC, to Marlene H. Dortch, Secretary, FCC, File No. BPH-20190723AAN, at 3 (dated Feb. 4, 2021) (Entravision February 4<sup>th</sup> Letter); Letter from Barry A. Friedman Letter from Barry A. Friedman, Counsel, Entravision Holdings, LLC, to Marlene H. Dortch, Secretary, FCC, File No. BPH-20190723AAN, at 2-3 (dated July 23, 2021) (Entravision July 23<sup>rd</sup> Letter); Letter from Mark B. Denbo, Counsel, Prescott Valley Broad. Co. Inc., to Marlene H. Dortch, Secretary, FCC, File No. BPH-20190723AAN, at 1 (dated Aug. 3, 2021) (PVBC August 3<sup>rd</sup> Letter).

<sup>41</sup> Entravision January 15<sup>th</sup> Letter at 1-2.

<sup>42</sup> *Id.* at 3-4.

<sup>43</sup> *Id.* at 5.

## II. DISCUSSION

### A. Procedural Issues<sup>44</sup>

13. We reject Entravision’s assertion that the AFR is defective and should be dismissed because it fails to comply with section 1.115(f) of the Commission’s rules.<sup>45</sup> That rule requires applications for review to “be submitted to the Secretary, Federal Communications Commission.”<sup>46</sup> Entravision alleges that PVBC addressed the AFR to “Audio Division, Media Bureau,” not the Commission’s Secretary.<sup>47</sup> However, as PVBC notes, the AFR actually is addressed “To: Office of the Secretary, Attention: Audio Division, Media Bureau.”<sup>48</sup> As the Commission has held, addressing an application for review “To: Office of the Secretary” but then “directing an application for review to the attention of a specific bureau does not, in itself, warrant dismissal.”<sup>49</sup>

14. Next, we turn to the Entravision AFR Opposition, which was late-filed.<sup>50</sup> Entravision attributes this to (1) its counsel not “operating from their business offices” due to the COVID-19 pandemic, (2) the AFR being mailed to counsel’s business office and then to counsel’s residence, and (3) delays in the delivery of mail due to COVID-19 impacts on the U.S. Postal Service. According to Entravision, its counsel received a copy of the AFR on December 10, 2020, and filed the Entravision AFR Opposition on the next business day. We find Entravision’s explanation reasonable, and thus will consider the late-filed Entravision AFR Opposition.

### B. Substantive Issues

#### 1. Policy Regarding Reimbursement Negotiations

15. We uphold the Bureau’s refusal to require Entravision to deposit funds into an escrow account. Section 316(a) of the Communications Act of 1934, as amended (Act), provides that the Commission may modify “any station license . . . if in the judgment of the Commission such action will promote the public interest, convenience, and necessity.”<sup>51</sup> The Commission has held on numerous occasions that the substitution of an existing FM radio station’s channel at one community serves the public interest where such change permits the provision of a new or expanded service in another community.<sup>52</sup> In these cases, if reimbursement appeared to be “feasible and equitable in the

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<sup>44</sup> Because we address the merits of PVBC’s argument regarding *Appaloosa Broad. Co., Inc.*, File No. BLH-20160217AAB Letter Order (MB Aug. 23, 2017) (*Appaloosa*), *supra* para. 18, we need not reach arguments made by PVBC and Entravision about whether the Bureau erred in rejecting PVBC’s *Appaloosa*-related argument on procedural grounds in the *Reconsideration Decision*. AFR at 9; Entravision AFR Opposition at 5.

<sup>45</sup> Entravision AFR Opposition at 1, n.1.

<sup>46</sup> 47 CFR § 1.115(f).

<sup>47</sup> Entravision AFR Opposition at 1, n.1.

<sup>48</sup> PVBC AFR Reply at 1, n.1.

<sup>49</sup> *Channel 61 Associates*, Memorandum Opinion and Order, 33 FCC Rcd 2419, 2423, para. 14 (2018).

<sup>50</sup> Entravision AFR Opposition at n.2. Entravision filed a separate petition requesting leave for this late-filing. See Petition for Leave to Accept Late Filed Opposition to Application for Review of Entravision Holdings, LLC, File No. BPH-20190723AAN, at 2 (dated Dec. 11, 2020).

<sup>51</sup> 47 U.S.C. § 316(a).

<sup>52</sup> See, e.g., *Lake City, Mullins, Conway, and Kingtree, S.C., and Fayetteville and Fairmont, N.C.*, Report and Order, 47 FCC 2d 1067, 1077-78, para. 24 (1964) (*Lake City*) (“While [the involuntary channel change] involves disturbing the existing Kingtree Channel 261A service, the public interest in the new Lake City assignment, in our view outweighs this consideration.”); *Circleville, Ohio*, Second Report and Order, 8 FCC 2d. 159, 162, para. 7 (1967) (“The public interest in the new Columbus assignment, in our view, clearly outweighs whatever disruption of service may occur temporarily in connection with the Circleville operation.”); *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fourth Further Notice of Proposed Rulemaking and

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circumstances,” the Commission has required the party benefitting from a section 316 license modification (benefitting party) to reimburse the party whose license was modified (accommodating party) for the reasonable costs associated with the channel change.<sup>53</sup> Although the Act does not require benefitting parties to reimburse the expenses of accommodating parties, the Commission has required such reimbursement as a matter of private equity.<sup>54</sup>

16. While it is undisputed that the Bureau can impose specific requirements related to reimbursement in involuntary channel change cases, it has chosen not to do so unless there is evidence calling into question the financial ability of a benefitting party to reimburse an accommodating party or the existence of “unusual circumstances” that compel the Commission to intervene.<sup>55</sup> As a result, the Bureau generally does not require a benefitting party to demonstrate its financial ability to reimburse before it will modify an accommodating party’s license,<sup>56</sup> has left the timing and manner of

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Third Notice of Inquiry, 10 FCC Rcd 10540, 10545, n.30 (1995) (“There is ample precedent for our reallocation of spectrum in the public interest, even where such reallocation results in displacement of current users of the spectrum, and it is clear that we have broad discretion to do so.”); *KPVO(FM)*, 31 FCC Rcd at 8920.

<sup>53</sup> *Lake City*, 47 FCC 2d at 1078, para. 26 (finding “equitable considerations dictate that [the accommodating party] should be reimbursed for the reasonable costs incurred in accomplishing the channel change”). See *Churchville and Luray, Virginia*, Memorandum Opinion and Order, 6 FCC Rcd 1313, 1313-14, para.5 (MMB 1991) (recognizing that “changing the channel of an existing station creates a potential for a temporary disruption to the listening habits of a station’s audience” but finding this “does not override the public interest benefit of providing service to additional population”); *Indio and Desert Center, California*, Report and Order, 1985 FCC LEXIS 2738, \*3 (MMB 1985) (*Indio*) (finding “equitable considerations dictate that [the accommodating party] should be reimbursed for the reasonable costs incurred in accomplishing the channel change”). See also *Jackson, Lima, Kenton, and Bellefontaine, Ohio*, Report and Order, 3 FCC 2d 598, 604, para. 14 (1966) (*Jackson*) (noting that “economic injury as such is . . . no ground for refusing to take actions which are otherwise in the public interest,” and explaining that “[i]t is only when the economic injury to the licensee affects the public interest that it becomes a relevant factor”).

<sup>54</sup> *Lake City*, 47 FCC 2d at 1078, para. 26. The Act “provides licensees with no right to reimbursement when changes are required in their operating frequencies to permit other new or changed assignments.” *Id.*

<sup>55</sup> *Dickson, Tennessee; Benton and Calvert City, Kentucky*, Report and Order, 4 FCC Rcd 8707, 8707, para. 5 (MMB 1989) (*Dickson*). For instance, the Bureau has suggested that Commission intervention might be appropriate if there is evidence calling into question a benefitting party’s willingness to fulfill its obligation to reimburse an accommodating party. See *Canovanas, Culebra, Las Piedras, Mayaguez, Quebradillas, San Juan, and Vieques, Puerto Rico, and Christiansted and Frederiksted, Virgin Islands*, Report and Order, 10 FCC Rcd 6673, 6677, para. 19 (MMB 1995) (rejecting accommodating party’s request that benefitting parties be made jointly and severally liable for the costs of the involuntary channel changes in order to protect accommodating parties from undue delay in being reimbursed, and noting that “[t]here is nothing in the record in this proceeding, and [accommodating party] offers no evidence, to suggest that any of the parties responsible for participating in the reimbursement are not willing and able to do so”).

<sup>56</sup> *Cheyenne*, 15 FCC Rcd at 7531-32, para. 8; *Castle Rock*, 7 FCC Rcd at 7670, para. 9; *Othello, East Wenatchee and Cashmere, Washington, and Wallace, Idaho*, Report and Order, 6 FCC Rcd 6476, 6477-78, para. 10 (MMB 1991) (*Othello*); *Dickson*, 4 FCC Rcd at 8707, para. 5. To the extent that PVBC focuses on the fact that neither the Bureau nor its predecessor the Mass Media Bureau has explicitly discussed escrow accounts since *Othello* and *Dickson*, PVBC AFR Reply at 4, PVBC misses the point. On a number of occasions since then, both the Bureau and the Mass Media Bureau have considered whether to impose requirements related to the timing and manner of reimbursement concurrent with modification of an accommodating party’s license. In each instance, they have affirmed that they will not do so in the absence of evidence suggesting the inability of the benefitting party to reimburse the accommodating party. *Ione, Oregon; Walla Walla, Washington and Athena, Hermiston, La Grande, and Arlington, Oregon*, Report and Order, 21 FCC Rcd 10017, 10021, para. 11 (MB 2006) (noting accommodating parties had questioned benefitting party’s ability to reimburse them, but declining to require benefitting party to do more than pledge to reimburse the accommodating parties as required by *Circleville*); *Cheyenne*, 15 FCC Rcd at 7531-32, para. 8 (declining “to require [benefitting party] to pay the expenses in advance for the frequency change because no showing has been made as to [benefitting party’s] inability to reimburse [accommodating party]”);

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reimbursement to the good faith negotiation of the parties involved,<sup>57</sup> and has not mediated, at the outset, claims regarding the amount of reimbursement.<sup>58</sup> The Bureau has, however, required parties to reach a reasonable and equitable agreement in an expeditious manner.<sup>59</sup> If parties were not able to do so, as a last resort, only then has the Bureau intervened.<sup>60</sup>

17. We decline, as PVBC requests, to modify the Bureau's approach to reimbursement in section 316 cases involving FM radio stations.<sup>61</sup> The Bureau's approach allows the parties to negotiate the arrangement that works best for them.<sup>62</sup> It also avoids unnecessary Commission involvement in

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*Colonial Heights*, 11 FCC Rcd at 18082, paras. 10-11 (declining to require escrow because there had been no evidence presented to cause the Bureau to waver from its policy not to require demonstrations of financial ability prior to ordering an involuntary channel change); *Castle Rock*, 7 FCC Rcd 7670, para. 9 (declining to require benefitting party to pay accommodating party in advance because no showing had been made as to benefitting party's inability to reimburse). We also find no merit to PVBC's assertion that the Bureau failed to cite any decisions other than *Othello* in support of its decision. AFR at 7. The Bureau cited a number of other decisions. See *Letter Order* at 6, n.39 (citing *Dickson*); *Reconsideration Decision* at 6, nn.14, 16, 19 (citing *Dickson*, *Cheyenne*, and *Irvington, Kentucky, and French Lick, Indiana*, Report and Order, 25 FCC Rcd 1147, 1149, para. 7 (MB 2010) (*Irvington*)). And, as noted herein, there are additional Bureau-level decisions that are on point.

<sup>57</sup> *Irvington*, 25 FCC Rcd at 1149, para. 7 (noting that the timing of reimbursement is a matter that can be negotiated by the parties); *Cheyenne*, 15 FCC Rcd at 7531-32, para. 8 (stating "we will leave matters such as the time and manner of reimbursement to the good faith negotiations of the parties" and "what constitutes legitimate and prudent expenses for reimbursement is left to the good faith negotiation of the parties"); *Camas, Washington, and Seaside, Oregon*, Report and Order, 8 FCC Rcd 1796, 1797, para. 5 (MMB 1993) (*Camas*) ("Reimbursement ... is left to the good faith negotiation of the parties involved."); *Castle Rock*, 7 FCC Rcd at 7670, para. 9.

<sup>58</sup> See *Camas*, 8 FCC Rcd at 1797, para. 5; *Milan, Metter, Swainsboro, and Wrens, Georgia*, Opinion, 6 FCC Rcd 5793, 5794, para. 6 (MMB 1991) (*Milan*).

<sup>59</sup> *KPVO(FM)*, 31 FCC Rcd at 8921 ("Under *Circleville* and subsequent cases, determination of what constitutes legitimate and prudent expenses for reimbursement is left to the expeditious good faith negotiation of the parties . . ."); *Camas*, 8 FCC Rcd at 1796, para. 5 ("Parties are expected to reach a reasonable and equitable agreement in an expeditious manner."). The Bureau has explained that, while negotiations may begin earlier, they must begin immediately following modification of the accommodating party's license. See *Ada, Newcastle, and Watonga, Oklahoma*, Report and Order, 11 FCC Rcd 16896, 16901, para. 19 (MMB 1996) (declining to require that accommodating party and benefitting party "reach agreement on the reimbursement amount prior to the modification" of the accommodating party's license).

<sup>60</sup> *Lake City*, 47 FCC 2d at 1078, para. 26; *Camas*, 8 FCC Rcd at 1797, para. 5; *Milan*, 6 FCC Rcd at 5794, para. 6; *Indio*, 1985 FCC LEXIS at \*3.

<sup>61</sup> AFR at 7. We also decline to expand Entravision's reimbursement obligation to include an FM translator affected by KVVA-FM's upgrade and move. The Bureau previously rejected PVBC's claim that Entravision must reimburse the licensee of an FM translator that rebroadcasts KPPV(FM) and will be displaced by KVVA-FM's upgrade and move. See *Letter Order* at 6. While PVBC did not seek reconsideration or review of that aspect of the *Letter Order*, in the AFR, PVBC again discusses how the KVVA-FM channel change will impact that translator. See AFR at n.5. Accordingly, we take this opportunity to affirm that, as the Bureau noted, FM translators are authorized on a secondary basis and are subject to displacement by full-service FM stations. See *Letter Order* at 6, citing *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, MM Docket No. 88-140, Report and Order, 5 FCC Rcd 7212, 7214, para. 86 (1990). In situations where a translator is displaced and identifies a new channel on which to operate, the translator licensee—not the station causing the displacement—pays all the costs associated with the channel change. This is because, in constructing an FM translator station, a translator licensee has "recognized and accepted the secondary status of its construction permit and constructed its station notwithstanding the inherent risk that its station is always subject to displacement by a full service station." *FCC Adopts Limit for NCE FM New Station Applications in October 12 – October 19, 2007 Window*, MM Docket No. 95-31, Public Notice, 22 FCC Rcd 18699, 18702 (2007).

<sup>62</sup> *Cheyenne*, 15 FCC Rcd at 7531-32, para. 8; *Castle Rock*, 7 FCC Rcd at 7670, para. 9; *Othello*, 6 FCC Rcd at 6477-78, para. 10 (MMB 1991); *Dickson*, 4 FCC Rcd at 8707, para. 5.

negotiations between two private parties and preserves limited Commission resources. We note that nothing prohibits parties from voluntarily agreeing to an escrow account, and/or advance payments into an escrow account or to the accommodating party directly.<sup>63</sup> However, like the Bureau, we recognize that “there may well be other means for [discharging the reimbursement obligation] consistent with the legitimate interests of the parties and the public.”<sup>64</sup> Accordingly, we affirm that the choice of how a benefitting party fulfills its reimbursement obligations (including the choice of whether to use an escrow account) is best left to the negotiations of the benefitting and accommodating parties themselves absent a factual basis for questioning a benefitting party’s financial ability to reimburse or where other unusual circumstances apply.

18. We reject PVBC’s argument that the current approach—described in paragraphs 15 and 16—is “unworkable.”<sup>65</sup> As an initial matter, based on our experience over the last 30 years, there has not been evidence to suggest that escrow accounts should now be required absent a factual basis for questioning a benefitting party’s financial ability to reimburse or where other unusual circumstances apply. While PVBC alleges that “numerous” benefitting parties have taken actions “to stonewall accommodating licensees” and that accommodating licensees face the “very common situation[ ]” of being left “holding the bag,”<sup>66</sup> PVBC cites only two cases—*Roy E. Henderson (Henderson)*, and *Appaloosa Broadcasting Company, Inc. (Appaloosa)*—in which it alleges that a benefitting party failed to reimburse the accommodating party.<sup>67</sup> Further, in the more than one hundred involuntary channel change orders issued by the Bureau (or the Mass Media Bureau) since the specific issue of escrow accounts was last addressed, only three have required Bureau intervention to ensure that the benefitting party reimbursed the accommodating party.<sup>68</sup> There are meaningful differences between these three cases and the instant case. Significantly, *Henderson* involves a benefitting party that is a sole proprietorship with limited resources<sup>69</sup> when compared to the benefitting party in the present case, a wholly-owned subsidiary of a publicly traded company with a market capitalization of more than \$500,000,000. The accommodating party in *Appaloosa* had itself delayed its implementation of the involuntary channel change for more than six years.<sup>70</sup> Although the *Appaloosa* case did require Bureau intervention regarding

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<sup>63</sup> *Dickson*, 4 FCC Rcd at 8707, para. 5 (“Certainly . . . an [escrow] arrangement might provide a reasonable means for discharging the reimbursement obligation.”).

<sup>64</sup> *Id.*

<sup>65</sup> AFR at 8.

<sup>66</sup> *Id.* at 6-7. See also PVBC AFR Reply at 5.

<sup>67</sup> As Entravision notes, both *Henderson* and *Appaloosa* are unpublished Bureau decisions. Entravision AFR Opposition at 5. An unpublished decision “may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission.” 47 CFR § 0.445(f). Here, PVBC’s discussion of the unpublished *Henderson* and *Appaloosa* is appropriate since all parties here have actual knowledge of the facts of these cases. See Entravision AFR Opposition at 5-7.

<sup>68</sup> *Roy E Henderson*, File No. BRH-2013032ADT, Letter Order (MB Sept. 12, 2019) (*Henderson*); *Appaloosa; Application of Peter Wayne Lechman, For License to Cover Construction Permit for Station WBOP(FM), Churchville, Virginia*, Memorandum Opinion and Order, 8 FCC Rcd 3058 (MMB 1993) (*Lechman*) (addressing dispute regarding the amount owed by benefitting party to accommodating party, and ordering benefitting party to pay specific amount to accommodating party). Nearly the same number of involuntary channel change cases have required the Bureau to intervene to ensure that the accommodating party implements the involuntary channel change. *Arso Radio Corp.*, Letter Order, 27 FCC Rcd 13214, 13219 (MB 2012) (*Arso*); *Susquehanna Radio Corp.*, Application File Nos. BLH-20101203ABV, BPH-20070820ABO, Letter Order (MB May 13, 2011).

<sup>69</sup> *Henderson* at 1 (noting that Roy E. Henderson is the sole principal of the benefitting party).

<sup>70</sup> The Bureau modified the license of the accommodating party’s station to specify a different operating frequency on October 23, 2009, and directed the accommodating party to file an application to implement the station’s channel change by November 22, 2009. *Christian Media Inc.*, File No. BLH-19881221KC, Letter Order, (MB Oct. 23, 2009). The accommodating party did not file that application until June 19, 2015, more than five and a half years

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reimbursement, the accommodating party in *Appaloosa* ultimately was reimbursed.<sup>71</sup> Finally, in contrast to this case but similar to *Henderson*, *Lechman* involved an individual as the benefitting party with limited resources when compared to Entravision. In any event, nothing in the record suggests that the accommodating party in *Lechman* was not reimbursed. Given that nearly all of the involuntary channel change cases ordered since the Bureau last considered escrow accounts have not resulted in reimbursement disputes, we conclude that the existence of these three cases does not justify revision of the Bureau's general policy regarding escrow accounts.

19. We likewise will not—as PVBC requests—revise the Bureau's policy due to the current economic status of the radio industry. PVBC makes general statements about “enormous losses in listenership and revenues” and speculates that “undertaking a channel change during a global pandemic without a guarantee of full reimbursement could lead to economic ruin.”<sup>72</sup> However, PVBC does not submit any specific data or other evidence to support its claims, and has not demonstrated that it lacks the financial ability to front the cost for the expenses associated with the involuntary channel change, nor does it allege that Entravision has suffered any change in circumstances that would impact Entravision's ability to reimburse PVBC. While we recognize that the pandemic has had wide ranging impacts on all facets of the economy, we will not make policy decisions based on PVBC's speculation. We note, though, that the Bureau's existing policy permits the Bureau to impose requirements related to reimbursement where there is a factual basis for questioning a benefitting party's financial ability to reimburse or where other “unusual circumstances apply.”<sup>73</sup> We believe that, where adequately documented, an accommodating party's inability to pay up front the costs of an involuntary channel change could constitute an unusual circumstance justifying a requirement that the benefitting party make advance payments to the accommodating party.<sup>74</sup> But, there is no evidence that this is the case here.

20. Like the Bureau,<sup>75</sup> we reject PVBC's argument that the current approach creates an imbalance of bargaining power between an accommodating party and a benefitting party.<sup>76</sup> As the Bureau noted, it is Commission policy to condition construction permits which are dependent upon a change of channel by an existing station on the issuance of program test authority to that station. This prevents a benefitting party from going on the air with its new or improved services until such time as the accommodating party is ready to begin operation on its new channel, and incentivizes the benefitting party to resolve any reimbursement issues that might cause delays in the accommodating party's build out or operation of its new facilities. The construction permit issued for KDVA(FM) includes such a

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after issuance of the decision modifying its station's license, and more than three years after the Bureau denied its petition for reconsideration of the modification decision. See *Christian Media Inc.*, Letter Order (MB May 3, 2012).

<sup>71</sup> See Letter from Lee G. Petro, Counsel for Christian Media, Inc., to Marlene H. Dortch, Secretary, FCC, Application File No. BLH-20160217AAB (dated Sept. 8, 2017) (acknowledging accommodating party's receipt of reimbursement on August 10, 2017). To the extent PVBC asserts that the accommodating licensee in *Appaloosa* “waited for nearly eight years to obtain reimbursement,” AFR at 8, we find that claim to be disingenuous because, as noted, the accommodating party delayed its implementation of the involuntary channel change for more than six years.

<sup>72</sup> AFR at 7.

<sup>73</sup> *Dickson*, 4 FCC Rcd at 8707, para. 5.

<sup>74</sup> See *Jackson*, 3 FCC 2d at 605, para. 17 (noting that “equitable considerations, as well as the limitations of [accommodating party]'s economic situation, require that [the accommodating party] should be reimbursed for the reasonable costs of the channel change”).

<sup>75</sup> *Reconsideration Decision* at 4.

<sup>76</sup> AFR at 5.

condition.<sup>77</sup> We also note that it is inaccurate for PVBC to suggest that it will be required to “shoulder the entire burden of a channel change in the mere hopes that Entravision . . . will provide reimbursement.”<sup>78</sup> In fact, a benefitting party faces non-renewal of its station’s license if it fails to honor its pledge to reimburse an accommodating party for the reasonable costs of changing its station’s channel.

21. We find that the Bureau correctly applied its existing reimbursement policy<sup>79</sup> in reaching its determination that PVBC had failed to justify a directive to use an escrow account. As the Bureau noted,<sup>80</sup> PVBC did not question whether Entravision had the financial ability to reimburse it. Further, while PVBC did question whether Entravision was willing to reimburse it,<sup>81</sup> at the time the Bureau considered PVBC’s request, the record contained no evidence to support that claim.<sup>82</sup> The only pieces of evidence before the Bureau were Entravision’s statements that it *was* willing to reimburse PVBC.<sup>83</sup>

22. We disagree with PVBC’s argument that, by requiring an escrow account in this particular case, the Commission will avoid having to referee potential future disputes between PVBC and Entravision.<sup>84</sup> An escrow account is a mechanism to ensure funds are set aside in a secure manner to ensure timely payment.<sup>85</sup> Even with an escrow account, the parties would need to reach agreement on the appropriate amount to be escrowed, the value of items that PVBC is required to replace, the reasonableness of the costs of replacements, guidelines regarding the acceptable use of the escrow funds, and the conditions that must be met for the funds to be released to PVBC. These are the very topics upon which PVBC and Entravision have failed to reach agreement. For instance, PVBC indicates that Entravision has refused to reimburse it for expenses PVBC incurred in filing the KPPV(FM) Application,<sup>86</sup> and Entravision has questioned certain expenses included in a list PVBC provided to it.<sup>87</sup> There is no basis upon which to believe that imposing an escrow requirement would facilitate agreement between the parties or prevent the Commission from being involved in the parties’ reimbursement negotiations.

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<sup>77</sup> While Entravision has requested that we delete this special operating condition, we deny that request herein. *See infra* para. 23.

<sup>78</sup> AFR at 5.

<sup>79</sup> *See supra* paras. 15-17.

<sup>80</sup> *Reconsideration Decision* at 3, n.15, *citing* Petition at 4.

<sup>81</sup> While PVBC initially argued that Entravision had failed to negotiate in good faith when it did not respond to a letter sent by PVBC prior to the Bureau modifying the KPPV(FM) license, we affirm the Bureau’s rejection of that argument. The Bureau has explained that the obligation to negotiate regarding reimbursement arises not when a license modification pursuant to section 316 is proposed, but when it is ordered. *See Letter Order* at 6, *citing Pike Road, Alabama*, Report and Order, 29 FCC Rcd 13947, 13950, para. 9 (MB 2014).

<sup>82</sup> We note that evidence regarding events occurring after the Bureau issued the *Reconsideration Decision* is not relevant to our review of that decision. *See* 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c) (both barring applications for review that rely on questions of fact or law upon which the Bureau has been afforded no opportunity to pass). This evidence is relevant, however, to our discussion of the ongoing reimbursement negotiations between the parties. *See infra* para. 29.

<sup>83</sup> KVVV Application, Attach. 34 (Comprehensive Allocation Study) at 6; KDVA Application, Attach. 34 (Comprehensive Allocation Study) at 6.

<sup>84</sup> AFR at 11.

<sup>85</sup> Caroline Banton, *Escrow* (Mar. 9, 2021), <https://www.investopedia.com/terms/e/escrow.asp> (“[e]scrow is a process used when two parties are in the process of completing a transaction, and there is uncertainty over whether one party or another will be able to fulfill their obligations”).

<sup>86</sup> AFR at 3, n.7; PVBC AFR Reply at 5-6; PVBC January 14<sup>th</sup> Letter at 4-5.

<sup>87</sup> Entravision AFR Opposition at 8. According to Entravision, PVBC provided a list of expenses that totaled \$1,692,000. *Id.*

## 2. Entravision Request

23. In the Request, Entravision urges us to delete the special operating condition that prevents KDVA(FM) from commencing program tests (or being licensed) on its new channel until KPPV(FM) commences program tests (or is licensed) on its new channel.<sup>88</sup> Entravision asserts that we should remove this condition because, at this time, PVBC holds only an implied STA to operate KPPV(FM) on its old channel, and is entitled to “no protection from operating stations, construction permits, pending applications or subsequently filed applications.”<sup>89</sup> PVBC, on the other hand, claims that KPPV(FM)’s continued operations on its old channel are pursuant to its license not an implied STA.<sup>90</sup> Before we consider the merits of the Request, we first address whether KPPV(FM) continues to be licensed to operate—and entitled to protection from conflicting applications—on its old channel. As set forth below, we conclude that it is not licensed to operate on its old channel but rather holds an implied STA. Although we agree with Entravision on KPPV(FM)’s operational status, we nevertheless deny the Request, finding that deletion of the special operating condition from the KDVA(FM) construction permit is not appropriate at this time.

24. *Implied STA.* We agree with Entravision that PVBC holds only an implied STA to operate KPPV(FM) on its old channel at this time.<sup>91</sup> Where an existing full-service non-reserved band FM station’s license has been modified to specify a new channel (or class, or community of license), and the modification is final, the station is neither licensed to its old channel (or class, or community of license) nor entitled to any protection based on its formerly licensed facilities.<sup>92</sup> During the construction permit period for the modified facilities, however, the station is allowed to continue operating its previously authorized facilities under an implied STA.<sup>93</sup> The modification of the KPPV(FM) license to

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<sup>88</sup> Request at 1.

<sup>89</sup> *Id.* at 1-2.

<sup>90</sup> PVBC August 3<sup>rd</sup> Letter at 4; PVBC February 3<sup>rd</sup> Letter at 2; PVBC January 22<sup>nd</sup> Letter at 3; PVBC January 14<sup>th</sup> Letter at 6.

<sup>91</sup> Request at 1-2. *See also* Entravision July 23<sup>rd</sup> Letter at 2; Entravision February 4<sup>th</sup> Letter at 2-3; Entravision January 25<sup>th</sup> Letter at 2; Entravision January 15<sup>th</sup> Letter at 5.

<sup>92</sup> *1998 Biennial Regulatory Review, Streamlining of Mass Media Applications, Rules, and Processes*, Notice of Proposed Rule Making, 13 FCC Rcd 14849, 14855, n.22 (1998) (*1998 Streamlining Notice*) (discussing scenario where Commission’s grant of a “one-step FM commercial station application to change channel or station class” modified a station’s license to specify a new channel, and explaining that, “[d]uring the construction permit period,” “the formerly authorized facilities are no longer protected from subsequently filed applications”). *See also Wendolyn Tellez*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 33 FCC Rcd 112, 114, para. 7 (MB 2018) (*Tellez*) (where construction permit to change an existing full-service non-reserved band FM station’s channel had been granted, operations on the old channel were “not entitled to any protection”); *KZLZ, LLC*, Letter Order, 31 FCC Rcd 10661, 10663, n.10 (MB 2016) (*KZLZ*) (noting that grant of a construction permit to downgrade a station’s class and change its community of license resulted in a “mandatory move,” and explaining that operation of the station at its old community of license was “not protected against new station or modification application filings”); *Arso*, 27 FCC Rcd at 13218 (MB 2012) (holding that licensee of existing full-service non-reserved band FM station “lost all protection rights for [station’s] formerly licensed channel” when order modifying station’s license to specify a new channel became final); *Lieberman Broad. of Dallas*, Letter Order, 25 FCC Rcd 4765, 4767 (MB 2010) (*Lieberman*) (indicating that existing full-service non-reserved band FM radio station’s “continued operation on its old channel received no protection under the Commissions technical rules”); *Cumberland, Kentucky, Weber City, Glade Spring, and Marion, Virginia*, Report and Order, 21 FCC Rcd 6431, 6432, para. 4 (MB 2006) (*Cumberland*) (noting that existing full-service non-reserved band FM station’s license had been modified to specify a new channel, and that modification was final, and explaining that the station was not “entitled to any protection based on its formerly licensed facilities”).

<sup>93</sup> *1998 Streamlining Notice*, 13 FCC Rcd at 14855, n. 22 (discussing scenario where Commission modified an existing commercial FM station’s license to specify a new channel, and explaining that, “[d]uring the construction permit period, the licensee may continue to operate the previously authorized facilities on an interim or ‘implied

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specify a new channel is final. Thus, PVBC now holds only an implied STA to operate KPPV(FM) on its old channel.

25. We reject PVBC's assertion that implied STAs arise only with respect to changes made to an existing full-service non-reserved band FM station's channel (or class, or community of license) through "allotment rule makings."<sup>94</sup> In support of its claim, PVBC cites the *1999 Streamlining Order*,<sup>95</sup> which stated: "[a]fter the allotment rule making has become final, the affected station has at best an 'implied STA' to remain on its old frequency until it is ready for operation on its new frequency."<sup>96</sup> PVBC, however, ignores a clarification the Commission made the previous year in the *1998 Streamlining Notice*.<sup>97</sup> There, the Commission indicated that, where an existing FM commercial station's channel or station class was modified using the one-step upgrade procedure in place at that time (which involved the filing of an application not an allotment rulemaking),<sup>98</sup> the licensee could continue to operate the station's "previously authorized facilities" on an implied STA basis.<sup>99</sup> The Commission's statement in the *1998 Streamlining Notice* supports the position taken by the Bureau in subsequent cases that an implied STA is not limited to situations where the modification was accomplished via an allotment rulemaking.

26. We further reject PVBC's argument that implied STAs arise only where the channel (or class, or community of license) change at issue is voluntary.<sup>100</sup> PVBC contends this is the case because the Commission instituted the implied STA concept to guard against spectrum warehousing, and because the risk of spectrum warehousing only arises in relation to voluntary changes to a station's channel (or class, or community of license).<sup>101</sup> PVBC has not cited any decision suggesting such a rationale for

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Special Temporary Authority' basis"). See also *Tellez*, 33 FCC Rcd at 114, para. 7 (where permit to change an existing full-service non-reserved band FM station's channel had been granted, licensee could operate on its old channel on an implied STA basis); *KZLZ*, 31 FCC Rcd at 10663, n.10 (noting that grant of a construction permit to downgrade a station's class and change its community of license resulted in a "mandatory move," and explaining that operation of the station at its old community of license was pursuant to implied STA).

<sup>94</sup> PVBC January 22<sup>nd</sup> Letter at 2 (asserting the *1999 Streamlining Order* "clearly applies the concept of the 'implied STA' only to allotment proceedings"); PVBC January 14<sup>th</sup> Letter at 6-7 (asserting that "an implied STA arises exclusively in the context of a rule making proceeding"). See also PVBC August 3<sup>rd</sup> Letter at 4; PVBC February 3<sup>rd</sup> Letter at 2.

<sup>95</sup> *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999) (*1999 Streamlining Order*).

<sup>96</sup> *Id.* at 17540, n. 55.

<sup>97</sup> *1998 Streamlining Notice*, 13 FCC Rcd at 14855, n. 22.

<sup>98</sup> See *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, Report and Order, 8 FCC Rcd 4735 (1993).

<sup>99</sup> *1998 Streamlining Notice*, 13 FCC Rcd at 14855, n. 22. Given the clarification made in the *1998 Streamlining Notice*, we reject PVBC's arguments that (1) "[t]he FCC introduced the concept of the implied STA in the [*1999 Streamlining Order*]," PVBC January 22<sup>nd</sup> Letter at 2, and (2) the Bureau "improperly extended" the implied STA concept to modifications accomplished without allotment rulemakings. PVBC January 14<sup>th</sup> Letter at 6-7.

<sup>100</sup> PVBC August 3<sup>rd</sup> Letter at 4; PVBC February 3<sup>rd</sup> Letter at 2; PVBC January 22<sup>nd</sup> Letter at 3; PVBC January 14<sup>th</sup> Letter at 5-7.

<sup>101</sup> PVBC January 22<sup>nd</sup> Letter at 3-4; January 14<sup>th</sup> Letter at 6. To the extent that PVBC suggests that allotment rulemakings involve only changes to an authorized full-service non-reserved band FM station's channel (or class, or community of license) at the request of the station's licensee, PVBC January 22<sup>nd</sup> Letter at 2, that is incorrect. In fact, prior to rule changes adopted by the Commission in 2006, *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, MB Docket 05-210, Report and Order, 21 FCC Rcd 21412 (2006), the only way to request an involuntary change to an existing full-service non-reserved band FM station's channel (or class, or community of license) was through an allotment rulemaking. Contrast, e.g., *Fishers, Lawrence, Indianapolis and Clinton, Indiana*, Notice of Proposed Rulemaking

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implied STAs. PVBC's argument is also logically flawed. First, no increased risk of spectrum warehousing arises where the license of an existing full-service non-reserved band FM station is modified to specify a new channel (or class, or community of license). This is so because, as explained in paragraph 24, once the modification of the station's authorization is final, the station's authorization to operate on its old channel (or class, or community of license) no longer exists.<sup>102</sup> From that point on, the station is not entitled to interference protection for its previously licensed facilities and should be motivated to transition to its new facilities.<sup>103</sup> Second, even if there was a risk of spectrum warehousing,<sup>104</sup> PVBC has not demonstrated why it would be present only with respect to voluntary channel changes. As the Commission previously noted, there are occasions where the initiating (or benefitting) party promptly constructs its facility but cannot commence operations because the affected (or accommodating) station has not completed its modified facilities.<sup>105</sup>

27. We acknowledge that the Commission has not previously addressed what purpose implied STAs serve or why they take effect upon the finality of a modification. We clarify here that implied STAs ensure that existing full-service non-reserved band FM stations that are changing channels (or class, or community of license) are able to continue providing service to the public during the construction permit periods for their new facilities.<sup>106</sup> It is in the public interest to allow such a station to continue operating on its old channel (or at its old class, or community of license) until it is ready and authorized to operate on its new channel (or at its new class, or community of license). However, we note that we expect licensees to implement channel (or class, or community of license) changes expeditiously in order to ensure that their continued operation on their old channel (or class, or community of license) does not unnecessarily or unreasonably impede another station's ability to move or commence operations.<sup>107</sup> Moreover, implied STAs take effect only upon the finality of a grant of a modification application to operate on the new channel given the possibility of action on review that could disrupt such modification.

28. *Deletion of Special Operating Condition.* Although we have determined that KPPV(FM)'s operations on its old channel are pursuant to an implied STA and thus that we could delete the special operating condition that prohibits KDVA(FM) from commencing program tests (or being

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and Order to Show Cause, 20 FCC Rcd 4303, 4303, para. 1 (MB 2005) (noting that benefitting parties had filed a petition for rulemaking proposing changes to their stations and an involuntary channel substitution for a third station) with *Media Bureau Offers Examples to Clarify the Treatment of Applications and Rulemaking Petitions Proposing Community of License Changes, Channel Substitutions, and New FM Allotments*, Public Notice, 22 FCC Rcd 6852 (MB 2007) (explaining that, under the new rules adopted in 2006, if an involuntary channel change is necessary to permit an upgrade to another station, the benefitting party files a minor modification application for its station that includes an exhibit referencing the involuntary change proposed to the other station).

<sup>102</sup> *1998 Streamlining Notice* (referring to "previously authorized" and "formerly authorized" facilities); *Arso*, 27 FCC Rcd at 13218 (discussing "formerly licensed channel"); *Cumberland*, 21 FCC Rcd at 6432, para. 4 (explaining that station was not a "licensed . . . station" on its old channel and describing its facilities on the old channel as "formerly licensed facilities").

<sup>103</sup> See *supra* para. 24 and note 92. To the extent that PVBC suggests that, "[w]ithout applying the concept of the implied STA," the licensee would, "in effect," have interference protection for its station on two different channels, to the detriment of competitors," PVBC January 22<sup>nd</sup> Letter at 3, that is incorrect.

<sup>104</sup> PVBC January 14<sup>th</sup> Letter at 6; PVBC January 22<sup>nd</sup> Letter at 3.

<sup>105</sup> *1999 Streamlining Order*, 14 FCC Rcd at 17540, n. 55.

<sup>106</sup> Without an implied STA, the station would have to go silent until its new facilities were constructed and operational.

<sup>107</sup> *KPVO(FM)*, 31 FCC Rcd at 8920; *Arso*, 27 FCC Rcd at 13218; *Liberman*, 25 FCC Rcd at 4768; *Corona de Tucson*, 23 FCC Rcd at 4796, para. 10 (all finding that a station's implied STA is "subject to summary cancellation if necessary to accommodate the operation of any FM station pursuant to its authorization").

licensed) on its new channel until KPPV(FM) commences program tests (or is licensed) on its new channel, we will not do so at this time. As explained above, it is Commission policy to condition construction permits which are dependent upon a change of channel by an existing station on the issuance of program test authority to that station. The condition may incentivize the benefitting party to resolve reimbursement issues that might cause delays in the accommodating party's build out of its new facilities.<sup>108</sup> Although Entravision suggests the accommodating party has not acted with due diligence,<sup>109</sup> we note PVBC is just over a year into the three-year construction period specified in its construction permit for Channel 295.<sup>110</sup> Accordingly, it would be premature to lift the special operating condition at this time, and could have a negative impact on KPPV(FM) listeners.

### 3. Reimbursement Negotiations

29. At this time, it is evident that the parties have failed to reach agreement concerning what items are eligible for reimbursement and what costs related to each item would be legitimate and prudent.<sup>111</sup> As the Bureau did,<sup>112</sup> we remind the parties that they are required to engage in expeditious good faith negotiations to determine the legitimate and prudent expenses expected to be incurred by PVBC in implementing the KPPV(FM) channel change. Given the increasingly contentious nature of this proceeding, though, we direct the Bureau to monitor the parties reimbursement negotiations. To facilitate this, we direct the parties to report to the Bureau in writing regarding the progress of their negotiations within 30 days of the release of this *Order*. To the extent agreement has not been reached by that time, and there is still disagreement over the legitimate and prudent expenses that Entravision must reimburse, in addition to the report, PVBC must separately submit, within 30 days of the release of this *Order*, a list of all expenses that it claims are reimbursable along with a justification and documentation (such as invoices or estimates from third parties) to support the estimated cost of each expense.<sup>113</sup> We direct Entravision to respond to PVBC's submission within 14 days of PVBC's filing with the Bureau. Finally, we direct the Bureau, based on the foregoing information provided by PVBC and Entravision, as well as any other information that the Bureau may request from the parties, to issue a decision resolving any disputes regarding whether (1) an expense item is legitimate and prudent and therefore reimbursable, and/or (2) whether the cost of that item is reasonable. While Entravision will not be required to reimburse PVBC for any expense item until PVBC has actually incurred that expense, we expect that the Bureau's intercession, to the extent necessary, will offer clarity to the parties going forward and allow PVBC to move forward with the involuntary channel change of KPPV(FM).

### 4. Strike Pleadings

30. We find no merit to Entravision's assertion that the AFR and letters PVBC submitted in relation to the Request are strike pleadings.<sup>114</sup> A party alleging a strike petition must make a strong showing that delay is the primary and substantial purpose behind the pleading.<sup>115</sup> The Commission will

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<sup>108</sup> See *supra* para. 20.

<sup>109</sup> Entravision July 23<sup>rd</sup> Letter at 2.

<sup>110</sup> 47 CFR § 73.3598.

<sup>111</sup> See *supra* note 14.

<sup>112</sup> *Reconsideration Decision* at 6.

<sup>113</sup> An accommodating party, in this case PVBC, bears the burden of proof with respect to whether an item and/or amount is legitimate and prudent. Once an accommodating party provides such justification and documentation that the item and amount are legitimate and prudent, a benefitting party, in this case Entravision, may come forward with evidence challenging the accommodating party's showing.

<sup>114</sup> Entravision AFR Opposition at 9 (asserting AFR is strike pleading); Entravision January 18<sup>th</sup> Letter at 5 (asserting January 14<sup>th</sup> Letter is strike pleading); Entravision January 25<sup>th</sup> Letter (arguing the PVBC "has engaged in a series of strike pleadings").

not “infer a ‘strike’ motive from the mere filing” of an objection, even if the objecting party may have gained some benefit from normal processing delays.<sup>116</sup> Entravision has submitted no extrinsic evidence that delay was a “primary and substantial purpose” behind the filing of the AFR or the letters. Moreover, PVBC has stated that it did not file the AFR or the letters for the purpose of blocking, impeding or delaying the grant of an application.<sup>117</sup> We also note that (1) like the Petition, the AFR does not challenge the Bureau’s modification of KPPV(FM)’s license, (2) PVBC timely filed the KPPV(FM) Application, and (3) the KPPV(FM) Application was granted on January 15, 2021. Taking all of these things into consideration, we will not strike the AFR or the letters, or otherwise sanction PVBC.

### III. ORDERING CLAUSES

31. For the reasons set forth above, **IT IS ORDERED** that the Application for Review filed by Prescott Valley Broadcasting Co. Inc. on November 20, 2020, **IS DENIED**.

32. **IT IS FURTHER ORDERED** that the Request for Removal of Special Operating Condition and Issuance of Revised Construction Permit filed by Entravision Holdings, LLC, on January 6, 2021, **IS DENIED**.

33. **IT IS FURTHER ORDERED** that the parties **SHALL SUBMIT** to the Media Bureau a written report regarding the progress of their reimbursement negotiations within 30 days of the release of this *Memorandum Opinion and Order*. If the parties have not yet reached an agreement on the legitimate and prudent expenses that Entravision Holdings, LLC, must reimburse, Prescott Valley Broadcasting Co. Inc. **SHALL SUBMIT** to the Media Bureau, within 30 days of the release of this *Order*, a list of all expenses that it currently claims are reimbursable along with a justification and documentation to support the estimated cost of each expense. Entravision Holdings, LLC, **SHALL RESPOND** to the Prescott Valley Broadcasting Co. Inc. submission within 14 days of its filing with the Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>115</sup> *Radio Carrollton*, 69 FCC 2d at 1150, para. 25.

<sup>116</sup> *Id.* at 1150, para. 26.

<sup>117</sup> PVBC AFR Reply at 8; PVBC February 3<sup>rd</sup> Letter at 2; PVBC January 22<sup>nd</sup> Letter at 4, n.7.