

January 6, 2021

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street, N.E.
Washington, D.C. 20554

RE: Station KDVA(FM)
Buckeye, Arizona
FIN: 2750
File No. BPH-20190723AAN
**Request for Removal of Special Operating Condition and Issuance of Revised
Construction Permit**

Dear Ms. Dortch:

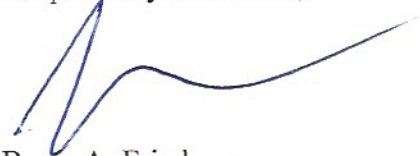
This office is counsel to Entravision Holdings, LLC ("Entravision"), the licensee of FM Station KDVA(FM), Buckeye, Arizona ("Station"). Entravision is the holder of a construction permit, in FCC File No. BPH-20190723AAN (the "Permit"), for the modification of the Station's license.

The Permit authorizes Entravision to engage in modifications to the Station's facilities, including a substitution to the Station's output channel and related facilities modifications. However, the Permit also contains a Special Operating Condition that limits when this work may be undertaken.

Entravision hereby asks that the Commission delete Special Operating Condition No. 4. As the basis for doing so, Entravision is submitting the attached Request that evidences the facts and precedent that support the relief being sought.

Should there be any questions in regard hereto, please communicate with the undersigned.

Respectfully submitted,



Barry A. Friedman

cc: Mr. Rodolfo Bonacci, FCC Audio Division
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REQUEST FOR REMOVAL OF SPECIAL OPERATING CONDITION AND ISSUANCE OF REVISED CONSTRUCTION PERMIT

Entravision Holdings, LLC ("Entravision"), the licensee of Station KDVA(FM), Buckeye, Arizona ("KDVA" or "Station"), hereby requests that the Commission remove a special operating condition contained in its construction permit in FCC File No. BPH-20190723AAN (the "Permit") and, in so doing, issue a revised Permit. The Permit was issued following submission of a July 23, 2019 application (the "KDVA Application") for the Station containing a request for channel substitutions, a Commission *Order to Show Cause*¹ to Prescott Valley Broadcasting Co., Inc. ("PVBC"), the licensee of Station KPPV(FM), Prescott Valley, Arizona ("KPPV"), and PVBC's response thereto. *Letter to Entravision Holdings, LLC*, Ref No. 1800B3-HOD, released July 21, 2020, *recon. denied*, *Letter to Entravision Holdings, LLC*, Ref. No. 1800B3-HOD, released October 21, 2020, *application for review pending*.

The Permit authorizes Entravision to engage in modifications to the Station's facilities, including a change in community of license, substitution of output channel, and related facilities modifications. However, the Permit also contains the following Special Operating Condition, which limits Entravision's ability to construct these modifications immediately despite the issuance of the Permit:

4. PROGRAM TESTS FOR KDVA(FM) (FACILITY ID# 2750) WILL NOT COMMENCE ON CHANNEL 294A WITH THE FACILITIES SPECIFIED HEREIN UNTIL PROGRAM TESTS FOR KPPV(FM) (FACILITY ID# 53414) COMMENCE ON CHANNEL 295C2 AND A LICENSE WILL NOT BE GRANTED FOR KDVA(FM) ON CHANNEL 294A WITH THE FACILITIES SPECIFIED HEREIN UNTIL A LICENSE IS GRANTED FOR KPPV ON CHANNEL 295C2.

As the Commission has recognized, in the leading case of *Letter to Brian M. Madden, Esq.*, 25 FCC Rcd 4765 (A.D. 2010) ("*Madden Letter*")², a party may hold a valid construction permit but, where that permit, as here, is contingent on another station (the accommodating station) engaging in a channel substitution, there are restraints on the exercise of that authority. Entravision holds a valid construction permit to modify the operating facilities the Station, including a channel substitution, as a benefiting station. In turn, PVBC, the licensee of KPPV, the accommodating station, holds merely an "implied STA" that allows KPPV to remain in operation on the channel it previously was authorized for (Channel 294C2) until such it is ready to operate on its newly authorized channel (Channel 295C2). *Id.* at 4767. *See also*, 1998 *Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, 14 FCC Rcd 17525, 17540 n. 55 (1999). More importantly, the Commission concluded, in the *Madden Letter*, that a station operating on the authority of an implied STA is entitled to "no

¹ *Letter to Prescott Valley Broadcasting Co., Inc.*, dated October 10, 2019.

² *See also Wendolynn Tellez*, 33 FCC Rcd 112, 114 n. 24 (MB 2018).

protection from operating stations, construction permits, pending applications or subsequently filed applications." *Id.* This lack of protection sets the stage for the relief being requested in this instance.

Entravision applied for this modification of KDVA's license on July 23, 2019, nearly one and one-half years ago. During that lengthy time period, PVBC has consistently sought to prevent and/or delay Entravision's legitimate efforts to modify the KDVA facility. To that end, PVBC has contested the *Order to Show Cause*, has filed a frivolous informal objection (in effect, a strike petition) to the KDVA application which, after it was correctly denied, has been followed by further frivolous and equally meritless pleadings: a Petition for Reconsideration and a Petition for Stay, both of which were also properly denied and, now, an Application for Review, which is pending and which Entravision expects will also be denied in due course. These pleadings have consumed a considerable amount of time and expense on Entravision's part to deal with. This is especially so since the FCC has found, in the two decisions issued to date, that none of the arguments presented by PVBC have any validity and constitute an effort to challenge well-reasoned and established precedent that have properly served the public interest for decades. Entravision fully expects that PVBC will extract further time and expense from it, in dealings at the Commission, before this matter is finally disposed of through administrative and, perhaps, judicial review.

In the July 21, 2020 letter decision, denying PVBC's objection to the issuance of the Station's Permit and ruling on the outstanding *Order to Show Cause*, the Commission gave PVBC 90 days in which to file a construction permit application to effectuate the required channel substitution. PVBC waited out the entire 90-day period before submitting its application. Entravision, seeking to move the proceeding forward, then urged the Media Bureau to apply expedited treatment to the PVBC application for KPPV following its submission on October 19, 2020. PVBC vociferously objected to the request. What PVBC did not reveal to Entravision at any time, and which was not a matter of public information, is that the "red light policy" had been applied by the Commission to PVBC, preventing any action on the KPPV application owing to PVBC's failure to meet its annual regulatory fees obligation. As a result, PVBC has not only prevented any expedited action on its application but has secured extended delay that has resulted in nearly three months passing without any action on the KPPV application.

During the year and one-half since the KDVA application was initially filed, Entravision has awaited PVBC securing a construction permit and completing the construction work required for KPPV before Entravision could proceed with its own program tests and licensing, owing to the limitations on multiple station channel substitutions. As of this date, Entravision has no idea whether or when PVBC will receive a construction permit, let alone commence construction, and when it will complete construction of its modified facilities. However, Entravision has every reason to believe, based on how PVBC has handled its extended application filing and now its "red light" problem, that PVBC will seek to use up every day it can before it completes the required work.

The *Madden Letter* informs us that a station, operating under an implied STA, cannot use its implied STA to block unnecessarily the ability of a benefiting licensee, holding a valid construction permit, from undertaking authorized construction of that party's facilities. Entravision submits that it has exercised substantial forbearance, in responding to PVBC's frivolous pleadings, PVBC's use of every possible day before filing its minor change application, and the unnecessary "red light" problem applicable to consideration of its application. Entravision submits that it should not have been put through these administrative delays, that it was not responsible for, and whatever other delaying tactics PVBC might be planning, any longer and wishes to proceed with the construction and operation of its modified facilities so that it can provide better service to its listening public, the true parties to this proceeding.

In the *Madden Letter*, the Commission indicated that the holder of an implied STA must recognize that its continued operations, on its old frequency, are in jeopardy when there is an outstanding and conflicting construction permit. It went on, after taking into consideration the limitations attendant to an implied STA, to reach the following result: "we conclude that deletion of Special Operating Condition No. 4 is in the public interest." *Letter to Brian M. Madden, Esq.*, supra at 4767. Such a result represents a correct application of law and a relevant precedent for resolution of this matter.

Entravision submits that the *Madden Letter* sets out the consideration that must be given in this instance. A substantial time period has passed since PVBC filed the first of its meritless pleadings that have only served to delay the administrative process and cost Entravision time and expense. And PVBC still has not obtained the construction permit it was required in July 2020 to secure.³ In turn, the implied STA held by PVBC has served to block Entravision's ability to modify the KDVA facilities. All of this evidences the lack of "good faith" that the Commission found critical in connection with a party's obligations in carrying out channel substitutions under Section 316 of the Communications Act. As such, neither Entravision nor its listening public should be harmed any further by the failure of PVBC to have secured a valid construction permit as of this date and the delaying tactics it has employed to slow the process.

Before more time is unjustifiably lost, the Commission should, as it did in the *Madden Letter*, remove Special Operating Condition No. 4 from the KDVA construction permit, so that Entravision can complete its work on the modification of the KDVA license.

³ In *Letter to Mark N. Lip, Esq.*, 31 FCC Rcd 8916 (MB 2016), the Commission determined that the failure to comply with the time period required to submit a minor modification application was such that it admonished the applicant. It also determined that had not so much time passed, it would have taken "alternative enforcement action" (n. 47). Entravision submits that the "red light" failure warrants the enforcement action provided for in the *Lipp* decision.