

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

In the matter of	)	
	)	
WKOB Communications, Inc.	)	
Debtor-in-Possession	)	Facility Identification Number 51441
	)	
Certificate of Eligibility for Class A	)	
Television Status for Low Power	)	
Television Station WKOB-LP	)	
New York, New York	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 19, 2001**

**Released: January 11, 2002**

By the Commission:

1. The Commission has before it: (1) an Application for Review filed on November 29, 2000 by WKOB Communications, Inc., Debtor-in-Possession (WKOB), licensee of WKOB-LP, channel 48, New York, New York, and supplemented on June 29, 2001; (2) a motion for leave to file, which is opposed by WKOB, and opposition filed by WRNN-TV Associates Limited Partnership (WRNN), licensee of station WRNN-TV, Kingston, New York, on August 1, 2001; (3) a reply filed by WKOB; and (4) a motion for leave to file and response to reply filed by WRNN on August 16, 2001. These pleadings relate to the November 9, 2000 letter decision of the Chief, Video Services Division, Mass Media Bureau, which denied reconsideration of the Bureau's dismissal of the Statement of Eligibility for Class A Low Power Television Station Status for WKOB-LP.

2. Background. Low power television station WKOB-LP previously operated on channel 53. Because WKOB's operation on channel 53 conflicted with the channel 53 DTV allotment at Newark, New Jersey, *see* 47 C.F.R. § 73.622(b), on June 1, 1998, WKOB filed a displacement application to move to channel 48 pursuant to Section 73.3572(a)(4) of the Commission's rules.<sup>1</sup> WKOB's application was mutually exclusive with a displacement application for channel 48 at Elizabeth, New Jersey, and accordingly, was sent to auction. *Closed Broadcast Auction (Auction No. 25)*, 14 FCC Rcd 10632 (1999). On October 8, 1999, WKOB was the prevailing bidder at \$1.269 million and its application was granted on March 28, 2000.

3. The Community Broadcasters Protection Act of 1999 (CBPA)<sup>2</sup> was signed into law November 29, 1999, and provided that an LPTV station may qualify for primary Class A status, and thereby avoid future displacement if, during the 90 days preceding the date of enactment of the statute: (1) the station broadcast a minimum of 18 hours per day; (2) the station broadcast an average of at least 3 hours per week of programming produced within the market area served by the station, or the market area served by a group of commonly controlled low power stations that carry common local programming produced within the market area served by such group; and (3) the station was in compliance with the

<sup>1</sup> File No. BPTLL-JG00601NK.

<sup>2</sup> Pub. L. 106-113, 113 Stat. Appendix I at pp. 1501A-594 – 1501A-598 (1999), codified at 47 U.S.C. § 336(f).

Commission's requirements for LPTV stations. 47 U.S.C. § 336(f)(2)(A). In addition, Section (f)(2)(B) of the statute gave the Commission discretion to determine that the public interest, convenience and necessity would be served by treating a station as a qualifying LPTV station, even if it did not meet the Section (f)(2)(A) requirements during the eligibility period. In the *Report and Order* promulgating rules for the new Class A television service, the Commission concluded that because "the intent of Congress in enacting the CBPA was to establish the rights of a very specific, already-existing group," the Commission would "allow deviation from the strict statutory eligibility criteria only where such deviations are insignificant or when we determine that there are compelling circumstances, and that in light of those compelling circumstances, equity mandates such a deviation." *Establishment of a Class A Television Service*, 15 FCC Rcd 6355, 6369 (2000)(*Report and Order*); *recon. granted in part*, 16 FCC Rcd 8244 (2001)(*Memorandum Opinion and Order on Reconsideration*), *appeal docketed*, No. 01-1249 (D.C. Cir. June 29, 2001).

4. The CBPA also provided that licensees intending to seek Class A designation file a certificate of eligibility with the Commission no later than January 28, 2000. WKOB filed a timely statement of eligibility, stating that the station did not currently broadcast a minimum of 18 hours a day or an average of three hours of locally produced programming per week. WKOB explained in its statement that until August 31, 1999, it had broadcast programming 24 hours a day under a time brokerage agreement with Paxson Communications LPTV, Inc. The station then went silent because its time brokerage programming agreement expired. WKOB notified the Commission on September 17, 1999 that the station was back on the air with a "limited" amount of programming. WKOB also stated that it had obtained locally-produced programming targeted to the needs of the Korean residents of New York City, and asserted that this specialized programming service supported an award of Class A status. Because WKOB was unable to certify its compliance with the statutory requirements, and it had not demonstrated a compelling reason to permit such deviation, its statement of eligibility was dismissed.<sup>3</sup>

5. On reconsideration, WKOB asserted that certain public interest factors, including its status as a minority-owned small business airing Korean-language programming, and the fact that, due to displacement by the channel 53 DTV allotment at Newark, it successfully bid over 1.2 million dollars to obtain Channel 48 as a displacement channel, warranted exercise of discretion by the Commission to allow WKOB-LP to file an application for a Class A license. By letter dated November 9, 2000, the Chief, Video Services Division, Mass Media Bureau, denied reconsideration, explaining that because the intent of Congress in enacting the CPBA was to establish the rights of a specific, already-existing group of low power television stations, the Commission declined to expand the eligible class to stations which proposed to comply with the statutory criteria in the future, citing *Report and Order*, 15 FCC Rcd at 6361-62. The Division also noted that in the *Report and Order*, the Commission instructed that only insignificant deviations from the statutory eligibility criteria would be considered, and the Division concluded that the failure to meet the programming eligibility requirements during the 90-day period ending November 28, 1999 could not be deemed "insignificant."

6. In its November 29, 2000 application for review, WKOB asserts that the Division's interpretation of the CBPA was erroneous as a matter of law because it ignored the explicit alternative set forth at Section (f)(2)(B) of the statute – that the Commission may determine that the public interest, convenience, and necessity would be served by granting Class A status to a station not meeting all three of the requirements set forth in Section (f)(2)(a) of the statute. In a supplement filed June 29, 2001, WKOB informed the Commission that the certification of eligibility it filed in January 2000, inadvertently stated that WKOB-LP failed to broadcast three hours a week of locally produced programming during the relevant 90-day period, except for the period from August 29<sup>th</sup> to September 17, 2000, when the station was dark. WKOB now claimed that it aired three hours of locally produced

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<sup>3</sup> See *Public Notice*, DA 00-1227, June 9, 2000.

programming, but admits, however, that the station did not air a minimum of 18 hours a day during the entire 90-day period preceding November 29, 1999.

7. In its opposition to the supplement, WRNN argues, *inter alia*, that WKOB's supplement is procedurally defective and is inconsistent with earlier representations regarding its operations during the eligibility period.<sup>4</sup> WRNN also asserted that it monitored WKOB-LP for 39 days between April 28<sup>th</sup> and August 22, 2000, and that based upon the transcripts provided by a Korean language interpreter hired by WRNN, and its visual review of the programming, the majority of the programs observed were religious services conducted in churches located in Korea. In its August 10, 2001 reply to WRNN's opposition, WKOB provides additional information regarding its programming, explaining that the programming is produced in New York, and edited in WKOB-LP's studio, and contending that if a Class A station cannot incorporate footage shot outside its service area in a locally produced program, then "a local newscast would not get credit for local time during a news story on an address by the President in Washington." WKOB also asserts that "its historical record of all-day programming coupled with its record of local service to the Korean minority community in New York justifies an exercise of the discretion granted to the Commission by the [CBPA] to act in the public interest."

8. Discussion. We are unpersuaded by WKOB's argument that the staff interpretation of the CBPA is erroneous as a matter of law because it ignores "the explicit alternative set forth in the statute – that the Commission may determine that in the alternative, the public interest, convenience, and necessity would be served by granting Class A status to a station not meeting all three of the [eligibility] requirements." The staff properly applied the alternative analysis adopted by the Commission in implementing the CBPA, which contemplated deviation from the programming and operational statutory eligibility requirement only where the deviations were "insignificant" or there are "compelling circumstances [so that] equity mandates such a deviation." *Report and Order*, 15 FCC Rcd at 6369.

9. We agree with the staff's conclusion that WKOB's deviation from the eligibility requirements was significant. By its own admission, WKOB aired an average of only three hours each week of programming during the eligibility period, which falls far short of the 18 hour minimum specified in the CBPA.<sup>5</sup> Nor can we conclude that WKOB has presented "compelling circumstances" to support a grant of Class A status. To the extent WKOB relies on its airing of foreign language programming, in the *Report and Order*, 15 FCC Rcd at 6369, the Commission declined to establish a different set of criteria for foreign language stations that did not meet the statutory programming criteria, and accordingly, the staff correctly concluded that WKOB's foreign language programming did not justify Class A status. We also do not find the expiration of the station's programming agreement with Paxson on August 31, 1999 to be a compelling circumstance outside of WKOB's control; instead, the agreement was not renewed upon expiration of its term, and it appears that WKOB took no prior or immediate steps to obtain a full schedule of alternative programming. More importantly, WKOB does not contend that it aired locally produced programming when the station was programmed by Paxson, and thus, even if the programming agreement had not expired prior to the 90-day eligibility period, WKOB

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<sup>4</sup> WRNN states that it is the proponent of a rulemaking proceeding to change its digital television allotment to channel 48 (which WKOB opposes), and that it had no reason to participate until WKOB presented "new and contradictory material." In response, WKOB argues that WRNN lacks standing and has not demonstrated any public interest reasons why it should be allowed to participate at this late date. Despite WRNN's failure to participate earlier in this proceeding, we find that the public interest is served by considering certain of its arguments.

<sup>5</sup> Because WKOB greatly deviated from the 18 hour programming requirement, we need not reach WRNN's contention that the programming aired on WKOB-LP was not locally produced programming, as contemplated by the CBPA. We conclude, however, that on the basis of the record in this proceeding, the local programming issues are plainly subject to reasonable debate, thereby negating any inference of an intent to deceive the Commission on WKOB's part.

has made no showing that it would have qualified for Class A status. Finally, while we are not unsympathetic to the fact that WKOB paid a large sum of money for a channel on which it may be displaced, bidders in the auction in which WKOB participated were on clear notice that the channel 48 spectrum being auctioned was secondary in nature. *Closed Broadcast Auction No. 25*, 14 FCC Rcd at 10660-61. We also note that WKOB bid for channel 48 prior to enactment of the CBPA, when it had no expectation that its station could be awarded primary status in the future.

10. In view of the foregoing, the application for review filed by WKOB Communications, Inc. IS HEREBY DENIED and the opposition filed by WRNN-TV Associates Limited Partnership IS HEREBY DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary