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**Federal Communications Commission
Office of the Secretary**

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In re)
)
Reclassification of License of) Facility ID No. 69753
Class A Television Station KVER-CA)
Indio, California)

To: The Secretary
Attn: Chief, Video Division, Media Bureau

RESPONSE TO ORDER TO SHOW CAUSE

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December 8, 2014

SUMMARY

As set forth herein, Entravision Holdings, LLC urges the Commission not to modify the Class A authorization for Station KVER-CA, Indio, California.

The basis upon which the Commission has issued its Order to Show Cause was the allegation that the Station was off-air for some purported business decision. On the contrary, the Station was off-air because of facts and circumstances well beyond its control and motivated by a third-party Commission licensee that did not wish to have the Station authorized to operate a digital Class A station on Channel 40. That party commenced administrative litigation, that it later walked away from, that prevented KVER from promptly operating in digital on two channels that it proposed. Once these obstacles were removed, Entravision immediately constructed and has operated KVER in digital.

Likewise, Entravision has a long history of serving the Palm Springs community with low-power and Class A stations that provide Spanish-language programming, including local news and the promotion of civic engagement. For the Commission to downgrade a Station in a market where it has provided service far beyond what is customarily provided by any type of station, is at odds with the Class A service.

While the facts along provide a basis for the Class A status to be maintained, there is no statutory or legislative basis upon which to downgrade a Class A station. The Commission has never taken such actions with respect to other broadcast services. In addition, the Commission has no basis under Section 336 of the Communications Act to change the KVER classification and that provision trumps Section 316.

Finally, when Entravision first undertook the reduction in operations for KVER, in order to allow for it to secure a digital output channel, Entravision was not on notice that such an

action would affect the Station's Class A status. In the absence of an applicable rule or announced policy, the Commission is not in a position to alter the status of a Class A station.

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RESPONSE TO ORDER TO SHOW CAUSE

Entravision Holdings, LLC (“Entravision”), the licensee of Class A Television Station KVER-CA, Indio, California (“KVER” or the “Station”), by its attorneys, hereby submits this Response to the *Order to Show Cause*, DA 14-1597, released November 4, 2014 (“Order to Show Cause”), issued by the Chief of the Video Division of the Media Bureau.¹ The Order to Show Cause fails to take note of the facts and circumstances relating to the efforts of Entravision to secure the ability to operate the Station in the digital mode, fails to recognize applicable law and policy having to do with Class A stations, violates the Communications Act and Commission requirements, will not serve the public interest and must, as a result, be denied forthwith. In support thereof, Entravision states as follows.

¹ *Reclassification of License of Class A Television Station KVER-CA, Indio, California, DA 14-1597, released November 4, 2014.* This Response is timely filed as it is submitted prior to the December 8, 2014 response date specified in Paragraph 9 of the Order to Show Cause.

PRELIMINARY STATEMENT

The Order to Show Cause is premised on allegations that the Station, which currently is classified as a Class A station, has failed to comply with the statutory requirements of Section 336(f) applicable to Class A stations and, as a result, is subject to being downgraded to low-power television status. The particular element of Section 336(f) that the Media Bureau seizes upon is that the Station has been silent during portions of the past four years.

Entravision does not contest that there have been periods during this time period in which KVER has not been operating. However, Entravision submits that a Class A station that is silent is not subject to reclassification, through application of Section 316 of the Communications Act, to LPTV status. As the Bureau itself discusses in the Order to Show Cause, the Commission has recognized that a Class A licensee may maintain its Class A status even when it must request Special Temporary Authority to operate with parameters at variance with its license.

Memorandum Opinion and Order on Reconsideration in MM Docket No. 00-10, 16 FCC Rcd 8244, 8257, n.76 (2001). Moreover, the Commission has permitted broadcasters to remain silent without losing their authorizations and has not adopted a formal policy that Class A stations, silent for a specific period of time, are subject to the loss of their Class A status. More importantly, and of dispositive significance to the consideration of the Show Cause, Entravision wishes to make note of the unusual circumstances of this case that confirm its efforts, with KVER and its other low-power and Class A stations, to operate them in service to the public and to convert as many of them, including KVER, as possible to service in the digital mode. The facts prove this out.

KVER has been a Class A station since the advent of Class A stations in 2000.² In fact, KVER and Entravision's cluster of LPTV and Class A stations in the Palm Springs DMA have been a prime example of a broadcast licensee operating low-power stations in service to the public; in fact, any objective observer would say, providing better broadcast service than full-service stations and Class A stations in nearly every other market. Entravision, since it obtained Class A status for KVER, not only provides the Palm Springs market, where 36% of the television households are Hispanic,³ with the required 18 hours per day of programming and three hours of locally produced programming; it exceeds it. KVER offers full-time Spanish-language programming for its viewers. This is significant, since the Palm Springs DMA is not a major market; in fact, Palm Springs is the 148th largest Nielsen DMA with only 154,320 television households.

Entravision's local programming is far superior to what is found on most other Class A stations. KVER relies on a four-person news department, which produces two weekday one-half hour local news programs, in Spanish, at 6:00 p.m. and 11:00 p.m.⁴

KVER's service to its viewing public does not stop with the local news. It provides an Entravision-produced national news program, *Perspectiva Nacional*, each Saturday, which delivers national news and opinion addressing the needs and interests of Latinos. Beyond that, Entravision and KVER encourage civic engagement in Palm Springs, providing Latinos with information and resources to participate in local government and politics. Entravision challenges the Commission to find a broadcast station, in a market the size of Palm Springs or larger, that better serves its public.

² File No. BLTVA-2001214KA.

³ Nielsen Television Households 2014-2015.

⁴ <http://www.kvertv.com/show/noticias-univision-notivalle/>

With the June, 2009 digital transition, Entravision sought a means to provide KVER in the digital mode to its viewers. On June 9, 2009, in File No. BDISDVA-20090612AIJ, Entravision filed a digital displacement application requesting that it be granted a construction permit to broadcast on Channel 11. The displacement request was premised on Station KNBC-TV, Los Angeles, California, also operating on KVER's then authorized VHF Channel 4. A construction permit authorizing that displacement relief was granted on September 7, 2010. *Public Notice*, Report No. 47318, released September 10, 2010. This proposed displacement also reflected the well-known fact that low-channel VHF stations poorly serve their viewing public and that the Commission has encouraged digital broadcasters to operate in the UHF band in order to better serve their public.⁵

Following the grant of the Channel 11 displacement application, Entravision filed a second digital displacement application, on September 22, 2010, in File No. BDISDTA-20100922ABX. In support of that request, Entravision noted that its operation on Channel 11 would be affected by operation of Digital Station KTTV, Channel 11, Los Angeles, California. Entravision proposed that it be authorized to operate on UHF Channel 40, which was free of the potential interference on the VHF channels and, owing to the inherent limitations of VHF operations in the digital mode, would better serve the growing Latino population that lives throughout the Coachella Valley of California.

This attempt to provide superior Spanish-language digital television service to the Coachella Valley fell victim to the efforts of Journal Broadcasting Corporation ("Journal"). Journal was then the licensee of Full-Service Station KMIR-TV, Palm Springs, California.⁶ It

⁵ See submission of ABC, Inc. in FCC File No. BDSTA-20120619ABX.

⁶ Interestingly, Journal abandoned any interest in KVER when it decided to sell KMIR-TV and, in the fall of 2013, secured FCC consent to assign its KMIR-TV license to a third party. The

also sought to add LPTV stations, including one for Channel 40 (File No. BNPDTL-2010519AEB) in an effort to reach more of the Coachella Valley. Pursuant to the Commission's rules, however, a displacement application would trump a new application.

As one would expect, the Entravision filings for KVER caused Journal to swing into regulatory objection mode because of the potential impact of a displacement application. It first, on October 12, 2010, filed a Petition for Reconsideration of the already granted Channel 11 displacement application, despite Commission rules requiring a party to object well before the reconsideration stage.⁷ It followed this up with a Petition to Deny the Channel 40 displacement application. Entravision and Journal submitted extensive pleadings dealing with both procedural and substantive issues.

Nearly two years after the administrative litigation began, the Media Bureau issued its initial decision. In *Letter to Mr. Walter Ulloa*, released September 14, 2012, the Chief of the Video Division granted Journal the relief it sought and rescinded the Channel 11 construction permit and dismissed it and also dismissed the Channel 40 application. Entravision filed a timely Petition for Reconsideration on October 12, 2012 and a further round of pleadings ensued.

While the matter was pending before the Media Bureau, with Channels 11 and 40 denied to KVER, the Media Bureau also took away KVER's ability to operate on Channel 4. In File No. BNPDVL-20100219ABN, a construction permit for operation on digital Channel 4 at Cathedral City, California, was granted to Tara Broadcasting, LLC.

Seeking a means to commence digital operations, Entravision filed a digital companion channel application for Channel 11 in File No. BDCCDVL-20120920ABN. It was granted, with

current licensee has not participated in any matter involving KVER and did not even secure assignment of Journal's LPTV applications, including the one for Channel 40, that were once so important to Journal but now stand dormant and abandoned.

⁷ See Section 1.106(b)(1) of the Commission's Rules.

no objections presented by Journal, on May 6, 2013. On June 18, 2013, Entravision filed an application in File No. BDCCDTL-20130618AAY, requesting a digital companion channel construction permit for operation on Channel 41. *Public Notice*, Report No. 28015, released June 21, 2013. The Channel 41 application was also unopposed by Journal.

On January 14, 2014, Entravision's counsel received an unsolicited call from the Deputy Chief of the Video Division. Entravision was given an offer it could not refuse. If Entravision agreed to dismiss its pending Petition for Reconsideration of the dismissal of the Channel 11 and Channel 40 applications, the Commission would grant the pending Channel 41 digital companion channel application. One day later, on January 15, 2014, Entravision filed its Contingent Motion to Dismiss. Within 60 days, the Commission came through with its end of the bargain. The Channel 11 construction permit was dismissed and the Channel 41 digital companion channel permit was granted. *Public Notice*, Report No. 42801, released March 21, 2014.

Three months after the construction permit was issued, the KVER-LD digital companion channel was broadcasting,⁸ providing the Coachella Valley with the digital service that Entravision has offered on Station KVES-LD, Palm Springs, California, and elsewhere throughout communities where Entravision holds broadcast authorizations and serves significant Latino populations.

ARGUMENT

There exists a clear and convincing basis upon which the Commission should deny the proposed modification of license as provided for in the Order to Show Cause. These arise from the unique facts of this case as well as applicable law and Commission policy. Upon review of

⁸ File No. BLDTL-20140623. *Public Notice*, Report No. 28270, released June 27, 2014.

these provisions, the Commission must not proceed with the modification provided for in the Order to Show Cause and must, instead, deny the modification and grant Entravision's request to convert Station KVER-LD to Class A status.⁹

**THE STATION HAS BEEN SILENT ONLY OWING TO THE UNIQUE FACTS
ARISING FROM ADMINISTRATIVE LITIGATION AND COMMISSION ACTIONS
AND NOT ANY BUSINESS DECISION**

Initially, Entravision submits that it has established the requisite "compelling circumstances" that amply justified its actions involving KVER. As described herein and as evidenced by Entravision's record in the Palm Springs market and elsewhere, Entravision is an active operator of LPTV and Class A stations and has every business reason to operate them and not to keep them in analog service and/or silent.

In this particular situation, all of Entravision's efforts to operate KVER and to convert it to digital service were stymied by a self-interested party, Journal, that opposed Entravision's applications when they might have benefited Journal and then ignored the matter when it lost interest. However, the result was that the Commission dismissed two digital displacement applications, including one for the very same channel (Channel 11) that the Commission later granted a construction permit for. All of these efforts resulted in the inability to plan for, let alone operate, KVER on any basis.

To this end, Entravision asks the Commission what channel should Entravision have operated KVER on? As for Channel 4, the Commission had found, by granting KVER's construction permit, that KVER was displaced from operation on that channel. The Commission

⁹ File No. BLDTA-20140623ABQ.

compounded the inability of Entravision to use that channel by assigning it to Station KAKZ-LD.¹⁰

As for Channels 11 or 40, the Commission had dismissed applications that Entravision filed to use either of those channels. Thus, where was Entravision to go and operate the Station? At every turn, owing to Journal's prior interest in Channel 40, Entravision was prevented from operation, especially in digital, and had submitted a Petition for Reconsideration seeking appropriate relief.¹¹ If this was not enough, it took nearly four years for matters to be resolved and only occurred when the Deputy Chief made Entravision the offer Entravision had been seeking from the outset; operation on Channel 40 (just one channel adjacent to Channel 41 that Entravision had sought in its September 22, 2010 application to the Commission). Had the Commission been willing to review this matter at any early time and make the same offer, Entravision would not have been in a position whereby the Commission could refuse it the continued right to operate as a Class A station.

Likewise, Entravision wishes to note that there was no ability for KVER to operate on a digital basis as its two digital applications were dismissed and its digital companion channel request was not granted until 2013. The only alternative was to operate on an analog basis. Of course, after June of 2009, there were few, if any, analog television sets in use in this country.

¹⁰ A further problem arose in regard to KAKZ-LD. Despite being an LPTV station, KAKZ-LD used Channel 4 as its PSIP. As a result, KVER, despite being a Class A station was unable to identify itself with its viewing public, as required by Sections 73.682(d) and 73.6024 of the Commission's Rules. In an email, dated July 24, 2014, the Deputy Chief of the Video Division denied Entravision use of Channel 4 as a PSIP for KVER, instead, providing it to an LPTV station that unlike a Class A station was not obligated to make use of PSIP. This was a further nail in the coffin of the use of Channel 4 by KVER.

¹¹ The pendency of a Petition for Reconsideration, along with the administrative litigation, has been recognized by the Commission, in other instances, as a basis to toll time limitations. In connection with the three-year rule for broadcast station construction, as contained in Section 73.3598(b)(2), administrative review of a proceeding is a basis for tolling of the time limitation.

Requiring KVER to operate in analog would not only mean little if any service to the public, but would have required KVER to operate with few parties able to watch its over-the-air signal. Clearly, who in the public would have benefited from an analog broadcaster in the post-digital transition period?

In sum, the facts of this case are unique and evidence that the self-interest of Journal along with delays in Commission action resulted in Entravision being unable to operate KVER as it had no authorized channel to make use of. There was no business decision on Entravision's part not to operate KVER. On the contrary, Entravision invested considerable time, effort and expense to secure a digital construction permit and immediately constructed it and continues to operate it. This alone is evidence of Entravision's desire to operate KVER as a digital television station and runs counter to the Commission's claim that a business decision was motivating Entravision.

Section 336(f)(2)(B) of the Communications Act provides that where the Commission has, at the appropriate time, reached a determination "that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section," the Commission is required to grant Class A status. As previously noted, the Station has provided valuable Spanish-language programming in a television market that has a heavily Latino population. Entravision submits that the meritorious performance in serving the public interest it has provided since 2000, the problems it faced in securing authorization from the Commission to operate KVER as a digital station, and Entravision's prompt construction of the digital facility once authorized, all stand as more than ample reason for the continued application of Section 336(f)(2)(B) and as a further and substantial basis upon which to maintain the Station's Class A status.

THE BUREAU'S ACTION CONTRAVENES COMMISSION PRECEDENT AND LEGISLATIVE INTENT

In taking its action to order the downgrade of the Station, the Bureau has proceeded in a manner that contravenes the statute establishing the Class A television service, relevant provisions of the Communications Act, and applicable precedent of the Commission in dealing with broadcast stations that have not operated over a lengthy period of time. The Class A television service is a unique subset of the low-power television service. Unlike other low-power television stations, Class A stations have a primary spectrum use status. As a result, Class A stations are, like stations in other full-service broadcast services, entitled to a degree of permanent status, subject to the renewal process and renewal expectancy. More importantly, the Commission has never revoked the license of a full-service station that was off-air during its term and there is no basis for doing so in this instance.¹²

The Class A television service was created under the terms of the Community Broadcasters Protection Act of 1999.¹³ The intent of Congress in doing so, was to create, for certain, qualifying low-power television stations then in existence, a new status that was no longer a secondary one to full-service television stations. *Report of the Senate Committee on Commerce, Science, and Transportation on S. 1427* (the Community Broadcasters Protection Act of 1998) at p. 2. More importantly, the legislation limited the ability of the Commission to modify a Class A station's license. Paragraph (7) of subsection (f) precluded "the Commission from granting **or modifying** a Class A license absent a showing that the Class A station would not cause impermissible interference to other operating stations (emphasis added)." *Id.* at pp. 6-7.

¹² In other instances of a Class A station not meeting one of the Section 336 requirements, the Commission has taken forfeiture actions. See, e.g., *Una Vez Mas Las Vegas License, LLC*, 22 FCC Rcd 6355 (EB 2007); *Aracelis Ortiz*, 19 FCC Rcd 2632 (EB 2004).

¹³ Pub. L. 106-113, 113 Stat. Appendix I at pp. 1501A-594-1501A-598 (1999) and codified at 47 USC 336(f).

Consequently, Entravision submits that Section 316(a) is trumped by the more recent language of Section 336(f)(7). Section 336(f)(7) limits modifications to technical situations. There is no authority to take a license modification action related to Class A compliance matters. Rather, the Commission can only deal with such compliance in the enforcement or renewal contexts.

Even assuming that the Commission determines that Section 316(a) permits the modification of a Class A authorization granted by Section 336, the proposed modification is at odds with ample Commission precedent. In this regard, the Commission decision in *Birach Broadcasting Corporation*, 16 FCC Red 5015 (2001), *aff'd*, 294 F. 3d 164 (D.C. Cir. 2002), is compelling. In *Birach*, a radio station had failed to operate throughout its entire radio term. At renewal, a third party challenged the station's entitlement for renewal on a number of bases, including that the licensee had failed to provide service to the community and that, since the licensee had failed to serve the public throughout the completed license term, it did not deserve to remain the licensee of the station during the ensuing renewal period.

Despite the failure to serve the public at all, the Commission granted the renewal without even designating the renewal application for a hearing. The rationale given for doing so was that "the Commission's longstanding policy has been to encourage silent stations to resume broadcast operations." *Id.* at 5020. Thus, as long as the station resumed broadcasting before its license was forfeited, under provisions of Section 312(g) of the Communications Act, the Commission determined that a renewal of license was an appropriate action.

More importantly, the Commission noted that not renewing the Station's license would have represented a violation of "due process protections that must be afforded to licensees in this situation." *Id.* The question, as posed by the Commission in *Birach*, was whether the licensee

knew or should have known what the Commission expected of it. *McElroy Electronics Corp. v. FCC*, 990 F. 2d 1351, 1358 (D.C. Cir. 1993). Since the licensee did not have “full and explicit notice” of the fact that the licensee could face a license revocation, it was “fundamentally unfair” to deny renewal on the “unique facts of this case.” *Id.* See also *Salazar v. FCC*, 778 F. 2d 869, 871 (D.C. Cir. 1993); *General Electric Co. v. Environmental Protection Agency*, 53 F. 3d 1324, 1328 (D.C. Cir. 1995).

In its brief to the Court of Appeals, the Commission provided further explanation for its determination that a failure to operate did not mandate a non-renewal of license. It reasoned to the Court (at p. 35):

These cases were cited by the Commission, however, not because they arise in similar circumstances, but because they support the general, and fundamental, notion that an agency must provide clear notice of what is required by its regulations before a party can be penalized for not meeting them....The Commission, entrusted with determining whether renewing a broadcast license would be in the public interest, did not believe that such a standard clearly required operation during the license term, and (as discussed above) New World has presented no authority establishing that the public interest standard clearly imposed such a requirement.

The reasoning applied by the Commission in *Birach* is equally applicable to this instance and the Commission is obligated to treat *Entravision* and its Station in a like manner. *Melody Music, Inc. v. FCC*, 345 F. 2d 730 (D.C. Cir. 1965). In this regard, and unlike the station in the *Birach* case, *Entravision* has provided service to its viewers when it has been authorized by the Commission to do so and has only been off-air owing to the actions of a self-interested third party, *Entravision*'s inability to secure from the Commission a channel to operate on, and the length of time it took the Commission to resolve this matter. Just as the Commission recognized the “harsh consequences of a denial” and the “due process protections that must be afforded to licensees...” in *Birach*, so must those policies apply to *Entravision*. In that *Entravision* was not on “full and explicit” notice that of the consequences of being silent, when it first went silent in

2010, and especially given the unique circumstances of this case, and Entravision was acting to achieve the ability to provide digital television service to the greatest number of viewers, it is unfair to modify Entravision's license in this instance. Instead of acting in such a drastic manner, the Commission should set out the policy, as it did in *Birach*, for parties such as Entravision in the future. Absent doing so, in the words that the Commission used in describing the situation where a party is not on notice, there is no reason for Entravision to be penalized in this instance.

Lastly, the application of Section 316(a) is in direct conflict with Section 312(g) of the Communications Act. As described above, Section 312(g) was adopted as part of the Telecommunications Act of 1996.¹⁴ The Congressional intent was clear and reflected a desire that continuing operating authority was subject to a limitation where a party "does not transmit for 12 consecutive months." *Conference Report on the Telecommunications Act of 1996* at p. 186.

Neither Section 312(g) nor the legislative history speaks to the status of a station that fails to operate for a period of less than one year. In fact, the Commission has customarily granted all forms of broadcasters the right to operate for a period of less than one year. This is confirmed in the *Order to Show Cause* where the Bureau points out that "in appropriately compelling circumstances involving a temporary inability to comply," a Class A station is entitled to special temporary authority to operate at variance with Class A requirements, including the on-air requirement. Thus, Entravision submits that Section 312(g) evidences that the Commission cannot modify or withdraw a broadcast station's license in any situation where there is a failure to operate for less than one year.

¹⁴ Pub. L. No. 104-104, 110 Stat. 56 as codified at 47 USC 312(g).

Entravision is entitled to rely on Section 312(g) because it has complied with STA requirements at all times. In turn, the Bureau has granted Entravision the right to remain silent with no mention that either the request or the grant in any way jeopardized the Station's future Class A authority. Entravision believes that it was entitled to rely on such grants as a basis for the continued viability of the Station's Class A standing. In fact, the issuance of the STAs, without any notification of potential loss of Class A standing, serves as further confirmation that only Section 312(g) applies to silent station operation and any action requires a silent station period of one year.

CONCLUSION

It is evident from the arguments presented that the Bureau acted both arbitrarily and capriciously in proposing to modify the Station's license. The Bureau has failed to recognize that the Station has been silent not because of a "business decision" but because KVER was subjected to frivolous administrative litigation meant to protect an application that the party no longer has any interest in, the delays inherent in the Commission's handling of administrative litigation and applications, and the failure of the Commission to provide KVER with a digital channel on which it could serve the public interest, while providing the only possible channel available to KVER to a third party. More importantly, the Commission lacks the authority to take any action that results in the modification of the Station's license for a variety of reasons. These include that the enabling act for Class A stations limited the instances where a modification can occur, that the Commission has never modified a Class A license for failing to operate and given no advance warning of its intention to do so, and that the Communications Act limits the instances where a failure to operate can impact on the underlying license to stations silent for less than one continuous year. Even assuming a statutory basis might exist, Section

336 contains a provision allowing the Commission to maintain a station's Class A status where public interest considerations prevail. On a factual, statutory, or public interest basis, there is a compelling reason for the Commission to reverse its initial determination and not undertake any modification of the Station's license.

WHEREFORE, for the foregoing reasons, Entravision Holdings, LLC, the licensee of Station KVER-CA, Indio, California, respectfully requests that the Media Bureau either deny the modification proposed in the Order to Show Cause or set the matter for hearing.

Respectfully submitted,

ENTRAVISION HOLDINGS, LLC

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Dated: December 8, 2014

DECLARATION

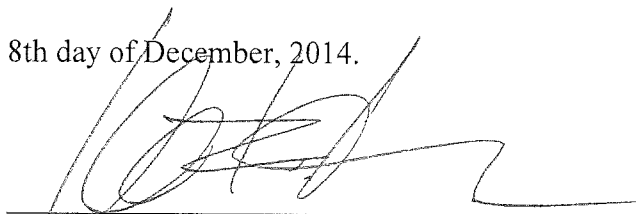
I, Walter F. Ulloa, declare, under penalty of perjury, that the following is true and correct:

1. I am the Chief Executive Officer of Entravision Holdings, LLC, the licensee of Station KVER-CA, Indio, California.

2. I have read the foregoing Response to Order to Show Cause.

3. The facts stated in the Response to Order to Show Cause are true and correct, to the best of my information, knowledge and belief.

Executed at Santa Monica, California on the 8th day of December, 2014.

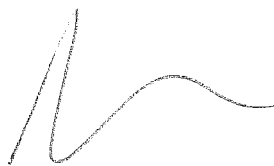


Walter F. Ulloa

CERTIFICATE OF SERVICE

I, Barry A. Friedman, hereby certify that I have served on this 8th day of December, 2014, a copy of the foregoing **Response to Order to Show Cause** on the following parties by first-class mail, postage pre-paid:

Ms. Barbara Kreisman *
Video Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554



Barry A. Friedman

* By Hand