Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
KM LPTV of Milwaukee, L.L.C.	)	**File No. BLTVA-20001206ADM**
	)	
To Convert Low Power Television Station WMKE-LP, Milwaukee, Wisconsin to Class A Station Status	)	

To: Chief, Mass Media Bureau

REPLY

WLS Television, Inc. ("WLS"), licensee of WLS-TV, Channel 7, Chicago, Illinois, by its counsel hereby respectfully submits its Reply to the "Opposition to Petition to Deny" filed on January 31, 2001, by KM LPTV of Milwaukee, L.L.C. ("KM") and the "Opposition to Petition for Reconsideration" filed on February 7, 2001, by KM. At issue in this proceeding is the current and future ability of viewers to receive WLS's Channel 7 broadcast signal.

I. PROCEDURAL BACKGROUND

The Commission permitted WMKE-LP ("WMKE") to move its low power operations to VHF Channel 7 when Low Power Television (LPTV) Branch staff, upon reconsideration, granted WMKE's displacement application and waived certain interference requirements.[1] The grant and waiver explicitly were based on the fact that as a low power licensee, WMKE was obligated to correct any objectionable interference and further, that no new interference was predicted to be

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[1] Letter from Hossein Hashemzadeh, Supervisory Engineer, LPTV Branch, VSD, MMB to Jeffrey L. Timmons, Esq., et al. (Feb. 11, 2000) (1800E3-JLB) (hereinafter "Waiver Letter").

caused to reception of WLS-TV because of the unique design of the antenna that WMKE is to employ. The Waiver Letter stated that if actual interference to WLS viewers resulted, WMKE must remedy any such interference or cease operating on Channel 7 pursuant to Section 74.703(b) of the FCC's low power rules.[2] WLS timely filed a Petition for Reconsideration challenging the basis for the waiver and grant. The Petition for Reconsideration remains pending.[3]

Although its LPTV grant was not final, WMKE pursued Class A status as defined by the Community Broadcasters Protection Act of 1999 ("CBPA")[4] and the FCC's implementing rules.[5] The above-referenced Application to convert WMKE-LP to Class A status was accepted for filing and appeared on public notice on Monday, January 8, 2001.[6] WLS filed a Petition to Deny the conversion of WMKE-LP to Class A status on January 17, 2001 – just six business days after public notice. WLS later learned, however, that the LPTV Branch granted the Application on January 16, 2001, a mere five business days after acceptance of the Application appeared on public notice.[7] WLS filed a timely Petition for Reconsideration of the Class A grant on January 24, 2001.

KM filed an Opposition to WLS's Petition to Deny on January 31, 2001 and an Opposition to WLS's Petition for Reconsideration on February 7, 2001. The substantive issues raised in each of KM's filings are substantially identical.

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2 *See* Waiver Letter.

3 Petition for Reconsideration of WLS Television, Inc. in File No. BPTVL-980918JG (filed Mar. 17, 2000).

4 Pub. L. No. 106-113, § 5008, 113 Stat. 1501 (1999), codified at 47 U.S.C. § 336 (f), (g).

5 *Establishment of a Class A Television* Service, *Report and Order* in MM Docket No. 00-10, 15 FCC Rcd 6355 (2000) ("*Class A Report and Order*").

6 *Public Notice*, Rep. No. 24896 (Jan. 8, 2001).

7 Public Notice of the January 16, 2001 grant appeared on January 19, 2001. *Public Notice*, Rep. No. 44904 (Jan. 19, 2001).

Accordingly, in an effort to avoid duplicative filings and conserve Commission resources, WLS files this single Reply to both Oppositions.

II. GRANT OF THE WMKE CLASS A APPLICATION WAS INCONSISTENT WITH THE STATUTE AND THE COMMISSION'S IMPLEMENTING ORDER AND RULES

KM asserts that WLS cannot distinguish among predicted interference, the waiver process, and actual interference, and that WLS fails to recognize "alternate" means of showing no interference.[8] Of course, WLS is completely cognizant of the differences. Apparently unlike KM, however, WLS also recognizes that Congress in the CBPA created a new protected class of television licensees that no longer are subject to secondary status, and therefore no longer must resolve interference. It is logical that neither Congress nor the Commission imported into the rules governing Class A licensees all interference waiver processes and all waivers of interference precisely because of this change in status and obligations.

As WLS explained in its Petition to Deny and Petition for Reconsideration, to have adopted the same rules in this completely different context with a different allocation of responsibility to resolve interference would have been extremely disruptive and inequitable. The waiver governing WMKE's operations and obligations explicitly required its continued remediation of all instances of interference. Class A stations, by contrast, are themselves protected and not subject to this obligation. Accordingly, both Congress in the CBPA and the Commission in its *Class A Report and Order* explicitly prohibit interference to protected pre-existing primary stations from Class A stations. There is absolutely

[8] Opposition to Petition to Deny at ¶ 2; Opposition to Petition for Reconsideration at ¶ 6.

no basis for the wholesale importation of the waivers that KM advocates, and to do so would be extremely disruptive and harmful to licensees such as WLS.

A. The WMKE Class A Application Failed to Satisfy the No Interference Requirements of the CBPA

KM asserts that its WMKE Class A Application satisfies the "no interference" requirements of the CBPA not because it causes "no interference," but because it creates "no new interference." KM bases its assertion on a mistaken notion that the CBPA does not limit or otherwise address non-interference showings.[9] As WLS stated in its Petition to Deny and in its Petition for Reconsideration, in the CBPA Congress unequivocally prohibited the Commission from granting a Class A license unless the applicant shows that the station will not cause interference within the predicted Grade B contour of a protected analog station.[10] The intent of this provision is especially clear in the legislative history. Early versions of the CBPA would have prohibited "impermissible interference" and thereby allowed the FCC to determine "what constitutes interference."[11] These early versions were replaced by the final version, which prohibits "interference" without qualification. The CBPA simply does not vest the Commission with authority to distinguish between permissible and impermissible (*e.g.*, masked or new) interference. KM, in its Oppositions, fails to address the clear language of the CBPA on this issue and its legislative history.

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9 Opposition to Petition to Deny at ¶ 5; Opposition to Petition for Reconsideration at ¶ 2.

10 The CBPA reads: "The Commission may not grant a class A license, nor approve a modification of a class A license, unless the applicant or licensee shows that the class A station for which the license or modification is sought will not cause . . . interference within (i) the predicted Grade B contour . . . of any television station transmitting in analog format." 47 U.S.C. § 336(f)(7).

11 S. REP. NO. 105-411 at 7 (1998).

B. The Commission Has Not Imported Interference Waiver Processes and Waivers of Interference to its Class A Rules

In its Oppositions, KM makes the same arguments that it repeatedly has advanced in the Commission's Class A proceeding, namely that existing waivers granted to secondary LPTV licensees should be "grandfathered" and those licensees permitted to upgrade to protected Class A status; and that the full panoply of Section 74.705 waiver bases should be available to Class A licensees.[12] These arguments have never been accepted by the Commission. KM is so adamant in arguing that there is a need for "clarification" that it fails to recognize the difference between secondary and primary status and that the CBPA and its legislative history preclude grant of its request.

First, in implementing the CBPA, the Commission stated that Class A applicants should be permitted to "utilize all means for interference analysis" afforded LPTV stations in the DTV *Sixth Report and Order*, including the Longley-Rice terrain-dependent propagation models.[13] KM, in both its Application and its Oppositions, argues that the Commission's *Class A Report and Order* should have stated that Class A applicants should be permitted to utilize all means for "interference analysis and waiver methods."[14] But it did not. With good reason, the Commission made no mention of recognizing and extending waivers granted to LPTV stations to Class A stations. LPTV licensees are required to protect primary stations even with such waivers, whereas Class A stations are not required to do so.

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12 Opposition to Petition to Deny at ¶¶ 6-7.

13 *Class A Report and Order* at ¶ 76 (emphasis added).

14 *See* Application at Exhibits 9-10; *see also* Opposition to Petition to Deny at ¶ 6.

Second, the Commission's rule implementing the Class A to analog interference provision of the CBPA, Section 73.6011, states that Class A stations must protect analog broadcast television stations "based on the requirements specified in Section 74.705" of the Commission's rules (emphasis added).[15] Section 74.705 prohibits an LPTV station's 28 dBu F(50, 10) contour from overlapping a full power television station's Grade B 56 dBu F(50,50) contour. These are the requirements specified in Section 74.705. Significantly, Section 73.6011 does not incorporate all waiver bases. Of course, KM wishes that it did, and pleads that all waiver exceptions should be considered "requirements" as well, but presumably without the concomitant obligation to resolve all interference[16] The waiver exceptions are not incorporated, and they cannot be considered to be because of the express provisions of the CBPA.

C. KM's Recently-Submitted Engineering Report Fails To Demonstrate That WMKE's Facilities Are Consistent With the Statute or the Class A Order and Rules

KM, as an attachment to its Opposition to Petition for Reconsideration, submits an Engineering Report utilizing the Longley-Rice terrain dependant propagation study. The Engineering Report shows, according to KM, that WMKE causes no new interference to WLS-TV.[17] More importantly, WLS notes that the study clearly demonstrates that WMKE's signal causes prohibited overlap within the WLS-TV Grade B contour. As discussed above, for the purposes of the CBPA it is irrelevant whether or not there is "zero new interference." The CBPA prohibits masked as well as new interference, and does not vest the Commission with

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15 47 C.F.R. § 73.6011.

16 Opposition to Petition to Deny at ¶ 7; Opposition to Petition for Reconsideration at ¶ 6.

17 Opposition to Petition for Reconsideration at ¶ 4.

authority to deviate from this prohibition. Accordingly, KM's own Engineering Statement demonstrates that the Application for Class A status was not properly granted.

III. THE CURRENT AND FUTURE ABILITY OF VIEWERS TO RECEIVE WLS'S CHANNEL 7 BROADCAST SIGNAL MUST BE PROTECTED

WLS opposes the above-referenced Application because WMKE's operations as a protected Class A licensee on Channel 7 imperil the ability of viewers to receive WLS's Channel 7 broadcast signal. WLS is genuinely concerned about current and future interference that would deny its viewers continued reliable reception. There is no "hidden motive." In fact, efforts have been initiated to assess the real world interference.

WLS appreciates KM's offer to enter into a Consent Agreement by which it would agree to: (1) accept received interference caused by WLS's analog Channel 7 operations and (2) remedy actual interference that it causes to WLS's analog Channel 7 operations.[18] Unfortunately, however, KM's proffer pertains only to WLS's analog operations on Channel 7, not its future digital operations on Channel 7. KM's proffer therefore does not provide adequate protection to WLS's viewers because it limits its offer to only WLS's analog operations on Channel 7.

WLS-TV is one of the 189 stations for which the FCC allotted an out-of-core DTV allotment (Channel 52).[19] As indicated by the Commission in its January,

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[18] *See* Opposition to Petition to Deny at Exhibit 1.

[19] "Out-of-core refers to an allotment on channels 52-69, spectrum which will be reallocated to non-exclusive broadcast uses. "In-core" refers to allotments within channels 2-51, which will remain for digital broadcasting after the transition to digital is complete. *See Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order,* 13 FCC Rcd 7418, ¶ 54 (1998).

2001, *DTV Biennial Review Report and Order*, WLS will need to relocate its digital operations to Channel 7 by the end of the DTV transition period.[20]

Furthermore, should KM convert to digital operations, the incursion of WMKE's signal will be even more problematic because reception of digital signals is more difficult with a co-channel digital signal than with a co-channel analog signal.[21] Protecting WLS's Channel 7 digital service area is as important as protecting its current analog Grade B service area. The Commission has promised to enforce such protection in decision after decision on digital television. We ask only that it follow through here to ensure protection of WLS's entire service area for both analog and digital.

WLS is not opposed to a Consent Agreement. However, any such agreement must: (1) protect against interference within the WLS-TV DTV service area (the noise-limited contour); and (2) contain a commitment by WMKE that it will not in the future commence digital operations on Channel 7. Protection of the WLS-TV DTV service area is necessary to ensure that the Commission's goals of the DTV transition are met. In addition, due to anomalous propagation characteristics in the Chicago area, the increased protection required for co-channel digital signals compared to analog,[22] and the fact that any interference in the digital context has

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[20] Congress scheduled the transition period to be completed on December 31, 2006, or when 85 percent of viewers have access to digital receiving equipment, whichever is later. *See* 47 U.S.C. § 309(j)(14). In its recent *DTV Biennial Review Report and Order*, the Commission stated that "Indeed, stations in some circumstances may not necessarily be permitted to select their post-transition DTV channels. We presume that, except in extraordinary circumstances, stations that have one in-core and one out-of-core channel will remain on their in-core channel after the transition." *See Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 00-39, ¶ 16 (FCC 01-24) (rel. Jan. 19, 2001).

[21] *See* 47 C.F.R. § 73.623(c)(2). The Desired-to-Undesired signal ratio (D/U) for a co-channel analog signal into a digital signal is +2 dB; the D/U ratio for a co-channel digital signal into a digital signal is +15 dB, or a difference of 13 dB.

[22] *Id.*

the extreme consequence of eliminating all reception (the "cliff effect"), it is equally important for the protection of WLS's viewers that WMKE commit to limit its Channel 7 operations to analog.

WLS looks forward to working with KM to achieve a mutually-acceptable Consent Agreement so that both parties may concentrate on their business of broadcasting.

IV. WLS AND OTHER INTERESTED PARTIES WERE NOT AFFORDED AN ADEQUATE OPPORTUNITY TO RESPOND TO THE WMKE CLASS A APPLICATION PRE-GRANT

KM itself apparently believes that the Commission's unusually hasty grant requires justification and devotes four pages of its Opposition to Petition for Reconsideration to the concept of due process.

Unfortunately, KM's argument wholly ignores the core issue: interested parties like WLS must be afforded an adequate opportunity to respond. KM dismisses precedent which directly addresses this issue[23] and instead offers its own "analogous" precedent, a pair of broadcasting decisions – *Metromedia, Inc. and Improvement Leasing Co.* – that do not involve the failure to provide an opportunity to respond. To illustrate, KM relies on *Improvement Leasing Co.*, which involves the following facts: notice that an application was accepted for filing appeared on August 17, 1978; a Petition to Deny was filed March 29, 1979 (six months later but outside the statutory 30 days); the application was granted August 16, 1979 (one year after public notice of acceptance for filing).[24] Exactly why KM believes that this is analogous to the instant situation, a situation where grant occurred five business days after public notice of acceptance for filing, is unknown.

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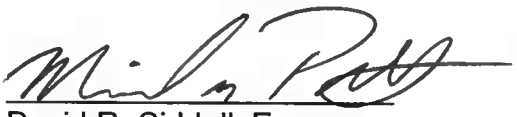
23 *Southern Pacific Satellite Company*, 92 F.C.C.2d 666 (1982).

Nonetheless, *Metromedia* stands for the proposition that WLS's Petition for Reconsideration must be given full consideration. And *Improvement Leasing Co.* makes it clear that WLS's Petition to Deny is also worthy of the Commission's full consideration.[25] On these points, WLS is in complete agreement with KM.

V. CONCLUSION

For the foregoing reasons, WLS respectfully requests that the Bureau, upon reconsideration, deny KM's Application to convert WMKE-LP to Class A status.

Respectfully Submitted,



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[24] *Improvement Leasing Co.*, 73 F.C.C.2d 655 (1979).

[25] *See Metromedia, Inc.*, 56 Rad. Reg. 2d (P & F) 1198, ¶ 9 (1984) and *Improvement Leasing Co.*, 73 F.C.C.2d 655, ¶ 21 (1979).

CERTIFICATE OF SERVICE

I, Michael M. Pratt, do hereby certify that a copy of the foregoing Reply was sent by first-class mail, this 12th day of February, 2001, to the following:

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