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

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In re Application of)
)
KM LPTV of Milwaukee, L.L.C.)
)
To Convert Low Power)
Television Station WMKE-LP,)
Milwaukee, Wisconsin)
to Class A Station Status)

File No. BLTVA-20001206ADM

To: Chief, Mass Media Bureau

**PETITION FOR RECONSIDERATION
OF
WLS TELEVISION, INC.**

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EXECUTIVE SUMMARY

WLS-TV files this Petition for Reconsideration because it is adversely affected by the Mass Media Bureau Staff's grant of a Class A license to WMKE-LP in Milwaukee, Wisconsin.

This Class A grant would remove protections against interference with WLS-TV reception within WLS-TV's protected service area. These very same protections were relied upon explicitly by the Staff less than one year ago in granting the WMKE-LP license and waiver of one of the Commission's interference rules.

Without these protections against interference, viewers within the protected Grade B contour of WLS-TV are stripped of protection against interference and WLS-TV is without recourse to require correction of the interference situation. This removal of protection against interference was incorrectly granted and is arbitrary and capricious for the reasons stated below.

WLS-TV filed a Petition to Deny the WMKE-LP Class A application on January 17, the sixth business day after public notice of the application's acceptance for filing. However, in a break from its usual processing schedule associated with prior Class A applications, the LPTV Branch granted the application a mere five business days after the initial public notice. The Commission has recognized that a period similar to that here does not afford the public an adequate opportunity to respond.

A waiver of the Commission's LPTV-to-analog broadcast interference requirement cannot be "grandfathered" because: (1) the Community Broadcaster's Protection Act unequivocally prohibits the Commission from granting a Class A license unless the applicant shows that the station will not interfere within the predicted Grade B contour of a protected analog station, such as WLS-TV; and (2) in its Class A Report and Order, the Commission declined to adopt KM's proposal that applicants should be permitted to use LPTV waivers to obtain Class A status.

Finally, although not disclosed by WMKE-LP in its Class A application, WMKE-LP's license is not final. It remains subject to a Petition for Reconsideration filed by WLS-TV.

Accordingly, WLS-TV requests that the grant of WMKE-LP's application for a Class A license be rescinded.

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To: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

WLS Television, Inc. ("WLS"), licensee of WLS-TV, Channel 7, Chicago, Illinois, by its counsel and pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, hereby respectfully requests that the Mass Media Bureau reconsider the actions set forth in an instrument of authorization dated January 16, 2001, from the LPTV Branch, Video Services Division, Mass Media Bureau, converting the facilities of WMKE-LP, Milwaukee, Wisconsin, to Class A status.¹ For the reasons below, WLS requests that the Bureau, upon reconsideration, deny KM LPTV of Milwaukee, L.L.C.'s ("KM") above-referenced application ("Application").

¹ *Public Notice*, Rep. No. 44904 (Jan. 19, 2001). Section 1.106(f) of the Commission's rules provides that a petition for reconsideration "shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules" 47 C.F.R. § 1.106(f). Accordingly, this Petition is timely filed.

I. INTRODUCTION

WLS is adversely affected by the conversion of WMKE-LP to Class A status and was not afforded an adequate opportunity to oppose the Application.²

A. WMKE-LP's LPTV Authorization Is Not Yet Final

On February 11, 2000, upon reconsideration of an earlier denial and over the objections of WLS,³ LPTV Branch staff granted the application of KM allowing WMKE-LP to move its low power operations to VHF Channel 7. The grant was accompanied by a concurrently-granted waiver of the interference requirements contained in Section 74.705(d)(1) of the Commission's rules ("Waiver Letter").⁴ WLS timely filed a Petition for Reconsideration that remains pending.⁵

The waiver and grant were based upon KM's argument that predicted interference within the WLS-TV Grade B contour is overlapped by interfering contours of one or more other Channel 7 stations -- an analog station in Traverse City, Michigan (WPBN) and a digital station in Grand Rapids, Michigan (WOOD-DT).⁶ The Waiver Letter stated that no new interference was predicted to be caused to WLS-TV by the signal of WMKE-LP, but if in fact actual interference to WLS-TV viewers resulted, WMKE-LP would be required to remedy any such

² 47 C.F.R. § 1.106(b)(1).

³ See File No. BPTVL-980918JG.

⁴ 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").

⁵ Petition for Reconsideration of WLS Television, Inc. in File No. BPTVL-980918JG (filed Mar. 17, 2000). The arguments made in WLS-TV's Petition for Reconsideration are compelling and the Petition for Reconsideration is incorporated by reference herein. Nothing in this Petition for Reconsideration should be construed as accepting the grant contained in the Waiver Letter.

⁶ See Waiver Letter.

interference or to cease operating on Channel 7 pursuant to Section 74.703(b) of the FCC's low power rules.⁷

B. KM Concedes Causing Interference Within WLS-TV's Protected Contour In the WMKE-LP Class A Application

On April 4, 2000, pursuant to the Community Broadcasters Protection Act of 1999 ("CBPA"),⁸ the FCC released final rules⁹ to permit low power television stations to obtain permanent protected status as Class A television stations. The rules provide for a bifurcated licensing process. WMKE-LP completed the first step by filing a certification of eligibility with the FCC.¹⁰ The LPTV Branch's grant of the above-referenced Application to convert to Class A status is the second and final step in the process converting a secondary station to primary status.

KM, in its Application, concedes that operation of WMKE-LP on Channel 7 causes co-channel interference within the protected Grade B contour of WLS. The Application does not contain the required certification that the Class A applicant's facilities comply with the Commission's rules regarding protection of analog broadcast stations (47 C.F.R. § 73.6011).¹¹ Nor does the Application reference the fact that the grant of its LPTV license to operate on Channel 7 is not final. Instead, KM's Application contains an exhibit arguing that the waivers underlying WMKE-LP's non-final LPTV authorization provides an adequate basis for granting the station Class A status.¹²

⁷ 47 C.F.R. § 74.703(b).

⁸ Pub. L. No. 106-113, § 5008, 113 Stat. 1501 (1999), codified at 47 U.S.C. § 336 (f), (g).

⁹ *Establishment of a Class A Television Service, Report and Order* in MM Docket No. 00-10, 15 FCC Rcd 6355 (2000) ("*Report and Order*").

¹⁰ *Public Notice*, Rep. No. 97659 (Feb. 8, 2000).

¹¹ Application at p. 5.

¹² *Id.* at Exhibits 8-9.

C. Grant of the WMKE-LP Class A Application Violated Established Principles of Due Process

Despite the special circumstances identified by KM, the LPTV Branch accepted the Application and placed the acceptance on public notice on Monday, January 8, 2001.¹³ WLS filed a Petition to Deny the conversion of WMKE-LP to Class A status on January 17, 2001 – the sixth business day after public notice. The LPTV Branch, however, granted the Application on Tuesday, January 16, 2001, *a mere five business days after acceptance of the Application appeared on public notice*. Consequently, WLS was unable to oppose the grant in a timely fashion.

WLS acknowledges that the CBPA requires the FCC to act upon applications for Class A status in an expedient manner.¹⁴ However, Congress has recognized that in carrying out its licensing authority it also is important that the Commission afford interested parties an “adequate opportunity to protect their interests in an orderly and logical manner.”¹⁵ This requirement is derivative of the fundamental principles of due process – notice and an opportunity to respond, that have been recognized by the U.S. Supreme Court.¹⁶ The Commission itself has affirmatively recognized that a period similar to that afforded to parties interested in the WMKE-LP Class A Application does not afford the public an adequate opportunity to respond.¹⁷ Furthermore, the five-day window for opposing parties to address the

¹³ *Public Notice*, Rep. No. 24896 (Jan. 8, 2001)

¹⁴ See 47 U.S.C. § 336(f)(1)(c) (requiring the Commission to award Class A licenses within 30 days after receipt of acceptable applications).

¹⁵ H.R. Rep. No. 1800, 86th Cong., 2d Sess (1960).

¹⁶ See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

¹⁷ *Southern Pacific Satellite Company*, 92 F.C.C.2d 666 (1982) An amendment to a pending application was placed on public notice July 23, 1982 (Friday) and the Commission issued an Order

WMKE-LP Class A application deviated significantly from the processing schedule associated with prior Class A applications.¹⁸

The opportunity provided to interested parties to respond to KM's Application to convert WMKE-LP to Class A status was unreasonably brief under normal circumstances, and completely inadequate given that on its face the applicant could not certify compliance with statutory and Commission requirements. Consequently, WLS, a party adversely affected by the grant of KM's Application to convert WMKE-LP to Class A status, was not afforded an adequate opportunity to protect its interests pre-grant.

II. ARGUMENT

A. **Conversion of WMKE-LP to Class A Status Was In Error Because the Station Causes Interference Within the Predicted Grade B Contour of WLS-TV**

KM in its Application reveals that WMKE-LP's facilities do not comply with the Commission's rules regarding protection of analog broadcast stations (47 C.F.R. § 73.6011).¹⁹ Notwithstanding its admitted failure to comply with Section 73.6011, KM argues that WMKE-LP should be granted Class A status based on a theory that the waiver of Section 74.705 underlying WMKE-LP's low power authorization on a non-interference secondary basis provides a foundation for being granted protected primary Class A status.

granting related applications on July 29, 1982 (Thursday). The Order did not address the amended application because the "public did not have an opportunity to respond."

¹⁸ See, e.g., File No. BLTVA-20000823ACQ (public notice of acceptance for filing appeared 9/13/00 and grant occurred 10/13/00); File No. BLTVA-20001030AAD (public notice of acceptance for filing appeared 11/16/00 and grant occurred on 12/14/00); File No. BLTVA-20001114ABM (public notice of acceptance for filing appeared 12/5/00 and grant occurred on 12/29/00); and File No. BLTVA-20001201ACJ (public notice of acceptance for filing appeared on 1/4/01 and grant occurred on 1/17/01).

¹⁹ Application at p. 5 and Exhibits 9-10.

Specifically, KM relies on language from the *Class A Report and Order*, in which the Commission determined that Class A applicants should be permitted to “utilize all means for interference analysis” afforded LPTV stations in the DTV *Sixth Report and Order*, such as Longley-Rice terrain-dependent propagation models.²⁰ KM asserts that the language from the *Report and Order* means that Class A applicants may utilize all “interference analysis and waiver methods permitted in the DTV proceeding.”²¹

Despite KM's creative attempt to bootstrap the waiver it received as a low power licensee with only secondary status into Class A protected status, the fact that WMKE-LP's signal causes interference within WLS-TV's predicted Grade B contour bars grant of Class A status to WMKE-LP. KM's interpretation of the *Class A Report and Order*: (1) is contrary to the CBPA; (2) is contrary to the plain language in the *Report and Order*; and (3) has been implicitly rejected by the Commission.

1. The CBPA Unequivocally Prohibits Grant of Class A Status Unless the Station Will Not Cause Interference Within the Predicted Grade B Contour of an Analog Station

The CBPA unequivocally prohibits 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:

(7) No interference requirement. —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—
(A) interference within—

²⁰ *Report and Order* at ¶¶ 76 (emphasis added).

²¹ Application at Exhibits 9-10 (emphasis added).

(i) the predicted Grade B contour (as of the date of the enactment of the Community Broadcasters Protection Act of 1999, or November 1, 1999, whichever is later, or as proposed in a change application filed on or before such date) of any television station transmitting in analog format;²²

If a station causes interference within a full power analog station's predicted Grade B contour, the statute flatly prohibits Class A status being extended to that station and does not grant the Commission authority to waive such interference or to distinguish between permissible and impermissible interference.

The absolute nature of this statutory provision is demonstrated by the fact that earlier versions of the CBPA would have prohibited "impermissible interference." The Committee Report on the legislation by the Senate Committee on Commerce, Science, and Transportation stated that the provision was intended to provide the FCC with flexibility in determining "what constitutes interference."²³ The final version that became law, however, was specifically amended to be more restrictive and prohibits "interference" without qualification. The intent of Congress therefore is clear that no protected station should have to accept interference within its predicted Grade B contour. This Congressional judgment is fully justified by the fact that elevating an LPTV licensee to Class A protected status eliminates the requirement that the licensee is responsible for resolving all interference.

2. *Waivers Associated with a Station's LPTV Authorization Do Not Provide a Valid Foundation for Class A Status*

The Commission did not, and pursuant to the language of the CBPA, could not, make the determination that a station which causes interference within the

²² 47 U.S.C. § 336(f)(7).

²³ S. REP. NO. 105-411 at 7 (1998).

Grade B contour of a full power analog station remains eligible for Class A protected status by virtue of a waiver associated with the station's low power secondary authorization.

In implementing the CBPA, the Commission merely 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. The Commission made no mention of recognizing and renewing waivers granted to LPTV stations in order to obtain Class A status.

Accordingly, the Commission's implementing rule, 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.²⁴ 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. There is no evidence in the *Report and Order*, or in Section 73.6011, indicating that the Commission intended to incorporate the full panoply of Section 74.705 waiver bases into Section 73.6011.

3. *KM's Arguments Supporting the Use of LPTV Waivers as a Foundation for Class A Status Have Been Implicitly Rejected by the Commission*

Finally, it is emphasized that KM, in both its Comments and Reply Comments in the Class A proceeding, unsuccessfully argued this very same issue. KM argued that LPTV stations desiring to convert to Class A status should be permitted to rely upon all existing waivers of the requirements for interference

²⁴ 47 C.F.R. § 73.6011.

protection to analog full power television stations granted to them as LPTV licensees.²⁵ The Commission did not adopt KM's proposal. KM is well aware of this fact, and filed a Petition for Reconsideration in which it once again asks the Commission to "grandfather" all LPTV waivers.²⁶

B. Conversion of WMKE-LP to Class A Status Was In Error Because WMKE-LP's Particular Low Power Authorization Fails to Provide A Sufficient Basis for Class A Status

Assuming arguendo that KM's interpretation of the CBPA and the Class A *Report and Order* is valid, and interference waivers granted to low power stations may form the basis for Class A status, there are multiple additional reasons why WMKE-LP's particular waiver fails to provide a sufficient basis for Class A status.

First, LPTV Branch staff, in granting KM's displacement application and waiver of Section 74.705(d)(1) of the Commission's rules, explicitly relied upon the provisions of Section 74.703(b) of the Commission's rules,²⁷ which require that low power television stations remedy actual interference. As a Class A station, WMKE is not subject to Section 74.703. The result is that viewers of WLS who suffer interference lose the protection provided by Section 74.703(b). In other words, WMKE is not required to remedy any actual instances of interference within WLS's protected contour and viewers thereby are left unprotected.²⁸ WMKE-LP's waiver

²⁵ See Comments of KM Communications, Inc., et al. in MM Docket No. 00-10, at 13 (filed Feb. 10, 2000); Reply Comments of KM Communications, Inc., et al. in MM Docket No. 00-10, at 11 (filed Feb. 22, 2000).

²⁶ See Petition for Reconsideration of KM Communications, Inc. et al. in MM Docket No. 00-10 (filed June 9, 2000).

²⁷ See Waiver Letter; see also 47 C.F.R. § 74.703(b).

²⁸ The probability of such interference is substantial for a number of reasons. WMKE-LP's antenna is a fed array of seven CL-713 antennas theoretically designed as a single radiating structure to provide the desired performance. An array of multiple fed antennas displays completely different characteristics than a single antenna, and each antenna must be fed with a correct proportion of the total power and at correct phases. See Opposition to Petition for Reconsideration of WLS Television, Inc. in File No. BPTVL-980918JG (filed Jan. 19, 2000).

was explicitly grounded on the secondary status of WMKE-LP, and that status was relied upon to ensure reception of WLS-TV by its viewers. Class A status eradicates the very protection upon which the waiver was granted.

Second, WMKE-LP's low power authorization is the subject of a pending Petition for Reconsideration filed by WLS, and therefore is not final. Class A protected status was intended for established stations and should not be granted in the absence of a final low power authorization.

III. CONCLUSION

The LPTV Branch erred in allowing KM to bootstrap its non-final LPTV authorization into a Class A authorization. The CBPA explicitly prohibits the granting of Class A status to a station that causes interference within the predicted Grade B contour of a full power analog station. Commission rules implementing the CBPA are consistent with this prohibition. Even if such interference did not preclude Class A status, WMKE's LPTV authorization should not have been converted to Class A status because WMKE-LP's underlying LPTV authorization is non-final and explicitly based, among other things, on its obligations as a secondary licensee to remedy interference.

For these 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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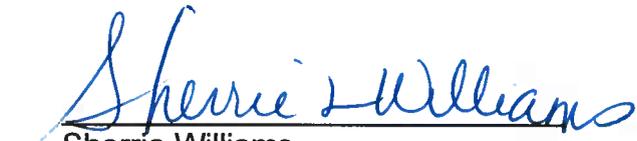
CERTIFICATE OF SERVICE

I, Sherrie Williams, do hereby certify that a copy of the foregoing Petition for Reconsideration was sent by first-class mail, this 24 day of January, 2001, to the following:

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