

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of:

KM LPTV of Milwaukee, L.L.P.

to Convert LPTV Station WMKE-LP,
Milwaukee, Wisconsin to Class A Station

File No. BLTVA-20001206ADM

To: Chief, Low Power Television Branch
Mass Media Bureau

PETITION FOR RECONSIDERATION

Milwaukee Area Technical College ("MATC"), by its counsel and pursuant to Section 1.106 of the Commission's rules, petitions for reconsideration of the grant, on January 16, 2001, of the above-referenced application for Class A license filed by KM LPTV Milwaukee, L.L.C ("KM"). MATC submits that the Class A operations of Station WMKE-LP on Channel 7 compromises the future DTV reception and operations of WMVS-DT and contradicts the Commission's objective for a smooth digital rollout. Accordingly, MATC asks the staff to reconsider its decision and deny the WMKE-LP Class A application for the reasons given below.

Procedural Issues

MATC meets the standard for reconsideration in this instance. With all due respect to FCC staff, MATC submits that the staff acted hastily in granting the WMKE-LP Class A application and may have overlooked the complicating rule waiver involved. Moreover, reconsideration in this instance would be in the public interest.

The WMKE-LP application appeared on Public Notice as accepted for filing on January 8, 2001 in Report No. 24896. A mere five business days later, on January 16, 2001, the FCC granted the application. This gave MATC only four business days to prepare and file an objection to the Class A application. Clearly, the FCC provided MATC with an insufficient amount of time to object, especially in light of the fact that WMKE-LP's operations on Channel 7 have previously been opposed by MATC and other area broadcasters.

MATC acknowledges that the Community Broadcasters Protection Act of 1999 ("CBPA") requires the FCC to act upon applications for Class A status within 30 days of acceptance. However, Congress has recognized that in carrying out its licensing authority, it is also important that the FCC afford interested parties adequate notice and time to respond. Thus, under Section 309(d)(1) of the Communications Act of 1934, as amended, the FCC cannot act on an application until after it has been on Public Notice for 30 days. In this case, the four business days provided to interested parties to respond to KM's Class A application were unreasonably brief given that the WMKE application did not comply with statutory and FCC rules regarding interference and included an interference waiver request.

This was not a "plain-vanilla" Class A application. First, the application included complicating factors of interference rule waivers that have a considerable impact on WMVS-DT's future operation. When WMKE-LP initially requested and was granted waiver of certain interference requirements, it sought these waivers as an LPTV station -- a secondary service. Now, WMKE-LP seeks protected, primary Class A status and wants to incorporate by reference the previous waiver grant. It should not have been allowed to do so. Second, the FCC's grant of the WMKE-LP displacement application to relocate to Channel 7 remains subject to a Petition for Reconsideration, which is pending in FCC File No. BPTVL-980918JG. Lastly, the FCC

overlooked KM's pending Petition for Reconsideration in the Class A rulemaking proceeding, which raises the same interference protection issues raised in the WMKE-LP application.¹ These issues are more appropriately addressed in the notice and comment rulemaking proceeding, not in a licensing proceeding such as this.

Moreover, reconsideration in this instance is in the public interest. As part of the need for an orderly DTV transition, the public interest requires protection of MATC's DTV station. By hastily granting WMKE-LP's Class A application, WMVS-DT's operation has been compromised. Frankly, such action disserves the public interest. Accordingly, MATC meets the standard for reconsideration in this instance.

Factual Background

MATC is the licensee of noncommercial educational Station WMVS-DT, Channel 8, Milwaukee, Wisconsin, which is first adjacent to the operations of Station WMKE-LP on Channel 7. The WMKE-LP license history is somewhat tortured and it briefly summarized here:

* On June 1, 1998, KM filed a displacement application requesting operation of Station WMKE-LP on Channel 38. (See File No. BPTVL-980601KD). On September 18, 1998, KM filed an amendment to this application seeking to specify operation on Channel 7. (See File No. BPTVL-980918JG). On July 19, 1999, the FCC dismissed the displacement application because operation of WMKE-LP, as amended to Channel 7, would cause objectionable interference to the proposed digital operation of Station WMVS-DT.

* On September 1, 1999, KM filed a Petition for Reconsideration of the FCC's dismissal of the WMKE-LP displacement application. The FCC denied this Petition. On December 30, 1999, KM filed a request for STA to begin LPTV operations on Channel 7.

* Also during the month of December, MATC made KM aware of its intentions to commence DTV operations on Channel 8. On January 6, 2000, KM filed another Petition for Reconsideration of the FCC's dismissal of the WMKE-LP displacement application. On January

¹ In its Petition for Reconsideration of the Class A *Report and Order*, KM asks the FCC, *inter alia*, to allow LPTV stations seeking to convert to Class A status to do so under all existing LPTV waivers of the requirements for interference protection. See Petition for Reconsideration of KM Communications, Inc., et al., in MM Dkt. No. 00-10 (filed June 9, 2000).

26, 2000, MATC filed an objection to the operation of the Milwaukee LPTV station on Channel 7 and to KM's accompanying STA request. MATC filed its Reply on February 18, 2000.

* By letter dated February 11, 2000, the FCC reinstated and granted the WMKE-LP displacement application for Channel 7. The FCC found that WMKE-LP's proposed operation on Channel 7 was not predicted to cause objectionable interference to the operation of WMVS-DT. The FCC went on to state that if actual interference did occur to the WMVS-DT signal, KM would be required to resolve the problem.

* On March 6, 2000, by telephone call, MATC notified KM of the commencement of program tests over the WMVS-DT facilities and expressed its concern that WMKE-LP's operations may be causing interference to the digital station's signal. By letter dated March 7, 2000, KM replied to MATC's telephone call. On March 17, 2000, WLS Television, Inc., another party in interest, filed a Petition for Reconsideration of grant of the WMKE-LP displacement application. This petition remains pending.

* On December 5, 2000, KM filed the WMKE-LP application for Class A license. (See FCC File No. BLTVA-20001206ADM.) This application appeared on Public Notice on January 8, 2001. Five business days later the FCC granted the application. Public notice of the grant was released on January 19, 2001.

Argument

A. Grant of the WMKE Class A License Conflicts with the CBPA

MATC submits that the FCC staff erred in granting the WMKE Class A license. First, the grant of the WMKE Class A license conflicts with the CBPA. See 47 U.S.C. § 336(f), (g). The CBPA unequivocally prohibits the FCC from granting a Class A license unless the applicant shows that the station will not cause interference to a DTV station's protected service area.² Accordingly, the statute requires WMKE-LP to fully protect MATC's DTV station. And KM admits in an exhibit to its Class A application that WMKE does not fully protect digital Station WMVS-DT. Thus, grant of its Class A license contradicts the plain language of the CBPA.

² Section 336(f)(7)(A)(ii)(I) and (II) of the CBPA provides that "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] to the digital television service areas provided in the DTV Table of Allotments [and] the areas protected in the Commission's digital television regulations (47 C.F.R. 73.722(e) and (f)".

KM argued that WMKE-LP should be granted Class A primary status based on a theory that the waiver of Section 74.706 underlying WMKE-LP's low power authorization on a non-interference secondary basis provides a basis for waiver here. However, the statutory language of the CBPA and the Commission's implementing rule, Section 73.6013, clearly prohibit interference within a digital station's noise-limited contour. Importantly, the statute does not distinguish between permissible and impermissible interference. Consequently, if a Class A applicant causes interference within the DTV service area (the noise-limited contour), the statute prohibits Class A status from being granted to that station. The WMKE-LP Class A application proposes just this: interference to WMVS-DT's signal reception. Accordingly, the WMKE Class A license should be rescinded.

B. Grant of the WMKE Class A License Conflicts With the *Class A Report and Order*

Second, grant of the WMKE Class A license also conflicts with the *Class A Report and Order*.³ The *Report and Order* makes Class A proponents subject to the interference protection criteria in Sections 73.622 and 73.623 of the FCC rules.⁴ WMKE does not meet these requirements. Section 73.622(e) defines a DTV station's protected service area as the station's noise-limited contour. Section 73.623 provides the technical criteria for evaluating certain applications. Furthermore, Section 74.706 of the FCC rules provides the interference protection requirements that LPTV and translator stations must afford DTV stations. Section 74.706(d) of the rules states that a LPTV application will not be accepted if the ratio of its field strength to that of a first-adjacent DTV station fails to be +48 dB at all points with the DTV noise-limited

³ See Establishment of a Class A Television Service, 15 FCC Rcd 6355 (2000) ("*Report and Order*").

⁴ See *Report and Order*, 15 FCC Rcd at ¶ 78-79.

area if the LPTV station is located within this same area. The KM application concedes that WMKE-LP is located within first-adjacent Station WMVS-DT's noise-limited contour and that it fails to be +48 dB at all points within this contour.

Thus, grant of the WMKE Class A license is contrary to the plain language of the CBPA, the Class A *Report and Order*, and the FCC's own rules and, thus, must be denied.

C. Grant of the WMKE Class A License Compromises the WMVS DTV Conversion Plans

Third, grant of the WMKE Class A license compromises MATC's DTV conversion. MATC, a public institution of higher education, seriously committed to its DTV conversion plans by making a fifteen-million dollar investment in its DTV project. To now allow an LPTV station to cause interference to the reception of the WMVS-DT signal seriously undermines this investment. Moreover, if WMKE has primary status, MATC will now have to protect it, which could thwart the future modification and expansion plans for WMVS-DT.

As the attached engineering statement prepared by MATC's consulting engineer explains, WMVS-DT's current operations are restricted by predicted interference to NTSC stations. However, when the NTSC stations cease operation at the end of the transition period, WMVS-DT could increase its power to the maximum level permitted by Section 73.622(f)(5) of the FCC's rules, if it were not for the existence of this Class A station and its interference waiver. Effectively, providing WMKE -- a station that does not even meet the FCC's interference protection rules -- Class A status places a permanent cap on any changes to WMVS-DT, and thus, will prevent WMVS-DT from "maximizing" to match the other full service DTV stations in the market at the end of the transition period. Clearly, neither Congress nor the FCC intended such a result. It would be contrary to its plans for a smooth digital rollout.

KM claims, however, that WMKE's operations should not cause actual interference to WMVS-DT. However, as MATC pointed out in previous filings, and reasserts here, the FCC and KM must consider that DTV is still in its nascent stages and that there is a dearth of knowledge about DTV propagation and adjacent channel NTSC impact on DTV reception. Especially given that WMKE-LP is located in downtown Milwaukee in an area populated with office buildings and apartment dwellings, the FCC should have erred on the side of caution and denied WMKE's Class A request until it better understands how a DTV signal will work in the "real world."

KM also makes the point of noting in its application that it has not received any complaints of interference from WMVS-DT, or its viewers, since it began operations on Channel 7. In the analog world, this statement might provide evidence of a lack of actual interference. However, in the digital world, this statement is anecdotal at best. The paucity of DTV receivers makes it impossible to determine the impact of WMKE's operations on WMVS's DTV signal reception. How can viewers object when they do not yet own digital receivers? Until DTV receivers are commonplace, and WMVS-DT viewers actually have the hardware to view the DTV signal, MATC will not know the extent of interference. Thus, again, the FCC should have erred on the side of caution and denied WMKE's Class A request until the DTV rollout is further along.

Lastly, MATC remains concerned about the possible conversion of the LPTV station to digital because this would impinge on any future upgrades to the WMVS-DT facilities. In fact, such a conversion by WMKE at its present power will increase interference to WMVS-DT ten-fold. As explained in the attached engineering statement of John F.X. Browne, the required DTV-to-DTV interference protection is 20 dB greater than that for NTSC-to-DTV (the standard

under which interference to WMVS-DT was calculated and waived by the FCC). Thus, in order to maintain the same level of interference to WMVS-DT, as assumed when the waiver under which the WMKE-LP authorization was granted, WMKE would have to operate with an ERP of 30 watts or less. Thus, if WMKE converts to digital, the FCC should restrict its power to 30 watts or less. To do otherwise seriously undermines WMVS-DT's future operations.

D. WMKE's Waiver of the Protection Rules Is Not Justified

Lastly, WMKE-LP's waiver of the protection rules for MATC's DTV station is not justified. WMKE did not meet the high hurdle required of waiver applicants.⁵ It is well-settled that an "an agency must adhere strictly to its rules unless a party can show reasons why in the public interest the rule should be waived, [and] the agency must explain why deviation better serves the public interest."⁶ In its Class A application, WMKE tried to incorporate the interference waiver it was granted as a secondary service, instead of providing a new justification showing why waiver was appropriate for a Class A station. In fact, the WMKE application provides no evidence demonstrating how waiver of the interference protection rules for a Class A station with regard to WMVS-DT would serve the public interest. MATC does not believe it is possible to make such a showing. Even so, the FCC has not explained its deviation from its own rules.

Station WMKE-LP's waiver request was premised on the secondary status of WMKE. KM argued that WMKE-LP should be granted Class A status based on a theory that the waiver of Section 74.706 underlying WMKE-LP's authorization on a non-interference secondary basis

⁵ *Northwest Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁶ *Id.* at 1166.

provides a basis for its ascension to protected primary Class A status. However, FCC staff, in granting KM's displacement application, and associated waiver, explicitly relied upon the provisions of 74.703(b) of its rules, which require that low power television stations remedy actual interference. In fact, the FCC letter, dated February 11, 2000, granting the application and waiver provides that "if interference actually occurs to the WMVS-DT signal, KM will be required to resolve the problem." Granting Class A status eradicates the very protection upon which the waiver was granted.

Moreover, in implementing the CBPA, the FCC 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 FCC made no mention of utilizing waivers granted to LPTV stations in order to obtain Class A status, and its rules are completely consistent with this purpose. Thus, pursuant to the language of the CBPA, the FCC cannot now make the determination that WMKE-LP, which does not meet the required protection ratio at all points within the existing WMVS-DT service area, remains eligible for Class A protected status by virtue of a waiver associated with the station's secondary authorization. In fact, the issue of whether or not LPTV waivers can be transmuted into Class A waivers is the subject of a pending Petition for Reconsideration filed by KM.⁷ The FCC should not prejudge that rulemaking proceeding in the case of this licensing determination.

⁷ Petition for Reconsideration of KM Communications, Inc. *et al*, in MM Dkt. No. 00-10 (filed June 9, 2000)

Conclusion

WMKE-LP's current LPTV authorization, and associated interference waivers, are based in part on the assumption that, as a secondary service, it must remedy complaints of interference. KM's attempt to "bootstrap" its LPTV authorization into a Class A authorization must, therefore, be denied. The CBPA explicitly prohibits the granting of Class A status to a station that causes interference within the noise-limited contour of a DTV station. As the CBPA intends, the FCC should err on the side of caution in protecting DTV from Class A. Accordingly, the FCC should not permit WMKE to obtain Class A status under this set of circumstances. At the very least, the FCC should require WMKE to remedy, promptly, at its own expense, all instances of interference caused to MATC DTV reception, or to cease operations, if such interference cannot be remedied promptly. In addition, if WMKE is permitted to retain Class A status and converts to digital operation, the FCC should require that its ERP be limited to 30 watts.

For these reasons, MATC respectfully requests that the FCC reconsider its decision to grant the application of KM LPTV of Milwaukee, L.L.C. for a Class A station on Channel 7 at Milwaukee, Wisconsin and deny that application.

Respectfully Submitted,

MILWAUKEE AREA TECHNICAL
COLLEGE

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January 31, 2001

CERTIFICATE OF SERVICE

I, Sally Naccarato, a secretary at Dow, Lohnes & Albertson, hereby certify that a copy of the foregoing Petition for Reconsideration was mailed this 31st day of January 2001 to the following:

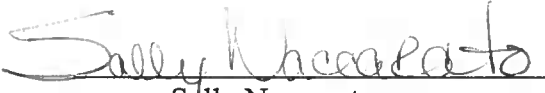
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Engineering Statement
of
John F.X. Browne, P.E.
re
Grant of Class A Status
Low Power TV Station WMKE-LP
Milwaukee, WI

Background

This engineering statement has been prepared in support of a Petition for Reconsideration to be filed by the Milwaukee Area Technical College (MATC) regarding the above captioned matter.

WMKE-LP has recently been granted Class A status by the Commission. MATC objected to the original grant of this facility as a low power TV station under Part 74 because of its concerns regarding the potential for interference to MATC's station WMVS-DT. WMKE-LP is authorized to operate on TV Channel 7 with 3 kW (max) effective radiated power (ERP); WMVS-DT operates on Channel 8 with an ERP of 25.1 kW (max) from a site approximately 6.4 km distant.

Interference Criteria Should Be Observed

The Commission's rules state that an analog LPTV station operating on an adjacent channel to a full-service DTV station must provide the required interference protection "at all points within the DTV station's noise limited contour" (74.706(d)(2)(ii)). The Commission's

rules previously prohibited the construction of an LPTV station inside the protected contour of an adjacent-channel, full-service station as it is impossible to provide interference protection under such a scenario (unless, of course, the stations are co-located). Likewise, it is impossible to meet the interference requirements in this case as the WMKE-LP facility is inside the WMVS-DT protected contour at a non-colocated site.

The Commission granted a waiver of the interference requirement on the basis that the extent of the interference area would be small and, since the LPTV station would be secondary to the full-service station, it would be responsible for resolving any cases of actual interference. With Class A status, WMKE-LP would no longer be required to correct interference to the primary station WMVS-DT and, as a matter of fact and of great concern, WMVS-DT would now have to protect WMKE-LP ^{1/}.

The Primary Public TV Station in Milwaukee
Would be Permanently
Restricted to its Present Facilities

WMVS-DT operates with "maximized" facilities of 25.1 kW. This is considerably below the "normal" maximum power of a Zone I High-Band VHF DTV station ^{2/}. The power is presently restricted by predicted interference to NTSC stations. When these NTSC stations terminate operation at the end of the transition period, WMVS-DT could raise its power to the maximum level permitted by the Commission's rules if it were not for the existence of this Class A station, nee LPTV station granted under a waiver of the Commission's Rules.

^{1/} As noted in its application for construction permit, a substantial portion of the WMKE-LP service area receives interference from WMVS-DT.

^{2/} DTV stations on Channels 7-13 are permitted an ERP of 30 kW (in Zone I) at an HAAT of 305 meters.

**WMVS-DT Will Be Prevented
from Maximizing under the
Provisions of Section 73.622(f)(5)**

Section 73.622(f)(5) of the Rules permits stations to maximize power "to match the coverage of the station with the largest coverage area in the market"^{3/}. Clearly, WMVS-DT would be prevented from doing this if WMKE-LP maintains its Class A status under a waiver.

**The Future Conversion of WMKE-LP
to Digital Operation Will
Increase Interference to
WMVS-DT Ten-Fold**

The new Class A rules permit Class A stations to convert to digital operation in the future. The required DTV-to-DTV interference protection is 20 dB greater than that for NTSC-to-DTV (the standard under which interference to WMVS-DT was calculated and waived by the Commission). Thus, in order to maintain the same affected interference area (to WMVS-DT) as assumed when granting the waiver under which the WMKE-LP authorization was granted, WMKE-LP(DT) would have to operate with an ERP of 30 watts or less. DTV operation at the present power would increase interference to WMVS-DT ten-fold.

**Clearly This Facility Should Not
Be Granted Class A Status**

In summary, the WMKE-LP facility with Class A status:

- receives extensive interference from WMVS-DT within its normally protected contour;

^{3/} The Commission recently clarified this policy in its Report & Order in MM Docket 00-39.

- would not have been approved under the Commission's rules if WMVS-DT was, in fact, an analog station as the applicable rules proscribe the authorization of an adjacent-channel LPTV station inside the protected contour of a full-service station ^{4/};
- effectively places a permanent cap on any changes in WMVS-DT and, thus, will prevent WMVS-DT from being "maximized" to match the coverage area of the other full-service stations in the market at the end of the transition period;
- would have to be limited to 30 watts ERP when converted to digital operation to maintain the same interference impact to WMVS-DT which was assumed in the grant of the waiver which permitted the authorization of the LPTV station under Part 74.

WMKE-LP is a Displacement Facility

WMKE-LP was displaced from Channel 8 by WMVS-DT. While it may have been convenient for it to move to Channel 7, this was – for the reasons stated above – a poor technical solution to the displacement problem. It is not clear that the LPTV licensee has made an adequate showing that no other channel – including UHF – is available without a waiver and, furthermore, a showing that, if no other channel is available without requiring a waiver, the choice of Channel 7 over other channels (which would also require a waiver) results in the most efficient use of the spectrum (i.e., having the least potential interference impact while permitting the maximum development of other authorized facilities).

The Commission should not lose sight of the fact that if WMKE-LP had been originally authorized on Channel 7 (its present channel) it would have been eligible for displacement because of WMVS-DT; it is still eligible today for displacement from Channel 7 under these same rules and policies and one would expect a licensee so situated to seek another channel.

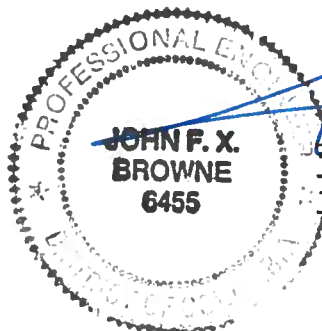
^{4/} Section 74.705(b)(1)

Should an LPTV station which is eligible for displacement because it receives severe interference within its already small service area (thus, not making efficient use of the spectrum) be permitted to exist on a co-equal basis with a full-service station whose ability to provide a wide-area service comparable to that of other full-service stations in its market is seriously impaired thereby? It is suggested that, should the Commission decide to affirm the Class A status of WMKE-LP, the authorization should be limited with respect to WMVS-DT as follows:

- That WMVS-DT can increase its power omnidirectionally to the extent which would be permitted by the FCC if WMKE-LP were not operating on Channel 7 at its present site..
- That WMKE-LP must reduce its power commensurate with appropriate consideration of antenna height such that it does not increase the interference affecting WMVS-DT if it moves to site at a greater separation than 6.4 km.
- That WMKE-LP not be authorized for more than 30 watts ERP on Channel 7 if digital operation is proposed.

Certification

This statement was prepared by me or under my direction. All assertions contained in the statement are true of my own personal knowledge except where otherwise indicated and these latter assertions are based on information from sources known to be reliable and are believed to be true.



John F.X. Browne

John F.X. Browne, P.E.
January 24, 2001