

REQUEST FOR WAIVER

Dilip Viswanath (“Viswanath”), licensee of LPTV Station K44FO, by his counsel and pursuant to Section 1.3 of the Commission’s Rules, respectfully requests a waiver of the Class A license application filing rules to allow acceptance of his late-filed Class A license application for LPTV Station K44FO, Dallas, Texas (the “Station”). Due to his prior law firm’s failure to advise him of the Class A filing deadline and confusion surrounding a change in Viswanath’s counsel, plus an emergency hospitalization of his father, the July 12, 2001 deadline for filing Class A license applications was missed. Viswanath is filing his Class A license application for the Station contemporaneously with this request. In support of his waiver request, Viswanath states as follows:

BACKGROUND

In response to the enactment of the Community Broadcasters Protection Act of 1999 (“CBPA”) Viswanath, with the assistance of his prior law firm, timely filed a certificate of eligibility for Class A status for the Station. On June 2, 2000, the Commission released a Public Notice announcing that Viswanath’s certification had been approved, and that he was eligible to file for a Class A license for the Station.

The Commission released a *Report and Order*, 15 FCC Rcd 6355 (2000) (“*R&O*”), implementing the CBPA and establishing rules for the new Class A service on April 4, 2000. The *R&O* provided that applications for Class A licenses would be accepted commencing on the date the rules adopted in the *R&O* became effective, and would be accepted for a six-

month period following that effective date. The Class A rules became effective on June 9, 2000, and the filing window for Class A license applications opened on that date. The six month filing window was scheduled to close six months later on December 9, 2000.

Over 20 parties filed for reconsideration of the *R&O*. Recognizing that reconsideration would not be completed by the December 9, 2000 filing deadline, and that reconsideration might impact the Class A license application filing process, the Commission decided to extend the filing deadline. In a Public Notice released December 5, 2000 (DA 00-2743), the Commission extended the Class A license filing deadline for a period that would end 90 days after release of the reconsideration order.

On April 13, 2001, the Commission released its *Memorandum Opinion and Order on Reconsideration* in the Class A proceeding (FCC 01-123) (“*MO&O*”). Reciting the language of the December 5, 2000 Public Notice, the *MO&O* stated that Class A applications would be accepted for a period of ninety days after the release of the *MO&O* (*i.e.*, July 12, 2001). LPTV licensees that had obtained grants of their certificates of Class A eligibility were not provided directly with notice of the release of the *MO&O* or any other notice of the establishment of the July 12, 2001 Class A license application filing deadline..

Viswanath was represented by a different law firm until June 26, 2001. On that date, a letter was submitted to the former firm stating that Viswanath wanted his client files transferred to undersigned counsel, who was establishing a new solo practice effective July 1, 2001. Viswanath’s prior firm did not deliver the client files to undersigned counsel until July 10, 2001, just two days before the filing deadline. New counsel did not have sufficient time to audit the files to determine what actions had or had not been taken by the prior law firm with respect to the Station.

To further complicate matters, Viswanath was advised a week before the July 12, 2001 filing deadline that his father would need to undergo emergency open heart bypass surgery. His father was admitted to the hospital on July 12 and was resident in the hospital for a week. Because of the seriousness of that type of surgery, Viswanath was with his father for the week of the hospital stay.

Since undersigned counsel and Viswanath became aware of the missed deadline, they have worked diligently in preparing the application for filing. Undersigned counsel first became aware of the missed deadline on August 3, 2001. Since then, a consulting engineer was engaged to prepare the technical portion of the application. Viswanath and undersigned counsel prepared the legal portion of the application and undersigned counsel prepared the instant waiver request.

The Class A license application for K44FO was not filed in a timely manner because of these unusual and compelling circumstances. Viswanath seeks a waiver of the rules to allow for the acceptance of the Class A license application that is being filed electronically contemporaneously with this request.

A WAIVER IS APPROPRIATE UNDER THESE CIRCUMSTANCES

The Commission can waive any of its rules upon a finding of good cause consistent with the public interest. 47 C.F.R. § 1.3; *WAIT Radio v. FCC*. 418 F.2d 1153 (D.C. Cir. 1969). In deciding whether or not to grant a specific waiver request, the Commission must take into account considerations of hardship and equity in its broader quest for regulation in the public interest. *Id.* The facts of this case demonstrate sufficiently compelling circumstances to

justify grant of the requested waiver.¹ Additionally, no other parties will be affected by accepting Viswanath's late-filed application as this juncture. The public interest would also be served by grant of the waiver, because Viswanath's Station has already been certified by the Commission as eligible for Class A status, meaning that the Station has, and continues to meet the programming requirements for Class A eligibility. Congress and the FCC have both pronounced the importance of protecting LPTV stations that have and continue to serve the public in the manner Viswanath's station has, and that is the whole impetus for the creation of the Class A service.

A. The Particular Facts of this Case Support Grant of the Waiver

Viswanath should not be held accountable for the missed deadline. After authorizing his prior law firm to take the steps necessary to secure the Station's eligibility for Class A status, his reasonable and logical expectation was that the firm would advise him when the Class A license applications would be due. In fact, the prior firm prepared a Class A license application for filing in December 2000, but when the filing deadline was extended, the prior firm advised Viswanath to wait until the *MO&O* was released before filing. Then, the prior law firm failed to advise him of the release of the *MO&O*, or of the July 12, 2001 filing deadline. To make matters worse, his client files were not transferred to undersigned counsel until just two days before the filing deadline.²

¹ Applicants seeking waiver of Commission application filing deadlines demonstrate unusual or compelling circumstances for their waiver requests. *Waiver of Application Filing Deadlines*, 58 RR 2d 1706 (1984).

² Undersigned counsel started his new practice on July 1, 2001. He worked diligently in auditing all of the client files he received, and first became aware of the missed deadline on August 3, 2001, when he initiated a telephone call to the FCC to determine status of the Class A filing deadline. Since then, undersigned counsel has worked diligently with the client, and his

While an applicant is generally bound by the actions of its counsel, the Commission has also recognized that it is appropriate to provide special relief to applicants when the failure to comply with rules and deadlines is more the failure of counsel, than the applicant. *Maricopa County Community College District*, 4 FCC Rcd 7754, 66 RR2d 1733 (Rev. Bd. 1989). In addition to his former firm's contribution to the missed deadline, Viswanath had the added unforeseeable hardship of dealing with his father's impending emergency heart bypass surgery. Under these circumstances, a waiver to allow acceptance of this late-filed application is appropriate.

B. Grant of the Waiver Will Not Harm Other Television Licensees

Viswanath's Class A eligibility certification was timely filed with the Commission, and a Public Notice announcing its acceptance was released on June 2, 2000. From the date the certificate of eligibility was filed, all other LPTV, Class A and full-power stations were obliged to protect the K44FO service area because in adopting the *R&O*, the Commission proposed to "commence preservation of the service area of LPTV stations from the date of receipt of an acceptable certification of eligibility filed pursuant to section (f)(1)(B) of the CBPA." *R&O* at § 39. This protection requirement continues unless there is a finding that the Station is no longer eligible for Class A status.

Other television stations contemplating changes to facilities will not be prejudiced by accepting Viswanath's Class A application at this time. The Station's service area was entitled to protection since the certificate of eligibility for Class A status was filed. Class A license applications are still being processed, so accepting Viswanath's application at this

consulting engineer to prepare the Class A application and the instant waiver request in eleven days.

juncture would not unduly prejudice primary changes looking to make changes to their facilities.

C. The Public Interest and Underlying Purpose of the Class A Rules will be Advanced by Grant of the Waiver.

The Commission interpreted the CBPA as having been designed to “permit a one-time conversion of a single pool of LPTV applications that met specific criteria before the statute was enacted.” *MO&O* at para. 15. To qualify for eligibility for Class A status, a station had to, during the 90 days prior to enactment of the CBPA, (1) broadcast a minimum of 18 hours per day; (2) broadcast an average of at least 3 hours per week of programming produced within the market area served by the station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group; and (3) be in compliance with the Commission's requirements for LPTV stations. *R&O* at § 15. Viswanath’s Station K44FO met this stringent standard.

The CBPA was about rewarding pioneer LPTV operators who qualified for eligibility for Class A with stability from displacement. This stability would reduce expenditures by ending the need to file periodic displacement applications, and afford these licensees greater ability to raise capital to sustain their operations. The critical element of this Class A conversion process was meeting the eligibility criteria. While filing the license application is important, the Commission did state it would, in cases where Class A applicants were unable to timely file their Class A license applications on time, examine those instances on a case-by-case basis to determine their eligibility for filing. *R&O* at § 14. The same consideration for late-filings was not available during the Class A eligibility certification process.

Viswanath’s Station met the eligibility certification requirements, and continues to

operate consistent with the rules and requirements for Class A facilities. If his Station is not granted a Class A license, the Station will not be protected from displacement. The Station has already been forced to move from Channel 19, and would likely be forced to eventually move from Channel 44 if it is not protected by Class A status. If forced to move again, the station would likely fail, and Dallas would lose a local source of niche programming. The public interest would be served, and the goals of the Class A rules advanced, if the requested waiver is granted.

CONCLUSION

Viswanath has operated the Station in a manner that qualifies the Station for Class A status. Viswanath engaged his former law firm to prepare the necessary filings before the FCC to secure a certificate of eligibility for Class A status for the Station. Through no fault of his, the deadline for filing the Class A license application was not met. It would run contrary to established case law to punish Viswanath for actions or omissions of his counsel that were not foreseeable or known to him. *Maricopa., supra.; Shea v. Donohoe Constr. Co.*, 254 U.S.App.D.C. 175, 178, 795 F.2d 1071, 1074 (1986).

The analysis here should be similar to that used to determine when dismissal of an applicant who missed procedural deadlines was appropriate in the comparative hearing context. In those cases, the examination focused on the applicant's proffered justification for the failure to comply, the prejudice suffered by other parties, the burden placed on the administrative system and the need to punish abuse of the system and to deter further misconduct. *Communi-Centre Broadcasting, Inc.*, 856 F.2d 1551 (D.C. Cir. 1988).

Viswanath has presented adequate justification for the waiver in the form of

unusual and compelling circumstances. No other parties will be prejudiced by grant of the waiver and acceptance of Viswanath's Class A application at this juncture.³ Since Class A applications are still being processed, acceptance of Viswanath's application at this time should not cause a significant burden on the administrative system. Finally, there is no evidence to support that Viswanath's late-filing was deliberate or intended to gain him any kind of competitive advantage.

WHEREFORE, it is respectfully requested that Viswanath's late filed Class A application be accepted pursuant to the requested waiver, and processed by the Commission.

Respectfully submitted
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³ Viswanath has been broadcasting notice of the filing of the Class A application over the Station as required by the rules, so the public will have notice and an opportunity to comment on the application.