



Before the
Federal Communications Commission
Washington, D.C. 20554

Received & Inspected
DEC 11 2012
FCC Mail Room

In the Matter of) Facility ID No. 51284
)
Reclassification of License of Class A Television)
Station W28AJ)
Allingtown, Connecticut)

RESPONSE AND OPPOSITION TO ORDER TO SHOW CAUSE

The Law Offices of Hill & Welch, on behalf of Paging Associates, Inc., ("PAI"), pursuant to 47 C.F.R. §1.87, hereby responds to and opposes the Commission's November 6, 2012 *Order to Show Cause* ("Order"). In response and opposition thereto, the following is respectfully submitted:

1) The *Order* proposes to rescind Station W28AJ's Class A status and to reclassify it as a "lower power television" station because Station W28AJ had "fail[ed] to provide information" which had been requested previously by the Commission's staff. *Order*, ¶ 3. PAI's respectfully submits that there are two sets of factual circumstances which counsel against the drastic measure of modification of Station W28AJ. First, the factual circumstances underlying PAI's failure to file the quarterly children's programming reports counsel against the imposition of any severe penalty for failing to file the children's programming reports. Second, the factual circumstances surrounding PAI's failure to timely respond to the Commission's prior letter inquiries also counsel against imposition of a harsh penalty. Undersigned counsel has reminded PAI about the duty a licensee has to respond to Commission correspondence, however, as explained more fully below, this is certainly not a situation where a licensee is simply thumbing its nose at the Commission. While PAI believes that Commission

consideration of these unique factual circumstances will counsel against changing Station W28AJ's station class, there are also some legal arguments which indicate that changing the station class as proposed in the *Order* is inappropriate. Each of these will be discussed in turn.

The Factual Circumstances Underlying PAI's Failure to File The Quarterly Children's Programming Reports

2) On April 10, 2012 the Commission staff sent a letter to Station W28AJ inquiring about the preparation of the quarterly FCC Form 398 reports (Children's Television Programming Report) for calendar years 2010 and 2011. PAI did not respond to that inquiry. On September 18, 2012 the Commission staff sent a follow-up inquiry. PAI did not respond to that inquiry.

3) At the outset, PAI respectfully assures the Commission that children's programming was aired as required by the Commission's rules.¹ While the actual airing of the programming is not an issue in the Commission's letters, PAI considers that it is important to note for the record that the Children's programming was aired and that PAI has complied with the substantive requirement to air Children's programming.²

4) PAI has for many years obtained its children's programming from White Springs Television ("WST"). PAI's recollection is that from the early 2000s up to the period just after the 2008 world-wide economic crisis/collapse, WST transmitted its children's programming signal to PAI

¹ Section 303b of the Communications Act makes the airing of children's programming a consideration at license renewal time and 47 C.F.R. § 73.671 requires TV stations to air children's programming.

² During the relevant time period at issue in the Commission's letter inquiries, and currently, PAI obtains its children's related programming from White Springs Television. PAI is not aware that White Springs Television failed to deliver its contracted programming. PAI's counsel is unable to ascertain from the two Commission staff letters why there is a focus on the FCC Form 398 record keeping requirement to the exclusion of the TV station operating rule found at § 73.671 which requires the broadcast of children's programming.

and its other customers via satellite feed. WST would send periodic e-mail updates to PAI which summarized the programming on the satellite feed and which PAI would use to prepare/file the FCC Form 398 Children's Television Programming Report. Some time after the 2008 economic crisis WST apparently sought to cut costs by 1) changing from a satellite feed to an internet based streaming feed; and 2) WST stopped providing e-mail programming information which PAI could use to create its quarterly FCC Form 398 reports. The reduced level information received from PAI's children's programming about the programming which was sent was, coupled with various life crisis for PAI's owner as discussed below, combined to cause various lapses in PAI's attention to regulatory requirements. It is respectfully requested that the Commission consider the following personal information in connection with its review of this matter.

The Factual Circumstances Surrounding PAI's Failure to Timely Respond to the Commission's Letter Inquiries

5) In addition to the change in the level of information received by PAI from its children's television programmer about the children's programming, W28AJ's owner has been under going a multi-year period of severe personal crisis and emotional distress. Unlike larger communications corporations which will have multiple layers of staffing to fill gaps caused by personal misfortune which could befall any individual at any time, PAI is a very small, family-owned and operated business which is operated 100% by the person who is executing the Certification attached to this *Response*. A personal crisis for a small station's owner can, and has, paralyzed the station. We hope that the following information will help the Commission assess PAI's "intention" during this period.

6) In September 2009 PAI's owner became suspicious that his spouse was having an extra-marital affair. Rather than make an immediate confrontation at that time, PAI's owner waited

through year-end so that the family holiday would not be ruined. In January 2010 PAI's owner initiated a discussion with his spouse concerning the extra-marital affair he suspected was ongoing. Sometime during January 2010 the spouse moved out of the family house and in September 2010 she filed for divorce. From that point in time to January 2012 when the divorce occurred PAI's owner was subjected to a period of multiple investigations into his business affairs and into his personal life. As might be expected, this was a very stressful time and PAI's attention lapsed regarding regulatory paperwork. The point was not to ignore the Commission's report filing rules, but it was a period when the world felt like it was closing in and functioning at a high level was extremely difficult and it appears likely nearly impossible. PAI regrets the lapse in attention, whatever the cause and PAI is currently attempting to see what information it has which can be used to create the missing reports to the extent that it is able to create them.

The Order Is Legally Deficient Regarding Station Class Impairment

7) PAI hopes that the following is taken not as a harsh criticism of the Commission nor of the Commission's desire to obtain rule compliance, but rather as the observations of an attorney who is trying to assist a distraught and overwhelmed Licensee retain a valuable asset, the Class A class status designation. Undersigned counsel has represented PAI in various matters before the FCC since 1985, but this is the first matter in which undersigned counsel has assisted PAI in perhaps 10 years or so. Undersigned counsel considers that this case is best viewed as "hardship" case in which there was not only a world-wide economic collapse similar to what happened at the outset of the Great Depression, a collapse which appears to have caused a reduction in service by PAI's program supplier involving the information PAI used to create the FCC Form 398 reports, there were also severe personal hardships experienced by PAI's critical staff person which immobilized PAI. However,

Commission and court of appeals procedures require that parties before the FCC raise all known issues at the first opportunity so we provide the following legal discussion. Undersigned counsel's hope is that this legal section is reviewed as fulfillment of counsel's duty to raise all matters and not as gratuitous criticism or as a grasping at straws effort.

8) The *Order* proposes to rescind Station W28AJ's Class A status and to reclassify it as a "lower power television" station because Station W28AJ had "fail[ed] to provide information" which included the failure to respond to the Commission's inquiries and the failure to file the FCC Form 398 reports. *Order*, ¶ 3. However, the Community Broadcasters Protection Act of 1999 ("CBPA") provides that PAI's station must be "in compliance with the Commission's *operating* rules for full-power television stations." *Order*, ¶ 2 (emphasis added). There is no allegation in anything the Commission sent to PAI which indicates that there is any operating issue with Station W28AJ. The underlying issue as expressed in the Commission's correspondence to PAI concerns the failure to file quarterly reports. This matter concerns a record keeping/failure to respond issue, not a station operations issue, and changing Station W28AJ's Class A status based upon these informational shortcomings is not authorized by the CBPA.

9) Moreover, the penalty for failing to file forms/provide information is \$3000. April 10, 2012, Letter from Deputy Chief, Video Division to PAI, at 2. There is nothing in the rules which indicates that a station class reduction could result from the failure to file a required report or a series of required reports. The Commission is required to provide prior "full and explicit notice" that loss of a Federally granted right will ensue for the failure to follow a rule; it's a matter of "fundamental fairness." *Salzer v. FCC*, [778 F.2d 869] 778 F.2d 869, 871-72, 875 (D.C. Cir. 1985). With all due respect, the staff cannot create or impose a new penalty merely by sending a letter to a regulated

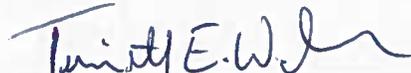
company and claim in the letter that a unnoticed penalty would be applied. The APA requires a rulemaking so that 1) parties would have prior notice of the Commission's requirements; and 2) the standardized penalty would be the product of the Commissioners' collective action rather than staff action -- *See USTA v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) (the APA requires the Commission to conduct a notice and comment rule making proceeding before adopting standardized forfeiture amounts). If the proposed station class reduction penalty is not a "standardized" penalty, then the Commission must explain why it is proposing to treat PAI differently from other Class A stations which have failed to file required reports and/or failed to respond to letter inquiries; the Commission is required to treat similarly situated parties in a similar manner. *Green Country Mobilphone v. FCC*, 765 F.2d 235 (D.C. Cir. 1985).

10) While the *Order* states that Section 316(a) authorizes the Commission to modify authorizations "if such action is in the public interest," Section 316(a) does not authorize the FCC to make such license modification actions in violation of PAI's protected rights to prior notice and fairness, Section 316(a) is not an exception to the rulemaking requirement, Section 316(a) does not authorize Commission the staff to make station reclassification a penalty for failure to file required reports, and Section 316(a) does not override the CBPA's requirement that station classification depends upon TV "operating rules" and station classification does not turn on record keeping rules. The public is interested in procedural and substantive fairness, and with all due respect, neither of those seem to be present in the *Order* with regard to the proposed station reclassification.

WHEREFORE, in view of the information presented herein, it is respectfully submitted that PAI has presented facts and legal reasons which counsel for lenient treatment.

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December 6, 2012

Respectfully submitted,
Paging Associates, Inc.



Timothy E. Welch

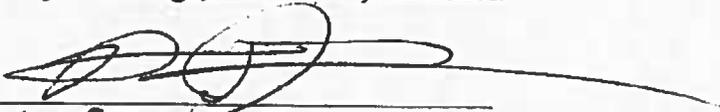
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CERTIFICATION

I hereby declare under penalty of perjury that I have reviewed the foregoing *Response and Opposition to Order to Show Cause* and that the assertions of fact stated therein are true to the best of my knowledge, information, and belief.



Robert L. Knapp, President
Paging Associates, Inc.
December 6, 2012

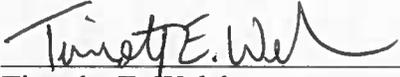
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Certificate of Service

I hereby certify that I have this 6th Day of December 2012 caused to be delivered a copy of the foregoing *Response and Opposition to Order to Show Cause* as indicated below.



Timothy E. Welch

The original sent via First Class United States Mail to:

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