Federal Communications Commission
Washington, D.C. 20554

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The School Board of Broward
County, Florida
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Re: Application to Convert WFUN-LP to
Class A Television Status
File No. BLTTA-20001208AEP
Facility ID No. 60542

Gentlemen:

On August 27, 2004, LocalOne Texas, Ltd. (LocalOne) filed a timely petition for reconsideration of the Video Division's dismissal of the above-referenced application to convert WFUN-LP, Miami, Florida, to Class A television status. The Division had granted LocalOne's application on February 2, 2001, and The School Board of Broward County, Florida (School Board), the licensee of noncommercial educational television station WPPB-TV, channel *63, Boca Raton, Florida, filed a petition for reconsideration of that action, arguing that WFUN-LP was not qualified for Class A television status.[1]

The Community Broadcaster's Protection Act of 1999 (CBPA)[2] limits Class A status to stations which "from and after the date of its application for a class A license, [are] in compliance with the

[1] Sherjan Broadcasting Company, the licensee of Class A television station WJAN-CA, Miami, also filed for reconsideration, but is no longer participating in this proceeding. By letter dated July 8, 2005, LocalOne requested that the Commission hold the instant petition for reconsideration "in abeyance," because it was currently in negotiations with the School Board , which may result in the School Board dropping its objection to the grant of Class A status to WFUN-LP. This request is opposed by Telefutura Miami LLC, the licensee of WAMI-DT, channel 47, Hollywood, Florida, which states that it has been forced to reduce its power level in order to protect WFUN-LP, which is not entitled to Class A status. We agree with Telefutura that discussions between LocalOne and the School Board have no bearing on our earlier decision that WFUN-LP failed to meet the statutory requirements for Class A status at the time it filed its license application, based upon the factual record in this case.

[2] Codified at 47 U.S.C. § 336(f).

Commission's operating rules for full-power television stations . . .."[3] Based upon the information submitted by the parties on reconsideration, the Division concluded that the station was not qualified for Class A television status at the time it filed its application to convert WFUN-LP to Class A status. Thus, the Division rescinded grant of the application and dismissed it. The Division's decision was based primarily on its conclusion that the location specified as WFUN-LP's main studio at the time it filed its license application and several months thereafter – the station's transmitter site at 390 N.W. 210th Street in Miami – did not qualify as a main studio under the Commission's rules and policies. According to the record, the transmitter location was not staffed as required,[4] did not house any production equipment,[5] was not open to the public,[6] and did not have a published telephone number.[7]

On reconsideration, LocalOne asserts that the Division's "revocation" of its Class A license – after assessing forfeitures rather than revocations against other Class A licensees that were not in full compliance with the Commission's rules after filing a Class A license application – is arbitrary and capricious. LocalOne, however, confuses the imposition of administrative sanctions against licensees and permittees, with Commission action on a timely petition for reconsideration of the grant of an application before finality. Pursuant to Section 312(a)(4) of the Communications Act, the Commission may revoke a station license "for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act . . .." Alternatively, the Commission may assess a forfeiture penalty pursuant to Section 503(b)(1)(B) of the Act against any person determined to have "willfully or repeatedly failed to comply with any provision of this Act or of any rule, regulation, or order issued by the Commission under this Act . . .."

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[3] 47 U.S.C. § 336 (f)(2)(A)(i)(III). In *Establishment of a Class A Television Service*, 15 FCC Rcd 6355, 6369 (2000), the Commission also stated that it would apply to Class A licensees all Part 73 regulations except those which could not apply for technical or other reasons, and required that qualified low power television licensees file a license application on FCC Form 302-CA no later than July 12, 2001.

[4] *See Jones Eastern of the Outer Banks, Inc*., 7 FCC Rcd 6800 (1992); *see also* FCC Form 302-CA, Instruction II.F (to qualify as a main studio, "the studio must be staffed by at least one management-level employee and one staff-level employee at all times during regular business hours.") In response to the staff's written request for specific information regarding the staffing practices at 390 N.W. 210th Street location, LocalOne identified the General Manager of the station, who purportedly worked 40 hours a week and "was present at the main studio on a regular basis," and three part time employees who dealt with programming matters and "delivered programs to the main studio." The School Board later submitted vehicle logs maintained by American International Security Enforcement Agency, Inc. at the multi-use tower at 390 N.W. 210th Street, for recording names of visitors to the site, and their arrival and departure times. These logs showed that between December 1, 2000 and April 9, 2001, the General Manager visited the site on only two occasions, for a total of one hour and 38 minutes. Only one of the part-time employees visited the site during that time period, for one hour.

[5] See *Clarification of the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, 3 FCC Rcd 5024, 5026 (1988); *see also* FCC Form 302-CA, Instruction II.F ("a station must equip the main studio with production and transmission facilities that meet applicable standards . . . Maintenance of production and transmission facilities and program transmission capability will allow broadcasters to continue . . . to produce local programs at the studio.") In addition, WFUN was unable to comply with the locally produced programming requirement of the CBPA during the entire time its license application was pending, and beyond, because of alleged equipment failure.

[6] Representatives of the School Board and Sherjan visited the site, which was fenced and guarded, several times during regular business hours and were never permitted to enter the premises.

[7] After being unable to find a listed telephone number for the station, one of the School Board representatives asked the guard (who was not an employee of the station) for the station's telephone number, and was given the home telephone number of the person identified by the guard as the General Manager of the station. .

Here, however, the Division reconsidered the staff's grant of Class A status to WFUN-LP pursuant to Section 405 of the Communications Act, which provides that upon the filing of a timely petition for reconsideration, "it shall be lawful [for the Commission], in its discretion, to grant such a reconsideration if sufficient reason therefore be made to appear." Section 405 further provides that:

> Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration.

In this case, LocalOne filed an application to convert low power television station WFUN-LP to Class A status, certifying that it met all the statutory requirements that are prerequisite to the Commission conferring Class A status. The staff granted the application, based upon LocalOne's certifications, and the School Board filed a petition for reconsideration, alleging that LocalOne has falsely certified its qualifications, and thus, that the staff's grant was in error. In support, the School Board provided information and evidence that was not available to the staff in its consideration of the four corners of LocalOne's license application. Based upon the pleadings and submissions of the parties, the Division concluded that LocalOne had not met the operating requirements for full-service stations at the time it filed its license application. In implementing the CPBA and establishing the Class A television service, the Commission concluded that, consistent with the intent of Congress in enacting the CBPA to establish primary rights of a specific, already-existing group of stations, it would "allow deviation from the strict eligibility criteria only where such deviations are insignificant or when we determine that there are compelling circumstances, and that in light of those compelling circumstances, equity mandates such a deviation."[8] Because the grant was based upon a false certification that WFUN-LP was in compliance with the Commission's operating requirements for full service television stations "from and after the date" of filing its Class A license application, and the deviation from this statutory requirement could not be deemed insignificant, the Division appropriately reconsidered and reversed the staff's earlier grant.

In the two cases cited by LocalOne,[9] where Class A licensees were issued a forfeiture for violations of the operating requirements for full-service television stations, these licensees were not similarly situated with WFUN-LP, and thus, the staff's decision to rescind here was not arbitrary and capricious.[10] In each of these cases, the grant of Class A status to the stations had been final for some time, and there were no pending petitions for reconsideration. In *Aracelis Ortiz*, the station had been granted Class A status in April 1999. More than three years later, after a routine inspection of the station's EAS equipment, the Commission found that the station had neither operational EAS equipment or a main studio "on June 25, 2002." Accordingly, a monetary forfeiture was imposed. There was no determination in *Ortiz* that the station did not have a main studio from the time it filed its Class A license application in 1999 until June 25, 2002. If such a determination had been made, instituting a revocation proceeding pursuant to Section 312 of the Act may have been appropriate, since arguably, the licensee's failure to meet the statutory eligibility requirements at the time it certified its compliance in its license application, could not be deemed insignificant. In *TV-45 Productions, Inc*. the station had obtained its Class A status a year prior to the FCC field inspection, which showed that while the station had EAS equipment, it had never been installed. Given that station's explanation for its failure to install the

[8] *Report and Order* at 6369.
[9] *Aracelis Ortiz*, 19 FCC Rcd 2632 (2003); *TV-45 Productions – KLHU-CA*, 17 FCC Rcd 11259 (2002).
[10] The Commission must treat similarly situated applicants and licensees consistently, and disparate treatment is an arbitrary and capricious abuse of discretion. *See, e.g., Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

equipment in a timely fashion, the Commission chose only to impose a forfeiture pursuant to Section 503 of the Act.[11]

LocalOne also complains that the "revocation" of its Class A license is inconsistent with the Commission's standard practice of assessing forfeitures against full-service television stations with main studio violations. In support, LocalOne cites a series of cases involving forfeitures against FM radio stations. Again, all of those cases involved licenses or construction permits where the grant was final and Section 405 of the Act was no longer applicable. Moreover, there is no statutory requirement that such stations comply with the Commission's operating requirements for radio and full-service television stations "from and after the date" of filing its license application, as there is for the Class A television service. None of the cases cited by LocalOne support its novel assertion that in order to grant a timely petition for reconsideration, which requests reversal of the grant of an application for a construction permit or license, the Commission must issue a show cause order pursuant to Section 312(c) of the Communications Act and conduct an evidentiary hearing before an Administrative Law Judge.

LocalOne further argues that at all times after filing the license application, WFUN-LP was always in substantial compliance with the Part 73 operating requirements and thus deserved, at most, imposition of a forfeiture, citing to a number of instances where the Commission issued forfeitures for violations LocalOne consider less egregious than its own. None of these cases, however, involved the issue of a station's compliance with the statutory qualifications involved here, or the Commission's interpretation of the CPBA to permit only "insignificant" deviations from the statutory criteria. Moreover, we agree with the staff that LocalOne substantially failed to comply with the main studio requirements. LocalOne also attempts to downplay the significance of the main studio requirements; asserting, for example, that because the Commission did not discuss staffing or other main studio requirements in the Report and Order, "this suggests that the Commission considered compliance with main studio staffing requirements to be *less* of a priority than compliance with [other Part 73 rules]." We note that other parties to the rulemaking proceeding to implement the CBPA, recognized that in order to qualify as a main studio, the location must be appropriately staffed. One party specifically sought reconsideration of the staff requirement, which was denied. Moreover, the directions to the Class A license application filed by LocalOne clearly indicated that the main studio was required to be staffed consistent with the standards set forth in *Jones Eastern of the Outer Banks, Inc*., 7 FCC Rcd 6800 (1992), for full-service stations.

LocalOne also faults some of the staff's factual findings and conclusions. For example, with respect to the requirement that a station have a local telephone number for viewers to call, Local One argues that it had a local phone number. The fact that it was unlisted, however, makes its existence irrelevant in terms of LocalOne's compliance with this requirement. LocalOne also disputes the staff's conclusion that the transmitter site building specified as WFUN-LP's main studio was not accessible during regular business hours, citing to the fact that the School Board's representatives were able to speak to a guard at the site and ultimately review the station's public file. These representatives were never

[11] The licensee in *TV-45 Productions, Inc.* explained that the EAS equipment was not hooked up at the time the station was inspected by the Commission because the station was located in a remote area, where it was difficult to get engineering assistance, and it had repeatedly asked the station's contract engineer to complete the job. The contract engineer also supplied a statement saying that he was the only broadcast engineer within 150 miles of the station and had not been able to work the installation of the station's EAS equipment into his busy schedule. Unlike the record in the instant case, we believe, based on the totality of circumstances presented in *TV-45 Productions, Inc.,* that it is reasonable to conclude that the station's inability to comply with the EAS requirement warranted a forfeiture, rather than the wirhdrawal of Class A status.

allowed into the so-called "main studio," which was surrounded by a fence which was locked. LocalOne also suggests that the staff overlooked relevant facts because it did not consider all of the submissions in the proceeding. LocalOne is incorrect. The staff's letter decision referenced LocalOne's July 14, 2003 filing, which requested that the Commission dismiss certain School Board submissions at p. 2, and its October 7, 2003 submission at n.2.

Based on a careful review of the record in this case and the parties submissions in connection with LocalOne's filing of a petition for reconsideration, we find no basis to overturn the staff's decision to grant the petition for reconsideration filed by the School Board, and to rescind the grant of and dismiss the above-referenced application to convert low power television station WFUN-LP to Class A television status.

Finally, LocalOne also filed for a stay of the Division's decision.[12] In acting on requests for a stay, the Commission considers: (1) the likelihood of success on the merits by the party requesting the stay; (2) whether irreparable harm would occur absent a stay; (3) whether other interested parties would suffer substantial harm if the stay were granted; and (4) whether the public interest favors a stay.[13] We will deny the request for a stay. After careful consideration of LocalOne's arguments, we have affirmed our earlier decision and conclude, for the reasons set forth herein, that LocalOne is not likely to prevail upon the merits. In addition, there is no threat of irreparable harm absent a stay. It is well-settled that "'mere injuries, however substantial, in terms of money, time and energy,' expended do not constitute irreparable harm because there is the 'possibility that adequate compensatory or other corrective relief will be available at a later date.'"[14] While WFUN-LP is not entitled to primary status as a Class A television station absent a stay, LocalOne presents no information indicating that it cannot continue to operate as a low power television station absent a stay. In the event it is subsequently displaced, it may apply for displacement relief and move to another channel at its present location or a different location.

In view of the foregoing, the Petition for Reconsideration and Motion for Stay filed by LocalOne Texas, Ltd. ARE HEREBY DENIED.

Sincerely,

Donna C. Gregg
Chief, Media Bureau

cc: Scott R. Flick, Esq.

[12] Section 405(a) of the Act provides that the filing of a petition for reconsideration does not excuse an applicant from complying with the order on reconsideration, or stay enforcement of the order, "without the special order of the Commission."

[13] *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), *Washington Metropolitan Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977).

[14] *Station KDEW(AM)*, 11 FCC Rcd 13683, 13685 (1996), *citing Virginia Petroleum Jobbers and Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985).