

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

In the Matter of)	
)	
Budd Broadcasting Co., Inc.	)	File No.: BRCDT - 20120925ACP
Licensee of Station WFXU(TV)	)	Facility ID No. 22245
Live Oak, Florida	)	Acct. No.: 201541420016
	)	FRN No: 0005846795
In the Matter of)	
)	
Budd Broadcasting Co., Inc.	)	File No. BALCDT-20170707AAI
(Assignor)	)	Fac. ID No. 22245
	)	Fac. ID No. 187680
And)	
)	
Gray Television Licensee, LLC)	
(Assignee))	
)	
For Assignment of License of Stations)	
WFXU(TV), Live Oak, Florida)	
WUFX-LD, Tallahassee, Florida)	

ORDER AND MEMORANDUM OPINION AND ORDER

Adopted: December 5, 2017

Released: December 6, 2017

By the Commission:

1. In this consolidated Order and Memorandum Opinion and Order, we: (1) adopt the attached Consent Decree entered into between the Commission and Budd Broadcasting Co., Inc. (Budd), the licensee of television station WFXU(TV), Live Oak, Florida (Station), which resolves issues raised in our review of the above-captioned application for renewal of the Station’s license; and (2) grant the above-referenced, uncontested application for consent to assignment of the licenses of WFXU and associated low power television station WUFX-LD, Tallahassee, Florida (collectively, the Stations), from Budd to Gray Television Licensee, LLC (Gray), conditioned upon grant of the license renewal application and Gray’s compliance with the terms of the Consent Decree, in particular the negotiated Compliance Plan. In connection with the assignment application, we grant a “failing station” waiver of the local television ownership rule, pursuant to Note 7 of Section 73.3555 of the Commission’s rules (Rules),¹ to permit common ownership of WFXU and WCTV(TV), Thomasville, Georgia. We also grant a temporary waiver of the main studio rule to permit the request for co-location of WFXU and WCTV(TV) for a period of six months or until elimination of the main studio rule becomes effective, whichever is earlier.²

2. **Consent Decree and Renewal.** During review of Budd’s most recent application for renewal of the Station’s license and through related investigations, staff discovered the following: (i)

¹ 47 CFR § 73.3555, Note 7.

² 47 CFR § 73.1125. *Elimination of Main Studio Rule*, Report and Order, MB Docket No. 17-106, FCC 17-137 (October 24, 2017) (*Main Studio Order*) (eliminating rule requiring each AM, FM, and television broadcast station to maintain a main studio located in or near its community of license and adopting proposal eliminating existing requirements associated with main studio rule.).

extended periods of silence throughout the Station's License Term; (ii) noncompliance at the Station with the children's programming requirements set forth in Section 73.671 of the Commission's rules,³ which implements the Children's Television Act of 1990 (CTA);⁴ (iii) noncompliance with Section 73.1745(a) of the Rules, which prohibits unauthorized operation of a station;⁵ (iv) failure to provide an appropriate Station signal over all of Live Oak, Florida, its authorized community of license, in violation of Section 73.625 of the Rules;⁶ and (v) noncompliance with Section 73.3526 of the Rules, which *inter alia*, requires broadcast stations to upload to their online public files issues and programs lists, commercial limits certifications, and Children's Television Programming Reports on a quarterly basis, and a statement certifying that the licensee broadcast local public notice announcements regarding the pendency of its license renewal application, pursuant to Section 73.3580(h).⁷ A copy of the Consent Decree, which includes a Compliance Plan, is attached hereto and incorporated by reference.

3. After reviewing its terms, we find that the public interest would be served by adopting the Consent Decree. With limited exceptions not applicable here,⁸ grant of a pending renewal application is a necessary predicate to the grant of a license assignment.⁹ Given the extent of violations at issue here, we conclude that the Consent Decree provides the appropriate terms and conditions to support grant of a short-term renewal of the license under Section 309(k)(2).¹⁰ A short-term renewal is appropriate in order to ensure the ongoing operation of the Station in the public interest and compliance with the aforementioned Rules and the CTA.¹¹ As a result, we need not determine whether Budd committed "serious violations" of our rules or violations that constituted a "pattern of abuse" for purposes of Section

³ 47 CFR § 73.671.

⁴ Pub L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. §§ 303a, 303b, and 394.

⁵ 47 CFR § 73.1745(a).

⁶ 47 CFR § 73.625.

⁷ 47 CFR §§ 73.3526(e)(11)(i)-(iii), (e)(13), 73.3580(h).

⁸ See *Existing Shareholders of Cumulus Media, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 12956, 12960 (MB 2011) (assignment of license pending renewal granted where there was no question as to the assignor's basic qualifications and assignee agrees to stand in the stead of the assignor in pending renewal application).

⁹ See, e.g., *Shareholders of Univision Communications, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 5842, 5859 (2007) (*2007 Univision Order*).

¹⁰ Section 309(k)(1) of the Act states that the Commission shall grant a license renewal application "if it finds, with respect to that station, during the preceding term of its license—(a) the station has served the public interest, convenience, and necessity; (b) there have been no serious violations by the licensee of the Act or Commission rules and regulations; and (c) there have been no other violations by the licensee of the Act or Commission rules or regulations which, taken together, would constitute a pattern of abuse." 47 U.S.C. § 309(k)(1). Section 309(k)(2) of the Act states, however, that if the licensee fails to meet this three-part standard, the Commission may deny the application—after notice and comment, and opportunity for hearing under Section 309(e) of the Act — "or grant the application on terms and conditions as are appropriate...." 47 U.S.C. § 309(k)(2).

¹¹ Section 309(k)(1) of the Act states that the Commission shall grant a license renewal application "if it finds, with respect to that station, during the preceding term of its license—(a) the station has served the public interest, convenience, and necessity; (b) there have been no serious violations by the licensee of the Act or Commission rules and regulations; and (c) there have been no other violations by the licensee of the Act or Commission rules or regulations which, taken together, would constitute a pattern of abuse." 47 U.S.C. § 309(k)(1). Section 309(k)(2) of the Act states, however, that if the licensee fails to meet this three-part standard, the Commission may deny the application—after notice and comment, and opportunity for hearing under Section 309(e) of the Act — "or grant the application on terms and conditions as are appropriate...." 47 U.S.C. § 309(k)(2).

309(k)(1).¹² Therefore, the Commission directs Media Bureau staff to grant the license renewal application after the Effective Date of the Consent Decree for a period of two years, provided that the following conditions have been met: (1) Budd has timely provided the certification required by paragraph 18 of the Consent Decree and the Station is operating consistent with that certification; (2) Budd has timely and fully satisfied its obligation to make the Settlement Payment referenced in paragraph 21 of the Consent Decree; and (3) there are no issues other than the violations that are the subject of the Investigation that would preclude grant of the License Renewal Application.

4. **Assignment Application.** Section 310(d) of the Communications Act of 1934, as amended (Act), provides that no station's license shall be transferred or assigned until the Commission, upon application, determines that the public interest, convenience, and necessity will be served thereby.¹³ Having reviewed the information provided, we find that the Applicants are qualified and that grant of the application, with grant of the failing station waiver and a temporary main studio waiver discussed below, serves the public interest.

5. *Failing Station Waiver.* Budd filed an application to assign WFXU to Gray on July 12, 2017. Grant of the application would result in Gray's common ownership of WFXU and WCTV, which would not comply with the local television ownership rule. Both WFXU and WCTV are located in the Tallahassee, Florida-Thomasville, Georgia DMA and have overlapping digital noise limited contours. The local television ownership rule allows an entity to own two television stations licensed to communities in the same Designated Marketing Area (DMA), the digital noise limited contours of which overlap, if: (1) at least one of the two stations is not ranked among the top four stations in the DMA, based on the most recent all-day audience share; and (2) at least eight independently owned and operating, full-power commercial and noncommercial television stations would remain in the DMA after the transaction.¹⁴ Fewer than eight independently owned and operating stations would remain in the market after the combination.¹⁵ Accordingly, Gray requests a waiver of the local television ownership rule, pursuant to the "failing station" standard.

6. The Commission defines a "failing station" as one that has been struggling for "an extended period of time in terms of both its audience share and financial performance."¹⁶ The criteria for a "failing station" waiver are: (1) one of the merging stations has had a low all-day audience share (*i.e.*, 4 percent or lower); (2) the station has had negative cash flow for the previous three years; (3) the merger will produce tangible and verifiable public interest benefits; and (4) the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station, and selling the station

¹² 2007 *Univision Order*, 22 FCC Rcd at 5859, n.113 ("Given our finding that the grant of the renewal application is warranted under Section 309(k)(2) of the Act because the consent decree contains appropriate terms and conditions, we need not determine whether Univision committed "serious violations" of our rules or violations that constituted "a pattern of abuse" for purposes of Section 309(k)(1).")

¹³ 47 U.S.C. § 310(d).

¹⁴ 47 CFR § 73.3555(b). *See also* 2014 *Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Report and Order, 31 FCC Rcd 9864, 9885, 9895, paras. 52, 78 (2016) ("2016 Quadrennial Second Report and Order") (replacing the analog Grade B contour with the digital noise limited contour), *recon. granted in part and denied in part*, Order on Reconsideration and Notice of Proposed Rulemaking, FCC No. 17-156 (rel. Nov. 20, 2017) ("*Order on Reconsideration*"). In an order released on November 20, 2017, in MB Docket Nos. 14-50, *et al.*, the Commission eliminated the requirement that at least eight independently owned and operating full power stations remain in the market. *See Order on Reconsideration*. This amendment to the Commission's rules, however, is not yet in effect. The new rule will become effective no earlier than 30 days after its publication in the *Federal Register*. *See id.* at para. 156.

¹⁵ WFXU is not ranked within the top four stations in the market.

¹⁶ *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12939 (1999) (*Local Ownership Order*).

to an out-of-market buyer would result in an artificially depressed price.¹⁷ A waiver will be presumed to be in the public interest if the applicant satisfies each criterion.

7. WFXU has continued to hold an all-day audience share below the Commission's four percent benchmark.¹⁸ Gray states that the Station has failed to appear in the Nielsen Media Research ratings in the last four sweeps.¹⁹ In addition, Gray submitted an amended cash flow statement showing that WFXU, as an independent station, has been operating with negative cash flow for calendar years 2014, 2015, and 2016.²⁰ We, therefore, find that Gray has satisfied the first two factors.

8. With respect to the anticipated public interest benefits of the merger, Gray asserts that WFXU will become a *bona fide* competitor in the DMA once it gains access to Gray's resources and integrates with WCTV.²¹ In particular, it states that, for the first time, a majority of over-the-air viewers and MVPDs in the DMA will be able to receive WFXU's programming once Gray improves the Station's facilities "and/or" rebroadcasts its programming on one of WCTV's multicast channels.²² Moreover, Gray claims that most MVPDs will want to retransmit the Station's programming once they receive a quality signal, and that common ownership of WFXU and WCTV will assist in improving WFXU's signal to cable headends.²³ Gray further contends that common ownership would provide WFXU with: (1) the ability to utilize WCTV's financial resources to modernize its operations and meet its financial obligations; (2) the ability to utilize the full support and experience of WCTV's engineering team; (3) the ability to provide its viewers with live and breaking weather coverage, non-weather emergency programming, and other such information as necessary to the viewers in its DMA; (4) the ability to provide its over-the-air viewers and MVPDs access to news content from Gray's Washington, D.C. Bureau, which provides an important outlet for lawmakers to reach their constituents;²⁴ and (5) the ability to relocate WFXU to WCTV's studio, which would "instantly upgrade the physical plant for the station with the latest workstations, equipment, and software necessary to compete in today's television environment."²⁵ Consequently, we find that common ownership of WCTV and WFXU will produce tangible and verifiable public interest benefits, satisfying the third factor.

9. Finally, as to the fourth factor, Gray submits a declaration by Doyle Hadden, President of Hadden & Associates Nationwide Media Brokers (Firm), a media brokerage firm with over 30 years of experience, concerning the Station's marketability. Mr. Hadden states that, for the past several years, the Firm has marketed WFXU to many "in-market" and "out-of-market" television owners throughout the United States without success.²⁶ He notes that the Firm's efforts to market and sell WFXU to potential buyers have been difficult due to the Station's history of being "off-air" and inability to generate sufficient revenue to operate as an independent station, especially since it does not broadcast any locally

¹⁷ Id. at 12939-40, para. 81; 47 CFR § 73.3555, note 7.

¹⁸ Waiver Request at 1.

¹⁹ Id.

²⁰ File No. BALCDT – 20170707AAI, Profit and Loss Statement (Cash flow Statement). Gray requested confidential treatment for this material, pursuant to Sections 0.457 and 0.459 of the Commission's rules. 47 CFR §§ 0.457, 0.459. Consistent with Commission practice, Gray provided a cash flow statement for WFXU, which enabled staff to determine whether WFXU has been operating with negative cash flow for the past three years.

²¹ Waiver Request at 2.

²² Id. at 2-3.

²³ Id. at 3.

²⁴ Id.

²⁵ Id.

²⁶ Id. at Exhibit 1.

produced news, weather, or sports.²⁷ Mr. Hadden also observes that these challenges are exacerbated by WFXU's inability to "reach a respectable portion of any of the metro population" in its DMA, which results in lower audience shares and zero advertising revenues for the Station.²⁸ He anticipates that WFXU will continue to struggle to "maintain a position of strength" without programming containing nationally syndicated news, live shows, sports, and other such programs, and that "[o]perating as-is, the station would be sold as a 'stick.'" ²⁹ According to Mr. Hadden, a willing and able "in-market" buyer is the only reasonable option to acquire WFXU.³⁰ We recognize the evidentiary value of fact-based broker due diligence and find that Mr. Hadden's letter demonstrates that an in-market buyer, such as Gray, is the only reasonable candidate to acquire WFXU. Consequently, we find that Gray is the only reasonably available candidate willing and able to acquire and operate the station, and selling the station to an out-of-market buyer would result in an artificially depressed price.

10. Consistent with the *Local Ownership Order*, we believe that the operation of WFXU in tandem with a stronger, in-market station will pose minimal harm to our interest in diversity and competition, because, absent the waiver, its financial situation hampers its ability to provide a viable voice. Accordingly, we find that granting WFXU a "failing station" waiver of the local television ownership rule would serve the public interest.

11. *Temporary Waiver of Main Studio Rule.* Section 73.1125(d)(2) of the Rules requires a licensee to obtain Commission consent to relocate a station's main studio outside of the locations specified in Section 73.1125(a) of the Rules.³¹ A licensee seeking a waiver of a Commission rule must show "good cause" warranting such a waiver.³² Specifically, a licensee has the burden to plead with particularity the facts and circumstances that warrant a deviation from the general rule and that such a deviation will serve the public interest.³³ Gray provides sufficient facts and circumstances to warrant a temporary waiver of Section 73.1125(a) to permit the request for co-location of WFXU and WCTV(TV) for a period of six months or until the elimination of the main studio rule becomes effective, whichever is earlier. Specifically, Gray has shown that use of WCTV's studio during this time amounts to an upgrade compared to WFXU's current facilities and will benefit viewers while it evaluates WFXU's current main studio and the need for upgrades.³⁴ As required by Section 73.1125, Gray must continue to maintain a local telephone number for WFXU in the station's community of license or a toll-free number thereby ensuring that community members remain able to communicate with station representatives.³⁵ We will, therefore, grant a temporary waiver of Section 73.1125(a) to permit the request for co-location for a period of six months or until elimination of the main studio rule becomes effective, whichever is earlier.

12. Accordingly, **IT IS ORDERED**, that, pursuant to Section 4(i) of the Act,³⁶ the Consent Decree attached to this Order **IS ADOPTED**.

13. **IT IS FURTHER ORDERED**, that, pursuant to Section 309(k)(2) of the Act,³⁷ the Commission directs the Media Bureau to grant the application to renew the broadcast license of station

²⁷ *Id.* at 2.

²⁸ *Id.*

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ 47 CFR § 73.1125(d)(2).

³² 47 CFR § 1.3.

³³ See 47 CFR § 73.1125(b)(2); See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

³⁴ See Waiver Request at 1-4.

³⁵ 47 CFR § 73.1125.

³⁶ 47 U.S.C. § 154(i).

WFXU(TV), Live Oak, Florida, File No. BRC DT-20120925ACP, after the Effective Date of the Consent Decree for a period of two years, provided that the following conditions have been met: (1) Budd has timely provided the certification required by paragraph 18 of the Consent Decree and the Station is operating consistent with that certification; (2) Budd has timely and fully satisfied its obligation to make the Settlement Payment referenced in paragraph 21 of the Consent Decree; and (3) there are no issues other than the violations that are the subject of the Investigation that would preclude grant of the License Renewal Application.

14. IT IS FURTHER ORDERED, that the investigation by the Commission into the matters discussed above IS TERMINATED.

15. IT IS FURTHER ORDERED, that a copy of this Order and Consent Decree shall be sent by both First Class Mail and Certified Mail, Return Receipt Requested, to Budd's counsel, Aaron P. Shainis, Shainis & Peltzman, Chartered, 1850 M Street, NW, Suite 240, Washington, DC 20036.

16. IT IS FURTHER ORDERED, that the request for a waiver of the local television ownership rule pursuant to Note 7 of Section 73.3555 of the Commission's rules, the "failing station" waiver standard, IS GRANTED.

17. IT IS FURTHER ORDERED, that a temporary waiver of the Main Studio Rule for WFXU pursuant to Section 73.1125(d)(2) of the Commission's rules, as discussed above, IS GRANTED.

18. IT IS FURTHER ORDERED, that the application seeking consent to assignment of the licenses of stations WFXU(TV), Live Oak, Florida, and WUFX-LD, Tallahassee, Florida (File No. BALCDT-20170707AAI), IS GRANTED, conditioned upon grant of the application to renew the broadcast license of station WFXU(TV), Live Oak, Florida, File No. BRC DT-20120925ACP, and Gray's compliance with the terms of the attached Consent Decree and Compliance Plan.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page)

³⁷ 47 U.S.C. § 309(k)(2).

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

In the Matter of)	
	)	Facility ID No. 22245
Budd Broadcasting Co., Inc.	)	File No.: BRC DT - 20120925ACP
Licensee of Station WFXU(TV)	)	Acct. No.: 201541420016
Live Oak, Florida	)	FRN: 0005846795

CONSENT DECREE

1. The Federal Communications Commission (Commission) and Budd Broadcasting Co., Inc. (Budd or Licensee), licensee of station WFXU(TV), Live Oak, Florida, hereby enter into this Consent Decree for the purposes of resolving the Commission’s investigation of (i) the station’s extended periods of silence throughout its License Term; (ii) the Licensee’s compliance with the Children’s Television Act of 1990 (CTA) and Sections 73.625, 73.671, 73.1745, and 73.3526 of the Commission’s rules,³⁸ and (iii) Budd’s above-captioned pending license renewal application.

I. DEFINITIONS

2. For the purposes of this Consent Decree and Compliance Plan, the following definitions shall apply:

- a) “Act” means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
- b) “Adopting Order” means the Order of the Commission adopting the terms of this Consent Decree without change, addition, deletion, or modification.
- c) “Budd” or “Licensee” means Budd Broadcasting Co., Inc., and its subsidiaries, affiliates, successors, assigns, and/or transferees.
- d) “Bureau” means the Media Bureau of the Federal Communications Commission.
- e) “Commission” and “FCC” mean the Federal Communications Commission and all of its bureaus and offices.
- f) “Communications Laws” means, collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which Budd is subject by virtue of it being a Commission licensee, including but not limited to 47 CFR. §§ 73.625, 73.671, 73.1745, and 73.3526, and the CTA.
- g) “CTA” means the Children’s Television Act, Pub L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. §§ 303a, 303b, and 394.
- h) “Division” means the Video Division, Media Bureau of the FCC.

³⁸ Pub L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. §§ 303a, 303b, and 394; 47 CFR. §§ 73.625, 73.671, 73.1745, and 73.3526.

- i) “Effective Date” means the date on which the Commission releases the Adopting Order.
- j) “Investigation” means the examination of Budd’s compliance with the Communications Laws. “License Renewal Application” means the renewal application of station WFXU(TV), Live Oak, Florida, File No. BRCDT - 20120925ACP.
- k) “License Term” means from January 25, 2007 (when Budd acquired the Station) to the Effective Date.
- l) “Parties” means Budd and the Commission, each of which is a “Party.”
- m) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.
- n) “Station” means the broadcast television station WFXU(TV), Live Oak, Florida.

II. BACKGROUND

3. On September 25, 2012, Budd filed its License Renewal Application (FCC Form 303-S) for the Station. In the process of evaluating the application, it became clear to the Bureau that, throughout its License Term, the Station consistently cycled on and off the air and ultimately spent the majority of its License Term off of the air. On February 20, 2014, the Division sent Budd a letter of investigation (LOI), pursuant to Section 1.88 of the Rules, inviting the Licensee to submit a statement of its view regarding the Investigation and whether grant of the License Renewal Application would be consistent with Section 309(k) of the Act.³⁹ In so doing, the Division asked Budd to provide certain specific information concerning its operation of the Station during the License Term, including a full accounting of the Station’s periods of silence. Budd responded to the LOI on July 1, 2014.⁴⁰ On March 8, 2016, the Division sent Budd a follow-up LOI requesting that the Licensee confirm both the Division’s records of Budd’s broadcast activity and whether the Station was currently broadcasting over the air pursuant to its licensed parameters. Budd responded to that letter on March 22, 2016.⁴¹ The Division’s findings with regard to the Investigation are outlined below.

4. Budd acquired the Station on January 25, 2007. It certified in the assignment application that “it is cognizant of and will comply with its obligations as a Commission licensee to present a program service responsive to the issues of public concern facing the station’s community of license and service area.”⁴² Notwithstanding its pledge of service to the public, shortly after its acquisition of the Station, Budd made the first of numerous requests for Special Temporary Authorization (STA) to remain silent, citing technical or equipment issues as the justification for the requests.⁴³ Only one such request

³⁹ 47 U.S.C. § 309(k).

⁴⁰ Letter from Aaron P. Shainis to Peter Saharko, Video Division, Media Bureau, Federal Communications Commission (Jul. 1, 2014) (2014 LOI Response).

⁴¹ Letter from Aaron P. Shainis to David J. Brown, Deputy Chief, Video Division, Media Bureau, Federal Communications Commission (Mar. 22, 2016) (2016 LOI Response).

⁴² See File No. BALCT - 20061121AIV (filed Nov. 21, 2006).

⁴³ See, e.g., File No. BLSTA-20070829AAH (citing transmitter malfunction); File No. BLSTA-20080226AAN (citing problems with decoder that “will take approximately 3 weeks to correct”); File No. BLSTA-20080812AAR (citing issues with transmitter); File No. BLSTA-20090113ACH (citing equipment problems); File No. BLSTA-20090128AFW (citing transmitter issues); File No. BLSTA-20091130ALJ (citing equipment issues); File No. BLSTA-20101118AJD (citing technical difficulties).

was granted. Since the Licensee acquired WFXU, the Station has been off the air for at least 47 months (well over half) of its License Term, if not more. Many of these extensive periods of silence occurred without Bureau authorization. Additionally, Budd frequently notified the Bureau that it had resumed operation just before the Station would have failed to transmit a signal for 12 consecutive months, which period of non-transmission would have resulted in the automatic expiration of its license pursuant to Section 312(g) of the Act, a tactic in which Budd acknowledges to have engaged to avoid such a result.⁴⁴

5. In addition to Budd's lengthy periods of silence, as part of the Media Bureau's review of WFXU's application, staff questioned whether the Licensee had complied with the CTA and met the Commission's renewal application processing guideline of airing an average of at least three hours of Core Programming each week. According to the Licensee's Children's Television Programming Reports, it appears that the Station did not broadcast any Core Programming from the time that it acquired the Station in January 2007 until the third quarter of 2013.⁴⁵

6. Under the CTA, as implemented by Section 73.671 of the Rules, a broadcast television licensee is required "to serve, over the term of its license, the educational and informational needs of children through both the licensee's overall programming and programming specifically designed to serve such needs."⁴⁶ Programming specifically designed to serve the educational and informational needs of children is defined by the Rules as "Core Programming."⁴⁷ In the *1996 Children's Television Order* revising our rules and policies governing children's programming, the Commission established a license renewal application processing guideline of at least three hours of Core Programming per week.⁴⁸ The Rules provide that the Media Bureau staff shall approve the CTA portion of any license renewal application where the licensee demonstrates that it has aired an average of at least three hours per week of Core Programming, as averaged over a six-month period.⁴⁹ A licensee will also be deemed to have satisfied this obligation and be eligible for staff approval if it demonstrates that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of Core Programming, demonstrates a level of commitment to educating and informing children at least equivalent to airing three hours per week of Core Programming.⁵⁰ The renewal applications of licensees that do not meet these processing guidelines are referred to the

⁴⁴ See 2014 LOI Response at 6-7, Att. DD, Declaration of Robert Carr. 47 U.S.C. 312(g), as amended, provides that "[i]f a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period...."

⁴⁵ See WFXU's Children's Television Programming Reports for Q1 2007 through Q3 2013, *available at*: <http://licensing.fcc.gov/KidVidNew/public/report/10/query.faces>.

⁴⁶ See 47 CFR § 73.671(a).

⁴⁷ See 47 CFR § 73.671(c).

⁴⁸ *Policies and Rules Concerning Children's Television Programming: Revision of Programming Policies for Television Broadcast Stations*, Report and Order, 11 FCC Rcd 10660, 10718 (1996) (*1996 Children's Television Order*). The Commission established rules setting forth seven criteria for evaluating whether a program qualifies as CORE programming: (1) the program has serving the educational and informational needs of children ages 16 and under as a significant purpose; (2) the program is aired between the hours of 7:00 a.m. and 10:00 p.m.; (3) the program is a regularly-scheduled weekly program; (4) the program is at least 30 minutes in length; (5) the program is identified as being specifically designed to educate and inform children through the on-screen display of the E/I symbol throughout the program; (6) the educational objective and the target child audience are specified in writing in the licensee's Children's Television Programming Report; and (7) instructions for listing the program as educational/ informational, including an indication of the age group for which the program is intended, are provided by the licensee to publishers of program guides. *1996 Children's Television Order*, 11 FCC Rcd at 10696; 47 CFR § 73.671(c).

⁴⁹ 47 CFR §§ 73.671(d), (e)(1).

⁵⁰ *Id.*

Commission, where the licensees have a full opportunity to demonstrate compliance with the CTA.⁵¹ Staff has concluded that it cannot clear the License Renewal Application under our processing guidelines pursuant to Section 73.671 of the Rules and, therefore, has referred the matter to the Commission, as required.

7. In addition to the foregoing, recent Enforcement Bureau on-site investigations of the Station revealed that the Licensee is operating the Station at variance from its licensed parameters, in violation of Section 73.1745(a) of the Rules. Section 73.1745(a) of the Rules states that “no broadcast station shall operate at times, or with modes or power, other than those specified and made a part of the license....”⁵² On February 4, 2016, two FCC enforcement officials from the Tampa, Florida, field office, visited the WFXU transmitter site to inspect the Station. The field agents took photos and field strength measurements at the site and reported their findings in a log.⁵³ The agents then drove to the Station’s community of license, Live Oak, Florida, while continuing to observe the field strength meter display, and observed the strength of WFXU’s signal diminish to the point that it disappeared before they arrived in Live Oak. Based on this, the agents determined that WFXU was operating at reduced power and no actual television service was being provided by the Station to its community of license, Live Oak, Florida, in apparent violation of Section 73.625 of the Rules.

8. On February 9, 2016, the two field agents again visited the Station’s authorized transmitter site. They turned the vehicle’s receiver to TV Channel 48 on 674-680 MHz and detected a signal originating from the authorized transmitter site. The agents turned a TV monitor to Channel 48 and observed that the Station’s signal was weak and the picture on the monitor was pixelating. The agents again drove to Live Oak while observing the field strength meter display and discovered that WFXU’s signal diminished to the point that it disappeared completely approximately 10 miles before they arrived in Live Oak. The agents plotted the location on a map and, based on their observations, concluded that the Station signal was covering a radius of approximately 9.5 miles, and that the signal failed to cover or reach the city of Live Oak, WFXU’s community of license. According to Commission records, the Licensee has not filed an STA request to operate at variance from its licensed parameters and, therefore, is not authorized to operate at such reduced power.⁵⁴

9. Lastly, in addition to the foregoing, the Station has also apparently committed numerous violations of the Commission’s online public file requirements contained in Section 73.3526 of the Rules during the License Term. Section 73.3526 of the Rules requires each commercial broadcast licensee to maintain a public inspection file containing specific types of information related to station operations. Subsection 73.3526(e)(11)(i) of the Rules requires that every full-power commercial television and Class A licensee to place in its public inspection file, on a quarterly basis, a list of issues and programs “that have provided the station’s most significant treatment of community issues during the preceding three month period.”⁵⁵ Copies of the issues and programs lists must be “retained in the public inspection file until final action has been taken on the station’s next license renewal application.”⁵⁶ Budd failed to file any issues and programs lists between 2007 and the third quarter of 2013, despite the Station’s numerous, albeit brief, claimed periods on the air during that time. Budd’s online public file only contains issues

⁵¹ *Id.*

⁵² 47 CFR § 73.1745(a).

⁵³ Enforcement Bureau Field Office log of Field Agent visit to WFXU transmitter site (Feb. 12, 2016).

⁵⁴ We note that the Licensee has filed numerous “silent” STAs throughout its license period signaling to the Bureau that it was not broadcasting during certain periods of time, but there is no evidence in our records that the Licensee ever sought a technical STA and obtained temporary authority to operate at reduced power.

⁵⁵ 47 CFR § 73.3526(e)(11)(i).

⁵⁶ *Id.*

and programs lists that cover the time period since Budd began operating the Station on a consistent basis (from the third quarter of 2013 through the present).

10. Subsection 73.3526(e)(11)(ii) of the Rules requires each full-power commercial television and Class A licensee to prepare and place in its public inspection file, on a quarterly basis, records sufficient to substantiate the Station's certification, in its license renewal application, of compliance with the commercial limits on children's programming.⁵⁷ That subsection also requires such licensees to file the reports with the Commission by the tenth day after the close of the reporting quarter.⁵⁸ Since its 2007 acquisition of the station, Budd has failed to file children's commercial limit certifications on a quarterly basis. Throughout the License Term, Budd only filed certifications for the following quarters: the fourth quarter of 2013, the first quarter of 2014, all four quarters of 2015, and the first quarter of 2016. Budd did not file certifications for any other quarter during its License Term. Furthermore, among the certifications Budd did file, none were filed in a timely manner. Moreover, in response to the children's commercial limits certification in the renewal application, Budd answered "N/A" to whether it complied with the requirement or not.

11. Subsection 73.3526(e)(11)(iii) of the Rules requires each commercial television and Class A licensee to prepare and place in its public inspection file a Children's Television Programming Report (FCC Form 398) for each calendar quarter reflecting, *inter alia*, the efforts that it made during the quarter to serve the educational and informational needs of children. That subsection also requires licensees to file the reports with the Commission by the tenth day after the close of the reporting quarter.⁵⁹ Commission records show that Budd failed to file a Children's Television Programming Report for the third quarter of 2009. Furthermore, Budd filed its children's reports extensively *late* for all four quarters of 2007, all four quarters of 2008, the first, second, and fourth quarters of 2009, all four quarters of 2010, all four quarters of 2011, all four quarters of 2012, and the first two quarters of 2013, and further indicated in those late-filed reports that no children's programming was aired due to the fact that the "station has been silent pursuant to STA request."⁶⁰ As set forth above, if the Station was not silent during that entire time, as Budd maintains, it should have filed reports detailing the children's programming it broadcast even for the short periods of time when it was on the air. Furthermore, despite the fact that the Station was apparently consistently back on the air throughout all of 2015, the Licensee filed its children's reports extensively late for all four quarters.

12. Lastly, Subsection 73.3526(e)(13) of the Rules provides that "[e]ach applicant for renewal of license shall, within 7 days of the last day of broadcast of the local public notice of filing announcements required pursuant to § 73.3580(h), place in the station's local public inspection file a statement certifying compliance with this requirement."⁶¹ This rule extends to the licensee's online public file.⁶² Budd's online public file does not contain any statements that demonstrate compliance with this requirement.

13. As required by the CTA, we have considered whether Budd "has served the educational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs." The Commission and Budd have negotiated the terms of the Consent Decree, which resolves the matters relating to the Licensee's extended periods of silence, children's programming, unauthorized operation, and filing issues raised in this proceeding. As part of the Consent

⁵⁷ 47 CFR § 73.3526(e)(11)(ii).

⁵⁸ *Id.*

⁵⁹ 47 CFR § 73.3526(e)(11)(iii).

⁶⁰ WFXU FCC 398 Children's Television Programming Report for Quarter 2, 2011 (filed July 18, 2012). In all but one case, the requested STA was not granted.

⁶¹ 47 CFR § 73.3526(e)(13).

⁶² See *Second Report and Order*, 27 FCC Rcd at 4539.

Decree, Budd has agreed to make a settlement payment of \$100,000 (One Hundred Thousand Dollars) to the U.S. Treasury, and to implement and maintain a Compliance Plan designed to ensure its future compliance with the children's programming requirements of the Act and Rules noted above for two (2) years after the Effective Date.

III. TERMS OF AGREEMENT

14. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Commission, which approval shall be evidenced by incorporation of the Consent Decree by reference in the Adopting Order.

15. **Jurisdiction.** Budd agrees that the Commission has jurisdiction over it and the matters contained in this Consent Decree and that the Commission has the authority to enter into and adopt this Consent Decree.

16. **Effective Date.** The Parties agree that this Consent Decree shall become effective on the Effective Date as defined herein. As of the Effective Date, the Adopting Order and this Consent Decree shall have the same force and effect as any other order of the Commission.

17. **Violations.** The Parties agree that any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

18. **Certification of Authorized Station Operation.** Within thirty (30) days of the Effective Date, Budd will cause the Station to operate in full compliance with its license for the station (File No. BLCDT-20071113ACD) and the Communications Laws, including operation at the full authorized power specified therein. Within such time, Budd will submit a sworn statement under penalty of perjury, in a form consistent with 47 CFR § 1.16, signed by its President, Harvey M. Budd, certifying that the Station is so operating. Budd will place such certification in the Station's electronic public file and send an electronic copy of the certification to Barbara Kreisman at barbara.kreisman@fcc.gov and David Brown at david.brown@fcc.gov at the time of such placement.

19. **Termination of Investigation; Grant of Short-Term Renewal.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Commission agrees to terminate the Investigation. In consideration for the termination of the Investigation, Budd agrees to the terms and conditions contained herein. The Bureau shall grant the License Renewal Application upon payment of settlement payment for a period of two years from the date of such grant, provided that the following conditions are met: (1) Budd has timely provided the certification required by paragraph 18 of this Consent Decree and the Station is operating consistent with that certification; (2) Budd has timely and fully satisfied its obligation to make the Settlement Payment referenced in paragraph 21 of this Consent Decree; and (3) there are no issues other than the violations that are the subject of the Investigation that would preclude grant of the License Renewal Application. In exchange, Budd agrees to implement and maintain the Compliance Plan, outlined below. The Commission further agrees that in the absence of new material evidence, it will not use the facts developed, in whole or in part, from the Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion or in response to any petition to deny or other third-party complaint or objection, any inquiries, investigations, forfeiture proceedings, hearings, or other sanctions or actions against Budd concerning the matters that were the subject of the Investigation. However, upon filing of the Station's next license renewal application, the Commission may consider the actions of Budd subsequent to the date of grant of the License Renewal Application to determine whether renewal is warranted under Section 309(k) of the Communications Act.

20. **Subsequent Investigations.** This Consent Decree shall not prevent the Commission from investigating new evidence of noncompliance by Budd with the Communications Laws. Except as expressly provided in this Consent Decree, nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints or other adjudicatory pleadings filed against Budd

for alleged violations of the Act or the Commission's rules or for any other type of alleged misconduct, regardless of when such misconduct took place.

21. **Settlement Payment.** Within six months of the Effective Date, Budd will make a settlement payment to the United States Treasury in the amount of One Hundred Thousand Dollars (\$100,000). Budd acknowledges and agrees that upon execution of this Consent Decree, the Settlement Payment shall become a "Claim" or "Debt" as defined in 31 U.S.C. § 3701(b)(1).⁶³ Budd shall send electronic notification of payment to David Brown at david.brown@fcc.gov on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the FRN captioned above.⁶⁴ An FCC Form 159 (Remittance Advice) must be submitted with payment unless payment is made online at the Commission's Fee Filer website. When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions that Budd should follow based on the form of payment it selects:⁶⁵

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

22. **Waivers.** Budd waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Commission issues an Adopting Order as defined herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither Budd nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and Budd shall waive any statutory right to a trial *de novo*. Budd hereby agrees to waive any claims it may have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 CFR § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree. Notwithstanding any provision of the Consent Decree or the Adopting Order, this Consent Decree shall be void and of no further force or effect if the conditions specified in paragraphs 18 and 21 are not satisfied within the time periods specified.

⁶³ Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996).

⁶⁴ Payment may be made online at the Commission's Fee Filer website: <https://www.fcc.gov/encyclopedia/fee-filer>. Online payments do not require Licensees to submit FCC Form 159. Alternatively, payment may be made using FCC Form 159; detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁶⁵ Should the Licensee have questions regarding payment procedures, it should contact the Financial Operations Group Help Desk by phone at 1-877-480-3201, or by e mail at ARINQUIRIES@fcc.gov.

23. **Admission of Liability.** Budd admits to the facts discussed in paragraphs 3-13 with regard to its extended periods of silence, its failure to provide any Core Programming, as defined in Section 73.671, from January 2007 through the third quarter of 2013, its unauthorized operation of the Station pursuant to Section 73.1745(a), its failure to provide a Station signal over its community of license in violation of Section 73.625, and its failure to meet the filing requirements of Section 73.3526 of the Rules. By entering into this Consent Decree, Budd makes no other admission of liability or violation of any law, regulation or policy, and the Commission makes no finding of any such liability or violation. Notwithstanding any other provision of this Consent Decree, it is expressly agreed and understood that if this Consent Decree, or paragraph 19 hereof, or both, are breached by the Commission, or are invalidated or modified to the signatories' prejudice by the Commission or any court, then and in that event the provisions of the immediately-preceding sentences shall be of no force or effect.

24. **Compliance Plan.** In recognition that Budd's policies and practices regarding compliance with the Communications Laws can be enhanced to ensure compliance in the future, Budd represents that it will adopt and implement a compliance plan at the Station, and at any station acquired by Budd as well as any station licensed to Budd that becomes newly subject to the requirements of the Communications Laws while the Compliance Plan remains in effect. A copy of the plan is set forth below. Budd agrees, to the extent that it has not already done so, to implement the Compliance Plan upon issuance of the Adopting Order and to keep such Compliance Plan in effect for two (2) years from the Effective Date.

25. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

26. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or order adopted by the Commission (except an order specifically intended to revise the terms of this Consent Decree to which Budd does not expressly consent) that provision will not be superseded by such rule or Commission order.

27. **Successors and Assigns.** Budd agrees that the provisions of this Consent Decree shall be binding on its subsidiaries, affiliates, successors, assigns, and/or transferees. However, if Budd or any of its principals are not principals of any successor entity, the obligations of the Consent Decree shall not be operative.

28. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties with respect to the Investigation.

29. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

30. **Paragraph Headings.** The headings of the paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

31. **Authorized Representative.** The individual signing this Consent Decree on behalf of Budd represents and warrants that he is authorized to execute this Consent Decree and to bind Budd to the obligations set forth herein. The FCC signatory represents that she is signing this Consent Decree in her official capacity and that she is authorized to execute this Consent Decree.

32. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

Federal Communications Commission

By:

Marlene H. Dortch
Secretary

Date:

Budd Broadcasting Co., Inc.

By:

Harvey Budd
President

Date:

COMPLIANCE PLAN OF BUDD BROADCASTING CO., INC.

For a period of two (2) years from the Effective Date, in order to ensure future compliance with the Communications Laws, Budd, as defined in paragraph 2(c) above, will institute the following procedures for any television station that is licensed, controlled or subsequently acquired by it. This Compliance Plan is meant to cover, but is not limited to, the Station, as defined in paragraph 2(n) above. Unless otherwise provided, all terms defined in the Consent Decree apply to this Compliance Plan.

1. Budd will operate the Station in accordance with its licensed parameters, including at its full authorized power level (File No. BLCDDT-20071113ACD).
2. Budd will designate a Compliance Officer to oversee compliance with the Communications Laws, including the authorized operation of the Station and the acquisition, production, formatting, scheduling, and/or dissemination of information, as applicable, regarding educational and informational (E/I) programs and public service and public affairs programming in order to ensure compliance with the FCC's related rules and policies.
3. The Compliance Officer will conduct training for all Station employees and management at least once every twelve (12) months on compliance with the requirements of the Communications Laws, including the CTA and the Rules. A certification that the aforementioned training has occurred shall be placed in the online electronic public inspection file for the Station within three (3) business days of each such training event.
4. The Compliance Officer will train any new employee within five (5) business days of commencement of his or her duties at the Station on the requirements of the Communications laws, including the CTA and the Rules.
5. The Compliance Officer will assemble the information necessary regarding all programming to fully and accurately complete the Station's quarterly issues/programs lists and Children's Television Programming Reports (FCC Form 398s) and all other filings required by the Rules and ensure that Budd timely satisfies all Commission filing requirements, working with other Station staff or outside counsel, as the Compliance Officer may deem appropriate.
6. A. The Compliance Officer and other appropriate staff of the Station, in consultation with the Licensee, will periodically determine the significant needs and problems of the residents of Live Oak, Florida and select programming that relates to such needs and problems, maintaining logs of the broadcast of all such programming over the Station. This information will be compiled into quarterly issues & programs lists and will be timely placed in the Station's online public file.
B. All such quarterly issues/programs lists will be signed and dated by their preparer before they are placed in the public file.
7. A. The Compliance Officer and other appropriate staff of the Station will log all children's Core Programming broadcast by the Station, as defined by Section 73.671 of the Rules. These logs will be compiled into quarterly FCC Form 398s and will be timely placed in the Station's online public file.
B. All such Children's Television Programming Reports will be signed and dated by their preparer before they are placed in the Station's online public file.
8. The Station Manager and other appropriate staff of the Station will comply with the Commission's public file rule, Section 73.3526, by filing commercial limit certifications on a quarterly basis in the Station's online public file.
9. In 2019, when the Station's license is next up for renewal, the Compliance Officer and other appropriate staff of the Station will properly broadcast and file with the Commission local public notice announcements pursuant to Sections 73.3526(e)(13) and 73.3580(h) of the Rules.

10. Licensee will conduct annual audits, beginning one year from the Effective Date, of the Station's public file. This exercise will terminate on the successful completion of the second annual public file audit. The second audit will be due on the anniversary of the first audit.
11. Licensee shall annually submit a sworn certification to the Commission, signed by the Licensee, that the Station's public file fully complies with the Public File Rules. If the Licensee cannot truthfully make this certification, it shall set forth in detail any public file deficiencies and describe any corrective measures taken. This report shall be filed within ten (10) days of each annual public file audit pursuant to the preceding numbered paragraph 9 of this Compliance Plan.