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

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Federal Communications Commission  
Office of the Secretary

In the Matter of:

WVUM, Inc.

Application for Minor Modification of FM  
Station WVUM(FM), Coral Gables, Florida  
(FIN-74175)

FCC File No. BPED-20070615ACK

To: The Commission, Office of the Secretary

PETITION FOR RECONSIDERATION

WVUM, Inc. ("WVUM"), licensee of radio station WVUM(FM), Coral Gables, Florida (FIN-74175), by its counsel and pursuant to Section 1.106 of the Commission's Rules,<sup>1</sup> hereby seeks reconsideration of the Media Bureau's recent dismissal of the above-captioned application. By that application, noncommercial educational FM radio station WVUM(FM), operated as the station of the University of Miami, sought a minor modification of the station's authorization to increase its effective radiated power and improve its service to the community. By letter dated March 24, 2008, the Media Bureau dismissed the application based on the fact that it would not satisfy the TV Channel 6 protection requirements contained in Section 73.525 of the Commission's Rules with respect to WTVJ(TV), Miami, Florida.<sup>2</sup> WVUM(FM) submits that the Media Bureau's decision in this matter is in error and should be reconsidered. As detailed below, the fact that WTVJ(TV) will no longer broadcast on Channel 6 as of February 17, 2009 is

<sup>1</sup> 47 C.F.R. § 1.106 (2007).

<sup>2</sup> Letter from Dale E. Bickel to Mr. Paul Driscoll, dated March 24, 2008, regarding FCC File No. BPED-20070615ACK (hereinafter "Letter Decision").

a certain event, mandated by Congress and codified in the Commission's Rules. As such, WVUM's application seeks a construction permit conditioned on an established event, and is not a contingent application, which might be precluded by Section 73.3517. Furthermore, contrary to the Media Bureau Letter Decision, WVUM did request a waiver of the Commission's Rules to the extent that such a waiver was deemed to be necessary. Finally, this application poses no issues for the Commission with respect to comparative consideration of applications filed during a noncommercial filing window, as this application is a minor change application, submitted before the window and not requiring any comparative consideration or any question about comparative upgrades. Accordingly, WVUM respectfully requests that the Media Bureau reconsider its actions, reinstate the above-captioned application, and grant the construction permit for a minor modification of WVUM(FM).

**I. WTVJ(TV) Will Terminate Operations on TV Channel 6 by February 17, 2009.**

The Media Bureau's Letter Decision errs in its suggestion that whether WTVJ(TV), Miami, Florida, will terminate analog television service on Channel 6 by February 17, 2009, is speculative and inappropriate for WVUM(FM) to condition the grant of its application upon. The termination of WTVJ(TV)'s analog operation on television Channel 6 is far from speculative. In fact, it is required by law, as the cessation of analog television broadcasting has been mandated by Congress and codified in the Communications Act of 1934, as amended.<sup>3</sup> In addition, WTVJ(TV)'s election of DTV Channel 31 as its post-transition digital television channel has been codified in the FCC's DTV Table of Allotments.<sup>4</sup> More to the point, however, is the fact that, based on its recent *DTV Transition Status Report* FCC Form 387 filed with the

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<sup>3</sup> 47 U.S.C. § 309(j)(14)(A).

<sup>4</sup> See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eight Report and Order, FCC 08-72, MB Docket No. 87-268 (rel. March 6, 2008) at Appendix B.

Commission, WTVJ(TV) has completed construction of its final, DTV post-transition facility on Channel 31 and is operating with those digital facilities today.<sup>5</sup> Thus, the television station has completed its transition to DTV Channel 31 and all that remains is for it to shut off the analog operation on TV Channel 6, which it has reiterated that it will do in its recent DTV Status Report. Therefore, it is not a question of whether or if WTVJ(TV) will vacate TV Channel 6, but rather simply a matter of running out the clock until February 17<sup>th</sup> of next year.

Ultimately, the Media Bureau's decision that, "[WVUM(FM)'s] proposed facility cannot become operational unless WTVJ(TV) implements certain changes in its technical operations based on certain future events,"<sup>6</sup> drastically overstates the situation, as all that remains is for WTVJ(TV) to turn off the analog television operation on Channel 6. In fact, WTVJ(TV) cannot broadcast on that channel after that date, as it has no authority to do so, and the statute bars analog television broadcasts after that date.<sup>7</sup> Accordingly, WVUM(FM)'s application is not a speculative proposal hoping for the implementation of uncertain changes based on uncertain future events, but rather is predicated on the clear end-date that has been set by Congress, reiterated by the Commission, and confirmed by the licensee of the television station. The fact that WTVJ(TV) has already completed and is operating its full digital facilities on DTV Channel 31 leaves no question about the fact that WTVJ(TV) will vacate Channel 6 by February 18, 2009. Therefore, the Media Bureau's dismissal of WVUM(FM)'s application as premature and speculative is in error, and must be reconsidered.

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<sup>5</sup> FCC File No. BDTRCT-20080214ACL.

<sup>6</sup> *Letter Decision* at 1.

<sup>7</sup> 47 U.S.C. § 309(j)(14)(A).

## II. WVUM's Application is Not Inconsistent with the Contingent Application Rule.

The Media Bureau further erred in concluding that WVUM's application was inconsistent with the contingent application rule contained in Section 73.3517 of the Commission's Rules.<sup>8</sup> Section 73.3517 of the Commission's Rules generally prohibits the filing of applications contingent upon other interrelated applications.<sup>9</sup> Here, however, WVUM(FM)'s minor modification application is not contingent on any other application or any other Commission action. In particular, WVUM's proposal is not contingent on any application or request grant of authority sought by TV Channel 6 WTVJ(TV).<sup>10</sup> Thus, WVUM's application is not a contingent application, but rather simply seeks a grant conditioned on a delay in operation of the new facilities until after February 17, 2009.<sup>11</sup> As such, the Commission's prohibition on contingent applications articulated in Section 73.3517 is inapposite to this case, and the Media Bureau's application of that rule section as a basis for dismissing WVUM(FM)'s application is in error. Processing WVUM(FM)'s application would not expend limited FCC staff resources on a proposal that may never be implemented, as there is no hindrance or contingency to the implementation of the proposal, other than to delay commencement until after February 17, 2009.

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<sup>8</sup> *Letter Decision* at 1.

<sup>9</sup> 47 C.F.R. § 73.3517 (2007) (detailing circumstances in which multiple applications contingent upon one another may be filed and processed simultaneously, or in which an applicant seeking to acquire a station may file for a modification of the station while its assignment application remains pending).

<sup>10</sup> Further, the Media Bureau's Letter Decision erroneously suggests that WVUM's application relies on a "contingent consent agreement from a potentially impacted Channel 6 station" which it does not.

<sup>11</sup> The Media Bureau holding that WVUM had not sought a waiver of the contingent application rule is similarly in error, as the application is not a contingent application. In addition, the Letter Decision fails to acknowledge or consider that the application did, in fact, seek a waiver of the TV Channel 6 interference protection rules contained in Section 73.525 of the Commission's Rules to the extent necessary to permit the processing and grant of the application. *See* FCC File No. BPED-20070615ACK at Exhibit 15.

The Media Bureau routinely grants construction permits for radio stations conditioned on the occurrence of a particular event, such as the completion of a channel change by another station, completion of an adjacent station's change in community of license, or the surrender of a nonconforming booster facility. The case at hand is no different, as WVUM(FM) simply seeks a construction permit conditioned on WTVJ(TV)'s termination of analog operations on Channel 6. Accordingly, as WVUM(FM)'s application is not a contingent application prohibited by the rules, the Media Bureau's dismissal on that basis is in error and must be reversed.

**III. The Consideration of This Application Does Not Raise Any Issues of Comparative Upgrading in a Filing Window, But Window Applications Could Preclude the Processing of this Application.**

The Letter decision speculates that the processing of this application could frustrate potential applications by other applicants who decided to wait until the Channel 6 station had terminated its operation before they filed an application. But there was nothing that precluded any such applicants from filing an application just as WVUM(FM) has done to take advantage of the mandatory termination of the Channel 6 operation. WVUM(FM) should not be penalized for its decision to act promptly to take advantage of an opportunity that was available when it filed its application. In fact, it is possible that the Commission's dismissal of the WVUM application could preclude it from refileing at some undetermined time in the future, after the termination of the operation by Channel 6 when the Commission allows the filing of applications, as WVUM's opportunity may have in the interim been precluded by changes in other stations or new applications which preclude the improvement it seeks.

While the Commission speculates that the processing of this application could frustrate the comparative analysis of applications filed in the recent noncommercial filing window, this application is a minor change application, filed before the window opened and is not subject to such considerations. Moreover, even if it had been filed during the window, the Commission can

honor the prohibition against “upgrading” of an applicant’s comparative position by simply not giving any applicant credit for areas that it can cover only because of the Channel 6 disappearance, on the theory that those areas could not have been covered at the time that the applications were filed. Just as an applicant cannot claim a preference for the post-window filing divestiture of another broadcast interest or the positive improvement of its 307(b) showing (by, for instance, a subsequent favorable change in the number of stations in its coverage area), the Commission can simply declare that it will not give comparative preference to any applicant whose coverage was not possible at the time of the application because it relied on a Channel 6 station disappearing, as that coverage was not possible at the time of the filing. But the Commission need not delay the processing of applications such as that of WVUM(FM) which are not even involved with the comparative processing process.



**CONCLUSION**

For the reasons stated above, WVUM respectfully requests that the Media Bureau reconsider its action in this matter, reinstate the above-captioned application, and grant the minor modification of WVUM(FM) conditioned on the fact that it will not commence operation until after February 17, 2009.

Respectfully submitted,

**WVUM, INC.**

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Dated: April 23, 2008

**CERTIFICATE OF SERVICE**

I, Rhea Lytle, a Secretary in the law firm of Davis Wright Tremaine LLP, hereby certify that on this 23rd day of April 2008, I caused a copy of the foregoing "PETITION FOR RECONSIDERATION" to be served by U.S. Mail upon the following:

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