

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
FLORIDA ATLANTIC UNIVERSITY)	File No. BMPLIF-19950524DE
)	
Application For Authorization of New)	
D-3 and D-4 EBS Facilities at)	
Boynton Beach, Florida)	
_____)	

To: The Wireless Telecommunications Bureau

**REPLY TO
OPPOSITIONS TO PETITION FOR RECONSIDERATION**

**SOUTHERN FLORIDA
INSTRUCTIONAL TELEVISION, INC.**

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SUMMARY

Southern Florida Instructional Television, Inc. (“SFITV”) hereby replies to the Oppositions to Petition for Reconsideration filed by Florida Atlantic University (“FAU”), and FAU’s lessee of excess capacity, Sprint Corporation and its wholly owned subsidiary, Wireless Broadcasting Systems of West Palm Beach, Inc. (collectively, “WBS/Sprint”). These filings opposed SFITV’s petition for reconsideration of the grant by the Wireless Telecommunications Bureau (the “Bureau”) of FAU’s captioned application (the “FAU Application”).

Neither WBS/Sprint nor FAU addressed to any significant degree SFITV’s argument that the Bureau had acted in violation of regulatory and statutory requirements that any grant of an application must include a written disposition of any substantive issues raised in a petition to deny such application. SIFTV timely filed a petition to deny the FAU Application on November 1, 1996. In its summary grant of the FAU Application, released on May 25, 2005, the Bureau does not address the substantive issues raised in the Petition.

Instead, WBS/Sprint and FAU devote their pleadings to challenging SFITV’s standing, alleging that SFITV had not shown itself to be a “party in interest” in this proceeding as required by Section 309(d)(1) of the Communications Act. To the contrary, however, SFITV clearly established that grant of the FAU Application would require a denial of its own pending modification application due to the harmful interference that would be caused to the FAU proposed facilities by the proposed SFITV facility. WBS/Sprint’s and FAU’s insistence that the only interference to be considered is interference from the FAU proposed facility to the SFITV proposed facility is

disingenuous at best; any interference that would preclude the grant of the SFITV modification establishes the requisite injury for standing.

Even if SFITV did not have standing to file the Petition to Deny, the FCC's recent rule changes establishing 35 mile Geographic Service Areas confers standing on SFITV to file a petition for reconsideration of the Bureau's action. The grant of the FAU Application would give FAU a 35 mile protected service area overlapping SFITV's pre-existing 35 mile protected service area, requiring a "splitting of the football," thus significantly reducing SFITV's GSA far beyond what it would have received had its Modification been deemed mutually exclusive with FAU's Application and had that mutual exclusivity been resolved by the Bureau in favor of SFITV.

Having challenged SFITV's mutually exclusive status, WBS/Sprint and FAU next allege various deficiencies as to SFITV's Modification, claiming that such deficiencies should have resulted in its dismissal "10 years ago," and that such dismissal would have barred any standing to challenge the FAU Application. For the same reasons as argued in 1996, these arguments do not hold up under close scrutiny and are appropriately addressed in a consideration of SFITV's Petition to Deny in any event. And even if these arguments were supportable, they would not undermine SFITV's standing due to the injury it will suffer as a result of the FAU Application grant. Barring such grant, the original SFITV station license -- even without consideration of the SFITV Modification -- would result in a much larger GSA than SFITV would receive if the FAU Application was granted. In addition, upon a denial of the FAU Application, SFITV, along with any other interested party, would be free to file an auction application for the newly available "white space" in Boynton Beach.

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To: The Wireless Telecommunications Bureau

REPLY TO
OPPOSITIONS TO PETITION FOR RECONSIDERATION

SOUTHERN FLORIDA INSTRUCTIONAL TELEVISION, INC. (“SFITV”), through counsel and pursuant to Section 1.106 of the Rules, hereby replies to the Oppositions to Petition for Reconsideration of Sprint Corporation and Wireless Broadcasting Systems of West Palm, Inc. (collectively, WBS/Sprint”) filed on July 7, 2005, and Florida Atlantic University (“FAU”) filed on July 20, 2005 (WBS/Sprint and FAU are jointly referred to as the “Boynton Beach Parties”).¹ These filings opposed SFITV’s Petition for Reconsideration of the Bureau’s grant of FAU’s above-captioned application (“FAU Application”).

As detailed in SFITV’s Petition to Deny and reiterated in SFITV’s Petition for Reconsideration, the FAU Application is mutually exclusive with the pending application to modify SFITV’s Miami, Florida D Group Station, BMPLIF-930616DV, Call Sign

¹ Section 1.106 of the Commission’s Rules permits replies to be filed “within 7 days after the last day for filing oppositions” By a consent motion for extension filed on July 7, 2005, FAU requested until July 20 to file its Opposition and did in fact file its Opposition on that date. Accordingly, this Reply is filed within 7 days of that filing.

WHR-790 (the “SFITV Modification”). Barring a resolution of such mutual exclusivity, the FAU Application is not eligible for grant and should be returned to pending status. Moreover, SFITV argued that the Bureau had issued its grant without the required disposition of SFITV’s timely filed and pending Petition to Deny.

The Boynton Beach Parties challenge SFITV’s standing to file the Petition for Reconsideration -- and by extension the underlying Petition to Deny -- claiming that SFITV has not established that it is a “party in interest” and has failed to demonstrate any “direct injury” from the FAU Application grant. The Boynton Beach Parties next assert that the SFITV Modification was nevertheless defective and should have been dismissed “10 years ago.” SFITV addresses these arguments below.

**I.
DISCUSSION**

A. Post-Grant “Standing” Rationales Do Not Excuse The Bureau’s Failure To Consider SFITV’s Petition To Deny.

The Boynton Beach Parties urge the Bureau to disregard the dictates of the Commission’s Rules and the Communications Act, each of which requires that before granting any application, the Commission must “dismiss or deny” any petition pending with respect to that application, “by issuing a concise statement of the reason(s) for dismissing or denying the petition, disposing of all substantive issues raised in the petition.” 47 C.F.R. § 1.939(h); 47 U.S.C. § 309(d)(1). Alleging a lack of standing on the part of SFITV, the Boynton Beach Parties ask the Bureau to ignore SFITV’s Petition to Deny and the substantive issues raised therein. A determination as to whether SFITV has the requisite standing, however, should be made as part of the consideration of the

Petition to Deny itself -- not as an ad hoc post-decision rationale justifying why the Petition to Deny was ignored. In light of the Bureau's failure to consider SFITV's Petition to Deny, the appropriate action is to rescind the grant of the FAU Application and to return it to pending status.²

In the sole reference by the Boynton Beach Parties to the specific statutory and regulatory requirements associated with petitions to deny, WBS/Sprint remarks in footnote 8 of its Opposition that Section 1.939(h) of the Commission's Rules -- and presumably Section 309(d)(1) of the Communications Act, as well -- "does not contain a temporal element" and suggests that the Bureau may issue the required "statement" at some future point in time. Any fair reading of the cited rule and statutory provision, however, would lead to the conclusion that consideration of the petition must occur *before*, or at the very least, simultaneous with, the grant of the application. To find otherwise defeats the very purpose of the requirement, which is to ensure that grants do not occur without consideration of any pending petitions, and defeats reconsideration rights under Section 405 of the Communications Act.

B. SFITV Has Standing To File For Reconsideration of the Grant of the FAU Application.

Notwithstanding the Boynton Beach Parties' allegations as to its standing, SFITV was a legitimate "party in interest" in this proceeding before each of the November 1, 1996 Petition to Deny the FAU Application, and the June 24, 2005 Petition for Reconsideration of the Bureau's grant of the FAU Application.

² See, Metro Mobile CTS, Inc. 8 FCC Rcd 8675 (1993) ("Upon review, we have concluded that . . . grant of the . . . application was not valid because it violated Section 309(d) of the Communications Act . . . [T]he MSD failed to address McElroy's petition against the . . . application. . . . In setting aside the . . . grant, the application is returned to pending status.")

1. The FAU Application Is Mutually Exclusive With The SFITV Modification.

The Boynton Beach Parties challenge SFITV's standing to file the Petition to Deny and the Petition for Reconsideration on the grounds that the SFITV Modification is not mutually exclusive with the FAU Application. In particular, the Boynton Beach Parties claim that no mutual exclusivity can exist because FAU's Application does not propose facilities predicted to cause interference to SFITV's proposed facilities.³ In fact, however, the Boynton Beach Parties' view of mutual exclusivity is overly narrow and is not consistent with the more expansive concept of mutual exclusivity set out in the Commission's rules and applied in Commission cases.

Rule 21.31(a), cited by the Boynton Beach Parties, declares that:

The Commission will consider applications to be mutually exclusive if their conflicts are such that grant of one application would effectively preclude by reason of harmful electrical interference the grant of one or more of the applications.

47 C.F.R. §21.31(a). This concept has been repeatedly endorsed by the Commission in various cases, and has been found a sufficient ground for standing under Section 309(d) of the Communications Act.⁴

³ WBS/Sprint Opposition, pp. 4-5; FAU Opposition, pp. 4-6.

⁴ See, e.g., Virginia Communications, Inc., 2 FCC Rcd 1895 (1987) (MMDS applicants for the Boston NECMA were considered to be mutually exclusive with the winning lottery application of VCI because if VCI's application were to be disqualified, a second lottery for the same frequencies and market area will be scheduled with the remaining applicants participating. Therefore, each of the MMDS applicants at issue was a party whose interest would be adversely affected by the grant of VCI's application, and had standing under Section 309(d)(1) of the Act and Section 21.30 of the rules). Algreg Cellular Engineering, 12 FCC Rcd 8148 (1997)(petitioners were deemed to have standing because they were mutually exclusive applicants in markets in which mutually exclusive applications were pending.) The Trustees of Indiana University, 8 FCC Rcd 5555, para. 11 (1993)("Upon the filing of its mutually exclusive application, IEBC became a party in interest, the status required of a petitioner by Section 309(d)(1) of the Act.").

Although acknowledging this standard for determining mutual exclusivity, the Boynton Beach Parties misapply it by focusing solely on the degree of interference from the FAU proposal to the SFITV proposal, and ignoring the interference from the SFITV proposal to the FAU proposal. While FAU seeks to minimize the extent of the interference from SFITV to FAU, it is documented in SFITV's Petition to Deny,⁵ and at no time has FAU indicated any willingness to accept this interference. The Bureau's consideration of the grantability of the SFITV Modification *after* a grant of the FAU Application -- a consideration which would treat the FAU Application as a previously authorized station with legal priority -- would necessarily result in a conclusion that the SFITV Modification would inflict harmful interference on a granted station, which in turn, *would necessarily result in a denial of the SFITV Modification.*⁶ And where the grant of one application would, by reason of harmful interference, preclude the grant of another application, those applications are deemed to be mutually exclusive.

The Boynton Beach Parties seek to obfuscate this essential fact by pointing to FAU's ability to add or remove receive sites or to install higher performance antennas in order to alleviate such harmful interference, concluding -- rather disingenuously -- that

⁵ Under the FCC Rules then in effect, harmful co-channel interference is defined as anything less than 45 dB of co-channel interference protection. 47 C.F.R. §21.902(b)(3). Such harmful interference was demonstrated in the Engineering Exhibit attached to SFITV's Petition to Deny and resubmitted with its Petition for Reconsideration.

⁶ The Boynton Beach Parties are incorrect in their assertion that the Bureau is not precluded from granting SFITV's Modification. FAU Opposition at p. 7; WBS/Sprint Opposition at pp. 6-7. If there is less than 45 dB of co-channel interference protection, and there is no waiver or acceptance of such interference by the station receiving the interference, the interfering station cannot be granted.

SFITV is “not authorized to claim an interference injury on FAU’s behalf” in any event.⁷ But the Boynton Beach Parties miss the point. Whether they can now tolerate interference has no bearing on mutual exclusivity. FAU had every opportunity -- prior to the ban on settlements of EBS mutually exclusive EBS applications⁸ -- to accept interference to its facilities to resolve the mutual exclusivity. Yet FAU did not.⁹ Thus, SFITV does not seek to act on FAU’s behalf in any respect. SFITV is merely applying the FCC’s rules on harmful interference, just as the Bureau would do in considering SFITV’s modification, and concluding that a prior grant of the FAU Application would preclude a grant of the SFITV Modification upon application of those rules.

The Boynton Beach Parties next proclaim that the FAU and SFITV applications are not mutually exclusive because “the Bureau never made a determination that the applications were mutually exclusive.”¹⁰ This confuses the *observation* of the fact of mutual exclusivity with the *fact* of mutual exclusivity. Moreover, this is precisely the basis for the Petition for Reconsideration -- that the Bureau failed to take into account that there is another application pending that is mutually exclusive with the FAU Application.

⁷ FAU Opposition, p. 6; WBS/Sprint Opposition, at p. 5. This statement also neglects to consider the extensive interference the SFITV Modification would cause to FAU’s proposed protected service area, including interference within 15 miles of the PSA center point.

⁸ NPRM and MO&O in WT Dkt. No. 03-66, 18 FCC Rcd 6722, 6813-14, para. 228 (2003).

⁹ As the tortured proceeding below reflects, the Boynton Beach Parties have shown no indication to do so despite SFITV’s (and the other Miami parties’) best intentions.

¹⁰ FAU Opposition, p. 7, WBS/Sprint, p. 6.

Finally, the Boynton Beach Parties argue that the FAU and the SFITV applications are not mutually exclusive because there was no overlap in the 15 mile protected service areas in effect at the time that the applications were filed.¹¹ This argument is a red herring first because SFITV has never argued that its mutually exclusive status was based on any overlap of the 15 mile PSAs, and second because mutual exclusivity as defined prior to the implementation of GSAs was not determined by PSA overlap, but rather by theoretical interference.¹²

2. The Change In The FCC's Rules Establishing 35 Mile Geographic Service Areas Confers Standing Upon SFITV To File The Petition For Reconsideration.

Although SFITV believes that it has amply demonstrated standing to file the Petition to Deny in the proceeding below, which, in turn, would confer standing to file the Petition for Reconsideration of the FAU Application grant, the change in the FCC's rules

¹¹ FAU Opposition, pp. 7-8; WBS/Sprint Opposition, p. 7.

¹² Having advanced numerous arguments that the SFITV Modification was not mutually exclusive with the FAU Application, the Boynton Beach Parties appear to back away from their reliance on Footnote 47 of the Memorandum Opinion and Order in MM Docket 83-523, as grounds for waiver of the cut-off rules to the applications participating in their self-styled "market settlement." The Boynton Beach Parties nevertheless respond to SFITV's argument that Footnote 47 can apply only when the applications have achieved cut-off status and when they resolve *all* mutually exclusive applications by claiming that Footnote 47 applies even when the applications have not achieved cut-off status (citing Archdiocese of Detroit, 5 FCC Rcd 821 (1990)). WBS/Sprint Opposition, p. 3, n 6, FAU Opposition, p. 3, n 7. In fact, however, that case actually confirms the opposite view that applications to be amended must have already achieved cut-off status. 5 FCC Rcd at 822, para. 8. The Boynton Beach Parties further point to the treatment of applications for Lake Charles, Louisiana as supporting the proposition that the FCC has granted waivers of the cut-off rules, even when applications have not achieved cut-off status. WGS/Sprint Opposition, p. 3, n 6; FAU Opposition, p. 3, n 7. A review of the FCC's Public Notice, Report No. 23684A, released on February 29, 1996, shows this statement to be untrue -- that Report definitively states that the applications in Lake Charles, Louisiana referred to by the Boynton Beach Parties "have previously achieved cut-off status."

establishing 35 mile “geographic service areas” provides a separate legitimate basis for SFITV’s standing to file the Petition for Reconsideration of the Bureau’s action.

Section 1.106 of the Commission’s Rules provides that:

any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken.

47 C.F.R. §1.106(b)(1) (Emphasis added). As acknowledged by the Boynton Beach Parties, effective September 15, 1995, the Commission enlarged PSAs from 15 to 35 miles, which, by FCC rule, created an “overlap” in GSAs between the FAU and SFITV proposals. The FCC has since determined to resolve overlaps by “splitting” the overlap area.¹³ Since both the FAU Application and the SFITV Modification were pending at the time these new rules were adopted, however, grant of the FAU Application without consideration of the SFITV Modification accords unfair priority to FAU and adversely affects SFITV by reducing the area it would otherwise be entitled to. This falls squarely within the type of “adverse effect” contemplated by Section 1.106(b)(1) of the Commission’s Rules.¹⁴ Far from applying retroactively to an existing licensing

¹³ The Boynton Beach Parties argue that the proper place for SFITV to address this issue was in the rulemaking proceeding adopting the changed rule. FAU Opposition, at p. 8; WBS/Sprint Opposition at p. 7. To the contrary, SFITV has no quarrel with the new rule and is not seeking redress of that rule retroactively in a licensing proceeding. Rather, SFITV merely claims that a grant of the FAU Application will adversely affect it by virtue of the area that will be awarded to FAU and the consequent lesser area that will be left for SFITV. This confers standing on SFITV to file its petition for reconsideration.

¹⁴ See also Coalition for the Preservation of Hispanic Broadcasting, et al. v. FCC, 893 F. 2d 1349 (D.C. Cir. 1990).

proceeding, the change in rules applied *prospectively*, gives standing to SFITV to file its Petition for Reconsideration of the Bureau's grant.

C. The Boynton Beach Parties' Claims That SFITV's Modification Is Deficient Do Not Detract From SFITV's Standing.

Finally, the Boynton Beach Parties attack SFITV's standing by focusing on alleged deficiencies in SFITV's Modification, urging the Bureau to "nevertheless consider whether application defects and processing irregularities associated with SFITV's application require dismissal."¹⁵ Thus, for example, the Boynton Beach Parties quibble with SFITV's proposed location, they question the staff's processing of SFITV's modification and claim that such modification "lacked essential interference consent letters" warranting dismissal.¹⁶ To the extent that the Boynton Beach Parties have issues with SFITV's Modification, the proper forum for consideration of those issues is in the Petition to Deny the SFITV Modification, not in a Petition for Reconsideration of the Bureau's grant of FAU's Application.¹⁷

But more importantly, even if the SFITV Modification was deemed deficient and dismissed, under Orange Park Florida T.V., Inc. v. FCC, 811 F.2d 664 (D.C. Cir., 1987), such deficiency would not detract from SFITV's standing to petition for reconsideration of the Bureau's grant so long as SFITV would suffer harm from the grant of the FAU

¹⁵ FAU Opposition, p. 9; WBS/Sprint Opposition, p. 8.

¹⁶ FAU Opposition, pp. 9-11; WBS/Sprint Opposition, pp. 8-10.

¹⁷ Even so, the arguments made by the Boynton Beach Parties in this respect are without merit. The staff acted properly and within its discretion to process the SFITV Modification as a major modification. Such processing violated no FCC rule or statutory provision. Similarly, there has been no showing at any time that the SFITV Modification lacked any interference consent letters, and the Boynton Beach Parties' claim otherwise is general and unsupported.

Application. Such harm is demonstrated by the fact that SFITV's original license area would encompass a full 35 mile GSA upon denial of the FAU Application. In addition, denial of the FAU Application would enable SFITV to file an auction application for the newly available "white space" in Boynton Beach (along with any other interested party). The erroneous grant of the FAU Application thus causes SFITV cognizable harm regardless of the status of the SFITV Modification, and such harm is sufficient to confer standing to challenge that grant. Id. at 670-73.

**II.
CONCLUSION**

WHEREFORE, the foregoing premises considered, SFITV respectfully requests that the Bureau reconsider the grant of the FAU Application and return that application to pending status, for disposition in accordance with the rules governing mutually exclusive applications.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cynthia M. Johnson of Kilpatrick Stockton, LLP, hereby certify that I have, on this 27th day of July of 2005, had copies of the foregoing "Reply to Oppositions to Petition for Reconsideration" delivered to the following via electronic mail, overnight delivery or by United States first class mail, postage prepaid, as indicated:

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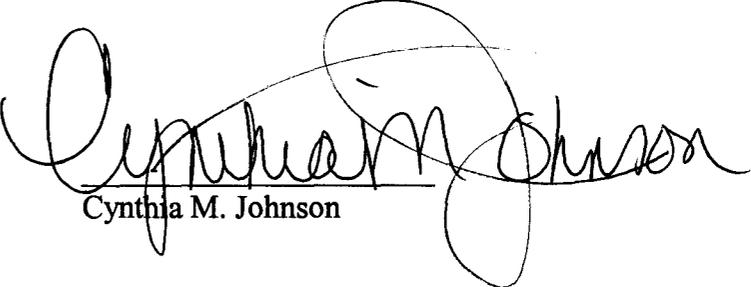
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