BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	Facility ID Nos. 70412, 70413, 70414,
Reclassification of License of Thirteen	)	70415, 70417, 70418, 70423, 70424,
Class A Television Stations Licensed	)	70425, 70426, 70427, 70428, 70430
To L4 Media Group, LLC	)	
	)	

To: Office of the Secretary
Attn: Barbara A. Kreisman, Chief, Video Division, Media Bureau

L4 MEDIA GROUP, LLC
RESPONSE TO ORDER TO SHOW CAUSE

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April 13, 2012

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SUMMARY

In this Response to Order to Show Cause, L4 Media Group, LLC, licensee of the above-referenced Class A television broadcast stations, demonstrates that the licenses should not be modified as proposed by the Video Division because no valid basis for such modification exists and such modification would be flatly inconsistent with established Commission policy.

The Commission's effort to downgrade the L4 licenses is premised on a fundamentally flawed statutory interpretation. In holding the licensees of Class A television stations to a more stringent standard than Congress intended, the FCC has exceeded its authority.

The Commission's modification proposal is further undermined by the agency's inconsistent application of the purported policy regarding ongoing Class A eligibility and station silence. Because the Commission has failed to maintain a clear policy approach by which licensees might be given notice as required under due process, and further failed to provide a reasoned explanation for the apparent departure from past practices, the Commission's proposed modification cannot withstand scrutiny under the Administrative Procedures Act.

For these reasons, the Commission may not modify the licenses from Class A status to low power television status.

RESPONSE TO ORDER TO SHOW CAUSE

1. ***Introduction***. Pursuant to Section 1.87 of the Commission's Rules, L4 Media Group, LLC ("L4" or "Licensee"), licensee of the above-referenced Class A television broadcast stations, by its attorneys, hereby responds to the "Order to Show Cause" released March 12, 2012 (DA 12-384) ("OSC"). As demonstrated herein, the L4 licenses should ***not*** be modified to low power television ("LPTV") status. No valid basis for such modification exists; to the contrary, such modification would be flatly inconsistent with established Commission policy.

2. ***Background.*** In the OSC, the Video Division proposes to reclassify L4's Class A stations to LPTV status. While the Division attempts to lard up the OSC with a litany of supposed rule violations that, in the Division's eyes, reflect an "inability to meet the ongoing Class A eligibility requirements", in fact the OSC dramatically overstates the true situation. That situation is simply this: as it repeatedly apprised the Commission, L4 temporarily ceased operation of its stations in order to conserve its financial resources. That cessation was, as a practical matter, completely reasonable and, as a legal matter, completely consistent with the Commission's rules and policies as well as the Communications Act of 1934, as amended.

3. Temporary cessation of operation was reasonable because of a number of factors, all of which were beyond L4's control. First, of course, was the undeniable fact that, beginning in 2007, the United States suffered a severe recession that imposed dramatic financial hardships on the entire U.S. business community, and small businesses in particular. L4, a small business, took what it viewed to be appropriate steps to protect and preserve its assets in the face of the extraordinary economic difficulties imposed by the recession.

4. Second, the plight of L4 – and the plight of all other Class A licensees – was seriously aggravated by the Commission's own regulatory policies over the past decade. In June,

2009, of course, the Commission completed the transition of the full-power television industry to digital operation. But Class A stations were omitted from the transition, left to navigate an essentially *ad hoc* system that afforded them – and the viewing and advertising public – little certainty as to when and how Class A stations would join the digital ranks.[1] As a result, Class A licensees suffered declines in viewership and advertising. And for their own planning purposes, Class A licensees did not and could not know when they would be required to invest in new equipment, a factor that exacerbated economic pressures already imposed by the recession. This uncertainty continued until July 2011, when the Commission finally adopted a digital transition plan for Class A and LPTV.[2] Thus, Class A licensees have had less than one year to plan and implement a digital transition plan.[3]

5. Additionally, in connection with the 2009 DTV transition, the Commission declined to require analog-to-digital converters to pass through analog signals. That effectively shut many, if not most, Class A stations, which have no cable or satellite must-carry rights, out of access to both wired and over-the-air homes as the full power DTV transition was completed.

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[1] After omitting LPTV and Class A stations from the digital transition discussion for years, in 2004 the Commission determined that the Communications Act afforded the agency the discretion to establish a deadline for the transition of low power television stations after the end of the full-service station transition period. *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Report and Order, 19 FCC Rcd 19331, 19337-19338 ¶¶ 13-18 (2004) ("*First Digital LPTV Order*") *citing* 47 U.S.C. §§ 309(j)(14)(A), 336(f)(4).

[2] *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Second Report and Order, FCC 11-110 (2011) ("*Second Digital LPTV Order*").

[3] While the *First Digital LPTV Order* permitted LPTV and Class A stations to apply for digital facilities, the uncertainty of the eventual digital transition coupled with the economic recession made the prospect of early conversion a risk many small business owners were not able to bear. *See, e.g., Second Digital LPTV Order*, at ¶ 8.

6. Faced with the multiple dilemmas posed by extraordinary economic and regulatory circumstances beyond its control, L4 availed itself of the Commission's well-established policy which permits stations to temporarily cease operation. For decades the Commission has routinely allowed such cessations. Indeed, the Commission has demonstrated considerably leniency to licensees who have chosen to take their stations off-the-air even for extended periods of time. Far from penalizing such stations (as the OSC proposes to do), the agency's "longstanding policy has been to encourage silent stations to resume broadcast operations." *Birach Broadcasting Corporation*, 16 FCC Rcd 5015, 5020 (2001) (renewing the station license even though the station had spent a considerable portion of its license term off the air), *appeal dismissed sub nom. New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002). As the Commission explained its policy to the U.S. Court of Appeals for the D.C. Circuit in *New World Radio*, agency precedent makes clear that "notwithstanding a station's prolonged silent status, if the station has returned to the air – even if it is after the designation for hearing on the renewal application [ ], or after a hearing on a show cause order for revocation [ ] – the Commission has favored permitting the licensee to continue as such." FCC Brief in *New World Radio*, *supra*, filed October 24, 2001, at 36 (footnote and citations omitted); *see also Southwestern Broadcasting Corp.*, 11 FCC Rcd 14880 (1996); *Keyboard Broadcast Communication*, 10 FCC Rcd 4489 (1995); *Cavan Communications*, 10 FCC Rcd 2873 (1995).

7. L4 advised the Commission of its temporary cessation of operations. In response, the Commission gave L4 no reason to believe that, by availing itself of the well-established opportunity to take its stations off-the-air temporarily, L4 was in any way jeopardizing the Class A status of its stations. To the contrary, the Commission repeatedly granted L4 authority to remain silent, noting only that, pursuant to Section 312(g) of the Communications Act, failure

of any station to broadcast for 12 consecutive months would result in the automatic expiration of that station's license.[4]

8. L4 has worked diligently since the adoption of the Class A digital transition order last summer to finalize and implement plans to convert all of its stations to digital operations. L4 has identified digital facilities for all of the stations and intends to begin filing new digital operations applications within the month. It has begun resuming analog operations, which resumption will roll out over the next week to all stations, and it has secured programming which is targeted to the African American community. *See* Declaration of Rick Ehrman, attached hereto at Exhibit A. Just as the Commission concluded in *Birach,* in light of the Commission's policy favoring the resumption of broadcast operations and L4's filing of, and the Commission's grant of, numerous silence authority requests,[5] the Commission simply cannot conclude that L4 knew or should have known that its conduct would result in a downgrade of license status. *See Birach,*

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[4] The letters granting L4's "stay silent" authorizations also cautioned that L4 would still be expected to comply with "all relevant rules". The only two rules specifically mentioned, however, were the requirement to file a renewal application at the appropriate time and the need to comply with tower lighting and painting requirements. Logically, the rules which might be deemed "relevant" to a silent station would ***not*** ordinarily include any rules relating to programming because, by virtue of its silent status, the station would not be providing any programming at all.

The only notices present on letters issued by the Video Division granting authority to remain silent refer to § 312(g) ("As a matter of law, the license for the above station will automatically expire if broadcast operations do not commence within 12 months from the date that the station ceased broadcasting.") and the following admonition:

> The station's silent status does not suspend the licensee's obligation to comply with all other relevant Commission rules, including the filing, when appropriate, of applications for renewal of broadcast license. Finally, we note that it is imperative to the safety of air navigation that any prescribed painting and illumination of the station's tower shall be maintained. See 47 C.F.R. Sections 17.6 and 73.1740(a)(4).

[5] It should be noted that, beginning in 2010, the Video Division stopped processing silent station STA requests, leaving them to linger in the Commission's electronic filing system in an "accepted for filing" status. Absent action on these requests, licensees were advised by the staff, informally, to treat the request as granted unless notified otherwise.

16 FCC Rcd at 5020 (*citing* McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993)).

9. The downgrade of a Class A station to LPTV status is not simply a matter of modification; given the bundle of rights associated with the Class A status, and the attendant obligations borne by Class A licensees, a downgrade of a Class A license to LPTV status is akin to a revocation of license.[6] Class A television stations, in exchange for compliance with the Commission's operating rules for full-power television stations, are accorded primary spectrum use status. Primary status provides a permanency to a license which is not afforded to LPTV stations, which are secondary and must always yield to full-power television stations, even where the full-power television station's requirements preclude the LPTV from operating in the market at all.

10. In order to ensure the survival of certain LPTV stations in light of the impending digital television transition, and to preserve such stations which served minority communities in particular, Congress passed the Community Broadcasters Protection Act of 1999, offering primary spectrum use status for those stations which met certain qualifying criteria. Pub. L. No. 106-113, 113 Stat. Appendix I at pp. 1501A-594 – 1501A-598 (1999) ("CBPA"), *codified at* 47 U.S.C. § 336(f). By requiring ongoing compliance with full-power operating rules, Congress fundamentally altered the qualifying station licenses from vulnerable to protected. Section 316(a) of the Communications Act of 1934, as amended, which provides for the Commission's "modification" of licenses is an insufficient foundation on which to rest what amounts to a

[6] In the *Silent Station Order*, the Commission explicitly reserved the right to apply existing revocation and cancellation procedures "[f]or stations that have been silent for substantial periods but which do not meet the automatic expiration requirement of 12 consecutive months of silence." *Id.* Such actions, however, are inapposite to the proposed action in the instant case. Here, the Commission proposes to "modify" the licenses, rather than cancel or revoke them, precluding the Licensee from due process rights, including the opportunity for a hearing.

revocation of license and replacement with another license. Primary status affords Class A stations the certainty needed to access capital and better programming, and will ensure survival through the next transition: spectrum reallocation. Downgrade to secondary status is equal to revocation of Class A survival.

11. ***Erroneous Statutory Interpretation Exceeds Agency Authority.*** As a preliminary matter, it must be noted that the OSC misstates the statutory requirements for Class A stations. In Paragraph 2, the OSC asserts that Section 336(f) of the Communications Act requires that

> during the 90 days preceding enactment of the statute, a low power television station must have: (1) broadcast a minimum of 18 hours per day; (2) broadcast an average of at least three hours per week of programming produced within the market area served by the station; and (3) been in compliance with the Commission's rules for low power television stations. Class A licensees must continue to meet these eligibility criteria in order to retain Class A status. [Footnotes omitted]

The three threshold showings – *i.e.*, (a) minimum 18 hours a day operation; (b) average three hours of local programming; (c) compliance with LPTV rules – are accurately described in the first portion of that quoted passage. However, the final sentence of that passage – which asserts that Class A licensees must continue to meet those three threshold criteria – is incorrect: continued compliance with the three threshold criteria is ***not*** a statutory requirement. Rather, the structure of Section 336(f) of the Act plainly instructs that, once a station has demonstrated that it met the three enumerated criteria during the 90 days preceding November 20, 1999, thereafter the station, in order to maintain its qualification for Class A status, must merely remain "in compliance with the Commission's operating rules for full-power television stations." Since the three specific criteria to be satisfied prior to November 20, 1999, are ***not*** among the "operating rules for full-power stations", the statute by its specific terms does ***not*** impose any continuing obligation to satisfy those three specific criteria going forward.

12. Thus, to the extent that the OSC is based on some notion that failure to comply with any or all of those three specific criteria can support any kind of penalty, the OSC is wrong. L4 acknowledges that its stations temporarily ceased operation. But, as noted above, such cessation is a matter of longstanding and routine Commission policy and practice. In doing so, L4 complied with the rules for full-power stations, as the Communications Act requires: L4 notified the Commission that it was temporarily ceasing operation, and it obtained Commission approval for such cessation. Since the Commission does not penalize full-power stations for such cessations, the Commission cannot permissibly penalize Class A stations in such circumstances. *See, e.g., Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

13. L4 recognizes that, in adopting the Class A rules in 2000, the Commission purported to impose on Class A stations eligibility criteria beyond those specified by Congress. *See Order on Reconsideration*, 16 FCC Rcd at 8256-57. That effort, however, was ineffective because it contravened the plain language of the governing statute.

14. As the Commission stated in its initial order adopting and implementing the CBPA, the statute "was designed to permit a one-time conversion of a single pool of LPTV applications that met specific criteria before the statute was enacted." *In the Matter of Establishment of a Class A Television Service*, Report and Order, 15 FCC Rcd 6355, 6361 (2000) ("*Report and Order*"). It is clear from the statute's preamble that Congress intended Class A protection as a reward for past service by certain LPTV stations that went above and beyond the LPTV operating requirements. *See* CBPA, Section 5008(b)(1). But nothing in the statute or its legislative history suggests that Congress intended to require Class A stations to continue to meet

that extremely stringent standard;[7] indeed, to the contrary, the only on-going requirements specified by Congress were those applicable to conventional full-power licensees.

15. Congress was explicit in limiting the scope of the three threshold criteria for initial Class A qualification. *See* 47 U.S.C. §336(f)(2)(A)(i). Had Congress intended the three threshold criteria to constitute prospective obligations, Congress could and would have used more expansive language, as it did in the directing the further criteria (in 47 U.S.C. §336(f)(2)(A)(ii)). In that latter section, Congress clearly specified that the obligation to comply with all rules applicable to full-power stations would be in effect "from and after the date of [a station's] application [for Class A status]." That specification was plainly in contradistinction to the 90-day look-back period for evaluation of the three threshold criteria; the statute contains absolutely no indication that those three threshold criteria were to be imposed in a prospective manner.

16. Where Congress' words are clear, they should be literally construed. *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373 (1986) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962) ("The 'plain purpose' of legislation . . . is determined in the first instance with reference to the plain language of the statute itself.")). "Because statutory language represents the clearest indication of Congressional intent... we must presume that Congress meant precisely what it said." *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001). The FCC impermissibly exceeded its authority by adopting rules much broader and more burdensome to Class A stations than Congress intended. *See Bd. of*

[7] In its Order of Reconsideration, the Commission dismissed a similar argument raised by Univision. *Order on Reconsideration*, 16 FCC Rcd at 8256-57. As discussed *infra*, the Commission's explanation fell far short of that necessary to overcome the presumption that Congress did not mean what the statute plainly says.

Governors, 474 U.S. at 374 ("The statute may be imperfect, but the [agency] has no power to correct flaws that it perceives in the statute it is empowered to administrate. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute."). Moreover, in its implementation of the CBPA to require continuous compliance with the threshold criteria, the FCC failed to meet its "onerous" burden to rebut the presumption that Congress meant what it said. *Id.* (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088–89 (D.C. Cir. 1995)). Thus, the FCC has exceeded its authority by applying an erroneous interpretation of the statute to Class A stations. *See Fin. Planning Ass'n v. SEC*, 482 F.3d 481 (D.C. Cir. 2007) (holding that an agency exceeds its authority where it applies an interpretation at odds with the plain meaning of the statute).

17. Not only did the Commission exceed its authority by interpreting the statute to subject Class A stations to a burdensome ongoing eligibility regime, the FCC has also substituted its own interpretation of the penalties for station silence the where Congress has occupied the field. In 1996, Congress passed § 403 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the Telecommunications Act"), *codified at* 47 U.S.C. § 312(g), to provide for the automatic expiration of a station's license when it failed to broadcast for 12 consecutive months. The Commission determined that this "silent station provision" applied to all broadcast stations, and that FCC-issued special temporary authorizations ("STAs") for stations to remain off the air for a specified period of time would not toll this automatic forfeiture of license. *Implementation of Section 403(l) of the Telecommunications Act of 1996 (Silent Station Authorizations)*, 11 FCC Rcd 16599, 16600 (1996) ("*Silent Station Order*"). The Commission explicitly noted that nothing about the statute changed the requirements that stations notify and/or seek authorization for periods of silence. *Id.*

18. In other words, the adoption of the silent station provision acted to ease the administrative burden on the Commission of revocation proceedings where a broadcast station remained off the air longer than twelve consecutive months. The statute does not suggest a legislative intent that stations be penalized for remaining silent for *less* than twelve consecutive months.[8] Nor does § 312(g) impact the Commission's explicit authority from Congress to grant applications for temporary operations (or, in the case of silence, non-operation) if it finds extraordinary circumstances warrant such temporary authority in the public interest. 47 U.S.C. § 309(f). Moreover, "the Commission has acknowledged that 'in appropriately compelling circumstances involving a temporary inability to comply,' a licensee can apply for an STA to operate at variance with the CBPA's operational and programming requirements without affecting its Class A status." *Show Cause Order*, at 3 (quoting *Order on Reconsideration*, 16 FCC Rcd at n.76.).

19. The stations at issue each sought STA to remain silent and the Commission granted each such STA. Presumably, in granting these authorizations, the Commission determined that the circumstances underpinning the requests were "appropriately compelling" such that grant of STA in each instance was in the public interest. This precedent cannot be reconciled with the Commission's current claim that a station may no longer preserve its Class A status for experiencing periods of *authorized* station silence.

20. ***Inconsistent Application Provides Inadequate Notice.*** Even assuming, *arguendo*, that the Commission's expansive interpretation of the CPBA is valid, the FCC is proposing to subject the Licensee to a drastic penalty without adequate notice, violating the Licensee's due process rights. "Traditional concepts of due process preclude an agency from penalizing a private

[8] There is sparse legislative history on § 312(g) the CBPA. Where there is little relevant legislative history, a statute's plain language is reinforced. *Nat'l Public Radio*, 254 F.3d at 230.

party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broadcasting Company v. FCC,* 824 F.2d 1, 3 (D.C. Cir. 1987). Moreover, if an agency wishes interpret its own rules to cut off a party's rights, it must give full notice of its interpretation – "otherwise the practice of administrative law would come to resemble 'Russian Roulette.'" *Id,* at 4. It can hardly be said that the Commission has provided sufficient notice that a Class A licensee might suffer the harsh penalty of downgrade to LPTV status because the agency might someday find, *ex post facto*, that serial station silence, even where authorized, is contrary to its interpretation of the CPBA. As the D.C. Circuit has said, such a "sometimes-yes, sometimes-no, sometimes-maybe policy...cannot, however, be squared with [the court's] obligation to preclude arbitrary and capricious management of the [agency]'s mandate." *Bd. of Governors,* 732 F.2d at 977. The Commission explicitly found, on multiple occasions over a period of years, that the L4 stations' circumstances were sufficiently compelling to warrant temporary silence authority. At no point did the Commission provide notice that extended periods of silence might jeopardize the stations' primary status.[9]

21. ***Absent Reasoned Explanation, Departure from Prior Practice is Arbitrary and Capricious.*** The governing precedents are clear: "an agency may not... depart from a prior policy *sub silentio*." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (U.S. 2009) (citing *United States v. Nixon*, 418 U.S. 683, 696, (1974)). Indeed, when an agency's prior policy has engendered serious reliance interests, as here, it is arbitrary or capricious to ignore such matters. *Id.* (citing *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996)). "Whatever the ground for the departure from prior norms, [...] it must be clearly set forth so that the reviewing

[9] *See supra* note 4.

court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Atchison v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (U.S. 1973). Moreover, an agency must "provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003). The Commission has not reconciled its historical conduct with the position it is taking today – it has not even attempted to explain its abrupt detour from precedent or apparent disavowal of its own previous determinations, or the reliance of the Licensee thereon, that temporary silence served the public interest.

22. The FCC's failure to supply notice and a reasoned explanation for its policy shift regarding the impact of silence on Class A status eligibility is arbitrary and capricious, and thus an abuse of discretion in violation of the Administrative Procedures Act. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (holding that unexplained inconsistency in agency practice is a reason for holding a policy change arbitrary and capricious under the APA, unless the agency adequately explains the reasons for a reversal of policy). Moreover, this bait-and-switch amounts to a retroactive change in enforcement policy, which "requires that an agency explain why it has decided to take this rather extraordinary step." *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 (D.C. Cir. 1986). Where the Commission fails, as here, to "consider an obvious and less drastic alternative to a retroactive change in enforcement policy," its action will be found arbitrary and capricious and cannot stand. *Id.*

23. Congress intended that the FCC treat Class A as equivalent to full-power television stations in terms of rule enforcement; had Congress intended otherwise, it would not have specified that full-power television operating rules were the standard for maintaining

qualification going forward. Full-power stations are not subject to "downgrade" of license for rule violations; they are subject to forfeitures and, in extreme circumstances, revocation hearings. The primary status accorded to Class A stations demands that the Commission treat Class A licenses as it does full-power stations. In seeking to apply the draconian sanction of revocation of primary status rather propose forfeitures for alleged rule violations, the Commission is impermissibly making, rather than implementing, law. *See Engine Mfrs. Ass'n*, 88 F.3d at 1089. Moreover, where disparate treatment is apparent, "[t]he issue presented is whether [the FCC's] harsh result is appropriate under the circumstances." *NLRB v. Washington Star Co.*, 732 F.2d 974, 975 (D.C. Cir. 1984) (per curiam) (holding NLRB's inconsistent application of enforcement of filing deadline "puzzling to the point of arbitrariness."). Revocation of primary status of the L4 licenses in light of the circumstances would be arbitrary and capricious.

24. ***Conclusion*** It is clear that the Commission exceeded its authority in interpreting that statute to permit revocation of primary status from Class A stations. Moreover, the Commission failed to justify its abrupt enforcement policy change in light of the its prior posture toward silence authorizations for Class A stations. For these reasons, the the L4 licenses should ***not*** be modified as proposed.

Respectfully submitted,

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April 13, 2012

EXHIBIT A

DECLARATION OF RICK EHRMAN

Rick Ehrman hereby declares under penalty of perjury that:

1. I am Manager of L4 Media Group, LLC.

2. I have read the Order to Show Cause directed to L4 Media Group, LLC that was released by the Federal Communication Commission on March 12, 2012.

3. I have read the foregoing Response to Order to Show Cause.

4. The facts as stated in the Response to Order to Show Cause are true and correct.

Executed 13 day of April, 2012.

Rick Ehrman