

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

*In the Matter of* )  
 )  
Expanding the Economic and Innovation ) **GN Docket No. 12-268**  
Opportunities of Spectrum Through Incentive )  
Auctions )

To: **The Commission**

**OPPOSITION**

Asiavision, Inc. (“Asiavision”), licensee of Station WIAV-LD, Washington, DC, Facility No. 168063, by its attorney, hereby supports the requests filed with the Commission requesting reconsideration of the above-referenced decision<sup>1</sup>, with regard to the protection of eligible Class A stations that have not yet received their Class A licenses. Asiavision opposes those petitions for reconsideration only on the very narrow point that should the Commission grant the relief requested for eligible Class A stations that filed for a license on an in-core channel after February 22, 2012, the Commission must grant the same relief to other similarly situated Class A eligible stations. In particular, Asiavision urges the Commission to exercise its acknowledged discretion to protect WIAV-LD, a legacy out-of-core Class A Qualified station that obtained an in-core channel but was not able to file for a digital Class A license until after February 22, 2012. Of the many hundreds of submissions to the record of this proceeding, no commenters proposed that Class A stations licensed after February 22, 2012, should not be granted service preservation. Indeed, commenters addressing the issue uniformly proposed that the appropriate benchmark for

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<sup>1</sup> *Report and Order*, “Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,” FCC 14-50 (rel. June 2, 2014) at ¶¶ 232-235 (the “Order”).

service area protection was the commencement of the incentive action. As do others, Asiavision also believes that to the extent the Order denies protection to stations such as WIAV-LD, the Order contravenes the Spectrum Act's directive regarding service protection and the mandate of the Community Broadcasters Protection Act of 1999 (the "CBPA"), and it arbitrarily subjects similarly-situation parties to disparate treatment.

In enacting the CBPA, Congress directed the Commission to issue licenses to Class A Qualified low power stations immediately where it was possible to do so. But Congress recognized that Class A-eligible stations located on out-of-core channels 52 through 69 could not immediately be granted permanent Class A status on their assigned channel because of their need to relocate to an in-core channel. The CBPA directed that these designated "Class A Qualified" stations be permitted to move in-core; it also directed the Commission to issue Class A licenses to Class A Qualified stations "simultaneously" upon assignment of their in-core channels. Moreover, the CBPA provided that these stations would be entitled to retain their Class A Qualified status until such time as they could be granted a Class A license on their in-core channel. The Commission itself acknowledged both the will of Congress and the challenges facing Class A Qualified stations when it determined to "impose any time limit on the filing of a Class A application by LPTV licensees operating on a channel outside the core."<sup>3</sup>

Many out of core, Class A Qualified stations were able to move to available in-core channels and were immediately issued Class A construction permits. However, other eligible stations, particularly in the top 30 markets, could not move immediately because of a lack of available displacement channels. These stations, including Asiavision (licensee of WIAV-LP

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<sup>3</sup> *Report and Order, "Establishment of a Class A Television Service,"* 15 FCC Rcd 6355, 6397 ¶ 103 (2000) ("Class A Report and Order").

operating on Channel 58), had to wait -- in some cases for years -- for the completion of the full power digital transition and associated band repacking for in-core channels to become available.

As other parties to this proceeding have explained (and Asiavision agrees), the Commission's decision to protect only Class A facilities licensed or for which a license to cover was pending as of February 22, 2012, finds no support in the Spectrum Act itself. The Order also cannot be reconciled with the CBPA, which provides that "[t]he Commission shall act to preserve the service areas of low-power television licensees pending the final resolution of a class A application."<sup>4</sup> In its order implementing the CBPA, the Commission noted the statutory directive; moreover, it concluded that, under the CBPA, an eligible station's service must be protected "as long as [its Class A] certification is ultimately granted by the Commission."<sup>5</sup> Furthermore, in considering how to implement the CPBA's service preservation directive specifically with respect to out-of-core low power stations, the Commission determined to "commence contour protection for those stations upon issuance of a construction permit for an in-core channel."<sup>6</sup> The Commission reasoned that "it is appropriate to commence contour protection with the award of a construction permit on the in-core channel, rather than a license to cover construction, as these permittees will have already certified their eligibility for Class A status."<sup>7</sup> No "deadline" exists in the CPBA for perfection of Class A status to an in-core channel.

As described below, Asiavision timely filed its certificate of Class A eligibility and was granted a construction permit for an in-core channel (via a companion channel) in 2008. Thereafter, Asiavision maintained the stations' Class A qualified status (i) throughout the time it

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<sup>4</sup> See 47 U.S.C. § 336(f)(1)(D).

<sup>5</sup> See Class A Report and Order, ¶ 39.

<sup>6</sup> Class A Report and Order, ¶ 40 n.81.

<sup>7</sup> *Id.* at ¶ 103.

filed for a digital operations on Channel 44 in 2013; (ii) through the time it then filed for conversion of its Channel 44 companion channel as permitted in *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television (Second Report and Order)*, 26 FCC Rcd 10732 at ¶¶ 51-52 (2011); and (ii) through today. Given Congress's clear directive in the CBPA that qualified low power stations' service areas were to be preserved "pending final resolution" of their Class A applications, and absent a Congressional directive in the Spectrum Act to the contrary, the Commission's failure to protect WIAV's digital Class A status on Channel 44 is contrary to law and must be reversed.<sup>8</sup>

Contrary to the Commission's view expressed in the Order with regard to stations in general, WIAV-LD did not "fail to take steps to obtain a Class A license and remove [its] secondary status in a timely manner."<sup>9</sup> WIAV-LD worked diligently and continuously to perfect its digital Class A status. At no time has a question been raised as to whether WIAV-LD acted in a diligent manner. Specifically, when the CBPA was enacted in 1999, Asiavision's Class A eligible station was a low power station licensed and operating on out-of-core Channel 58 (with call sign WIAV-LP). Asiavision timely submitted its statement of eligibility for Class A status in 2001 and since that time continuously has maintained that status. Its service includes, among other things, children's programming; locally produced, locally originated programming; and Emergency Alert Service messages. WIAV-LD's continuing Class A eligibility and service have been documented in the Station's public file and in the certifications contained in its initial and subsequent applications for conversion to Class A status. WIAV-LP therefore was, and

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<sup>8</sup> As noted above, of the many hundreds of submissions to the record of this proceeding, no commenters proposed that Class A stations licensed after February 22, 2012, should not be granted service preservation. Indeed, commenters addressing the issue uniformly proposed that the appropriate benchmark for service area protection was the commencement of the incentive action.

<sup>9</sup> See Order at ¶ 234.

remained, entitled under the CBPA to Class A status. When the Commission enacted procedures to allow it to move its Class A status to its companion channel (rather than convert to digital on its original primary Channel) in *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television (Second Report and Order)*, 26 FCC Rcd 10732 at ¶¶ 51-52 (2011), it opted to take advantage of that opportunity. Therefore, it remains entitled to that Class A status on the current Channel 44.

Thus, every step of the way Asiavision acted diligently and in good faith to preserve WIAV-LP's Class A status and move it into the core. To summarize:

- November 2007: Asiavision files for a digital construction permit for WIAV-LD on in-core Channel 44, immediately after that channel becomes available. *See* File No. BDCCDTL-20071128AGL.
- May 22, 2008: Asiavision's digital construction permit is granted. Asiavision subsequently modifies this permit to specify an alternate transmitter site in June 2009.
- December 31, 2011: WIAV-LP suspends operations in order to comply with the Commission's directive that all out-of-core low power facilities be decommissioned as of December 31, 2011. The Station remains off the air while its digital companion facilities on Channel 44 are constructed.
- December 12, 2012: Asiavision's digital facility is constructed and station resumes service as WIAV-LD. On December 31, 2012, Asiavision files a license application for its digital companion channel. Class A eligibility maintained on new channel.
- April 26, 2013. License for digital companion channel is granted. Class A operations continue.
- November 12, 2013. Application for conversion of digital license to Class A status is filed. This license remains pending almost a year later despite repeated requests to process this application.

Thus, throughout the period from March 2009 through April 2014, Asiavision worked diligently and in good faith to construct and activate WIAV-LD's Class A digital facilities. It did so in reliance on the provisions of the CBPA and the Commission's implementing orders regarding the digital transition of formerly out-of-core Class A stations.

Yet now, in an order issued in June 2014 -- more than a year after the Commission became well aware that WIAV-LD completed its successful digital transition; more than five months after the Commission was aware that a Class A conversion application was on file for WIAV-LD; and two years after the enactment of the Spectrum Act -- the Commission has determined that all of Asiavision's good faith efforts to perfect WIAV-LP's original Class A status and move its operations to an in-core channel should be nullified. Asiavision agrees with the other parties' arguments that this result is contrary to Congress's intent in the CBPA; inconsistent with the Commission's historical decision "to impose no time limit" on authorization of Class A facilities by qualified out-of-core stations; and manifestly inequitable.

In the Order the Commission exercised its discretion to grant protection to the following classes of stations:

1. New full power stations that were authorized, but not constructed or licensed, as of February 22, 2012.
2. Full power facilities authorized in outstanding construction permits issued to effectuate a channel substitution for a licensed station.
3. Modified facilities of full power and Class A stations that were authorized by construction permits granted on or before April 5, 2013.
4. Class A facilities authorized by a construction permit to implement their mandatory transition to digital operation.

However, as other parties have pointed out, none of these categories pertain to those situations such as that posed by Asiavision and certain other Class A Eligible stations where a station was

perfected following the arbitrary February 22, 2012 date. There is no doubt the Commission has the acknowledged that it has the discretion to protect station such as WIAV-LD. WIAV-LD's circumstances are strikingly similar to those of KHTV-CD, Los Angeles, California ("KHTV"), which the Commission also exercised its discretion to protect.<sup>10</sup> Like KHTV, Asiavision worked diligently to convert to digital Class A status.<sup>11</sup> Like KHTV, Asiavision made repeated certifications that it continued to meet all Class A operating requirements. Like KHTV-CD, Asiavision was required to obtain a digital LPTV license for Channel 44 before WIAV-LD's digital Class A license application could be processed.<sup>12</sup> Yet the Commission has not offered any reasoned explanation for its failure to exercise its discretion to protect a station such as WIAV-LD. The law is clear that the Commission must justify its disparate treatment of similarly-situated parties.<sup>13</sup>

Moreover, neither of the stated concerns underlying the Commission's decision to limit its grant of discretionary protection -- to avoid protecting either permitted facilities that may never be constructed or two sets of facilities for certain stations<sup>14</sup>-- is applicable to the relief requested here. WIAV-LD is licensed and in operation, and the operation of its out-of-core, analog facilities on Channel 58 was terminated by Commission action effective December 31, 2011. The Commission has had the ability to (i) review its own Class A Eligibility lists to

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<sup>10</sup> See Order at ¶ 235.

<sup>11</sup> *Id.*

<sup>12</sup> See Order at ¶ 235 n.730.

<sup>13</sup> See *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (remanding denial of renewal application where the renewal application of another applicant engaging in similar behavior had been granted). See also *Arnold L. Chase*, 6 FCC Rcd 7387, 7412 (1991) (citing *Melody Music* for the proposition that "similar factual situations must be treated similarly under FCC's rules"); *Applications of American Broadcasting Cos.*, 7 F.C.C. 2d 245, 260 (1966) (Commission "must apply [the] same principles to all licensees").

<sup>14</sup> Order at ¶ 195.

determine what stations still were likely to be moved to in-core channels (and were entitled to protection); (ii) contact the parties whose facilities had not yet moved to in-core channels to ascertain their intentions; or (iii) examine its own CDBS database to determine which stations were still filing applications to perfect their Class A status on in-core channels; and (iv) *at the very least*, issue a *Public Notice* several months in advance if a new “deadline” was going to be imposed, giving existing station owners specific NOTICE of whatever new “deadline date” was going to be imposed for perfected of licensed Class A in-core facilities. Yet, the Commission did NONE of those things, and to post-hoc impose a deadline on such Class A Eligible licensees that can no longer be met is blatant unfair, unnecessary, and deprives such parties of their rightful due process rights. Out-of-core Class A stations like WIAV-LP (which historically had understood that their facilities would be protected based on the express mandate of the CBPA and the Commission’s implementing orders) were given no advance notice that the rules would change in the middle of the game -- and no opportunity to come into compliance with the new regime. Nevertheless, the Order had the effect of stripping WIAV-LD (and others) of the protected Class A status that Asiavision had worked in good faith and diligently over a period many years, consistent with the CBPA and Commission orders -- and at great financial and personal expense -- to preserve.

Finally, it again must be emphasized that the CBPA, which should control the Commission’s discretion, did not itself establish a deadline for retention of Class A entitlement for out-of-core licensees, nor did the Commission itself establish such a deadline. While Commission indirectly established such a deadline by ordering all out-of-core licensees (including Class A Qualified licensees) to go off the air on December 31, 2011, by necessity, that required all formerly out-of-core licensees (including Class A Qualified licensees) to begin

operation on an in-core channel no later than December 31, 2012 – a deadline which Class A Qualified licensees such as Asiavision (and others) met. *That date* provided the Commission the full right to (i) strip Class A Qualified licensees of any further Class A rights, and to ignore such stations in its spectrum’s plans, if operations on in-core channels did not commence by that date and (ii) grant full rights to all other Class A Qualified licensees who successfully met that deadline. It is that date that should control – namely, if a Class A Qualified station began operation on an in-core channel by December 31, 2012, it should be protected. If it was not in operation on that date, it should not be protected. That status has always been readily ascertainably by the Commission through review of its original Class A Eligibility List compared against its own application database, and promotes the most logical and fair degree of protection and certainty to all parties, including the Commission.

### **Conclusion**

As the Commission recognizes repeatedly throughout the Order, it has the discretion to extend protection where doing so would serve the public interest. Here, the public interest benefits are manifest: Asiavision’s application to move to digital Channel 44 in order to implement Class A Qualified stations’ mandatory transition to digital operation followed years of diligent efforts to secure a replacement channel. Protecting WIAV-LD will not materially encumber spectrum or constrain the Commission’s repacking efforts.<sup>15</sup> Meanwhile, the requested relief will align WIAV-LD’s status with that of other, similarly-situated stations that have been protected. Equity and the public interest therefore mandate that the Commission exercise its discretion and grant protection to WIAV-LD.

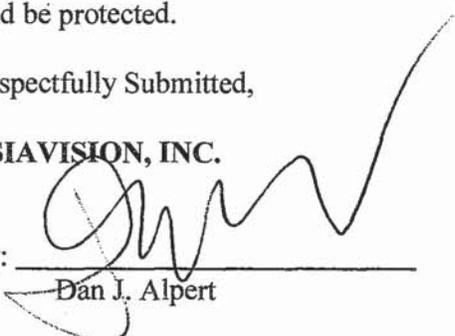
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<sup>15</sup> See Order at ¶ 234.

Accordingly, for all the reasons stated herein, Asiavision agrees that the Order should be reconsidered and reversed and WIAV-LD should be protected.

Respectfully Submitted,

**ASIAVISION, INC.**

By: 

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Dan J. Alpert

Its Attorney

The Law Office of Dan J. Alpert  
2120 N. 21<sup>st</sup> Rd.  
Arlington, VA 22201

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