

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

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

**PARTIAL OPPOSITION TO PETITIONS FOR RECONSIDERATION OF  
ABACUS TELEVISION AND THE VIDEOHOUSE, INC.**

Latina Broadcasters of Daytona Beach, LLC (“Latina” or the “Licensee”), licensee of Station WDYB-CD, Daytona Beach, Florida (Facility ID No. 41375) (“WDYB”), by its attorneys and pursuant to Section 1.429(f) of the Commission’s rules,<sup>1</sup> hereby submits this partial opposition to the petitions for reconsideration (the “Petitions”) filed by Abacus Television (“Abacus”) and The Videohouse, Inc. (“Videohouse”) (collectively, “Petitioners”) in the above-captioned proceeding. Latina fully supports Petitioners’ assertions that it was improper for the Commission to deny protection to certain Class A-eligible stations that had not yet licensed Class A digital facilities as of February 22, 2012. Latina opposes the Petitions only to the extent that Petitioners suggest that the Commission should extend additional protection *solely* to Petitioners’ stations, WPTG-CD and WOSC-CD (the “Stations”). Instead, the Commission should afford protection to *all* similarly-situated Class A stations that are licensed by the Pre-Auction Licensing Deadline, including WDYB.

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<sup>1</sup> 47 C.F.R. § 1.429(f).

## **I. INTRODUCTION AND SUMMARY.**

Latina is wholly-owned by Nora Crosby Soto, an Hispanic female who, after 25 years of industry experience at Televisa/Univision and elsewhere, invested her own money and launched a television company to serve the Latino community. In 2010, Latina purchased then-silent WDYB. Pursuant to the Community Broadcasters Protection Act of 1999 (“CBPA”),<sup>2</sup> WDYB was Class A-eligible. Because WDYB was licensed to out-of-core Channel 53, however, the station was not able to convert its low power television license to a Class A license. Nonetheless, WDYB complied with each of the Commission’s requirements governing Class A television station operation.

Upon acquiring WDYB, Latina undertook construction of a new digital facility that would allow the station to provide quality locally-produced as well as Azteca America network programming to Central Florida’s burgeoning Latino community. On February 15, 2011, Latina filed a displacement application seeking permission to construct a new digital facility for WDYB on in-core Channel 14.<sup>3</sup> The Commission issued the construction permit on May 23, 2011. On September 29, 2012, less than two years after acquiring WDYB and with 20 months remaining on its construction permit, Latina commenced digital operation on Channel 14.

For a variety of reasons beyond Latina’s control, it took almost two more years for the Media Bureau to grant Latina’s request to convert WDYB’s in-core authorization to a Class A license. On November 15, 2012, the Commission granted WDYB’s digital license application.<sup>4</sup> That same day, Latina filed an application on Form 302-CA to convert the license to Class A

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<sup>2</sup> Pub. L. No. 106-113, § 5008, 113 Stat. Appendix I at pp. 1501A-594-1501A-598 (1999), codified at 47 U.S.C. § 336(f).

<sup>3</sup> FCC File No. BDISDTL-20110215ACR.

<sup>4</sup> FCC File No. BLDTL-20121011AAE.

status (the “Class A Application”).<sup>5</sup> Some eighteen months later, on February 12, 2014, the Media Bureau, acting through delegated authority, inexplicably denied the Class A Application,<sup>6</sup> and Latina asked the Media Bureau to reconsider its decision. Ultimately, the Media Bureau reinstated and granted the Class A Application (on October 23, 2014).<sup>7</sup> Obviously, during the interim period while WDYB’s status remained in limbo, the Commission adopted a *Report and Order* in the instant proceeding and the time for filing petitions for reconsideration of the order expired.<sup>8</sup>

As a legal matter, by retroactively adopting a firm date by which out-of-core Class A-eligible stations must have filed their Class A applications in order to be auction-eligible or receive protection in post-auction repacking, the *Report and Order* contradicts the CBPA and cannot be squared with the Commission’s deadlines for Class A-eligible stations to transition to in-core channels. As a policy matter, the Commission’s failure to protect low power television stations that were Class A-eligible and licensed as Class A stations prior to the Pre-Auction Licensing Deadline may serve to extinguish a significant source of diverse, locally-produced programming, contrary to the Commission’s long-stated goals. The Commission’s approach relegates stations like WDYB to an uncertain future whereby their fate as over-the-air broadcasters is entirely out of their hands *despite having fully complied* with the Commission’s rules governing Class A operation and meeting the applicable Commission deadlines. Such a result is unjust, unlawful, and contrary to the public interest. The Commission should reconsider

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<sup>5</sup> FCC File No. BLDTA-20121115ACK.

<sup>6</sup> See Letter from Barbara A. Kreisman, Chief Video Division, Media Bureau, FCC, to Latina Broadcasters of Daytona Beach, LLC, FCC File No. BLDTA-20121115ACK (Feb. 12, 2014).

<sup>7</sup> See Letter from Barbara A. Kreisman, Chief Video Division, Media Bureau, FCC, to Latina Broadcasters of Daytona Beach, LLC, FCC File No. BLDTA-20121115ACK (Oct. 23, 2014).

<sup>8</sup> *Expanding the Economic and Innovation Opportunities for Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567 (2014) (the “*Report and Order*”).

this decision and extend protection to each of the limited number of out-of-core, Class A-eligible stations that have timely constructed their in-core facilities.

**II. THE COMMISSION SHOULD EXTEND PROTECTION TO CLASS A STATIONS LICENSED BY THE PRE-AUCTION LICENSING DEADLINE.**

Latina supports and incorporates herein by reference Petitioners' arguments addressing how the Commission's failure to protect Class A-eligible stations that had not yet licensed their in-core digital facilities as of February 22, 2012 is inconsistent with the CBPA and the agency's own policies. Specifically, although the Commission, in hindsight, has criticized these stations for "fail[ing] to file for Class A licenses until after February 22, 2012,"<sup>9</sup> the agency cannot reconcile its *ex post facto* justification with its previous position that Congress "impose[d] no time limit on the filing of a Class A application by LPTV licensees operating on a channel outside the core."<sup>10</sup> Moreover, the Commission's revisionist approach is inconsistent with its own policies for the Class A digital transition. In the *Digital LPTV Second Report and Order*, the Commission set December 31, 2011 as the deadline for out-of-core stations (including Class A-eligible stations) to cease operations in the 700 MHz band, thereby giving stations until December 31, 2012 to commence broadcasting on in-core facilities.<sup>11</sup> Now, the Commission effectively is penalizing these stations (*i.e.*, denying them the mandatory protections associated

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<sup>9</sup> *Report and Order* ¶ 234,

<sup>10</sup> See Abacus Petition at 2; Videohouse Petition at 2 (quoting *Establishment of a Class A Television Service*, Report and Order, MM Docket No. 00-10 (rel. Apr. 4, 2000)).

<sup>11</sup> *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 ¶ 23(2011). Under Section 312(g) of the Communications Act, Class A-eligible out-of-core stations had 12 months from the date they ceased operations on an out-of-core channel to commence broadcasting in the core.

with the incentive auction) for *complying* with the Commission’s rules—an action clearly contrary to agency precedent.<sup>12</sup>

The Commission’s attempt in the *Report and Order* to justify the disparate treatment of Class A stations based on the number of stations involved is misguided. *First*, the Commission appears to overstate the nature of the problem. Although there may have been “approximately 100 formerly out-of-core Class A-eligible LPTV stations that obtained an in-core channel but did not file for their Class A license until after February 22, 2012,”<sup>13</sup> the Commission has not articulated how many of these stations remain Class A-eligible and have either licensed their in-core facilities or still have valid construction permits. The relevant universe may contain far fewer stations than the Commission projects.

*Second*, the number of stations to which protection might be extended should have no bearing whatsoever on the Commission’s decision, as these stations “have made investments in their facilities” in reliance upon the agency’s prior guidance,<sup>14</sup> and deserve the protection to which they are entitled under the CBPA.

*Finally*, the Commission already has established relevant precedent by extending protection to an out-of-core Class A-eligible station that filed its license application after February 22, 2012.<sup>15</sup> The Commission cannot refuse to extend the same protection to similarly-situated licensees without a rational basis. There are three relevant dates for determining whether a full power or Class A television station will be auction-eligible or receive repacking

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<sup>12</sup> See *C&W Communications*, Order, 20 FCC Rcd. 5586, ¶ 9 (2005) (describing license revocation as “an extraordinary sanction” warranted only by “egregious” misconduct).

<sup>13</sup> *Report and Order* ¶ 232. Latina lacks sufficient information to verify this statement.

<sup>14</sup> *Id.* ¶ 234.

<sup>15</sup> *Id.* ¶ 235. The Commission granted Class A status to station KHTV-LP, Los Angeles, CA.

protection: February 22, 2012 (the date of the Spectrum Act’s enactment);<sup>16</sup> April 5, 2013 (the date the Media Bureau issued a freeze on the processing of certain applications);<sup>17</sup> and a yet-to-be-determined Pre-Auction Licensing Deadline (for stations who had pending construction permits as of April 5, 2013).<sup>18</sup> Neither the single excepted station, KHTV-CD, nor WDYB was licensed or had a grantable Class A license application pending as of February 22, 2012; both stations applied for their Class A license by April 5, 2013; and both stations have been licensed in advance of the Pre-Auction Licensing Deadline. There is no relevant distinction between these stations.<sup>19</sup> Just as it is inappropriate for the Commission to discriminate against Class A-eligible stations, so too is it inappropriate to discriminate among them.<sup>20</sup> The agency was correct to extend protection to KHTV-CD, and it should do the same for WDYB and other similarly-situated stations.

As far as Petitioners’ Stations are concerned, but for the FCC’s delay in granting WDYB’s Class A application, WDYB’s circumstances are comparable:

	WDYB-CD	WPTG-CD	WOSC-CD
Station Commences In-Core Operations	9/29/2012	Appx. 07/2013	12/27/2012 (reduced facilities)
Application for In-Core License Filed	10/11/2012	07/02/2013	03/27/2013
Application for In-Core License Granted	11/15/2012	12/23/2013	04/03/2013
Valid Class A Application Filed	11/15/2012	04/04/2014	04/01/2014

<sup>16</sup> *Id.* ¶ 191.

<sup>17</sup> *Id.* ¶ 207.

<sup>18</sup> *Id.*

<sup>19</sup> Moreover, the FCC’s decision to extend protection to KHTV-CD rebuts any theoretical argument that the agency lacks the authority to protect a Class A-eligible station that was not licensed as a Class A as of February 22, 2012.

<sup>20</sup> See *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965); *Comms. & Control, Inc. v. FCC*, 374 F.3d 1329, 1336 (D.C. Cir. 2004) (FCC must explain why it demands strict adherence from some licensees, but not all).

Given that WDYB commenced in-core operations before the Stations did; applied for its in-core license before the Stations did; received its in-core license before the Stations did; and filed a valid Class A application before the Stations did, there is no rational basis for the Commission to protect WPTG-CD and WOSC-CD but not WDYB. Again, the Commission should extend protection to all Class A stations that were out-of-core on February 22, 2012 and are licensed as Class A stations by the Pre-Auction Licensing Deadline.

### **III. EXTENDING PROTECTION TO WDYB IS IN THE PUBLIC INTEREST.**

It would be unmistakably harmful to the Commission's diversity and localism objectives to conduct the auction without protecting WDYB. Since it acquired the station, as evidenced by its considerable upfront investment to launch a high-quality, in-core digital signal, Latina planned to bring Azteca America's unique programming to Hispanic viewers in Central Florida. Ms. Crosby Soto invested more than half a million dollars of her own funds in rebuilding the station, and is seeking investment to launch a local news operation. Despite the considerable money and time already invested in WDYB, without the certainty attendant to protection in the auction that will facilitate additional financing, Latina's plans for the station will never come to fruition.

In adopting the CBPA, Congress specifically acknowledged that Class A stations promised to uniquely further the Commission's diversity and localism objectives by affording unserved communities increased, targeted television programming offerings.<sup>21</sup> With the United

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<sup>21</sup> See 105 Cong. Rec. S12017 (daily ed. Nov. 7, 1997) (statement of Sen. Wendell Ford) (observing that "many other LPTV stations offer more local and 'niche' programming because their service areas are smaller, their audiences more targeted"); 105 Cong. Red. S. 12846 (daily ed. Oct. 21, 1998) (statement of Sen. Wendell Ford) ("The core mission of low power broadcasters is to provide programming for local communities that are not served by full power stations."); 106 Cong. Red. S10462 (daily ed. Aug. 5, 1999) (statement of Sen. Conrad Burns) ("Low power television stations (LPTV) offer their communities significant services including valuable local and other specialized programming to unserved and underserved audiences throughout the United States."); 106 Cong. Rec. S14724 (daily ed. Nov. 17, 1999) (section-by-section analysis of S. 1948) ("LPTV stations in urban markets typically provide niche programming (e.g., bilingual or non-English programming) to under-served communities in large cities. In

States Hispanic population growing from 32.8 million in 2000 to 48.9 million in 2010,<sup>22</sup> as a policy matter, it is more important than ever to honor the protections Congress intended for Class A stations that have abided by the Commission's rules. Multiple studies have shown that a disproportionately large segment of Spanish language speakers living in the U.S. relies exclusively on over-the-air television for video service compared to the general population.<sup>23</sup> It would be a disservice to this burgeoning, underserved segment of the U.S. population to eliminate an important source of programming in Central Florida now that Latina has completed its investment in WDYB and is fulfilling the initial visions of Congress and the Commission for Class A television stations. The Commission's action, if not reconsidered, threatens to deprive the Hispanic audience, whose viewing choices are particularly limited, of an alternative programming source.

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many rural markets, LPTV stations are consumers' only source of local, over-the-air programming. Owners of LPTV stations are diverse, including high school and college student populations, churches and religious groups, local governments, large and small businesses, and even individual citizens.”).

<sup>22</sup> Census.gov, Melissa Therrien and Roberto R. Ramirez, *The Hispanic Population in the United States* (Mar. 2000), available at <http://www.census.gov/population/www/socdemo/hispanic/ho00.html>; Census.gov, *The Hispanic Population in the United States: 2010 Detailed Tables* (Mar. 2010), available at <http://www.census.gov/population/www/socdemo/hispanic/cps2010.html>.

<sup>23</sup> Centris Marketing Science, *Newsletter* (Jan. 2014), available at <http://www.centris.com/January2014Newsletter.html> (noting that “use of over the air . . . programming as the primary source of TV content is more prevalent among Hispanics compared to the general population”); see also *OTA TV Homes Include 46 Million Consumers*, TVNewsCheck.com (June 6, 2011) (“[S]ome minority groups are more dependent on broadcast reception than the general population, including . . . 23% of Hispanic homes . . . , a proportion that increases to 27% among homes in which Spanish is the language of choice.”), available at <http://www.tvnewscheck.com/article/2011/06/06/51686/ota-tv-homes-include-46-million-consumers>; *Digital Broadcast Television Transition Estimated Cost of Supporting Set-Top Boxes to Help Advance the DTV Transition*, U.S. Government Accountability Office, GAO-05-258T, at 4 (Feb. 17, 2005) (“Additionally, non-white and Hispanic households are more likely to rely on over-the-air television than are white and non-Hispanic households.”), available at <http://www.gao.gov/new.items/d05258t.pdf>.



**Certificate of Service**

I, Nora Crosby Soto, hereby certify that on November 12, 2014, I caused a copy of the foregoing “Partial Opposition to Petitions for Reconsideration of Abacus Television and The Videohouse, Inc.” to be mailed via first-class postage prepaid mail, to the following:

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