

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

In the Matter of)	
)	MM Docket No. 99-292
Establishment of a Class A)	
Television Service)	RM-9260

COMMENTS OF USA BROADCASTING, INC.

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SUMMARY

USA Broadcasting, Inc. ("USAB"), hereby submits its comments to the Commission's most recent *Notice of Proposed Rule Making* regarding what low-power television ("LPTV") stations should be eligible for Class A status and the nature and extent of any Class A protections.

In this proceeding, USAB urges the Commission to fulfill two fundamental principles underlying the establishment of Class A status:

- that all LPTV stations have a full and fair opportunity to obtain Class A status; and
- that Class A regulations enable LPTV stations to achieve their full potential in providing diverse programming options to communities throughout the United States.

Each of these goals is entirely consistent with the bedrock purposes of the LPTV service – to foster the diversity of video programming available via free, over-the-air television, regardless of where that programming is produced – and the purposes of the Community Broadcasters Protection Act (the "CBPA") – to protect such programming diversity in light of the increasing uncertainty caused to LPTV stations by the transition to digital television and the loss of certain broadcast spectrum. Accordingly, the Commission should establish eligibility criteria that enables all fully programmed LPTV stations an opportunity to achieve Class A status.

Moreover, the Commission should structure LPTV regulations to ensure further enhancement of the nation's LPTV facilities, including prioritizing certain LPTV applications and allowing maximum latitude to LPTV's analog and (potential) digital operations.

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To: The Commission

COMMENTS OF USA BROADCASTING, INC.

USA Broadcasting, Inc. ("USAB"), pursuant to Section 1.415 of the Commission's Rules, respectfully submits these comments in response to the *Notice of Proposed Rule Making* in the above-captioned proceeding. ^{1/}

In the *Initial Notice*, the Commission recognized the valuable programming diversity that low-power television ("LPTV") stations provide their communities. It also noted that such stations increasingly were threatened with displacement or elimination. Accordingly, in order to afford certain LPTV stations additional protection from future interference or displacement, the Commission proposed the creation of a new "Class A" status for LPTV stations. The Commission reasoned that the conferral of Class A status upon qualified LPTV stations would

^{1/} On September 29, 1999, the Commission issued its initial notice in this proceeding. See *Notice of Proposed Rule Making, Establishment of a Class A Television Service*, MM Docket No. 99-292 ("Initial Notice"). Two months later, on November 29, 1999, the Community Broadcasters Protection Act of 1999 (the "CBPA"), which also addressed the status of low power television stations, was signed into law. Accordingly, on January 13, 2000, the Commission issued an *Order and Notice of Proposed Rule Making* in order to terminate the *Initial Notice* and to request comment on issues raised by the CBPA and related matters (the "*Second Notice*").

enhance their ability to obtain financing, to engage in long-term planning, to enter the world of digital television, and to better respond to the needs of their communities. In addition, the mere opportunity to obtain such Class A status might encourage other LPTV licensees to improve their facilities or programming so that they too might enjoy the several benefits of Class A status.

Since the *Initial Notice*, Congress has confirmed the value of LPTV stations. In the Community Broadcasters Protection Act, Congress mandated the most basic level of protection that Class A status would afford LPTV stations, and even defined one class of stations that should be eligible for Class A status. However, the CBPA was not intended to foreclose the ability of the Commission to grant other LPTV stations these same protections on a going-forward basis. Any other reading of the CBPA would contradict its own text and stated purposes. Moreover, unreasonable restrictions on Class A eligibility would be irrational and unfair and would eliminate a major public benefit of the Commission's initial Class A proposal: namely, the incentive that Class A status would provide to improve existing LPTV facilities.

USAB controls the licensees of 26 LPTV stations, including 21 stations that will be displaced during the digital transition. Because USAB is well aware of both the benefits that LPTV stations provide and the burdens that they continue to face, USAB urges the Commission to develop Class A status so that it may serve as a means by which LPTV stations may be able to acquire the certainty necessary to invest in their facilities and their programming, and to maximize actual programming diversity within local television markets. After all, the purpose of the CBPA was "to promote diversity in television programming such as that currently provided by low-power television

stations.” 2/ By establishing additional eligibility opportunities that both take into account the economic constraints that have burdened many LPTV operations, and that appropriately value diverse programming that is not otherwise available via free, over-the-air service, the Commission may better preserve and encourage the programming diversity that LPTV stations provide and which the American public deserves.

I. THE COMMISSION SHOULD USE CLASS A STATUS AS THE CBPA INTENDS: A MEANS TO MAINTAIN AND DEVELOP ACTUAL VIDEO PROGRAMMING DIVERSITY.

In the *Second Notice*, the Commission inquired as to whether the CBPA authorizes the grant of Class A LPTV status to stations only during a brief period following passage of the CBPA, or on a going-forward basis. 3/ That question can have only one answer. Simply stated, the Community Broadcasters Protection Act does not limit and does not intend to limit what LPTV stations merit Class A status, and when, at least after a set point in time, they might apply for such status. In fact, such limits would be contrary to the purposes that motivated the passage of the Act. Moreover, a failure to use Class A status as a means to encourage all LPTV licensees to further develop their stations so as to provide a full slate of quality programming would be contrary to the interests of the public, which merits more such programming alternatives via free broadcast television.

2/ See CBPA at Section (b)(5).

3/ *Second Notice* at ¶ 9.

A. The Text and Purposes of the CBPA Demonstrate that the Commission Should Continue to Designate LPTV Stations for Class A Status on a Going-Forward Basis.

Both the text and stated purposes of the Act make clear that Congress saw the CBPA as an initial step -- not the final word -- toward the betterment of the LPTV service. Through the CBPA, Congress approved the creation of a Class A status for the LPTV service and further advanced the proposal offered in the *Initial Notice* by defining:

- several of the extra protections that should be afforded Class A stations;
- how the Commission should balance digital maximization concerns with those of low-power stations;
- what procedures should be used with regard to the first Class A LPTV stations; and
- one set of stations that should qualify for such Class A status.

Importantly, however, the CBPA did not suggest that it was meant to be a ceiling as to what LPTV stations merit Class A status.

In fact, the plain language of the Act confirms that Congress did not intend the CBPA to be the beginning and the end with regard to what stations may qualify for Class A status. Under the CBPA, the key question with regard to Class A status is not whether a station has submitted a “Certification of Eligibility” under Section (f)(1)(B), which is just a procedural step relating to a special, initial class of Class A LPTV stations, but whether an LPTV station satisfies the requirements of Paragraph 2(A) of the statute. Specifically, under Section (f)(1)(C), any LPTV station that satisfies the “requirements set forth in Paragraph 2(A) . . . may submit an application for Class A designation within 30 days after final [Class A] regulations are adopted.”

This text is notable for two reasons. First, the CBPA does *not* say when the “window” for such Class A applications must close --- only that such applications *may begin to be submitted* within 30 days after the Class A regulations are issued. Second, this language, which defines the set of stations eligible for Class A status, refers only to Paragraph 2(A) -- not certifications of eligibility or Section (f)(1)(B) -- as defining what classes of LPTV stations merit Class A eligibility. And that paragraph indicates that Class A status is to be available on a going-forward basis.

Specifically, Paragraph 2(A) states that an LPTV station qualifies for Class A status if either one of two circumstances is true:

A) during the 90 day period ending November 28, 1999:

- it has broadcast a minimum of 18 hours per day; and
- it has broadcast at least three hours per week of locally produced programming; and
- it has complied with Commission rules on LPTV service;

OR

B) the Commission determines that such qualification would serve the public interest, or for other reasons determined by the Commission.

The intent of such a two-pronged provision is clear. Congress wanted to ensure that a certain type of LPTV station -- the type of station that prompted the *Initial Notice* -- would be eligible for Class A status. However, Congress also did not want to foreclose stations that did not comply with the CBPA’s exceedingly restrictive requirements as of November 28, 1999, from achieving Class A status. Accordingly, under the CBPA, Congress authorized the Commission to grant Class A status to any LPTV station,

without requiring the station to have aired any particular type of programming during any particular period, so long as that grant is in the public interest.

The stated purposes of the CBPA corroborate that Congress intends the Commission to grant Class A status to stations on a broad and going-forward basis. In the statute's findings, Congress acknowledged that "[i]t is in the public interest to promote diversity in television programming such as that currently provided by low-power television stations." ^{4/} Further, the Act noted that, prior to the passage of the CBPA, the secondary nature of LPTV stations "have blocked many low-power broadcasters from having access to capital, and have severely hampered their ability to continue to provide quality broadcasting, programming or improvements." In light of such avowed purposes of the CBPA -- to better enable LPTV licensees to get the financing and stability necessary to develop their stations and programming -- it would be nonsensical to read the statute to limit application of Class A status to only those stations that had provided certain types of quality programming *prior to enactment of the CBPA*. Rather, the establishment of Class A status must preserve and promote the programming diversity afforded by LPTV stations, not just at the time of the statute's enactment, but throughout the digital transition period and beyond.

B. Class A Status Must Be Used to Encourage Programming Diversity, Including Programming That Is Not Otherwise Available To A Particular Local Broadcast Market.

The broadcasting of locally originated programming is one of many functions of low-power television stations. However, the airing of such local

^{4/} CBPA at Section (b)(5).

programming is not LPTV's only public service, or even its most important one. After all, locally originated programming is not guaranteed to be any more of interest to a particular community than programming produced elsewhere. In addition, the location where certain programming was produced does not testify to the quality or value of the programming. Simply stated, just because programming is not locally produced does not undermine its contribution to programming diversity. Indeed, diverse programming that is not local in origin may better serve the many specialized audiences – such as children, the elderly, students, tourists, farmers and boaters, as well as ethnic groups – of the typical LPTV station. ^{5/} Such groups may be far better served by outside programming targeting their specific interests than unrelated programming that just happened to be created on the other side of their town.

Accordingly, it makes sense that, in approving LPTV service, the Commission identified as its "first decision criterion" the glaring "public need for program diversity" on broadcast television, including "diverse or local program service." ^{6/} The ordering is appropriate, for it is uniformly more important that LPTV stations offer their audiences the option of additional quality programming than where that programming is produced. Moreover, LPTV stations typically must seek to provide distinct, quality programming before they can afford to create any type of quality local programming.

^{5/} *First Report and Order* at ¶ 2.

^{6/} *First Report and Order, Review of the Commission's Rules Governing the Low Power Television Service*, 9 FCC Rcd 2555 (¶2, 13) (1994) ("*First Report and Order*") (emphasis added).

Such reasoning also confirms what common sense would suggest: all LPTV eligibility for Class A status should not be dependent on some type of hourly quota of local programming or the nature of the station's licensee. The public service that LPTV stations provide simply cannot be measured in the number of hours that they choose to show programming created in a neighbor's backyard rather than a Hollywood back lot. Nor should Class A status depend on the size of the entity that owns a particular LPTV outlet. Instead, consistent with the essential goal of LPTV stations – to foster *real* programming diversity -- LPTV stations that continue to dedicate themselves to providing quality programming, wherever produced, to their audiences throughout the viewing day should be able to attain Class A status.

Given the technical advances in the television industry in recent years, many station groups, including USAB, have chosen to take advantage of operating efficiencies by producing programming at a central location and distributing it to local outlets. The contribution to diversity and competition provided by this centrally produced programming is no less valuable than that provided by locally produced programming.

Instead of establishing eligibility criteria based on where programming is produced, the Commission should establish a separate set of eligibility criteria that look to whether an LPTV station is offering significant video programming that is not otherwise available via free, over-the-air broadcasts in the relevant area. If so, the Commission should deem the LPTV station – assuming that it meets certain minimum operating criteria and has materially complied with applicable Commission rules -- eligible for Class A status. Such a step would be consistent with the underlying

purpose of LPTV service, the CBPA and the public interest, because the provision of such programming is itself a significant benefit to the public.

Moreover, in local television markets with fewer than eight full-power television voices, all LPTV stations that operate for a set minimum number of hours weekly should be automatically granted Class A status. LPTV stations provide much needed voices in rural areas that are not fully served by full power television stations. For example, an LPTV station is often a community's only local television station. ^{7/} By conferring Class A eligibility automatically on LPTV operators in smaller markets, the Commission would encourage stability and investment in LPTV stations where their presence is most critical for purposes of programming diversity and the equitable distribution of broadcast licenses.

This proposal is consistent with the Commission's actions in the recent television ownership rule proceedings. Indeed, the framework for the new local ownership rule is based on the premise that, without a certain number of television voices, a local market lacks sufficient programming diversity. The Commission itself observed that markets with fewer than eight television voices "start with fewer broadcast television outlets, and thus [have] a lower potential for providing robust diversity to viewers in such markets." ^{8/} This rationale also should protect LPTV stations in markets with fewer than eight television voices. Accordingly, if the Commission chooses not to confer Class A status on all LPTV stations providing

^{7/} *Initial Notice* at ¶ 1.

^{8/} *Initial Notice* at ¶ 70.

diverse or otherwise unavailable programming, it should at least rule that LPTV stations in markets with fewer than eight television voices are eligible for Class A status.

II. WHATEVER CLASS A ELIGIBILITY CRITERIA ARE ULTIMATELY ADOPTED, THE COMMISSION MUST AFFORD LPTV STATIONS THE OPPORTUNITY TO SATISFY SUCH REQUIREMENTS.

To the extent the Commission decides to make Class A eligibility dependent upon the provision of local programming or on any other characteristic, USAB urges the Commission to grant Class A status to LPTV stations that agree to satisfy such requirements within five years from the time they obtain Class A status. It would be irrational for the Commission to extend Class A protection only to those licensees that were able to guess what would be necessary to attain such status prior to the completion of this rule making proceeding. In particular, it would offend fundamental fairness for the Commission to exclude LPTV stations that have not, to date, developed local program components from the benefits of Class A status. Only by allowing Class A LPTV stations to phase in local (or other required) programming will the Commission take into consideration the economic realities that have and continue to confront LPTV stations – as recognized expressly in the CBPA – and thus, encourage LPTV stations to develop local program components in a realistic manner.

A. It Would Offend Fundamental Fairness To Close The Door To Class A Status For LPTV Stations That Have Not Yet Developed Local Program Components Because Of The Very Instability – And The Resulting Diminished Investment – That Class A Status Is Supposed To Remedy.

Historically, LPTV has been a secondary service. As such, LPTV stations "may not cause objectionable interference to existing full service stations, and . . . must

yield to facilities increases of existing full service stations or to new full service stations where interference occurs. ^{9/} The secondary status of LPTV stations has resulted in unavoidable instability for LPTV stations, which limits their ability to attract the capital needed to develop such facilities.

The recent threat of DTV displacement only has increased the uncertainty plaguing LPTV stations, and exacerbated their inability to justify further investment. The Commission recognized when it adopted the DTV Table of Allotments that it would be necessary to displace a number of LPTV stations to provide all full power television stations with a second channel. ^{10/} That, and the congressional directive to auction Channels 60-69, has resulted in the loss of channels on which LPTV stations can provide diverse programming to their local markets. And displacement is no empty threat. Of USAB's 26 LPTV stations, DTV allotments threaten to displace all but five.

As a result of all of this uncertainty, LPTV stations have had little incentive to make any investment, never mind the substantial investment required to develop local program production capabilities. The Commission would unfairly penalize LPTV stations that were not recently airing local program components if it were to condition Class A status on whether the station currently provides local programming.

^{9/} *Report and Order* at ¶ --- (p. 486); *see also id.* at n. 23 "[Because] it is integral to the concept of a secondary service that it yields to a mutually exclusive primary service, we shall not take low power stations into account in authorizing full service stations, and we urge low power applicants to consider this fact when they select channels."

^{10/} *See, e.g., Sixth Report and Order, Advanced Television Systems and Their Impact on Existing Television Broadcast Service*, MM Docket No. 87-268, at ¶ 141.

B. USAB's Own Experience In Developing Local Programming Confirms That Quality Local Programming Cannot Be Developed Without Substantial Upfront Investment And Some Possibility Of Future Return.

In the *Initial Notice*, the Commission tentatively noted that "the greater stability that Class A status could provide such stations, many of which are small businesses, may enable them to make long term commitments to continuation of service, expansion of service (including digital operations), station upgrades and program production and services." ^{11/} Such greater stability would enable LPTV stations to attract capital that has not been available to them in the past. In any event, the stability conferred by Class A status will provide the necessary level of comfort for LPTV licensees to invest in their own facilities.

Without such a level of comfort, it is little wonder why many LPTV stations have been reluctant to develop extensive local programming. USAB's own recent experience with full-power WAMI-TV, Miami, Florida, illustrates that the resources required for a substantial local programming component may be overwhelming, even for a full power television station. WAMI-TV was launched in June 1998 as a newly formatted station with a strong commitment to local programming. WAMI-TV offered more than 40 hours per week of locally produced programming immediately after its launch. However, the costs of sustaining this local programming effort – which were not offset by revenues of the newly minted format – proved too much for WAMI-TV to bear. The station had to cut back on its local fare. Based on this experience, USAB has found that it makes more sense to establish a platform (i.e., a station with market

^{11/} *Initial Notice* at ¶ 15.

share) and then, later, to add local programming incrementally as investment in the local programming component becomes feasible. 12/

Consistent with its plan for WAMI-TV, USAB urges the Commission not to close the door on LPTV stations that meet the Commission's eligibility criteria for Class A status in the future.

III. THE COMMISSION WILL PROMOTE THE GOAL OF DIVERSITY BY ADOPTING CLASS A RULES THAT WILL ENCOURAGE LPTV STATIONS TO REALIZE THEIR FULLEST POTENTIAL.

The Commission's fundamental impetus for creating LPTV service was a clear "public need for program diversity." 13/ That impetus should remain the Commission's goal in developing Class A protections and regulations. USAB urges the Commission to adopt rules that encourage Class A LPTV stations, and other LPTV stations, to realize their fullest potential as additional video programming outlets.

A. Displaced LPTV Stations Should Receive Priority for Channels Vacated By Full-Power Television Stations Following the Digital Transition Period.

The digital transition (and the loss of Channels 60-69 by television broadcasters) have wreaked havoc on LPTV stations, and have or will cost the public a number of alternative programming options. Common fairness should compel the Commission to grant all displaced LPTV stations first priority with regard to newly vacated spectrum following the digital transition. Specifically, the Commission should

12/ In addition, it is noteworthy that WAMI-TV is a full-power television station, with a concomitant larger service area *and* the additional benefit of being entitled to mandatory cable carriage. This is a significant economic benefit that is not available to LPTV stations except in very limited circumstances.

13/ *Report and Order* at ¶ 12.

announce that displaced LPTV licensees will be allowed to apply for any vacated television spectrum on a first-come, first-serve basis, without permitting competing applications, following the digital transition period.

Such an announcement would convey many benefits. First, it would enable an LPTV station to plan on a long-term basis, including determining whether, when and how to convert its operations to digital. Second, it would tell investors in LPTV stations that the Commission is interested in preserving the service and the programming options the stations provide. Third, it would reassure LPTV licensees, including those that have been forced to move to the fringes or cluttered areas of the core television spectrum, that better spectrum may be available within the next decade or so, which will encourage them to continue to provide quality programming service until that time. Fourth, it may enable LPTV stations to serve as stronger competitors in local television markets. Each of these benefits will, in turn, benefit the public, as each will better ensure the continuation of the additional programming choices that LPTV stations can provide.

At the very least, the Commission should allow displaced LPTV stations to apply for replacement channels on a first-come, first-serve basis, without competing applications, to the extent such replacement channels are or become available. Again, both equity and the clear public interest in the diversity provided by LPTV stations compel this result, which is necessary to the continued vitality of the service. Otherwise, future LPTV investors must increasingly question whether they can afford the risk of a station losing its channel, especially as more and more broadcast spectrum appears to be at risk for being allocated to other services.

B. Class A LPTV Stations Should Be Protected At Least To The Contours Prescribed in Section 74.707 of the Rules.

In the *Second Notice*, the Commission asked what contour should serve as the protected contour of Class A LPTV stations. ^{14/} USAB agrees with the Commission's proposal: such stations should be protected at least to the relevant contour described in Section 74.707. Such a level of protection both would be consistent with the general understanding of all broadcast licensees, and also would ensure that the protective effect of the CBPA is no less than Congress intended.

C. Class A LPTV Stations Should Be Afforded Maximum Latitude With Regard To Their Digital Operations.

The LPTV service was among the hardest hit by full-power television's transition to digital operations. However, unlike full-power stations, LPTV stations have not all received a paired digital channel or other assistance to facilitate their transition into the digital future.

This proceeding offers an opportunity for the Commission to mitigate such damage. After all, the budgets of LPTV stations are, as a rule, even less able to afford the expensive transition to digital than full-power television stations. Accordingly, the Commission should take affirmative steps to encourage LPTV's transition so that the service is not left behind, and the public is not deprived of the benefits that a digital LPTV service could provide.

Accordingly, the Commission should make clear that Class A LPTV stations may apply to initiate digital operations at any point. Moreover, such stations

^{14/} *Second Notice* at ¶ 16.

should be allowed to apply for a "paired" digital channel, subject to local availability, in order to enable LPTV stations to enjoy the same luxury as full-power stations: to operate digital and analog facilities simultaneously until such time as the vast majority of Americans are able to receive and process a digital signal. At that time, like full-power stations, an LPTV station would be able to choose between its two channels (assuming both are within the core television spectrum) for its continued operations.

Authority for LPTV stations to obtain a paired channel not only would maximize the use of available spectrum during the transition period, but also would ensure, especially in smaller television markets, that all of the viewing public, whether owners of a digital or analog set, would be able to access a nearby LPTV station's valuable programming at any point during the transition process. It also may very well serve as additional incentive – or at least, remove a potential obstacle -- to consumers contemplating whether to acquire a digital television set, which will benefit the entire digital transition process.

D. Class A LPTV Stations Should Be Afforded Maximum Latitude With Regard To Their Analog Operations.

Also, in light of the burdens LPTV stations are already bearing in the face of the digital transition and the loss of channels 60-69, the Commission should be willing to extend LPTV stations additional flexibility with regard to their analog operations.

For example, in the *Initial Notice*, the Commission expressed concern that power increases for LPTV stations may interfere with maximization of full-power digital television stations. USAB urges the Commission to permit Class A LPTV stations to

maximize their power levels any time after the deadline for full-power television maximization applications -- set at May 1, 2000 -- has passed. This compromise will ensure that Class A LPTV stations have "roughly similar regulatory status" as other television stations, 15/ without threatening the ability of full-power television stations to serve their audiences. Further, maximization will ensure more efficient spectrum use, will result in more viewers and advertisers for LPTV stations, and should lead to greater investment in LPTV stations and higher quality programming.

E. Any Benefits To LPTV Stations Should Not Be Constrained By An Irrational Focus On The Nature Of A Station's Ownership.

USAB urges the Commission to remember that the impetus underlying LPTV stations is to provide actual programming diversity. Accordingly, it should not matter what party owns the stations, but only whether the station actually contributes to the programming choices available to its viewers.

The CBPA underscored the importance of such reasoning, making it very clear that Class A eligibility is not to be affected by an LPTV licensee's other ownership interests. The Commission should respect that congressional directive, both in letter and in spirit, and ensure that Class A eligibility depends on considerations other than an LPTV station's shareholders.

Similarly, the Commission should refuse to limit Class A eligibility to small business licenses. The goal underlying the creation of LPTV stations was to increase programming diversity and local programming. By placing a small business limitation or other such artificial limitations on Class A eligibility, the Commission will exclude

15/ H.R. Rep. No. 106-384, at 6 (1999).

many LPTV stations that can or do provide critical programming diversity. This would contradict the purpose of the CBPA, and likely jeopardize actual programming diversity. Neither of these results is in the public interest. Accordingly, the Commission should pursue the more reasonable and even-handed course of enabling all LPTV licensees, regardless of ownership, to aspire to Class A status.

IV. CONCLUSION

LPTV stations serve the public interest by increasing diversity. The Commission should interpret the CBPA to enable all LPTV stations that provide or intend to provide programming diversity to achieve Class A status. To do otherwise would unfairly penalize LPTV stations that have been constrained in their efforts to fully realize the potential of their stations due to LPTV's historical secondary status. Further, the Commission should take other steps to enable LPTV stations to maximize their potential with regard to both digital and analog operations, both now and following the transition period.

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