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February 10, 2000

BY HAND DELIVERY
Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, DC 20554

Re: Establishment of a Class A Television Service
MM Docket No. 00-10;
MM Docket No. 99-292; RM-9260

Dear Ms. Salas:

Transmitted herewith on behalf of The WB Television Network are an original and six (6) copies of its Comments filed in response to the FCC's *Order and Notice of Proposed Rule Making*, FCC 00-16 (released January 13, 2000), concerning the establishment of a Class A television service.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.

Andrew S. Kersting
Counsel for The WB Television Network

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 00-10
Establishment of a Class A	)	MM Docket No. 99-292
Television Service	)	RM-9260

To: The Commission

COMMENTS OF
THE WB TELEVISION NETWORK

THE WB TELEVISION NETWORK

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February 10, 2000

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SUMMARY

In response to Congress' enactment of the Community Broadcasters Protection Act of 1999 (the "CBPA"), the FCC issued an *Order and Notice of Proposed Rule Making*, FCC 00-16 (released January 13, 2000), requesting comments concerning its various proposals to implement the new legislation. As one of its proposals, the FCC tentatively proposed that it will not require Class A applications to protect pending applications for new full-service television stations, many of which have been pending at the Commission for several years.

As demonstrated herein, in promulgating rules to implement the CBPA, the Commission should interpret the new legislation in a manner that will avoid raising constitutional questions, and adopt rules that are consistent with the Communications Act as a whole as well as the FCC's longstanding regulatory framework. Therefore, in implementing Section 336(f)(7)(A) of the Act, the FCC should require Class A applications to protect pending applications for new full-service television stations. Requiring such protection would serve the public interest by promoting the Commission's fundamental objectives of fostering competition and creating additional opportunities for increased ownership diversity, which the new full-service stations would provide. Interpreting the statute in this manner also would promote the emergence of new broadcast networks such as The WB Television Network because it would provide additional full-service broadcast stations with which new networks could establish primary affiliations, and thereby enhance their distribution.

Moreover, in connection with the FCC's September 28, 1999, Closed Broadcast Auction, the Commission required the winning bidders to make substantial down payments to the federal treasury in order to preserve their right to obtain a construction permit for their proposed new full-power stations. If the Commission now were to require Class A applications to protect only "authorized"

full-power stations, and the winning bidders' applications are ultimately dismissed because of a conflict with a subsequently-filed Class A application, the Commission's acceptance of the winning bidders' down payments without the corresponding issuance of a construction permit for their proposed facility would raise a significant question as to whether the Commission's action constituted an unlawful "taking" in violation of the due process clause of the Fifth Amendment.

Furthermore, the Commission's proposed interpretation of Section 336(f)(7)(A) of the Act would result in an inconsistency between the treatment of pending applications for new full-service television stations, and applications for LPTV and TV translator stations. Under the Commission's proposal, pending applications for full-power stations would not be entitled to protection from Class A applications, despite their primary service status. Conversely, LPTV and TV translator applications, including those which are not eligible for Class A status, would be entitled to protection from Class A applications even though they have always operated, and will continue to operate, on a secondary basis. The Commission's proposal also would be grossly inequitable due to the disparate treatment that applications for full-service stations and LPTV and TV translator applications received during the DTV "freeze."

Moreover, the Commission's proposal not to require Class A applications to protect pending applications for new full-service stations would result in an inconsistency between Sections 336(f)(7)(A) and 307(b) of the Act. Indeed, many of the pending full-power applications would promote the objectives of Section 307(b) because they propose to bring a first local television service to the designated community.

In addition to the protection that the Commission should afford pending full-power NTSC applications, Class A applications should not be permitted to cause even *de minimis* interference to

DTV stations, including DTV stations which seek to maximize their facilities and thereby extend their service area beyond their NTSC replicated area.

Finally, the Commission should make every effort to limit the number of authorized Class A stations. With the exception of LPTV stations operating on channels 52-59 (which should not be permitted to file a Class A application until the end of the transition period), the opportunity to file a Class A application should be limited to the 30-day period immediately following the Commission's adoption of final rules implementing the CBPA. The Commission also should adopt rules requiring strict adherence to the statutory eligibility requirements, and should grant waivers of the enumerated statutory criteria only under the most exceptional and compelling circumstances.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 00-10
Establishment of a Class A	)	MM Docket No. 99-292
Television Service	)	RM-9260

To: The Commission

COMMENTS OF THE WB TELEVISION NETWORK

The WB Television Network ("The WB"), by its attorneys, hereby submits these comments in response to the *Order and Notice of Proposed Rulemaking*, FCC 00-16 (released January 13, 2000) ("*NPRM*"), in the above-captioned proceeding. The WB respectfully submits that, as an emerging network, it can provide the Commission with a unique and important perspective concerning the issues raised in this proceeding. Accordingly, as the Commission adopts new rules to implement the Community Broadcasters Protection Act of 1999 (the "CBPA"),[1] which was signed into law on November 29, 1999, The WB respectfully requests that the Commission consider the significant impact its new rules will have on the development of emerging networks such as The WB.

[1] Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), Appendix I, *codified at* 47 U.S.C. §336(f).

I. Introduction and Background.[2]

The Commission has long espoused a commitment to foster the ability of new networks to enter and compete in the television marketplace.[3] Dating back to 1941, when the Commission adopted its Chain Broadcasting rules,[4] a primary goal of the Commission has been to remove barriers that inhibit the development of new networks. In adopting the Chain Broadcasting rules, the Commission explained that the rules were intended to "foster and strengthen broadcasting by opening up the field to competition" and encourage the development of new networks.[5]

Although the broadcast industry has changed dramatically since the Chain Broadcasting rules were adopted, the Commission's goal of removing barriers that would inhibit the development of new networks[6] is no less important today. Indeed, due to the paucity of unaffiliated television stations in many markets and the number of choices (including the four incumbent broadcast

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[2] The WB previously has provided portions of this background information in other FCC rulemaking proceedings, but has included it in these comments for the benefit of the new members of the Commission.

[3] *See Report on Chain Broadcasting*, Commission Order No. 37, Docket 5060 (May 1941 at 88) ("*Report on Chain Broadcasting*"); *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 25 FCC 2d 318, 333 (1970); *Fox Broadcasting Co. Request for Temporary Waiver of Certain Provisions of 47 C.F.R. §73.658*, 5 FCC Rcd 3211, 3211 and n.9 (1990), citing Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (Vol. 1 Oct. 1980)), *waiver extended*, 6 FCC Rcd 2622 (1991).

[4] *Report on Chain Broadcasting* at 88. Although the Chain Broadcasting rules originally were adopted for radio, they were applied to television in 1946. *Amendment of Part 3 of the Commission's Rules*, 11 Fed.Reg. 33 (Jan. 1, 1946).

[5] *Report on Chain Broadcasting* at 88.

[6] *See Revisions of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, 47 C.F.R. §73.658(a), (b), (d), (e) and (g)*, 10 FCC Rcd 11951, 11955 (1995).

networks) that vie for viewers' attention, the challenge of launching a new broadcast network is even more daunting today. Today's new networks -- The WB, UPN and PaxNet -- deserve the same chance that the earlier entrants were given to compete in the free over-the-air television market.

The WB was launched on January 11, 1995, with two hours of prime time programming per week, which was carried by 48 affiliated stations nationwide with an audience reach of 80 percent.[7] By the end of the 1999-2000 broadcast year, The WB will be broadcasting 13 hours of prime time programming on six nights, and will be carried by approximately 68 primary affiliated full-power stations. As part of its regular weekly program schedule, The WB broadcasts 19 hours of children's programming, including programs designed to meet the educational and informational needs of its children's audience.

In attempting to establish itself as a viable competitor with the four major networks, the single most difficult impediment for The WB has been securing an affiliation with a sufficient number of television stations to gain and maintain sufficient nationwide coverage.[8] In some markets, The WB has experienced difficulty finding an available station with which to affiliate. In other markets, it has had difficulty finding sufficiently powerful stations with which to affiliate and provide adequate market coverage. Unlike the established networks, which have extensive distribution systems composed of powerful VHF stations, The WB network has only 6 primary VHF affiliates; the remaining 62 primary affiliations are with weaker UHF stations. The WB also has been forced to rely on low power stations or cable carriage in some markets. In other markets, The

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[7] The 80 percent figure includes The WB's cable carriage on Superstation WGN-TV, Channel 9, Chicago, Illinois. Without WGN-TV's carriage, The WB's over-the-air audience reach was 61 percent at launch.

[8] The WB's national advertisers require coverage of at least 80 percent of the country.

WB has had no alternative but to enter into secondary affiliations with stations that have a primary affiliation with another network.[9] Together, these difficulties have significantly hampered The WB's quest for nationwide reach.

Finding stations with which to affiliate has been particularly frustrating for The WB because it has no control over (or the ability to increase) the number of available television stations in a particular market. Almost two-thirds of all television markets have only four commercial TV stations. The WB is hampered by the fact that it is, at best, the fifth -- or in some cases the sixth -- entrant in a market. Fewer than 20 percent of all markets have six or more commercial stations. Even in those markets where there are six or more stations, that number of broadcast facilities does not necessarily ensure that one is available to The WB for affiliation. In addition to affiliating with ABC, CBS, NBC and Fox, incumbent stations in many markets frequently have existing affiliations with a home shopping or religious network, making them unavailable to new network entrants.

In those few markets where a station is available for affiliation, the station generally is the weakest station in the market. Moreover, even if an available station is located in a particular Designated Market Area, the station often is so far removed from the center of the market that its signal may cover only a small portion of the population within that market. The weaker coverage

[9] Secondary affiliations are The WB's least favorable alternative because the hallmark of a network is the ability to run its programming "in pattern," *i.e.*, in the order determined by the network, and simultaneously (within the same time zone) by all of its affiliated stations. As a secondary affiliate, The WB's programming is aired only when the affiliated station is not broadcasting the programming of its primary affiliate. The WB would never choose a secondary affiliation over a primary affiliation, even if the secondary affiliation is with a station with a stronger signal, so long as the primary affiliate is a full power, viable facility.

and market position of many of The WB's affiliates, and the correspondingly lower ratings that these stations achieve, translate directly into lower advertising dollars, and, hence, lower revenues.[10]

The enormous task of launching a new network -- both financial and otherwise -- cannot be understated. Although The WB has been on the air for five years, it posted its first quarterly profit in the fourth quarter of 1999, and continues to have a long, arduous path to travel before being capable of sustaining a profitable operation on a consistent basis. Indeed, it was reported that The WB lost $96 million in 1998, up from $88 million in 1997.[11] Similarly, UPN reportedly lost $180 million during 1998.[12]

The establishment of a new network as a profitable entity depends in large measure upon the life blood of any national network -- its primary affiliates. Accordingly, in July 1996, a series of applications and rulemaking petitions were filed with the Commission which, together, cover many of the top 100 television markets in which there were no full power stations available to affiliate with The WB on a primary basis. At the time these applications and petitions were filed, each of the

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[10] Although steadily growing, The WB's ratings currently are far lower than the established networks. While The WB's prime time network programs have averaged a 3.0 percent rating to date during the current broadcast season, the prime time rating of NBC [CBS?], the number one network, averaged 10.7 percent or more than 3.5 times that of The WB. Consequently, although The WB pays established network prices for its programs as it tries to gain a competitive foothold, its revenues lag far behind those of the established networks. The average rating of The WB's affiliates during non-network broadcasts is lower still. As a result, promotions for The WB's network programs during the non-network broadcast hours are viewed by significantly fewer viewers than see promotions on the established networks.

[11] *UPN, WB 1998 Losses Widen*, Television Digest, April 12, 1999. The WB lost $24 million during the third quarter of 1999 alone, which was an increase from $17 million during the same period during 1998. *Notebook*, Television Digest, October 18, 1999.

[12] *UPN, on the ropes, airing wrestling on prime time; United Paramount Network*, Los Angeles Business Journal, August 10, 1999, p. 30.

applicants/petitioners had an existing affiliation relationship with The WB. Although there was no commitment on the part of either the various applicants/petitioners or The WB to enter into an affiliation agreement with respect to the proposed new NTSC stations, The WB indicated its willingness to enter into affiliation agreements with the applicants/petitioners in their respective proposed communities in the event they were successful in obtaining a station license.

Collectively, the WB-related applicants filed 20 applications for new NTSC stations in July 1996, 11 of which proposed to bring a first local service to the designated community. Seven of the applications specify a channel between channels 60-69, and 19 of the applications specify a community within a freeze area. The WB-related parties also filed 21 allotment rulemaking petitions for new NTSC stations. All of these rulemaking petitions (which currently remain pending) were filed prior to the July 25, 1996, deadline for filing such petitions.[13] Each of these petitions proposes to bring a first local television service to the designated community. Three of the petitions specify a channel between channels 60-69, and 13 of the petitions specify communities located within a freeze zone.[14]

If The WB is to be competitive with the four established networks, let alone flourish, it must be allowed to compete for affiliates in those markets in which it currently does not have one. In order to promote the efforts of The WB and other emerging networks, The WB requests that, in adopting rules to implement the CBPA, the Commission consider the significant impact that its new

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[13] *See Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588, ¶105 (1997) ("*Sixth Report and Order*").

[14] The WB-related parties also filed accompanying construction permit applications for each of their allotment petitions. Each of these applications was filed well before the September 20, 1996, deadline for filing NTSC applications. *See Sixth Report and Order,* ¶104, n. 173.

rules will have on emerging networks such as The WB. Specifically, The WB requests that the Commission make every effort to ensure that its new rules will not hinder or impede the prompt construction and on-air operation of new television stations, which will provide The WB and other emerging networks with additional stations and markets in which to gain primary affiliations. Indeed, regardless of whether it is The WB or another new network that gains an affiliate in a particular market, and thereby strengthens its effort to obtain a competitive stronghold with the four established networks, the prompt commencement of new service from additional broadcast outlets and resulting network affiliations will further the significant public interest objective of encouraging the emergence of new national networks.

II. Class A Applications Should Be Required to Protect Pending Proposals for New NTSC Stations.

The CBPA provides for the establishment of a new primary service, "Class A" license for qualifying LPTV stations. The CBPA amended Section 336(f) of the Communications Act of 1934, as amended (the "Act"), to provide that the FCC may not grant a Class A license (nor approve a modification of a Class A license) unless the applicant demonstrates, *inter alia*, that the proposed Class A station will not cause interference to the predicted Grade B contour "of any television station transmitting in analog format . . . ."[15]

In the *NPRM*, the FCC specifically requested comment on how it should interpret the phrase, "transmitting in analog format," contained in Section 336(f)(7)(A) of the Act.[16] The Commission proposed to require Class A stations to protect only those full-service NTSC stations actually

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[15] 47 U.S.C. §336(f)(7)(A).

[16] *NPRM*, ¶27.

transmitting or authorized to transmit in analog format (*i.e.*, NTSC stations which hold either a license or construction permit). Thus, the Commission proposed not to require Class A stations to protect pending NTSC applications or allotment rulemaking petitions, or modified allotment proposals for channel or other technical changes, including modification applications filed after November 29, 1999. *Id.* The FCC noted, however, that there are still applications and allotment rulemaking petitions pending before the Commission involving channels 60-69 and requests for waiver of the 1987 DTV filing freeze[17] which, together, account for approximately 180 potential new NTSC stations. *Id.* at ¶28. Some of these applications have been on file with the FCC for over ten years. Although these pending applications are entitled to protection from full-service analog modification applications,[18] they would not be protected from Class A applications under the Commission's proposed interpretation of the CBPA. *Id.* The Commission also noted that the CBPA requires Class A applications to protect LPTV and TV translator applications filed prior to the date on which a Class A application is filed.[19] For the reasons stated below, the Commission should interpret Section 336(f)(7)(A) of the Act to require Class A applications to protect the predicted Grade B contour specified in pending applications and allotment rulemaking petitions proposing new NTSC stations.[20]

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[17] *See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, 1987 FCC LEXIS 3477 (July 17, 1987), 52 Fed.Reg. 28346 (1987) ("*Freeze Order*").

[18] As stated above, the deadline for filing applications for new NTSC stations was September 20, 1996. *See Sixth Report and Order*, ¶104, n. 173.

[19] *NPRM*, ¶27, citing 47 U.S.C. §336(f)(7)(B).

[20] In its initial *Notice of Proposed Rule Making*, FCC 99-257 (released September 29,

(continued...)

A. The Commission's Proposed Interpretation of Section 336(f)(7)(A) of the Act Could Result in an Unconstitutional "Taking".

On September 28, 1999, the Commission held a "Closed Broadcast Auction" during which it auctioned construction permits for new broadcast facilities to mutually exclusive applicants. Prior to the auction, on July 9, 1999, the Commission released a public notice announcing the procedures and minimum opening bids for the upcoming auction, which contained the following "due diligence" disclaimer:[21]

> Potential bidders are solely responsible for investigating and evaluating all technical and marketplace factors that may have a bearing on the value of the facilities on which they intend to bid. *The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC permittee in these services, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular services, technologies or products, nor does an FCC construction permit or license constitute a guarantee of business success.* Applicants should perform their individual due diligence before proceeding as they would with any new business venture.

Id. at 4 (emphasis in original). The Commission's disclosure statement did not provide any indication, however, that with respect to pending applications for new full-service television stations, even after an applicant's submission of a winning bid and making a down payment sufficient to bring the applicant's total deposit with the government to 20% of its net winning bid, the winning bidder's

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[20](...continued)
1999) ("*Initial Notice*"), the Commission acknowledged that the pending applications and rulemaking petitions could result in as many as 250 new NTSC stations. *Initial Notice*, ¶35.

[21] *See Public Notice*, DA 99-1346 (released July 9, 1999) ("Closed Broadcast Auction; Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999"), at 4.

application might ultimately be subject to dismissal in the event it conflicts with a subsequently-filed Class A application for an LPTV or TV translator station.[22]

Following its September 28, 1999, auction, the Commission issued a public notice announcing that the long-form applications of 12 winning auction bidders for new full-power television stations ("Winning Bidders") had been accepted for filing.[23] Each of the Winning Bidders submitted their requisite down payment(s) within ten days of the close of the auction in order to secure their position as the successful high-bidder with respect to their pending application(s).[24] The applications of these Winning Bidders have not yet been granted, nor have any construction permits been issued for the proposed full-power facilities.

The Commission's September 28, 1999, Closed Broadcast Auction constitutes a contractual arrangement between the Winning Bidders and the federal government. The Winning Bidders already have paid substantial sums of money to the government, and are obligated to pay the remaining 80% of their winning bids in order to obtain a grant of their respective applications and a construction permit for their proposed new full-service television stations. If the FCC were to interpret Section 336(f)(7)(A) of the Act not to require subsequently-filed Class A applications to

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[22] On February 8, 2000, the FCC issued a public notice announcing that over 1,600 LPTV stations had filed statements of eligibility for Class A status. *See Public Notice*, No. 97659 (released February 8, 2000) ("Statements of Eligibility for Class A Low Power Television Station Status Tendered for Filing"), Attachment A.

[23] *See Public Notice*, DA 99-2709 (released December 3, 1999) ("Closed Broadcast Auction Winning Bidder Applications Accepted For Filing - Auction No. 25"), Attachment A.

[24] The aggregate amount of these down payments was over $3.7 million. Winstar Broadcasting Corp. alone paid the federal government $2,201,600 in down payments for its five (5) winning net bids. *See Public Notice*, DA 99-2153 (released October 12, 1999) ("Closed Broadcast Auction No. 25 Closes"), Attachment A, p. 1.

protect the pending applications of the Winning Bidders, and the Winning Bidders do not receive an FCC authorization for their respective station(s) prior to the filing of the Class A applications, the Commission's interpretation of Section 336(f)(7)(A) could result in a "taking" in violation of the due process clause of the Fifth Amendment.[25] Therefore, in interpreting Section 336(f)(7)(A) of the Act, the Commission should construe the phrase "transmitting in analog format" as describing only the nature of the service which is entitled to protection (*i.e.*, analog), and not the status of the station's existing operation (*i.e.*, pending application, authorized or operating station). By interpreting the new legislation in this manner, the Commission could safely avoid raising a significant constitutional question involving the "takings clause."[26]

Moreover, if the Commission were to interpret Section 336(f)(7)(A) in the manner proposed and cause the Winning Bidders to forfeit their respective down payments without being awarded a construction permit for the facilities proposed in their pending applications, the Commission's action

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[25] *See United States v. Winstar Corp.*, 518 U.S. 839 (1996); *The Binghampton Bridge*, 70 U.S. 51, 74 (1865). In *Winstar*, the Court concluded that the U.S. government was liable for breach of contract when a Federal statute and implementing regulations invalidated a provision in existing agreements between thrifts and bank regulatory authorities which permitted thrifts to count supervisory goodwill and capital credits toward their regulatory capital requirements. Similarly, in *Binghampton Bridge*, the Court held that a state breached an express statutory provision conferring geographical exclusivity on a bridge builder when the state subsequently permitted another bridge builder to construct a bridge in violation of the first bridge builder's exclusive rights. *See also Wells Fargo Bank v. U.S.*, 88 F.3d 1012, 1018 (Fed. Cir. 1996).

[26] *See United States v. Security Industrial Bank*, 459 U.S. 70, 82 (1982) (Court declined to construe a statute in a manner that would require it to resolve difficult questions arising under the "takings clause"); *Roth v. Pritikin*, 710 F.2d 934 (2d Cir. 1983) (in the absence of a clear congressional mandate to the contrary, the court construed a statute in such a manner to avoid "[e]ven the spectre of a constitutional issue concerning the proper application of the 'takings clause'"). *See also Branch v. FCC*, 824 F.2d 37, 47 (D.C. Cir. 1987) (noting that an administrative agency properly may be influenced by constitutional considerations in interpreting or applying a statute).

undoubtedly would have a significant chilling effect on the bid amounts in any future FCC auctions. Indeed, potential bidders will be reluctant to bid a significant amount for an FCC authorization if they know that they may never obtain a construction permit even if they are the winning bidder at the auction.

B. It Would Constitute a Grave Injustice Not to Require Class A Applications to Protect Pending NTSC Proposals.

The WB recognizes that the establishment of a Class A license and concomitant "primary service" status is now statutorily mandated for qualifying LPTV stations. Nevertheless, the FCC has repeatedly stated that it would seek to accommodate pending applications and rulemaking petitions for new NTSC stations.[27] In doing so, the Commission acknowledged that new NTSC service would promote two of its fundamental objectives by fostering competition and creating opportunities for increased broadcast diversity.[28] As shown above, the commencement of new NTSC service also would promote the emergence of new networks such as The WB by providing them with additional broadcast outlets to air their programming and thereby enhance their distribution.

In the *Initial Notice*, the Commission stated that, based upon its experience in developing the DTV allotment table, "it may be difficult, if not impossible, for many NTSC applicants and petitioners to find replacement channels" for their pending proposals consistent with the

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[27] *See, e.g., Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, FCC 99-257, ¶41 (1998). *See also Reallocation of Television Channels 60-69, the 746-806 MHZ Band, Report and Order*, 12 FCC Rcd 22953 (1998) ("*Channels 60-69 R&O*"); *Public Notice*, DA 99-2605 (released November 22, 1999) ("Mass Media Bureau Announces Window Filing Opportunity For Certain Pending Applications and Allotment Petitions for New Analog TV Stations") ("*Window Filing Notice*").

[28] *See Initial Notice*, ¶36, citing *Channels 60-69 R&O*, 12 FCC Rcd at 22971, ¶40.

Commission's interference protection requirements.[29] The ability of these NTSC proponents [30] to modify their proposals to eliminate technical conflicts with DTV stations[31] and move from channels 60-69 will be made even more difficult due to the Commission's requirement that these pending NTSC proposals meet the minimum distance separation requirements, and protect DTV stations as required by the Commission's rules, without any allowance for *de minimis* interference.[32] The Commission's refusal to permit NTSC proponents to cause even *de minimis* interference to NTSC or DTV stations will significantly hinder the ability of these proponents to amend or modify their pending NTSC proposals to eliminate interference conflicts and/or move from channels 60-69. The ability of these NTSC proponents to amend or modify their pending proposals would be made even more difficult if they were required to protect future Class A applications.

LPTV stations have always received protection that is secondary to that afforded to full-service stations.[33] As the Commission stated in its rulemaking proceeding establishing the LPTV service, it is a "fundamental principle" that "low power television stations, like television translators,

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[29] *Initial Notice*, ¶37.

[30] For ease of reference, unless a distinction is otherwise warranted, the pending NTSC applicants and rulemaking petitioners will be collectively referred to herein as "NTSC proponents."

[31] The Commission defined "DTV stations" in this context to include "DTV allotments, authorized or requested increases in DTV allotment facilities, and proposals for new or modified DTV allotments." *Window Filing Notice*, p. 1.

[32] *See Window Filing Notice*, pp. 3, 5.

[33] *See, e.g., Low Power Television and Television Translator Service*, MM Docket No. 86-286, 1986 FCC LEXIS 3075, ¶18 (1986) (Notice of Proposed Rulemaking) ("Television translators have always been considered secondary to full service television stations in spectrum priority. This secondary status was continued when the low power television service was instituted.").

should enjoy only a secondary status."[34] Thus, LPTV stations and TV translators have always known that they were authorized on a secondary basis, and were subject to displacement at any time.

In July 1987, the Commission initiated the DTV proceeding and ordered a freeze on new analog TV allotments which temporarily fixed the Television Table of Allotments for 30 designated television markets and their surrounding areas.[35] The Commission adopted its *Freeze Order* in order to "preserve sufficient broadcast spectrum to insure reasonable options relating to spectrum issues for . . . new technologies."[36] In instituting the freeze, the Commission recognized that, due to their secondary status, LPTV stations and translators would not hinder future spectrum use, and expressly excluded them from the freeze:

> This freeze will not apply to low power television (LPTV) and television translator applications. . . . These constitute a secondary service and pursuant to present rules are subject to displacement by a primary service. Therefore, LPTV and TV translator grants will not restrict Commission options.[[37]]

The Commission repeatedly reaffirmed and relied upon the secondary status of LPTV stations and translators throughout the DTV proceeding.[38] Indeed, the FCC stated that "the low power television service was established for the specific purpose of supplementing conventional

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[34] *Future Role of Low Power Television Broadcasting and Television Translator Service*, BC Docket No. 78-253, 82 FCC 2d 47, 54-55 (1980) (Notice of Proposed Rule Making).

[35] *See Freeze Order*, 52 Fed.Reg. 28346 (1987).

[36] *Id.*, ¶2.

[37] *Id.*, ¶3, n.4.

[38] *See, e.g., Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, MM Docket No. 87-268, 13 FCC Rcd 7418, 7461-62 ¶106 (1998); *Sixth Report and Order*, 12 FCC Rcd 14588, 14652 (1997); *Second Report and Order/Further Notice of Proposed Rulemaking*, MM Docket No. 87-268, 7 FCC Rcd 3340, ¶¶39-41 (1992).

broadcast station coverage."[39] Accordingly, based on the secondary status of LPTV and TV translator stations, and the lack of sufficient available spectrum, the Commission refused to include LPTVs and translators in the initial class of eligible DTV stations.[40]

As demonstrated above, LPTV stations and translators continued to be licensed throughout the DTV "freeze" due to their secondary status. Indeed, the secondary nature of LPTV service is the very basis upon which many "qualified LPTV stations" obtained their existing authorization. LPTV licensees have used the "secondary" nature of their service to commence operation, remain on the air, and enhance their respective facilities throughout the DTV proceeding, while, at the same time, many NTSC proponents (including the WB-related applicants and rulemaking petitioners) have not had their proposals acted upon by the Commission due to the DTV freeze. As a result of this disparate treatment during the freeze, it would be grossly inequitable not to require qualified LPTV stations to protect the pending NTSC proposals of those proponents who have been precluded from receiving an NTSC license as well as an initial paired DTV channel assignment during the DTV freeze because they proposed a primary service. Requiring pending NTSC proposals to protect Class A applications would be especially egregious because the NTSC proposals have been pending at the Commission for a minimum of three and one-half years, if not substantially longer.

Furthermore, as stated above, Section 336(f)(7)(B) of the Act requires Class A applications to protect authorized LPTV and TV translator stations, as well as pending applications for such facilities. As noted above, LPTV and TV translator stations have always been secondary services

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[39] *Second Report and Order*, MM Docket No. 87-268, 7 FCC Rcd 3340, 3351 (1992) (emphasis added).

[40] *Id.*

subject to displacement at any time. It would be entirely inconsistent with the Commission's longstanding regulatory framework to adopt the Commission's proposed interpretation of Section 336(f)(7)(A) of the Act and require Class A applications to protect pending applications for LPTV and TV translator stations, but, at the same time, not protect pending applications for full-service stations, including those which propose to bring a first local service (and likely a new network service) to the designated community. The Commission's proposed interpretation would become even more egregious where a TV translator application, entitled to protection, is filed only days before a conflicting Class A application, while the pending NTSC applications, which have been held hostage to the DTV freeze, were filed years ago, long before the CBPA was enacted.

Moreover, the Commission must protect those pending NTSC proposals which propose to bring a first local television service to the designated community. As stated above, of the 41 WB-related NTSC proposals which have been pending before the Commission since July 1996, 32 of them propose to bring a first local television service to the designated community of license. Requiring Class A applications to protect those pending NTSC proposals which propose a first local service would promote the objectives of Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of full-service television broadcast stations among the various states and communities.[41] It is well established that "full-service stations, by definition, can reach larger audiences than the low power television stations."[42] Further, there are likely to be many

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[41] 47 U.S.C. §307(b). *See National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing a goal of the Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression").

[42] *Memorandum Opinion and Order of the Third Report and Order*, MM Docket No. 87-
(continued...)

instances where potential viewers who reside within the predicted Grade B contour of a proposed full-service facility will not be able to receive the signal of a conflicting Class A station. Therefore, if a community is proposed to be served by both a Class A applicant and a full-power station, consistent with Section 307(b) of the Act, the full-service facility should be preferred because it would provide a more efficient use of scarce spectrum and substantially greater public interest benefits.

In addition, protecting first local service NTSC proposals not only would promote the second television allotment priority of providing each community with at least one television broadcast station,[43] it also would provide an opportunity for an emerging network such as The WB to enhance its national audience reach by gaining an additional primary affiliate.

The CBPA does not require that Class A applications receive protection from earlier-filed NTSC proposals. In light of: (i) the difficulty that many NTSC proponents already will face in attempting to find a replacement channel for their pending proposals; (ii) the disparate and inequitable treatment of LPTV and TV translator applications *vis-a-vis* full-service NTSC proposals during the DTV "freeze," which was in effect for over 12 years; (iii) the inherent inconsistency that would result in requiring Class A applications to protect all pending LPTV and TV translator applications (including those which are not qualified for a Class A license), but not pending NTSC proposals; and (iv) the inconsistency that would result between the Commission's proposal to require NTSC proposals to protect Class A applications and the longstanding objectives of Section 307(b)

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[42](...continued)
268, 7 FCC Rcd 6924, 6953 (1992), citing *Memorandum Opinion and Order of the Second Report and Order*, MM Docket No. 87-268, 7 FCC Rcd 3340, 3350-52 (1992).

[43] *See Sixth Report and Order* in Docket Nos. 8736 and 8975, 41 FCC 148, 167 (1952).

of the Act; the Commission, in interpreting Section 336(f)(7)(A) of the Act, should require Class A applications to protect pending NTSC proposals (*i.e.*, applications and allotment rulemaking petitions for new NTSC stations).

C. The Commission Should Permit Interference Agreements Between Class A Stations and Applicants for New NTSC Stations.

In the unlikely event the Commission elects to adopt its proposal to require Class A applicants to protect only authorized NTSC stations, and not all pending NTSC proposals, the Commission should permit the pending NTSC proponents and Class A applicants to negotiate interference agreements, particularly where a full-service station agrees to accept interference from a conflicting Class A station.

III. Class A Protection for DTV Stations.

The FCC should adopt its proposal not to permit Class A stations to cause *de minimis* levels of interference to DTV service, other than a 0.5% rounding allowance, which is consistent with that afforded to NTSC modification proposals.[44]

With respect to the "maximization" of DTV facilities, "maximization" should be construed as encompassing not only DTV stations seeking to increase their power and/or antenna height above their allotted values, but also stations which seek to extend their service area beyond the NTSC replicated area by relocating their DTV stations from their allotted transmitter site to a new site. Consistent with its proposal, the Commission should require Class A applicants to protect all full-service stations seeking to replicate or maximize their DTV power regardless of the existence of any "technical problems," as referenced in Section 336(f)(1)(D) of the Act. Indeed, the CBPA makes

[44] *See NPRM*, ¶30.