

ARTER & HADDEN^{LLP}

ATTORNEYS AT LAW

founded 1843

1801 K Street, N.W., Suite 400K
Washington, D.C. 20006-1301

telephone 202.775.7100
facsimile 202.857.0172

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Direct Dial: (202) 775-4463
Internet Address: gmillar@arterhadden.com

February 10, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals, Room TW-A325
445 Twelfth Street, S.W.
Washington, D. C. 20554

Dear Ms. Salas:

On January 28, 2000, Mohave County Board of Supervisors filed a Statement of Eligibility for Class A Low Power Television Status under the Community Broadcasters Protection Act. Transmitted herewith in connection with the January 28 filing is a copy of the County's comments being filed this date in MM Docket Nos. 00-10 and 99-292 and RM-9260. These comments are submitted in order to supplement the public interest reasons supporting the County's certification set forth previously.

If there are any questions regarding this filing, please do not hesitate to call William K. Keane of this firm at (202) 775-7123 or the undersigned counsel.

Sincerely,



Gerie A. Miller

Attachments

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

COMMENTS OF MOHAVE COUNTY BOARD OF SUPERVISORS

Mohave County Board of Supervisors (“Mohave County”), by its counsel, hereby submits its Comments on the Order and Notice of Proposed Rulemaking in the above-captioned proceeding (FCC 00-16, released January 13, 2000; the Notice). As shown below, the Commission should take steps to ensure that television translators like the County’s -- translators which represent the sole source of conventional, over-the-air television service in a rural area -- are not disadvantaged vis-à-vis Class A low power television stations.

Introduction

Mohave County was founded in 1864 as one of Arizona’s original four counties. It is located in northwestern Arizona, bordered on the Colorado River to the west and the State of Utah to the north. The County is composed of high desert, grasslands and mountains. It encompasses approximately 13,217 square miles -- some 200 miles north to south. Approximately 10 percent of the land is privately owned; 90 percent is under government control. The total population of the County is only 147,529, making it one of the most sparsely populated areas in the lower-48 States.

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The governmental and administrative affairs of Mohave County are carried out by a three-member Board of Supervisors who serve four-year terms. The county seat is located in Kingman, population 19,225.

The County's economy is based on manufacturing, livestock and tourism. Grand Canyon National Park, one of the world's largest tourist attractions, is located in the northern section of the County. The northern part of the County is also home to Hoover Dam, which forms Lake Mead, a 230 square mile recreation facility bordering California and Nevada. Including Lake Mead and the Colorado River, the County has over 1,000 miles of shoreline which provide an abundance of recreational opportunities. South along the Colorado River is Parker Dam, which forms Lake Havasu and is the site of the London Bridge. These facilities offer year-round boating and camping sites for tourists. As a result, the County attracts several million visitors annually.

Given its isolation from major television markets, the County's Board of Supervisors determined over 40 years ago to establish a means of bringing over-the-air television service to the many remote communities in the County. Starting with its first translator in 1957, the County gradually expanded the translator system to the point where today it consists of 45 stations re-broadcasting the signals of distant stations (primarily network affiliates) from Phoenix, Las Vegas and Prescott, as well as a station in Kingman.

In 1983 the County established a Television Improvement District for the purpose of constructing, maintaining and operating the television translator facilities. This was based on a determination by the Board of Supervisors that the public interest, convenience and necessity would be served for the residents of the County who otherwise could not receive television service. The Improvement District relies solely on revenues generated through the County

property tax. The County has made every effort to maintain the level of service at a cost effective rate that even senior citizens can find affordable, less than \$.10 per \$100 of assessed valuation. And, of course, without the translators, many of the millions of tourists who visit the County every year would be without television service.

All told, the County's translator system serves residents located in over 15 communities. These include communities like the Town of Colorado City (pop. 4,095) which is located in the Arizona Strip on the north side of the Grand Canyon (a 4½-hour drive from Kingman); Bullhead City (pop. 28,535); and three Indian reservations (Kaibab-Palute, Hualapai, and Ft. Mohave).

Background

By means of the subject Notice, the Commission looks to implement the Community Broadcasters Protection Act of 1999 ("CBPA" or "the Act"). The CBPA directs the agency to prescribe regulations establishing a Class A television license for qualifying stations. Class A status would confer a form of primary status on the recipient station by protecting its service area.

The Notice poses a host of questions pertaining to implementation of the CBPA, many of these technical in nature. Mohave County confines these opening comments to the issues which are of critical importance to the citizens and taxpayers of the County.

As a general matter, the County must be concerned with any plan that would relegate its translators to secondary status behind LPTV stations -- stations with which it has long been co-equal. These concerns are underscored by the fact that the County will be required to undertake significant additional channel changes in the years to come due to DTV conversion. Moreover, the County may be impacted by full-service TV station maximization proposals.

Thus, even though the Act protects pre-existing translator stations/applications from Class A applications (CBPA, Section (f)(7)(B)), it leaves open the question as to whether Class A stations would receive priority over translators in the context of mutually-exclusive DTV displacement applications. (The County has already encountered mutual-exclusivity in its displacement filings.)

For these reasons the County is justifiably concerned about the potential effects of Class A LPTVs on its system. The Commission should act now to ensure that the County's translator system is not jeopardized.

Discussion

I. THE COMMISSION HAS THE DISCRETION TO AWARD CLASS A STATUS TO TRANSLATORS

Examination of the CBPA -- as well as the Communications Act -- demonstrates that the Commission has the authority to grant Class A status to entities other than just LPTVs.

A. The CBPA Grants the Agency Broad Discretion in Awarding Class A Status.

Section (f)(2)(A) of the CBPA prescribes criteria for Class A status peculiar to low power television stations, e.g. requirements that the applicant has broadcast an average of at least three hours of locally-produced programming per week during the 90 days preceding the date of enactment, and has been in compliance with the Rules for low power stations during this period. However, the Act goes on to state:

For purposes of this subsection, a station is a qualifying low-power television station if --

the Commission determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.

Section (f)(2)(B) of the Act. In other words, the statute confers not just one, but two alternative bases for the Commission to award Class A status to entities other than LPTVs: One based on the “public interest, convenience, and necessity,” and a second based on “other reasons determined by the Commission”.

That the Act should contain such a broad and explicit grant of discretionary authority should not be surprising. After all, in the original Notice of Proposed Rulemaking in MM Docket No. 99-292, the Commission asked whether translators should be accorded greater protections along with LPTV stations. FCC 99-257, at paras. 23-24. This text was released on September 29, 1999; Congress passed the CBPA on November 19. Congress clearly was, and must be deemed to have been, knowledgeable about its regulatory agency’s thinking germane to the legislation it was considering. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to legislation it enacts.”); VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1581 (Fed. Cir. 1990) (same). The fact that Congress did nothing to restrict the agency’s discretion, but actually endorsed additional grounds for awarding Class A status not restricted to LPTVs, underscores that the CBPA represents an independent source statutory of authority for the Commission to confer Class A status on the County’s translators.¹

¹ The conference report states, after describing the LPTV qualifications in Section (f)(2)(A), that “In the alternative, the FCC may qualify an LPTV station as a Class A licensee if it determines that such qualification would serve the public interest, convenience, and necessity or for other reasons determined by the FCC.” Joint Explanatory Statement of the Committee of Conference at p. 64. This language indicates no more than that LPTVs represented, in the minds of the conferees, the most conspicuous beneficiary of the Act -- not the only beneficiary. In any event, it is an axiom of statutory construction that where the language of a statute itself is clear -- as it is here -- that controls without resort to legislative history. Local Exchange Carriers’ Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, 12 FCC Rcd 18730, 18900 (1997) (“A fundamental principle of statutory interpretation holds that when the language of a statute is clear, an examination of legislative history is unwarranted.”); Consumer Product Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (“Absent a clearly expressed legislative intention to the contrary, [the statute’s] language must ordinarily be regarded as conclusive.”).

B. Independent of the CBPA, the FCC Has the Authority to Protect the County's Translators.

While passage of the CBPA is helpful, the Commission need not necessarily rely on it to protect the County's translators.

Passage of the CBPA does not affect the Commission's general public interest authority to "[c]lassify radio stations" and to make such regulations as may be necessary to "carry out the provisions" of the Communications Act. 47 U.S.C. Sections 154(i), 303(a), (f), and (r) and 307. It was just such authority which the Commission relied upon in considering coverage for certain translators in September's Notice of Proposed Rulemaking, supra. In other words, the agency itself having created the rules for translators and LPTVs, the agency is free to later change its rules absent some express Congressional direction to the contrary. And, as seen above, there is nothing in the CBPA -- or anywhere else for that matter -- which would restrict the agency's public interest discretion in this regard.

Thus, the Commission has retained the authority to award Class A benefits, or their equivalent, to more than just LPTVs. The question is whether the agency should, as a matter of policy, exercise that discretion. The answer to that question, at least in the case of the County, is clearly affirmative.

II. THE FCC SHOULD EXERCISE ITS AUTHORITY TO ENSURE THAT THE COUNTY'S TRANSLATORS ARE NOT DISADVANTAGED.

For nearly 50 years it has been firmly established national policy that over-the-air television service be made available to all areas of the country. This policy finds its expression in the Sixth Report and Order in Docket Nos. 8736 et al creating the television table of assignments. 41 FCC 148 (1952). There the Commission established as the very first priority

out of five the provision of “at least one television service to all parts of the United States.” Id. at para. 63.²

The TV translator service was established by the Commission in 1956 in furtherance of the Section 307 mandate to ensure a “fair, efficient and equitable” distribution of broadcast service “among the several States and communities” of the United States. 47 U.S.C. Section 307(b). In so doing the Commission stated that it:

“has been concerned with the important problem of providing television service to small, isolated communities and sparsely settled areas beyond the range of stations now on the air. Many such communities and areas are unable to support their own television station under present requirements, even though channels may be assigned to the community or would be available for assignment. The purpose of this proceeding has been to explore the possibility of low-cost television translator stations as one means of extending the benefits of television to these outlying communities and areas.”

Report and Order in Docket No. 11611, 13 RR 1561. The Commission went on to say that “the urgent need for television service in isolated communities requires prompt action.....” Id. at 1566.

Nor are the policy views reflected in Docket 11611 confined to that era. The Commission remains aware of the contribution which TV translators like the County’s make to the continued realization of this universal service objective. Indeed, just four months ago the agency stated:

“We are ... concerned that the creation of a Class A LPTV service not unduly disrupt important services provided by secondary service facilities such as television translators, including public translators and translators that serve rural areas.”

² The provision of at least one reception service to all parts of the United States is embodied in the radio context as well. See Second Report and Order in BC Docket No. 80-130, FCC 82-240, 51 RR 2d 807, 808, 810 (1982) (provision of at least one aural service is the highest priority).

Notice in MM Docket No. 99-292, at para. 24. The County's translators provide these "important services" and thus serve fundamental objectives of the Communications Act -- objectives which remain at least as basic today as they were 44 years ago.³

III. THE COMMISSION SHOULD ADDRESS SPECIFIC RISKS TO THE COUNTY SYSTEM.

In the County's case, no fewer than ten (10) of its forty-five (45) translators are located on Channels 52 through 59, and one of its stations, located on Channel 64, is still without a displacement channel. Ultimately, all of these stations must locate substitute channels in the "core" spectrum, channels 2-51. In other words, a substantial migration is in the offing for these stations, as well as other County stations which may be displaced due to digital television conversion. Moreover, over 1,000 full-service stations have filed notices of intent to maximize their facilities; if even a substantial number of these follow through, there could be further impacts on the County's system.

To be sure, the County's translators will receive some benefit from geography. However, it would be foolhardy to rely on this alone given the scope of the changes facing the County's system. Accordingly, any window the Commission might consider for the filing of new displacement applications (for Channels 52-59, for example) should be opened for Class As and rural translators like the County's equally. Likewise, the County's displacement applications should be accorded equal status and rights with any Class A application with which they might

³ Of course, there are a variety of different delivery vehicles today, including cable and satellite, which were not available in 1956. However, the County's translator system remains the only conventional television delivery vehicle for many County residents, particularly the less well-off, and the only one supported by taxpayers.

be mutually-exclusive. In the alternative, the agency could open an early window exclusively for rural translators facing the prospect of displacement.⁴

In this regard, the Notice also asks whether the displacement presumption applied to translators and LPTVs on Channels 60-69 should be extended to stations occupying Channels 52-59. Id. at para. 53. The answer is affirmative. By extending the presumption, the Commission will increase the opportunity for existing translators to locate substitute channels while they are still available. To continue the existing policy, on the other hand, prevents translator licenses from filing for such channels until the time of the next window for new and major changes -- by which point available channels may be further depleted. In the County's case such a result clearly disserves the public interest.⁵

Finally, the question is posed as to whether the agency should extend in effect an open-ended opportunity for LPTV stations to seek Class A status. Id. at para. 9. It bases this on the proposition that Section (f)(2)(B) of the CBPA "gives the Commission discretion to determine that the public interest, convenience and necessity would be served by treating a station as a qualifying LPTV station, or that a station should be considered to qualify for such status for other reasons". However, Section (f)(1)(A) of the Act states that "within 60 days after [the] date of enactment, licensees intending to seek Class A designation shall submit to the Commission a certification of eligibility" It is axiomatic that "shall" is the language of

⁴ The County does not take issue with the Commission's tentative determination that LPTV stations granted Class A status should have their contours protected from and after the date of enactment (November 29, 1999). Id. at para. 12. Likewise, the County recognizes the protections afforded its own stations' contours by Section (f)(7)(B) of the Act. 47 U.S.C. § 336(b)(7)(B). Thus, a chief focus of these comments is on the maintenance of equality between translators and LPTVs relative to securing displacement channels: The Commission should not allow displaced Class A stations priority as against rural translators in securing such channels. See Notice at para. 49.

⁵ Consistent with the above, the County also supports the proposal to apply the same relaxed definition of minor changes to translators as the Commission might apply to Class As. Id. at para. 48.

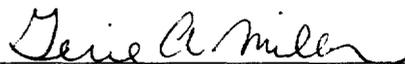
command. *The American Heritage Dictionary of the English Language* (3rd ed. 1996)(visited February 9, 2000) <<http://www.dictionary.com>> (indicating that “shall” is “used to express obligation or duty”). The use of such statutory language forecloses an open-ended opportunity for certifications.⁶

CONCLUSION

For the foregoing reasons, the Commission should hold that the County’s translators will be afforded Class A status, or its functional equivalent, in order to ensure that the principal delivery vehicle for conventional, off-the-air television service to the citizens of Mohave County, Arizona, be not jeopardized.

Respectfully submitted,

MOHAVE COUNTY BOARD OF
SUPERVISORS

By: 
William K. Keane
Gerie A. Miller

ARTER & HADDEN LLP
1801 K Street, N.W., Suite 400K
Washington, D.C. 20006-1301
(202) 775-7123

Its Counsel

February 10, 2000

⁶ If the Commission should nonetheless determine to allow later filings on the basis of Section (f)(2)(B), but contrary to Section (f)(1)(A), it would be arbitrary and capricious to refuse to exercise that same authority to confer Class A benefits on the County’s translators -- a result which is not inconsistent with another Section of the Act.