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February 22, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
TW-A325
Washington, DC 20554

Re: **Notice of Proposed Rule Making**
In the Matter of Establishment of a Class A Television Service
MM Docket No. 00-10, MM Docket No. 99-292, RM-9260

Dear Ms. Salas:

On behalf of Davis Television Clarksburg, LLC; Davis Television Corpus Christi, LLC; Davis Television Duluth, LLC; Davis Television Fairmont, LLC; Davis Television Pittsburg, LLC; Davis Television Topeka, LLC; and Davis Television Wausau, LLC, I am transmitting herewith an original and eight copies of their Reply Comments in the above-referenced matter.

In addition, by copy of this letter, I am submitting the reply comments on a 3.5 inch diskette, in an IBM compatible format using software that is compatible to Word 97, in "read only" mode, to Wanda Hardy (FCC Paralegal Specialist) and to the Commission's copy contractor, International Transcription Service, Inc.

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List A B C D E

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,

Ross G. Greenberg

RGG:rg
Enclosures
cc (w/diskette): Wanda Hardy (Room 2-C221)
International Transcription Service, Inc.

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

REPLY COMMENTS OF DAVIS TELEVISION CLARKSBURG, LLC; DAVIS TELEVISION CORPUS CHRISTI, LLC; DAVIS TELEVISION DULUTH, LLC; DAVIS TELEVISION FAIRMONT, LLC; DAVIS TELEVISION PITTSBURG, LLC; DAVIS TELEVISION TOPEKA, LLC; AND DAVIS TELEVISION WAUSAU, LLC

Davis Television Clarksburg, LLC ("Davis Clarksburg"), licensee of television broadcast station WVFX(TV), Channel 46 at Clarksburg, West Virginia; Davis Television Corpus Christi, LLC ("Davis Corpus Christi"), applicant for a construction permit for a new television broadcast station to operate on Channel 38 at Corpus Christi, Texas; Davis Television Duluth, LLC ("Davis Duluth"), applicant for a construction permit for a new television broadcast station to operate on Channel 27 at Duluth, Minnesota; Davis Television Fairmont, LLC ("Davis Fairmont"), applicant for a construction permit for a new television broadcast station to operate on Channel 66 at Fairmont, West Virginia; Davis Television Pittsburg, LLC ("Davis Pittsburg"), applicant for a construction permit for a new television broadcast station to operate on Channel 14 at Pittsburg, Kansas; Davis Television Topeka, LLC ("Davis Topeka"), applicant for a construction

permit for a new television broadcast station to operate on Channel 43 at Topeka, Kansas; and Davis Television Wausau, LLC ("Davis Wausau"), permittee of television broadcast station WFXS(TV), Channel 55 at Wittenberg, Wisconsin, by their attorneys, hereby submit their reply comments relating to the Commission's Order and Notice of Proposed Rule Making in the above-captioned proceeding, FCC 00-16 (released January 13, 2000) (the "Notice"). Davis Clarksburg, Davis Corpus Christi, Davis Duluth, Davis Fairmont, Davis Pittsburg, Davis Topeka and Davis Wausau are commonly owned and are hereinafter referred to as "Davis." Davis submitted comments in this proceeding on February 10, 2000.

I. BACKGROUND

The Notice sought comment on a wide ranging set of issues, all related to the implementation of the Community Broadcasters Protection Act of 1999, Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), Appendix I, codified at 47 U.S.C. § 336(f) (the "CBPA"), which requires the Commission to prescribe regulations establishing a Class A television license available to licensees of qualifying low-power television ("LPTV") stations. Davis commented on several aspects of the Notice,[1] and strongly urged the Commission to ensure that Class A LPTV applicants provide interference protection to operating full-power analog (or "NTSC") stations, unbuilt NTSC construction permits and NTSC applications.

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[1] As a clarification to footnote 4 of its comments, Davis here acknowledges that Rule 74.780 makes Subpart G of Part 73 applicable to certain low-power stations. Subpart G in turn now cross-references Part 11 of the Rules, which superseded Subpart G of Part 73. Subpart 74 has not been amended to directly specify the applicability of Part 11.

II. NUMEROUS COMMENTERS, INCLUDING THE COMMUNITY BROADCASTERS ASSOCIATION, CONCLUDE THAT FULL-POWER NTSC APPLICATIONS SHOULD BE PROTECTED BY CLASS A LPTV STATIONS UNDER THE COMMUNITY BROADCASTERS PROTECTION ACT

In the Notice, the Commission noted that "[w]ith respect to NTSC facilities, Section (f)(7)(A) of the CBPA provides that a Class A license or modification of license may not be granted where the station will cause interference 'within the predicted Grade B contour (as of the date of the enactment of the . . .[CBPA] . . . or as proposed in a change application filed on or before such date) of any television station transmitting in analog format.'" Notice at ¶ 27 (citing 47 U.S.C. § 336(f)(7)(A)(i)) (alteration in original). The Notice went on to state that the Commission is "inclined to include among the NTSC facilities that Class A stations must protect both stations actually transmitting in analog format and those which have been authorized to construct facilities capable of transmitting in analog format (*i.e.*, construction permits)" and that "[u]nder this interpretation, pending applications for new NTSC full-power stations would not be protected, nor would allotment proposals for such facilities, modified allotment proposals for channel or other technical changes . . . ." Notice at ¶ 27. The Commission invited comment on how to interpret the phrase "transmitting in analog format" and requested comment on its tentative conclusion. In its comments, Davis stated that the phrase "transmitting in analog format" should be read to encompass all full-power NTSC licenses, construction permits, and applications and that all should be protected from interference from Class A LPTV stations. A virtual chorus of voices has joined Davis in calling for Class A interference protection for the

NTSC "universe." Particularly revealing comments on the subject were submitted by the Community Broadcasters Association (the "CBA").[2]

In its comments, the CBA states that "CBA does not believe that it was the intent of Congress to disrupt any proceedings already cut off as of [November 29, 1999] for full power analog construction permits, whether through auctions, settlements, or cut-off singleton applications. Accordingly, *Class A stations may be displaced only by existing analog stations and full power applicants that have completed all processing short of grant. This category includes post-auction applications, applications proposed for grant in pending settlements, and any singleton applications that are cut off from further filings.*" Comments of CBA at ¶ 12 (emphasis added). The CBA, the primary advocate for the low-power television industry, concedes that certain types of NTSC applications should be protected from Class A LPTV interference and that these applications may properly and lawfully displace Class A LPTV stations. The fact that the organization created and empowered to speak for LPTV licensees believes that Congress intended in the CBPA to provide such protection for full-power NTSC applications provides powerful support for Davis' basic position that the phrase "transmitting in analog format" as used in the CBPA was a shorthand phrase that cannot be read literally to mean only NTSC stations that are actually transmitting.

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[2] Well before enactment of the CBPA, the CBA filed a September 30, 1997 Petition for Rule Making (amended March 18, 1998) seeking to establish a Class A LPTV license. Although the Commission issued a Notice of Proposed Rule Making in response to the CBA Petition, that Notice was ultimately withdrawn in light of the CBPA.

Although the CBA tries to distinguish between certain NTSC full-power applications that should be afforded protection and those that should not, it has opened a door that cannot rationally be closed in such a manner. The CBA does not explain how it interprets the phrase "transmitting in analog format" to include those applications that have "completed all processing short of a grant" but exclude "pending rule making petitions for new allotments for new allotments or full power applications that have not yet been accepted for filing, such as those with large market freeze waivers that have not been acted upon . . . [or] singleton applications that will be subject to future competing applications in a future filing window . . . ." Id.[3] In making such distinctions, the CBA is merely engaging in clever sophistry, quite possibly in an attempt to protect certain of its members' interests in specific applications before the Commission. Congress, however, has made no distinction between classes of applications, other than distinguishing those that pre-date the enactment of the CBPA from those submitted after that date. There is no rational basis for concluding that Congress meant to include *certain* pre-November 29, 1999 full-power NTSC applications but not others, nor is there any lawful or equitable way to distinguish between these classes of applications. Indeed, it would be entirely irrational and inequitable to use FCC application processing speed as the key determinant of

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[3] The CBA's hair-splitting approach to the NTSC application issue is difficult to apply to specific cases. For example, Davis Pittsburg entered into a settlement agreement with the only other mutually exclusive applicant for Channel 14 at Pittsburg, Kansas, in January 1998, but its application still has not been accepted for filing, more than two years later, for reasons that are beyond Davis Pittsburg's control.

whether an application merits protection or not.[4] Accordingly, the Commission should accept the CBA's assertion, extend it to its logical boundaries and protect all operating full-power NTSC stations, all unbuilt construction permits and *all* applications.

There is compelling support for Davis' viewpoint from numerous other commenters that acknowledge that full-power NTSC applications are within the scope of protections afforded by the CBPA. See, e.g., Comments of:

- The Association for Maximum Service Television, Inc. and the National Association of Broadcasters at 11: "MSTV and NAB disagree . . . with the Commission's further conclusion not to protect long-pending NTSC applications . . . . In establishing the Class A service, Congress could not possibly have intended to eliminate the rights of these applicants to have their long-pending applications processed in due course."

- WB Television Network at 8, 11: "[T]he Commission should interpret Section 336(f)(7)(A) of the [CBPA] to require Class A applications to protect the predicted Grade B contour specified in pending applications . . . . [T]he 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)."

- KM Communications, Inc. at 9, 11: "**It would make no sense for Congress to intend, or for the Commission to interpret, the CBPA in a manner that requires Class A stations to protect an application proposing a secondary LPTV or TV translator operation, but not an application proposing a primary full power television operation!** . . . KM urges the Commission to adopt a standard that requires proposed Class A stations to protect all analog full power stations that are either authorized or proposed in all applications pending as of November 29, 1999, including applications for new full power analog television stations." (Emphasis in original.)

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[4] For example, some applications filed at the same time as Davis' applications (September 1996) recently went to auction (September 1999) after they had failed to reach a universal settlement.

- Association of Federal Communications Consulting Engineers at 4: "To cast aside such applications for full-service stations in favor of low power stations which have been considered secondary service up to this time not only changes the rules in the eleventh hour for such full-service applications but does not seem to be in the public interest, since the full-service stations will ultimately serve more viewers than the low power stations."

- The Association of America's Public Television Stations at 7: "[I]t would be inequitable and contrary to the primary status of full power stations for pending full power analog applications to become secondary to subsequent low power Class A applications. Giving a new Class A applicant priority over pending analog applicants would be unprecedented, as there are no known circumstances in which a later filed application has been given precedence in this manner by the Commission."

- Joint Comments of Schwartz, Woods & Miller[5] at 6, 7: "The Joint Parties urge the Commission to continue to require full protection of NTSC facilities, including pending applications, construction permits and operating stations . . . . The phrase 'transmitting in analog format' in Section 5008 (f)(7)(A) is sufficiently broad to embrace analog stations transmitting, authorized to transmit or proposing to transmit in analog format."

- Pappas Telecasting Companies at 4: "[T]he Commission should interpret Section 336(f)(7)(A) of the [CBPA] to require Class A applications to protect the predicted Grade B contour specified in pending applications and allotment rulemaking petitions proposing new NTSC stations."

- Entravision Holdings, LLC at 6: "Entravision is concerned that limiting the protection to permittees and licensees will have a disruptive effect on full service stations, which remain the principal over-the-air broadcast service."

- Pelican Broadcasting Company at 2: "[T]here is a real potential that [parties], who have filed their applications in good faith, remained pending for years, and justly anticipated the resolution of their proceeding through a negotiated settlement and selection of an appropriate channel during the filing window

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[5] Filed on behalf of public broadcast licensees Connecticut Public Broadcasting, Inc., Educational Television Association of Metropolitan Cleveland, Inc., Mississippi Authority for Educational Television, New Jersey Public Broadcasting Authority, Northern California Educational Television Association, Inc., North Texas Public Broadcasting, Inc., University of New Hampshire, University of North Carolina, Western New York Public Broadcasting Association and WMHT Educational Telecommunications.

announced by the Commission, will see their plans scuttled. This would be manifestly unfair."

- Television Capital Corporation at 6: "LPTV and TV translator stations were licensed throughout the DTV freeze because of their secondary status. This secondary status now forms the basis upon which many 'qualified LPTV stations' obtained their authorizations. Thus, while the applications and proposals of NTSC advocates languished, LPTV licensees were unfettered in their ability to commence and improve operations. Now, they have been bumped to the proverbial head of the line simply because they proposed a secondary rather than primary service. Fundamental fairness dictates that qualified LPTV stations should be required to protect pending NTSC applications and proposals and facilities sought in the reallocation window."

- Larry A. Miller and World Broadcasting, Inc. at 10: "The [Commission's] proposed interpretation of the CBPA would constitute a windfall to Class A stations at the expense of (i) applicants for construction permits for new primary analog stations who have been prosecuting their applications for years, and (ii) the public which their proposed new stations would serve. Equity demands that the Commission protect these applicants."

- Winstar Broadcasting Corporation[6] at 2: "[Winstar Broadcasting Corporation] proposes that the Commission interpret the CBPA so that pending applications of auction winners are provided interference protection against Class A service to prevent the frustration of legitimate economic expectations and rights. Such an interpretation is permissible under the statute."

These commenters and others like them demonstrate the strong opposition to the Commission's proposed interpretation of the CBPA as not protecting full-power analog applications. The Commission's proposed interpretation is, in fact, *universally opposed* by umbrella groups representing the broadcasting industry at large, by key commercial and public broadcasters, by engineers and, to the extent explained above, by the *low-power industry itself.* All of these commenters recognize that Congress' instructions to the Commission that newly

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6 Auction winners Pacific Bay Broadcasting, Marcia T. Turner d/b/a Turner Enterprises and DanBeth Communications, Inc. joined in the comments of Winstar Broadcasting Corporation.

licensed Class A LPTV stations are to protect stations "transmitting in analog format" must be read in context to encompass full-power NTSC licenses, construction permits, *and applications*.

III. CONCLUSION

The Commission has the opportunity to confer Class A status upon qualifying low-power television stations without denying the public the overall benefits that full-power television stations offer. Commenters large and small agree with Davis and believe that the CBPA requires the Commission to extend Class A LPTV interference protection to operating full-power analog stations, unbuilt construction permits and applications. Accordingly, Davis requests that the Commission protect full-power NTSC applications from interference caused by Class A LPTV stations.

Respectfully submitted,

DAVIS TELEVISION CLARKSBURG, LLC
DAVIS TELEVISION CORPUS CHRISTI, LLC
DAVIS TELEVISION DULUTH, LLC
DAVIS TELEVISION FAIRMONT, LLC
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February 22, 2000

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134767

CERTIFICATE OF SERVICE

I, Yaiza E. Garabito, hereby certify that a true and correct copy of the foregoing "Reply Comments" was sent by hand delivery this 22nd day of February 2000 to the following:

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