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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

PETITION FOR RECONSIDERATION

Robert E. Kelly ("Petitioner"), pursuant to 47 C.F.R. §1.106, hereby submits his Petition for Reconsideration of the Commission's Order in the above referenced proceeding ("Order"), which Order established a Class A television service to implement the Community Broadcasters Protection Act of 1999 (CBPA), which was signed into law November 29, 1999.[1] Pursuant to the CBPA and the FCC's implementing rules, certain qualifying low-power television (LPTV) stations were accorded Class A status. Petitioner respectfully requests that the Commission reconsider several aspects of its Order. First, Petitioner asks that the Commission allow those entities who hold construction permits and will build LPTV stations in the future the opportunity to qualify for Class A service. The failure to do so will violate the First

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1 Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. Appendix I at pp. 1501A-594 - 1501A-598 (1999), *codified at* 47 U.S.C. § 336(f) (CBPA). This bill was enacted as part of the Intellectual Property and Communications Omnibus Reform Act of 1999, which itself is part of a larger consolidated omnibus appropriations bill entitled "Making consolidated appropriations for the fiscal year ending September 30, 2000, and for other purposes."

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Amendment rights of such entities, as the FCC has promulgated rules which discriminate based on the content of the programming on the subject LPTV stations. In addition to the Constitutional infirmity, such a failure would also constitute unreasoned decision making and is arbitrary and capricious.

Petitioner also requests the Commission to reconsider its initial decision to limit the filing of Class applications for in-core channels to a six-month period but to allow an unlimited amount of time for such filing to out-of-core channels. There is no reasonable basis for creating two different classes in this case and thus this distinction is improper on its face.

Finally, the Commission needs to clarify several issues. The Commission needs to define "locally produced" programming. The Commission seems to have adopted the definition urged in Kelly's comments and adopted by Congress, i.e., locally originated programming, but this issue is not clear in the Commission's Order. Also, the Commission needs to address the issue of those stations that have been displaced and have already received displacement authority to move to a new channel prior to the adoption of the CPBA. If the original channel is not located in the channels 52-69, there must be a resolution of whether these displacements have either six months or an unlimited time to file Class A licenses.

I. The Commission's Eligibility Rules Is Unconstitutional

The 90-day eligibility requirement for the broadcast of locally-produced programming in the Commission's rules limited to existing licensees only is a content-based restriction of an LPTV licensee's ability to communicate with its audience, and as such is subject to strict scrutiny. See *Turner Broadcasting System, Inc. v. Federal Communications Comm'n* (Turner I), 512 U.S. 622, 642 (1994) (Court has applied "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon
speech because of its content").

In general, the "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). A law that singles out speech based upon the ideas or views expressed is content-based, whereas a law that "confer[s] benefits or impose[s] burdens on speech without reference to the ideas or views expressed" is most likely content-neutral. Id. at 643; see also id. at 661 (law that does not "pose ... inherent dangers to free expression, or present ... potential for censorship or manipulation, [will not] ... justify application of the most exacting level of First Amendment scrutiny").

The Supreme Court has also rejected

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others [as] wholly foreign to the First Amendment.

Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978) (A state's effort to control some voices in order to "enhance the relative voices" of less influential speakers contradicts basic tenets of First Amendment jurisprudence.)

In this case, the Commission has promulgated rules that require strict scrutiny, as the 90-day eligibility restriction is clearly content based, and is not content neutral. The restriction is concerned with the communicative impact of the regulated speech." Turner I, 512 U.S. at 658.

First, locally produced programming is not content neutral. By its nature, it can only be a certain type of programming. Where it is produced dictates what is in the content by restricting it in scope. This confirmed by the fact that the Commission itself states in the Order that the purpose of the local market definition is "rewarding and protecting LPTV stations which provide communities with locally oriented programming."

> We also believe that extending the market area to encompass the Grade B contour will give stations more flexibility to provide locally oriented programming to the community within their signal range, and provide

> them with a more stable economic base in which to improve their commercial viability. Accordingly, we believe that the predicted Grade B contour is a more appropriate measure than our original protected contour proposal with respect to provision of locally oriented programming for the communities served by LPTV stations.

Order at ¶ 19.

It is clearly the purpose of the Commission's rules to establish a content-based regulation. The Commission has defined the type of programming involved to slant it in the direction locally-oriented programming. Also, certain types of programming are excluded. For example, locally-produced commercials are not included in the definition. Order at ¶ 16. This restriction is another indication that the rule in question is content based.

The Supreme Court has recognized that "Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner I*, 512 U.S. at 659. In fact, the Commission has not met the test imposed by the strict scrutiny standard by failing to extend it to other entities with LPTV authorizations that may desire to qualify for Class A status in the future.

A content-neutral regulation of speech "will be sustained under the First Amendment if it [1] advances important governmental interests unrelated to the suppression of free

speech and [2] does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc. v. Federal Communications Comm'n (Turner II)*, 520 U.S. 180, 189 (1997) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). If a regulation on speech is intended to redress an actual or an anticipated harm to an important governmental interest, then the Government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664.

While the speech restriction in this case arguably advances a stated governmental interest, i.e., the preservation of the LPTV service, it burdens substantially more speech than necessary to further those interests. The Commission's action to restrict the class of LPTV stations eligible for Class A status, rather than expand the group, on its face must fail this test. For any group to have a better chance for survival, in the financial world or in the animal kingdom, it is elementary that the more members of the group, the better its chance for survival. The Commission fails this test completely, without a reasonable explanation for its actions.[2]

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2 Concern about interference to DTV channels and the harm to this developing service is unwarranted, as the Commission's current interference rules clearly provide virtually unlimited interference protection to DTV channels by LPTV stations, Class A

(continued...)

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Under the well-established standard for agency interpretation of a statute, if Congress has directly spoken to the issue, and the intent of Congress is clear, then there is nothing for the agency to interpret, and the court must give effect to the unambiguous expression of Congress. If, however, the court decides that the statute is ambiguous, then the court determines only whether the agency's interpretation is a reasonable one. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984.

The FCC's interpretation is not a reasonable one. The FCC sets out the basis for its legislative interpretation as follows:

> Some commenters asked that we expand the initial group of eligible LPTV stations beyond those who filed their certification in a timely manner. We decline to expand the eligible class in that way. We agree with the commenters who argue that for the purposes of conversion of the current class of stations, the statute clearly set forth a time frame within which licensees must file Class A certifications. (Citation omitted) As expressed by the Association of Local Television Stations, Inc. (ALTV), the statute was designed to permit a one-time conversion of a single pool of LPTV applications that met specific criteria before the statute was enacted. (Citation omitted.) We find the statutory interpretation set forth by the Community Broadcasters Association (CBA), and others, arguing that the statute allows ongoing eligibility, unpersuasive because the intent of Congress in enacting the CBPA was to establish the rights of a very specific, already-existing group.(Citation omitted) The statute itself states its intent to apply to a small number of stations: "Since the creation of low-power television licensees by the Federal Communications Commission, a small number of license holders have operated their stations in a manner beneficial to the public good providing broadcasting to their communities that would not otherwise be available." (Citation omitted) We recognize that Section (f)(2)(B) grants us discretion to determine that other LPTV stations qualify for Class A

> status. This discretion will be addressed in detail below.
>
> Order at ¶20.

The Commission's interpretation is in error. If Congress intended to limit the class of eligible stations "to permit a one-time conversion of a single pool of LPTV applications that met specific criteria before the statute was enacted", then the Congress would not have given the flexibility to the Commission to determine other LPTV stations could qualify as well. This interpretation, proffered by the trade association who is extremely biased toward the limitation of the Class of eligible LPTV stations, simply is not justified.

Furthermore, the Commission's reliance on the portion f the CPBa that states that "Since the creation of low-power television licensees by the Federal Communications Commission, a small number of license holders have operated their stations in a manner beneficial to the public good providing broadcasting to their communities that would not otherwise be available" is misplaced. This language is merely an observation on the state of the LPTV industry, and is not proffered as the justification for limiting the class of eligible stations.

The Commission also relies on a portion of the Section-by-Section Analysis at S14725 that "[I]t is not clear that all LPTV stations should be given such a guarantee [of Class A status] in light of the fact that many existing LPTV stations provide little or no original programming service." This language in no way

Urges the limitation of the class; it again merely is an observation of the LPTV industry.

The Commission's interpretation is clearly erroneous, finding meaning in language which meaning is not there. This is not reasonable, as required by Chevron, supra. Therefore, the Commission must reconsider this aspect of the Class A rules and allow all holders of an FCC authorization the same opportunity to qualify for Class A status as was afforded existing LPTV licensees.

II. The Commission's Rules Are Arbitrary And Capricious

Even if not unconstitutional, the Commission's rules are arbitrary and capricious. Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, expressly vests a reviewing court with the right to hold unlawful and set aside any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA particularly proscribes the failure to draw reasoned distinctions where reasoned distinctions are required.[3] An agency is required to take a "hard look" at all relevant issues and considered reasonable alternatives to its decided course of action.[4] A decision resting solely on a ground that does not

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2(...continued)
or otherwise.

3 *American Trucking Associations, Inc. v. I.C.C.*, 697 F. 2d 1146, 1150 (D.C. Cir. 1983).

4 *Neighborhood Television Co. v. F.C.C.*, 742 F. 2d 629, 639 (1984); *Telocator Network v. F.C.C.*, 691 F. 2d 525, 545 (D.C.

(continued...)

justify the result reached is arbitrary and capricious.[5]

In this case, the Commission's conclusions are based on an incorrect reading of the statute and legislative history. The Commission certainly has not examined all aspects of the issue and given the Class A rules as to eligibility the "hard look" required by ample case precedent.

In addition, there is no rational basis to restrict in-core licensees to file for Class A status within six months, but to impose no restrictions on those entities located on out-of-core channels. The CPBA and the Section-by-Section analysis is absolutely silent on this issue. Therefore, imposing any limit at is unreasonable, and only one class is manifestly arbitrary and capricious.

III. The FCC Should Adopt a Clear Definition of "Locally-Produced"

Petitioner urges that the FCC must adopt a clear definition of locally-produced programming as used in the Class A legislation (CBPA. Without a definition provided by this proceeding, LPTV operators will be required to comply with Class

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Cir. 1982) (agency must consider all relevant factors); *Action For Children's Television v. F.C.C.*, 564 F. 2d 458, 478-79 (D.C. Cir. 1977) (agency must give relative factors a "hard look").

5 *MCI Telecommunications Corp. v. FCC*, 10 F. 3rd 842, 846 (D.C. Cir. 1993).

A rules without the administrative certainty required by due process of law and the Commission's own case precedent.

II. Congress Has Provided The Necessary Definition

Section (f)(2) of the CBPA provides as follows:

> (2) QUALIFYING LOW-POWER TELEVISION STATIONS- For purposes of this subsection, a station is a qualifying low-power television station if-
>
> > `(A)(i) during the 90 days preceding the date of enactment of the Community Broadcasters Protection Act of 1999--
> >
> > > `(I) such station broadcast a minimum of 18 hours per day;
> > >
> > > `(II) such station broadcast an average of at least 3 hours per week of programming that was <u>produced within the market area</u> served by such station, or the market area served by a group of commonly controlled
>
> low-power stations that carry common local programming produced within the market area served by such group; and
>
> > > `(III) such station was in compliance with the Commission's requirements applicable to low-power television stations; and
> >
> > `(ii) from and after the date of its application for a class A license, the station is in compliance with the Commission's operating rules for full-power television stations... (Emphasis supplied.)

The language in the CBPA itself provides no definition of locally-produced programming, nor does it provide any direction. However, the Conference Report accompanying this legislation remedies this void and speaks clearly to this issue. The Conference Report states

> Paragraph (2) lists the criteria an LPTV station must meet to qualify for a Class A license. Specifically, the LPTV station must: during the 90 days preceding the date of enactment, broadcast a minimum of 18 hours per day--including at least 3 hours per week of locally-originated programming--and also be in compliance with the FCC's rules on low-power television service; and from and after the date of its application for a Class A license, be in compliance with the FCC's rules for full-service television stations. (Emphasis supplied.)

This use of the specific term "locally-originated" to define the type of programming necessary to qualify for Class A status is no mistake nor is it an example of imprecise drafting on the part of the legislative drafters. Petitioner's conclusion is based on the fact that there is no mention whatsoever of programming that is locally "produced" in the Conference Report accompanying the legislation. On the other hand, in every instance where programming is referenced in this context in the legislative history, only term "locally originated" is used.

For example, the Conference Report states

> Low-power television plays a valuable, albeit modest, role in this market because it is capable of providing locally-originated programming to rural and urban communities that have either no access to local programming, or an over-abundance of national programming. (Emphasis supplied.)

In addition, the Conference Report states

> The House Committee on Commerce's record in considering this legislation reflects that there are a significant number of LPTV stations which broadcast programming--including locally originated programming--for a substantial portion of each day. From the consumers' perspective, these stations provide video programming that is functionally equivalent to the programming they view on full-service stations, as well as national and local cable

> networks. Consequently, these stations should be afforded roughly similar regulatory status. (Emphasis supplied.)

It is clear from the foregoing that Congress intended those stations with three hours of locally-originated programming per week to qualify for Class A status.

III. The FCC Rules Also Contain a Definition of Local Origination

The term "locally originated" is not a vague phrase of indeterminate or ambiguous meaning. Rather, it is a term of art contained in the Commission's rules at 47 CFR §74.701. The definition in §74.701 provides that

> (g) Program origination. For purposes of this part, program origination shall be any transmissions other than the simultaneous retransmission of the programs and signals of a TV broadcast station. Origination shall include locally generated television program signals and program signals obtained via video recordings (tapes and discs), microwave, common carrier circuits, or other sources. (h) Local origination. Program origination if the parameters of the program source signal, as it reaches the transmitter site, are under the control of the low power TV station licensee. Transmission of TV program signals generated at the transmitter site constitutes local origination. Local origination also includes transmission of programs reaching the transmitter site via TV STL stations, but does not include transmission of signals obtained from either terrestrial or satellite microwave feeds or low power TV stations.

Since this term of art is incorporated directly into the CBPA through the legislative history, and it is already found in the Commission's rules, it must be adopted as the definition here.

IV. Well-Established Principles of Legislative Interpretation Are Controlling Here

It is a well-established principle of legislative interpretation that an agency administering a statute must give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In this case, Congress has spoken clearly and unambiguously on the issue of locally-produced programming. There is no gap in the Congressional intent requiring agency interpretation on this issue. Consequently, the FCC is constrained by well-established case precedent, including clearly-defined principles established by the Supreme Court, in this area and must adopt the definition provided in the CBPA by Congress establishing the type of programming necessary to establish Class A status for LPTV licensees.

WHEREFORE, the foregoing premises considered, Robert E. Kelly respectfully requests that Commission reconsider the Class A rules as requested above.

Respectfully submitted,
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Dated: June 9, 2000