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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	)	
	)	
Establishment of a Class A Television Service	)	MM Docket No. 00-10
	)	FCC 00-115
	)	
	)	
	)	

To: The Commission

REPLY OF PAGING ASSOCIATES, INC.
TO THE NATIONAL CABLE TELEVISION ASSOCIATION'S OPPOSITION
TO PETITION FOR RECONSIDERATION

Pursuant to §1.429(g), Paging Associates, Inc. ("PAI"), owner and operator of LPTV stations W28AJ, Allingtown, CT, and W28CA, Bridgeport, CT, by its attorney, hereby replies to the July 7, 2000 *Opposition of the National Cable Television Association* ("NCTA") *to Petition for Reconsideration* (*Opposition*) in the above-captioned matter.[1]

INTRODUCTION

NCTA does not dispute that the Community Broadcasters Protection Act ("CBPA") requires the Commission to prescribe regulations that accord Class A stations primary status as television broadcasters. *See* 47 U.S.C. § 336(f)(1)(A)(ii). NCTA also does not dispute that Class A stations, under the CBPA, must be subject to the same license terms and renewal standards as licensees for other Part 73 television stations. *See* 47 U.S.C. § 336(f)(1)(A)(i). It also does not dispute that the Commission properly placed the rules governing Class A service with the full-service broadcast rules found in Part 73 in order to accomplish Congress' intent "to place Class A licensees on roughly even

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[1] *See In the Matter of Establishment of a Class A Television Station*, Report & Order, MM Docket No. 00-10, FCC 00-115 (rel. April 4, 2000) (hereinafter "*April 4th Report and Order*").

footing with full-service licensees." *See April 4th Report & Order*, ¶ 47. NCTA nevertheless disagrees with PAI's contention that the Commission must afford Class A stations the same opportunity for mandatory cable and satellite carriage coverage as any other Part 73 primary service television broadcaster.

NCTA's argument is two-fold. First, it contends that Class A stations cannot meet the eligibility requirements for mandatory cable coverage under the provisions of the Cable Television Consumer Protection and Competition Act of 1992 because the Act applies only to "local commercial television stations," which term is expressly defined to exclude low power television stations that operate pursuant to Part 74 or any successor regulations thereto. Second, it claims that Class A stations are not entitled to mandatory cable coverage like other Part 73 stations because neither Congress nor the Commission intended to change the must carry rules to include mandatory carriage rights for Class A stations. Both arguments are wholly without merit.

There is no question that Congress created a new category of television broadcast stations to be accorded primary status as television broadcasters and subject to the same license terms and standards as primary service stations except as expressly limited in the statute. Congress, therefore, necessarily intended that Class A stations, with limited exception, would be treated like any other primary service station. The CBPA provisions governing Class A stations do not contain any exception which bars mandatory cable and satellite must carry and NCTA cites nothing which indicates that Congress meant to exclude Class A stations from mandatory must carry requirements.

Moreover, there is no language in either the 1992 Cable Act or the 1999 Satellite Home Viewer Improvement Act that prevents Class A stations licensed under Part 73 from qualifying for mandatory cable and satellite carriage like any other primary service station. Despite NCTA's

contention to the contrary, no change in the must carry rules is necessary for Class A stations to qualify for must carry coverage; the current rules already cover Part 73 commercial broadcasters.

In short, NCTA has not established any reason why the Commission should not include Class A stations in the Tables of Allotments as PAI requests. Absent such inclusion, Class A stations will be precluded from having equal access to the cable and satellite coverage afforded all other primary service stations, thereby threatening the commercial viability of such stations and their ability to continue to provide quality locally-originated programming.

I. CONGRESS INTENDED TO PROVIDE CLASS A LICENSEES THE SAME RIGHTS AND SERVICES AS ALL OTHER PRIMARY SERVICE STATIONS WITHOUT EXCLUSION FROM MANDATORY CABLE AND SATELLITE CARRIAGE

Although NCTA does not dispute that the CBPA grants Class A stations primary status as television broadcasters subject to the same license terms and renewal standards as provided for full power television stations, NCTA nonetheless argues that Congress could not have intended for Class A stations to have mandatory carriage rights like all other Part 73 stations because Congress would not have made "a major revision to the must carry rules *sub silentio*." *Opposition*, at 2.

A primary flaw in NCTA's argument is the erroneous premise that there has to be a significant change to the must carry rules in order to afford mandatory must carry to all Part 73 licensees. There has been no change to the must carry requirements and none is required. The CBPA has created a new class of licensees having the same rights and obligations as pre-existing Part 73 television stations, 47 U.S.C. § 336(f)(1)(A), and the rules already contemplate carriage of Part 73 TV broadcast stations. As a result, Class A stations necessarily are entitled to the same mandatory carriage rights as other primary service stations operating under Part 73.

This interpretation is not only consistent with the express language of the CBPA, but also its spirit and intent. Congress explicitly found that there were a small number of low power

television broadcasters who "have operated their stations in a manner consistent with the programming objectives and hours of operation of full-power broadcasters providing worthwhile services to their respective communities while under severe license limitations compared to their full-power counterparts." Community Broadcasters Protection Act of 1999; Congressional findings, Act Nov. 29, 1999, P.L. 106-113, Div. B, § 1000(a)(9), 113 Stat. 1536 (enacting into law § 5006(b) of Title V of S. 1948 (113 Stat. 1501A-594), as introduced on November 17, 1999). Congress further found that license limitations "have blocked many low-power broadcasters from having access to capital, and have severely hampered their ability to continue to provide quality broadcasting, programming, or improvements." *Id.* As a result, Congress found a need to provide additional rights for these stations, which operate in the "public interest to promote diversity in programming . . .." *Id.*

While Congress also was concerned with the uncertainty of the future status of these stations in the transition to high definition, digital television,[2] these Congressional findings establish unequivocally that the purpose of the CBPA was not solely to protect these stations during the transition to digital television, but also to eliminate license limitations that have prevented these broadcasters from having access to capital and that have hampered their ability to continue to operate in a manner beneficial to the public good. For this reason, Congress accorded these qualifying license holders "primary status" under the same license terms and standards applicable to other Part 73 television stations.

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[2] Congress also found that the "passage of the Telecommunications Act of 1996 [Act Feb. 8, 1996, P.L. 104-104] has added to the uncertainty of the future status of these stations by the lack of specific provisions regarding the permanency of their licenses, or their treatment during the transition to high definition, digital television."

From an economic standpoint, there can be no question that the lack of mandatory cable and satellite carriage has been one of the most damaging limitations experienced by these qualifying broadcasters. Without access to the satellite and cable subscribers in their local markets, these Class A station stations have been greatly hindered in their ability to acquire capital, thereby endangering the continuation of quality locally-originated programming to their communities. By according these few qualifying Class A stations the same primary status conferred upon other Part 73 licensees, Congress clearly intended to eliminate all technically feasible license limitations.

It is not reasonable to conclude, as urged by NCTA, that Congress meant to confer on Class A stations all of the license terms and standards applicable to full power stations except mandatory carriage. The CBPA expressly states that a Class A license "shall be subject to the same license terms and renewal standards as the licenses for full-power television stations except as provided in this subsection" and, as long as the station continues to meet the qualification requirements for Class A licenses, it "shall be accorded primary status as a television broadcaster . . ." 47 U.S.C. § 336(f)(1)(A). There is no exception in the statute, express or implied, which bars Part 73 Class A stations from the benefits of mandatory cable and satellite carriage provisions.

The fact that Congress did not specifically reference the mandatory carriage rights of Class A stations in the CBPA or the accompanying conference report does not support NCTA's argument that Congress did not intend Class A stations to have such rights.[3] The language of the CBPA does

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[3] NCTA claims that the "lone" reference to mandatory carriage in the legislative history suggests that none of the participants believed the CBPA would alter the must carry rules. *Opposition*, at 6. However, the reference cited is not, in fact, legislative history indicating Congressional intent but merely a letter from a constituent letter to a congressman. One citizen's view of the then proposed law does not reflect Congressional intent. Moreover, the language of the statute is clear that exceptions must be expressly listed in § 336 and there is no need to resort to background materials to discern Congressional intent. *See Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 922, 929 n.11 (D.C. Cir. 1985), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991) ("it is elementary in the

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not delineate, or even attempt to delineate, every right and obligation of Class A stations. The statute specifically requires that Class A stations be treated like other full-power, Part 73 stations. Therefore, the fact that Congress did not specifically reference mandatory carriage, nor any other right or obligation of full power television stations, does not mean that Congress intended that Class A stations are to be denied such rights.[4]

By providing that Class A stations shall be accorded the same license terms and standards as other full-power stations, "except as provided in this subsection," 47 U.S.C. § 336(f)(a)(1), the plain language of the statute shows that Congress necessarily intended that Class A stations would be treated like other Part 73 stations in all respects, unless § 336 specifically provides otherwise.[5] In the face of this explicit Congressional requirement, NCTA has failed to demonstrate that exclusion may be inferred from what NCTA articulates as Congressional "silence."[6]

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[3](...continued)
law of statutory construction that, absent ambiguity or unreasonable result, the literal language of the statute controls and resort to legislative history is not only unnecessary but improper.").

[4] NCTA's argument merely selects one of many Part 73 rights and obligations for exclusion. NCTA does not explain why the must carry right is to be excluded while other rights are included and NCTA provides no standard for selecting which other Part 73 rights and obligations are, or are not, applicable. Of course, NCTA cannot specify a standard because the statute is clear that the only exceptions to a Class A stations' rights are those exceptions which are listed in § 336 of the Communications Act. 47 U.S.C. § 336(f)(1)(A)(i).

[5] The statute is clear on the issue of exceptions: any exception must be expressly listed in § 336. Because the statute is clear, this is not a matter committed to agency discretion. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (if Congress has spoken clearly on the issue, the inquiry ends and effect is given to Congressional intent).

[6] NCTA correctly asserts that "when Congress enacted must carry in the 1992 Cable Act, it provided elaborate justifications for doing so in the legislative history, including a lengthy defense of the constitutionality of the statute. Those must carry rules have also been the subject of extensive litigation in the courts as well as numerous Commission rulemakings." *Opposition*, at 2. However, NCTA fails to explain why Congress must jump through the same hoops a second time. As NCTA notes, mandatory must carry is a given; there is no need for additional Congressional findings on the issue of the need or justification for must carry merely because a few new primary broadcast stations
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The Commission, in its *April 4th Report and Order*, similarly recognized the Congressional intent as "intending to place Class A licensees on roughly even footing with full-service licensees . . ." *April 4th Report and Order*, ¶. 47. For this reason, the Commission decided to apply to Class A licensees "all Part 73 regulations except for those that cannot apply for technical or other reasons." *Id.* at ¶ 23. While the Commission may have believed that Class A stations should be excluded from the Table of Allotments for technical reasons, it surely did not intend by this action to preclude Class A stations from the same mandatory carriage rights that apply to all other Part 73 primary service stations. *April 4th Report and Order* at n. 61 ("Nothing in this *Report and Order* is intended to affect a Class A LPTV station's eligibility to qualify for mandatory carriage under 47 U.S.C. § 534").[7]

II. NEITHER THE 1992 CABLE ACT NOR THE 1999 SATELLITE ACT PRECLUDES CLASS A STATIONS FROM MANDATORY CABLE AND SATELLITE CARRIAGE

There is no language in either the 1992 Cable Act or the 1999 Satellite Act which precludes Class A stations from eligibility for mandatory cable and satellite carriage. The 1992 Cable Act does not exclude from the definition of "local commercial television station" all low power television stations. Rather, it excludes only those low power television stations, television translator stations, and passive repeaters that "operate pursuant to Part 74 . . . or any successor regulation thereto." 47 U.S.C. § 534(h)(1)(B)(i). While this provision prevents Part 74 stations from asserting mandatory

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[6](...continued)
are added to Part 73. NCTA's position would lead to the clearly incorrect result that a new 5 million watt TV station which is licensed after the passage of the 1992 Cable Act would not be entitled to assert mandatory must carry rights in the absence of explicit Congressional findings supporting the inclusion of the station into the pool of stations governed by Part 73.

[7] It is the passage of the CBPA, not Commission action, that puts Class A stations on equal footing with other Part 73 stations.

must carry, it does nothing to preclude a Part 73 station from asserting such rights, including those few Class A licenses.

Once a station is granted a Class A license, it is required by the CBPA to be in compliance with the Commission's operating rules for full power television stations regulated by Part 73. 47 U.S.C. § 336(f)(2)(A)(ii). For this reason, the Commission, in its *April 4th Report and Order*, placed the rules governing the new Class A service in Part 73. Class A stations operate under Part 73, not Part 74. As a result, Class A stations clearly are not low power television stations operating under Part 74,[8] and therefore Class A stations do not fall within the exclusion under the Cable Act.

Moreover, Class A stations cannot be excluded from the definition of "local commercial television stations" under the 1992 Cable Act on the ground that they operate under successor regulations to Part 74. NCTA fails to present any authority which suggests that the Commission's amendments to Part 73 governing Class A stations are deemed "successor" regulations to Part 74. Part 74 has neither been repealed nor supplanted and Part 74 continues in full force and effect.[9] The facts that the Part 74 regulations have not been deleted or superceded and that they continue to govern low power television stations negates the argument that the Part 74 rules have been "succeeded" by the new Part 73 Class A regulations. Even if the Class A Part 73 regulations were considered "successor" regulations to Part 74, statutory construction requires that the most recently

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[8] By contrast, Part 74 television stations that do not meet the requirements for Class A status are governed by Part 74 and, therefore, continue to be excluded from the definition of "local commercial television station" set forth in the 1992 Cable Act.

[9] *See e.g.*, *Paralyzed Veterans of America v. CAB*, 752 F.2d 694, 726 (D.C. Cir. 1985) ("14 C.F.R. § 15.5(c)(2) (1968)" replaced by "the successor regulation, 49 C.F.R. Part 21, Appendix c (a)(2)(1984)") (Bork, dissenting); *Winter v. Miller*, 676 F.2d 276,280 (7th Cir. 1982) ("42 C.F.R. § 248.3(c)(1)(ii)(B) (1974)" replaced by the "successor regulation 45 C.F.R. 248.3(c)(1)(ii)(B) (1972)").

enacted statute controls when determining Congressional intent.[10] The more recently enacted §336 provides that nothing shall interfere with the rights of a Class A station, except for those items which are listed in § 336 itself. Thus, whether or not the new Part 73 Class A regulations are deemed "successor" regulations is irrelevant because that "exception" is not contained in § 336, it is found in another portion of the Act which otherwise continues in full force and effect.

In addition, although NCTA claims that Class A stations cannot constitute full power television broadcast stations eligible for mandatory carriage under the 1992 Cable Act, there is no authority in support of this argument. Neither the Cable Act itself nor the regulations promulgated thereto expressly define the term "full power television broadcast station." It is reasonable to conclude, however, that full power television broadcast stations are those television broadcast stations operating under Part 73 as distinguished from low power television stations, translator stations and booster stations operating under the provisions of Part 74.[11] Since a Class A station has primary broadcaster status and must comply with the operating rules under Part 73, it is a full power television station operating under Part 73 rather than a low power television station operating under Part 74.

Similarly, Class A stations also are eligible for mandatory coverage by satellite carriers under the terms of the 1999 Satellite Act. Satellite carriers are required to carry, upon request, the signals of all television broadcast stations located within that local market. 47 U.S.C. § 338(a). Under the Satellite Act, a "television broadcast system" means an "over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of Part 73 of title 47, Code

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[10] *See e.g.*, *Chae Chan Ping v. U.S.*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Edye v. Robertson*, 112 U.S. 580, 599 (1884).

[11] The Commission defines a "low power television station" as "[a] station authorized under the provisions of this subpart [of Part 74] . . .." 47 C.F.R. § 74.701(f).

of Federal Regulations, except that such term does not include a low-power or translator television station." 47 U.S.C. § 325(b)(7). Thus, Class A stations are entitled to mandatory satellite carriage like any other Part 73 primary television broadcast station.[12]

CONCLUSION

Whether the Commission accomplishes the Congressional directive to afford all rights to Class A stations, except those rights explicitly denied in § 336, by amending the Table of Allotments, or by making an explanatory statement therein, or by addressing the must carry issue in some other manner, Class A stations are entitled to mandatory cable and satellite carriage rights by virtue of their status as "primary" service stations under the CBPA. For the reasons set forth herein and in PAI's *Petition for Reconsideration or Alternatively, for Clarification*, PAI respectfully requests that the Commission reconsider its decision not to include Class A stations in the Table of Allotments or otherwise clarify the applicability of mandatory must carry rights to Class A primary service broadcasters.

Respectfully submitted,
PAGING ASSOCIATES, INC.

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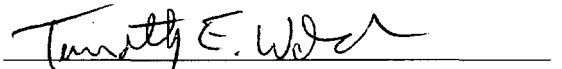

Timothy E. Welch
Its Attorney

[12] NCTA does not address the constitutional equal protection argument that it is unconstitutional to deny mandatory carriage rights to a class of Part 73 broadcasters while affording such rights to other Part 73 broadcasters.

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of July 2000 sent a copy of the forgoing REPLY OF PAGING ASSOCIATES, INC. TO THE NATIONAL CABLE TELEVISION ASSOCIATION'S OPPOSITION TO PETITION FOR RECONSIDERATION by First-Class United States mail, postage prepaid, to the following:

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