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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C. 20554

NOV 26 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.622(b),	)	MM Docket No. 00-180
Table of Allotments, Digital	)	RM-9956
Television Broadcast Stations	)	
(Fort Myers, Florida)	)	
	)	
TO: Chief, Video Services	)	
Division, Media Bureau	)	

DOCKET FILE

**EMERGENCY MOTION TO VACATE REPORT AND ORDER**

Caloosa Television Corporation, licensee of Class A Television Station WBSP-LP, Channel 9, Naples, Florida, hereby respectfully files this Emergency Motion to Vacate the "Report and Order" issued by the Chief, Video Services Division in the above-captioned matter, DA 02-3154, released November 20, 2002. The "Report and Order" makes a crucial factual error with respect to the status of WBSP-LP, and then goes on to deprive Caloosa of its rights pursuant to Section 316(a) of the Communications Act of 1934, 47 U.S.C. §316(a) and Section 1.87 of the Commission's Rules. As a result, Caloosa calls upon the Chief, Video Services Division, to vacate her November 20, 2002 "Report and Order" and return the above-entitled case to pending status. In support whereof, the following is shown:

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List ABOVE

**Grievous Factual Error**

1. The "Report and Order" contained the following footnote 2 which is grievously factually erroneous:

Caloosa is the licensee of **low power station** WBSP-LP, channel 9, Naples, Florida. It opposes the proposed channel substitution because, among other things, its LPTV station will be displaced. Although entitled "Reply Comments," Caloosa's comments are untimely and will be dismissed because they raise new matters that should have been filed during the initial comment period. See Section 1.415(c) of the Commission's Rules. **In any event, WBSP-LP is not a Class A-eligible facility and is therefore not entitled to protection against FMBC's proposal.** See Establishment of a Class A Service, 15 FCC Rcd 6355, 6370-71 (2000), clarified on recon., FCC 01-123, ¶ 8-9 (released April 13, 2001).

[emphasis supplied]

2. Contrary to the foregoing, WBSP-LP is a **licensed Class A Television Station**. By letter of the Chief, Video Services Division, dated August 11, 2000, the Commission found that **"the public interest would be served by declaring Caloosa Television Corporation eligible to file an application for Class A status (FCC Form 302-CA) for station WBSP-LP . . ."** [emphasis supplied]. A copy of this letter is attached hereto as Exhibit A. Caloosa did file such an FCC Form 302-CA application for WBSP-LP, File No. BLTVA-20010712AIK, and it was granted on August 10, 2001. A copy of this license as downloaded from the Commission's CDBS database on the FCC website is attached hereto as Exhibit B.

3. As this factual error totally undermines both the rationale and the result in the "Report and Order", Caloosa

now calls upon the Chief of the Video Services Division to do the right thing and to immediately vacate the "Report and Order" and return MM Docket No. 00-180 to pending status.

**Violation of Section 316(a) Rights**

3. Fort Myers Broadcasting Company (FMBC) proposes to operate a digital television station on Channel 9 to serve Fort Myers, Florida and vicinity, which would be known as WINK-DT. Fort Myers is approximately 31 miles north of Naples. Obviously, any operation of WINK-DT on Channel 9 would cause destructive interference to the operations of Class A station WBSP-LP.

4. As a licensed Class A television station on Channel 9, Section 73.6010(a) (2) of the FCC's Rules clearly provides that WBSP-LP is entitled to "be protected from interference within the following predicted signal contours:  
\* \* \* 68 dBu for stations on Channels 7 through 13". See also **Establishment of a Class A Television Service**, 15 FCC Rcd 6355 (2000). There is no doubt that WINK-DT will cause destructive interference to WBSP-LP within WBSP-LP's 68 dBu contour

5. Section 316(a) (1) of the Communications Act of 1934, as amended, 47 U.S.C. §316(a)(1), states as follows:

(a)(1) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

Section 1.87(a) of the Commission's Rules, promulgated pursuant to Section 316 of the Communications Act, states as follows:

(a) Whenever it appears that a station license or construction permit should be modified, the Commission shall notify the licensee or permittee in writing of the proposed action and reasons therefor, and afford the licensee or permittee at least thirty days to protest such proposed order of modification, except that, where safety of life or property is involved, the Commission may by order provide a shorter period of time.

6. It is well settled at the FCC that Section 316 rights are abridged when there would occur (1) a permanent loss of radio service (2) which is directly caused by another licensed broadcast facility. ***Pike-Mo Broadcasting Co.***, 2 FCC 2d 207, 208-09 (1965). Were WINK-DT to commence operations on Channel 9 at Fort Myers, there would be a permanent loss of service by WBSP-LP on Channel 9 at Naples.

7. The result in the "Report and Order" is that the Chief of the Video Services Division has revoked WBSP-LP's

Class A license, without any notice to Caloosa and without Caloosa having the right to be heard. In view of the August 11, 2000 letter appended as Exhibit A, not only does this violate all norms of administrative due process and fairness, but it constitutes a textbook case of arbitrary, capricious and irrational decision making. At the very least, because WBSP-LP is a Class A television station with Section 316 rights, the FCC had an obligation to allow Caloosa to "show cause" why Section 73.622 of the Rules not be amended to allot digital Channel 9 at Fort Myers.

***Modification of EM and TV Licenses Pursuant to Section 316 of the Communications Act***, 2 FCC Rcd 3327 (1987). WBSP-LP's Section 316 rights should have been observed, just as they would have been in FM or analog TV proceedings; see e.g. ***EM Table of Allotments, Park City, Montana et al***, 17 FCC Rcd 7234 (2002); ***Television Table of Allotments, Lima, Ohio et al***, 2 FCC Rcd 6233 (1987); ***Television Table of Allotments, Wilmington, North Carolina et al***, 5 FCC Rcd 4004 (1990). However, the Video Services Division assiduously failed to observe Caloosa's Section 316 and Section 1.87 rights.

8. By not considering Caloosa's "Reply Comment", the appearance is that the Video Services Division intentionally "steamrollered" Caloosa's Section 316 rights in favor of the forces of digital television, by not allowing Caloosa to be

heard in this docket. Our hope is that this was not the case, and that the factual error described above was the cause of the Video Service Division depriving Caloosa of its statutory and administrative rights to due process.

**Conclusion**

**WHEREFORE,** Caloosa Television Corporation urges that this "Emergency Motion to Vacate Report and Order" **BE GRANTED,** and that MM Docket No. 00-180 **BE RETURNED TO PENDING STATUS.**

Respectfully submitted,

**CALOOSA TELEVISION CORPORATION**

By 

Dennis J. Kelly  
Its Attorney

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November 26. 2002

# **EXHIBIT A**



Federal Communications Commission  
Washington, D.C. 20554

AUG 11 2000

Mr. George E. DeVault, Jr.  
Caloosa Television Corporation  
P.O. Box WKPT  
Kingsport, Tennessee 37662

AUG 16 2000

Dear Licensee:

**This** is in reference **to** the statement of eligibility for Class A low power television station (LPTV) status which was filed on behalf of station WBSP-LP, (Fac. ID 64580), Naples, Florida.

As you are aware, the Community Broadcasters Protection Act **of** 1999 (CBPA) provides that a low power television station licensee may convert the secondary status of its station to the new Class A status, provided it can satisfy certain statutorily-established criteria. **To** become eligible for a Class A certificate of eligibility, the licensee's station must, during the 90-day period ending November 28, 1999, have: (1) broadcast a minimum of 18 hours per day; (2) broadcast an average of at least three **hours** per week of programming produced within the market **area** served by the station or by a group of commonly-controlled low power television stations; and (3) been **in** compliance with the Commission's regulations applicable to the low power television service. The legislation also provided that licensees intending to seek Class A designation file a certification of eligibility with the Commission no later than January 28, 2000. In the event that a low power television station licensee is not able to **satisfy** fully the programming and operational standards, the Commission is nevertheless empowered by the CBPA to certify such licensee's eligibility if the Commission determines that the public interest, convenience and necessity would **be** served thereby.

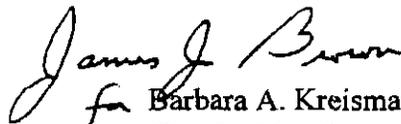
While the CBPA affords the Commission discretion not to strictly apply the programming and operational standards, the Commission has determined in the Class A television service rulemaking proceeding in MM Docket No. 00-10 that it would allow deviation "only where such deviations are insignificant" or where "there are compelling circumstances, and that in light of those compelling circumstances, equity mandates such a deviation." See Report and Order, 15 FCC Rcd 6355,6369 (2000). "Examples **of** such compelling circumstances," stated the Commission, "include a natural disaster or interference conflict which forced the station off the air during **the** 90 day period prior to enactment of the CBPA." Id.

Mr. George E. DeVault, Jr.

2

While you acknowledge that the station did not meet the programming standards during the 90-day period ending November 28<sup>th</sup>, you explain that the station was off the air during the 90-day period due to equipment failure. You **also** state that, prior to discontinuing broadcast operations, the station had been simulcasting the programming of commonly-owned, same market station WEVU-LP, which station has been declared eligible for Class A status. Based upon the representations set forth in your statement of eligibility, we find that the public interest would be served by declaring Caloosa Television Corporation eligible to file an application for Class A status (**FCC**Form 302-CA) for station WBSP-LP in accordance with the procedures set forth in the Commission's Report and Order in MM Docket No. 00-10.

Sincerely,



for **Barbara A. Kreisman**  
Chief, Video Services Division  
**Mass** Media Bureau

# **EXHIBIT B**



United States of America  
**FEDERAL COMMUNICATIONS COMMISSIONS**  
**CLASS A TELEVISION**  
**BROADCAST STATION LICENSE**

Authorizing Official:

Official Mailing Address:

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CALOOSA TELEVISION CORPORATION  
P.O. BOX WKPT  
KINGSPORT TN 37662

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Hossein Hashemzadeh  
Associate Chief  
Video Division  
Media Bureau

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Facility Id: 64580

Grant Date: August 10, 2001

This license expires 3:00 a.m.  
local time, February 01, 2005.

Call Sign:WBSP-LP

License File Number:BLTVA-20010712AIK

This permit affords CA status to.: BPTVL-20000918ADV

Subject to the provisions of the Communications Act of 1934, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this license, the licensee is hereby authorized to use and operate the radio transmitting apparatus herein described.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained *so* far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve the public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by Section 606 of the Communications Act of 1934.

Callsign: WBSP-LP

License No.: BLTVA-20010712AIK

Name of Licensee: CALOOSA TELEVISION CORPORATION

Station Location: FL-NAPLES

Frequency (MHz): 186 - 192

Offset: ZERO

Channel: 9

Hours of Operation: Unlimited

Transmitter: Type Accepted. See Sections 74.750 of the Commission's Rules

Antenna type: (directional or non-directional): Directional

Description: SCA HDCA-10

Major lobe directions            215            305  
(degrees true):

Antenna Coordinates: North Latitude:    26 deg 25 min 22 sec

    West Longitude:    81 deg 37 min 49 sec

Maximum effective radiated power (Visual):            0.573 kW

Height of radiation center above ground:                116 Meters

Height of radiation center above mean sea level: 123.6 Meters

Antenna structure registration number: 1027588

Overall height of antenna structure above ground (including obstruction lighting if any) see the registration for this antenna structure.

Special operating conditions or restrictions:

- 1 This Authorization reflects the licensee/permittee's certification that the class A television stations will not cause interference to the reception of existing full-service stations on either NTSC or DTV channels, any DTV facilities resulting from maximization applications filed by May 1, 2000, and existing LPTV, television translator and class A television stations.

\*\*\*            END OF AUTHORIZATION            \*\*\*

**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing "Emergency Motion to Vacate Report and Order" were served by first-class United States mail, postage prepaid, on this 26<sup>th</sup> day of November, 2002 upon the following:

Barbara A. Kreisman, Esquire (by hand)  
Chief, Video Services Division  
Office of Broadcast License Policy  
Media Bureau  
445 - 12<sup>th</sup> Street, SW, Room 2-A666  
Washington, DC 20554

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Counsel for Cox Broadcasting, Inc.

  
Dennis J. Kelly