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

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	)	

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**PETITION FOR RECONSIDERATION**

Caloosa Television Corporation, licensee of Class A Television Station WBSP-LP<sup>1</sup>, Channel 9, Naples, Florida (Caloosa), and pursuant to Section 1.429(b) of the Commission's Rules, hereby respectfully submits its Petition for Reconsideration respecting the "Report and Order" in the above-entitled matter issued by the Chief, Video Services Division, DA 02-3154, released November 20, 2002. Upon the grant by the Commission on August 11, 2001 of Caloosa's Class A license for WBSP-LP, the Commission was obliged by Section 316(a) of the Communications Act of 1934, as amended, and companion Section 1.87 of the Commission's Rules, to give Caloosa notice that WBSP-LP's Class A television license would be modified (if not destroyed) by the allocation of digital channel 9 at nearby Fort Myers, Florida, and to afford Caloosa the opportunity to be heard

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on the matter. The Commission failed to do so. Therefore, the "Report and Order" must be vacated or reversed at the earliest possible time. Furthermore, Caloosa's December 11, 2000 "Reply Comments" in this case should have been considered, because they actually were responsive to matters raised in the initial comment period (as opposed to raising "new" matters").

1. Because Caloosa's Class A license was granted after the expiration of the comment periods in the above-entitled matter, the "reconsideration" period subsequent to the "Report and Order" is the first time that Caloosa could bring its Class A licensing to the attention of the *Commission* as a matter of right<sup>2</sup>.

2. 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). As pointed out in the Comments of Post-

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<sup>1</sup>The call letters will be changed to WBSP-CA, effective December 26, 2002 (Callsign Request #28230).

<sup>2</sup>As soon after the issuance of the "Report and Order" as was practicable, Caloosa filed an "Emergency Motion to Vacate Report and Order" with the Commission (on November 26, 2002) and served that on all parties to this proceeding. The contents of that pleading are incorporated herein by reference.

Newsweek Stations-Florida, Inc. on November 22, 2000  
(Statement of engineering consultant William R. Meintel at  
3)

In addition, it is noted that this proposal would also have a significant impact on LPTV station WBSP-LP Channel 9 Naples, FL. WBSP-LP is only 66.7 km from the WINK-DT proposal and would therefore be forced to find an alternative channel if it wishes to continue to operate.

Thus, there is no doubt that WINK-DT will cause destructive interference to WBSP-LP within WBSP-LP's 68 dBu contour. Indeed, were WINK-DT to commence operations on Channel 9 at Fort Myers, there would be a permanent loss of Class A service by WBSP-LP on Channel 9 at Naples due to destructive interference.

3. 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.

4. 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). Indeed, the appellate cases in the area are consistent in holding that a license is modified for purposes of Section 316 when an unconditional right conferred by the license is substantially affected. In **FCC v. National Broadcasting Co. (KOA)**, 319 U.S. 239 (1943), the Supreme Court held that a broadcaster's license to broadcast on a given frequency is "modified" if the FCC grants a license to another broadcaster on that frequency; see also **Western Broadcasting Co. v. FCC**, 674 F.2d 44 (D. C. Cir. 1982). In another Section 316 case, the D. C. Circuit held that a full-time broadcaster's license, which includes the right to presunrise broadcasting, is modified by a grant of pre-

sunrise authority to a daytime broadcaster within interference range. *WBEN, Inc. v. FCC*, 790 F.2d 743 (D. C. Cir. 1961).

5. Therefore, Caloosa had and continues to have Section 316 rights, and the Commission is obligated to respect those rights. The "Report and Order" must necessarily be vacated, and Caloosa be given a "Further Notice" and the right to be heard, as is usual and customary in FM and analog television allocation cases.

6. Furthermore, pursuant to the November 29, 1999 Public Law 106-113, the "Community Broadcasters Protection Act" the Commission has the following statutory obligations imposed by 47 U.S.C. §336(f)(1)(D), the so-called "safety net" provisions for Class A television stations:

**(D)Resolution of technical problems**

The Commission shall act to preserve the service areas of low-power television licensees pending the final resolution of a class A application. If, after granting certification of eligibility for a class A license, technical problems arise requiring an engineering solution to a full-power station's allotted parameters or channel assignment in the digital television Table of Allotments, the Commission shall make such modifications as necessary--

**(i)** to ensure replication of the full-power digital television applicant's service area, as provided for in sections 73.622 and 73.623 of the Commission's regulations (47 CFR 73.622, 73.623);  
**and**

**(ii)** to permit maximization of a full-power digital television applicant's service area consistent with such sections 73.622 and 73.623,

if such applicant has filed an application for maximization or a notice of its intent to seek such maximization by December 31, 1999, and filed a bona fide application for maximization by May 1, 2000. Any such applicant shall comply with all applicable Commission rules regarding the construction of digital television facilities.

7. In the instant case, there are no real "technical problems" preventing WINK-DT from going on the air on digital channel 53. Channel 9 is merely a matter of preference for the owners of WINK-DT. Furthermore, WINK-DT would be able to operate on digital channel 53 until the end of the "digital transition" period, when, it intends to move its digital operations onto WINK-TV's present analog channel 11. Therefore, when faced with the choice of honoring WINK-DT's preference and thus eliminating Class A service or preserving Class A service, the Commission has a statutory obligation to preserve the service area of Class A station WBSP-LP, the desires of Fort Myers Broadcasting Company notwithstanding.

**Conclusion**

**WHEREFORE,** Caloosa Television Corporation urges that this "Petition for Reconsideration" **BE GRANTED,** and that, alternatively, the petition of Fort Myers Broadcasting Company to allocate digital channel 9 to Fort Myers, Florida (in lieu of digital channel 53) **BE DENIED,** or that the

"Report and Order" in MM Docket No. 00-180 **BE VACATED** and  
that the proceeding **BE RETURNED TO PENDING STATUS.**

Respectfully submitted,

**CALOOSA TELEVISION CORPORATION**

By   
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December 20, 2002

**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing "Petition for Reconsideration" was served by first-class United States mail, postage prepaid, on this 20<sup>th</sup> day of December, 2002 upon each of the following:

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