

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of )  
 )  
Amendment of Section 73.606(b) and )  
Section 73.622(b) )  
(Campbellsville and Bardstown, Kentucky) )

MM Docket No. 01-148  
RM-10141

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Federal Communications Commission  
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OPPOSITION TO APPLICATION FOR REVIEW

Independence Television Company ("Independence"), licensee of Television Stations WDRB(TV), Louisville, Kentucky, and WFTE(TV), Salem, Indiana, by its attorneys and pursuant to 47 C.F.R. § 1.115, hereby opposes the Application for Review filed by Louisville Communications, LLC ("Petitioner").<sup>1</sup> The Application for Review challenges the Video Division's Report and Order (the "Order") denying the Petition for Rule Making filed by Petitioner to change the community of license for WBKI-TV (the "Station" or "WBKI-TV") from Campbellsville, Kentucky, to Bardstown, Kentucky (the "Petition").<sup>2</sup> The Application for Review argues that the Commission should permit WBKI-TV to abandon Campbellsville because the community is already served by a Class A low power television station, W04BP, Campbellsville, Kentucky. As Independence demonstrated and as the Video Division properly found, the Class A station cannot be considered a local service for allotment purposes, and, as such, removal of the sole local transmission service from Campbellsville contravenes long-standing Congressional and Commission policies. Petitioner sets forth no reason for any departure from the well-established law cited by the Video Division and, thus, its Application for Review should be denied.

<sup>1</sup> This Opposition is timely filed within 15 days of the submission of the Application for Review. See 47 C.F.R. § 1.115.

<sup>2</sup> *Campbellsville and Bardstown, Kentucky*, Report and Order, DA 04-88 (rel. July 9, 2004).

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## Background

The City of Campbellsville is located in the heart of central Kentucky and is home to approximately 10,500 residents, and by any measure, qualifies as a community for allotment purposes. To ensure that the needs and interests of the residents of the City and surrounding areas are well-served, the Commission allocated analog Channel 34 and digital Channel 19 television service to Campbellsville. WBKI-TV is licensed as Campbellsville's sole local television service.

As Independence has demonstrated previously, Petitioner's attempt to abandon Campbellsville violates Congress' and the Commission's fundamental policies to ensure that television licensees serve their local communities and that television licenses are allocated equitably. Specifically, Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."<sup>3</sup> The Commission consistently has interpreted this provision to require the allocation of television stations to local areas rather than to regional or nationwide areas.<sup>4</sup> By ensuring a localized rather than regionalized or national broadcast service, the Commission has afforded consumers the ability to receive programming directed toward individual local needs and interests.

Congress' and the Commission's emphasis on service to local communities was specifically addressed in the Commission's allocation proceeding regarding changes to broadcast stations' communities of license. While mindful of the importance of local broadcast service, the Commission in 1989 concluded that it could relax its allocation rules to permit a licensee to modify its station's authorization to specify a new community of license without being subject to competing expressions of

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<sup>3</sup> 47 U.S.C. § 307(b).

<sup>4</sup> *See, e.g., Report and Statement of Policy re: Commission en banc Programming Inquiry*, 44 FCC 2303, 2316 (1960) (stating the Communications Act requires "the diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service.").

interest.<sup>5</sup> In doing so, the Commission nevertheless made clear that it “will not allow any broadcaster to take advantage of this new procedure if the effect would be to deprive a community of an existing service representing its only local transmission service.”<sup>6</sup> On reconsideration, the Commission explained that its prohibition on the removal of a community’s sole local broadcast service furthers the statutory mandate of Section 307(b) of the Communications Act because such removal “could result in diminishment rather than enhancement of local service.”<sup>7</sup>

Accordingly, the Commission concluded that only in “rare circumstances” would it waive its prohibition against removal of sole local service.<sup>8</sup> Indeed, the Commission has found “rare circumstances” sufficient to justify a waiver in only the most exceptional of cases.<sup>9</sup> As Independence previously demonstrated and as the Video Division agreed, no such exceptional circumstances exist here.<sup>10</sup>

Quite aware of the decades old Congressional and Commission policies preventing it from removing the Station from Campbellsville, Petitioner, in the Application for Review, does not plead with specificity any compelling public interest benefits that would result from a waiver of the Commission’s well-established policy in this case. Instead, Petitioner argues for the same “novel” waiver the Video Division previously and properly rejected – namely, that a Class A low power station should be deemed comparable to a full-power station for purposes of the Commission’s allocation

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<sup>5</sup> *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989) (“*Community of License R&O*”), recon. granted in part, 5 FCC Rcd 7094 (1990) (“*Community of License MO&O*”); see also 47 C.F.R. § 1.420(i).

<sup>6</sup> *Community of License R&O* at ¶ 28.

<sup>7</sup> *Community of License MO&O* at ¶ 16.

<sup>8</sup> *Id.* at ¶ 17.

<sup>9</sup> See *Ardmore, Oklahoma and Sherman, Texas*, 7 FCC Rcd 4846 (1992) (finding, among other things, that spacing constraints precluded the licensee from relocating the transmitter site in such a way that would deprive the licensed community of a city grade signal from the station); *Los Angeles and Norwalk, California*, 6 FCC Rcd 5317 (1991) (change involved a licensed community previously deemed by the Commission to be legally indistinguishable from the proposed community).

<sup>10</sup> See Order at ¶ 8; Independence Comments at pp. 6-7.

priorities and policies. Low power television stations, even those with Class A status, cannot serve as substitutes for full-power television stations. Nor do the facts in this case justify a waiver of the Section 307(b) policies at issue. As such, Petitioner has not even come close to satisfying the high burden for waiver of the Congressional and Commission policies mandating the fair, equitable, and efficient allocation of television licenses.

**I. Petitioner has Provided No Basis to Treat Low Power Class A Stations as Full-Power Television Stations for Allotment Purposes.**

As Petitioner itself previously has conceded, Section 307(b) charges the Commission with ensuring a “fair, efficient, and equitable distribution” of television licenses.<sup>11</sup> “The Commission fulfills the 307(b) obligation by making available for licensing only a frequency that has been assigned to a specific community in the Table of Allotments through a rulemaking proceeding. A system of priorities guides the Commission’s 307(b) determinations, setting preferences for applicants proposing to establish a station in a nonserved or underserved community.”<sup>12</sup>

In contrast, neither Class A stations nor non-Class A low power television stations are subject to the TV Table of Allotments, because such stations “are not required to meet basic full-service station requirements, i.e. provide responsive programming or maintain a presence in the community, cover the community with an adequate strength signal, etc. Although LPTV and translator stations are licensed to specific communities, the Commission has concluded that Section 307(b) issues are not relevant in the context of these secondary services.”<sup>13</sup>

Consequently, elevating the status of Class A and non-Class A LPTV stations as requested by Petitioner would betray the Commission’s prior determinations that such stations are not functionally or

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<sup>11</sup> See Petition at ¶ 2; Petitioner Comments at ¶ 13.

<sup>12</sup> *Implementation of Section 309(j) of the Communications Act*, 13 FCC Rcd 15920, ¶ 115 (1998) (subsequent history and internal citations omitted).

<sup>13</sup> *Id.* at n. 109, citing, *Low Power Television and Television Translator Service*, 2 FCC Rcd 1278, ¶ 24 (1987). See *Establishment of a Class A Television Service*, 15 FCC Rcd 6355, ¶¶ 2, 27 (2000), *on recon.*, 23 C.R. 893 (2001) (“*Class A MO&O*”).

legally equivalent to full-power stations for allotment purposes.<sup>14</sup> Such a move also would undercut the entire allotment system because it would enable a full-power television station (or FM station) to abandon a rural or mid-size community whenever the Commission authorized an LPTV station (or LPFM station) in its community. Because there are more than 950 LPTV stations eligible for Class A status,<sup>15</sup> and approximately 2,000 licensed and operational LPTV stations,<sup>16</sup> Petitioner's proposed reinterpretation of the Commission's Section 307(b) priorities likely would facilitate the widespread migration of full service television stations from rural to urban communities in clear violation of Section 307(b). This would open the floodgates to hundreds of similar "move-ins" from rural communities throughout the country, thereby effectively razing the Commission's statutory mandate.<sup>17</sup> Such a result would turn the Commission's "rare circumstances" standard on its head.

Moreover, as a practical matter, Class A television service is no substitute for full-power television service. As the Video Division properly noted, "Class A Television Stations are not given full protection by all other stations; they are limited to very low power; finally, they have different main studio requirements from full power stations."<sup>18</sup> Indeed, these stations operate at drastically reduced power levels and serve a much smaller geographic region than full-power television stations.<sup>19</sup> Consequently, even a licensed Class A eligible LPTV station cannot hope to replicate the type, extent,

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<sup>14</sup> See *PZ Entertainment Partnership, L.P.*, 7 FCC Rcd 2696, ¶ 4 (1992) (affirming denial of applications based on Commission "concern that a secondary source like an on-channel booster be allowed to demonstrate compliance with the Commission rules and policies implementing Section 307(b).").

<sup>15</sup> *Certificates of Eligibility for Class A Television Status*, DA 00-1224 (rel. June 2, 2000).

<sup>16</sup> Federal Communications Commission Fact Sheet, Low Power Television (LPTV), November 2001, at <http://www.fcc.gov/mb/video/files/LPTVFactSheet.html> (visited on Aug. 29, 2004).

<sup>17</sup> *Community of License MO&O* at ¶ 11 ("[W]e believe it is axiomatic that our allotment priorities and policies are and should be applied consistent with and in furtherance of the goals of Section 307(b) of the Act").

<sup>18</sup> Order at ¶ 7.

<sup>19</sup> *Class A MO&O* at ¶ 2. For example, while full-service UHF television stations can operate with up to 5,000 kilowatts of effective radiated power, Class A stations are limited to operations of just 150 kilowatts. See 47 C.F.R. §§ 73.614, 73.6007, 74.735.

or manner of service provided by full-power television stations. In addition, even with Class A status, LPTV stations generally lack mandatory cable carriage rights.<sup>20</sup>

Neither law nor policy nor fact justify Petitioner's proposed reinterpretation of Section 307(b) and the Commission's implementing rules, policies, and decisions. Quite simply, the existence of a Class A or non-Class A low power television station cannot duplicate the service provided by a full-power television station and therefore cannot serve as an "existing service" for allotment purposes. The Commission accordingly should decline Petitioner's invitation to dispense with the "rare circumstances" waiver standard. Independence submits that Section 307(b) and common sense dictate this result.

**II. Any Such Unprecedented Waiver Based on Class A Status Should Not Be Applied in this Case.**

If the Commission accepts Petitioner's invitation to even consider Class A and non-Class A low power television stations as equivalent to full-power stations for allotment purposes, the Commission should not apply the new principle here. W04BP provides just a fraction of the service that is required to be provided to Campbellsville by WBKI-TV. Indeed, it is highly unlikely that Campbellsville residents could even receive consistently a high-quality off-air signal from W04BP.

As noted above, the Commission restricts low power television stations to significantly lower power levels than those available to full-power television stations. In particular, VHF LPTV stations may be authorized with an effective radiated power of up to 3 kilowatts. In contrast, W04BP is licensed with just 0.07 kilowatts. This represents just 2.3 percent of the maximum power level for VHF LPTV stations, and a mere 0.07 percent of the maximum power level for VHF full-power stations.

In its Application for Review, Petitioner claims that despite W04BP's low power, W04BP may be treated as a "primary service" for allotment purposes because W04BP provides the "requisite" coverage of Campbellsville; W04BP currently serves virtually all of Campbellsville "as a practical

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<sup>20</sup> *Class A MO&O* at ¶¶ 39-42.

matter” and W04BP is carried on the Campbellsville cable system.<sup>21</sup> Petitioner further notes that the “loss of video reception is not at issue in this case” because WBKI-TV’s facilities would not be relocated and thus “the power at which W04BP operates is immaterial.”<sup>22</sup>

To the contrary, W04BP’s minimal power level is quite “material” in this case. The negligible power level authorized to W04BP prevents this LPTV station from obtaining even the 15 to 20 mile signal reach typical of other LPTV stations.<sup>23</sup> The exceedingly small service area may be sufficient for W04BP to serve the Campbellsville University community. Because Campbellsville University is the licensee of W04BP, however, the LPTV station does not appear to be operated by or for the residents of Campbellsville or any surrounding areas. Moreover, although W04BP may be carried on a single cable system, it is not carried, and in fact has no right to be carried, on the large cable systems and PBS systems that retransmit the local full-power television stations’ signals to roughly 500,000 households in the Louisville DMA.<sup>24</sup>

Petitioner’s claims notwithstanding, W04BP has not served and cannot serve as a local outlet for Campbellsville in the same manner as a local television station. As detailed in Independence’s Comments, W04BP has neither served Campbellsville nor been viewed locally as a “voice” for Campbellsville.<sup>25</sup> Significantly, there are no entries for or references to W04BP on the community

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<sup>21</sup> Application for Review at p. 5.

<sup>22</sup> *Id.*

<sup>23</sup> Acknowledging W04BP’s current minimal power level, Petitioner points out that *in the event that* W04BP were displaced by DTV operations, the station *could* move its operation to Channel 25 with an increased effective radiated power of 5 kilowatts from its currently licensed site, and operation by W04BP on Channel 25 “would not be subject to” displacement by any other station. Application for Review at p. 5 (*emphases added*). Petitioner’s speculation about future events is simply irrelevant to whether W04BP’s current facilities are sufficiently equivalent to a full-power station for allotment purposes.

<sup>24</sup> Petitioner asserts that if WBKI-TV were permitted to change its community of license, W04BP would become a “qualified low power station” entitled to carriage. Application for Review at pp. 3-4. Petitioner’s assertion provides no basis for finding that W04BP may serve as a substitute for over-the-air full-power broadcast service.

<sup>25</sup> Independence Comments at pp. 10-11.

Internet website “campbellsville.com” – not even on the page listing local news and media.<sup>26</sup> The fact that the local website does not consider the LPTV station to be a local media fatally undercuts Petitioner’s arguments to the contrary. In addition, W04BP broadcasts a signal that is hundreds of times less powerful than that of a full-power television station. As such, W04BP’s meager facilities and extremely limited role in the Campbellsville community ensure that W04BP will never offer a local service commensurate with what a full-power television station could provide.

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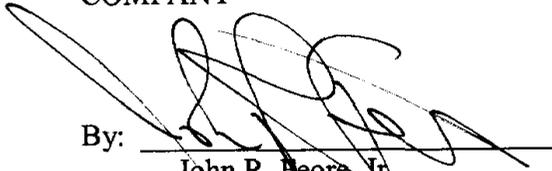
<sup>26</sup> See Internet website of Campbellsville.com, <http://www.campbellsville.com/>

## CONCLUSION

The City of Campbellsville deserves a full-power television station that is responsive to its needs and interests as required by Section 307(b) of the Communications Act, and there is no reason why Campbellsville should now lose its only full-power television station. Petitioner has not demonstrated any error in the Video Division's Order and has not shown any reason for the Commission to change its long-standing Section 307(b) policy. Finally, as a practical matter, low power television stations, especially Campbellsville University's W04BP, are ill-equipped to fill the void created by the loss of a full-service television station, such as WBKI-TV. For these reasons, Independence respectfully requests that the Commission deny the Application for Review.

Respectfully submitted,

INDEPENDENCE TELEVISION  
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September 2, 2004

**CERTIFICATE OF SERVICE**

I, Ruby Brown of Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 2nd day of September 2004, I caused a copy of the foregoing "Opposition to Application for Review" to be served on the following:

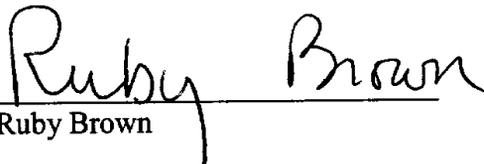
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