

3. The Commission's statutory authority to authorize additional Class A stations is explicit. Section 336(f)(2)(B) of the Communications Act allows the Commission to treat any LPTV station as qualifying for the purpose of a Class A upgrade if it determines "that the public interest, convenience, and necessity would be served...or for other reasons determined by the Commission." In other words, the Commission has more than adequate statutory authority; and its discretion is even broader than the general statutory public interest, convenience, and necessity standard,³ as the Commission may authorize additional Class A stations for other reasons it may determine. If the Commission perceives that there is an inadequate amount of local programming on television stations generally, what better way is there to increase that programming than by admitting additional stations into a class that is statutorily required to broadcast local programming?

4. CBA suggests that the standards to be applied should be the same ones specified for the original window for Class A eligibility established by the statute for the initial qualification period in 1999.⁴ Stations should be required to demonstrate their eligibility by actually broadcasting an average of at least three hours a week of local programming. The Commission should give advance notice of the 90-day time period during which performance will be assessed. Stations that qualify during that period could then be given a 30- or 60-day window to certify their qualifications and submit Class A upgrade applications.

³ See 47 USC §303.

⁴ 47 USC §336(f)(2)(A)(i)(I).

5. The upgrade opportunity should not be a one-time event, however, because localism is a continuing public interest value, and new stations and new entrepreneurs who buy existing LPTV stations should not be shut out of the opportunity to serve and to be rewarded for service to the public. However, the entry barrier could be a little higher after an initial opportunity, such as having to demonstrate the requisite amount of local programming for two consecutive 90-day periods. After allowing six months to process applications in the first window, the Commission should re-open the Class A filing opportunity and leave it open permanently for those who qualify.⁵

6. As much as CBA supports localism, it is concerned about other proposals in the NPRM, which are unnecessarily broad in scope and would be so financially burdensome that they would likely be counterproductive if forced upon Class A stations, especially those stations that must rely solely on over-the-air distribution to reach viewers. CBA does not believe that the NPRM indicates an intent by the Commission to apply all of these proposals to Class A stations;⁶ but to the extent that Class A stations are included, it is very important to remember that Class A stations are for the most part owned by small

⁵ Any concerns about impact on the full power television digital transition should disappear after the conclusion of the transition process for those stations on February 17, 2009. Even after that date, §336(f)(7)(A)(ii)(I) of the Communications Act ensures that full power digital stations need not accept interference from Class A stations within the protected service area of the full power station.

⁶ While 47 USC §336(f)(A)(i) subjects Class A stations to the same license terms and renewal standards as full-power television stations, the Commission has always recognized that some full-power rules are simply not appropriate when applied to Class A stations; *see, e.g.*, 47 CFR §73.1125(c), which specifies a main studio rule exclusively for Class A stations, and 47 CFR §73.6026, which applies only the appropriate parts of the Part 73 regulations to Class A stations.

businesses, with very limited access to capital and other resources. Access to resources is so difficult not only because of lesser geographic signal coverage but largely because only a small number of Class A stations enjoy mandatory access to the multichannel video program distribution (“MVPD”) systems that exercise gateway control over to television receivers in over 87% of the nation’s homes.⁷ To survive, Class A stations must be highly efficient and innovative, taking advantage of modern technology whenever possible to control costs.

7. Were Class A stations required to establish community advisory boards, maintain a physical presence at their studios during all hours of operation, and file quarterly performance reports, significant resources would have to be diverted from the main public interest goal of producing and broadcasting local programming. These and the other proposed chores are designed to encourage local programming and documentation thereof; but a very small business like a Class A station, which will usually have a staff of fewer than 10 persons, and often fewer than even five, will be very hard-pressed, and often unable, to do it all. Something will have to give, and many Class A stations may fall by the wayside and have to revert to LPTV status. The Commission must not let the tail wag the dog by establishing requirements that are intended to produce an end result that already

⁷ As fewer and fewer Americans rely on over-the-air broadcast reception to access news, information and entertainment, viability is becoming more and more difficult for stations that do not have MVPD access.

exists for Class A stations but then in practice make achievement of the ultimate goal more difficult.⁸

8. There are more direct, efficient, and effective ways to solve the problems that seem to have led to the Commission's studio location and "physical presence" proposals. The problem of facilitating contact with a station in the event of an emergency can be solved by requiring stations to maintain a local telephone number that rings to a cellphone or pages someone 24 hours a day who can respond promptly to the need for emergency access to the airwaves.⁹ The issue of ensuring a line of communication between a station and the community is already resolved for Class A stations because of their existing local programming requirement.

⁸ There are other problems with advisory boards in today's era of specialized program formats, which are especially prevalent in the Class A industry. For example, may a Spanish language station limit membership on its advisory board to Spanish speakers, and may an English language station exclude Spanish speakers? May a religious station confine membership to those who share the licensee's beliefs, as is permitted for employees under the FCC's equal employment opportunity rules (*see* 47 CFR §73.2080(a): "Religious radio broadcasters may establish religious belief or affiliation as a job qualification for all station employees.")?

⁹ Having someone with adequate knowledge and expertise paged would be far more effective than requiring a physical presence at the studio, because stations would end up hiring minimum wage non-expert employees to sit and do nothing during hours they were not needed for station operations. Modern technology allows people to examine transmitter operating parameters and even manipulate equipment that controls which program is broadcast from remote locations. This technology is highly efficient. It makes no sense for the Commission to turn back the clock by ignoring the flexibility that technology offers. Under the Commission's rationale, telecommuting by its own employees should be discouraged, because on days those employees telecommute, members of the public cannot reach them by telephone except by leaving a message and waiting for a callback.

9. The proposal to require each station to maintain a main studio within its community of license would fall especially hard on Class A operators. Because of the limited signal coverage of Class A stations, many operators hold licenses for multiple stations with different communities of license, which as a group cover more of a Designated Marketing Area than only one station could cover.¹⁰ Section 73.1125(c) of the Rules allows these stations to share a main studio if their Grade B contours overlap. Separate main studios would impose a serious economic burden and would serve no real purpose. It should be noted that any problem of distant main studios that may exist for full power stations does not exist for Class A stations, because these stations have relatively small coverage areas, and the existing rule requires that the main studio be within the Grade B contour of at least one commonly owned station in the market.

10. The fact that Class A stations already broadcast local programming does not justify the Commission's requiring reporting of programming in specific categories, such as news and public affairs, which would leave stations in fear that if they choose not to offer those categories, they will have difficulty at license renewal time. Forcing program categories on stations that the marketplace would not otherwise support can have unintended and undesirable consequences, because stations will seek the least expensive source for programming they do not believe is financially self-sustaining or at least affordable. The least expensive source will probably be the full power station in town that has the most resources to produce the sought after program category. The prime example is

¹⁰ Ownership of several stations is permitted, because Class A ownership is not attributable for ownership limitations under 47 CFR §73.3555.

already becoming commonplace in the full power industry -- the production of newscasts for smaller stations by the news leader in the market. Because Class A stations are not attributable ownership interests under Section 73.3555 of the Rules, there is no limit on the number of stations in the market that may obtain their news or any other programming from a single source, in any quantity, as long as the same programming is not duplicated on the full power and Class A stations. But what is the end result? The news leader in the market now has more outlets and more newscasts, increasing its power and influence as a “voice” in the community.¹¹ Once again, trying to compel conduct rather than incentivize it will not lead to the desired result and may even stimulate an undesirable result.¹²

¹¹ See, e.g., *Nexstar Broadcasting, Inc., and Mission Broadcasting, Inc.*, DA 08-483, released March 3, 2008; and *Piedmont Television of Springfield License LLC and Perkin Media, LLC*, 22 FCC Rcd. 13910 (MB 2007). While these cases involved full power stations, they illustrate how a strong station will take over most of the operations of a weaker station and thus broaden its influence over the dissemination of ideas in the market. It would be tragic if Class A stations were pushed into joint sales and service agreements that in practice reduce rather than expand diversity of voices.

¹² Much of the detailed regulation of 40 years ago, to which the Commission proposes to return, was developed in a world with a limited number of aural and visual media. All of them competed for as many listeners and viewers as possible, leading to “lowest common denominator” program schedules aimed at the mass audience. Without regulation, some important kinds of programming might not have seen the light of day. Today, the media world is very different. Excluding translators, the Commission reported in a public notice released March 18, 2008, that 19,418 radio and television stations were licensed as of December 31, 2007. Moreover, there are hundreds of video channels offered by cable and satellite systems, hundreds of audio channels offered by the XM and Sirius audio satellite systems, and perhaps thousands of audio and video programming sources available on the Internet. With this proliferation of sources, survival requires format specialization, especially for smaller stations like Class A stations. The result has been more, not fewer, choices for the public. Viewers and listeners can find virtually any kind of programming they want any time of the day or night. There is no need whatsoever to force one outlet to broadcast a type of programming that, rather than being unavailable, is readily available at will from another station or distribution outlet.

11. Of course, implementation of Chairman Martin's proposal to provide an opportunity for Class A stations to migrate to full power status, which CBA has warmly welcomed and continues to encourage, will fully subject those stations that do migrate to any and all rules adopted in this proceeding. The LPTV industry has previously demonstrated its willingness to accept public service obligations in return for improved security and privileges, the prime example being acceptance of the obligation to broadcast an average of three hours of local programming a week in return for primary spectrum status in the Community Broadcasters Protection Act of 1999.¹³ If stations were given the opportunity to migrate to full power status, which comes with MPVD access rights, they would certainly be willing to take steps to enhance their dialog with the local community.¹⁴

12. Absent migration to full power status, however, CBA respectfully submits that Congress has spoken to the question of what Class A stations should be required to do -- broadcast an average of three hours a week of locally produced programming. The Commission should respect that decision and should not impose burdens that as a practical matter will end up diverting resources from achieving the Congressional objective. To impose heavy new burdens on Class A stations -- burdens that appear to have been designed with the idea that a television station is staffed with 25, 50, or more persons, including a separate administrative staff -- not only would undermine the Congressional decision about what Class A stations should be required to do but would also erect a

¹³ 47 USC §336(f).

¹⁴ Willingness to accept increased public interest obligations should not be interpreted as endorsing proposals that ignore technological advances or impose unnecessary inefficiency on station operations, as discussed elsewhere in these Comments.

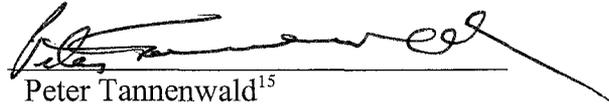
barrier to Class A status that would contravene the mandate of §257 of the Communications Act to identify and eliminate market entry barriers for the entrepreneurs and other small businesses that are so prevalent in the Class A industry.

13. In conclusion, CBA urges the Commission to use the Class A licensing structure as a way to encourage additional stations to enter the local programming arena, but it should not impose one-size-fits all administrative burdens on small businesses that will act as a barrier to entry, discourage stations from seeking or retaining Class A status, and inadvertently undermine an industry that is already subject to a direct statutory local programming requirement.

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th St., 11th Floor
Arlington, VA 22209-3801
Tel. 703-812-0404
Fax 703-812-0486

April 28, 2008

Respectfully submitted,



Peter Tannenwald¹⁵
Paul J. Feldman

Counsel for the Community
Broadcasters Association

¹⁵ Not admitted in Virginia. Member of the District of Columbia Bar.