

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of Amendment of Parts 73 and ) MB Docket No. 03-185  
74 of the Commission's Rules to Establish )  
Rules for Digital Low Power Television, )  
Television Translator, and Television Booster )  
Stations and to Amend Rules for Digital Class )  
A Television Stations )

**COMMENTS OF KM BROADCASTING, INC.**

KM Broadcasting Inc. (KMB), licensee of Class A LPTV stations WXOB-LP in Richmond, Virginia, and W25CS in Chesapeake, Virginia, hereby submits its comments in the above-referenced proceeding.

I. Summary of Comments

The FCC has issued its NPRM at a critical juncture in the history of the LPTV industry, whose very future is in doubt for numerous reasons. The access to capital specifically envisioned by Congress when it passed the Community Broadcasters Protection Act ("CBPA") in 1999<sup>1</sup>, which established the Class A status for LPTV stations, turned out to be wishful thinking and has never materialized. Spectrum remains scarce for displaced stations. Programming sources are dwindling, some disappearing overnight, with little or no replacement programming sources appearing to replace them. While the industry approaches a crossroads for survival, the Commission

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<sup>1</sup> Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. Appendix I at pp. 1501A-594 - 1501A-598 (1999), codified at 47 U.S.C. § 336(f) (CBPA). This bill was enacted as part of the Intellectual Property and Communications Omnibus Reform Act of 1999, which itself is part of a larger consolidated omnibus appropriations bill entitled "Making consolidated appropriations for the fiscal year ending September 30, 2000, and for other purposes."

acknowledges in the NPRM that LPTV stations have a unique position in terms of serving the public interest: “Many LPTV stations serve as the only local television station and source of local TV news and public affairs programming to their communities.” The LPTV industry deserves the chance to continue to serve the public interest as a robust service, not one whose existence hangs in the balance. Consequently, the FCC has a unique and historic opportunity to serve the public interest by both meeting its stated goal of the furtherance of the transition to digital television as well as promulgate rules that will guarantee the continued existence of the LPTV service. While KMB acknowledges the importance of the transition to digital television, KMB feels strongly that the FCC must use the LPTV digital conversion rules to provide the groundwork for the stabilization of the current LPTV industry. The FCC must provide a solid basis for the existence of current LPTV stations before it provides a framework for expansion of the existing service. This framework is permanent status, not Class A status, for all LPTV stations that make the investment to further important FCC policy and convert to digital transmission. LPTV’s contribution overall to the digital conversion will be minimal without permanent status, given the status of the conversion by full power stations already almost completed; however, the FCC’s influence on the future of the LPTV industry can be profound, with the proper regulatory assistance.

This permanent status has been envisioned by legislation and the FCC previously. The FCC established a pilot project for the conversion of LPTV stations to digital service on the instruction of Congress in legislation known as the LPTV Pilot Project Digital Data Services Act (DDSA). Successful completion of the pilot program would have led to completely permanent (not Class A) status for those LPTV stations providing digital interactive services and access to the Internet. The same type of protection for digital LPTV stations must be afforded here.

In the initial phase of the LPTV conversion, the FCC must permit only on-channel conversion, and should not award a second channel to LPTV operators, particularly if the conversion will not result in a permanent license. Allowing current operators to have two channels when most can barely manage one will do nothing to assist the development of the industry. And surely, opening up new channels for application by any new party after incumbents have been afforded the opportunity to apply will have a devastating effect on existing operators by exacerbating current frequency scarcity and rewarding newcomers when it is existing operators that are in dire need of regulatory assistance to ensure the future of the industry.

The FCC's rules for digital conversion should establish completely voluntary options for LPTV stations to convert except where otherwise required by statute to do so, particularly with respect to the time for conversion. Under no circumstances should existing analog LPTV operators be forced by the FCC to convert to digital at any time in the future, as such conversion is not mandated by statute. There should be no deadline established for conversion, and the marketplace should determine when LPTV operators should convert. Also, all renewed analog LPTV licenses should be for the full license period and not be truncated to a shorter date in anticipation of a digital conversion requirement that may not happen for years.

## II Fundamental Principle for LPTV Digital Conversion.

The NPRM provides that the main reason for the NPRM is that

Translators and LPTV stations will play a significant role in furthering the transition to digital television. Viewers in many communities depend on the services of TV translator and LPTV stations for their over-the-air television service. Through our rules, policies and application processes, we seek to provide flexible and affordable opportunities for low power digital service, both through the digital conversion of existing analog service and, where spectrum is available, new digital stations.”

The conversion to digital will not be successful, both from either the FCC's perspective or the LPTV industry's perspective, unless and until the FCC provides the groundwork for the stabilization of the current LPTV industry. The FCC must provide a solid basis for the existence of current LPTV stations before it provides a framework for expansion of the existing service.

The LPTV industry currently is at the nadir of its existence. Station values have never been lower, in some part due to the economy, but mostly due to the uncertainty of the future of LPTV. Class A status was not the panacea envisioned by legislators when they created the CBPA. Investment has not flowed into the industry; in fact, quite the opposite. Stations are not changing hands, new owners are not invigorating the industry, because there simply are no buyers. Programming services traditionally used by LPTV stations are discontinuing service it seems daily, with little or no alternatives arising to take their place. Full power stations are dividing their second, digital channels, many of which displaced operating LPTV stations,<sup>2</sup> in order to carry as many network programs as possible, further eliminating t4additional programming sources for LPTV stations in smaller markets. The FCC cannot allow more stations to be built when the existing industry desperately needs shoring up.

First and foremost, the FCC must extend permanent status to LPTV stations that elect to convert to digital transmission. There are numerous reasons to support this action.

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<sup>2</sup> The FCC estimates that 35 to 45 percent of all LPTV stations will have changed operation or been forced off the air by displacement caused by the allocation of the second channel to each full-power station in each television market. H. R. Report No. 384, 106th Cong., 2d Sess. 6 ("Committee Report").

First, this permanent status has been envisioned by legislation and the FCC previously. The FCC established a pilot project for the conversion of LPTV stations to digital service on the instruction of Congress in legislation known as the LPTV Pilot Project Digital Data Services Act (DDSA). The DDSA found its roots in legislation introduced by Senator Burns of Montana and Senator Breaux of Louisiana (S. 2454, 106<sup>th</sup> Congress, 2d Session) which proposed permanent status for low power television stations providing digital data service. Consequently, based on this predecessor legislation, successful completion of the pilot program would have led to completely permanent (not Class A) status for those LPTV stations providing digital interactive services and access to the Internet. The same principle underlying S. 2454 applies in the instant case, i.e., the reward of permanent status for furthering desirable public policy embraced by both Congress and the FCC.

In addition, the NPRM in this proceeding itself in many instances proposes to establish rules for LPTV digital service that are the same for digital service by full power stations. As in the rules for the Class A service, if a digital LPTV station is to be subject to many of the same rules as full-power, it should enjoy the same benefits as well.

Finally, it simply is the right thing to do. The LPTV industry has survived to this point two decades after its creation despite the numerous obstacles placed in its way. Due to its secondary status, LPTV is treated as a second-class citizen from a regulatory perspective and in the television marketplace. The Class A legislation has failed to open the capital markets to the LPTV industry. Given the current state of affairs, the FCC has the historic opportunity to not only further the conversion to digital but also to preserve the LPTV industry. Congress, in the CBPA, and the FCC both have acknowledged the service of LPTV stations in the public interest. And that is because

the LPTV industry, despite the operational hardships, has demonstrated over the course of the past two decades that its operation clearly is in the public interest, with its emphasis on local programming and the rich variety of programming not available from other broadcast sources. There are compelling legal and policy reasons to utilize the LPTV digital conversion to permanently establish the LPTV service on equal footing with other permanent services.

The NPRM gives several reasons for not extending permanent status to digital LPTV stations:

It does not require us to distinguish among applicants for additional channels based on their current class of analog license, thus simplifying the licensing process. It does not award channels in the digital service that would, at this point in the digital transition, require protection by full-service stations, thus easing concerns that providing digital channels to Class A, LPTV and translator stations would limit our flexibility in implementing the digital transition for full-service television stations.

And, given the secondary nature of the channels awarded, it permits us to use less extensive interference protection standards, thus expanding the number of stations that might obtain an additional channel. If the channels awarded were to be protected, the interference standards would have to be more stringent.

None of these reasons are sufficiently compelling to override the bases urges above for permanent status for digital LPTV stations. The uniformity of classification argument could just as easily apply to primary status. The full-power conversion is basically completed, with minimal flexibility needed to complete the conversion. And LPTV operators would gladly trade some interference restrictions for permanent status.

### III. The FCC Should Authorize Digital Channels On-Channel Only

The FCC proposes three methods of authorizing digital channels. The FCC proposes that incumbents convert to digital operations on their authorized channels as a minor amendment not subject to competitive applications. Second, the FCC proposes authorizing new digital channels,

with the initial application window open to incumbents only, and then, finally, opening a window for all applicants.

The FCC must permit only on-channel conversion, and should not award a second channel to LPTV operators, particularly if the conversion will not result in a permanent license. There is no need for additional LPTV channels at the expense of existing LPTV operators that need the regulatory assistance to create the assurance for capital markets to ensure industry growth. Allowing current operators to have two channels when most can barely manage one will do nothing to assist the development of the industry. And surely, opening up new channels for application by any new party will have a devastating effect on existing operators by creating frequency scarcity and regarding newcomers when it is existing operators that need assistance.

Another reason a second channel should not be given and that only on-channel digital conversion should be allowed is that clearly the statutory provisions against using auctions to award second, digital channels applies to the LPTV service. It was bad enough that the full-power broadcasters received huge chunks of spectrum free of charge so that it could monopolize spectrum and force LPTV operators off their channels. To allow LPTV operators to receive free, additional spectrum would compound the initial crime and create a spectrum gold rush decidedly against the public interest and the interest of existing LPTV broadcasters.

#### IV. The Commission May Not Use Auctions for New Digital LPTV Stations

Assuming the FCC does eventually allow LPTV operators to apply for a second, digital channel, the FCC may not use auctions in the event of mutually exclusive applications. As the NPRM points out, the auction exemption provisions in Section 309(j)(2)(B) of the Communications Act states that competitive bidding authority shall not apply to licenses or construction permits “for

initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses.” The language is clear and unambiguous; it creates no exceptions for the LPTV service, and, in fact, does not mention any differing class of television broadcast service. Under the well-established standard for agency interpretation of a statute, if Congress has spoken directly to the issue, and the intent of Congress is clear, then there is nothing for the agency to interpret, and it must give effect to the unambiguous expression of Congress. *Chevron U.S.A v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 (1984).

In *Chevron*, the Court held that, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” 467 US. 842-43. Consequently, since the language is unambiguous, the fact that this provision was adopted in the Balanced Budget Act of 1997 in conjunction with a number of other provisions meant to facilitate the full power digital television transition is immaterial.

Since the auction provisions do not apply, permitting applicants for second digital stations to resolve mutual exclusivities through engineering solutions or settlements would be reasonable.

#### V. Minimum Programming Standards May Not Be Established

The Commission tentatively concludes that digital LPTV stations should be subject to the same minimum video program service requirement applicable to DTV broadcast and digital Class A stations. KMB does not believe the Commission has the authority to require such requirement.

In a recent decision, the United States Court of Appeals for the District of Columbia Circuit in *Motion Picture Association of America, Inc., et al, v. Federal Communications Commission*, 309 F. 3d 796, November 8, 2002) (‘the MPAA Decision’), held that the FCC has no authority aside

from § 1 of the Telecommunications Act of 1934 to regulate the content of broadcast programming. The FCC must look beyond § 1 to find authority for regulations that significantly implicate program content.

KMB does not believe that Section 336(f) contains language providing the independent authority necessary for the Commission to comply with the MPAA Decision. Therefore, KMB urges that the FCC establish no minimum requirements, and allow each LPTV station to decide what programming it needs to broadcast to meet its public interest requirements.

#### VI. Channel Assignments Should Be Limited to Core Channels

KMB urges that the FCC limit the assignment of channels for the digital service to the core group of channels. This will facilitate the grant of permanent status to digital LPTV channels. Any other regime of channel assignments simply wouldn't work. The FCC's proposal to use channels outside the core is premised on the assumption that all digital channels will be secondary. AS KMB urges primary status for digital LPTV channels, it urges the FCC to reject that proposal.

In the alternative, all channels should be available for application, but permanent status should be available only to licensees on the core channels. No one issued a license on the non-core channels should then be allowed to file a displacement application into the core channels. This end run only punishes existing LPTV operators.

#### VII. Section 336(f)(4) Provides No Displacement Protection, So Permanent Status Is Needed

The language in Section 336(f)(4) of the Communications Act states that

The Commission is not required to issue any additional license for advanced television services to the licensee of a class A television station under this subsection, or to any licensee of any television translator station, but shall accept a license application for such services proposing facilities that will not

cause interference to the service area of any other broadcast facility applied for, protected, permitted, or authorized on the date of filing of the advanced television application. Such new license or the original license of the applicant shall be forfeited after the end of the digital television service transition period, as determined by the Commission. A licensee of a low-power television station or television translator station may, at the option of licensee, elect to convert to the provision of advanced television services on its analog channel, but shall not be required to convert to digital operation until the end of such transition period.

The NPRM states that “One significant question raised by Section 336(f)(4) is whether any additional channels awarded under its terms would be protected from displacement by primary stations and, if so, would this status extend only to Class A stations’ digital channels or to translators’ channels as well.” The Commission also seeks comment on whether the licensing approach detailed in Section 336(f)(4) is the only means by which we might award additional digital channels to Class A and translator stations or whether we may use the “all-secondary” channel approach we have described above and defer the implementation of the 336(f)(4) licensing scheme until a later point in the digital transition.

As with the analysis of the auction exemption provisions in Section 309(j)(2)(B) of the Communications Act, *supra*, the language in Section 336(f)(4) of the Communications Act is also unambiguous. The statute provides no displacement protection for second, digital channels. The qualifying provisions in Section 336 (E) (2) specifically refer to LPTV stations, not licensees. So the extension of protection based on a licensee’s status is not contemplated by the statute. (The argument that Class A status should extend through a qualified licensee to all of the licensee’s stations, whether the stations themselves met the Class A qualifying criteria, has previously been

rejected by the Commission.) This language does not preclude the Commission from extending permanent status, not Class A-based, to all LPTV stations, Class A or otherwise.

Also, KMB would submit that Section 336(f)(4) is the only means by which the FCC might award additional digital channels to Class A and translator stations and the FCC may not use the “all-secondary” channel approach we have described above and defer the implementation of the 336(f)(4) licensing scheme until a later point in the digital transition.

#### VIII. The FCC Should Extend Its Minor Facilities Change Rules

The FCC proposes that the displacement relief policies and procedures now applicable for analog translator and LPTV stations generally apply to digital LPTV and TV translator stations (*i.e.*, stations having a reasonable expectation of channel displacement due to actual or predicted interference conflicts.) KMB generally supports his proposal, so long as new applicants for out of core channels, should the FCC ultimately permit such applications, may not then apply for displacement relief to the core channels.

#### IX. Section 309(j)(14) Does Not Apply to the LPTV Service .

Section 309(j)(14)(A) of the Communications Act provides that the Commission may not renew a license for analog broadcast television service for a period extending beyond December 31, 2006. KMB urges that this provision does not apply to analog authorizations in the low power television service. Section 3 of the Communications Act defines the term “analog television service” as “television service provided pursuant to the transmission standards prescribed by the Commission in Section 73.682(a) of its regulations. The LPTV service rules (Part 74, Subpart G) do not make reference to this rule section. This means that stations licensed in the LPTV service do not have to cease analog service by the deadline prescribed in Section 309(j)(14). On the other

hand, KMB is not sure that Class A stations licensed under Part 73 are not be subject to this exemption.

Since stations in the low power television service are not subject to Section 309(j)(14), it means that such stations are not required to operate digitally for purposes of Section 309(j)(14)(B), which sets forth three conditions that qualify a station for an exemption of the analog authorization termination date in Section 309(j)(14)(A). However, this is immaterial, since the analog termination date does not apply to LPTV stations in any event, stations in the low power television service are not subject to Section 309(j)(14) in the first instance.

#### X. The FCC May Not Impose Conversion Deadlines for Analog, Non-Class A Stations

Under the heading “Issuances of Licenses for Advanced Television Services to Television Translator Stations and Qualifying Low-Power Television Stations,” Section 336(f)(4) of the Communications Act provides that “A licensee of a low-power television station or television translator station may, at the option of the licensee, elect to convert to the provision of advanced television services on its analog channel, but shall not be required to convert to digital until the end of such transition period.” This statutory provision appears to require that Class A TV and TV translator stations convert to digital operation at the end of the transition period. The FCC seeks comment on the applicability of this provision and whether or not the digital conversion requirement extends to non-Class A LPTV stations.

Once again, the statutory language is clear. The digital conversion requirement does not extend to non-Class A LPTV stations. Consequently, the FCC should adopt no digital conversion requirements for any LPTV stations for which the conversion is not statutorily mandated. In the absence of a statutory mandate the Commission should not adopt a trigger-based mechanism for the

eventual cessation of analog service. KMB urges that the marketplace shall decide when it its time to convert to digital operation. Certainly, establishing permanent status for digital conversion would be a mighty incentive more likely to result in LPTV conversion more quickly and in greater numbers than any FCC-mandated criteria.

#### XI. The Three-Year Digital Station Construction Period Is Reasonable

KMB supports the three-year construction period proposed by the Commission. The FCC should not consider any accelerated buildout for digital stations, since the full-power stations have had 17 years to adopt their digital conversion rules. By requiring the LPTV industry to do it in a much shorter time period is not reasonable.

#### XII. The Class A Rules Do Not Pass First Amendment Scrutiny; Thus Permanent Status Is Needed

Permanent status is required for digital LPTV stations as discussed previously. Permanent status is also necessary for another reason: the Class A rules not pass First Amendment scrutiny.

Well-established principles of First Amendment law require heightened scrutiny when the federal government promulgates rules premised on content-based programming. In addition to the constitutional infirmity, such failure to conduct the required scrutiny also constitutes unreasoned decision making and is arbitrary and capricious.

That the Commission's Class A rules are premised on content-based programming is clear. The Commission states explicitly in

the *Class A Order*<sup>3</sup> that the purpose of the local market definition is "rewarding and protecting LPTV stations which provide communities with locally-oriented programming." *Class A Order* at 6364 ¶ 19 (JA 38).

In fact, the Class A rules involve a direct regulation of the content of protected speech; specifically, an order of the government to an FCC licensee to distribute speech selected by the government.

The Supreme Court has clearly defined the principle of content-based laws:

In general, the "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). A law that singles out speech based upon the ideas or views expressed is content-based, whereas a law that "confer[s] benefits or impose[s] burdens on speech without reference to the ideas or views expressed" is most likely content-neutral.

*Turner Broadcasting System, Inc. v. Federal Communications Comm'n (Turner I)*, 512 U.S. 622, 643 (1994).

In the same case the Supreme Court recognized that "Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Id.* at 659. The Turner Court also noted that the requirements for mandatory carriage of low power stations, which extended only to those stations whose programming addressed

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<sup>3</sup> *In the Matter of Establishment of a Class A Television Service*, 15 FCC Rcd 6355 (2000) ("Class A Order")

"local news" and local "informational needs" "appears to single out certain low power broadcasters for special benefits on the basis of content." *Id.* at 644 n. 6.

In this case, the Commission has promulgated rules regulating speech carried on the broadcast spectrum. As such, careful First Amendment scrutiny is required, even under the lenient standard of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In fact, "where first amendment protection is at issue, there is a need for particularly careful, precise and independent judicial review." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). There is no less a burden of review on the government in this case.

As demonstrated, it was clearly the purpose of the Commission's rules to establish a set of content-based regulations. The Commission has promulgated rules, and proposes again to promulgate rules, which demonstrably discriminate among different speakers in a medium. As was noted above, the Commission has also failed to conduct any review of the First Amendment implications of the Class A regulations in either the *Class A Order* or the *Reconsideration Order*. Consequently, the Commission, by failing to conduct any First Amendment review, has failed to meet the well-established constitutional requirement pertaining to content-based regulations. To avoid any challenge to the Class A rules, analog or digital, the Commission should establish permanent status for digital LPTV which rules relate in no way to content, merely to transmission mode.

For the same reason, the Commission should avoid creating rules that differ for Class A and LPTV stations, except where statutorily mandated.

### XIII. The FCC Must Define “Locally Produced Programming”

The FCC seeks “to clarify a matter not explicitly addressed in the Class A TV rules or in the proceeding that established the Class A service” regarding “locally produced programming”. The clarification does not address a more basic issue: the FCC has never in this proceeding defined the term “locally produced”, and specifically, what is meant by “produced”.

While neither the FCC nor the language of the CBPA has defined this term, the Conference Report accompanying the legislation<sup>4</sup> remedies this void and speaks clearly to this issue. The Conference Report states in part that:

Paragraph (2) lists the criteria an LPTV station must meet to qualify for a Class A license. Specifically, the LPTV station must: during the 90 days preceding the date of enactment, broadcast a minimum of 18 hours per day--including at least 3 hours per week of locally-originated programming--and also be in compliance with the FCC's rules on low-power television service... (Emphasis supplied.)

Committee Report at 13.

This use of the specific term "locally originated" in the Conference Report to define the type of programming necessary to qualify for Class A status is no mistake nor is it an example of imprecise drafting on the part of the legislative drafters. There is no mention whatsoever of programming that is "locally produced" in the Conference Report accompanying the legislation.

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<sup>4</sup> H. R. Report No. 384, 106th Cong., 2d Sess. 6 ("Committee Report").

On the other hand, in every instance where programming is referenced in this context in the Committee Report, only the term "locally originated" is used.

For example, the Committee Report states:

Low-power television plays a valuable, albeit modest, role in this market because it is capable of providing locally-originated programming to rural and urban communities that have either no access to local programming, or an over-abundance of national programming. (Emphasis supplied.)

*Id.* at 5.

In addition, the Committee Report also states:

The Committee's record reflects that there are a significant number of LPTV stations which broadcast programming--including locally originated programming--for a substantial portion of each day. (Emphasis supplied.)

*Id.* at 6.

It is clear from the foregoing that Congress intended those stations with three hours of "locally originated" programming per week to qualify for Class A status.

The use of the specific term "locally originated" is carefully calculated here. That is because it is a term of art contained in the Commission's rules at 47 C.F.R. §74.701(h). The definition in §74.701(h) provides that:

(h) Local origination. Program origination if the parameters of the program source signal, as it reaches the transmitter site, are under the control of the low power TV station licensee. Transmission of TV program signals generated at the transmitter site constitutes local origination. Local origination also includes transmission of programs reaching the transmitter site via TV STL stations, but does not include transmission of signals obtained from either terrestrial or satellite microwave feeds or low power TV stations.

Since this term of art is incorporated into the CBPA through the legislative commentary, and it is already found in the Commission's rules, it should be adopted as the definition here.

The Commission does state in the *Class A Order* that “The LPTV stations eligible for Class A status under the CBPA and our rules provide locally-originated programming.” *Class A Order* at 6357 ¶ 1. So it would appear the Commission has adopted this definition. But it is not as clear as it should be for such a critical element of the Class A process and the Commission should take this opportunity to provide a clear definition, as long as it is revisiting the rules for locally-produced programming.

#### XIV. Conclusion

The foregoing premises considered, KM Broadcasting, Inc., respectfully requests the Commission incorporate its comments into rules adopted in this proceeding.

Respectfully Submitted,

KM BROADCASTING, INC.

By: Robert E. Kelly  
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