

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Promoting Diversification of Ownership In the Broadcasting Services)	MB Docket No. 07-294
)	
2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996)	MB Docket No. 06-121
)	
2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996)	MB Docket No. 02-277
)	
Cross-Ownership of Broadcast Stations and Newspapers)	MB Docket No. 01-235
)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets)	MB Docket No. 01-317
)	
Definition of Radio Markets)	MB Docket No. 00-244
)	
Ways to Further Section 257 Mandate and To Build on Earlier Studies)	MB Docket No. 04-228
)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable systems serving more than 90 percent of the nation’s cable customers and

owners and operators of more than 200 cable program networks. NCTA's members also include equipment suppliers and others interested in, or affiliated with, the cable television industry.

INTRODUCTION

The FCC issued this rulemaking “to increase participation in the broadcasting industry by new entrants and small businesses, including minority- and women-owned businesses, which historically have not been well-represented in the broadcasting industry.”¹ In its Report and Order in this proceeding, the Commission took several measures designed to achieve that goal. Its Third Further Notice of Proposed Rulemaking seeks comment on several additional proposals. In addition, it asks whether the Commission has authority to adopt rules requiring cable carriage of Class A low power television stations.²

NCTA has long supported efforts to promote diversity in the communications arena. But forcing cable carriage of all Class A low power television stations is not the way to achieve that goal, and Congress has not given the FCC authority to do so. Congress has already spoken to the breadth of cable's mandatory carriage obligation in Section 614 of the 1992 Act. The Commission has already ruled that Class A stations, just like any other low power station, are only entitled to mandatory cable carriage in those circumstances delineated in Section 614 of the Cable Act requirements. The law has not changed since the Commission's entirely reasonable determination. Moreover, even if Section 614 were not wholly unambiguous in its intent to restrict the number of low power stations entitled to carriage, First Amendment considerations would militate against reading the Act to impose additional carriage requirements.

¹ Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294 (rel. Mar. 5, 2008) (hereinafter “Third FNPRM”).

² *Id.* at ¶ 99.

Mandatory carriage of all Class A low power stations would not only violate the Cable Act but also disserve any public interest in diverse programming. The Notice provides no reason to believe that low power stations have diverse ownership, or that granting cable carriage would do anything to increase the level of minority ownership of television stations. But surely expanding the number of stations entitled to preferential carriage rights on cable systems will lead to loss of diverse programming that serves niche audiences. Today, channel capacity is at a premium because of dual carriage obligations for the next three years. Forcing carriage of all Class A stations – low power stations that are often located in some of the most congested broadcast markets in the country, markets that contain the highest number of must-carry stations – will result in a loss of diverse voices on the cable system as operators are forced to make room for these over-the-air low power broadcasters.

Cable operators carry a variety of Class A low power stations voluntarily throughout the country, where those stations provide programming that customers value. And they carry those stations that meet the standards that Congress deemed sufficient to warrant mandatory carriage. But the Commission has no reason – or authority – to force cable operators to carry every Class A low power station.

I. THE COMMISSION LACKS STATUTORY AUTHORITY TO MANDATE CABLE CARRIAGE OF ALL CLASS A TELEVISION STATIONS

The NPRM notes that the Diversity and Competition Supporters endorsed a proposal put forth by the Community Broadcasters Association – an association representing low power stations – that the Commission “actively support[] cable must-carry *legislation* for Class A stations.”³ However, the Notice sidesteps that question altogether and instead seeks comment on whether the Commission *already* “ha[s] authority under the Act to adopt rules requiring such

³ *Id.* (emphasis added).

carriage [of Class A low power stations.]”⁴ But that question has already been asked and answered. No such authority exists.

The Commission confronted this issue directly when it adopted the new Class A service, pursuant to the Community Broadcasters Protection Act of 1999 (“CPBA”).⁵ It concluded that qualifying for Class A status did not change a station’s status for must-carry purposes.⁶ On reconsideration, the FCC reiterated that “Congress intended that Class A stations have the same limited must carry rights as LPTV stations.... [T]o be eligible for must carry, Class A stations, like other low power television stations, must comply with the Part 74 rules and the other eligibility criteria established by statute and our rules.”⁷

Congress, in Section 614, established two distinct sets of must-carry eligibility requirements for two separate classes of television stations – “local commercial television stations” and “qualified low power stations.” A “local commercial television station” is defined as “any *full power* television broadcast station... licensed and operating on a channel regularly assigned to its community by the Commission...”⁸ Class A stations, like any other LPTV station, operate at *low power*.⁹ As the FCC found in the context of mandatory carriage of low power stations by DBS, “Low power television stations that receive Class A status pursuant to

⁴ *Id.*

⁵ Pub. L. No. 106-113, 113 Stat. Appendix I at pp. 1501A-594 – 1501A-598 (1999), *codified at* 47 U.S. C. § 336(f).

⁶ *See Establishment of a Class A Television Service*, Report and Order, MM Docket No. 00-10, 15 FCC Rcd 6355, n.61 (2000) (“Nothing in this Report and Order is intended to affect a Class A LPTV station’s eligibility to qualify for mandatory carriage under 47 U.S.C. § 534.”).

⁷ *Establishment of a Class A Television Service*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd. 8244 at ¶ 37.

⁸ 47 U.S.C. § 534(h)(1)(A).

⁹ Memorandum Opinion and Order on Reconsideration, *supra*, 16 FCC Rcd 8244 at ¶ 32 (declining to increase the permitted power limits for Class A stations, explaining “Congress emphasized in the CBPA the importance of balancing the needs of LPTV licensees against the needs of full-service stations as they transition to a digital format. We do not wish to risk hindering the implementation of digital television. We will retain the current LPTV maximum power level requirements for Class A stations.”).

the CBPA are still low power stations for mandatory carriage purposes. Class A stations do not gain the same rights to carriage as their full power counterparts simply by receiving such status. The principal intent of the CBPA was to protect low power television stations from digital television ("DTV") interference. The CBPA did not create a new class of television stations eligible for full-fledged carriage rights on cable systems or satellite carriers.”¹⁰

Moreover, Section 614(h) expressly excludes from the definition of local commercial television stations any “low power television stations ... which operate pursuant to part 74 or title 47... or any successor regulations thereto.”¹¹ The Commission already determined that, while the rules for Class A stations are found in Part 73 of Title 47, those rules “are more properly viewed as ‘successor regulations’ for the group of Class A LPTV stations previously regulated under Part 74.”¹²

The Commission would need to articulate a reasoned explanation for departing from this wholly sound conclusion¹³ – and it is prevented by the plain language of the statute from doing so. By statute, Class A licenses are available to “qualifying *low power* television stations.” By statute, local commercial television stations are defined to include only “*full power*” stations. And by statute, low power stations qualify for mandatory carriage only in the limited circumstances set forth in Section 614(h)(2), where

(A) such station broadcasts for at least the minimum number of hours of operation required by the FCC under part 73;

¹⁰ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, Report and Order, 16 FCC Rcd 1918, 1977 (2000).

¹¹ 47 U.S.C § 534(h)(1)(B)(i).

¹² Memorandum Opinion and Order on Reconsideration, *supra*, 16 FCC Rcd at 8259 n.89.

¹³ See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”).

(B) such station meets all the obligations applicable to television broadcast stations licensed under part 73 with respect to the broadcast of non-entertainment programming, political programming, children’s programming, and equal employment opportunity, and the FCC determines that the provision of such programming would address local news and informational needs which are not being adequately served by full power television stations because of the geographic distances of such full power stations from the low power station’s community of license;

(C) such station complies with interference regulations consistent with its secondary status under part 74;

(D) such station is located no more than 35 miles from the cable headend and delivers a good quality signal to the headend;

(E) the community of license of the station and franchise area of the cable system are both located outside the largest 160 metropolitan service areas and the population of the community of license did not exceed 35,000; and

(F) there is no full power television station licensed to any community served by the cable system.¹⁴

There is, in short, no way to redefine what is by statute a “low power” station as a “full power” station for purposes of mandatory carriage.

And even if the statutory language were at all ambiguous and could somehow be construed to define Class A *low* power stations as *full* power stations for purposes of must-carry, the Commission and the courts would be constrained from adopting such a construction because of the serious First Amendment implications of imposing further must-carry obligations on cable operators. The Supreme Court narrowly held that the must-carry provisions of Section 614 survived intermediate First Amendment scrutiny insofar as they furthered important government interests identified by Congress in a manner that does not “burden substantially more speech than is necessary” to further those interests.¹⁵

¹⁴ 47 U.S.C. § 534(h)(2).

¹⁵ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 214 (1997) (“*Turner II*”).

But Congress itself did *not* believe that mandatory carriage of low power stations was necessary to further those interests. To the contrary, it provided that low power stations would only be subject to must-carry requirements in those limited cases where such stations met the six conditions discussed above. And, as the Supreme Court noted, even that limited low power carriage requirement raised serious constitutional problems, since the conditions for carriage of low power stations appeared to embody a *content-based* government interest (promoting carriage of “local news and informational needs”),¹⁶ which would subject the requirement to the most stringent First Amendment scrutiny.¹⁷

Construing the statute in a manner that gave additional low power stations full must-carry rights would, therefore, be unlikely to pass First Amendment muster, whether assessed under intermediate or strict scrutiny. Unless the statute cannot be read in any other way, it must be construed in a manner that avoids such constitutional problems.¹⁸ In this case, the statutory language hardly compels a construction that raises such constitutional problems. To the contrary, the plain language – as well as the avoidance doctrine – compels the opposite.

II. REQUIRING CARRIAGE OF CLASS A LOW POWER STATIONS FAILS TO SERVE THE PUBLIC INTEREST

Wholly apart from the Commission’s lack of authority to expand cable’s must-carry obligations to encompass additional Class A stations, it would disserve the public interest to do. Congress had good reasons for narrowly limiting the circumstances in which low power stations qualify for mandatory carriage on cable systems. Even under current law, cable operators carry

¹⁶ See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 n.6 (1994) (“*Turner I*”).

¹⁷ See *Turner II*, 520 U.S. at 256 (O’Connor, J., dissenting) (“Because I believe that the must-carry provisions fail even intermediate scrutiny, it is clear that they would fail scrutiny under a stricter content-based standard.”).

¹⁸ See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988); see also *United States v. Security Indus. Bank*, 459 U.S. 70, 78, 82 (1982); *NCTA v. FCC*, 415 U.S. 336, 342 (1974); *TCI of North Dakota v. Schriock Holding Co.*, 11 F.3d 812, 815 (8th Cir. 1993).

hundreds of low power stations, either pursuant to must-carry or retransmission consent.¹⁹

Mandatory carriage of additional Class A stations, without regard to the level of demand or the impact on cable operators, programmers and their customers would fail to serve the public interest.

The FCC has licensed 556 Class A low power stations.²⁰ While some low power stations are located in areas without full power stations – and many of those low power stations, Class A and otherwise, already are entitled to cable carriage – a sizable portion of low power stations are concentrated in urban markets that already are populated with many full power must-carry television stations. For example, the largest DMA in the United States – New York – has 21 full power stations, and four of its 23 additional low power stations are Class A stations. Los Angeles, which already has 24 full power stations, has an additional six Class A low power stations. New Jersey has four. Even the smaller Hartford-New Haven market has nine full power stations and three Class A stations.

Adding all these Class A stations to the array of broadcast stations that cable operators are required to carry would overwhelm cable capacity at a time when bandwidth is at a premium. Cable operators will already be devoting even more capacity to carriage of must-carry full power broadcast stations to ease the transition to digital beginning in February 2009.

Giving low power stations additional carriage rights inevitably comes at the expense of other services that cable customers value more highly. Channel capacity is finite, and most cable systems will continue to operate in a hybrid analog and digital mode. Thus, cable operators must use a single plant to provide video and non-video services, including not only analog broadcast

¹⁹ CableData Corp. data show that 288 different low power stations were carried by cable systems in 2006. Of those, nearly 100 were unique Class A low power stations.

²⁰ FCC, Broadcast Station Totals (as of December 31, 2007).

and non-broadcast services, but digital video programming, such as high definition programming, video-on-demand, as well as non-video offerings such as Internet access and telephone.

Piling new must-carry requirements on top of the existing requirements and uses will simply cause operators to drop other services to make room for the new stations. Not only would creating additional scarcity of available channels be unfair to non-broadcast cable program networks, which have no such guaranteed carriage, and to their viewers. But also the services most likely to be dropped are those that themselves appeal to niche, minority and diverse audiences in the cable operator's franchise area.²¹ Additional must-carry obligations would most directly diminish the channel space available for "prospective new minority programmers and undermine the recent progress in the creation of dedicated program networks for African-American, Latino and Asian-American audiences."²² And they would do so regardless of whether there was any demand for or viewership of the low power stations, much less whether such demand exceeded the demand for the more diverse niche channels they replaced.

Congress was right in granting only limited must-carry rights to low power stations. Operating at low power, these stations cannot (and are not intended to) reach and serve the same area as full power stations. Indeed, that is one reason why low power stations are more affordable than full power stations, since they serve more limited parts of the market. Yet, if cable carriage were to be mandated, especially in larger markets, low power stations would gain carriage far outside their area of license. Cable operators typically cannot target carriage of an integrated system to serve just the boundaries of the station's service area without the need to

²¹ See Letter to Chairman Daniel Inouye and Senator Ted Stevens from Johnathan Rodgers, President & CEO, TV One, and Michael Schwimmer, CEO, SiTV (dated Oct. 16, 2007) (expressing concerns that "new government regulations ... would stifle the growth of diverse programming aimed at minority and targeted audiences).

²² *Id.*

purchase and install equipment to block carriage in other areas. And capacity is wasted where operators have to artificially segment their systems based on governmental interference with their operations.

Diversity would not be enhanced by mandates to carry Class A low power stations. Rather, operators would simply be forced to subsidize low power operations for stations that would receive a windfall never anticipated when they licensed their limited operations.

CONCLUSION

The Commission has already explained why it has no authority to confer full must-carry status on low power stations – Class A or otherwise. There is no basis for a contrary conclusion. The plain language of the Act compels that result, as does the First Amendment and the need to construe statutes in a manner that avoids serious constitutional problems. In any event, wholly apart from statutory and constitutional constraints, the public interest would not be served by extending must-carry rights to Class A low power stations that do not qualify for carriage under the existing standards. Far from promoting diversity, such a reversal of policy would only further limit the already scarce capacity available for non-broadcast cable program services and result in the displacement of networks serving diverse minority and niche interests.

Respectfully submitted,

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