

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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Petition for Rulemaking to amend the)
Commission's Rules to extend its network)
and non-network territorial exclusivity,)
syndicated exclusivity, and network)
non-duplication protection rules to)
low-power, class A, and noncommercial)
broadcast stations)

RM-10335/

To: The Commission

OPPOSITION TO PETITION FOR RULEMAKING

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Date: December 19, 2001

No. of Copies rec'd 078
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SUMMARY

The Petition for Expedited Rulemaking ("Petition") filed by Venture Technologies Group, LLC ("VTG"), licensee of low power television ("LPTV") station WAWA-LP, Syracuse, New York, should be dismissed or denied. VTG's Petition requests that the Commission expand its syndicated exclusivity ("syndex"), network non-duplication ("non-dup") and network and non-network territorial exclusivity rules to include LPTV, Class A and noncommercial stations. However, VTG makes no showing of need for these sweeping rule changes. VTG only cites a private commercial dispute issue involving WAWA-LP and Time Warner's cable television system in Syracuse (the "System").

WAWA-LP seeks carriage on the System but has no must-carry rights due to Syracuse's inclusion in the top 160 MSAs and the presence of other full-power television stations licensed to Syracuse. Accordingly, VTG explains in its Petition that WAWA-LP should be afforded non-dup rights against WSBK in order to force Time Warner to black out WSBK's UPN network programming, which would essentially block Time Warner from carrying WSBK. In short, VTG seeks to have the Commission grant VTG *de facto* must-carry rights on TWC's System, directly contravening congressional policy in the 1992 Cable Act not to grant carriage rights in such a situation. Congress expressly limited LPTV mandatory carriage rights to situations where no full power television station serves the area. Syracuse, however, is served by numerous full power stations.

VTG's Petition is fatally flawed in other areas as well. Section 1.401(c) of the Commission's rules provides that repetitive petitions for rulemaking are subject to dismissal. Here, VTG's Petition seeks to open a new rulemaking to cover issues that have already been raised in the Commission's 1988 syndex/non-dup rulemaking, which is still open. Obviously, therefore, it would be repetitive to waste the Commission's resources to commence a new rulemaking to address these same issues. VTG's Petition

also fails to set forth the text or substance of its proposed rules, as is required by Section 1.401(c). Likewise, the Petition fails to provide facts or data in support of the action requested, another Section 1.401(c) requirement. Finally, the Petition fails to indicate how VTG's interests are affected by the sweeping rule changes it proposes, when such changes go far beyond VTG's private dispute to cover all types of television stations, all cable systems, and several different Commission rules.

Indeed, the wholesale changes sought by VTG would have numerous unintended consequences. If granted, the Petition would result in a required proceeding by the Copyright Office to adjust copyright royalty rates for all cable systems. It would also upset the delicate balance crafted in the Satellite Home Viewer Improvement Act of 1999, where Congress directed the Commission to apply syndex and non-dup rules that are "as similar as possible" to those affecting cable systems to satellite retransmission of superstations to subscribers, but not to delivery of up to two affiliates of the same network.

Moreover, the fragile network/affiliate relationship could be seriously jeopardized by the rule changes called for in VTG's Petition. LPTV stations have been established as a secondary service to full power stations, regarding both interference and must-carry rights. However, VTG's proposed changes could cause networks to rely on LPTV affiliates instead of independently owned full power stations, threatening the economic viability of such stations. This is especially true since LPTV stations are not subject to the national or local television ownership rules.

Off-air television viewers could also suffer under the changes proposed by VTG. Where full-power stations assert blackout rights within their 35-mile protected zone, it is expected that viewers within that zone will be able to receive the local station's programming instead of the blacked-out station. However, no such expectation exists as to LPTV coverage, since it is by definition low power. Thus, viewers living in the LPTV station's zone of protection could face a lose/lose situation: unable to view popular

programs imported on distant signals carried by the cable operator, and unable to receive an acceptable off-air signal from the LPTV station invoking the blackouts.

Finally, VTG's proposal, which would have the Commission grant additional syndex and non-network territorial exclusivity rights to noncommercial stations, would undermine congressional policies encouraging cable operators to carry distant noncommercial stations, and could deprive viewers of the ability to receive noncommercial syndicated programming from multiple local stations on a time-shifted basis.

For these reasons, Time Warner Cable respectfully requests that the Commission dismiss or deny VTG's Petition.

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To: The Commission

OPPOSITION TO PETITION FOR RULEMAKING

Time Warner Cable ("TWC" or "Time Warner"), by its attorneys and pursuant to Section 1.405(a) of the Commission's rules,¹ hereby opposes the Petition for Expedited Rulemaking ("Petition") filed by Venture Technologies Group, LLC ("VTG") on October 23, 2001 in the above-referenced matter. TWC operates cable television systems around the country, including the system serving Syracuse, NY (the "System") that is the subject of VTG's Petition. Accordingly, TWC is an interested party with standing to file this Opposition. As will be shown herein, VTG's Petition is a thinly-veiled attempt to achieve back door must-carry status in a situation where Congress has expressly determined that such a requirement should not be imposed on the cable operator. Moreover, VTG's Petition fails to conform to the Commission's rules in numerous ways. In addition, VTG has not demonstrated why the private commercial negotiation cited in

¹ 47 C.F.R. § 1.405(a).

its Petition -- limited to one low power television (“LPTV”) station and one cable system -- creates the need for a sweeping rulemaking that could have broad and unanticipated consequences affecting many aspects of television program distribution. Therefore, VTG’s Petition should be dismissed or denied.

I. INTRODUCTION

The Commission’s rulemaking function is designed to address issues facing numerous parties, and to provide generally applicable solutions for all those affected. VTG makes no showing as to how these global policy objectives are implicated by its isolated, private dispute.

A. VTG Makes No Showing Of Need For The Sweeping Rule Changes It Proposes.

VTG’s Petition requests sweeping changes to the Commission’s rules. In particular, the Petition seeks the ability for “all television broadcast stations (full, low-power, Class A, and noncommercial stations),” to “exercise program exclusivity against all other broadcast stations and [all] cable systems.”² Although VTG’s individual concern is limited to its desire to gain certain forced program blackout rights (and, through the exercise of those rights, cable carriage) for LPTV station WAWA-LP on TWC’s Syracuse System, VTG’s Petition nevertheless calls for fundamental changes to the Commission’s network non-duplication (“non-dup”) rules,³ its syndicated exclusivity (“syndex”) rules,⁴ and its network and non-network territorial exclusivity rules.⁵

² Petition at 1.

³ 47 C.F.R. §§ 76.92-76.95.

⁴ 47 C.F.R. §§ 76.101-76.110.

⁵ 47 C.F.R. § 73.658(b), (m). See Petition at 1.

VTG's sparse Petition makes no showing as to why any of these rules should be expanded. The Petition merely discusses VTG's own localized concern, *i.e.*, the desire for its LPTV station, WAWA-LP, to gain carriage on one cable system, Time Warner's Syracuse System. The lack of concern for the impact on established viewing patterns resulting from the wholesale changes in television program distribution contemplated by its proposal is evident in the "Background" section of VTG's Petition -- which constitutes more than 20 percent of its entire Petition -- yet does not even mention any other television station or cable system beyond WAWA-LP's own unique situation in Syracuse.

B. VTG Relies Solely On A Private Commercial Dispute Between It And Time Warner Cable.

VTG's Petition cites no global problem, nor does it demonstrate any need for the type of sweeping changes that are necessarily involved in a rulemaking. On the contrary, VTG cites a purely private commercial matter between LPTV station WAWA-LP and one cable system -- Time Warner's Syracuse System. The simple, undisputed facts of the case are that (1) WAWA-LP has no must-carry rights on Time Warner's System;⁶ and (2) like many other cable and DBS operators, Time Warner lawfully carries "superstation" WSBK-TV (channel 38, Boston, MA) ("WSBK") in order to deliver UPN network programming to subscribers of the System.⁷

⁶ Pursuant to 47 U.S.C. § 534(h)(2), WAWA-LP has no must-carry rights on TWC's System because, *inter alia*, (1) Syracuse is not outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of Syracuse greatly exceeds 35,000 (*see* Bureau of the Census Press Release, CB 91-66, Feb. 21, 1991); and (2) there are a number of full power television broadcast stations licensed to Syracuse. 47 U.S.C. § 535(h)(2)(E), (F).

⁷ Petition at 2.

TWC's decision to carry WSBK, and not to carry WAWA-LP, was an exercise of its editorial judgment. Indeed, the Syracuse System has a long history of carrying WSBK, dating back for over two decades.⁸ Such importation of WSBK as a source of UPN programming was unnecessary, however, when local station WNYS-TV, Ch. 43, was a primary UPN affiliate. Importation of WSBK was resumed after WNYS-TV discontinued its UPN affiliation. Moreover, the decision between WSBK and WAWA-LP was based on considerations beyond the availability of UPN network fare during prime time. Nearly all of WAWA-LP's non-prime time schedule, from 11:30 pm through 6:00 pm on the following day, consists of over 18 hours of uninterrupted home shopping and infomercials. WBSK, on the other hand, offers popular syndicated programming during non-prime time hours, including "Wheel of Fortune," "Jeopardy," "Frasier," "The People's Court," "Ricki Lake" and "Judge Judy."⁹ Additionally, WSBK's signal is delivered reliably by satellite with consistent picture quality, whereas the WAWA-LP signal strength is so low as to be essentially unusable.

VTG is evidently disappointed that Time Warner chose to carry WSBK instead of WAWA-LP, but obviously VTG knew or should have known when it purchased WAWA-LP that the station did not have must-carry rights. Undoubtedly, WAWA-LP's purchase price reflected this fact. Now VTG seeks to have the Commission, by rulemaking that will be applicable to thousands of stations and cable systems, give VTG a

⁸ See, e.g., Television Factbook, Services Vol., No. 49, 1980 ed. at 823-a.

⁹ See WAWA-LP program schedule attached as Exhibit 1. For WSBK-TV program schedule, see <http://www.paramountstations.com/common/program_guide>.

private financial boost and transform a low power television station into a full power station for must-carry purposes.

It is thus extremely disingenuous when VTG notes that “an Order granting the rule changes requested herein would not require Time Warner to carry WAWA-LP.”¹⁰ Of course, there is no other reason why VTG wants non-dup rights on TWC’s System against WSBK, except that it believes it can force TWC into carrying WAWA-LP instead of WSBK by requiring TWC to black out the bulk of WSBK’s UPN programming. VTG freely admits this when it states: “If WAWA-LP was a full-power station, it could invoke the protection of the Commission’s network non-duplication rules and prevent Time Warner from importing WSBK.”¹¹ Indeed, a grant of non-dup rights to WAWA-LP would place TWC in an untenable position: either TWC would be forced to carry a LPTV station that Congress has determined is not entitled to mandatory carriage, or TWC would be forced to deprive its customers of UPN programming. Either way, consumers would also lose WSBK’s other programming and the carefully crafted balance created by Congress and the Commission relating to broadcast signal carriage would be undermined.

The Commission has repeatedly stated that the FCC is not the proper forum for such a purely private issue.¹² This is especially the case with VTG’s Petition for

¹⁰ Petition at n.6.

¹¹ *Id.* at 2.

¹² See, e.g., Decatur Telecasting, Inc., 7 FCC Rcd 8622, 8624 (Vid. Serv. Div. 1992) (“The Commission has long held that it is not the proper forum for the resolution of private contractual disputes and that any redress should be sought in a local court of competent jurisdiction”) (citing John F. Runner, 36 RR 2d 773, 778 (1976) (“We are not here to referee continuous intramural sparring ...”)); Listeners’ Guild, Inc. et al. v. FCC et al., 813 F.2d 465, 469 (D.C. Cir. 1987) (“This decision is entirely consistent with the Commission’s longstanding policy of refusing to adjudicate private contract law

rulemaking, which would affect thousands of other parties, and especially where, as here, the matter is already covered by the 1992 Cable Act's must-carry provisions and the Commission's must-carry rules.

C. VTG Is Seeking A Back Door Avenue To Obtain Mandatory Carriage On TWC's Syracuse Cable System, A Benefit Expressly Denied By Congress.

Pursuant to the 1992 Cable Act's and Commission's must-carry provisions, LPTV stations have mandatory carriage rights on cable systems only in very limited circumstances.¹³ As Congress explained in the legislative history of the 1992 Cable Act, mandatory LPTV carriage is warranted only "in communities in which residents have limited access to the signals of full power stations providing local news and information," and even then only where the LPTV station produces programming to "address the local news and information needs of the community to which it is licensed."¹⁴ Similarly, the Commission has observed that:

an LPTV station will not be "qualified" unless the Commission determines that the provision of programming by such station would address local news and informational needs that are not being adequately fulfilled by full power television stations because such full power stations are distant from the LPTV station's community of license.¹⁵

questions for which a forum exists in the state courts") (citing Agreements Between Broadcast Licensees and the Public, 57 FCC 2d 42 (1975); Carnegie Broadcasting Co., 5 FCC 2d 882, 884 (1966); Transcontinent Television Corp., 44 FCC 2451, 2461 (1961)).

¹³ 47 U.S.C. §§ 534(c), (h)(2); 47 C.F.R. §§ 76.55(d), 76.56(b).

¹⁴ H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 74 (1992).

¹⁵ Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, Notice of Proposed Rule Making, MM Docket No. 92-259, 7 FCC Rcd 8055 at ¶ 27 (1992).

Moreover, Congress included express statutory language to ensure that nothing in the limited carriage rights afforded LPTV stations “shall be construed to change the secondary status of any low power station” under FCC regulations then in effect.¹⁶

VTG fails to mention a crucial fact -- WAWA-LP does not meet the statutory and Commission must-carry requirements on Time Warner’s System. Thus, its statement that “UPN, as a relatively new broadcast network, has to rely on low-power television stations in markets such as Syracuse to acquire a local voice so that it may compete on equal footing with other network affiliates”¹⁷ is demonstrably false. In this case, UPN does not rely on WAWA-LP to deliver UPN programming to Time Warner’s System. On the contrary, UPN permits its owned and operated affiliate, WSBK, to provide such programming. Perhaps, therefore, VTG’s true complaint is with UPN.¹⁸ Either way, it does not warrant a rulemaking by the Commission.

In essence, VTG seeks to use the threat of depriving TWC’s viewers of UPN network programming lawfully obtained in the marketplace to achieve must-carry status that Congress in the 1992 Cable Act and the Commission in its rules have decided WAWA-LP has no right to obtain. Such a result would undermine the delicate balance established by Congress and the Commission with respect to broadcast signal carriage

¹⁶ 47 U.S.C. § 534(h)(2).

¹⁷ Petition at 3.

¹⁸ In an analogous situation, superstation WGN formerly carried programming offered by The WB Network. Given the wide importation of WGN into distant areas by both cable and DBS, this situation was often disruptive to local WB affiliates. Thus, WGN no longer distributes WB Network programming outside its home DMA. See Application of the Satellite Home Viewer Improvement Act of 1999; Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals, Report and Order, 22 CR 158, 2000 FCC LEXIS 5795 at n.22 (Nov. 2, 2000) (“SHVIA Report and Order”).

because it would force cable operators to not carry stations and services they would otherwise carry, and require them to black out programming desired by their customers, only for the financial benefit of LPTV owners. Indeed, the back-door must-carry status sought by VTG would be available without regard to the presence of full power stations in the area or whether the LPTV was originating local news and informational programming, contrary to the express intent of Congress.¹⁹ Incongruously, because such rights would be available to LPTV stations such as WAWA-LP that are not “qualified” low power stations, their carriage would not appear to relieve a cable operator from its obligation to carry up two qualified LPTV stations in appropriate circumstances.²⁰ Furthermore, even if non-dup rights did not result in carriage of the LPTV, it would result in non-carriage for a full power station and deprivation of desirable programming from viewers, all of which is contrary to the statutorily-mandated secondary status of LPTV stations.

The relief requested by VTG would also violate the First Amendment. As the Turner I Court explains, the idea of must-carry is to ensure that non-carriage by cable does not destroy a broadcaster’s financial ability to reach its off-air viewers that are not cable subscribers.²¹ The non-dup and *de facto* must carry rights sought by VTG would extend far beyond the signal coverage area of LPTV stations, thereby upsetting the thin First Amendment balance that the Supreme Court narrowly upheld in Turner II.²²

¹⁹ 47 U.S.C. § 534(h)(2)(B), (F). See also, Mid-Maine Community Broadcasting, 13 FCC Rcd 20324 (1998).

²⁰ 47 U.S.C. § 534(c).

²¹ Turner Broadcasting System, Inc. et al. v. FCC et al., 512 U.S. 622, 649 (1994).

²² Turner Broadcasting System, Inc., et al. v. FCC et al., 520 U.S. 180 (1997).

Indeed, even the extremely circumscribed carriage rights for LPTV stations contained in the 1992 Cable Act have not been judicially upheld;²³ the expansive rights now sought by VTG clearly would not survive First Amendment scrutiny.

As the Commission has repeatedly stated in similar situations where television stations seek to utilize the 1992 Cable Act's DMA modification provisions to add out-of-DMA cable communities to gain expanded carriage rights on those systems, "the broadcast signal carriage rules were not intended to transform a station with a restricted market and service area into a regional 'super-station.'"²⁴ The same can be said here of VTG's attempt to bootstrap an LPTV station into the rights of a full power station.

II. VTG's PETITION FAILS TO SATISFY SEC. 1.401 OF THE COMMISSION'S RULES

A. The Petition Fails To Raise Any Issues Not Already Addressed In The Further Notice In Gen. Docket No. 87-24, And Thus Should Be Dismissed As Repetitive.

VTG concedes that, in 1988, the Commission commenced a rulemaking to examine its program exclusivity rules.²⁵ VTG also concedes that the Commission's 1988 rulemaking covered the same issues raised now by VTG.²⁶ The Commission has not terminated this open proceeding. Accordingly, there is no need for the new rulemaking requested by VTG. Instead, VTG could have requested that the Commission authorize it

²³ *Id.*, 520 U.S. at 222-24.

²⁴ See, e.g., *Cablevision Systems Corporation*, 11 FCC Rcd 6453 at ¶ 48 (CSB 1997), *recon. denied*, 12 FCC Rcd 12262 (1997).

²⁵ Petition at 1, citing *In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Further Notice of Proposed Rulemaking*, Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988) ("Further Notice").

²⁶ Petition at 1, 3, 4.

to file additional comments in Gen. Docket No. 87-24.²⁷ Alternatively, VTG could possibly have presented its views as informal comments filed after the close of the comment period in that proceeding, pursuant to 47 C.F.R. §§ 1.419(b). Either of these alternatives would avoid the wasteful repetition of matters being addressed in an active rulemaking. Section 1.401(e) of the Commission's rules provides that "Petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner."²⁸ Pursuant to this provision, VTG's Petition is clearly repetitive and thus should be dismissed.

B. The Petition Fails To Set Forth The Text Or Substance Of The Proposed Rules.

Section 1.401(c) of the Commission's rules regarding petitions for rulemaking provides:

The petition shall set forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner will be affected.²⁹

VTG's Petition, however, fails to "set forth the text or substance" of its proposed rules. Instead, it merely encourages the Commission in the most amorphous and general way "to resolve this unfinished business and provide all broadcast stations with equal protection from the exclusivity rules."³⁰ Indeed, VTG concedes that "the primary thrust

²⁷ See 47 C.F.R. § 1.415(d).

²⁸ 47 C.F.R. § 1.401(e).

²⁹ 47 C.F.R. § 1.401(c).

³⁰ Petition at 4 (footnote omitted).

of this Petition focuses on the network non-duplication rule.”³¹ As to the other rules encompassed by its scatter-shot Petition, i.e., the syndex, network and non-network territorial exclusivity rules, VTG merely “requests that the Commission address them in its Notice of Proposed Rulemaking.”³² Since the rule calls for specificity, VTG’s vague and ambiguous request in its Petition necessarily falls short and, accordingly, should be dismissed.

C. The Petition Fails To Provide Facts Or Data In Support Of The Action Requested.

Similarly, VTG’s Petition provides no “facts” or “data” to support its request, in violation of 47 C.F.R. § 1.401(c). The only “facts” VTG provides are the anecdotal circumstances pertaining to WAWA-LP’s inability to offer marketplace inducements to obtain carriage on TWC’s Syracuse System and VTG’s desire to gain non-dup rights for WAWA-LP in a back-door effort to force carriage. Obviously, this isolated commercial dispute cannot form the basis for the sweeping rule changes VTG requests. As for the “data” required by Sec. 1.401(c), VTG provides none at all. As the Commission’s Broadcast Bureau ruled in an earlier decision denying a petition for reconsideration of its decision dismissing a petition for rulemaking, “a pleading can be so short as to be bereft of substance. . . . [T]he problem was the total lack of substantive material. Instead, the

³¹ Id. at n.12. Again, this proves TWC’s point that VTG’s Petition inappropriately overreaches by seeking sweeping rule changes after citing only an isolated, local matter involving one LPTV station, one cable system and one Commission rule, the non-dup rule.

³² Id. at n.11.

petition offered conjecture or mere general observation[s]....”³³ Similarly, VTG’s Petition lacks substance in the form of facts or data, and thus is defective and should be dismissed.

D. The Petition Fails To Indicate How The Interests Of Petitioner Are Affected With Respect To Noncommercial Stations, Full Power Stations, Or Class A Stations.

As indicated above, Sec. 1.401(c) of the Commission’s rules also requires that a petition for rulemaking “shall indicate how the interests of petitioner will be affected.”³⁴ VTG utterly fails to indicate how its interests are affected by seeking a rulemaking that would extend far beyond low power television stations such as WAWA-LP to all other television stations, including noncommercial stations and Class A stations,³⁵ and far beyond the Commission’s non-dup rules, to its syndex and its network and non-network territorial exclusivity rules. Rather, VTG’s Petition mentions only one problem affecting its interests -- WAWA-LP’s frustration at not being able to formulate an attractive offer to achieve carriage on TWC’s Syracuse System, given its lack of must-carry rights on the System. This narrow issue clearly does not support the wholesale rule changes requested

³³ Amendment of Section 73.606(b), Tale of Assignments, Television Broadcast Stations (Newark, N.J.), Memorandum Opinion and Order, 29 RR 2d 1473 at ¶ 4 (Br. Bur. 1974) (“Newark Order”).

³⁴ 47 C.F.R. § 1.401(c).

³⁵ The Class A television service was established by the Commission in April 2000, implementing the Community Broadcasters Protection Act of 1999, which was signed into law in November 1999. Pursuant to that statute and Commission rules, LPTV stations meeting certain eligibility requirements may be upgraded to “Class A” status, affording them enhanced interference protection from full service analog and digital television stations. Class A stations are subject to all of the public interest obligations required of full power stations, but have the same limited must-carry rights as LPTVs. See In the Matter of Establishment of a Class A Service, Report and Order, 15 FCC Rcd 6355 (2000), *recon. granted in part and denied in part*, Memorandum Opinion and Order on Reconsideration, 23 Comm. Reg. 893 (2001).

by VTG. Indeed, the Commission has interpreted Sec. 1.401(c) to require “sufficient supportive material to establish that the public interest would be served by the proposal offered.”³⁶ Again, the fact that VTG is proposing wide-ranging rule changes that have ramifications far beyond its parochial interest points out the inappropriateness of addressing VTG’s private concern in a rulemaking proceeding.

III. THE SWEEPING CHANGES SOUGHT BY VTG WOULD LIKELY HAVE UNINTENDED CONSEQUENCES

The inappropriateness of VTG’s attempt to address its isolated cable carriage issue by means of a sweeping rulemaking proceeding is graphically illustrated by the unintended consequences that would undoubtedly flow from its request, causing unnecessary disruption to long-standing program distribution practices.

A. Impact On Copyright.

VTG’s Petition, if granted, would also have widespread effects on the cable copyright royalty scheme. Among VTG’s requested rule changes is the extension of syndex rights to LPTV, Class A and noncommercial stations, not just full power commercial stations.³⁷ Because syndex rights historically have been limited to full power commercial stations, such expansion of the Commission’s rules would trigger Sec. 801(b)(2)(C) of the Copyright Act of 1976, which provides that:

In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment

³⁶ Newark Order at ¶ 2 (footnote omitted).

³⁷ Petition at 1.

shall apply only to the affected television broadcast signals carried on those systems affected by the change.³⁸

An adjustment in the cable copyright compulsory license royalty rates pursuant to Section 801(b)(2)(C) can be triggered if the Commission's "rules are changed in the future to relax or increase the exclusivity restrictions."³⁹ In either case, according to the legislative history of the Copyright Act of 1976, "it is the Committee's judgment that the royalty rates paid by cable systems should be adjusted to reflect such changes."⁴⁰ Thus, VTG's requested expansion of syndex protection to all other types of television stations would give rise to a royalty adjustment proceeding pursuant to Sec. 801(b)(2)(C) of the Copyright Act. Moreover, due to VTG's sweeping request, such proceeding would need to encompass a wide variety of stations.

In short, VTG's broad rulemaking request cannot be examined in a vacuum -- it would surely precipitate a Copyright Office proceeding to adjust royalty rates for thousands of cable systems and other multichannel video programming distributors nationwide. An isolated carriage matter involving one LPTV station and one cable system simply should not be the catalyst that sets such broad-ranging events in motion.

B. Applicability To DBS.

Pursuant to the Satellite Home Viewer Act of 1988 ("SHVA"),⁴¹ as amended by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),⁴² satellite carriers are

³⁸ 17 U.S.C. § 801(b)(2)(C).

³⁹ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 177 (1976) (emphasis added).

⁴⁰ *Id.* (emphasis added).

⁴¹ Pub. L. No. 100-667, 102 Stat. 3935 (1988), *codified in* 17 U.S.C. § 119 (1995).

⁴² Pub. L. 116-113, 113 Stat. 1501, 1501A-526 to 1501A-545, Appendix I (1999).

authorized to retransmit certain broadcast signals to satellite subscribers considered to be “unserved” by local television broadcast stations. SHVIA generally permits satellite carriers to import up to two distant stations affiliated with a particular television network to “unserved households,” *i.e.*, viewers in areas where no local full power station (or translator repeating the signal of a full power station) affiliated with that network is available off-air. Notably, the presence of a local LPTV station affiliated with a television network does not overcome a determination as to “unserved household” status. Thus, even in areas served by a local LPTV network affiliate, Congress contemplated that DBS subscribers should have the unrestricted ability to receive that network’s programming from up to two distant full-power stations carried by the DBS operator.⁴³ In addition, SHVIA authorizes DBS operators to import an unlimited number of nationally distributed “superstations,” regardless of whether the DBS subscriber resides in a “served” or “unserved” household.⁴⁴

Section 339(b) of the Communications Act of 1934, as amended (the “Act”), as added by Section 1008 of SHVIA, directs the Commission to apply the non-dup and syndex rules, previously applicable only to cable television systems, to satellite carriers’ retransmission of nationally distributed superstations to DBS subscribers. Specifically, Section 339(b)(1)(A) of the Act requires the Commission “to apply network non-duplication protection (47 C.F.R. 76.92), syndicated exclusivity protection (47 C.F.R. 76.151), and sports blackout protection (47 C.F.R. 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers.” The

⁴³ See 17 U.S.C. § 119(a)(2)(B).

⁴⁴ 47 U.S.C. § 339(a)(1)(B).

fact that these specific rule sections were expressly referenced in the legislation is strong evidence that Congress understood and endorsed their scope, and determined that no substantive revisions were necessary.⁴⁵ And the fact that such regulations provided no non-dup or syndex protection for LPTV stations at the time of enactment of SHVIA is further evidence that Congress did not intend for an LPTV station, even if network-affiliated, to interfere with a DBS subscriber's unrestricted ability to receive satellite delivered superstations or up to two distant stations affiliated with each major network.

Congress directed the FCC to implement DBS non-dup and syndex rules so that they will be as "similar as possible" to the rules applicable to cable operators.⁴⁶

Accordingly, if LPTV stations were granted exclusivity rights against cable, cable operators and others would argue correctly that SHVIA mandates that equivalent exclusivity rights be granted against DBS. Thus, the presence of a network-affiliated LPTV station would interfere with Congressional expectations regarding the unfettered ability of DBS subscribers to receive any superstations that the DBS provider elects to carry, because the LPTV could require substantial blocks of network and syndicated programming to be deleted from such imported superstations.

The potential unintended consequences of VTG's Petition are even more vividly illustrated by the impact of LPTV non-dup rights on DBS carriage of affiliates of any of the four major networks to DBS customers residing in "unserved households." As noted

⁴⁵ The FCC has previously concluded that while Section 339(b)(1)(A) does not require that DBS syndex and non-dup rules be identical to the cable rules, they should nevertheless not be "substantially different." See SHVIA Report and Order at ¶¶ 20, 22.

⁴⁶ See H.R. Conf. Rep. No. 106-464, 106th Cong., 1st Sess. 103 (1999) ("Conference Report").

above, Congress directed the FCC to adopt non-dup protection for local stations *vis a vis* DBS importation of superstations. However, no such non-dup rights were provided with respect to the importation by DBS of affiliates of the four major networks. This is because Congress assumed that the non-dup problem was addressed by its unserved household definition - - given that distant affiliates could be imported only where no local affiliate is available, there was no perceived need to provide non-dup protection for affiliates of the four major networks.

If network-affiliated LPTV stations are granted non-dup rights, however, an anomalous situation would arise. Either the Commission would have to adopt functionally equivalent non-dup rules governing both DBS and cable importation of stations affiliated with one of the four major networks, which would appear to be beyond the authority granted to the FCC by Section 339(b)(1)(A), or LPTV non-dup blackouts would apply to cable but not to DBS, which would appear to violate the congressional mandate that non-dup rules for DBS and cable be as “similar as possible.” In either case, it is evident that a grant of non-dup rights to LPTV stations was not contemplated by Congress.

Obviously, in enacting SHVIA, Congress understood the secondary, supporting role of LPTV stations. Granting blackout rights to LPTV would thus undermine the “unserved household” test established by Congress by allowing for LPTV stations to force non-dup blackouts on DBS delivery of network stations. Such viewer disruptions would run totally counter to congressional intent.⁴⁷

⁴⁷ See *Id.* at 10 (footnote omitted) (“The Committee is concerned that, absent must-carry regulations, satellite carriers would carry the major network affiliates and few other

C. Impact On Network/Affiliate Relationship.

Yet another unintended consequence of extending the program exclusivity rules to LPTVs would be the deleterious impact on the often fragile television network/affiliate station relationship and on the economic viability of independently-owned stations.⁴⁸ LPTVs have long been licensed as only a “secondary service,” meaning they may not interfere with full power stations and must relinquish their frequencies or accept interference if a full power station wishes to commence either analog or digital operations using the same channel.⁴⁹ Moreover, LPTVs have no must-carry rights in any county where any full power station, whether network affiliate, independent or noncommercial, is located.⁵⁰ Again, this reflects Congressional intent that LPTV stations should not be allowed to usurp full power stations in any way.

Because of their secondary status and limited geographic reach, LPTVs historically have not been an attractive option for network affiliation. However, the

signals. Non-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage.”)

⁴⁸ See Petition for Inquiry into Network Practices, filed by Network Affiliated Stations Alliance (“NASA”), March 8, 2001 (“NASA Petition”). The Commission released a Public Notice soliciting public comment on May 22, 2001 (DA 01-2164). NASA’s chief allegation is that the national television networks are exercising undue influence over the programming and other business operations of their affiliates, in a manner contrary to the public interest. NASA Petition at ii.

⁴⁹ An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, Report and Order, 51 RR 2d 476 at ¶ 17 (1982) (“LPTV R&O”); see also, Letter from Univision, Inc. Concerning the Applicability of 47 C.F.R. Sec. 73.658(j) and 46 C.F.R. Sec. 73.658(k), 4 FCC Rcd 2417 at ¶ 11 (1989). VTG’s claim that LPTVs must be able to “compete on equal footing with other local network affiliates” (Petition at 3) stands in stark contrast to the Commission’s clear directive that LPTVs be licensed as a “secondary service.”

⁵⁰ See 47 C.F.R. § 76.55(d)(6).

prospect of non-dup and syndex rights (leading to *de facto* must-carry), coupled with certain other previous regulatory changes, could drastically alter the incentives for networks to rely on LPTV affiliates in lieu of independently owned full power stations. First, broadcast station owners, including various major national networks, are no longer restricted in their ability to own or provide financial support to LPTV stations. Historically, such facilities were viewed primarily as a mechanism for broadcasters to fill in voids in their coverage areas, or to provide television service where no other full power stations were available. They were certainly not intended as a vehicle for a broadcaster to invade another broadcaster's DMA. Thus, broadcasters were restricted from providing financial support to any such facilities located outside that broadcaster's coverage area. However, that prohibition was lifted in 1982.⁵¹

Second, and more significantly, LPTV stations are not subject to the national or local television ownership rules.⁵² Thus, a network with owned and operated affiliates in DMAs that, in the aggregate, place such network at or near the national television ownership limit, could own or financially support LPTV stations in all other DMAs nationwide. Indeed, VTG might well have just such a strategy in mind.⁵³

The lack of must-carry rights makes ownership of LPTV facilities less attractive to a network than entering into affiliation agreements with independently-owned full

⁵¹ See LPTV R&O at ¶ 84.

⁵² Id. at ¶¶ 90-95. See also 47 C.F.R. §74.780 (excluding §73.3555, the multiple ownership rule, from the list of Commission rules applicable to LPTVs).

⁵³ According to the Commission's Consolidated Data Base System, VTG is the licensee of 13 LPTVs, Class A and TV Translator stations, and has applications pending at the Commission for construction permits for an additional 136 such stations nationwide.

power stations. As explained in Section I.C. above, without non-dup rights, a network has little leverage to force cable carriage of an LPTV station affiliated with that network, because the cable operator can make arrangements to import a full power station affiliated with that network from another DMA. This is particularly true with respect to UPN, given the availability of two “superstations” affiliated with UPN that can be carried by cable systems outside their home markets anywhere across the country, without the necessity of obtaining retransmission consent.

However, this situation changes dramatically if LPTV stations are afforded non-dup rights. In that case, the cable operator has only two choices: carry the LPTV, or deprive its customers of programming distributed by that network. Revising the Commission’s rules to provide LPTVs with program exclusivity rights would make them a far more inviting outlet for the distribution of network programming. Armed with the right to require a cable operator to black out the network programming of “distant” television signals, an LPTV could force its way onto a cable operator’s channel lineup, since the cable operator would certainly want to provide its subscribers with access to that network’s programming. The LPTV station would have thus obtained “back-door” must-carry rights which Congress did not intend to grant. Functionally, that LPTV would become as important and necessary to the local television landscape as its competitor full power stations, and thus would immediately become a viable option for network affiliation.

Such a scenario could diametrically change the dynamics of the network/affiliate relationship, the maintenance of which has been a Commission and congressional priority

for over sixty years.⁵⁴ Rather than renewing affiliation agreements with existing independently-owned affiliates, the network/affiliate relationship could be bypassed altogether. Networks could determine that it is more economically attractive to simply own LPTV stations in numerous DMAs, and cause their programming to be broadcast on those stations. In doing so, networks could avoid some of the recent battles with affiliates that form the basis of the NASA Petition.⁵⁵ In fact, LPTVs with back-door must-carry rights could conceivably be even more valuable than full power stations, given the lack of public interest requirements imposed on LPTV stations.⁵⁶ LPTVs therefore would be

⁵⁴ Under the authority provided in Sections 4, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154, 303, 403, the Commission may regulate the network-affiliate relationship, and in fact has launched inquiries and rule making proceedings on several occasions. See In the Matter of the Investigation of Chain Broadcasting, Commission Order in Docket No. 5060 (May 2, 1941), reprinted in Report on Chain Broadcasting, Commission Order No. 37, Docket No. 5060, at 91-92 (May 2, 1941), modified by Supplemental Report on Chain Broadcasting (1941), *appeal dismissed sub. nom.*, NBC v. U.S., 319 U.S. 190 (1943); In the Matter of Commercial Television Network Practices and the Ability of Station Licenses to Serve the Public Interest, Notice of Inquiry, 62 FCC 2d 548 (1977); In the Matter of Commercial Television Network Practices, Further Notice of Inquiry, 69 FCC 2d 1524 (1978); Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, Notice of Proposed Rule Making, 10 FCC Rcd 11951 (1995). See also H.R. Rep. No. 85-1297, at III (1958) (the "Barrow Report").

⁵⁵ Some of those disputes, as illustrated in the NASA Petition, include whether affiliates: (1) may re-schedule popular network programs into different time slots (NASA Petition at 28); (2) may change "prime time" hours from 8:00-11:00 p.m. to 7:00-10:00 p.m., local time (See Reply Comments filed by KEZI(TV), Eugene, Oregon, dated August 17, 2001); (3) must pay a fee to preempt or reject network programs (NASA Petition at 8-10); (4) are required to clear an entire network program series (Id. at 11) or "excessively promote" the network's programs (Id. at 12); and (5) are entitled to the entire 6 MHz digital channel, or whether the network may use the excess spectrum for its ancillary purposes (Id. at 15-18).

⁵⁶ Commission rules required of full power stations inapplicable to LPTVs include those relating to: children's television programming (47 C.F.R. §§ 73.670-73.671), main studio location (47 C.F.R. § 73.1125) and the maintenance of public inspection files (47 C.F.R. § 73.3526), including the preparation of quarterly issues/programs lists, biennial ownership reports (47 C.F.R. § 73.615) and the political file (47 C.F.R. § 73.1943).

placed at an economic *advantage* over full power stations, a far cry from the “secondary service” envisioned by the Commission in creating them.

Even if networks do not actually purchase LPTVs in particular DMAs, the existence of LPTVs as additional options for distribution of its programming would give networks tremendous leverage over their affiliates. For example, networks could threaten the loss of affiliation if stations refuse to clear a particular series or preempt network programs too often. Revising the Commission’s rules to grant non-dup rights to LPTVs thus could have the unintended effect of squeezing out existing independently-owned full power stations. At the very least, such rule revisions would significantly alter the competitive balance in favor of networks and LPTVs, to the detriment of independently-owned full power affiliates.

D. Impact On Off-Air Television Viewers.

The expansive rule changes sought by VTG are also likely to have unintended consequences with respect to off-air television viewers. Under the Commission’s long-standing syndex and non-dup rules, a full power station licensed to Syracuse is generally afforded a 35 mile zone of protection.⁵⁷ Thus, such local full power stations can require cable systems importing stations from communities beyond 35 miles to black out duplicating network and syndicated programs.

Notably, the 35 mile zone of protection constitutes a reasonable proxy for a full power station’s Grade B signal coverage area. The practical effect of this situation is that

⁵⁷ See 47 C.F.R. §§ 76.92, 76.111, 76.127, and 76.128. See also Amendment of Part 73 of the Commission’s Rules With Respect to the Availability of Television Programs Produced by Non-Network Suppliers to Commercial Television Stations and CATV Systems, Memorandum Opinion and Order, 46 FCC 2d 892 (1974).

where a local station deprives cable subscribers of the ability to receive certain distant programming, the cable subscriber can at least continue to receive, via off-air reception, the programming broadcast by the local station invoking the protection. Even where such local station is not carried by the cable system (e.g., due to failure to obtain retransmission consent), the local station is nevertheless available in the same manner.

However, LPTV stations operate at power levels substantially below those of full power stations, and accordingly their coverage areas are significantly smaller.⁵⁸ If the VTG proposal were adopted, and LPTV stations were granted identical syndex and non-dup rights as full power stations, many television viewers would face a lose/lose situation: unable to view popular programs imported on distant signals carried by the cable operator, and unable to receive an acceptable off-air signal from the LPTV station invoking the blackouts.

E. Applicability To Noncommercial Stations.

VTG's Petition calls for the expansion of the syndex rules to include, for the first time, noncommercial educational ("NCE") television stations.⁵⁹ Currently, the Commission's syndex rules provide that only commercial television stations may exercise syndex rights against other stations carried on cable systems.⁶⁰ The Commission

⁵⁸ See LPTV R&O at ¶ 64.

⁵⁹ Petition at 1.

⁶⁰ 47 C.F.R. § 76.101.

previously explained that noncommercial stations “have never been covered by such rules.”⁶¹

The proposal to grant syndex rights to NCE stations is inconsistent with broader policy goals to encourage wide dissemination of such stations by cable operators. For example, unlike the severe restrictions that were placed on the importation of distant commercial stations, the Commission’s former distant signal importation rules did not restrict carriage of distant NCE stations, in the absence of an objection filed by an affected local NCE station licensee.⁶² This approach was consistent with the Commission’s determination that “the widest possible dissemination of educational and public television programming is clearly of public benefit and should not be restricted.”⁶³ Indeed, the FCC subsequently eliminated the right of local NCE stations to object to cable importation of distant NCE stations, concluding that:

it is anomalous for the government, and particularly the federal government, to contribute toward the creation of a system of public television as an alternative source of diverse programming to that supplied by the commercial stations while at the same time restricting the public’s access to additional sources of the programming created by the system.⁶⁴

Similarly, in the 1992 Cable Act, Congress made clear that, in addition to carrying the NCE stations entitled to mandatory carriage, a cable operator “may, in its discretion,

⁶¹ See Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Report and Order, Gen. Docket No. 87-24, 3 FCC Rcd 5299 at n.204 (1988).

⁶² 47 C.F.R. § 76.61(d) (repealed).

⁶³ See Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems, Cable Television Report and Order, 36 FCC 2d 143 at ¶ 95 (1972).

⁶⁴ Cable Television Syndicated Program Exclusivity Rules, 79 FCC 2d 663, Appendix C, ¶ 15 (1980).

carry the signals of other qualified noncommercial education television stations,” regardless of whether such stations are local or distant.⁶⁵ Moreover, unlike commercial television stations, a cable operator may carry NCE stations without obtaining retransmission consent.⁶⁶ Again, these provisions reflect a policy intended to encourage cable operators to carry a broad assortment of NCE stations, beyond the minimum threshold of stations entitled to must-carry rights.

Granting syndex rights to NCE stations would undermine these long standing policies. Most NCE television stations rely on essentially the same pool of network (e.g., PBS) and syndicated programming, although such programming is typically broadcast on staggered days or times by different NCE stations. Given that NCE stations are already entitled to assert non-dup rights with respect to PBS network programming, if they are given syndex blackout rights as well, cable operators will be left with little incentive to import additional NCE stations.

A similar unintended consequence would flow from the expansion of the non-network territorial exclusivity rule to NCE stations. As noted above, NCE stations, even those in the same DMA, often air the same syndicated programs, albeit on a time-shifted basis. Applicability of the non-network territorial exclusivity rule would allow a stronger NCE station to outbid other local NCE stations, many of which are operated by local institutions such as community colleges, for exclusive rights to particular noncommercial syndicated programs, thus depriving the viewing public of the benefits of maximum opportunity to view such programming at a variety of convenient times.

⁶⁵ 47 U.S.C. §§ 535(b)(2)(A); 535(b)(3)(A)(ii).

⁶⁶ 47 U.S.C. § 325(b)(2)(A).

Likewise, regarding non-dup, Section 615(f) of the 1992 Cable Act provides as follows:

(f) WAIVER OF NONDUPLICATION RIGHTS. --- A qualified local noncommercial educational television station whose signal is carried by a cable operator shall not assert any network nonduplication rights it may have pursuant to section 76.92 of title 47, Code of Federal Regulations, to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that cable operator.⁶⁷

According to the legislative history of this provision:

In subsection (f), the Committee recognizes that in some situations, a public television station may be considered “local” under the provisions of the legislation and “distant” for purposes of the “network non-duplication rules” established by the Commission in section 76.92, title 47, Code of Federal Regulations. Under the network non-duplication rules, television stations may require cable operators to delete network programming broadcast by stations that are more than 35 miles from the area served by the cable system if the network programming of such a “distant” station duplicates programming carried by the local station. Public stations are “local” under the legislation, however, if their community of license is within 50 miles of the principal cable headend. To avoid any conflict in the operation of the Commission’s Rules and the legislation, Subsection (f) makes explicit that qualified local public television stations may not assert network non-duplication rights against other qualified local public television stations. Non-duplication rights against public stations that are not “local,” as defined in this legislation, are preserved.⁶⁸

This demonstrates that Congress did not intend to expand the non-dup rights of NCE stations, and in fact sought to restrict them so as not to deprive local cable subscribers of a wide variety of noncommercial stations.

In sum, it is plain from the foregoing that Congress did not intend for commercial and noncommercial stations to have identical syndex and non-dup rights, as proposed by

⁶⁷ 47 U.S.C. § 535(f).

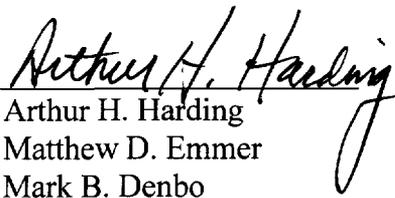
⁶⁸ H.R. Rep. No. 628, 102d Cong., 2d Sess. 100 (1992).

VTG. VTG's Petition would have the unintended consequence of upsetting clearly articulated congressional policy.

IV. CONCLUSION

VTG's Petition calls for sweeping changes to the Commission's rules, which would potentially affect all television stations, cable systems and various other MVPDs nationwide. However, VTG concedes that its interests only encompass the efforts of one LPTV station to gain carriage on one cable television system in Syracuse, NY. Obviously, such a sweeping rulemaking is an unnecessarily overbroad tool for addressing VTG's wholly private dispute. Furthermore, the Petition itself contains numerous fatal deficiencies. Accordingly, it should be dismissed or denied. Undersigned counsel have read the foregoing Opposition and to the best of such counsel's knowledge, information and belief formed after reasonable inquiry, this submission is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose.

Respectfully submitted,
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Date: December 19, 2001

DECLARATION*

I, Steve Miron, do hereby declare and state under penalty of perjury as follows:

1. I am the Vice President/General Manager of Time Warner Cable's cable television system serving Syracuse, NY.

2. I have read the foregoing Opposition to Petition for Expedited Rulemaking ("Opposition"). With respect to statements made in the Opposition, other than those of which official notice can be taken, the facts contained therein are true and correct to the best of my personal knowledge, information, and belief.

12/18/01

Date



Steve Miron

* Facsimile copy. Original to be filed on receipt.

EXHIBIT 1

CERTIFICATE OF SERVICE

I, Kyle A. Baker, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "Opposition to Petition for Expedited Rulemaking " was served this 19th day of December 2001, via first class mail, upon the following:

Paul Koplín
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Kyle A. Baker