

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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
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

**OPPOSITION OF THE NATIONAL CABLE & TELECOMMUNICATIONS
ASSOCIATION TO PETITION FOR RULEMAKING**

The National Cable and Telecommunications Association ("NCTA") is the principal trade association of the cable television industry in the United States. NCTA's members include the operators of cable television systems serving more than 90 percent of the nation's cable subscribers. They also include the operators of more than 200 cable program networks, as well as companies that provide equipment and services to the industry.

ARGUMENT

NCTA opposes the Petition for Expedited Rulemaking filed by Venture Technologies Group, LLC ("VTG"). VTG would like the network and non-network territorial exclusivity, syndicated exclusivity and network non-duplication protection rules to be extended to low-power, class A and noncommercial stations. While the Petition states that it seeks this result so that "the private contractual marketplace [is permitted] to operate freely and on a level playing field", its true ambition is just the reverse. It is seeking to enhance its assets, in this case a low-power TV station in Syracuse, acquired with the limitations inhering in the licenses of such stations, by government action. The FCC should not initiate this rulemaking.

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The FCC considered this matter in its 1988 Further Notice of Proposed Rulemaking and has declined through the years to provide this benefit. This status has not changed because Congress and the FCC have declined, despite repeated attempts by the low power industry, to upgrade the regulatory rights and privileges of low power stations to those of full power stations.¹

It is not necessary to detail the reasons that the FCC has declined to provide this upgrade. Suffice it to say that the FCC has long recognized differences among radio licensees – AM, FM, and TV – based on existing primary service, potential interference, and service needs. Low-power TV station licenses in particular were granted with limitations in mind as an extension of translator service. Congress in developing its must carry regime for analog signals afforded low power TV stations substantially less carriage rights – confirming what is obvious to all: low power stations do not enjoy the regulatory status of full-power stations.² When VTG recently acquired station WAWA-LP, Syracuse, it knew the limitations of the station’s license as to both cable and broadcast distribution. Its purchase price presumably reflected those limitations.

What WAWA-LP would most like is must carry status on the Time Warner Cable system in the relevant market. WAWA-LP has no must carry rights in this instance, however. To obtain them (a point not explained in VTG’s petition) would require a change by Congress to the Communications Act’s must carry provisions.

Instead of attempting to change Congress’s mind about low power status, VTG seeks to obtain somewhat the same carriage result by means of a new network non-duplication rule by getting the FCC to block the UPN signal which Time Warner has chosen to offer to subscribers.

¹ The Community Broadcasters Protection Act in 1999 permits LPTV stations meeting certain eligibility requirements to upgrade to “Class A” status, which provides for enhanced interference protection from full service stations. But even these stations have the same limited must carry rights as LPTVs.

² 47 U.S.C. §534(c).

Quoting the FCC decisions creating the network non-duplication rules, VTG argues that the justifications for the rules apply equally well to low power stations.³

But this comparison is simply not true. The FCC has never equated full power and low power stations, and Congress, as noted, has drawn a distinction in the must carry context that subordinates the rights of low power stations. So there is no reason to extend the network non-duplication or other full-power station rights to low power stations.

This result is neither unfair nor arbitrary. As noted, VTG presumably took the regulatory treatment of WAWA-LP into account in deciding on a purchase price. If low power stations are somehow as a group to be entitled to be upgraded, the FCC should consider the full range of impairments faced by these stations and judged which impairments to address in which order – not simply provide those improvements sought from time to time by individual low power broadcasters.⁴ And in reforming the low power regime, it would have to consider the additional responsibilities that would accrue with the upgrading of their status. Of course, there is no reason to do this – the low-power class of stations serve a distinct niche, different from the rights and responsibilities of full power broadcasters.

Further, VTG complains that it and UPN are being “jeopardized by the importation of distant superstations.”⁵ But there are countervailing policies beyond VTG’s ambition to obtain cable carriage and which argue against initiating an industry-wide rulemaking dealing with network non-duplication protection for low power stations. WSBK, Boston is a grandfathered superstation and therefore a cable system wishing to carry it needs no retransmission consent.

³ VPI Petition at 4.

⁴ The FCC rules, 47 C.F.R. §§74.731 *et seq.* list a host of technical limits on signal protection associated with low power TV service.

⁵ VPI Petition at 4.

However, were the imported UPN-affiliated station not grandfathered, UPN could by contract deny to the imported station any rights to agree to retransmission consent of its signal by a particular cable operator. So, if this arises elsewhere (not involving a grandfathered superstation) there is a market solution for low-powered stations.

If the distant signal, as here, is grandfathered, then the Congressional policy basis for grandfathering this signal is reason enough to reject VTG's petition. Retransmission consent is the rule, not the exception, for all non-must carry signals, distant and local. When Congress authorized the grandfathering of certain signals as exceptions, it acknowledged that certain signals had been serving cable audiences for some time and were entitled to exceptional status under the retransmission consent scheme. This is one of those cases. Indeed, the imported signal is from a northeastern major market and the station could be expected to be carrying regional sports and other material from time to time that has made the station a desirable part of the lineup in the Syracuse market.

Finally, it is worth emphasizing that the absence of network non-duplication protection does not "directly harm[] the citizens of Syracuse."⁶ First, the WAWA-LP signal is broadcast over the air – viewers can receive it without carriage from the cable system. Indeed, the narrowcast character of low-power stations in the early going of the service was perfectly suited for off-air reception; programming that would be very local, perhaps in a language that was spoken by a small, concentrated segment of a community, could be beamed by low-power as a unique video resource to the specialty community. The goal of developing low-power stations

⁶ Id., ¶2.

into “network affiliates,” while not forbidden by FCC rules, can hardly be ascertained by the orders creating the service.⁷

Second, if WSBK was forced off and replaced by WAWA-LP, there is no indication that cable viewers would be better off. The non-network programming attributes of a full-power station are the reasons a cable operator would prefer a distant to a local version of a UPN service. Indeed, Time Warner may be paying a fee under the copyright laws just to carry WSBK, whereas WAWA-LP offered to pay Time Warner – and still the cable operator chose the more expensive alternative. It appears obvious that the reason is Time Warner’s perception that the distant signal is of greater value to its subscribers. To undo that essential first amendment-protected judgment about content by imposing a network non-duplication rule here – that result would seem far more likely to “directly harm[] the citizens of Syracuse.”

CONCLUSION

For the foregoing reason we urge the Commission to reject VTG’s petition for rulemaking.

Respectfully submitted,



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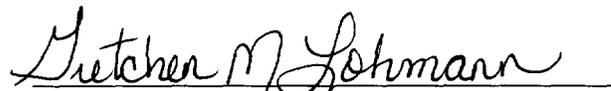
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⁷ “[L]ow power stations[‘]...small coverage areas lend themselves to programming to suit discrete groups in a community.” Inquiry Into the Future Role of Low Power TV Broadcasting and TV Translators in the National Telecommunications System, Report and Order, BC Docket 70-253, 51 Pike and Fisher R.R. 476, 485 ¶15(1982).

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, 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:

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