

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

In the Matter of)
)
Carriage of Digital Television Broadcast) CS Docket No. 98-120
Signals: Amendments to Part 76)
of the Commission's Rules)

**NATIONAL ASSOCIATION OF BROADCASTERS' AND
ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.'S
PARTIAL OPPOSITION TO THE PETITION FOR RECONSIDERATION
OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL**

The National Association of Broadcasters (“NAB”) and the Association for Maximum Service Television, Inc. (“MSTV”)¹ respectfully submit their partial opposition to the petition for partial further reconsideration of the Minority Media and Telecommunications Council (“MMTC Petition”) in the above-captioned proceeding. In the *Second Report and Order*,² the Commission erroneously concluded that the 1992 Cable Television Consumer Protection and Competition Act does not require cable operators to carry both the analog and digital signals and the free digital multicasting streams of local commercial stations.³

In its reconsideration petition, MMTC correctly observes that “Congress did not intend” the “primary video” that the Act requires cable operators to carry⁴ “to mean ‘one 24-hour

¹ NAB is a non-profit, incorporated association of radio and television stations. NAB serves and represents the American broadcasting industry. MSTV represents over 500 local television stations on technical issues relating to analog and digital television services.

² Second Report and Order and First Order on Reconsideration, *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005).

³ *Id.* ¶¶ 27, 33.

⁴ 47 U.S.C. § 534(b)(3).

program stream’ — a definition that would have been inconsistent with the nature of broadcasting both historically and as it is evolving today.”⁵ MMTC also “basically agree[s]” “that cable has more than sufficient channel capacity to accommodate at least some portion of local broadcasters’ multicast streams,” and “that without cable carriage, broadcast multicast channels will not succeed.”⁶ And MMTC further recognizes the significant benefits that multicasting will provide, including “the preservation of minority owned full power television broadcasting” and the “fulfillment of the promise of minority ownership as an engine of program diversity.”⁷ As NAB and MSTV noted in their reconsideration petition, all of these points would justify the Commission requiring cable operators to carry all multicasting streams.

In its reconsideration petition, MMTC has suggested that “the Commission should define ‘primary video’ as a programming stream, broken into 12-hour segments, . . . for which, in each 12-hour segment, at least a specified minimum number of hours of local content should be provided,” to qualify for cable carriage.⁸ NAB and MSTV oppose MMTC’s “12-hour local content segment” multicasting carriage proposal for at least two reasons. First, MMTC’s proposal is unsupported by the Cable Act. There is nothing in the Act that makes carriage of free commercial broadcasting streams a discretionary matter. Second, the proposal is impractical. MMTC recognizes that its proposal does not “recommend precise hourly requirements” as to the amount of multicasting programming that must be carried. In addition, it leaves “local content” undefined and makes no attempt to demonstrate how the Commission could administer and

⁵ MMTC Petition at 2.

⁶ *Id.* at 1 n.2.

⁷ *Id.* at 6-7.

⁸ *Id.* at 3. MMTC stated that it was “not yet prepared to recommend precise hourly requirements for this paradigm.” *Id.* at 3 n.7.

enforce this complicated scheme. This lack of definition and detail would pose serious practical difficulties for the Commission in formulating and administering MMTC's proposal.⁹

This failure to define "local content" is not insignificant. Depending on how one approaches such definition, a local content requirement could well raise constitutional concerns. In fact, in *Turner I*, the Supreme Court expressly held that the constitutionality of must-carry rested heavily on the fact that the Cable Act did not "favor or disadvantage speech of any particular content."¹⁰ Given the substantial evidence in the record about the extent to which broadcasters are using (and planning to use) multicasting streams to provide substantial amounts of programming that is local in origin and focused on minority communities,¹¹ it cannot reasonably be said that content-based mandatory carriage regulations are necessary to further the goals Congress sought to achieve in the Act. Indeed, due to the relative novelty of digital

⁹ MMTC also suggests that mandatory carriage of multicast streams should depend on whether broadcasters in a DMA use their digital signal to offer multicasting as opposed to one high-definition signal. That proposal is at odds with the Commission's well-established policy of allowing broadcasters "the freedom to innovate and respond to the marketplace in developing the mix of services they will offer the public" in deciding how to use their digital channels, in light of the fact that "broadcasters have incentives to discover the preferences of consumers and adapt their service offerings accordingly." Fifth Report and Order, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809 ¶¶ 41-42 (1997).

¹⁰ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 652 (1994). Further, "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations." *Id.* at 650; see Comments of the National Association of Broadcasters, MB Docket No. 03-15 (filed April 21, 2003), at 6-7.

¹¹ See Petition for Reconsideration of NAB/MSTV, CS Docket No. 98-120 (filed Apr. 21, 2005), at 20-24; see also Comments of Belo, MM Docket No. 99-360 (filed March 27, 2000), at 7-9 & App. A (major network affiliates devote one-third or more of total broadcast hours to non-entertainment programming).

broadcasting, the Commission should allow it to develop further before it considers imposing specific obligations.¹²

Service to a broadcaster's local community has always been a key element of the "public interest, convenience and necessity" that broadcasters are licensed to serve.¹³ The Commission, while maintaining the commitment to local service by broadcasters, has recognized that market forces are as effective as specific regulations in ensuring that broadcasters will air programs attuned to the needs of their communities.¹⁴ The Commission has also determined that efforts to require broadcasters to transmit a certain *quantity* of local programming as a condition of carriage may do little to improve the *quality* of the programming they do transmit; as the Commission has put it, broadcasters should be focused on "community problems, needs, and interests, and to [their] programming in response to them," rather than on meeting arbitrary quantitative standards.¹⁵ Indeed, the record in this proceeding demonstrates that, in planning

¹² See, e.g., *Notice of Proposed Rulemaking* in CC Docket No. 02-33, 17 FCC Rcd 3019, 3022-23 (2002) (in which FCC recognized that a "minimal regulatory environment" will promote "investment and innovation in a competitive market"); *TRAC v. FCC*, 801 F.2d 501, 518 (D.C. Cir. 1986) (court upheld FCC's determination not to apply certain broadcast public interest requirements to new teletext services offered by television broadcasters on grounds that the "burdens of applying" such obligations "might well impede the development of the new technology").

¹³ See, e.g., *Great Lakes Broad. Co. v. Fed. Radio Comm'n*, 37 F.2d 993, 995 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930); Report and Statement of Policy, *Commission En Banc Programming Inquiry*, 44 F.C.C.2d 2303, 2316 (1960) ("[T]he [broadcast] licensee must find his own path with the guidance of those whom his signal is to serve.").

¹⁴ See, e.g., Report and Order, *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Programming Requirements for Commercial Television Stations*, 98 F.C.C.2d 1075 ¶ 8 (1984) ("*Programming Policies Report and Order*"), *aff'd in rel. part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

¹⁵ Report and Order, *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 F.C.C.2d 419 ¶ 19 (1977), *aff'd sub nom. National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978). Moreover, the Commission has noted that programming of local interest need not necessarily be produced

multicast programming, broadcasters have been particularly focused on “community problems, needs, and interests.”¹⁶ And as the Commission has recognized, broadcasters operating in local markets are more likely able to respond to their viewers’ interests than would uniform regulatory obligations imposed on a national level.¹⁷ The Commission should therefore decline to place any condition on digital carriage rights that would undermine the flexibility of broadcasters to adapt to the needs of their local communities or raise the specter of content-based regulation.¹⁸

locally; for instance, programming about farming in drought conditions made in Kansas may very well be just as interesting and as relevant to farmers in Alabama suffering from those same conditions. *License Renewal Applications of Certain District of Columbia Broadcast Stations*, 77 F.C.C.2d 899 ¶ 17 (1980) (“[W]e have never held that only locally produced material can satisfy local programming obligations.”).

¹⁶ NAB/MSTV Reconsideration Petition at 20-24.

¹⁷ *See Programming Policies Report and Order* ¶¶ 89-90 (recognizing that “marketplace dynamics, not our regulations, are the primary determinants of licensee performance with respect to programming,” and expressing “confiden[ce] that existing and future marketplace forces will ensure the presentation of programming that addresses significant issues in the community”); Report and Order, *Deregulation of Radio*, 84 F.C.C.2d 968, 1023 (1981) (“Universally applied rules or guidelines cannot take into account differences among communities” and are often “unresponsive to the wants or needs of the public in individual markets”).

¹⁸ *See Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (noting that “[a]ny real content-based definition of the term [‘diverse programming’] may well give rise to enormous tensions with the First Amendment”); *see also Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) (finding that “Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content,” and in the absence of such a clear delegation of authority, the Commission lacks authority to mandate content). Since Congress scrupulously avoided any content-based conditions on must-carry, the Commission cannot take a different path.

CONCLUSION

For the foregoing reasons, the Commission should reject MMTC's petition for reconsideration to the extent it proposes that cable operators need not carry all non-subscription portions of local commercial digital broadcast signals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jerianne Timmerman, Associate General Counsel of the National Association of Broadcasters, hereby certify that a true and correct copy of the foregoing Partial Opposition to the Petition for Reconsideration of the Minority Media and Telecommunications Council was sent this 26th day of May, 2005, by first class mail, postage prepaid to the following:

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