

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)	MM Docket No. 01-235
)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets)	MM Docket No. 01-317
)	
Definition of Radio Markets)	MM Docket No. 00-244
)	
Ways to Further Section 257 Mandate and To Build on Earlier Studies)	MB Docket No. 04-228
)	

To: The Commission

COMMENTS OF THE COMMUNITY BROADCASTERS ASSOCIATION

Introduction

1. The Community Broadcasters Association (CBA) hereby submits these Comments in response to the Commission’s *Third Further Notice of Proposed Rule Making* (“*FNPRM*”) in the

above-captioned proceedings, FCC 07-217, released March 5, 2008.¹ CBA is the national association of the nation's Class A and Low Power Television (LPTV) stations and participates in administrative, judicial, and legislative proceedings to inform governmental officials of the needs and viewpoints of its industry.

2. CBA welcomes, agrees with, and heartily endorses the Commission's tentative finding that "cable carriage of Class A television stations could promote both programming diversity and localism, given that all such stations are required to originate local content."² These Comments will respond to the Commission's question about, and will provide support for, the authority of the Commission under the Communications Act to adopt rules requiring cable carriage of Class A stations.

Statutory Basis for Affording Mandatory Cable Carriage to Class A Stations

3. The statutory mandate for cable carriage of television broadcast stations is found in Section 614(a) of the Communications Act (47 USC Sec. 534(a)):

Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section.³

Section 614(c)(1) limits the Class A and LPTV carriage obligation to only one or two stations on each cable system:

If there are not sufficient signals of full power local commercial television stations to fill the channels set aside under subsection (b) of this section--

¹ The deadline for filing Comments was extended to July 30, 2008, in DA 08-1359, released June 16, 2008.

² *FNPRM* at par. 99.

³ Class A stations are not mentioned in Section 614, because that classification was created by Congress in Section 336(f) several years after Section 614 was enacted. Class A stations have been treated by the FCC the same as LPTV stations for purposes of Section 614.

(A) a cable operator of a cable system with a capacity of 35 or fewer usable activated channels shall be required to carry one qualified low power station; and

(B) a cable operator of a cable system with a capacity of more than 35 usable activated channels shall be required to carry two qualified low power stations.

Section 614(h)(2) further limits the carriage obligation to Class A and LPTV stations outside the top 160 Metropolitan Statistical Areas, communities of license with a population under 35,000, and cable systems in counties with no full power TV station, by defining “qualified low power station” in part as follows:

(E) the community of license of such station and the franchise area of the cable system are both located 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 such community of license on such date did not exceed 35,000; and

(F) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.

4. The overall impact of the statutory language impairs achievement of diversity of ownership, voices, and television programming by confining the must-carry obligation to only a few Class A and LPTV stations in rural communities and excluding the majority of stations, including those that serve minority and specialized audiences in medium and large markets.

5. A way to expand the carriage rights of Class A stations (with or without LPTV) without Congressional action amending the statute is to reclassify at least some of them as “commercial television” stations. The term “commercial television station” is defined in Section 614(h)(1)(A):

For purposes of this section, the term “local commercial television station” means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of Section 535(l)(1) of this title, licensed and operating on a channel regularly assigned to its community by the

Commission that, with respect to a particular cable system, is within the same television market as the cable system.

The elements of this definition are “full power,” “licensed and operating on a channel assigned to [a] community,” and the “same television market” (defined by the FCC as DMA) as the cable system. Channel “assigned to [a] community” is commonly interpreted as meaning being listed in the FCC’s Television Table of Allotments, Secs. 73.622 (digital) and 73.623 (analog) of the FCC’s Rules.

6. The Commission could work within the existing statutory framework by listing channels occupied by Class A stations in its Table of Allotments through a rule making proceeding. That would make those stations “assigned to [a] community” and would leave the only requirement to reclassify the selected stations as “full power.”

7. The term “full power” is not defined in the Communications Act, so there is no statutory obstacle to the Commission’s including or excluding any stations it wishes in or from that category. While Class A stations are limited to less power than what are now known as “full power” stations, the power limit is again established by rule rather than by statute; so it can be altered by the FCC without a statutory amendment.

8. There is ample precedent for establishing a wide range of power levels for “full power” stations. AM and FM radio are the prime example. AM stations range from 100 watts to 50,000 watts (*see* Secs. 73.21(a)(1) and (c)(1) of the Rules). FM, like TV, is divided into “full power” and “low power” categories. Full power FM channels are listed in a table of allotments, with maximum power levels ranging from 6 kilowatts to 100 kilowatts (*see* Sec. 73.211 of the FCC’s Rules) depending on station class. Power limits for LPTV stations (including Class A) are established in Sec. 74.35 and range from 3 kW VHF to 150 kW UHF (analog). “Full power” analog TV stations are limited to 100 kW VHF and 5,000 kW UHF (*see* Sec. 73.614).

9. Notably, the minimum power level for a “full power” TV station is only 100 watts (*see* Sec. 73.614(a)). Thus any Class A television station operating at the maximum power for its class could qualify as a “full power” station if the FCC classified it as full power and listed its channel in the TV Table of Allotments.

10 There is precedent in radio for allowing an existing station to upgrade to a higher class as a “minor” change, with no opportunity for competing applications, as long as the proposed higher class channel is mutually exclusive with the lower class channel (*see* Sec. 73.3573(a)(1)(ii)). Thus there is no reason why the Commission cannot allow Class A stations to upgrade to full power status, without Congressional action, if they remain on a mutually exclusive channel and agree to comply with all rules and regulations applicable to full power stations.⁴

11. The foregoing analysis demonstrates that the FCC has existing legal authority, without a statutory amendment, to allow Class A stations to migrate to full power status, be listed in the TV Table of Allotments, and consequently to qualify for statutory must-carry rights.

Importance of Cable Carriage

12. The importance of cable carriage to the economic viability of Class A stations is obvious and critical. Because cable television controls access to well over 65% of the nation’s television homes, failure to be carried on cable cuts off a majority of any station’s potential audience and thus has a strong adverse impact on the ability of Class A stations to succeed in the

⁴ To the extent that there is concern about allowing an upgrade of an LPTV station, which is a secondary spectrum user, to full power status with primary spectrum rights, that concern does not exist in the case of Class A stations, which are already primary spectrum users by virtue of an explicit Act of Congress, Sec. 336(f)(a)(ii) of the Communications Act.

marketplace.⁵ The number of households inaccessible to over-the-air signals exceeds 85% when telephone company systems like Verizon's FiOS and AT&T's U-Verse, along with satellite systems like DirecTV and Dish Network, are included.⁶ The availability of competitive delivery systems is of little benefit where the starting point is a maximum of less than 15% of the homes in the market.

13. On October 2, 2007, FCC Chairman Martin, addressing a Hispanic technology summit, stated: "as the Courts have recognized, cable carriage is necessary for broadcast channels to survive. Today, there simply is not an economic model by which a broadcaster can support a free programming stream that reaches only over-the-air households."⁷ CBA agrees with the Chairman and appreciates his understanding of real-world economics.

14. Several Class A stations have failed and had to close down their local service because of refusal of cable systems to provide analog carriage. An example is W24BW (Class A), Louisville, Kentucky, initially owned by African Americans and always dedicated to serving minority audiences, which had to fight vigorously in the local community to achieve cable carriage, and when "demoted" to carriage on a digital tier soon failed and survived only by entering into a time brokerage agreement with a full power television station.

⁵ It is widely understood that Section 614's must-carry requirements apply to video distribution systems operated by telephone companies. However, broadcast carriage rights on satellite systems are governed by the Copyright Act rather than the Communications Act; and no LPTV (or Class A) station has any satellite must-carry rights.

⁶ Virtually all cable and satellite installers disconnect, if they do not dismantle, over-the-air antennas when they install their services.

⁷ The Chairman's remarks are available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-277055A1.pdf.

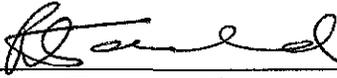
Conclusion

15. CBA believes that the Commission's statutory authority to provide mandatory cable carriage for Class A stations is clear. There is a lawful path to that result that is consistent with legal precedent, as well as sound public policy. CBA urges the Commission to proceed promptly to adopt rules to achieve that result, to give the public the benefit of more diversity of programming, diversity of ownership voices, entry opportunities for small businesses, and the advancement of the dissemination of ideas and creation of jobs on the local level.

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July 30, 2008

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