

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

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

To: The Commission, Office of the Secretary

COMMENTS OF ZGS COMMUNICATIONS, INC.

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Dated: July 30, 2008

Summary

ZGS Communications, Inc. (“ZGS”) hereby submits its comments in response to the FCC’s Report and Order and Third Further Notice of Proposed Rulemaking in the matter of *Promoting Diversification of Ownership in the Broadcasting Services*.

ZGS is a 100% minority-owned broadcasting company owning fifteen low power, Class A and full power television stations in twelve markets; all the ZGS television stations are Telemundo affiliates. ZGS was founded on, and embodies, the purpose of bringing local television service and programs to underserved minority audiences, specifically the Hispanic community. ZGS shares and has achieved the Commission’s longstanding commitment to fostering diversity and localism in broadcasting, as well as its goal of encouraging new entrants into the broadcast industry, particularly small businesses, minorities, and women.

ZGS submits that it is essential that Class A stations be afforded fair and non-discriminatory access to cable carriage on the same tier with other local television stations, *i.e.*, with broad viewership potential, if Class A stations are to remain a viable service. Class A stations are inherently the most “local”, having the only true requirement of all broadcast services to broadcast locally originated programming. Of great importance to fostering ethnic and viewpoint diversity in local television markets, Class A stations are also within the financial reach of minority-owned or small broadcasters wishing to serve underserved communities, but they generally have much smaller operating revenues and are often financially much more precarious than well established full power television stations. Such Class A stations cannot become or remain profitable, ongoing businesses offering high-quality locally originated programming without the fullest access to their potential audience on cable systems in their

communities, which ZGS believe can only be obtained by granting “must carry” rights for Class A stations.

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**COMMENTS
OF ZGS COMMUNICATIONS, INC.**

ZGS Communications, Inc. (“ZGS”) hereby submits its comments in response to the FCC’s Report and Order and Third Further Notice of Proposed Rulemaking¹ in the above referenced rule making proceeding. By the *Diversification Order*, the Commission took steps to increase participation in the broadcasting industry by new entrants and small businesses, including

¹ *In the Matter of Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rule Making, FCC 07-217 (rel. Mar. 5, 2008) (hereinafter “NPRM” or “*Diversification Order*”).

minority- and women-owned businesses. The related further *NPRM* also solicits comment on a number of additional measures designed to encourage diversity of ownership, access by new entrants, and a ultimately, a multiplicity of viewpoints, in the broadcast industry.

Of particular interest to ZGS is the Commission's suggestion that "must carry" rights for Class A television stations would promote the Commission's twin goals of programming diversity and localism.² Class A stations are the only stations with an explicit requirement to broadcast locally produced programming.³ And because their acquisition, capital and operating costs are substantially less than full power television stations they are within the financial reach of local minority and small business owners. But without fair access to the 70 to 90% of the audience in a market that views television by cable system carriage, Class A licensees, including new entrants, small businesses, and minority owners, simply cannot compete effectively or succeed.

As a minority-owned company that holds licenses for fifteen full-power, Class A, and low power television stations in markets around the country, ZGS can attest to the fact that Class A television stations are an excellent means for small businesses and minority owners to enter the ranks of broadcast licensees. It can also attest, however, that without the assurance of cable carriage, Class A television stations will remain second-class citizens with limited, conditional or even no assured access to the vast majority of the viewing audience in the community that subscribes to cable services. Under such circumstances, Class A stations also have a reduced ability to compete with full power stations or cable channels in the market for advertisers; financially they may well not be able to afford to produce the very local and relevant television programming that they would otherwise excel in providing and which their viewers are often most wanting to see; and even their financial survival as a business are at risk.

² *NPRM* at ¶ 99.

³ *See* 47 U.S.C. 336(f)(2)(A)(II).

As demonstrated below, the basis for Congress' decision to require "must carry" rights for local broadcast television stations, as well as the Supreme Court's subsequent conclusion that the "must carry" rules are constitutional, are directly applicable to Class A television stations. Like full power broadcast television stations in the early 1990s, the valuable public service that Class A stations currently provide is in jeopardy without assured access to cable carriage. Given that Class A stations must provide local programming and adhere to the rules applicable to full power stations it seems clear that if the Class A service had existed in 1992, Congress would have explicitly afforded it "must carry" rights as well. The number of Class A stations that would be entitled to carriage is relatively small, causing just a fraction of the burden created by "must carry" rights for full power stations. Thus, the benefit that would result to competition and diversity—both in terms of programming options and diversity of ownership—far outweighs the minimal impact on cable operators.

The Class A television service epitomizes diversity, localism, and competition. As an entry point for smaller broadcasters, particularly minorities, small businesses, and niche programmers, Class A stations collectively provide some of the most diverse and local programming of any broadcast stations. Therefore, ZGS recommends that Class A stations be afforded fair and non-discriminatory access to cable carriage on the same tier with other local television stations, i.e. analog basic or standard tiers that have broad viewership potential.

BACKGROUND

ZGS Communications, Inc., formerly known as ZGS Broadcasting, is a radio and television station group owner and operator that is 100% minority owned by founders Ronald Gordon and Eduardo Zavala. ZGS television stations are Telemundo network affiliates, and all ZGS stations broadcast Spanish-language programming.

ZGS owns and operates 15 Spanish-language television stations, representing the largest group of independent Telemundo affiliate stations in the country. Of the ZGS television stations, two are full power stations, KTDO(TV), Las Cruces, New Mexico (serving the El Paso, Texas market), and WWSI(TV), Atlantic City, New Jersey (serving the Philadelphia, Pennsylvania market); eight are Class A stations WRDM-CA, Hartford, Connecticut, WRIW-CA, Providence, Rhode Island, WRMD-CA, Tampa, Florida, WTMO-CA, Orlando, Florida, WMVJ-CA, Melbourne, Florida, WKME-CA, Kissimmee, Florida, WWDT-CA, Ft. Myers-Naples, Florida, and WZGS-CA, Raleigh, North Carolina; and five are low power stations, WDMR-LP, Springfield, Massachusetts; WTMU-LP, Boston, Massachusetts; WZDC-LP, Washington, D.C. (which can become Class A after the Commission's freeze is lifted), WZDT-LP, Richmond, Virginia, and ZGS is constructing new stations in Tallahassee (WWWF-LP) and Gainesville, Florida (W50DW). ZGS also owns three AM radio stations, two in the Tampa-St. Petersburg market and one in the Washington, DC market.

ZGS was founded in the early 1980s as a television production company specializing in creating programs and advertising for Hispanic consumers, and grew into a marketing and advertising agency. From that beginning, ZGS acquired low power television stations in several markets (Boston, Hartford, Springfield, Orlando, and Washington, DC were early acquisitions) and the principals used their production skills to bring a full service "look" to these stations and their programming, including locally originated Spanish-language newscasts and public affairs programming, all on a modest budget. ZGS also began its long affiliate relationship with Telemundo and has served to fill a void in these markets for high quality, local Spanish-language programming.

In this decade, with its broad base of low power and Class A stations in place and, of great importance, providing cash flow able to support bank financing, ZGS has been able to acquire

additional low power or Class A stations in Fort Myers-Naples, Raleigh, Richmond, Orlando, Gainesville, and Tallahassee, and two full-power television stations in the El Paso, Texas, and Philadelphia, Pennsylvania television markets, respectively.

ZGS therefore stands as one of the most successful examples of how minority-owned television broadcast businesses offering diverse programming for specific underserved audiences can be built, by acquisition of Class A television stations, such stations in turn providing the financial platform and cash flow for further expansion with credit facilities, including to ownership of full power stations, as ZGS has done. This example underscores the vital importance of lower cost Class A television stations as potential building blocks for such businesses.

From its inception, ZGS has not just been about business, but more importantly about service to the Hispanic community; first in its television programs, marketing and advertising, and then using the unparalleled power of television and radio broadcasting to reach an audience, in particular with Spanish-language news and public affairs programming that informs that audience, provides a valuable tool for organizing and publicizing community events, and serves as an important community resource. One specific example is that ZGS stations are often the first and best source of Spanish language emergency information in the event of a local natural disaster.

As a local broadcaster, ZGS has become integral to the communities that it serves. ZGS has created very successful Spanish-language local newscasts on its stations in Washington, DC, and Orlando, Florida, which air daily at 6 PM and 11 PM, and anticipates the launch of similar newscasts in El Paso, Texas with full power station KTDO(TV), and in Tampa, Florida with Class A station WRMD-CA within a year. Beyond local news, ZGS stations in all markets also produce and broadcast a significant amount of community oriented public affairs programming, and they provide culturally relevant programming for particular segments of the Hispanic community, for

example, programs originating in Puerto Rico, El Salvador, or the Dominican Republic that is attuned to these communities.

From its experience as a broadcaster, ZGS has come to appreciate and to utilize the value of its programming to organize and publicize community events, and to provide educational, cultural, and social support to the Hispanic population in its markets. ZGS's trademark event held in numerous markets is a one day grass roots community fair for Hispanic families known as "*Feria de la Familia*". At these events, there is not only entertainment, food booths and concessions, in addition to important information available about housing and home ownership, medical and child care, and educational, financial, and employment opportunities. Last year alone, nearly 70,000 people attended these events hosted by ZGS. The 2008 schedule is: WWDT Ft. Myers-Naples, June 29th; WTMO, Orlando, August 16; KTDO, El Paso, September 13; WRMD, Tampa, October 5; and WZDC, Washington, DC, November 2. ZGS stations also participate in "Vota Por Tu Futuro", a local effort to compliment the Telemundo Network's campaign for voter education, registration, and turnout that emphasizes local political races and ballot initiatives, and ZGS itself offers "La Buena Vida", a comprehensive health and lifestyle outreach campaign, and "Leer Para Vencer", a campaign that promotes reading in the Hispanic family.

As a result of its programming efforts and its ongoing community outreach efforts, ZGS maintains a close and continuing involvement with its communities. Additionally, ZGS's employees, now almost 200 in all, are in most cases from the respective station's community themselves and therefore reflect and understand its interests, values and needs. Overall, 94% of ZGS employees are minority group members, and 92% of its management staff is drawn from minorities. ZGS is therefore a primary source of training and development for entry level minority staff who go on to be television industry professionals, with ZGS or elsewhere.

With such a proven record of community service, ZGS can state without hyperbole that it does not do local news, public affairs programming, and community service events to fulfill a regulatory obligation, but because the very purpose of ZGS and its stations is to inform and serve the Hispanic community, and owning and operating of television and radio stations is the essential means to that end. Moreover, such activities and community-responsive programming are necessary to create a viable product in a competitive media landscape. ZGS therefore not only exemplifies a path to minority ownership of broadcast stations, but its success and focus on community service also show the benefits that can flow to a community when minority owners use the power of broadcasting to serve these communities – the very purpose of the Commission’s public interest, localism, and diversity policies.

Despite its patient path to success as a television group owner, and its aspiration to do even more community service in all of its markets, ZGS faces financial constraints common not only to minority-owned broadcasters but to many other smaller broadcasting companies that are competing with the largest group owners, and with other media, lately including web based services. In particular, because Class A stations are not now entitled to cable carriage, ZGS has had to negotiate for carriage on cable systems as best it can, in an effort to access the vast majority of its audience. Without the right to require carriage, ZGS’s stations are subject to discrimination by cable systems and hostage to their dominant market power. If the Class A television service is to survive as a viable service and effective entry point for new broadcast licensees and small business owners, then the Commission must extend cable carriage rights to Class A television stations.

DISCUSSION

I. The Commission Should Expand Opportunities for Class A Stations in Order to Encourage New Entrants, Small Businesses, and Minority- and Women-Owned Licensees, as well as Service to Underserved Audiences.

The *NPRM* seeks input on ways to encourage ownership diversity and new entry in broadcasting in order to ensure the widest dissemination of information from diverse and antagonistic sources.⁴ As a small business and a minority broadcaster with a long tradition of serving an “underserved” audience, *i.e.* Hispanic viewers, and the licensee of numerous LPTV and Class A stations, ZGS submits that one of the best ways to encourage ownership diversity and to increase participation by new entrants and small business owners in the broadcast industry is by ensuring that Class A stations providing local service can survive and compete effectively; in particular, the Commission should focus its efforts on ensuring that these stations can obtain cable carriage on tiers where other local television stations are seen in order to compete on a level playing field with these stations.

In November 1999, Congress adopted the Community Broadcasters Protection Act of 1999 (“CBPA”), establishing the Class A television service. Through the CBPA, Congress recognized and formally protected the spectrum of then-existing low power television stations that broadcast an average of at least three hours of locally produced programming per week, operated for at least eighteen hours per day, and followed all regulations for full-power stations.⁵ Thereafter, the Commission promulgated rules implementing the CBPA and governing Class A television stations. Nowhere in the CBPA or the Commission’s rules, however, did Congress or the Commission address the issue of cable carriage. Furthermore, the Cable Television Consumer

⁴ *NPRM* at ¶¶ 1-2.

⁵ § 5008 Publ. L. No. 106-113, 113 Stat. 1501 (1999), Appendix I, *codified at* 47 U.S.C. § 336(f).

Protections and Competition Act of 1992 (“1992 Cable Act”),⁶ which mandated must carry rights for full power television stations, dealt only with full-power local television stations and low-power television stations, and did not contemplate Class A stations, which were not created until the end of that decade. Thus, despite being *primary* television stations and, by definition, *local* television stations, Class A television stations do not have an explicit, statutory must carry right.

Class A stations are unique among broadcast stations as the only service with a required minimum level of locally produced programming.⁷ Cable carriage on par with other local television stations is an absolute financial necessity for Class A stations, first for survival of their businesses, but particularly for those stations seeking to do local news and public affairs programming, which are inherently expensive to produce and which must reach a wide audience to be feasible, *i.e.* to attract sufficient advertiser support to maintain these programs. Thus, ZGS recommends that Class A stations be afforded fair and non-discriminatory access to cable carriage, *i.e.* “must carry” on the same tiers as all other local television stations. and

While ZGS has been moderately successful in obtaining retransmission consent agreements with cable system operators in its markets – a testament to the local and high-quality programming provided by ZGS stations – this is not always the case. Such agreements can be very costly to enter into in terms of inventory committed to cross promotion or other typical retransmission consent terms and conditions imposed by cable system operators. Worse, with their substantial leverage in retransmission consent negotiations, cable system operators can dictate that a particular minority programming television station be placed on a digital tier, apart

⁶ Publ. L. 102-385, 106 Stat. 1460, *codified at* 47 U.S.C. § 534.

⁷ Class A stations are the only broadcast stations that are required by law to originate any locally produced programming, namely 3.0 hours of such programming per week, on average. 47 U.S.C. 336(f)(2)(A)(II).

from other similar programming and mainstream network programming. Such isolation can have a tremendous adverse effect on viewership and revenues.

This has happened to ZGS recently in Orlando, Florida, one of its most important markets and we speak from direct experience on this point. ZGS has invested heavily in the Orlando market over time, acquiring three Class A stations in order to approximate the over the air viewership it would have with a full power station. ZGS also invested heavily in its local news capabilities, and the ZGS late evening newscast has been rated first among Spanish language stations. The primary ZGS station, WTMO-CA, was carried on an analog standard tier for years, but was suddenly and arbitrarily moved to a premium digital tier by one cable system operator that is dominant in the Orlando market. After being moved to the premium digital tier WTMO-CA has experienced between a 20% and 50% loss in viewership and overall station revenue has declined 25%. The top rated WTMO-CA newscast is now seen by so few people after removal to the digital tier that it does not even register in the most recent Nielsen surveys. As a result, ZGS has been forced to cut its news staff by 25%.

Of eighteen available broadcast television stations in the DMA, only eight, including WTMO-CA, produce local news, only five, including WTMO-CA, produce other local programming, and only one is minority owned: WTMO-CA. The cable system operator chose to remove WTMO-CA from the analog tier where all the other local channels are positioned, but yet retained, among others, a Chicago super station, three shopping channels, a food channel, a garden channel, and five sports channels, none of which to our knowledge has any local content.

ZGS urges the Commission to consider that, in a post-DTV transition environment where there may be even more television programming channels vying for favorable placement on cable, it is appropriate and necessary for the Commission to enact “must carry” status for Class A television stations that would prevent cable system operators from arbitrarily assigning minority

programming stations for underserved communities to less accessible tiers than mainstream network channels, tiers where minorities must pay extra to see their important local news and public affairs programming that more mainstream audiences receive on their basic analog tier.

Ultimately, as the Commission recognizes, successful television broadcasting relies on the willingness of companies or even individuals to obtain financing, buy or build stations and their expensive physical plants, and then operate them profitably, including as an essential component the ability for their broadcasts to be seen by audiences and supported by advertisers. The best incentive and enhancement the Commission can provide to the Class A television service is to assure would be developers of new stations and current owners that they can have a viable business by being able to reach fully the communities they intend to serve.

II. The Commission has Authority Under the Communications Act to Extend “Must Carry” Rights to Class A Television Stations.

The Communications Act of 1934, as amended, embraces “all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio.”⁸ The FCC correspondingly enjoys “a comprehensive mandate . . . [with] not niggardly but expansive powers.”⁹ The Supreme Court established in *United States v. Storer Broadcasting Co.* that the FCC has broad rulemaking authority under sections 154(i) and 303(r) of the Communications Act to regulate where Congress has not specifically authorized the FCC to act.¹⁰ Section 154(i) states that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the

⁸ 47 U.S.C. 152(a).

⁹ *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968).

¹⁰ *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956) (Since §§ 154(i) and 303(r), grant the FCC general rule-making power not inconsistent with Act or law, rules adopted by Commission containing limitations against licensing not specifically authorized by Act were not ipso facto beyond the Commission's rule making authority).

execution of its functions.”¹¹ Sections 303 and 303(r) provides that “the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [make] such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act].” Together, these provisions authorize the Commission to issue regulations “reasonably ancillary to the effective performance of [its] various responsibilities.”¹²

The Supreme Court has previously upheld the Commission’s authority under 303(r) and 154(i), including in the context of the FCC’s promulgation of regulations promoting multiple viewpoints and diversity of ownership. In *Storer Broadcasting Co.*, the Court upheld the FCC’s reliance upon 303(r) and 154(i) for multiple-ownership rules that placed limitations on the total number of stations in each broadcast service a person may own or control.¹³ Referring to Section 303(b) and 154(i), the Supreme Court later affirmed in *FCC v. National Citizens Committee for Broadcasting* that, “[i]t is now well established that this general rulemaking authority supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable.”¹⁴ In *National Citizens Committee for Broadcasting*, the Court noted that it previously upheld the FCC’s authority under 303(r) and 154(i) to make rules “based on the

¹¹ 47 U.S.C. § 154(i).

¹² *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

¹³ *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956)

¹⁴ 436 U.S. 775, 793 (1978) (citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)). In *National Citizens Committee for Broadcasting*, the Court upheld the FCC’s regulation ordering divestiture, where a company owned a radio or television broadcast station and a daily newspaper in the same community that had an effective monopoly – economically and in the local marketplace of ideas.

Commission’s policy of promoting diversification of ownership,”¹⁵ just as it seeks to do in the instant rule making proceeding.

In addition, in *Metro Broadcasting v. FCC*, the Court upheld the FCC’s minority ownership policy, which was premised in part under Section 303, where the Commission awarded enhancement for minority ownership in comparative proceedings for new licenses.¹⁶ The Court reasoned that the action was supported by Congress’ recognition of extreme under-representation of minorities and their perspectives in broadcast media.¹⁷ The Court also explained that the FCC’s minority ownership program had been approved by Congress, under Sections 303, 307, 309, and 309(i)(3)(C), and that the program passed intermediate scrutiny.¹⁸ Although subsequently overruled in part by *Adarand Constructors v. Pena*,¹⁹ the Court did not overrule the FCC’s statutory authority to enhance diversity generally, only insofar as such an affirmative action program failed strict scrutiny. In the present context, granting Class A stations “must carry” rights would undoubtedly benefit small business entities, including those owned by minorities and women, however, it does not constitute an affirmative action program and does not involve racial or gender classifications. Thus, the Commission’s statutory authority to promote diversity of ownership affords the FCC further authority to grant Class A stations “must carry” rights.²⁰

Beyond the examples discussed above, the FCC has also employed sections 303(r) and 154(i) to promulgate numerous rules ranging from cable system rules to the establishment of the low power FM radio service. Thus, it is clear that the Commission has broad authority under the

¹⁵ *Id.*

¹⁶ 497 U.S. 547 (1990).

¹⁷ *Id.*

¹⁸ *Id.* at 563.

¹⁹ 515 U.S. 200, 227-31 (1995).

²⁰ 497 U.S. 547, 566 (1990) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1943)).

Communications Act to regulate in the public interest in a manner that is not inconsistent with the Communications Act, as demonstrated by the Commission's previous application of 47 U.S.C. sections 154(i) and 303(r), and the approval of that authority by reviewing courts. Such authority is more than sufficient to permit the Commission to extend "must carry" rights to Class A television stations as proposed in the *NPRM*.

III. The Supreme Court's Decisions in *Turner I* and *Turner II* are Directly Applicable to the Class A Service and Support "Must Carry" Rights for Class A Stations.

As the Supreme Court stated in *Turner Broadcasting Systems, Inc. v. FCC (Turner I)*, "it has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."²¹ This is precisely the policy goal driving the Commission's actions in the *Diversification Order* and related further *NPRM*. As the Court, Congress, and the Commission have long recognized, fostering competition and diversity in media services best serves the public interest.

The Commission need not look to its inherent authority alone in determining whether it can grant "must carry" status to Class A stations, but may also rely on the authority of two Supreme Court cases – *Turner I* and its companion case *Turner II*²² – that balanced the needs of local television stations to obtain assured cable carriage against the First Amendment based arguments of cable system operators that they should control the content of the programming they distribute. It seems incontrovertible that if the public interest supports "must carry" for full power television stations because localism is such an important value, as matter of law, as well as policy, this should also and perhaps more so be the case with a service that is even more local, by express statutory requirement, than the full power service.

²¹ 512 U.S. 622, 663-64 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 469, 668 n.27 (1972) (plurality opinion) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945)); *Id.* at 3.

²² *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997) (*Turner II*).

Turner I and *Turner II* contain more than just quotable policy statements; these two decisions reviewed and directly upheld the statutory mandate embodied in the 1992 Cable Act²³ that cable systems must afford “must carry” rights to local television stations.²⁴ The 1992 Cable Act was a recognition by Congress that regulations were needed “to prevent cable operators from exploiting their economic power to the detriment of broadcasters,” and “to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content.”²⁵ In upholding the “must carry” rules, the Supreme Court affirmed that logic, and found that the statute was narrowly tailored to serve the government’s legitimate interests,²⁶ and hence did not violate the First Amendment.²⁷ The Court found that protecting free, local over-the-air broadcasting was an important governmental interest,²⁸ and concluded that Congress had substantial evidence that local over-the-air broadcasting was in genuine jeopardy, and that the “must carry” provisions were a narrowly tailored remedy.²⁹

In particular, the Court found that the “must carry” provisions served three important government interests: 1.) “preserving the benefits of free, over the air local broadcast television;”³⁰ 2.) “promoting the widespread dissemination of information from a multiplicity of sources;”³¹ and 3.) “promoting fair competition in the market for television programming.”³²

²³ Pub. L. 102-385, 106 Stat. 1460, *codified at* 47 U.S.C. § 534.

²⁴ 47 U.S.C. § 534(a).

²⁵ *Id.* at 643.

²⁶ *Turner Broadcasting Sys., Inc. v. FCC*, 910 F. Supp. 734, 751-52 (1995).

²⁷ *Turner II* at 185.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 189-90 (citing *Turner I*, 512 U.S. at 662-63).

³¹ *Id.*

³² *Id.*

Ultimately, these important interests outweighed the burden imposed on cable systems to make a portion of their channels available for the carriage of local television stations.

In reaching that decision, the Court concluded that Congress had substantial evidence to support its conclusion that “that broadcast stations dropped or denied carriage would be at a serious risk of financial difficulty,” and “would deteriorate to a substantial degree or fail altogether.”³³ The Court cited, among other things, Congress’ legislative findings that:

Absent the reimposition of [must-carry], additional local broadcast signals will be deleted, repositioned, or not carried³⁴ with the end result that ‘the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.’³⁵

The Court also credited Congress’ finding that “the structure of the cable industry would give cable operators increasing ability and incentive to drop local broadcast stations from their systems, or reposition them to a less-viewed channel.”³⁶ Moreover, the Court found that Congress had substantial evidence that the “viability of a broadcast stations depends to a material extent on its ability to secure cable carriage. Congress saw a ‘direct correlation [between] size in audience and station [advertising] revenues,’ and that viewership was in turn heavily dependent on cable carriage.”³⁷ Therefore, for all these reasons, the Court upheld Congress’ determination that ‘absent legislative action, the free local off-air broadcast system is endangered.’³⁸

Although the Class A service did not exist at the time the 1992 Cable Act was implemented or when the Supreme Court affirmed the constitutionality of the Act, if the service had existed, it would have undoubtedly been afforded “must carry” rights. The very harms that

³³ *Turner II*, 520 U.S. at 209; *Turner I*, 512 U.S. at 667.

³⁴ CBPA § 2(a)(15); § 2(a)(8)(D).

³⁵ *Turner II*, 520 U.S. at 191 (citing § 2(a)(16)).

³⁶ *Id.* at 197-98.

³⁷ *Id.* at 209.

³⁸ *Id.* at 209.

Congress documented with regard full power television stations in the 1990s are precisely the harms facing Class A stations today – stations that in virtually every other regard are on par with full power stations. In fact, given that cable penetration since the *Turner II* decision has only increased and that cable distribution is even more crucial to the provision of television programming than at the time Congress felt obligated to step in and protect free, over-the-air broadcast television in the 1992 Cable Act, these harms are even more pronounced than before. “Must carry” rights are absolutely essential today for free, over-the-air Class A broadcast television stations to survive in today’s marketplace. Without cable carriage, Class A stations are broadcasting to only the fraction of the viewers in their service area who receive signals over the air, rather than by cable or satellite, a situation that Congress found threatened the continued survival of broadcast television in 1992.

Moreover, without “must carry” protections, cable operators are free to – and sometimes do, as demonstrated above – subject Class A stations to discriminatory treatment by segregating their channels from the other free, over-the-air stations, by moving them to digital tiers, or pay tiers, and by extracting concessions for carriage not required of other stations in the market. Again, these harms are identical to the circumstances that lead to the establishment of the current “must carry” obligations for full power stations.

Ultimately, the same important governmental interests identified by the Court and Congress as justification for “must carry” rights for full power stations would be served by extending carriage rights to Class A stations. Presently, Class A stations are the only broadcast stations required to broadcast a minimum amount of locally produced programming. There is no more truly local station than a Class A station, as ZGS’s own stations can attest. Without “must carry” rights, the benefits of the free, over-the-air local service provided by Class A television stations are in jeopardy, and along with them the viability of the entire service. Any reduction in

the number of Class A stations as a result of the failure to obtain cable carriage is contrary to the Commission's stated goals of promoting the widespread dissemination of information from a multiplicity of sources and fair competition in the market for television programming.

Accordingly, the Commission should apply the lessons learned by Congress leading it to enact the "must carry" legislation, and the conclusions reached by the Supreme Court upholding it to find that the preservation of Class A television mandates that such stations be granted "must carry" rights. The additional burden that would be imposed on cable operators as a result would be negligible, as detailed below.

IV. The Burden on Cable Operators is Minimal as the Number of Class A Stations that would be Entitled to Carriage is Relatively Small.

As *Turner I* and *Turner II* amply demonstrate, the fundamental practical argument about "must carry" status for full power television stations was (and is for Class A television stations) whether the burden on cable systems and their capacity imposed by "must carry" rules was justified by the gains to the public in receiving locally originated programming. Serious and objective consideration of a measure to extend "must carry" status to Class A television stations should therefore include discussion and analysis of the likely practical effects on cable systems that would be providing cable carriage for Class A television stations. For reasons that follow, ZGS believes such a measure would not cause a significant problem for modern cable systems, balanced with the public interest benefit of particularly diverse and local programming available from Class A television stations.

As an initial matter, the cable world has changed dramatically since the *Turner* cases were litigated. At the time of *Turner I*, the Court noted that: "More than half of the cable systems in operation today [1994] have a capacity to carry between 30 and 53 channels. And about 40% of

cable subscribers are served by systems with a capacity of more than 53 channels.³⁹ The most recent data available now show that the average cable system in the United States offers 118 channels, easily doubling the 1994 average capacity.⁴⁰ The average number of over-the-air channels is 17, and seems to be declining slightly rather than rising. All told there are 1,759 full power television stations in the United States, as of March 2008 FCC figures; of these, 1379 are commercial stations.⁴¹

Class A television stations were first authorized in 1999, and the first Class A television licenses were issued in 2000. This is therefore quite a young service, and its full future development lies ahead of it, but there are already some trends evident that bear on the question of “must carry” status for this service, although we are not aware of any authoritative study on this subject, and present some statistics here based on original research.

Currently, there are approximately 550 licensed Class A television stations, a few of which are in silent status.⁴² Nielsen has identified 210 television markets in the United States, so as a pure average, there are about 2.6 Class A television stations per market, and about 11 per state. On average, if all Class A stations obtained “must carry” status, the 2.6 stations per market added to the current average of 17 television stations per market would increase the average “must carry” burden by only 15% in a typical market.

³⁹ *Turner I* at 508 (internal citations omitted).

⁴⁰ Robert Marich and John Eggerton, “*Nielsen Finds Drop in Over-the-Air Channels*”, *Broadcasting & Cable*, June 6, 2008, citing a recent study by Nielsen Media Research.

⁴¹ “*Broadcast Station Totals as of December 31, 2007*”, FCC News Release, released March 18, 2008.

⁴² *Id.*

However, examination of the more detailed data shows that the distribution of Class A television stations is much more “lumpy” than uniform. As an example, these are the markets with the greatest number of Class A television stations:

Market(s)	Class A Stations
Santa Barbara-Santa Maria-San Luis Obispo, CA (Market #122)	17 Class A stations
Austin TX (Market #51); Birmingham AL (Market #40); Phoenix AZ (Market #12)	10 Class A stations
Corpus Christ, TX (Market #129); Syracuse, NY (Market #80)	9 Class A stations

These six markets alone account for 12% of all Class A stations. There are an additional six markets with eight Class A stations each, and ten markets with seven Class A stations each. Altogether, these 22 markets, about 11% of all markets, have 183 of the 550, i.e. 33% of Class A stations. With this high concentration in just a few markets, it is inevitable that the other 188 markets have many fewer Class A stations per market– the average of the remaining markets is two Class A stations per market, and within this range, some markets will have four or five Class A stations, and many have just one, or none. Therefore, as an initial observation, the impact of granting Class A television stations “must carry” rights would be predominantly felt in a small number of the overall total of US markets.

A second type of valuable analysis is how Class A television stations are being used, in practice. Again, there are no definitive statistics available. However, as a general matter, one prevalent use of Class A television stations is to solve the topographical and geographical challenges of certain markets – the Santa Barbara-Santa Maria-San Luis Obispo market being an excellent example, as it is sizeable, about 100 miles long, with numerous hills and valleys.

A similar situation is found in the Austin market where Lin Television has two full power stations KXAN-TV and KXAM-TV, broadcasting NBC programming, plus one Class A station broadcasting NBC programming. Lin Television owns another 7 Class A stations spread out through the Austin market which broadcast Telefutura programming.⁴³ This particular market has several communities of license for Class A stations that are more than 100 miles apart in it, both on an east west axis and on a north south axis.

There are numerous other examples where Class A television stations rebroadcast full power station programming on a smaller scale, for instance in Phoenix, Arizona where KAZT-CA, located on South Mountain in Phoenix, rebroadcasts the signal of KAZT-TV, licensed to Prescott, Arizona – there is a 7,500 foot mountain directly between these cities in the same market; or in Louisville, Kentucky, where WBKI-TV uses a site across the Ohio River from Louisville to “fill in ” their over the air signal into central Louisville from a different direction.

Another type of use for multiple Class A television stations in a market is to attempt to cover an entire market “over the air” with Class A signals alone. For example, ZGS owns and operates three Class A television stations in the Orlando-Daytona Beach-Melbourne market, all broadcasting Telemundo programming over the air to the primary population centers of this hyphenated market. And as noted above, Lin Television covers the Austin market with seven signals broadcasting Telefutura programming.

The purpose of raising these practical uses by a variety of Class A television station operators is to point out that in most of these cases, involving a significant proportion of all Class A stations, the presence of several such stations in a single market does not equate to the proposition that each of these stations individually would exercise “must carry” rights in the market. These stations are functioning horizontally, i.e. covering overlapping territory within a

⁴³ *BIAfn Television 2008 Yearbook* (2008) at 11.

market, either for full power stations or with other Class A stations, but there is only one basic programming stream involved, and therefore likely only one cable channel would be occupied if one “must carry” choice was available to the licensee in a specific market.

This duplication factor can not be readily quantified and could change over time, but as a probably low estimate, approximately twenty five percent of all the Class A stations duplicate the signal of a full power station (already receiving “must carry” status as a full power station) or another Class A television station in that market. This therefore works a significant reduction in the number of cable channels that would be used by Class A stations with “must carry” rights, particularly in the markets where Class A stations are most concentrated.

Second, as a general means of analysis, according to data provided by BIAfn, of the 550 Class A television stations, approximately 80, *i.e.* 15%, already carry the primary six English language networks.⁴⁴ These stations (or their full power affiliates in the same market) are highly likely to be carried by cable systems already, because the programming is in popular demand. At this point, without established “must carry” rights, these arrangements are “retransmission consent” agreements, giving the cable systems very substantial bargaining power with these stations for “in kind” considerations, *i.e.* channel positioning on the analog or digital tier, or cross-promotion agreements. But if “must carry” is adopted for Class A television stations, the impact on cable systems in terms of additional channels devoted to Class A English language network programming is likely to be marginal in terms of channel capacity, because the great majority of these stations are already being carried today.

Similarly, at least 80 of the 550 Class A stations are carrying Spanish language programming from Telemundo, Univision, Telefutera, or Azteca.⁴⁵ While “retransmission

⁴⁴ See BIAfn Media Access Pro Television Database (2008).

⁴⁵ *Id.*

consent” agreements for these stations may not equal the level of the English language network affiliates, they are fairly likely to have cable carriage by this means, but not the more secure carriage rights that would come with “must carry” rights.

From this point of view, estimating that 150 Class A stations (probably a low estimate), are already carried on cable systems, this factor also mitigates the likely impact of a “must carry” mandate for Class A stations, reducing the impact to about 400 additional stations in about 200 markets, i.e. about two additional cable channels per market, on average, that would be dedicated to Class A carriage, though this would vary from market to market, as discussed above. The Class A station network affiliates already carried under retransmission consent agreements, estimated at 150 stations, and the stations where there is significant duplication of Class A programming in the market, also about 150 stations, overlap to some degree, but considering both these factors together, the number of Class A stations that would receive new “must carry” carriage if adopted by the Commission may be from 60% to as low as 50% of all Class A stations, and therefore closer to one channel per market to be added by a “must carry” requirement.

Finally, our review of the current status of Class A television station practices should describe the current diversity of programming available to the public on these stations. As shown above, about 15% are English language network affiliates, and about 15% are Spanish language network affiliates. Approximately 80 Class A stations -- also 15% -- describe themselves as religious broadcasters. Another thirty five stations subscribe to recognized programming sources that are not networks, spanning Ion stations, stations playing MTV or Home Shopping for much of their programming, and Retro Television or Resort Television, for instance, and there are at least ten colleges and universities with commercial licenses.⁴⁶

⁴⁶ See BIAfn Media Access Pro Television Database (2008); *BIAfn Television 2008 Yearbook* (2008).

For the remaining Class A stations, about 265 of them, there is little more reliable data available on what type of programming they are broadcasting, but we know anecdotally there is a wide variety of non-Spanish ethnic programming on the air, particularly in more urban areas, such as Korean, Chinese or Indian, brokered programming with many different sources, and original news programming -- for instance, WZBN-CA, Trenton, New Jersey, the only commercial television station providing local news for the New Jersey state capital (while the majority of New Jersey full power stations in fact serve either Philadelphia or New York City).

Another indication of the diversity of ownership of Class A television stations is to observe their pattern of ownership as contrasted to the ownership of full power television stations, which yields surprising results. Of 550 Class A television stations, only 2 are licensed to English language network owned and operated companies, 57 are owned by station owners in the "top 25" television station groups, and 43 are owned by smaller multiple full power television station owners, totaling only 102, i.e. less than 20%, for the categories which hold such a preponderance of full power stations. Of the 550 Class A stations, 47 are owned by private individuals, i.e. without any corporate or similar business entity form. The remaining stations are owned by either Class A groups, i.e. multiple class A stations under common ownership, which is frequent, or by companies or organizations (such as religious broadcasters) that own singleton stations. Overall, Class A television ownership has not been "cornered" by the large media companies that own full power stations, and the Commission's association of Class A television stations with broad diversity of ownership is in fact accurate.

In summary, based on the information presented above, "must carry" access for Class A stations would cause an average market cable system operator (with an average of 118 cable channels) to use about two additional channels in the typical market for Class A stations, some a little more, some less. In markets where there are many Class A stations, the reason that there are

that many stations also suggests strongly that they duplicate the programming of full power televisions stations in these markets that already have “must carry” status, or that they are operated as a chain of Class A stations within that market, all showing substantially the same programming; these stations would not all need or use “must carry” rights. Overall, about 30% of Class A stations, *i.e.* 160 of 550 total, are most likely already carried by cable systems on a retransmission consent basis because they offer English or Spanish language network programming. The mostly independent Class A stations (*i.e.* non-network) providing local programming are therefore the most likely to benefit from must carry status, and probably the most likely to be financially harmed if they do not have assured access to cable systems.

ZGS urges that in its consideration and balancing of the competing claims by cable systems and Class A station operators relating to the “must carry” issue, the Commission should not rely on generalized appeals about industry speech rights or broad brush assertions about the facts. Instead the Commission should primarily focus on the unique aspects of the Class A service as it has developed, using the best available information about how Class A broadcasters are actually using the service now, and considering the potential for development of unique local and diverse programming on Class A television stations if “must carry” rights are granted and can provide the sound and predictable financial footing to these stations that would allow them to invest with confidence for the future.

ZGS suggests that there is no better source of truly diverse and local programming available to the public, particularly including minority citizens, than from the Class A service, and that permitting the service to grow to its full potential does indeed serve the public interest.

CONCLUSION

As the Commission explores ways to improve the diversity of licensees and the multiplicity of programming sources, it should strive to encourage new entrants, small businesses, and minority- or women-owned entities, all of which are underrepresented in the ranks of FCC licensees. ZGS shares and has achieved the Commission's goal of encouraging new entrants and fostering diversity and localism in broadcasting. Employing primarily Class A television stations, ZGS has provided service to the underserved Spanish-language community in over a dozen markets that rivals the programming offered by that of many competing full-power television stations.

Class A stations are inherently the most "local" of broadcast stations, having the only true requirement of all broadcast services to broadcast locally originated programming. They are also within the financial reach of minority-owned or small broadcasters wishing to serve underserved communities – which will generally have much smaller operating revenues than full power stations. The viability of the Class A service as a means of diversifying ownership in the broadcast industry and increasing the number of voices in the media marketplace, as well as ZGS's own ability to continue its service to its communities, however, is jeopardized by the imbalance of power between Class A stations and the cable operators who control access to the viewing audience, and hence advertising dollars. As an advertiser supported service, Class A stations cannot remain profitable, ongoing businesses without the fullest access to their audience—access that is enjoyed by other television stations in the market regardless of whether they provide local programming and community outreach on par with the ZGS stations, or even none at all. Accordingly, ZGS wholly supports strengthening the Class A television service by ensuring that Class A stations can obtain cable carriage on par with full-power television stations. In this way, the Commission can permit small businesses and minority owners that are already providing the

type of local service that the *NPRM* seeks to promote to survive and compete fairly with other television stations in the market. If the Commission seeks a feasible, practical near term action to advance its programming diversity and minority ownership goals, granting “must carry” status to Class A stations is one of the most effective ways it can achieve these goals.

Respectfully Submitted,

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