

**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 —)	MB Docket No. 06-121
Review 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 —)	MB Docket No. 02-277
Review of the 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)	MB Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MB Docket No. 01-317
Ownership of Radio Broadcast Stations in)	
Local Markets)	
)	
Definition of Radio Markets)	MB Docket No. 00-244
)	
Ways to Further Section 257 Mandate and To)	MB Docket No. 04-228
Build on Earlier Studies)	

COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. respectfully submits these comments in response to the Commission’s request for comment on whether it has authority to expand mandatory cable

carriage rights for Class A television stations.¹ As the Nation's second-largest cable operator, Time Warner Cable has a vital interest in any proceeding involving the must-carry obligations of cable operators. Section 614 unambiguously prohibits the Commission from granting Class A television stations the same must-carry rights as full-power stations. Moreover, granting such rights would run counter to the Commission's prior precedent, as well as the First Amendment.²

Background

Low power television stations were created by a 1982 Commission order.³ In that order, the Commission added rules to Part 74, under which licensees would be allowed to provide television service at reduced power.⁴ Today, "LPTV signals typically extend to a range of approximately 15 to 20 miles, while the signals of full-service stations can reach as far as 60 to 80 miles away."⁵ Low power stations were to have only "secondary spectrum

¹ *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rule Making, 23 FCC Rcd 5922, ¶ 99 (2008) ("*NPRM*").

² The *NPRM* may not have come to the attention of all interested parties: the main topic addressed in the *NPRM* is diversity of broadcast programming, and cable must-carry rights are dealt with in only one small paragraph. Thus, without additional notice, any new must-carry burden may be vulnerable not only on the merits but also on grounds of inadequate notice. See *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) (notice of proposed rule change that was inserted in a footnote in a passage having "nothing to do" with the affected rule was inadequate).

³ See *Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications Systems*, Report and Order, 51 R.R. 2d 476, 486 (1982).

⁴ See *Establishment of a Class A Television Service*, Report and Order, 15 FCC Rcd 6355, ¶ 2 n.4 (2000). The current limit is 3 kilowatts for low power VHF stations (versus 316 kilowatts for full power VHF stations) and 150 kilowatts for low power UHF stations (versus 5,000 kilowatts for full power UHF stations). See *id.*

⁵ *Id.*

status,” meaning that “they can be displaced by full-service TV stations that seek to expand their own service area, or by new full-service stations seeking to enter the same market.”⁶

In 1999, when the digital transition threatened widespread displacement, Congress concluded that the “secondary status” limitation “blocked many low-power broadcasters from having access to capital,” and thereby “hampered their ability to continue to provide quality broadcasting, programming, or improvements.”⁷ The Community Broadcaster Protection Act of 1999 therefore allowed low power stations to trade in their licenses for Class A licenses which would not have that limitation.⁸ The statute added to the Communications Act a new Section 336(f), captioned “[p]reservation of low-power community television broadcasting.”⁹ That provision required the Commission to make new rules under which a new “class A television license” was to be made available to “licensees of qualifying low-power television stations.”¹⁰

⁶ *Id.* ¶ 4.

⁷ Community Broadcasters Protection Act of 1999, § 5008(b)(3), Pub. L. No. 106-113, 113 Stat. Appendix I at p. 1501A-595 (1999).

⁸ *See* Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. Appendix I at pp. 1501A-594 – 1501A-598 (1999); *see* Section-by-Section Analysis to S. 1948, the Act known as the “Intellectual Property and Communications Omnibus Reform Act of 1999,” as printed in the Congressional Record of November 17, 1999, at pages S 14708 -14726, at S 14724 (“*Section-by-Section Analysis*”) (new statute “requires the Federal Communications Commission (FCC) to provide certain qualifying LPTV stations with ‘primary’ regulatory status, which in turn will enable these LPTV stations to attract the financing that is necessary to provide consumers with critical information and programming”).

⁹ 47 U.S.C. § 336(f).

¹⁰ *Id.* § 336(f)(1)(A).

Under the statute, a Class A licensee is accorded “primary status as a television broadcaster as long as the station continues to meet the requirements for a qualifying low-power station.”¹¹ Stations would be “qualifying low-power station[s]” if they were “in compliance with the Commission’s requirements applicable to low-power . . . stations” and satisfied certain content requirements, including that they broadcast “at least 3 hours per week of programming that was produced within the market area served by such station.”¹² Qualified low-power stations would also be required to comply with certain rules applicable to full-power stations.¹³

In 2000, the Commission promulgated the new Class A rules.¹⁴ Under the rules, Class A licensees would be subject to most but not all of the rules applicable to full-power licensees.¹⁵ At the same time, the Commission said, Class A stations would remain low power stations.¹⁶ Thus, a number of rules applicable to low power stations would remain applicable to Class A stations, including “the current LPTV maximum power levels.”¹⁷ The Commission also stated that “[n]othing in this Report and Order is intended to affect a Class A LPTV station’s eligibility to qualify for mandatory carriage under 47 U.S.C. § 534.”¹⁸

¹¹ *Id.* § 336(f)(1)(A)(ii).

¹² *Id.* § 336(f)(2)(A)(i).

¹³ *See id.* § 336(f)(2)(A)(ii).

¹⁴ *See Establishment of a Class A Television Service*, Report and Order, 15 FCC Rcd 6355 (2000).

¹⁵ *See id.* ¶ 23.

¹⁶ *See id.* ¶ 25 (“Class A stations will be low-power.”).

¹⁷ *Id.* ¶ 29.

¹⁸ *Id.* ¶ 31 n.61.

A few months later, the Commission addressed the must-carry status of Class A stations under SHVIA, whose must-carry provision denied full must-carry rights on DBS to any “low-power station.”¹⁹ The Commission stated:

Low power television stations that receive Class A status pursuant to the CBPA are still low power stations for mandatory carriage purposes. Class A stations do not gain the same rights to carriage as their full power counterparts simply by receiving such status. . . . The CBPA did not create a new class of television stations eligible for full-fledged carriage rights on cable systems or satellite carriers. Given the burdens a Class A carriage requirement would impose, we believe that Congress would have specifically noted in Section 338 that satellite carriers were required to carry these stations if they provide local-into-local service in a market.²⁰

The next year, on reconsideration of its Class A order, the Commission confirmed that the same held true for purposes of mandatory carriage on cable.²¹ The Commission found it “unlikely that Congress intended to grant Class A stations full must carry rights, equivalent to those of full-service stations, without addressing the issue directly.”²² The Commission explained that, under Section 614, the term “local commercial television station” is defined “to include only ‘full power’ stations, while Class A stations, like LPTV stations, operate at low power.”²³ Moreover, the Commission noted, “Section 614(h)(1)(B) expressly excludes from the definition of ‘local commercial television stations’ any low power television stations ‘which operate pursuant to part 74 of title 47, Code of Federal

¹⁹ 47 U.S.C. § 338(h)(7) (2000).

²⁰ *Implementation of Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Report and Order, 16 FCC Rcd 1918, ¶ 136 (2000) (footnotes omitted).

²¹ *See Establishment of a Class A Television Service*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 8244 (2001).

²² *Id.* ¶ 39.

²³ *Id.* ¶ 41.

Regulations, or any successor regulations thereto.’”²⁴ Although the Commission agreed that, insofar as they must comply with Part 73 rules, “Class A stations operate pursuant to Part 73,” the Commission concluded that “the new Part 73 rules for Class A stations are more properly viewed as ‘successor regulations’ for the group of Class A LPTV stations previously regulated under Part 74.”²⁵

Likewise, the Commission has in numerous other contexts determined that, because Class A stations operate at low power, they are not to be treated as full power stations. Thus, the Commission has treated Class A stations as low-power stations for purposes of

²⁴ *Id.* ¶ 41.

²⁵ *Id.* ¶ 41 n.89.

regulatory fees,²⁶ media cross-ownership rules,²⁷ and the allotment of television licenses to specific communities.²⁸

Against that background, the *NPRM* now revisits the question of Class A must-carry. Although the *NPRM* for the most part addresses issues having nothing to do with cable or must-carry, a single paragraph states: “[C]able carriage of Class A television stations could promote both programming diversity and localism, given that all such stations are required to

²⁶ See *FY 2002 Media Services Regulatory Fees*, Public Notice, 2002 WL 1798582 (rel. Aug. 7, 2002) (“In a recent rulemaking proceeding, . . . a category of ‘Class A TV’ was established that re-classified some of the Low Power TV (LPTV) stations. For purposes of regulatory fees, we are categorizing the Class A TV service as a derivative of Low Power TV (LPTV).”); *Establishment of a Class A Television Service*, Report and Order, 15 FCC Rcd 6355, ¶ 120 (2000) (“[W]e will apply the low power regulatory fees to Class A stations going forward. Class A stations, while having greater rights than the preceding LPTV stations, will still be greatly limited in their power and height restrictions. To require the same regulatory fees as are required for full-power stations would be onerous to these small, local operations.”).

²⁷ See *Review of the Commission’s Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, ¶ 24 (2001) (“Given the limited signal coverage of LPTV stations, including Class A stations, we do not believe that they have sufficient influence and power to qualify as a station for purposes of our requirement that eight broadcast TV stations remain in a market post-combination. Thus, we emphasize that the new duopoly rule requires that ‘at least 8 independently owned and operating full-power commercial and noncommercial TV stations’ must remain in a DMA post-merger.”) (footnotes and emphasis omitted).

²⁸ See *Amendment of Section 73.606(B), TV Table of Allotments, TV Broadcast Stations, and Section 73.622(B), Table of Allotments, Digital Television Broadcast Stations (Campbellsville and Bardstown, Kentucky)*, Report and Order, 19 FCC Rcd 12745 (2004) (denying a petition to relocate a full-power station, on the grounds that the original community of license would be left only with a low-power Class A station); *id.* ¶ 7 (“We continue to believe that this is a proposed removal of a sole local service. As an initial matter, we note that the Commission has not established that Class A Television stations are local transmission services for purposes of the TV Allotment priorities and we thus are not able to consider Class A Station W04BP to be a local service for these purposes. Class A Television Stations are not given full protection by all other stations; they are limited to very low power; finally, they have different main studio requirements from full power stations.”).

originate local content. We seek comment on whether we have authority under the Act to adopt rules requiring such carriage.”²⁹

Argument

I. GRANTING “CLASS A” STATIONS FULL MUST-CARRY RIGHTS WOULD BE CONTRARY TO UNAMBIGUOUS STATUTORY LANGUAGE.

Section 614 provides that only “local commercial television stations” have full must-carry rights.³⁰ Low-power stations, by contrast, are granted lesser rights.³¹ Section 614 defines the term “local commercial television station” to mean “any full power television broadcast station . . . licensed and operating on a channel regularly assigned to its community by the Commission”³² The statute specifically states that “[t]he term ‘local commercial television station’ shall not include . . . low power television stations . . . which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto.”³³

Because Class A stations operate under the same power limitations as all other low power stations, they are not “full power” stations, and are accordingly not captured by Section 614(h)(1)(A)’s definition of “local commercial television station.”³⁴ In addition, because Class A stations are not included in the Table of Allotments,³⁵ they are not “licensed

²⁹ *NPRM* ¶ 99.

³⁰ 47 U.S.C. § 534(b).

³¹ *See id.* § 534(c).

³² *Id.* § 534(h)(1)(A)

³³ *Id.* § 534(h)(1)(B)(i) (emphasis added).

³⁴ *Id.* § 534(h)(1)(A).

³⁵ *See* 47 C.F.R. §§ 73.606, 73.622.

and operating on a channel regularly assigned to its community by the Commission.”³⁶

Accordingly, Section 614(h)(1)(A) by itself makes clear that Class A stations are not entitled to full must-carry rights.

That conclusion is separately and independently compelled by Section 614(h)(1)(B)(i)’s exception for “low power stations . . . which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto.”³⁷ Because Class A stations operate under power limitations, they are “low power stations.”³⁸ Moreover, the CBPA by its terms labels Class A stations “low power stations.”³⁹ In addition, Class A stations “operate pursuant to” at least some of the rules of “part 74 of title 47, Code of Federal Regulations.” Insofar as they operate pursuant to provisions of part 73, those provisions are “successor regulations” to provisions of part 74.

³⁶ See *Establishment of a Class A Television Service*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 8244, ¶ 38 (2001) (party seeking reconsideration of Commission’s refusal to grant Class A stations full-fledged must-carry rights acknowledged that, “because the Commission excluded Class A stations from the Table of Allotments in subpart E of Part 73, they are not eligible for mandatory cable and satellite carriage”). Even if Class A stations were included in the Table of Allotments, that would eliminate only one of two hurdles embodied in Section 614(h)(1)(A) — Class A stations would still not be “full power” stations.

³⁷ 47 U.S.C. § 534(h)(1)(B)(i).

³⁸ See *Section-by-Section Analysis* at S 14724 (“From an engineering standpoint, the term low-power television service means precisely what it implies, i.e., broadcast television service that operates at a lower level of power than full service stations.”)

³⁹ 47 U.S.C. § 336(f)(1)(A)(ii) (station can be Class A licensee only “as long as the station continues to meet the requirements for a qualifying *low-power* station”) (emphasis added).

Thus, 614 unambiguously precludes granting full must-carry rights to Class A stations. If the Commission were to do so despite Section 614's clear language, a court would vacate the resulting order as foundering on the basis of "*Chevron* step one."⁴⁰

II. GRANTING FULL MUST-CARRY RIGHTS TO "CLASS A" STATIONS WOULD BE CONTRARY TO COMMISSION PRECEDENT.

Quite apart from the lack of statutory ambiguity, the Commission has previously held that Class A stations are not entitled to full must-carry rights. As explained above, the Commission held that, because Class A stations operate at low power, they are not full power stations, and that Class A stations are captured by the exception for "low power television stations . . . which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto."

This Commission is entitled to change course only if it can provide a reasoned explanation for its change of course.⁴¹ It is difficult to see what reasoned explanation could be provided here. In its prior pronouncement, the Commission did not find that the statute was ambiguous, that it was therefore entitled to resolve a statutory gap, and that it should resolve it against carriage based on policy grounds (say, that carriage would impose an overly onerous burden on cable operators). Rather, the Commission held that, even assuming that policy grounds existed for requiring carriage, the statute did not permit it.

⁴⁰ See, e.g., *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) ("an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear").

⁴¹ See, e.g., *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) ("The FCC cannot silently depart from previous policies or ignore precedent.") (internal quotation marks omitted); *Telephone & Data Sys. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994) ("The Commission may overrule or limit its prior decisions by advancing a reasoned explanation for the change, but it may not blithely cast them aside.").

Because that interpretation was correct, it would be impossible to provide a reasoned explanation for a change of course.

III. GRANTING FULL MUST-CARRY RIGHTS TO “CLASS A” STATIONS WOULD BE CONTRARY TO THE FIRST AMENDMENT.

Granting expanded must-carry rights to Class A stations would also raise substantial First Amendment issues. For one thing, granting such rights would trigger strict scrutiny. Only stations that provide statutorily required content can qualify as Class A stations.⁴² Moreover, the *NPRM* suggests that the Commission wishes to grant Class A stations carriage rights precisely because of their content.⁴³ Although the *Turner* Court upheld must-carry against a facial challenge, the Court also suggested that strict scrutiny would be triggered by “singl[ing] out . . . low-power broadcasters for special benefits on the basis of content.”⁴⁴

Strict scrutiny would also be triggered by any measure that would require cable operators to carry Class A stations beyond the area in which those stations’ signals can be received off-air. The *Turner* rationale contemplated the protection of noncable households

⁴² See 47 U.S.C. § 336(f)(2)(A)(i)(II) (requiring that “such station broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station”).

⁴³ See *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, ¶ 99 (2008) (“[C]able carriage of Class A television stations could promote both programming diversity and localism, given that all such stations are required to originate local content. We seek comment on whether we have authority under the Act to adopt rules requiring such carriage.”).

⁴⁴ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 n.6 (1994); see also *id.* at 676-77 (O’Connor, J., dissenting) (“I cannot avoid the conclusion that [the statute’s] preference for broadcasters over cable programmers is justified with reference to content. . . . In determining whether a low-power station is eligible for must-carry, the FCC must ask whether the station ‘would address local news and informational needs which are not being adequately served by full power television broadcast stations.’”).

from “loss of regular television broadcasting service due to competition from cable systems.”⁴⁵ Any measure requiring carriage beyond a station’s over-the-air reach cannot benefit from that rationale. Thus, it would be viewed as a naked preference for one set of speaker (broadcasters) at the expense of another (cable operators and cable programmers), triggering strict scrutiny under the settled principle that government may not “restrict the speech of some elements of our society in order to enhance the relative voice of others.”⁴⁶ In addition, such a measure would undermine (not promote) any governmental interest in the dissemination of locally oriented speech: it would invest Class A stations with an incentive to cater to viewers beyond their current local audience.⁴⁷

Granting special must-carry rights to Class A stations would be problematic even under intermediate scrutiny. The Commission will not be able to rely on the rationale on which it relied in the *Turner* litigation — that cable operators were able to deny broadcasters carriage for anticompetitive reasons, supposedly because cable operators were unconstrained by competition.⁴⁸ Real-world market conditions today show vibrant competition: two DBS

⁴⁵ See *Turner I*, 512 U.S. at 663.

⁴⁶ *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

⁴⁷ See *WLNY-TV, Inc. v. FCC*, No. 97-4243, Brief for FCC and United States at 13 (filed 2d Cir. Jan. 22, 1998) (“Local viewers will benefit from the stations’ concentration on local concerns, rather than those attractive to a distant, but more lucrative area.”).

⁴⁸ See *Turner I*, 512 U.S. at 649 (“Congress designed the must-carry provisions . . . to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming”); *id.* at 661 (“The must-carry provisions . . . are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television.”); *Turner II*, 520 U.S. at 197 (“cable operators possess a local monopoly over cable households”); *id.* at 227 (Breyer, J., concurring in part) (“a cable system . . . at present (perhaps less in the future) typically faces little competition”).

operators now offer service to virtually all households,⁴⁹ and telephone companies have aggressively moved into video markets as well.⁵⁰ It is therefore not plausible that cable operators could profitably act on anticompetitive incentives.⁵¹

Even overlooking that problem, the Commission would need to show that, without cable carriage of Class A stations, “the economic health of local broadcasting is in genuine jeopardy,” and that such carriage “does not burden substantially more speech than is necessary.”⁵² There is no evidence that the economic health of local broadcasting depends on full must-carry rights for Class A stations. Moreover, the added burden of carrying Class A stations would be severe, as the Commission itself has recognized.⁵³ There are 567 Class A stations,⁵⁴ and few of them are currently carried.

⁴⁹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 5 (2006) (“almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers”).

⁵⁰ See Reinhardt Krause, *Verizon’s Digital TV Push Gets Broader, More Expensive*, Investor’s Business Daily, June 11, 2008, available at <http://www.investors.com/Tech/TechArchives.asp?artsec=17&issue=20080611> (“Verizon has said it plans to spend \$23 billion through 2010 to reach 18 million homes, roughly half its residential customer base in 13 states, with FiOS wiring.”); AT&T Inc., *2007 Annual Report*, at 45, available at <http://tinyurl.com/5nomgz> (“We spent approximately [\$2.5 billion] on our U-verse services in 2007 and expect spending to be approximately [\$2.5 billion] in 2008 for capital expenditures on our U-verse services for initial network-related deployment costs. We expect to pass approximately 30 million living units by the end of 2010.”).

⁵¹ See, e.g., *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (“in [justifying another set of rules based on the assumption that cable operators had market power] the Commission will have to take account of the impact of DBS on that market power”).

⁵² See *Turner I*, 512 U.S. at 664-65 (plurality).

⁵³ See *Implementation of Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Report and Order, 16 FCC Rcd 1918, ¶ 136 (2000) (“Given the burdens a Class A carriage requirement would impose, we believe that Congress would have

Compelled carriage of Class A stations, moreover, would impose burdens beyond those imposed by compelled carriage generally. With a range of as little as 15 miles, the over-the-air reach of a Class A station is often more limited than the reach of a cable system. Thus, different parts of the same cable system might have to carry different Class A stations (sometimes on the same channel), which would present special technological difficulties. At a minimum, a Class A carriage requirement would turn a cable system's channel lineup into a strange hodge-podge. That would in turn make it more difficult to compete with DBS operators if they are not similarly burdened (which, incidentally, would raise constitutional issues all of its own).

Given that the *Turner* case was decided by the narrowest margin, that the industry is now competitive, and that Class A carriage would impose serious burdens, courts would hold that granting full must-carry rights to Class A stations would violate the First Amendment. Moreover, evaluation of compelled carriage of Class A stations would likely raise questions concerning must-carry's constitutionality more generally.

specifically noted in Section 338 that satellite carriers were required to carry these stations if they provide local-into-local service in a market.”).

⁵⁴ *NPRM*, Appendix B, ¶ 11.

Conclusion

The Commission may not grant full must-carry rights to Class A television stations.

Respectfully submitted,

/s

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