

**Before the
Federal Communications Commission
Washington DC 20554**

In the Matter of)	
)	
Promoting Diversification of Ownership In the Broadcasting Service)	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
)	
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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)	MB Docket No. 01-234
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)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets)	MB Docket No. 01-317
)	
)	
Definition of Radio Markets)	MB Docket No. 00-244
)	
)	
Ways to Further Section 257 Mandate and To Build Earlier Studies)	MB Docket No. 04-228
)	
)	

REPLY COMMENTS OF VERIZON

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REPLY COMMENTS OF VERIZON¹

I. Introduction and Summary

Verizon supports the Commission’s interest in promoting diversity and localism in programming, and we have been a leader among video providers in carrying a wide range of

¹ For purposes of this filing, Verizon refers to the regulated, wholly owned affiliates of Verizon Communications Inc.

programming – including multicultural, multilingual, and niche programming as well as low power and other local stations – in order to meet our customers’ diverse interests and better compete. But the Commission should not – and cannot, consistent with the express provisions of the Communications Act or the First Amendment – extend new mandatory carriage rights to Class A low power television stations. As the record here reflects, extending such rights to Class A stations would not meaningfully serve the Commission’s interest in promoting diversity, and instead could crowd out some of the diverse programming that providers carry today. Moreover, at least in the absence of concomitant changes by Congress to the current rules concerning statutory copyright licenses for distant television signals, such a move could result in substantial new costs for cable subscribers. Finally, expanding carriage obligations to more low power stations would run afoul of clear language of the Communications Act, as well as the First Amendment to the Constitution.

II. New Must-Carry Obligations Would Undermine, Not Promote, Diversity

Verizon supports the Commission’s goal of encouraging “programming diversity and localism,” but we do not believe that new carriage obligations requiring that capacity be devoted to low power Class A stations would be an effective method of furthering that interest.

Verizon’s commitment to providing programming that meets the needs of our diverse customer base is apparent from our channel line-up. Since introducing FiOS TV, Verizon has sought to carry a wide-range of diverse programming, including local, multicultural and multilingual programming. For example, Verizon’s La Conexión package offers a combination of popular English channels and more than 25 Spanish-language channels. Likewise, Verizon offers a wide range of international and non-English channels, including channels in Chinese, Farsi, French, Hindi, Italian, Japanese, Korean, Polish., Tagalog, and Vietnamese. And just this

week, we announced that we would be expanding our multicultural content to include fourteen additional international channels, including new channels with Arabic, Armenian, Balkan, Cambodian, Korean, Portuguese, Romanian, and Russian programming.² FiOS TV also includes many other types of programming to satisfy our consumers' diverse interest, including, religious programming (*e.g.*, The Word Network), independent programming (*e.g.*, The America Channel and the Hallmark Channel), and a broad range of niche programming (*e.g.*, Blackbelt TV). Verizon also has agreed voluntarily to carry several low power television stations carrying localized programming of interest to consumers, and Verizon adds to programming diversity and localism itself through its FiOS1 channel, which includes local weather, traffic, news, sports, and community features.³

Verizon's interest in providing a forum for independent and diverse voices is further evidenced by efforts such as its Community Studios project. Through this project, Verizon voluntarily enables groups such as the National Hispanic Media Coalition, the Leadership Conference on Civil Rights, i-Safe, the U.S. Distance Learning Association, the Black Leadership Forum, and the American Association of People with Disabilities to offer programming free of charge to FiOS TV customers on a video-on-demand basis.⁴ And Verizon has a strong incentive to continue to carry such diverse, localized and independent programming in order to distinguish itself from its competitors and to attract a broad range of customers.

² See Press Release, "Verizon FiOS TV Broadens Multicultural Content with 14 New In-Language Channels from World TV," <http://newscenter.verizon.com/press-releases/verizon/2008/verizon-fios-tv-broadens.html>.

³ See Press Release, "FiOS1, Verizon's First Local TV Channel, Debuts in Washington, D.C., (sic) Metro Area," <http://newscenter.verizon.com/press-releases/verizon/2007/fios1-verizons-first-local.html>.

⁴ See Press Release, "Verizon to Offer Unique TV Programming With New 'Community Studio' Pilot," <http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29670835>.

In addition, in order to satisfy our consumers' demand for more high definition (HD) programming, Verizon has announced that we intend to carry all available major HD programming by the end of this year, and we already carry approximately 100 HD channels (and hundreds more HD video-on-demand titles) in some areas.

In contrast to these substantial, voluntary and market-driven efforts that are increasing programming diversity and promoting localism, new carriage mandates for Class A stations, however well-intentioned, likely would be counter-productive. Indeed, the comments of the Diversity and Competition Supporters – the same group cited in the Further Notice in connection with must-carry obligations for Class A stations⁵ – acknowledge the possibility of “unintended consequences that blanket Class A must-carry would impose on cable systems that may have limited capacity.” Comments of Diversity and Competition Supporters at 23. Likewise, they acknowledge that only “[a]pproximately 15% of Class A stations are minority owned” and that “[m]any – perhaps most – Class A stations broadcast only minimal local programming and no multicultural or multilingual programming.” *Id.* Therefore, it would be wrong to assume that requiring the carriage of Class A stations would necessarily contribute in any meaningful way to diversity or localism.

The lack of benefit from a carriage mandate is all the more clear when the potential costs are taken into account. As several commenters note, even robust systems have some capacity limits, and any capacity that must be allocated to satisfy new carriage mandates necessarily takes away capacity that could otherwise be used for other purposes. And those other purposes may include the carriage of other diverse, local, or niche programming or the carriage of more HD

⁵ See Report and Order and Third Further Notice of Proposed Rulemaking, *Promoting Diversification of Ownership In the Broadcasting Services*, 23 FCC Rcd 5922 (2008), ¶ 99 (“Further Notice”).

programming.⁶ There is no reason to believe that the Class A stations that would be carried pursuant to any new mandate would contribute to diversity or localism any more than the channels that could be dropped by many cable operators – especially those already facing significant capacity constraints – as a result of such a mandate. Indeed, niche programming or other programming that is watched by only a small number of subscribers is precisely the programming likely to be lost as a result of new mandatory carriage obligations.⁷

In addition, a new requirement forcing the carriage of Class A stations could well harm consumers by increasing programming costs. This is so because the local service areas of particular low power stations are often much smaller than the area served by the cable systems that would be forced to carry those stations. As a result, under the current rules concerning the calculation of statutory license royalty payments under the Copyright Act, carriage of these stations throughout the cable system would generally be considered carriage of a “distant signal” subject to much higher royalty assessments under Section 111(d) of the Copyright Act.⁸ And for large cable systems that cover areas served by multiple low power stations, these fees for the carriage of “distant signals” would compound quickly, thus adding substantial new costs for the cable operator that likely would be passed on to consumers. Indeed, the fact that such costs may

⁶ See, e.g., NCTA Comments at 7-10; Cablevision Comments at 2-3.

⁷ The comments of the Diversity and Competition Supporters suggest that one possible way to address some of these concerns would be to limit any must-carry obligations to a “sub-class of Class A stations that are hyper-local or that provide extensive multicultural and (especially) multilingual service.” *Id.* at 23. Defining such a sub-class of stations in a way that promotes carriage of deserving stations without sweeping too broadly would undoubtedly be a complex and controversial task, and, as a content-based distinction, may pose substantial First Amendment concerns. In any event, as explained below, the Commission lacks legal authority to adopt a must-carry requirement for Class A stations. Therefore, as the Community Broadcasters Association’s original proposal suggested, the proper forum for considering any such proposal is Congress, and not the Commission. See Further Notice ¶ 99.

⁸ See, e.g., Register of Copyrights, “Satellite Home Viewer Extension and Reauthorization Act Section 109 Report,” <http://www.copyright.gov/reports/section109-final-report.pdf> at 3 (June 2008) (discussing Section 111’s application to “distant” signals).

be triggered by the carriage of a low power station is often one of the primary reasons that a cable operator refuses to carry a low power station in the first place, at least if the station offers content that would otherwise be of interest to subscribers. Therefore, if the Commission is interested in encouraging the carriage of low power stations, it should encourage Congress to reform this aspect of the statutory licensing regime (by redefining the licenses application to distant signals and reducing fees for licensees), rather than adopting a mandate that could result in significant new programming costs for consumers. Such reform would remove an existing obstacle to carriage of low power stations.

For all of these reasons – apart from the question of whether the Commission has authority to order carriage of Class A low power stations – it should not do so. Any such obligation may well undermine the Commission’s goals concerning diversity and localism, in addition to potentially increasing costs for consumers. As Verizon’s FiOS TV service well illustrates, the better course would be to continue to focus on policies that encourage additional video competition which, itself, drives providers to carry a diverse range of programming in order to compete effectively.

III. The Commission Has No Authority to Extend Must-Carry for Class A

In any event, in answer to the Further Notice’s question of whether the Commission has “authority under the Act to adopt rules requiring such carriage,” *id.* ¶ 99, the answer is plainly “no.” The Act spells out the meets and bounds of video providers’ must-carry obligations, including specifically with respect to low power stations. Any new requirement to carry Class A stations would disregard the lines that Congress drew.

There is little dispute that the must-carry provisions of the statute already specifically address the limited circumstances in which cable operators must-carry low power stations.

Section 614(c) indicates that only when “there are not sufficient full power local commercial television stations to fill the channels set aside under” the must-carry provision, must a cable operator carry one or two “qualified low power stations.” 47 U.S.C. § 534(c). The statute then goes on to spell out in detail which low power stations are “qualified,” for purposes of this limited carriage obligation. *Id.* § 534(h)(2). Moreover, to further remove any uncertainty, Congress also provided in the statute that the “local commercial television station” for which it intended to grant more generous must-carry rights were “full power television broadcast station[s]” and “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.” *Id.* § 534(h)(1) (emphasis added).⁹ There is no room for ambiguity in this careful line-drawing, and the Commission, therefore, is bound to follow Congress’s intent. Indeed, even the Community Broadcasters Association recognizes as much, and acknowledges in its comments the “statutory language . . . confining the must-carry obligation to only a few Class A and LPTV stations in rural communities and excluding the majority of stations.” Comments of the Community Broadcasters Association (“CBA Comments”) at 3.

In light of this unambiguous statutory language, the few commenters who support extending must-carry rights to Class A stations make two arguments, each of which would fail to honor the statutory language and Congress’s clear intent. First, some argue that the Commission should redefine “full power” stations to include “low power” stations. Second, one commenter argues that notwithstanding the statutory language, the Commission has authority to create new must-carry rights, and that Congress would have extended must-carry to Class A stations if they

⁹ Although the Commission decided to place its regulations concerning Class A stations in Part 73 of its rules, rather than Part 74, it has already recognized that such regulations are “successor regulations” purposes of this exclusion. *See* Memorandum and Order on Reconsideration, *Establishment of a Class A Television Service*, 16 FCC Rcd 8244, ¶ 41 n. 89 (2001) (“Class A Reconsideration Order”).

had existed when Congress adopted Section 614. *See* Comments of ZGS Communications, Inc. at 11-17. While the Commission has authority to interpret ambiguous statutory, it cannot ignore statutory limitations or re-write the statute, as these arguments would require.

First, some commenters urge the Commission to redefine what it means to be a “full power” station entitled to more robust must-carry rights so as to include Class A stations. *See* CBA Comments at 3-4; Comments of K-Licensee, Inc. at 3. This argument ignores that Class A stations, by definition, are “low power.” Section 336(f) – the section creating Class A licenses – is captioned “Preservation of *Low-Power* Community Television Broadcasting” and required the Commission to create rules “to establish a class A television license to be available to licensees of qualifying *low-power* television stations.” 47 U.S.C. § 336(f) (emphasis added). The Commission is not free, as the commenters pressing this argument would suggest, to define “night” as “day” in order to create new carriage obligations that Congress did not intend.

To define “full power” stations to include some or all “low power” stations would eviscerate a distinction that Congress clearly intended to draw, *see, e.g.*, 47 U.S.C. § 534(h) (expressly excluding “low power” stations from definition of “local television broadcast station”). The Commission cannot do so. Instead, where statutory language is neither “silent” nor “ambiguous,” the Commission is bound to follow the statute’s command. *See Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

In any event, the Commission has already considered and rejected the argument that Class A stations are entitled to the same must-carry rights as full power stations. In its order

adopting regulations to create Class A low power stations, the Commission noted that “[n]othing in this *Report and Order* is intended to affect a Class A LPTV station’s eligibility to qualify for mandatory carriage.”¹⁰ Again, on reconsideration, the Commission concluded:

We believe that Congress intended that Class A stations have the same limited must carry rights as LPTV stations. As noted above, Section 614(a) of the Communications Act, as amended, requires the carriage of local television broadcast stations and “qualified” low power stations in certain limited circumstances. . . . Thus, to be eligible for must carry, Class A stations, like other low power stations, must comply with the Part 74 rules and the other eligibility criteria established by statute and our rules.

Class A Reconsideration Order ¶ 42; *see also* Report and Order, *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 16 FCC Rcd 1918, ¶ 136 (2000) (“SHVIA Order”) (noting, in context of must-carry obligations of satellite providers, that “[l]ow power stations that receive Class A status pursuant to the CBPA are still low power stations for mandatory carriage purposes”). The Commission got it right the first three times that it considered this issue, and any change of course would not only violate the plain language of the statute but also would be arbitrary and capricious.

Second, and equally unavailing, is the argument that, notwithstanding the limitations of the statutory language, the Commission should create must-carry rights now in order to further its general interests in promoting diversity and localism, and that Congress intended to extend must carry to Class A stations, even though it did not say so. *See* Comments of ZGS Communications, Inc. at 11-17. Here again, however, the Commission cannot override an express statutory limitation on the breadth of must-carry obligations, even if that action could be said, in some sense, to further diversity. Such sweeping authority would nullify Congress’s

¹⁰ Report and Order, *Establishment of a Class A Television Service*, 15 FCC Rcd 6355, ¶ 31 n. 61 (2000) (“Class A Order”).

words in the statute, including the express provisions concluding that low power stations are *not* entitled to the same must-carry rights as full power stations, and would leave the Commission with near limitless authority to take any step that it wants – and ignore any express limitations that Congress adopts – provided that it could articulate some plausible connection to diversity. The Commission is not free to do so.

Moreover, here too the Commission has already considered and rejected the argument that Congress intended to extend must-carry rights to Class A low power stations when it created this class of stations in the Community Broadcasters Protection Act of 1999 (CBPA). As the Commission has correctly concluded, “the principal intent of the CBPA was to protect lower power television stations from digital television (“DTV”) interference” as full power stations transitioned to DTV, “not [to] create a new class of television stations eligible for full-fledged carriage rights on cable systems.” SHVIA Order ¶ 136. “Both the language of the CBPA and the accompanying conference report are silent with respect to the issue of must-carry rights for Class A stations,” and “it is 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.” Class A Reconsideration Order ¶ 39. Given the clear language of the must-carry provisions of Section 614, Congress would have said so if it intended to create new must-carry rights for Class A stations.

Finally, the First Amendment to the Constitution forecloses any argument that the Commission should impose additional obligations on cable operators, particularly in the case of new entrants who have never had the bottleneck control used to justify previous speech mandates on cable operators. Courts that have upheld restrictions on cable operators’ editorial discretion – including must-carry obligations – have relied on cable operators’ historical possession of

“bottleneck monopoly power.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994) (“*Turner I*”). For example, the “must carry” statute challenged in the *Turner* cases was premised on detailed evidence provided to Congress, corroborated by evidence presented at trial, that the cable industry in the early 1990s was dominated by large cable operators with local monopolies and with substantial ownership interests in cable programmers. This evidence showed that cable operators at the time had bottleneck control over the delivery of video programming, and with it the ability and incentive to refuse carriage to independent broadcasters in favor of the operators’ affiliates. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 208-13 (1997) (“*Turner II*”); *id.* at 196-207 (plurality opinion); *id.* at 227-28 (Breyer, J., concurring); *Turner I* at 633-34. Because detailed evidence further showed that this bottleneck control threatened the viability of many broadcast stations, *Turner II* at 195-213, and that the must-carry provisions would help preserve those stations, *id.*, the Court held that the statute served a substantial interest in preserving the important medium of free, over-the-air television for those without cable service. *Turner II* at 194; see also *Turner I* at 662-63.

Must-carry obligations for Class A stations could not satisfy this demanding test. First, as other commenters note, the justification of “preserving” free, over-the-air broadcasting is not present because Class A stations did not even exist until 2000. See *Cablevision Comments* at 13-14. Moreover, the emergence of competition has removed the “bottleneck control” that provided a basis for previous speech regulation. In particular, such regulation could not possibly be justified in the context of new entrant like Verizon who never possessed the “bottleneck” that has previously been required to sustain this type of regulation. Therefore, the Commission could not, consistent with the First Amendment, extend must-carry rights to Class A stations.

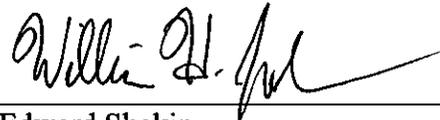
IV. Conclusion

Both on policy and legal grounds, the Commission should decline to extend must-carry rights to Class A low power stations.

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