

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

In the Matter of)	
)	
Promoting Diversification of Ownership In the Broadcasting Services)	MB Docket No. 07-294
)	
2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996)	MB Docket No. 06-121
)	
2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996)	MB Docket No. 02-277
)	
Cross-Ownership of Broadcast Stations and Newspapers)	MB Docket No. 01-235
)	
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 on Earlier Studies)	MB Docket No. 04-228
)	

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) hereby submits its reply comments in the above-captioned proceedings.

INTRODUCTION

In our initial comments, we showed that the Commission is precluded by both the Communications Act and the First Amendment from affording must-carry status to Class A low power stations that do not otherwise qualify for such status under Section 614(h)(2). We also pointed out that forcing cable operators to carry multiple low power stations at a time when they are already about to be required to carry the analog and high definition digital signals of television broadcasters would result in the displacement of cable program networks that appeal to minority and niche interests throughout cable communities. And it would do so without any evidence that such mandatory carriage of low power stations will have any effect on diversity of broadcast ownership. Nothing in the comments filed by other parties refutes these showings.

I. THE COMMISSION IS BARRED BY THE MUST-CARRY PROVISIONS OF SECTION 614 AND THE COMMUNITY BROADCASTERS PROTECTION ACT OF 1999 FROM GIVING CLASS A STATIONS MUST-CARRY STATUS – OR BY RECLASSIFYING THEM AS “FULL POWER” STATIONS.

The Act confers must-carry status on two categories of television stations – “local commercial television stations” and “qualified low power stations.” Local commercial stations are, by definition, “full power” stations, and do not include “low power television stations ... which operate pursuant to part 74 of title 47 ... or any successor regulations thereto.” Class A licenses are, by statute, available only to “licensees of qualifying *low power* television stations,” and the Commission has already rightly determined that its rules governing Class A stations, while codified in part 73 of the rules, are, indeed, “successor regulations” to the part 74 rules that previously applied to those stations.

Even most proponents of must-carry status for Class A stations acknowledge that such stations do not qualify for such status under the Act. But they contend that there is an easy way to circumvent this statutory obstacle: Simply conduct a rulemaking proceeding to add the

channels currently occupied by Class A stations to the Commission's Table of Allotments of full power channels, and then reclassify Class A stations as full power stations. The Community Broadcasters Association suggests that because the term "full power" is not defined in the Act, the Commission can call any station it wishes a "full power" station. It maintains that "[w]hile Class A stations are limited to less power than what are now known as 'full power' stations, the power limit is again established by rule rather than statute; so it can be altered by the FCC without a statutory amendment."¹

But while it may be the case that the power limit for Class A stations is established by rule, the classification of Class A stations as "low power" stations is, as discussed above, established by statute. The Commission cannot simply reclassify these very same stations, operating at the very same power levels (which are significantly lower than the power levels at which full power stations currently operate) as "full power" stations without running afoul of the language and the purpose of the statute. As the title of Section 336(f) of the Communications Act – which codifies the Community Broadcasters Protection Act of 1999 – makes clear, the purpose of establishing Class A licenses was specifically to ensure the "Preservation of *Low-Power* Community Television Broadcasting."² Turning Class A stations into *full power* stations would stand this purpose on its head. Instead of preserving low power stations, it would *eliminate* them.

In particular, the Commission cannot reclassify Class A stations in this manner for the purpose of giving them must-carry status. ZGS Communications asserts that "if the Class A service had existed in 1992, Congress would have explicitly afforded it 'must carry' rights"

¹ Comments of Community Broadcasters Association at 4.

² 47 U.S.C § 336(f).

along with full power stations.³ But there is no need to guess what Congress would have done if Class A stations had existed in 1992. Congress could have explicitly afforded Class A service must carry rights when it created the service in 1999 – and it chose not to do so. Instead, it specifically established Class A stations as a subset of low power stations without in any way altering the limits on and qualifications for must carry status for low power stations.

ZGS also suggests that it does not matter that Class A stations do not qualify for carriage under the specific must carry provisions of the Act because the Commission has broad ancillary jurisdiction under Sections 4(i) and 303(r) to grant such stations must carry rights.⁴ But Congress has specifically stripped the Commission of any such ancillary jurisdiction to impose must carry requirements or any other regulation of cable content. Section 624(f) of the Communications Act provides that “Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, *except as expressly provided in this title.*”⁵ In other words, if the authority isn’t specifically spelled out in Title VI, it doesn’t exist.

II. GRANTING CLASS A STATIONS MUST-CARRY RIGHTS WOULD IMPOSE A SUBSTANTIAL AND IMPERMISSIBLE BURDEN ON FIRST AMENDMENT RIGHTS.

The fact that Congress chose not to confer must carry status on Class A stations (except to the extent that such stations meet the general must carry qualifications for low power stations) confirms that it would not only be unlawful but also unconstitutional for the Commission to do so. As we explained in our initial comments, under the “intermediate” First Amendment scrutiny standard applied by the Supreme Court, the must carry provisions of the Communications Act

³ Comments of ZGS Communications, Inc. at 3.

⁴ *Id.* at 11-13.

⁵ 47 U.S.C. § 544(f) (emphasis added).

were narrowly upheld only because they furthered important government interests identified by Congress in a manner that did not “burden substantially more speech than necessary” to further those interests. If Congress specifically determined that carriage of low power stations was *not* necessary to further the interests underlying the must carry provisions, and Congress subsequently declined to give such status to Class A stations, it is hard to see how the statute could be constitutionally construed to permit the Commission to impose an additional obligation on cable operators to carry Class A stations.⁶

While ZGS seeks to portray the additional burden on cable operators as “relatively small,”⁷ its own analysis reveals that the burden would be substantial. Thus, ZGS notes there are, on average, about 2.6 Class A television stations per market.⁸ Adding 2.6 stations to channel lineups that are already saturated with video programming and other services would hardly be a small burden on cable operators – or on non-broadcast cable program networks competing for access to scarce channels.

But, as ZGS shows, this average number masks the fact that the distribution of Class A stations is not uniform throughout the nation. According to ZGS, a large number of Class A stations are concentrated in a relatively small number of markets. One market has 17 Class A stations; three markets have ten; two have nine; six have eight; and ten have seven.⁹ ZGS seems to think that because this very substantial burden is imposed in only a relatively small number of markets, while many other markets have an average of only two Class A stations per market, the burden is insignificant. But the fact that a Class A must carry rule could add as many as 17 must

⁶ See NCTA Comments at 7.

⁷ Comments of ZGS Communications, Inc. at 18.

⁸ *Id.* at 19.

⁹ *Id.* at 20.

carry stations to even a single market, and seven or more stations to 22 markets only *exacerbates* the burden and constitutional problem of such a rule even under the intermediate scrutiny First Amendment standard.

In any event, extending must carry rights to Class A stations could be subject to an even more stringent standard. The Supreme Court applied intermediate scrutiny only because the must carry obligations that it considered were “content-neutral” in scope and purpose. Yet several commenting parties in this proceeding urge the Commission to grant must carry status to Class A stations precisely because of the content carried on such stations. For example, according to ZGS Communications, “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.”¹⁰ A must carry requirement designed to promote specifically local programming would be *content-based*, not content-neutral. As such, it would be subject to – and almost certainly would not survive – the even more stringent standard of “strict scrutiny.”

¹⁰ *Id.* at 17. See also Comments of Diversity and Competition Supporters at 23: “Many – perhaps most – Class A stations broadcast only minimal local programming and no multicultural or multilingual programming, and thus offer the public little in the way of diversity of viewpoints and information. As such, the public would be better served if the Commission would create and entitle to must-carry a new sub-class of Class A stations that are hyper-local or that provide extensive multicultural and (especially) multilingual service.”

CONCLUSION

For the foregoing reasons, and for the reasons set forth in NCTA's initial comments, the Commission has no authority – and it would, indeed, be unconstitutional – to confer must carry status on Class A low power stations, and there is, in any event, no public policy reason to do so.

Respectfully submitted,

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