

**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 TIME WARNER CABLE INC.**

Time Warner Cable Inc. respectfully submits these reply comments to respond briefly to comments filed by the Community Broadcasters Association (“CBA”). We will not repeat arguments made in our opening comments — we will only respond to CBA’s arguments.

CBA argues that the Commission can grant Class A stations full must-carry rights without the need for a statutory amendment. According to CBA, the Commission could

accomplish this by taking two steps: (1) changing the tables of allotments to include Class A stations, and (2) issuing a regulation declaring Class A stations to be full power stations. CBA argues (in ¶ 7) that, because the term “full power” is not defined in the statute, the Commission may define it by regulation. CBA acknowledges (in ¶ 8) that current regulations limit Class A stations to 3,000 watts for VHF stations and 150,000 watts for UHF stations, while full power stations are entitled to broadcast at up to 100,000 watts for VHF stations and 5,000,000 watts for UHF stations — and CBA does not propose changing that.<sup>1</sup> CBA argues (in ¶ 9), however, that “the minimum power level for a ‘full power’ TV station is only 100 watts.” “Thus,” CBA concludes (in ¶ 9), “any Class A television station operating at the maximum power for its class could qualify as a ‘full power’ station if the FCC classified it as full power.”

But the adjectival phrase “low power” in “low power television stations . . . which operate pursuant to part 74” in Section 614(h)(1)(B)(i) — as well as the words “full power” in Section 614(h)(1)(A) — refers not to a station’s actual level of radiated power but to the rules pursuant to which the station is licensed. Thus, “low power television stations . . . which operate pursuant to part 74” means stations that operate under part 74’s rules for low power stations — not stations that operate pursuant to part 74 *and* that broadcast at a level of power that is by some relevant standard low.<sup>2</sup>

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<sup>1</sup> In fact, as we explained in our opening comments (at 2 n.4), some VHF stations may broadcast at up to 316,000 watts.

<sup>2</sup> As we explained in our opening comments (at 9), Class A stations operate pursuant to at least some of the rules of part 74 of title 47, Code of Federal Regulations, and, insofar as they operate pursuant to provisions of part 73, those provisions are successor regulations to provisions of part 74. CBA nowhere argues to the contrary.

That reading is the only one that makes sense. When Congress enacted Section 614, “full power station” and “low power station” had an established regulatory meaning: the former referred to a station licensed under part 73, and the latter referred to a station licensed under part 74. Thus, Congress must have intended to capture that regulatory meaning<sup>3</sup> — particularly when Section 614(h)(1)(B)(i) specifically refers to part 74. It is far-fetched to suggest that Congress instead meant to introduce a new term that courts and the Commission are free to interpret without being limited by the regulatory background of “low power,” subject only to the strictures of the relevant phrase’s everyday meaning.

That view is further compelled by the definition of “qualified low power station” in Section 614(h)(2) as “any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74” and satisfying the conditions set forth in Section 614(h)(2)(A)-(F). The definition makes clear that “conforming to the rules established for Low Power Television Stations contained in part 74” makes a station a low power station, and that satisfying the conditions of Section 614(h)(2)(A)-(F) makes a low power station a “qualified” low power station. Again, Congress’s plain intent was to capture the regulatory definition — not to create an entirely new term.

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<sup>3</sup> See, e.g., *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 193-94 (2002) (“Congress’ repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.”); *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (“Congress’ repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.”); *United States v. Hill*, 506 U.S. 546, 553 (1993) (where Congress used language previously found in agency regulation, it may be “assume[d] that Congress relied on the accepted [administrative practice]”); *Strickland v. Commissioner, Maine Dep’t of Human Servs.*, 48 F.3d 12, 20 (1st Cir. 1995) (“When Congress codifies language that has already been given meaning in a regulatory context, there is a presumption that the meaning remains the same.”).

This reading is also compelled by the absence of a statutory definition for “low power.” That absence makes sense when one reads “low power” to refer to a station’s licensing status: there is no need for a definition when Part 74 already supplies one. In contrast, the absence of a definition makes no sense if one reads “low power” to refer to a station’s radiated power. Important consequences depend on the difference between “low power” and “full power”: full power stations have strong must-carry protection, whereas low power stations have virtually none. If “low power” referred to radiated power, one would have expected Congress to provide a definition, as it did for all other statutory terms of this level of importance.

It would be no answer to argue that Congress meant to leave the line-drawing to the Commission. Section 614(h)(2) makes clear that the Commission may grant “low power” stations must-carry rights only where it finds that a number of extremely detailed requirements are met. It is improbable that Congress meant to permit the Commission to bypass each of these requirements — simply by redefining all low power stations to be full power stations. “Congress,” the Supreme Court has held, “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.”<sup>4</sup>

Even if Congress did intend that “low power” refer to radiated power, it would be unreasonable to draw the line between low power and full power stations that CBA advocates. A review of the Commission’s CDBS station-license database and third-party materials concerning station licensing shows that all full power stations operate at power levels well in excess of the

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<sup>4</sup> *Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001).

maximum power level for low power and Class A stations.<sup>5</sup> Thus, all stations licensed pursuant to Part 74 broadcast at a vastly lower level of power than full power stations. To nevertheless call Part 74 stations “full power” (on the theory that they broadcast at a level of power that is greater than the minimum level required by an obscure Part 73 regulation) flies directly in the face of what Congress intended. It would also render Section 614(h)(1)(B)(i) superfluous: there would be no “low power” left.<sup>6</sup>

If there were any doubt remaining, the First Amendment would break the tie. There are 567 Class A stations and 2,227 other low power stations, while there are only 1,250 full power commercial stations.<sup>7</sup> Any statutory reading that would allow the Commission to vastly increase the number of stations eligible for full must-carry rights would raise obvious and serious First Amendment concerns. The Supreme Court has stated that, “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”<sup>8</sup> There is no such indication in the statute, and the interpretation must accordingly be rejected.

In sum, CBA’s proposal would not work. It would accordingly be a poor use of this Commission’s scarce resources to conduct a rulemaking to amend the table of allotments: even if

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<sup>5</sup> See Warren Communications News, 76 Television & Cable Factbook (2008), Section A.

<sup>6</sup> See, e.g., *Nat’l Cable Television Ass’n, Inc. v. FCC*, 33 F.3d 66, 74 (D.C. Cir. 1994) (“an exception that excepts nothing” is not favored).

<sup>7</sup> *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rule Making, 23 FCC Rcd 5922, Appendix B, ¶¶ 7, 11 (2008).

<sup>8</sup> *Solid Waste Agency of N. Cook County v. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001).

the Commission completed such a rulemaking by including all Class A stations, those stations would still be captured by the exclusion of Section 614(h)(1)(B)(i), and accordingly would still not be entitled to full must-carry rights.

**Conclusion**

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

Respectfully submitted,

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