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	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways To Further Section 257 Mandate and To Build on Earlier Studies	)	MB Docket No. 04-228

REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby replies to comments submitted in response to the above-captioned Notice of Proposed Rulemaking ("*Notice*").[1] The record demonstrates that the Commission does not have the statutory authority necessary to further expand must-carry burdens on cable operators, and that, even if the Commission did have authority to increase

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[1] *In re Promoting Diversification of Ownership in the Broadcasting Services*, Report & Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd. 5922 (2007) ("*Notice*").

must-carry burdens, doing so would disserve the interests of American consumers. Adoption of any such unwarranted requirements at this crucial time in the transition to digital television would be particularly unwise.

In the *Notice*, the Commission asked whether it has "authority under the Act to adopt rules requiring [] carriage" of Class A broadcast stations.[2] The answer is a resounding "no."

As explained by NCTA, the Commission has already asked and answered this question:

> The Commission confronted this issue directly when it adopted the new Class A service. . . . It concluded that qualifying for Class A status did not change a station's status for must-carry purposes. On reconsideration, the FCC reiterated that "Congress intended that Class A stations have the *same limited must carry rights as LPTV stations*. . . . [T]o be eligible for must carry, Class A stations, like other low power television stations, must comply with the Part 74 rules and the other eligibility criteria established by statute and our rules."[3]

Class A stations are a subset of LPTV stations that have been specially designated for the sole purpose of fulfilling a statutory directive that certain LPTV stations be given special protection against interference from other broadcasters.[4] The statute does not empower the Commission to grant any LPTV stations additional must-carry rights.

Even if there were any ambiguity in the statute, which there is not, the Commission's use of that ambiguity to expand cable operators' must-carry obligations would further infringe on cable operators' editorial discretion to choose the stations they will carry and would violate the First Amendment.[5] The must-carry requirements established by Congress in 1992 survived

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[2] *Notice* ¶ 99.

[3] NCTA Comments at 4 (emphasis added) (internal quotations omitted); *see also* Cablevision Comments at 3-5; Time Warner Comments at 8-10. For purposes herein, unless otherwise designated, all citations to comments are to filings made in MB Docket No. 07-294.

[4] *See* 47 U.S.C. § 336(f); *see also In re Establishment of a Class A Television Service*, Report & Order, 15 FCC Rcd. 6355 (2000).

[5] *See* NCTA Comments at 6-7; Cablevision Comments at 11-15; Time Warner Comments at 11-14.

Constitutional review only by the barest of margins, and only on the basis of marketplace facts that no longer exist.[6] Expanding must-carry rights for hundreds of LPTV stations would substantially burden cable operators' editorial discretion without furthering any compelling government interest. Moreover, additional must-carry burdens cannot be justified by Congress's findings regarding the benefits and burdens of the must-carry regime adopted in 1992.

Although beyond the scope of this rulemaking,[7] expanded must-carry burdens would also be bad public policy. Contrary to the *Notice*,[8] any notion that expanding mandatory cable carriage of Class A stations "could" foster localism and diversity is refuted by fact. As the Diversity and Competition Supporters assert: "[m]any – 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."[9] Meanwhile, mandatory cable carriage of Class A stations would certainly *decrease* diversity by

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[6] *See* Comcast Ex Parte Letter, MB Dkt. No. 98-120, at 1-2 (Nov. 18, 2003) (reporting that "today's market conditions are dramatically different, in a variety of ways, from those reflected in the legislative hearings of the late 1980's and early 1990's, the Conference Committee Report on the 1992 Cable Act, the statute's legislative findings, the briefs filed by the FCC and the broadcasters in the *Turner* cases, and the Supreme Court's *Turner* decisions themselves"); *see also* Comcast Ex Parte Letter, MB Dkt. No. 98-120 att. A (Feb. 3, 2005) (describing seismic changes that have occurred between 1992 and 2005 in the video marketplace that have destroyed the legal foundation for must-carry).

[7] The *Notice* simply inquired about the Commission's *legal authority* to adopt expanded must-carry obligations. *Notice* ¶ 99 ("We seek comment on whether we have authority under the Act to adopt rules requiring such carriage."). The Commission did not inquire about the policy implications of expanding must-carry requirements, nor did it identify any new carriage rules the Commission might consider if it were to conclude -- contrary to its prior determination and the plain words of the statute -- that the Commission does have legal authority to expand must-carry burdens. As the Supreme Court has explained, "The Administrative Procedure Act requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.' . . . The object, in short, is one of fair notice." *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2351 (2007) (citing to 5 U.S.C. § 553(b)(3)).

[8] *Notice* ¶ 99 (asserting that "cable carriage of Class A television stations could promote both programming diversity and localism").

[9] Diversity and Competition Supporters Comments at 23.

"overwhelm[ing] cable capacity at a time when bandwidth is at a premium" because cable operators will be devoting even more capacity to carriage of full-power must-carry broadcast stations to ease the digital broadcast transition.[10] Comcast does in fact carry many Class A and other LPTV stations already, pursuant to voluntary marketplace agreements with individual stations and station groups, where they offer programming that Comcast believes its customers want: Comcast has negotiated retransmission consent arrangements covering over 100 LPTV stations, of which over 50 are Class A stations.

This is an especially inopportune time to consider any changes in must-carry burdens. The video marketplace is more competitive and dynamic than ever.[11] And as the National Association of Broadcasters observed when the broadcast digital transition was at a less critical juncture than it is today, "at this stage in the transition, stability and certainty in the rules and policies governing the transition are critical."[12]

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[10] NCTA Comments at 8. "Piling new must-carry requirements on top of the existing requirements and uses will simply cause operators to drop other services to make room for the new stations. Not only would creating additional scarcity of available channels be unfair to non-broadcast cable program networks, which have no such guaranteed carriage, and to their viewers. But also the services most likely to be dropped are those that themselves appeal to niche, minority and diverse audiences in the cable operator's franchise area. Additional must-carry obligations would most directly diminish the channel space available for prospective new minority programmers . . . " *Id.* at 9 (internal quotations omitted).

[11] *See, e.g.*, Comcast Comments, MM Dkt. No. 92-264, at 1-2 (Mar. 28, 2008); Comcast Reply Comments, MB Dkt. No. 07-198, at 3-9 (Feb. 12, 2008); Comcast Ex Parte Letter, MB Dkt. No. 06-189 (Mar. 30, 2007).

[12] *In re Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Petition for Reconsideration and Clarification of The Association for Maximum Service Television, Inc., and the National Association of Broadcasters, MB Dkt. No. 07-91, at 1 (Feb. 29, 2008).

Adoption of expanded must-carry obligations would be unlawful. The Commission should not expend any further resources considering the matter.

Respectfully submitted,

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