

Hardy, Carey, Chautin & Balkin, LLP
ATTORNEYS AT LAW

110 Veterans Memorial Boulevard, Suite 300
Metairie, Louisiana 70005
Telephone 504.830.4646
Facsimile 504.830.4659
www.hardycarey.com

RECEIVED

FEB - 7 2006

February 7, 2006

Federal Communications Commission
Office of Secretary

Elise M. Stubbe, Esq.
estubbe@hardycarey.com
Direct Dial: 504.830.4641

RETURN COPY
2597/002
(FOR DATE-STAMP AND RETURN)

Via Hand Delivery

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Expedited Petition for Declaratory Ruling That Qualified LPTV and Class A Stations Flash-Cutting to Digital-Only Operations Remain Entitled to Mandatory Cable Carriage of their Digital Transmissions

Dear Ms. Dortch:

Please find enclosed the original and four (4) copies of the above referenced Petition. If you have any questions, please do not hesitate to contact me.

Sincerely,

Elise M. Stubbe

Elise M. Stubbe

EMS:dbg
Encl.

Cc: Eloise Gore, by hand
Ken Smith

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Frances S. Smith d/b/a
NCN Cable Advertising

Low Power Television Station
WKFK-LP
Pascagoula, Mississippi

Petition for Declaratory Ruling

EXPEDITED PETITION FOR DECLARATORY RULING
THAT QUALIFIED LPTV AND CLASS A STATIONS FLASH-CUTTING TO
DIGITAL- ONLY OPERATIONS REMAIN ENTITLED TO
MANDATORY CABLE CARRIAGE OF THEIR DIGITAL TRANSMISSIONS

Submitted on behalf of
Frances S. Smith d/b/a NCN Cable Advertising, Inc.

By: Elise M. Stubbe, Esq.
Joseph C. Chautin, Esq.
Hardy, Carey, Chautin & Balkin, LLP
110 Veterans Blvd., Suite 300
Metairie, LA 70005

Table of Contents

I. Introduction..... 4

II. Background..... 4

 A. WKFK-LP..... 6

 B. LPTV Digital Order and Public Notices..... 7

 C. Service Jeopardized..... 9

III. A Declaratory Ruling is the appropriate vehicle for deciding this matter.. 10

IV. The FCC is fully within its authority to extend mandatory carriage rights to digital only LPTV and Class A stations, and does not have to change any of its existing rules to do so..... 11

 A. Authority..... 11

 B. LPTV and Class A Carriage Qualifications..... 13

 C. Digital Conversion..... 15

 D. Election Requirements..... 16

V. Conclusion..... 17

Summary

Pursuant to Rule 1.49(c), the Petition is including this summary of its Petition. Petitioner is filing a Petition for Declaratory Ruling to request clarification of the FCC's cable must-carry rules to indicate that they apply to the digital signals of Class A, LPTV and TV translator stations after those stations flash-cut to digital operation and cease operating their analog signals. Petitioner first presents an introduction to the issues involved and invokes the use of Rule 1.2. Next, Petitioner presents background about its station, WKFK-LP, Pascagoula, Mississippi, about the digital LPTV and Class A service, cable must carry and the necessity for a declaration. Third, Petitioner discusses why a Declaratory Ruling and not a Petition for Rulemaking is the appropriate method for dealing with this issue. Fourth, Petitioner explains under what authority the Commission can grant must-carry to digital LPTV signals and why no rules need to be changed in order to implement cable must-carry of digital LPTV and Class A signals. It also discusses the logistics of down conversion equipment and digital must-carry elections. Finally, Petitioner presents its conclusion.

Petition for Declaratory Ruling

I. Introduction

Pursuant to Section 1.2 of the Commission's rules and with this Petition, Frances S. Smith d/b/a NCN Cable Advertising ("NCN" or "Petitioner") respectfully requests the FCC remove uncertainty regarding the cable carriage rights of low power and Class A television digital signals on cable systems when those stations flash-cut to digital only operations. Specifically, NCN requests a declaratory ruling that must-carry qualified LPTV and Class A stations remain entitled to cable carriage of their signals after flash-cutting to digital-only operations, provided they continue meet the six statutory criteria set forth in Section 614(a) of the Act. The uncertainty surrounding this question seriously jeopardizes the smooth and continued offering of LPTV and Class A television services to the general public once the digital transition for these stations begins.

II. Background

Currently, there are 2,117¹ licensed LPTV and Class A television stations in the nation providing service in rural, urban and suburban areas throughout the continental United States, Alaska and Hawaii. The FCC originally created the Low Power Television ("LPTV") service in 1982 as an extension and expansion of the incumbent television translator service, created in 1956. From the very beginning, the FCC designed the LPTV service to expand the horizons of both broadcasters and viewers by allowing LPTVs, while operating at the same power as TV

¹. See Public Notice, *Broadcast Station Totals as of September 30, 2005*. December 8, 2005, DA 05-3149. LPTV and Class A stations outnumber full-power stations three to two. *Id.*

translators, to begin offering their own locally produced programming.² LPTV stations – and since 2000, Class A television stations – fill in the gaps in programming to smaller communities like Pascagoula that full-power stations are just not covering. Indeed, it is this adherence to providing local service that allows LPTV and Class A stations carriage rights on cable systems.³

Initially, LPTV stations were not given cable must-carry rights by the FCC. When it created the LPTV service in 1982, the Commission recognized that LPTV stations should be on cable systems, but decided against forcing cable operators to carry LPTV stations in part because of First Amendment concerns and in part because it felt that the best resolution of the matter was between the parties themselves.⁴ Ten years later in the 1992 Cable Act, Congress decided that it was time for LPTVs to have must-carry rights on cable systems provided they offered local broadcasting and programs.⁵ Must-carry for LPTV stations took effect in 1993. In 2000, must carry was continued for LPTV stations converting to Class A status.⁶

² *An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, Report and Order, 51 RR 2d 476 (1982)[hereinafter LPTV Report and Order].

³ *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 2981 at ¶ 62 [“...[A]n LPTV station will not be qualified unless the Commission determines that the provision of programming by such station would address local news and informational needs not being adequately served by full power television stations because such full power stations are distant from the LPTV station’s community of license.”](hereinafter, Original Must Carry Order).

⁴ LPTV Report and Order, 51 RR 2d at 522, ¶ 112 (1982).

⁵ 47 USC 534(c)(1) and (h)(2)(B).

⁶ *In the Matter of the Establishment of a Class A Television Service*, Memorandum Order and Order on Reconsideration, 16 FCC Rcd 8244, 8259-60 ¶¶ 42-43 (2001).

A. *WKFK-LP*

NCN first sought a construction permit to build a new LPTV station in Pascagoula, Mississippi in 2000. The FCC granted the application in 2002, and NCN constructed and began operating WKFK-LP on Channel 7 in Pascagoula, Mississippi in July of that year. In September 2002, it elected carriage on the local cable company's, Cable One, system serving Pascagoula and surrounding areas of Jackson County, Mississippi. The FCC granted carriage of WKFK-LP in Pascagoula, Escatawpa, Moss Point, Gauthier and other unincorporated areas of Jackson County on May 15, 2003 by order in response to the must-carry complaint filed by NCN against Cable One.⁷ WKFK-LP has been carried on Cable One's systems serving these areas continuously since 2003.

On September 12, 2005, NCN re-elected must carry status for WKFK-LP on these systems as well as those serving Vancleave and Ocean Springs, Mississippi for the cycle starting January 1, 2006 through December 31, 2008. Cable One granted carriage of WKFK-LP on all of its areas in the Biloxi-Pascagoula DMA serving Jackson County except Vancleave and Ocean Springs by letter dated October 20, 2005.⁸ As of January 1, 2006, WKFK-LP is being carried by Cable One in Pascagoula, Escatawpa, Moss Point, Gauthier and unincorporated Jackson County pursuant to must-carry. WKFK-LP is not being carried by any systems pursuant to retransmission consent and relies solely on must-carry for the carriage of its signal on cable in

⁷ *Frances S. Smith d/b/a NCN Cable Advertising, v. Cable One, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 9970 (2003). The order did not include carriage for two other areas in Jackson County, namely Vancleave and Ocean Springs, MS.

⁸ NCN filed a must-carry complaint against Cable One at the FCC arising out of this refusal on December 7, 2005, Report 0165, released January 23, 2006 (CSR-6966-M).

and around the Pascagoula area.⁹

B. LPTV Digital Order and Public Notices

On September 30, 2004, the FCC issued its LPTV Digital Order,¹⁰ setting forth a specific and measured approach to an eventual conversion of the LPTV, TV translator and Class A television services from analog to digital. Part of the order dealt with the question of how much time on-channel converting licensees should have to construct their digital facilities. The Commission decided to give licensees - including those like WKFK-LP who would likely be pursuing an on-channel conversion - three (3) years from the date of the digital construction permit grant to build their digital facilities and flash-cut to digital service.¹¹ The Order also stated, however, that the low power digital conversion would "be completed at some fixed time after the deadline for full-service television stations."¹² The LPTV Digital Order did not address or provide for cable mandatory carriage of those qualified LPTV and Class A stations that

⁹ Pursuant to SHVIA, WKFK-LP is not entitled to carriage on satellite systems and thus it - like this pleading - is limited to cable systems only. *In the Matter of the Implementation of the Satellite Home Viewer Improvement Act of 1999*, Report and Order, 16 FCC Rcd 1918, 1976-77 at ¶ 136 (2001).

¹⁰ *In the Matter of Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Report and Order, 19 FCC Rcd 19331 (2004)[hereinafter LPTV Digital Order]

¹¹ LPTV Digital Order at ¶ 170. The Commission further rejected the request by Commercial that on-channel conversion permits expire at the end of the LPTV digital transition citing the lack of a concrete date for a final LPTV conversion and concerns about spectrum lying fallow as a result. *Id.* Also, the Commission's discussion of an end to the LPTV digital transition apparently does not take into account the number of stations that would convert earlier as part of an on-channel conversion.

¹² *Id.* at ¶ 17.

convert to digital-only operations.

The reality is that LPTV and Class A stations – without assurance or certainty that their cable mandatory carriage rights will continue when they convert – are having to begin the process of digital conversion now, well in advance of an announced final conversion date. The process was made even more hurried by the announcement on January 26, 2006, by Public Notice, that in May 2006, LPTV, Class A and translator stations would be allowed to apply for companion channel digital authorizations.¹³ LPTV and Class A licensees are responding: as of January 31, 2006, 23 applications have been accepted or granted for digital flash-cuts by Class A, LPTV and TV translator stations.¹⁴ These permits will expire in three years, whether or not a final conversion date has been decided. Moreover, the public notice announcing the opening of a companion channel window for Class A, LPTV and TV translators also ordered a freeze on conversion and other applications in advance of the window.¹⁵ This means that licensees who were contemplating an on-channel conversion have even less time to make a decision before the freeze is implemented. Thus, many licensees are compelled to commence digital planning and file appropriate applications for on-channel or companion channel digital authorizations much earlier than they may have otherwise.

¹³ Public Notice, DA 06-123 (January 26, 2006). The companion channel authorizations will also expire in three years. Licensees must choose between an on-channel conversion and a companion channel.

¹⁴ FCC CDBS Database as of January 31, 2006 conducting searches for Digital LPTV and Digital Class A applications.

¹⁵ Public Notice, DA 06-123 (January 26, 2006).

C. *Service Jeopardized*

Without some confirmation that once a channel completes its conversion and flash-cut, cable companies will be required to carry its new digital signal, the FCC's well-founded concern about the blackout of LPTV and Class A signals may very well become a reality.¹⁶ WKFK-LP is particularly susceptible because Pascagoula's market of Biloxi-Gulfport has a 72% cable penetration rate, 4% higher than that of the nation.¹⁷ Moreover, once low power digital stations are dropped from cable line ups, it is unlikely that there will be enough viewers who can receive their digital over-the-air signals to allow the stations to remain viable financial operations.¹⁸ The combination of these factors would most likely make many LPTVs, like WKFK-LP, go dark after converting to digital - precisely what the FCC is trying to avoid.

In light of the foregoing, low power stations cannot make informed decisions about whether to convert to digital via on-channel conversion or companion channel applications until such time as there is clarification that LPTV and Class A digital signals will enjoy the same cable must-carry rights as these stations' analog signals. Given the amount of money - both in equipment and opportunity costs - that needs to be invested by these stations to convert their

¹⁶ LPTV Digital Order at ¶ 16. Moreover, the provision of PEG channels for the carriage of LPTV (and NCE) digital stations as set forth in paragraph 86 of the Digital Must-Carry Order, will do little to alleviate the problem in light of the fact that LPTVs would be at the mercy of the local franchise authorities who have dominion over PEG channels. Instead of increasing the chances of carriage, the use of PEG channels would likely make it even more difficult for digital LPTV stations to get carriage. Apparently, this provision does not apply to digital Class A stations.

¹⁷ William McGorry, *Broadcasting and Cable Yearbook*, 2005, p. C-9.

¹⁸ Consumers can only receive a digital off-air signal if their set is equipped with a digital tuner (either internal or external).

operations to digital, it is unlikely that many will undertake the conversion until there is a solid statement in favor of cable must-carry for low power digital signals. And for those stations that do undertake the conversion and flash-cut as required, the future is murky at best with a very real possibility of losing all of their viewers, not just those receiving them on cable.

III. A Declaratory Ruling is the appropriate vehicle for deciding this matter.

Section 1.2 grants the FCC the power "on motion...[to] issue a declaratory ruling terminating a controversy or removing uncertainty." In addition to its own rules and the Administrative Procedure Act, the DC Circuit and U.S. Supreme Court have both recognized the inherent power of administrative agencies to clarify issues without the need for making rule changes.¹⁹ Here, the controversy is uniquely suited for a Declaratory Ruling because all the Petitioner is seeking is a clarification of - not a change in - the rules governing must-carry. A Rulemaking in this case would be unnecessary, wasteful, and overly burdensome because there are no rules that require changing in order to answer the question of whether digital-only LPTV and Class A stations are entitled to cable must-carry.²⁰

Moreover, deadlines for LPTV and Class A stations to apply for on-channel or companion channel digital authorizations are only three to four months away. Thus, a Declaratory Ruling will efficiently and expeditiously clarify carriage rights for LPTV and Class

¹⁹ *Chisolm v. FCC*, 538 F.2d 349 (D.C. Circuit 1976); *National Labor Relations Board v. Bell Aerospace Company*, 416 U.S. 267 (1974).

²⁰ 47 CFR 1.401(a). See *Gerard A. Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Circuit 1988). [Court upheld FCC determination that policy issues raised in *ad hoc* waiver request were best addressed in rulemaking because the policy issues implicated possible change in FCC no-origination rule for FM translators or amendment to Table of Allotments to carve FM full power allotment for Bergen County, New Jersey].

A stations as they consider how best to comply with the FCC's directive to apply for on-channel or companion channel digital authorizations while not sacrificing service to the public.

IV. The FCC is fully within its authority to extend mandatory carriage rights to digital only LPTV and Class A stations, and does not have to change any of its existing rules to do so.

No existing rules²¹ need to be changed to implement must-carry of digital-only LPTV and Class A signals. All that is required is a declaration that certain rules, as written, are applicable to LPTV and Class A stations that flash-cut to digital only operations.

A. Authority

The FCC already has the authority to extend must-carry rights to LPTV digital stations. In 1992, Congress saw well into the future of television, recognizing the eventual digital conversion of low power television stations in the Cable Act. Specifically, Section 336(f)(4) states that “[a] licensee of a low power television station ... may, at the option of the licensee, elect to convert to the provision of advanced television services on its analog channel...”²² Class A and TV translator stations were given similar options.²³ The FCC in its 2004 LPTV Digital Order concluded that this section as well as Section 309(j)(14)²⁴ “ultimately compel LPTV, TV

²¹ This analysis includes those rules that were amended to allow for the carriage of full-power DT signals. *In the Matter of Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598 (2001) [hereinafter Digital Must-Carry Order].

²² 47 USC § 336(f)(4).

²³ *Id.*

²⁴ Section 309(j)(14) prohibits the renewal of any broadcast license in the analog service beyond December 31, 2006. 47 USC § 309(j)(14).

Translator and Class A stations to convert to digital.²⁵

While there is no affirmative mandate to the FCC to modify the must-carry rules to accommodate mandatory carriage of digital-only low power and Class A stations,²⁶ the current statutory language also does not prohibit that carriage or the FCC from implementing it. Indeed, Section 614(a) of the Communications Act provides for the cable carriage of “qualified low power television stations” with no distinction between analog and digital and thus, “supports the argument that [lower power and Class A] digital signals are entitled to mandatory carriage²⁷ once they commence digital-only operations.

Moreover, Congress did not contemplate an elimination of mandatory carriage for LPTV and Class A stations when they transition to digital only operations because doing so would have jeopardized their viability. Rather, it left the implementation of that carriage to the Commission’s discretion - much like it did in the implementation of analog LPTV must-carry. The Commission has properly preserved those rights over the past 12 years, applying to low power and Class A stations many of its must-carry rules referring to “commercial television

²⁵ LPTV Digital Order, at ¶ 13.

²⁶ Section 614(b)(4)(b) of the Communications Act requires the FCC to “establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of ... local commercial television stations” at such time as there are new television technology standards. The mandate is self-limited only to full-power stations through the use of “local commercial television” stations as that term is defined in 47 USC § 534(h)(1)(A).

²⁷ Digital Must-Carry Order, at ¶ 13. The Commission cited to 47 USC § 534(a) in support of digital full-power must-carry in 2001. *Id.* Unlike the full-power digital proceedings, Petitioner is not seeking carriage rights for ancillary and supplementary streams of programming nor is it requesting carriage of future companion streams. The Petition is limited solely to the question of carriage for primary digital signals for stations that flash-cut to digital-only operations after an on-channel or companion channel conversion.

stations” or “television stations”²⁸, determining on its own the appropriate signal strength measures for low power and Class A stations, and concluding that lower power stations were subject to retransmission consent even in the absence of a statutory mandate.²⁹ A continuation of the Commission’s properly exercised delegated authority is all that is needed here to ensure mandatory carriage rights for digital-only LPTV and Class A television stations.

B. LPTV and Class A Carriage Qualifications

Section 76.55(d) sets forth the six statutorily defined qualifications that an LPTV or Class A station must meet to be eligible for carriage. However, to be eligible for carriage, a LPTV or Class A station must first conform to the rules contained in Part 74. Part 74 has already been amended to include definitions of and regulations for digital LPTV and Class A stations,³⁰ and thus, 76.55(d) already contains an implicit authorization of carriage for stations that commence digital only operations.

Of the six qualifications in 76.55(d), only two are implicated in the implementation of

²⁸ For example, the must-carry election rules in Section 76.64(f) have been applied to LPTV even though the language mentions only commercial television stations. *See Frances S. Smith d/b/a NCN Cable Advertising, v. Cable One, Inc.*, at ¶ 4 (2003). Similarly, the FCC extended retransmission consent rights to LPTV stations in the Original Must Carry Order, at ¶140 and, *In the Matter of the Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723, 6741 at ¶ 86 [hereinafter, Must-Carry Memorandum Opinion].

²⁹ *See* Digital Must-Carry Order, ¶ 44 *citing* 47 USC § 534(h)(2)(D); Similarly, the Commission has used its delegated authority to apply several must-carry rules to NCE stations where the statute had been silent with respect to them. Must Carry Memorandum Opinion, at ¶ 59 (1994)[applied the full power signal quality standard to NCE translator signals]; Digital Must-Carry Order, at ¶ 22 [determined that NCE digital signals have must-carry rights along with their commercial counterparts despite lack of language to that effect in statute].

³⁰ *See* Digital LPTV Report and Order, Appendix B, 19 FCC Rcd 19331. These new regulations became effective on September 15, 2005, 70 FR 56581.

must-carry for digital-only low power and Class A stations, namely Qualifications 3 and 4. Neither needs to be revised. Qualification 3 requires LPTV stations to comply with interference regulations set forth in Part 74.³¹ To the extent that these regulations have already been revised for digital low power signals, only a clarification that Qualification 3 is fulfilled by a digital-only LPTV or Class A station is required.

Qualification 4 does not need to be modified either. It requires any LPTV signal seeking to be qualified for carriage to deliver a good quality over-the-air signal to the cable operator's headend.³² In the analog must-carry context, the Communications Act did not define what was to be considered a 'good quality signal' for LPTV and left to the Commission to determine the answer. Using this discretion, the Commission determined that the appropriate levels for LPTV signals were the same as those dictated by the statute for full power stations.³³ Moreover, the LPTV standards were only incorporated into the rule as a note. The same discretionary determination applies in the digital-only LPTV and Class A must-carry context. Exercising this discretion, the Commission should declare the same "good quality" signal levels for LPTV and Class A digital signals as those that are required for full-power digital television signals, namely a strength of -61 dBm.³⁴

³¹ 47 CFR 76.55(d)(3).

³² 47 CFR 76.55(d)(4).

³³ Digital Must-Carry Order at ¶ 44 (citing 47 USC § 534(h)(2)(D)).

³⁴ See Digital Must-Carry Order, at ¶ 46. The existing note to Section 76.55(d) defining a good quality signal for LPTV must-carry is not an impediment to a new signal level designation. Indeed, the Commission did not revise Section 76.55(c)(3) when it set the -61 dBm signal level requirement for digital full power must-carry. Given this precedent, the Commission does not now need to amend the note in the rules to indicate the new signal level requirements.

C. *Digital Conversion*

Like full-power digital carriage, carriage of digital LPTV signals will necessarily involve additional equipment. Specifically, many cable operators are currently receiving over-the-air digital signals and "down-converting" them to analog signals at the headend for carriage. The analog signals are then carried on the system normally. In its Digital Must-Carry Order, the Commission acknowledged the right of a digital full-power station to deliver one of its HDTV or SDTV signal streams to the cable system, which would then be converted to analog format for delivery to subscribers.³⁵ This is true even if the licensee has only one signal, namely its digital signal.³⁶ In the event the licensee elects to deliver its digital signal to be converted to analog for subscriber delivery, the licensee must provide the necessary down-conversion equipment at the cable headend.³⁷ This provision recognized that during the transition, not all subscribers would have sets capable of receiving digital signals, even from a cable system.

Likewise, the Commission should declare that LPTV and Class A stations that flash-cut to digital-only operations have the same right to provide necessary down-conversion equipment at the cable headend to enable reception of the station's signal by all cable subscribers.³⁸ In doing so, the Commission should clarify that the provision of down-conversion equipment does not contravene the long-standing prohibition against LPTV stations providing additional

³⁵ Digital Must-Carry Order, at ¶ 74.

³⁶ *WHDT-DT, Channel 59, Stuart, Florida*, 16 FCC Rcd 2692, 2699 at ¶ 14.

³⁷ See *Id.*

³⁸ Similarly, where an LPTV or Class A station has obtained a companion channel, it should be able to choose which of its streams will be carried and if it chooses the digital, it should be able to provide the necessary equipment for the conversion of that signal to analog.

equipment to ensure the receipt of a good quality over-the-air signal at the cable headend.³⁹

Down-conversion equipment supplies the signal to the subscriber, not to the headend and does nothing to enhance or manipulate the quality of the over-the-air signal.

D. Election Requirements

Many LPTV and Class A stations that elect to flash-cut will likely complete the process somewhere in the middle of a must-carry election cycle. Just like full-power television stations handing in their analog license and going to a digital-only operation, LPTV digital stations face the potential of being disenfranchised in the middle of an election cycle because their signal has changed. In the full power context, the Commission amended the DTV rules to allow that "... stations that return their analog spectrum allocation and broadcast in digital only" should follow the same election process as is applicable to new television stations.⁴⁰ Specifically, these stations must make an initial election for their 'new' digital signal no earlier than 60 days prior to beginning operation in digital and no more than 30 days after commencing their broadcast.⁴¹

The Commission should declare that LPTV and Class A stations commencing digital only operations will follow the same election procedures as full-power stations doing the same. Given

³⁹ The prohibition is set forth in Original Must Carry Order, 8 FCC Red at 2991, ¶ 104.

⁴⁰ Digital Must-Carry Order, at ¶ 29.

⁴¹ *Id.*; 47 CFR 76.64(f)(4). The rule also indicates that the election shall not become effective until 90 days after it is made. To the extent that stations are only allowed to elect within 60 days of carriage, this could lead to potential 30-day black outs between the time an LPTV elects carriage for its digital signal and when that carriage is effective. Petitioner urges the Commission to recognize the possible gap and in turn request that cable operators act on elections as quickly as possible to minimize potential black outs. This is especially critical since LPTVs will not have an analog signal back up if they chose to flash-cut instead of obtaining a companion channel.

that these election rules have previously been applied to LPTV and Class A stations,⁴² the declaration requested will simply follow that prior practice and ensure that stations transitioning to digital-only operations will not be disenfranchised as they comply with FCC digital conversion requirements.

V. Conclusion

Respectfully, the Commission needs to immediately review and act upon the question of whether LPTV and Class A television stations will have guaranteed must-carry rights when they convert to digital-only operation. All that is required is a brief clarification that the present rules will apply to guarantee those rights. No rules require amendment, nor are there any questions about whether the FCC has the authority to make this declaration. Thus, Petitioner respectfully requests that the FCC grant the Petition on an expedited basis and issue a Declaratory Ruling, as requested herein.

Respectfully submitted:



Elise M. Stubbe, Esq.
Joseph C. Chautin, Esq.
Hardy, Carey, Chautin & Balkin, LLP
110 Veterans Blvd., Suite 300
Metairie, LA 70005

Tel (504) 830-4646
Fax (504) 830-4659

Counsel for Frances S. Smith d/b/a
NCN Cable Advertising

Dated: February 7, 2006

⁴² Moreover, the rule does not limit itself to only full power stations because it simply refers to "stations" or "new television stations." As such, the rule should apply equally to LPTV and full-power stations.