

October 10, 2008



Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

Re: MB Docket No. 03-185  
ET Docket No. 04-186  
Notice of Oral Ex Parte Presentation

Dear Ms. Dortch:

On October 7, 2008, Harold Feld and Parul, Desai of Media Access Project (MAP), Alex Nogales and Inez Gonzalez of the National Hispanic Media Coalition (NHMC), Joel Kelso of Consumers Union (CU) and Joe Torres of Free Press (FP) (collectively “NHMC, *et al.*”) met with Commissioner Copps, Rick Chessen, Bruce Gottleib, and Scott Deutschman, with regard to the above captioned proceeding.

First, NHMC, *et al.* support moving forward with a *Notice of Proposed Rulemaking* that proposes to give Class A LPTV broadcasters must carry rights. Many of these stations provide needed local programming, particularly programming in Spanish or other non-English languages that serve communities otherwise unserved or under served by local free over-the-air television broadcasters. Unless these stations can reach a sufficient audience, they will cease operation. Only by reaching cable subscribers can these stations survive after the transition. This is the same public interest analysis that the *Turner* Court found survived scrutiny under the *O’Brien* test.

It is rational for the Commission to distinguish – at least in the first instance – between Class A LPTV stations and the remaining LPTV stations. Class A stations are a reasonably identifiable subset, in which 45% of the programmers provide needed Spanish language programming. In addition, the incremental burden on cable operators from adding Class A stations is significantly smaller than adding all LPTV stations. Accordingly, making an initial distinction between Class A stations and other LPTV stations is reasonable. Congress has made a similar distinction, which should inform the FCC’s decision making here.

At the same time, the Commission should not grant must carry rights without ensuring that the LPTV stations at issue genuinely serve their local communities in substantive ways. This is not merely a matter of equity, that conferring new privileges should also confer new responsibilities.

Rather, it is compelled by the constitutional analysis in *Turner*, which requires that the government show that the restriction on the cable operators' editorial discretion serves the compelling government purpose "of the highest order" of promoting the goals of diversity and localism. Unless the Commission demonstrates that granting LPTV stations must carry is narrowly tailored to serve this specific end, the regulation cannot stand. Accordingly, the proposed *NPRM* should propose means that ensure that grant of must carry rights will ensure an increase in local news and diverse opinions. This might include, for example, a requirement that any Class A LPTV broadcaster asking for must carry comply with the proposed rules in the Commission's localism docket regardless of what rules the Commission ultimately adopts for full power stations.

The trade press has reported two possible avenues for providing Class A stations with must carry rights. First, the Commission could assert authority to compel must carry. Second, the Commission could increase the power of LPTV stations so that they qualify for must carry under the existing statute. Each of these presents issues that are best addressed in the context of an *NPRM*.

***Commission authority to impose must carry.*** Some have suggested that because Congress has granted only limited must carry rights to Class A LPTV stations, the Commission has no authority to compel must carry for other Class A stations. This ignores the history of must carry prior to the 1992 Cable Act. *See* Cable Television Consumer Protection Act of 1991, S. Rep. 102-92 ("Senate Report") at 38-46. From the inception of cable, the FCC mandated "must carry" on the basis of its own, ancillary authority as approved by the Supreme Court in *Southwest Cable*. *Id.* at 38-39. These rules continued even after Congress passed the 1984 Cable Act on the basis of the FCC's inherent authority.

In *Quincy Cable TV v. FCC*, 768 F.2d 1434 (D.C. Cir., 1985), the D.C. Circuit ruled that the must carry rules could not withstand scrutiny under the *O'Brien* intermediate scrutiny standard. Critically, the court did not invalidate the FCC's rules as *ultra vires*. Rather, the *Quincy TV* Court held that the Commission had not demonstrated that the regulations could survive First Amendment scrutiny. Congress' response to the *Quincy* decision, as described in the Senate Report, was to continue to rely on the FCC's inherent authority:

The FCC refused to appeal the *Quincy* decision and was prepared to acquiesce in the court's ruling. The Congress and the broadcast community, however, ***believed the FCC should fashion a new set of rules*** that could withstand constitutional muster, and together, they forced the FCC to initiate a new proceeding in November 1985.

Senate Report at 39 (emphasis added).

In other words, even after passage of the 1984 Cable Act and the *Quincy* decision, Congress still preferred that the FCC impose must carry rules necessary to preserve localism and promote diversity under its inherent authority. Only after the D.C. Circuit again invalidated the FCC rules on First Amendment grounds in *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), did Congress step in to enact must carry rules as an express statutory mandate. In doing so, Congress made clear that it acted explicitly to address the factual questions raised by the *Century*

decision and create rules that could survive intermediate scrutiny. Senate Report at 41-46.

Nothing in the legislative history – including Congress initial decision to exclude LPTV stations from must carry or the subsequent grant of limited must carry for Class A stations – demonstrates a desire to preempt the inherent authority of the Commission to require cable operators to carry broadcast signals. To the contrary, as the legislative history clearly demonstrates, Congress first sought to compel a reluctant Commission to act on its own authority, and only later acted to resolve factual issues presented by the *Century* decision. Accordingly, if the Commission can compile a record that survives intermediate scrutiny, it continues to have the same inherent authority to order must carry for Class A LPTV stations that it had to order must carry for full power stations prior to the *Quincy* decision.

This analysis underscores, however, the need to link any grant of must carry rights to furthering the compelling goals of localism and diversity. Accordingly, any *NRPM* must compile a record showing how any rules proposed will further these goals. This includes application of ownership restrictions, and resolution of the pending inquiry in Docket No. 93-8 into whether stations that provide only program length commercials serve the public interest and whether such Class A LPTV stations that provide predominantly such programming should receive must carry rights.

***Increase in power.*** The Chairman has also suggested that the Commission could increase the power of Class A LPTV stations so that they would be eligible for must carry as full power stations under existing rules. While this certainly lies within the Commission’s authority, this would constitute a “major modification” and be subject to a showing that grant of the increased power serves the public interest.

In addition, the increase in power raises concerns addressed by the pending *Petition for Reconsideration* filed by New America Foundation and the Champaign-Urbana Wireless Internet Network. See *Petition for Reconsideration of NAF, et al.*, Docket No. 03-185 (filed December 29, 2004). As explained there, the Commission must properly balance the important contributions to diversity and localism of LPTV stations with approving devices to operate on an unlicensed basis in the broadcast “white spaces.” Unlicensed access to spectrum promotes the goals of the Communications Act and of the First Amendment, and any significant reduction in available spectrum for unlicensed devices would therefore raise serious concerns.

For this reason, NAF, *et al.* asked the Commission four years ago to condition any new grant of spectrum rights to LPTV stations on an understanding that expanded LPTV spectrum rights would receive no protection from senior white space devices authorized pursuant to 04-186. The Commission has used this approach previously, authorizing a licensed service in the 900 MHz band subject to interference from Part 15 devices previously authorized to use the band. See *Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Vehicle Monitoring Systems*, 11 FCC Rec 22462 (1996) (establishing “safe harbor” for devices authorized under Part 15 for unlicensed use against interference complaints from licensees).

If the Commission determines it will increase power for Class A LPTV stations, it should take a similar approach here. At the least, the *NPRM* should address how grant of increased power could also protect any unlicensed devices authorized in Docket No. 04-186.

MAP seeks permission to file this late. The intervening Jewish holiday of Yom Kippur delayed the filing of this Notice. In accordance with Section 1.1206(b) of the Commission's Rules, 47 CFR §1.1206, this letter is being filed with your office.

Respectfully submitted,

/s/

Harold Feld  
Senior Vice President

cc: Commissioner Michael Copps  
Rick Chessen  
Bruce Gottlieb  
Scott Deutschman