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

In the Matter of:	)	
	)	
Promoting Diversification of Ownership	)	MB Docket No. 07-294
In the Broadcasting Services	)	

To the Commission

REPLY COMMENTS OF THE DIVERSITY AND COMPETITION SUPPORTERS
IN RESPONSE TO THE THIRD NOTICE OF PROPOSED RULEMAKING

The Diversity and Competition Supporters (collectively "DCS")[1] respectfully offer these Reply Comments in response to the Report and Order and Third Further Notice of Proposed Rulemaking[2] ("Broadcast Diversity Order"), which seeks comment on twelve proposals to encourage ownership diversity and new entry in broadcasting.[3] Most of the proposals drew little opposition. We focus here on three proposals that attracted some opposition.

[1] The Diversity and Competition Supporters is a coalition of national organizations created in 2002 to advance the cause of minority ownership in MB Docket No. 02-277 (and subsequent dockets). A list of its 31 members is found in the Appendix to DCS' July 30, 2008 Comments in this proceeding ("DCS Comments"). These Reply Comments and all subsequently filed supplements and reply comments and pleadings reflect the institutional views of each of the Diversity and Competition Supporters, and are not intended to represent the individual views of each of the Diversity and Competition Supporters' officers, directors and members.

[2] See Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922 (released March 5, 2008) ("Broadcast Diversity Order").

[3] The record is already complete with comments made by several parties concerning the applicability of 47 U.S.C. §534 (2008) ("Section 614") and Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) to LPTV must-carry. These Reply Comments do not attempt to fully address these issues.

I. The Communications Act Does Not Prevent the Commission From Granting Full Must-Carry Rights To Hyper-Local, Multilingual Class A Television Stations

A. The Commission Provided Adequate Notice That It Is Considering A Rule Regarding Must-Carry For Television Stations Not Already Entitled To Must-Carry, Including Class A Television Stations

Time Warner suggests that, in the Broadcast Diversity Order, the Commission did not provide adequate notice that it was considering a must-carry rule for Class A stations because the section of the NPRM that deals with must-carry is only a single paragraph in length.[4] The Commission provided adequate notice, however. Section 553(b) of the Administrative Procedure Act ("APA"), 5 U.S.C. §553(b), which sets forth the notice requirement for an administrative proceeding, provides that a notice of proposed rulemaking must contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[5] Although the proposal to extend must carry to eligible entities is limited to a single paragraph in the Broadcast Diversity Order,[6] on its face this notice satisfies the requirements of Section 553(b). Indeed, the courts have held that even fewer words are adequate. For example, in Prometheus, the court held that, when read in the context provided by a single sentence, a single

[4] See Comments of Time Warner Cable Inc., MB Docket No. 07-294 (July 30, 2008) ("Time Warner Comments") at 2 n 2, (stating "The *NPRM* may not have come to the attention of all interested parties: the main topic addressed in the *NPRM* is diversity of broadcast programming, and cable must-carry rights are dealt with in only one small paragraph. Thus, without additional notice, any new must-carry burden may be vulnerable not only on the merits but also on grounds of inadequate notice", citing MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1142 (D.C. Cir. 1995) ("MCI") holding that notice of a proposed rule change that was inserted in a footnote in a passage having "nothing to do" with the affected rule was inadequate).

[5] See 5 U.S.C. §553(b)(3) (2008).

[6] See Broadcast Diversity Order, 23 FCC Rcd at 5970 ¶18 (stating "As noted, we are directed under law to describe any such alternatives we consider, including alternatives not explicitly listed above …The *Notice* describes and seeks comment on several possible ways to ease entry into the broadcasting business by small entities that have traditionally faced significant difficulties in entering broadcasting. The *Notice* seeks comment on how the proposals herein will achieve that goal. The Commission especially encourages small entities to comment on the proposals in the *Notice* in this proceeding. The Commission welcomes comment on how to minimize any burdens on small cable system operators that might result from eligible entities being entitled to carriage on such systems under the must carry statute and rules.")

word in the NPRM in that case - "triopolies" - was a sufficient "description of the subjects and issues involved," and was therefore provided adequate notice that the Commission was considering a rule that would allow triopolies.[7]

Further, the court's decision in MCI is inapposite because the must-carry notice in this case was part of the main text of the NPRM, not a footnote, and because the topic of the Broadcast Diversity Order is "Promoting Diversification of Ownership in the Broadcasting Services" and Class A television stations are broadcasting services. Thus, the Class A notice was related to the rest of the NPRM.

B. An Analysis of Congress' Intent In Excluding Class A Stations From Must-Carry Necessitates An Analysis of Sections 151, 257, And 309 Of The Act, In Addition to Section 614

Cablevision Systems Corp., the National Cable and Telecommunications Association ("NCTA") and Time Warner Cable, Inc. each contend that Section 614 of the Communications Act precludes must-carry for Class A television stations.[8]

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[7] See id. Prometheus Radio Project v. FCC, 373 F.3d 372, 416 (3d Cir. 2004), cert. denied, 545 U.S. 1123 (2005) (holding that "[s]pecifically, the Commission asked for comment on 'different economic incentives' relating to diverse viewpoints in newscasting that might exist 'among stand-alone stations, duopolies, or triopolies.' ... This leaves little doubt that the Notice provided a sufficient 'description of the subjects and issues involved' in the Commission's decision to allow triopolies.")

[8] See Comments of Cablevision Systems Corp., MB Docket No. 07-294 (July 30, 2008) at 3-5 (contending that (1) Section 614 limits must-carry to "full power television stations" and that, since Class A television stations are not "full-power" television stations, they are not entitled to must-carry; (2) Class A television stations do not qualify for must-carry under the definition of "qualified low power stations" in 47 U.S.C. §534(h)(2); and (3) Congress, not the Commission, has the sole authority to convert Class A stations to full-power status). See also Comments of the National Cable & Telecommunications Association, MB Docket 07-294 (July 30, 2008) at 3-6 (contending that (1) the Commission has already ruled out the possibility of granting must-carry to Class A stations in Establishment of a Class A Television Service, Report and Order, MM Docket No. 00-10, 15 FCC Rcd 6355 n. 61 (2000), which states that "Nothing in this Report and Order is intended to affect a Class A LPTV station's eligibility to qualify for mandatory carriage under 47 U.S.C. §534"; (2) Class A stations do not fit the definition of local commercial television stations under 47 U.S.C. §534(h)(1)(A); (3) Class A television stations are precluded from must-carry because they operate pursuant to Part 73 of Title 47, which is a successor regulation to Part 74; and (4) Class A television stations do not meet the circumstances set forth

An interpretation of Congress' intent when it enacted Section 614 must necessarily include an analysis of Sections 151[9], 257[10], and 309.[11] Approximately fifteen percent of low power television stations are minority-owned[12] - far more than the percentage of minority-owned channels currently available on cable. As DCS and others have established, the ability of a Class A station to provide its over-the-air audience with strong local or multilingual service depends on the availability of cable carriage.[13] Thus, the wholesale exclusion of all Class A television stations from must-carry would produce an insurmountable market entry barrier for minorities and other new entrants with Class A stations.

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in Section 614(h)(2) for "qualifying low power stations." See also Time Warner Comments at 8-10 (contending that (1) Section 614 limits must-carry to "local commercial television stations" - i.e., those that are listed in the Table of Allotments - and excludes low power television stations, such as Class A television stations, from must-carry; and (2) Section 614 precludes Class A stations from must-carry because they operate pursuant to part 73 of title 47 of the Code of Federal Regulations, which is a "successor regulation" to part 74; and (3) Section 614 is unambiguous and that, in going beyond its mandate, the Commission would exceed its authority by expanding must-carry to include Class A television stations).

[9] See 47 U.S.C. §151 ("…for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex ….")

[10] See 47 U.S.C. §257 (mandating that the Commission remove market entry barriers for "entrepreneurs and other small businesses.")

[11] See 47 U.S.C. §309(d) and (3) (setting forth license application procedures to protect the public interest).

[12] See MMTC Roadmap for Telecommunications Policy (July 21, 2008) at 17, available at http://www.broadcastingcable.com/contents/pdf/MMTCRoadMap.pdf (last visited August 24, 2008).

[13] See Supplemental Ex Parte Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 (filed November 20, 2007) at 11 (quoting Declaration of Rosamaria Caballero, President, Caballero Television Texas LLC (November 12, 2007) at 1 ("Access to capital has been the single greatest factor impacting the survival and growth of minority owned broadcast companies.") See also Arthur Greenwald, "For LPTV, DTV is a Countdown to Disaster," TV Newsday, November 17, 2007 (explaining that DTV conversion could leave LPTVs with analog-only service unless they are carried on cable, yet these stations have no must-carry rights).

C. The Commission Has Broad Authority To Afford Class A Stations Must-Carry Rights By Reclassifying The Stations As Full Power Stations

Even if Section 614 were read to exclude low power television stations from full must-carry rights,[14] the Commission is not powerless to afford must-carry rights to Class A stations that serve most of the key public interest functions generally provided by full power stations. The Commission has broad authority under Section 303(a) of the Communications Act to re-classify radio and television stations.[15] Furthermore, Section 303(b) of the Act affords the Commission the authority to prescribe the nature of the service to be rendered "by each class of stations and each station within any class."[16]

The Communications Act does not contain a definition of what constitutes a "full power" television station. Therefore, it is well within the Commission's authority to re-classify Class A television stations that provide hyper-local and multilingual programming as full power stations that are entitled to must-carry.[17] Whether a station is "licensed and operating on a channel assigned to [a] community," usually depends on whether the station is listed in the FCC's

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[14] See 47 U.S.C. §534(b)(2)(A) (stating, "under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station.") See also 47 U.S.C. §534(c)(describing the scope of the low power station carriage obligation).

[15] See 47 U.S.C. §303(a) (granting the Commission the authority to "from time to time, as public convenience, interest, or necessity requires … (a) classify radio stations.") See also 47 U.S.C. §303(g) (empowering the Commission to "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.")

[16] See 47 U.S.C. §303(b).

[17] See Comments of the Community Broadcasters Association, MB Docket No. 07-294 (July 30, 2008) at 2-3. Section 614(h)(1)(A) of the Communications Act, 47 U.S.C. §534, defines commercial stations as those which are "full power," "licensed and operating on a channel assigned to [a] community," and in the "same television market" as the cable system.

Television Table of Allotments.[18] Thus, the Commission could simply initiate a rulemaking proceeding to list some Class A television stations in its Table of Allotments.

II. The Commission Should Appoint An Advisory Committee To Begin The Process Of Transitioning AM Service To TV Channels 5 And 6

ABC, Inc. and the National Association of Broadcasters ("NAB") both contend that re-allocating TV Channels 5 and 6 for FM broadcasting would be contrary to the public interest. In particular, these commenters have expressed a need to utilize Channels 5 and 6 to provide post-transition broadcast services.[19] However, broadcasters have waived any claim to a property interest in broadcast spectrum.[20] Inevitably, when the Commission considers the reallocation of spectrum, someone will need to relocate for the greater good. That is what Congress intended: there are no squatters rights on the radiofrequency spectrum.[21] However, the Commission should undertake to minimize inconvenience to the current occupants of Channels 5 and 6, while at the same time expediting the badly needed migration of the AM band to this spectrum and the conversion of AM stations to FM service. To achieve these objectives, the Commission should

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[18] See 47 C.F.R. §73.622 (2008) (table of allotments for digital television). See 47 C.F.R. §73.623 (2008) (table of allotments for analog television).

[19] See Comments of the National Association of Broadcasters, MB Docket No. 07-294 (July 30, 2008) at 6 (stating "given the critical juncture of the digital television transition, the Commission should decline to revisit this issue in the instant proceeding" and "[as the Commission aptly recognized, construction of post-transition facilities, international coordination, protection of Class A, low power TV, and TV translators that use the low VHF channels would be severely affected by the proposed reallocation.") See also Comments of ABC, Inc., MB Docket No. 07-294 (July 30, 2008) at 2-3 (stating "it is clear that some [television] stations must operate on channel 5 or 6 in order to reach a substantial portion of their current analog viewers given current Commission rules regarding interference" and "[r]eallocating channels 5 and 6 at this time would undermine the Commission's substantial and diligent efforts to produce a seamless transition for the American public.")

[20] See 47 U.S.C. 304 (2008) (stating "No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.")

[21] Id.

establish an Advisory Committee – similar to the DTV Advisory Committee[22] – to receive the views of all stakeholders and recommend a transition plan that would do the greatest good in the shortest time with the least avoidable harm.

III. Given The Inadequacy Of The Commission's Ownership Database, DCS Supports The Proposed Additional Form 323 Filing Requirements

In its comments, the NAB contends that the additional FCC Form 323 filing requirement "might be burdensome for a sole proprietor." NAB further states, "It is not clear to NAB whether the current system contributes to or detracts from the reliability of minority and female ownership data."[23]

The Commission itself has acknowledged the inadequacy of its current ownership database,[24] as has the General Accounting Office.[25] The burden on an individual licensee to fill out a short form setting forth the race and gender of its owners is almost negligible. The Commission should adopt annual Form 323 reporting that would create a database the Commission, and researchers, can use to develop policy on ownership diversity.

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[22] See Formation of Advisory Committee on Advanced Television Service and Announcement of First Meeting, 52 Fed. Reg. 38523 (October 16, 1987) (establishing the Commission's DTV Advisory Committee). A procedural history of the DTV Advisory Committee's first decade of work can be found in Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd 1280 n. 1 (1997).

[23] See Comments of the National Association of Broadcasters at 8-9.

[24] See Broadcast Diversity Order, 23 FCC Rcd at 5942.

[25] See "Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and is Difficult to Assess," GAO-08-383 (released April 11, 2008) at 32, available at http://www.gao.gov/new.items/d08383.pdf (last visited August 26, 2008) (stating that "data weaknesses stemming from how the data are collected, verified, and stored limit the benefits of this effort. Further, more accurate and reliable data would allow FCC to better assess the impact of its rules and regulations and would enable the Congress to make more informed legislative decisions about issues such as whether to reinstate the tax certificate program.")

Respectfully submitted,

David Honig

David Honig
Executive Director
Joseph Miller
Earle K. Moore Fellow
Minority Media and Telecommunications Council
3636 16th Street, N.W.
Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

Counsel for the Diversity and Competition Supporters

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