

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

In the Matter of:)
)
Carriage of Digital Television Broadcast Signals:) CS Docket No. 98-120
Amendments to Part 76 of the Commission's Rules)

TO THE COMMISSION

PETITION FOR PARTIAL FURTHER RECONSIDERATION

The Minority Media and Telecommunications Council (“MMTC”), pursuant to 47 C.F.R. §1.429, respectfully petition for partial further reconsideration of Carriage of Digital Television Broadcast Signals, FCC 05-27 (released February 23, 2005), 70 F.R. 14412 (March 22, 2005) (“Second R&O”).

MMTC is the nation’s principal advocate for ownership diversity. MMTC represents 54 national organizations before the FCC and each year holds the nation’s principal minority media and telecom financing conference.¹

I. A Modest Proposal For Partial Must-Carry Tailored To Promote Local Service

Herein we propose a way to define “primary video” in a manner most likely to provide optimum program diversity while fostering a competitive marketplace for local programming.² Our approach would also foster minority ownership and strengthen America’s only television broadcasters that, by definition, must provide local service – Class A LPTVs.

¹ MMTC participated previously in ex parte meetings with commissioners and staff. MMTC also filed a substantive ex parte letter January 26, 2004.

² We leave to other parties the development of two basic premises with which we basically agree: (1) that cable has more than sufficient channel capacity to accommodate at least some portion of local broadcasters’ multicast streams; and (2) that without cable carriage, broadcast multicast channels will not succeed (in particular, that the approximately 20% of the national audience likely to rely on over the air television in the digital age simply isn’t large or wealthy enough to provide economic support for multicast channels – particularly if those channels are expected to provide local program service).

This proceeding really boils down to the definition of “primary video.” We sympathize with the Commission’s difficulty in defining a term that Congress developed inartfully.³ Nonetheless, the Commission correctly recognized that Congress did not intend “primary video” to mean “one 24-hour program stream” – a definition that would have been inconsistent with the nature of broadcasting both historically and as it is evolving today.⁴ Nowhere is it written that a “channel” must be an indivisible whole, a single stream of 24 hours on the air. It could be multiple streams, and it could be fractional portions of a stream. Already consumers can enjoy many “channels” in other-than-linear time, either through time shifting, through a related Internet site, or through a related audio channel. Further, many “channels” have two simultaneous presentations of content, either of which in isolation from the other could constitute a viable stand-alone 24-hour program stream; a classic example is a news crawl under an entertainment program. Finally, for three generations the Commission has allowed and encouraged share-times, under which two licensees can operate on a single channel in a mutually exclusive manner using different portions of the clock as a means of providing program separation.⁵ Inherently, share-times embody the concept that a “channel” need not be an indivisible whole – it can be a fraction.

Since the term “primary video” is broader than an indivisible single 24-hour stream, we propose, as further developed infra, that the Commission define “primary video” as those discrete portions of a broadcaster’s multicast programming, divisible in units of 12 hours and up to a reasonable maximum (e.g. 96 hours), that include substantial local content. There are two vehicles by which the Commission could develop and apply that definition: (1) fulfillment of the local programming recommendations included in the December, 1998 Final Report of the

³ See Second R&O at 15-21 ¶¶28-41.

⁴ Id. at 18 ¶34.

Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (the “Public Interest Report”); and (2) fashioning remedies that acknowledge and bootstrap on the broadcasting service that already is designed specifically to provide local program service: Class A and Class A-Qualified Low Power Television (“LPTV”).

A. The Commission Should Allow The Fruits Of Its DTV Public Interest Review To Guide Its Operational Definition Of “Primary Video”

The 1998 Public Interest Report represents the most significant effort to date to conceptualize the desirable attributes of a digital television future. The Report has sat on the shelf far too long, particularly given the fast evolution of the underlying technology and the slow evolution of consumer acceptance of the technology. As Commissioners Copps and Adelstein recommended, the Commission should act on the Report now.⁶ As it does so, the Commission should define “primary video” as a programming stream, broken into 12-hour segments, from 12 hours a day (one stream, as in a share-time) to a maximum (e.g., 96 hours a day, the equivalent of four 24-hour streams) for which, in each 12-hour segment, at least a specified minimum number of hours of local content are provided.⁷

The Public Interest Report addresses several issues that should be considered as part of the must-carry debate (including children’s programming and equal employment opportunity),

⁵ See 47 C.F.R. §73.1715 for recognition of a “share time” in a different context (expressly referring to each facility that shares time as a “broadcast station.”)

⁶ See Second R&O, Concurring Statement of Commissioner Michael J. Copps (“Copps Statement”) at 32 (“It is six years later now, and this Commission still has not provided the American people with a clear idea as to how broadcasters’ enhanced spectrum is going to improve our viewing experience”); see also Separate Statement of Commissioner Jonathan S. Adelstein (“Adelstein Statement”) at 39.

⁷ We are not yet prepared to recommend precise hourly requirements for this paradigm. An optimal range of requirements should emerge in further comments in this proceeding and also in any additional comments sought to refresh the record related to the Public Interest Report. Comments on the Report also could address such essential topics as the definition of local content, the length of time that could elapse before a broadcaster is deemed to have demonstrated its local programming bonafides, and verification of broadcasters’ compliance with the local programming requirement.

but its recommendation for a minimum local programming standard represents a good starting point and a sensible component of multicast must-carry. A minimum local programming requirement would allow the Commission to provide certainty to all concerned and assure enhanced local service for every viewer. It would represent a structural means of fulfilling the promise of diversity and inclusion in our most influential industry.

Our proposed approach embodies neither the 100% must-carry that the broadcasting industry wants, nor the 0% must-carry that the cable industry wants. Rather, it is a compromise, and it is a good one because it puts the public's interest in a robust marketplace for local programming first.⁸ It suggests an objective, verifiable standard to ensure that when broadcasters use their digital spectrum to serve their communities, they will have at their disposal the economic backbone of cable viewers that appears to be necessary for broadcasters to serve the needs of the 40 million households who most urgently need to maintain their connectedness with the television universe and with the broader society.

B. The Commission Should Afford Must-Carry Status To Class A And Class A-Qualified Low Power Television Stations

Although it was barely discussed in the Second R&O, LPTV provides the most constructive answer to the question of how to ensure that local programming will be available after the digital conversion.⁹ The 610 Class A LPTV stations and the 300 Class A-Qualified stations (those which have met the local programming requirement but have not yet been able to

⁸ As Commissioner Copps put it, "I don't believe cable should have the burden to carry every camera hanging out of a window or the home shopping programs or all those infomercials masquerading as real programs. Our challenge is to craft some balance here. But we never sought balance. We never had that public dialogue about how to incent truly local and diverse programming." Copps Statement at 33.

⁹ See Adelstein Statement at 39 n. 10 ("I find it instructive that when identifying which low-power television stations would be entitled to must carry, Congress limited the stations only to those that meet a variety of criteria, including certain programming requirements, and a determination by the Commission that the programming will 'address local news and informational needs.' 47 U.S.C. §534 (h)(2)(B).")

find a channel below Channel 52) are the only television stations mandated by law to provide local programming, and they must provide such programming as a condition precedent to the rare instances in which they qualify for must-carry.¹⁰

One reason the Commission created low power television was to foster minority ownership, given the difficulty faced by minorities in securing full power licenses.¹¹ Today, minorities own about 15% of all LPTV stations, and about 10% of all Class A LPTV stations. In addition to including a substantial number minority owners, the universe of LPTV stations tend to air programming that full power stations choose not to air – particularly foreign language and religious programs.

Notwithstanding the diversity and local service credentials of LPTV stations, they are gravely endangered by the very DTV transition that, in theory, is supposed to foster diversity and local service. Almost no LPTV stations are eligible for must-carry; few LPTV stations can afford to develop multicast channels; and many LPTV stations cannot afford or can barely afford to broadcast even a single stream in digital without access to the cable audience as an economic backbone.

Since Class A and Class A-Qualified LPTV stations are already required to broadcast local programming, the Commission can go a long way toward satisfying its objective of ensuring local content by taking these four modest steps:

¹⁰ See 47 U.S.C. §534(c)(1) and (h)(2); 47 C.F.R. §76.55(d). Although full power stations also have some public interest programming obligations, their obligations are enforceable only at license renewal time and, as a practical matter, the Commission will virtually never fail to renew a full power station's license on the grounds that its program service was inadequate. See, e.g., Simon Geller, 102 FCC2d 1443 (1985).

¹¹ See Low Power Television Broadcasting (Report and Order), 51 RR2d 476, 527 (Separate Statement of Commissioner Henry M. Rivera) (“The Commission’s initiative offers a rich, if distant, opportunity to promote diversity of ownership generally and to widen opportunities for minority ownership in particular[.]”)

First, the Commission can specify that whatever must-carry rights it adopts for full power TV as a result of this proceeding would also apply to Class A and Class A-Qualified LPTV stations. In this way, these LPTV stations could be received in cable households within the range of the LPTV station's Grade B contour – far less than the full DMA, but still significant.

Second, to accelerate the digital transition, the Commission could strike a deal with Class A and Class A-Qualified stations by allowing them to stipulate that if they receive cable carriage rights, they will immediately convert to digital-only and relinquish their analog channels.

Third, if the Commission finds that in a DMA there is a paucity of local service offered by full power stations over-the-air (e.g., if the full power stations each elect to offer high-definition channels rather than multicast channels with local content) then the Class A and Class A-Qualified LPTV stations located within the DMA would be entitled to must-carry throughout the DMA.

Fourth, if a full power station elects to use one of its multicast channels to rebroadcast a local Class A or Class A-Qualified LPTV's signal, that channel would be regarded as a part of the full power station's primary video offering, and thus entitled to must-carry status throughout the DMA.

These steps would represent a huge shot in the arm for low power television, and a major step forward for public access to local and diverse program service.

II. Minority Owners And Programmers Can Contribute To The Goals Of Must-Carry

Some measure of multicast must-carry is vital to the preservation of minority owned full power television broadcasting and to the fulfillment of the promise of minority ownership as an

engine of program diversity. As Commissioner (now Chairman) Martin wrote in partial dissent to the Second R&O.¹²

It should be kept in mind that this decision will have the most adverse impact on small, independent, religious, family-friendly and minority broadcasters. Must carry was designed for these smaller broadcasters that in the past have been unable to negotiate with larger cable operators. These broadcasters play an important part in their communities, and we should not be hindering them from investing in new, free programming for their viewers (emphasis supplied).

Minority owned stations are disproportionately smaller than most stations, and they tend less frequently to enjoy affiliations with the four major networks. Therefore, they experience greater difficulty in using retransmission consent than other stations, and as a result they are more likely than other stations to look to must-carry as their economic backbone in the digital age. Despite their limited resources, minority owned stations do an extraordinary job as providers of local programming, addressing needs not often recognized or prioritized by other stations

Minority-owned full power broadcast stations are endangered, notwithstanding the laudable efforts of a handful of large broadcasters who carry on voluntary efforts to help incubate new minority television counterparts.¹³ Currently there are only 21 minority owned full power television stations (four of which are in Puerto Rico). That is way down from 33 stations in 1999 when the Commission liberalized its duopoly rules. Taking its cue from the Third Circuit, the Commission ought to redouble its efforts to foster minority owned broadcasters' success, and to deploy the diversity-promoting fruits of their success to serve the public interest.¹⁴

¹² Separate Statement of Commissioner Kevin J. Martin, Dissenting in Part and Approving in Part, at 35.

¹³ Most notably, these include Paxson Communications, Max Media and LIN Broadcasting.

¹⁴ In 2003, the Commission unwisely repealed the Failing Station Solicitation Rule ("FSSR") without remembering that in 1999 it had created the FSSR as the only means of fostering minority television station ownership. The Court of Appeals had little difficulty reversing this

Multicast DTV presents a structural, content-neutral way of leveraging the skills and resources of minority owned broadcasters and programmers to provide programming diversity.

First, multicast DTV would enable the Commission to overcome some of the structural inequities that have so dramatically thinned the ranks of minority owned broadcasters.¹⁵ In particular, multicast DTV would enable minority television broadcasters, drawing upon their unique backgrounds, experiences and perspectives, to develop multicultural programs and program channels. Minority broadcasters would distribute this programming using their own DTV channel capacity and that of their fellow broadcasters.

Second, multicast DTV would help counteract the gatekeeper effects that have contributed to the paucity of minority-themed and multicultural programming, whose availability nationwide is far below the level that would have obtained absent these market imperfections. In particular, the vertically and horizontally integrated structure of the cable industry renders it extremely difficult for minorities and other new entrants to successfully launch any new channel, especially one whose viewership includes moderate-income families who receive television over-the-air or on basic cable.¹⁶ Some assurance of cable carriage would deliver the nation a level of multicultural programming that is commensurate with market demand.

surprising lapse on the part of the agency. Prometheus Radio Project v. FCC, 373 F.3d 372, 420-421 (3d Cir. 2004), rehearing denied, September 3, 2004 (petitions for certiorari pending).

¹⁵ See MMTC Comments in MB Docket 02-277 (Broadcast Ownership), filed January 2, 2003, pp. 35-50.

¹⁶ Because it is so difficult to obtain an FCC television station license, minority entrepreneurs for years have sought to deliver programming without being licensees. They have done this by supplying programming to broadcasting and to cable, in long form or short form. Certainly minority-themed channels have never received a particularly enthusiastic welcome from the cable industry: for example, even today only BET (which is no longer minority owned) operates as a profitable African American themed cable service. Other minority new entrants have typically been forced to yield up equity in exchange for carriage, or they have been blocked entirely. See Black Education Network, Inc. ex parte, January 28, 2004 (“There is an attitude among cable operators that there is only a need for one channel that is culturally relevant to African-Americans and only then in predominately urban cable systems. We have also experienced cable operators demanding to air programming [from] new entrants on substantially

Third, multicast DTV would deliver the nation a cornucopia of readily accessible, diverse program service, grounded on the reinvigoration of a vibrant minority owned sector of the industry. Such service would provide a market-based incentive for low-income consumers, especially minorities, to become early adopters of DTV technology. That, in turn, would accelerate the date by which the industry completes the transition from analog to digital.¹⁷

Respectfully submitted,

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less favorable terms than with long existing programming services.”) A rare exception, TV One, is likely to succeed because it has a major investment from an MSO, Comcast, which regards diversity as a high priority. If minority programmers had the option of securing carriage on any of several “pipes” – i.e., on cable or on any of several broadcasters’ multicast streams, these programmers might well find cable and broadcasters competing, for the first time in history, to secure minority-produced programming. See National Medical Association ex parte, March 25, 2004 (“By increasing the channel capacity of local and independent broadcasters, the FCC will greatly increase the chances of the NMA securing effective distribution of the types of programming we believe will be effective in addressing health issues.”)

¹⁷ See MMTC Comments in MB Docket 03-15 (DTV Conversion), filed April 21, 2003, pp. 17-26.