

THE FCC SHOULD NOT DEFY CONGRESS AND LAUNCH A RULEMAKING EXTENDING MUST CARRY RIGHTS TO ADDITIONAL LOW POWER TELEVISION STATIONS

The FCC may take up a notice of proposed rulemaking at its October 15 meeting that would extend cable carriage rights to hundreds of Class A low power television (LPTV) stations (and possibly extending additional must carry rights to the thousands of other LPTV stations).

New carriage rights are unlawful and directly in conflict with Congress' intent. Congress struck the right balance in the '92 Cable Act when it gave qualified LPTV stations must carry rights when they serve the public interest. LPTV stations today already qualify for carriage when: (1) they meet the public interest obligations and requirements imposed on full-power broadcast stations; (2) the FCC determines that their programming addresses local news and informational needs not adequately served by full power stations; (3) the stations are located in smaller markets; and (4) there is no full power station licensed to any community within the county or political subdivision served by the cable system.

Low power television stations were never meant to have the same rights as full power stations. Low power television stations are a less expensive, low powered means of delivering *over-the-air* programming tailored to the interests of viewers in small localized areas. They were never intended to serve the broader markets of full power stations nor are they capable of broadcasting beyond a small geographical area.

Just like cable networks, non-qualifying LPTV stations should negotiate for carriage based upon the quality of and consumer demand for their programming. Cable channel lineups should be determined by consumer preferences and market forces, not by the government and low power television broadcasters. Cable operators do carry LPTV stations voluntarily where market demand justifies carriage. But granting must carry requirements for low power television stations (LPTV) would relegate all cable networks to second class status behind all broadcast stations and hinder their chances of reaching television audiences.

Giving additional low power stations must carry rights would displace diverse popular cable program networks and impact other new services that customers desire (such as HD and interactive programming, high speed Internet service and digital telephony). It would also stunt the development of new cable networks that provide additional programming diversity to cable subscribers.

Requiring carriage of LPTV stations would impermissibly infringe the First Amendment rights of cable operators and program networks.

- The Supreme Court acknowledged, in narrowly upholding the currently existing must carry requirements, that such requirements adversely affect the First Amendment speech of cable operators and program networks. But the bare majority that upheld the rules found that the burden was not substantial because cable operators were *already* carrying *most* full power broadcast stations, even in the absence of must carry.
- This is not the case with respect to low power stations. A low power must carry requirement would force cable operators to carry a large number of stations that they would not otherwise choose to carry and, as a result, would displace a large number of cable program networks on cable systems. The imposition of such burdens on speech rights would not survive First Amendment scrutiny.