



# Broadcast Newsletter

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## **Class A Must Carry Dangled and Debated, But Ultimately Dies**

After years of lobbying and efforts by Class A television stations, Chairman Kevin Martin announced in late-September 2008 a plan that would allow some 555 Class A television stations to apply for full power status from the FCC which would enable those stations to demand immediate cable carriage under current must carry laws. The basis for Chairman Martin's proposal was that nearly half of Class A stations were Spanish-language broadcasters, a group that needed help from the FCC to better serve their minority communities. Other stations and programming formats were mentioned as well. Chairman Martin saw the Class A Must Carry effort as an opportunity to boost the economic value of Class A stations, making it easier for them to finance their transition to digital broadcasting.

Not surprisingly, the cable operators fought Chairman Martin's plan for Class A carriage. The cable companies claimed that new requirements to carry Class A stations would violate the law and needlessly embroil cable operators, stations, and the FCC in controversies unrelated to the completion of the digital television transition. Cable operators claimed that they voluntarily carried low power television stations that they believe were demanded by customers, including a significant number of multi-cultural and religious stations. Normally, such stations can only be carried if they meet six narrow criteria specified in the FCC's rules. Chairman Martin's plan would have permitted them to enjoy full carriage rights as full power television stations.

The Commission originally scheduled a vote on the matter at its October 15, 2008 meeting, which was to be held in Nashville, Tennessee, but Chairman Martin could not receive sufficient support for the proposal. Rather than adopt a rule allowing must carry for Class A stations, Chairman Martin was only seeking to initiate a notice of proposed rulemaking to seek public comment on the issue. However, reports indicated that the proposed rulemaking

would have tentatively concluded that conversion to full power status and follow on mandatory carriage rights, were supported by the Commission. Chairman Martin was unsuccessful in securing at least two additional votes by the Commissioners in order to move the proposal forward. At the last moment, while many Class A operators were en route to Nashville to testify at the Commission's meeting, the Commission removed the item from the proposed meeting agenda.

In later reports, Chairman Martin stated that he was disappointed and frustrated that the other four Commissioners would not go along with his plan to expand must carry rights for Class A television stations. While all the Commissioners had indicated that they would support a notice of inquiry on upgrading low power stations without the critical must carry components, Chairman Martin believed that approach would provide nothing for low power television. Martin found the Commissioners' views inconsistent with their stated desire for increased diversity in broadcasting.

The Community Broadcasters Association, a group of Class television and LPTV station owners, were shocked over the removal of the item from the Commission's agenda.

It is not clear at this time whether further efforts to expand Class A must carry rights will be undertaken by the Commission. The upcoming presidential election could change the make-up of the Commission and the possibility that the issue is revisited by the Commission.

## **New AM Station Proof of Performance Procedure Authorized**

In a late-September 2008 Report and Order, the FCC, as part of a broad-based streamlining initiative to simplify media bureau licensing procedures, simplified traditional proof of

performance requirements for directional AM stations.

There are approximately 1,900 directional AM stations currently licensed in the United States. These stations use antennas that suppress radiated fields in some directions and enhance it in others. AM licensees operating with directional antennas must periodically perform a proof of performance to demonstrate that the antenna pattern conforms to the station's authorization. AM stations must perform a full proof to verify the pattern shape when a new directional antenna system is authorized. In addition, partial proofs, which require fewer measurements, are occasionally necessary to show that an array continues to operate properly. Typically, a full proof requires measurement of the AM station's field strength on 6-12 critical bearings, ranging to distances of 15km or more from the antenna. Making necessary antenna adjustments, selecting accessible measurement points, and taking measurements can be a difficult, slow and expensive process.

In response to a joint petition for rulemaking filed by five broadcast consulting engineering firms, the Commission began a broad review of its rules for directional AM antenna performance verification, many of which have been in place for decades. As part of the review, the petitioners proposed that the Commission consider the use of computer modeling techniques for AM directional antennas. In the Report and Order, the Commission adopted the rules proposed by the coalition, which permit use of moment method proofs as an option for AM stations using series-fed radiators. The Commission did so even though the proposed rule results in a final pattern adjustment that is close to the authorized pattern but not perfectly precise. The new rule allows licensees to verify antenna performance based on measurements of internal parameters, i.e., current (or voltage)

and phase measured at specific locations on antenna elements. Those measured internal parameters are then used in moment method computer programs in conjunction with a physical model of the directional antenna, to compute the contribution of each antenna element to the directional pattern. AM stations using directional arrays consisting of top-loaded or sectionalized elements or folded unipoles are not eligible to use moment method calculations in place of field strength measurements.

If you have any questions regarding the new proof measurement method, a copy of the Report and Order can be obtained on the Commission's website. In addition, you may wish to consult your broadcast engineer regarding use of the new method, which can save substantial time and money.

## **FCC Releases Report on Tests of Prototype TV White Space Devices**

The FCC's Office of Engineering and Technology has been conducting a series of tests of prototype TV band devices to determine whether or not they may be authorized for use in so-called television "white space", spectrum where individual television channels/frequencies are not being used. The devices are usually operated at very low power.

When the report issued in mid-October 2008, an FCC press release issued by Chairman Kevin Martin indicated that the Office of Engineering and Technology Report showed that letting wireless low power devices use empty airwaves between TV stations would not cause interference with neighboring broadcasts. Martin also pushed for a vote on the issue at the FCC's scheduled meeting November 4, 2008.

In contrast to the Chairman's report, the FCC's brief summary and actual 149-page report suggested that interference concerns were presented that caused concern. In many respects, the white spaces report suggests that unlicensed devices that rely solely on spectrum sensing (to determine whether a television signal is present) may threaten the viability of clear television reception.

The National Association of Broadcasters has called upon the FCC to seek public comment on the report before moving forward. The executive summary and the report itself are available on the FCC's website. The report has been inserted into an engineering docket. Parties may submit ex parte comments if they so chose.

## **FCC Clarifies Cable Carriage Election Rules**

In a decision released on the eve of the deadline for full power television and qualified low power and Class A television stations to elect between retransmission consent and mandatory carriage, the FCC clarified its rules with respect to how elections would affect carriage of broadcast stations' digital signals, and the coordination required between broadcasters and cable operators.

Because existing carriage rules provide separate mechanisms for the election for carriage of a station's digital signal, the Commission issued the clarification to make clear that broadcast station elections made by October 1, 2008 apply to both the station's analog and digital signals for the new carriage cycle, removing the requirement for stations to make a separate digital election at a later date when they transition to all digital operations. The Commission also made clear that the October 1, 2008 election for a station

determines carriage of a station's signal for the entire 2009 - 2011 carriage cycle.

Cable operators must carry such stations' analog signal starting on January 1, 2009 and concluding no earlier than the actual termination of analog service by that broadcaster. When the station terminates analog service and begins broadcasting in only digital, carriers are required to commence carriage of a station's digital signal without any gap in carriage. However, if a broadcast station will cease analog broadcasting prior to February 17, 2009, the broadcaster must notify the cable operator 30 days before the date on which they anticipate termination of their analog signal. A failure to do so could result in a gap in carriage between the station's analog signal and when it commences digital operations.

The Commission also clarified channel placement issues with regard to digital stations, clarifying that election by a station for carriage on a particular broadcast channel will be considered as an election on the station's "major channel number" that is identified in its program and system information protocol (PSIP). Digital stations have the ability to identify a different channel for the public despite the fact that they operate digitally on a different channel. PSIP links the digital channel number with the appropriate primary video and program-related content. By using the PSIP, the cable operator can identify the correct channel location. Stations carried pursuant to mandatory carriage are authorized to demand carriage on their major channel number as broadcast in the station's PSIP. In the absence of a clarification on a major channel number, the channel elected will be considered the default PSIP channel by the cable operator.

In addition to clarifying cable carriage issues for full power stations, the Commission also confirmed, in a declaratory ruling, that the

FCC's cable must-carry rules apply to the digital signals of Class A, LPTV and TV Translator stations when they flash-cut to digital operation or cease operating their analog signals. Absent this clarification, those stations faced the possibility of losing cable carriage whenever they transition from analog to digital operations. The Commission's rule did not provide a specific carriage right for digital signals, leaving room for cable operators to argue that carriage rights ended upon the transition to digital because the Commission's rules did not provide for such carriage.

In addition, the Commission clarified that qualified LPTV and Class A stations have the same down conversion option for their digital-only signals as do digital-only full power stations. The down-conversion right will be in effect until February 17, 2009, after which Commission's prior ruling for requiring that all stations carried pursuant to mandatory carriage be made viewable to all subscribers, will apply for LPTV and Class A television stations the same as it does for full power stations. In other words, if a cable system does not deploy adequate devices to subscribers in order to enable reception of a digital signal, the cable operator must, at its own expense, down-convert the signal to analog in order to transmit and make it viewable by their subscribers.

Finally, the Commission clarified that for purposes of its rules, a "good quality signal" for Class A and low power television stations will be the same as it is for full power stations, minus 61 dBm at the cable system head in.

## **Penalty Box**

### **Three Stations Fined for Improper Broadcast of Telephone Conversations**

The FCC has recently fined three stations for violating Section 73.1206 of the Commission's

Rules, which prohibits the broadcast of telephone conversations without giving prior notice to individuals of the actual broadcast or intent to later broadcast a telephone conversation.

In the first case, WAAW-FM, Williston, South Carolina, was found liable for a monetary forfeiture of \$4,000. The Commission had received multiple complaints alleging that a station radio personality had violated the rule, providing recordings of the alleged broadcasts. The recordings captured conversations between the radio personality and a public official from the local airport regarding cab contracts. During one of the calls, the airport representative asked if he was on the air, which the radio personality confirmed. In response, the official asked whether the station thought it would have been fair to have let the airport official know before he was being put on the air. The radio personality stated that he called everyone on the air and apologized to the official.

In formal responses to the complaint, the station claimed that the recording provided had been edited to eliminate the full content of the call, whether radio personality claimed that appropriate notice had been provided. The station also claimed that the recording had been provided by a competitor station in town that had animosity toward the station personality. Finally, the station argued that, as a public official, the airport representative did not have an expectation of privacy.

The Commission rejected these arguments, holding that the prior notification requirement of the rule ensures the protection of an individual's "right to answer the telephone without having his or her voice or statements transmitted to the public by a broadcast station" live or by recording for delayed airing. The fact that the airport representative was a public official was irrelevant, according to the

Commission. Further, because the station radio personality had apologized to the airport official in the recording, the Commission found that the recording, though edited, carried more weight and concluded that a rule violation had occurred.

In the second case, two stations, one in North Miami Beach, Florida (WXDJ-FM) and the other in New York, New York, (WKSQ-FM), were each fined \$16,000 for violating the Section 73.1206 rule. In both cases, station personnel had hired an independent contractor to prank-call a woman claiming to be employees of a local hospital and telling her that her husband and daughter had died and their bodies were at the hospital. When the individual being called became hysterical, the contractor told her that the call was a prank. The woman responded: "My God -- why did you do this to me?" At that point, the independent contractor apologized. At no time did the independent contractor inform the call recipient that the call was being recorded for later broadcast. Only after the recording had been made and the prank been played, was the woman advised that the call had been recorded. The call recipient was also not given notice prior to the call being recorded that it was being recorded for future broadcast.

In response to complaints from the woman, and an inquiry from the Commission, the stations confirmed that a third-party vendor, rather than station personnel, had made the phone calls. They also indicated that the call was made at the call recipient's sister's request, and that the call recipient's permission to broadcast the call was requested and obtained after the telephone conversation had been recorded.

The Commission concluded that the type of behavior demonstrated by the station was the precise reason that Section 73.1206 was enacted – to prohibit entertainment at the

expense of an individual's right to privacy. The Commission further found that the call's origination and recording by an independent contractor rather than the stations themselves, did not exculpate the stations from liability. The Commission explained that it has "consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations." Because of the egregiousness of the violation, the repeated broadcast of the recorded call, and a prior history of rule violations, the FCC increased the base forfeiture amount for unauthorized broadcast of a telephone conversation (\$4,000) to \$16,000 for each station.

Stations should take extra caution in all circumstances where telephone calls are to be recorded for broadcast or will be broadcast simultaneously with their being made. In the context of this rule, the Commission has defined "conversations" broadly to include any word or words spoken during the telephone call, and specifically rejects arguments that statements made by parties called and answering the phone (i.e., "hello") are not subject to the rules' prior notification requirement. Other than in situations where on air activities make clear that callers will be broadcast when they call in, no broadcast or a recording for later broadcast may be made.

## **DATES TO REMEMBER**

### **November 1, 2008**

**ALL noncommercial full power TV stations that elected DTV Education Option 3** must begin airing at least 180 seconds per day of on-air consumer education on the digital transition, in variable timeslots, but including at least 22.5 minutes per month between 6:00 p.m. and 12:00 a.m., and must broadcast at least one 30-minute informational program on the digital transition between 8:00 a.m. and 11:35 p.m. on at least one day prior to February 17, 2009.

### **November 10, 2008**

**ALL full power TV stations that elected DTV Education Option 2**, must begin a 100-day countdown to the digital transition, during which it must air at least one of the following on each day through February 17, 2009: (a) a 5-15 sec graphic display superimposed during programming reminding viewers there are "x" number of days remaining until the transition and providing a website or toll free number for details; (b) a 5-15 sec animated graphic display that ends up with a reminder that there are "x" number of days remaining until the transition and providing a website or toll free number for details; (c) option (a) or (b) above with an added audio component; or (d) a longer 2-5 minute segment to communicate the countdown message, such as an "ask the expert" format where viewers call in.

### **December 1, 2008**

**ALL full power TV stations operating licensed digital facilities, or holding a permit but operating pursuant to temporary reduced power digital authorizations during the period from October 1, 2007 – September 30, 2008:** complete and electronically file FCC Form 317 (Annual DTV Ancillary/Supplementary Services Report) setting forth whether the station provided any ancillary/supplementary digital services at any time during the 12-month period ending September 30, 2008, **and**, for any ancillary/supplementary service for which a payment or subscription fee or charge is required in order to receive the service, or directly/indirectly paid by a third party in exchange for programming transmission, remit to the FCC 5% of gross revenues derived from such fees, charges or payments. Certain exceptions apply to the fee payment requirement – consult your counsel.

**TV & Class A TV Stations in Colorado, Minnesota, Montana, North Dakota and South Dakota:** complete annual EEO public file report, place in your public inspection file and post on website, if station has one.

**TV Stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont:** complete and electronically file your biennial ownership report on form 323 or 323-E (if

applicable). Also complete annual EEO public file report, place in your public file and post on station website, if station has one.

**TV Stations in Alabama and Georgia:** complete and electronically file your biennial ownership report on form 323 or 323-E (if applicable) and place copy in public file.

**TV & Class A TV Stations in Alabama and Georgia:** complete and electronically file your **mid-term EEO report on Form 397** (if applicable). Also complete annual EEO public file report, attach to Form 397 (if applicable), file in public file and post copy on station website, if station has one.

**AM & FM Stations in Alabama, Georgia, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont:** complete annual EEO public file report, place in your public inspection file and post on station website.

**AM & FM Stations in Colorado, Minnesota, Montana, N. Dakota and S. Dakota:** complete and electronically file your mid-term EEO review report via Form 397 (if applicable). Also complete annual EEO public file report, attach to Form 397, file in public file and post on station website, if station has one. Finally, complete and electronically file your biennial ownership report via Form 323 or 323-E (if applicable) and place copy in public file.

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