

**MUST-CARRY**

**The Policy Reasons Why We Need It**

by

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The Commission's current rules requiring cable carriage of local broadcast signals have been thrown out by the D.C. Circuit Court of Appeals<sup>1/</sup> and the National Association of Broadcasters and others have requested the Supreme Court to review that decision. At best, the ultimate legal status of "must-carry" is unsettled. As a matter of policy, however, the rationale underlying the must-carry rules remains intact.

Broadcast licensees are charged with serving the needs and interests of the communities they are licensed to serve. The FCC ensures that licensees program to meet community needs and broadcasters generally have been very responsive to this obligation. This interexchange between broadcasters and their communities has been and continues to be beneficial to the public. Issues of local interest are addressed and local concerns are expressed. A sense of community is encouraged and enhanced.

In heavily cabled communities, local broadcasters' access to their audiences is effectively through the cable. Yes, it is

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<sup>1/</sup> Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

technically possible to receive both cable programming and off-the-air broadcasting via the "A/B" switch. To expect widespread use of the A/B switch, however, is to underestimate the power of inertia. Most viewers will simply confine their choices to those available on cable. Legal theories notwithstanding, cable has the power to deny many broadcasting stations effective access to much of the communities they are licensed to serve.

It seems reasonable to assume that cable systems will not eject some of the most popular local stations since that would make the cable service less attractive. It is only the stations which are most in need of carriage that are most likely to be excluded. UHF independent stations and public broadcasting stations certainly will face increased handicaps as they struggle to overcome technical and financial burdens.

It is particularly ironic that the must-carry rules were sacrificed to the alleged First Amendment rights of cable systems when both the First Amendment and the must-carry rules were established to promote diversity of viewpoints. A further irony is the very real threat that UHF television, emerging as a healthy service after many years of struggle, will go into decline as more and more stations are denied cable carriage. Once off the cable, such stations will find that their earlier technical handicap was mild by comparison.

I am also perplexed that the removal of the must-carry rules has been heralded by some as a positive step toward permitting the "marketplace" to work its will. Since a cable system may carry any signal it chooses under its compulsory license and is free to reject any signal it chooses, this marketplace appears to be skewed very much in cable's favor. Given the fact that cable systems are increasingly seeking to add advertiser support to their revenue streams, they will be competing directly with broadcasters for advertisers' dollars. Yet, cable systems will be competing with the very significant government-bestowed advantage of a compulsory license. That is not my idea of a free marketplace.

In addition, the provision of cable services is in many instances a natural monopoly. It is extremely unlikely that a second cable system will be established in most communities. The fact that existing systems have, or can build, more than enough capacity to satisfy virtually any subscriber makes direct cable competition uneconomic. Thus, absent must-carry, the government is in the unjustifiable position of fostering a monopoly service to the disadvantage of competitive services.

The U.S. Supreme Court determined recently to review the Preferred<sup>2/</sup> case which established sweeping First Amendment

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2/ Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), cert. granted, No. 85-390 (Nov. 12, 1985).

protection for cable systems. The outcome of that review could have some implications for the Quincy decision as well. I wholly support full First Amendment rights for cable operators as they engage in free speech through cable originated programming. It is a misplaced reliance on First Amendment principles, however, to extend absolute discretion over channel selection to cable operators when they choose to act as a retransmission mechanism for local broadcast signals. In this capacity, they become an integral part of the Commission's broadcast allocation scheme, and they may appropriately be assessed reasonable carriage responsibilities. It is to be hoped that out of all of this legal turmoil will be developed a rational and fair environment in which both the broadcasting and cable industries can peacefully coexist and prosper to the ultimate benefit of the consumer.