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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Donna Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D. C. 20554

Dear Ms. Searcy:

Transmitted herewith, on behalf of Appalachian Broadcasting Corp., the licensee of television station WCYB-TV, in Bristol, Virginia, are its comments in MM Docket No. 92-259 and in Gen. Docket No. 87-24.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,

Herbert D. Miller, Jr.

enc.

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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues and Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries.	MM Docket No. 92-259 Gen. Docket No 87-24

COMMENTS

APPALACHIAN BROADCASTING CORP.

Herbert D. Miller, Jr.

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Its Attorneys

January 4, 1993

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The Congress has mandated substantial and far reaching changes in the relationships between CATV systems and the local television stations which they carry. Under the rules which the Commission is required to adopt, television stations will have carriage rights throughout their entire Areas of Dominant Influence (ADIs), subject to such changes in market definition as the Commission may prescribe.

The Commission is also required to "update" the listing of television markets contained in Section 76.51 of the Rules. That section will have little if any impact on signal carriage, but changes to it would, under the present rules, impact substantially and adversely on the network non-duplication rights of local television stations.

The market rankings adopted in 1971 were based on Arbitron's prime time household rankings. The rankings which the Commission is apparently required to adopt for Section 76.51 are based on an entirely different standard, numbers of ADI TV Households. The mere substitution of the new ranking methodology would amount to much more than an "updating" and would produce substantial -- albeit unintended -- alterations in network non-duplication rights. Rather than permit such changes to occur as an unintended result of this proceeding, the Commission should grandfather existing network non-duplication relationships until it is prepared to consider, on their own merit, substantive changes to the network non-duplication rules.

If the Commission is prepared to deal with the matter now, it should bring the network non-duplication rules into conformity with the new carriage requirements by giving local stations network non-duplication rights throughout their ADIs, without regard to arbitrary thirty-five and fifty-five mile zones and without regard to antiquated off-air viewing patterns established more than two decades ago when CATV was in its infancy.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

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JAN 4 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN RE IMPLEMENTATION OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992 BROADCAST SIGNAL CARRIAGE ISSUES	MM Docket No. 92-259
AND AMENDMENT OF PARTS 73 AND 76 OF THE COMMISSION'S RULES RELATING TO PROGRAM EXCLUSIVITY IN THE CABLE AND BROADCAST INDUSTRIES.	Gen. Docket No 87-24

COMMENTS

Appalachian Broadcasting Corp., the licensee of television station WCYB-TV, in Bristol, Virginia, files herewith, by its attorneys, its Comments in the above captioned proceedings.

WCYB-TV, an NBC Television Network affiliate, is located in the Bristol-Kingsport-Johnson City Area of Dominant Influence (ADI).[1] These comments pertain to the Commission's proposal to implement the mandate of Section 614(f) of the Cable Television Consumer Protection and Competition Act of 1991 ("The

[1] The other stations in the market are WJHL-TV, WEMT and WKPT-TV. WKPT-TV is affiliated with ABC, WEMT is affiliated with Fox, and WJHL-TV is affiliated with CBS.

Act") to "update" Section 76.51 of the Rules by adopting the current Arbitron rankings of markets by ADI TV Households.

I. The "Updating" of Section 76.51 Based on Current Arbitron ADI TV Household Rankings Would Introduce a Very Different Ranking Methodology Than Was Used in 1971.

As the Commission notes, Section 76.51 currently reflects Arbitron's 1970 prime time household rankings (FCC 92-499, ¶21). That ranking, which is no longer published by Arbitron, is based on prime time viewing only, and is in many cases quite different from the ranking, still published by Arbitron, of markets based on number of Area of Dominant Influence (ADI) TV Households. It is also different from the ranking which the Commission initially proposed to use, based on the net weekly circulation of the largest station in each market, see *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 FCC 2d 417 (1968). The change from the earlier proposal was made because the Commission determined that use of rankings based on prime time viewing to all market stations more accurately reflected market realities, see *CATV Regulation - Report to Congress*, 22 RR 2d 1755, 1762 (1971). The Commission, as best can now be determined, apparently gave no consideration in 1971 to the use of rankings based on numbers of TV ADI Households. Table I below compares the Section 76.51 rankings with Arbitron's 1970 and 1991 ranking by ADI TV Household:

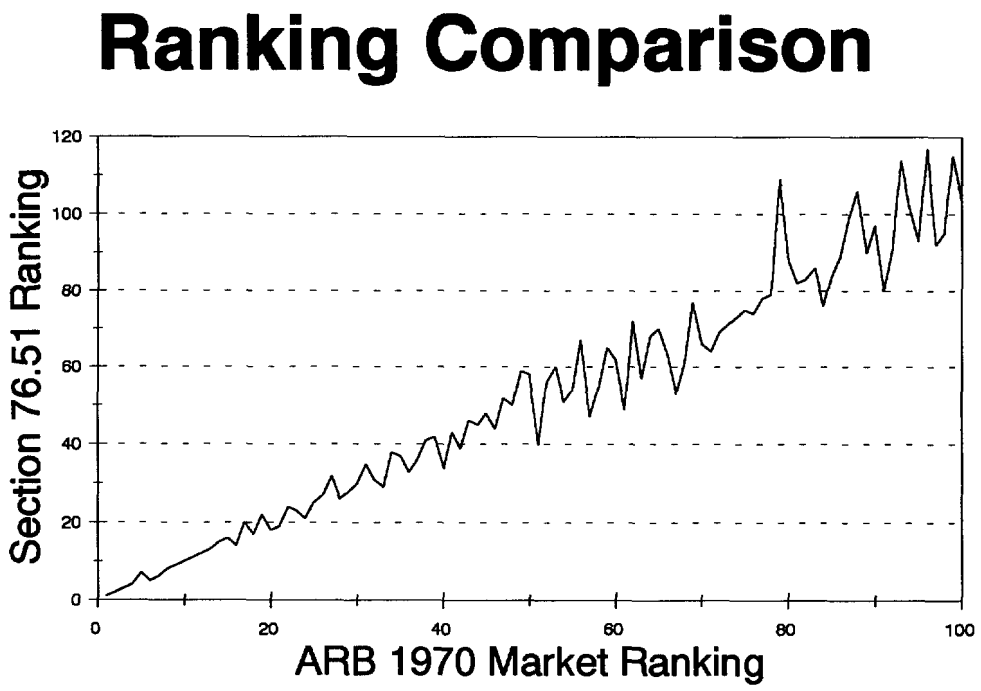
Table I

Market	Sec. 76.51 Rankings	70 ARB Rankings	91 ARB Rankings
New York, NY - Linden- Paterson - Newark, NJ	1	1	1
Los Angeles - San Bernardino - Corona - Fontana CA	2	2	2
Chicago IL	3	3	3
Philadelphia PA - Burlington, NJ	4	4	4
Deroit MI	5	7	8
Boston - Cambridge -Worcester MA	6	5	6
San Francisco - Oakland - San Jose CA	7	6	5
Cleveland - Lorain - Akron OH	8	8	11
Washington DC	9	9	9
Pittsburgh PA	10	10	17
St. Louis MO	11	11	18
Dallas - Fort Worth TX	12	12	7
Minneapolis - St Paul MN	13	13	14
Baltimore MD	14	15	22
Houston TX	15	16	10
Indianapolis - Bloomington IN	16	14	26
Cincinnati OH - Newport KY	17	20	30
Atlanta GA	18	17	12
Hartford - New Haven - New Britain - Waterbury CT	19	22	23
Seattle - Tacoma WA	20	18	16
Miami FL	21	19	15
Kansas City MO	22	24	29
Milwaukee WI	23	23	28
Buffalo NY	24	21	37
Sacramento - Sockton - Modesto CA	25	25	21
Memphis TN	26	27	38
Columbus OH	27	32	33
Tampa - St Petersburg FL	28	26	13
Portland, OR	29	28	27
Nashville, TN	30	30	32
New Orleans LA	31	35	36
Denver CO	32	31	19
Providence RI - New Bedford MA	33	29	45
Albany-Schenectady-Troy NY	34	38	54
Syracuse NY	35	37	69
Charleston - Huntington WV	36	33	50
Kalamazoo - Grand Rapids - Battle Creek MI	37	36	39
Louisville KY	38	41	47
Oklahoma City OK	39	42	40
Birmingham AL	40	34	49
Dayton-Kettering OH	41	43	51
Charlotte NC	42	39	31
Phoenix - Mesa AZ	43	46	20
Norfolk-Newport News-Portsmouth-Hampton VA	44	45	43
San Antonio TX	45	48	42
Greenville-Spartanburg-Anderson SC - Asheville NC	46	44	35
Greensboro-High Point- Winston Salem NC	47	52	48
Salt Lake City UT	48	50	41
Wilkes Barre-Scranton PA	49	59	53
Little Rock AR	50	58	57
San Diego CA	51	40	25

Toledo OH	52	56	62
Omaha NB	53	60	71
Tulsa OK	54	51	56
Orlando-Daytona Beach - Melbourne-Cocoa FL	55	54	24
Rochester NY	56	67	74
Harrisburg-Lancaster-York PA	57	47	44
Texarkana TX - Shreeveport LA	58	55	65
Mobile AL- Pensacola FL	59	65	61
Davenport IA - Rock Island - Moline IL	60	62	79
Flint -Bay City-Saginaw MI	61	49	58
Green Bay WI	62	72	66
Richmond-Petersburg VA	63	57	63
Springfield-Decatur-Champaign IL	64	68	75
Cedar Rapid - Waterloo IA	65	70	82
Des Moines - Ames IA	66	63	67
Wichita-Hutchinson KS	67	53	60
Jacksonville FL	68	61	55
Cape Girardeau MO- Paducah KY- Harrisburg, IL	69	77	76
Roanoke-Lynchburg VA	70	66	68
Knoxville TN	71	64	64
Fresno - Visalia - Hanford - Clovis CA	72	69	59
Raleigh - Durham NC	73	71	34
Johnstown-Altoona PA	74	73	89
Portland-Poland Springs ME	75	75	70
Spokane WA	76	74	78
Jackson MS	77	78	88
Chattanooga TN	78	79	81
Youngstown OH	79	109	89
South Bend - Elkhart IN	80	88	77
Albuquerque NM	81	82	52
Fort Wayne - Roanoke, IN	82	83	102
Peoria IL	83	86	108
Greenville-Washington-New Bern NC	84	76	95
Sioux Falls - Mitchell SD	85	84	103
Evansville IN	86	89	92
Baton Rouge LA	87	99	94
Beaumont-Port Arthur TX	88	106	133
Duluth - Superior MN	89	90	130
Wheeling WV Steubenville OH	90	97	143
Lincoln-Hastings-Kearney NB	91	80	98
Lansing-Onondaga MI	92	91	107
Madison WI	93	114	90
Columbus GA	94	102	119
Amarillo TX	95	93	122
Huntsville - Decatur AL	96	117	85
Rockford - Freeport IL	97	92	135
Fargo-Valley City, ND	98	95	109
Monroe La - El Dorado AR	99	115	121
Columbia SC	100	104	87
Springfield MA		81	97
Bristol VA - Kingsport -Johnson City TN		87	84
Salinas-Monterey CA		94	110
Augusta GA		96	111
Wichita Falls TX - Lawton OK		98	131
Springfield MO		100	82

West Palm Beach - Ft Pierce - Vero Beach FL	101	46
Waco-Temple TX	105	96
El Paso TX	107	100
Burlington VT - Plattsburgh NY	110	99
Tucson AZ	113	80
Lexington KY	132	73
Austin TX	133	72
Las Vegas NV	141	86
Ft Myers-Naples FL	191	93

The graph provided below compares the rankings set forth in Section 76.51 with the ARB 1970 market rankings based on number of ADI TV Households. It indicates that while there is a fair degree of similarity in the larger markets, the differences tend to increase substantially as the markets get smaller:



The proposed "update" would, therefore, be substantially **more** than a mere update, since it would apply a very different ranking methodology than was used

-- evidently after a great deal of thought had been given to the matter -- in formulating Section 76.51 in 1971.

II. The Change in Ranking Methodology Would Have A Substantial Impact on Existing Network Non-Duplication Rights.

The different ranking methodologies are reflected in the situation of the Bristol-Kingsport-Johnson City ADI, which does not appear in the Section 76.51 listing, even though it was ranked as the eighty-seventh Arbitron ADI market in 1970, based on number of ADI households. The Bristol-Kingsport-Johnson City ADI is currently ranked as the eighty-fourth market, based on number of ADI households. Two other ADI markets, Springfield, MA and Springfield MO, appear to be in the same situation. The Springfield, MA ADI was ranked eighty-first based on number of ADI TV Households in 1970, and the Springfield, MO ADI was ranked one hundredth. Neither is listed in Section 76.51. Springfield MA is now the ninety-seventh ADI market based on number of TV Households, and Springfield MO is now the eighty second.

As the Commission notes, the purpose of the statutory requirement that Section 76.51 be "updated" is unclear, since current ADI markets must in any event be used, pursuant to Section 73.3555(d)(e)(i), to determine must-carry rights (FCC 92-499, fn. 23). However, as the Commission also notes, Section 76.51 rankings are used to determine syndicated and network exclusivity rights (FCC 92-499, ¶21) and the simple importation of the current Arbitron rankings based on

numbers of ADI TV Households into Section 76.51 would have unintended consequences for both syndicated and network exclusivity rights.

Currently, network non-duplication is available within the thirty-five mile zones of top 100 markets and within the fifty-five mile zones of smaller markets. It is not available as against distant stations which are deemed to be "significantly viewed." Should the Commission simply substitute the current ADI TV Household rankings for the 1971 prime time household rankings in Section 76.51, and base network non-duplication protection rights on the modified Section 76.51 listing, the Bristol-Kingsport-Johnson City ADI would become a top 100 market. WCYB-TV would thereby be deprived of much of the network non-duplication protection to which it has been entitled for many years, because its protection zones would be reduced from 55 mile to 35 mile radii from Bristol, Kingsport and Johnson City. Springfield, MO and Springfield, MA appear to be in the same situation. Changes of this type and magnitude should not be allowed to occur as an unintended consequence of Section 614(f) of the Act, which requires only "updating," not substantive revision of the sort which would result from use of a very different ranking methodology than was used to determine the rankings in Section 76.51 in 1971. Other affected markets would include the following, none of which appear in the Section 76.51 listing:

Table II

Market	Current Ranking
West Palm Beach - Ft. Pierce - Vero Beach, FL	46
Waco-Temple, TX	96
El Paso, TX	100
Burlington, VT - Plattsburgh, NY	99
Tucson, AZ	80
Lexington, KY	73
Austin, TX	72
Las Vegas, NV	86
Ft. Myers-Naples, FL	93

In at least some cases, it is probable that changes in non-duplication rights based on changes in market ranking could become self perpetuating and quite frequent. For example, were a station in a market elevated from the 101st market to the 100th market thereby to lose protection in the area between its thirty-five and fifty five mile zones -- an area representing more than 145 percent of the land area within its thirty-five mile zone -- the resulting loss in viewership there could easily cause Arbitron to shift one or more counties to an adjacent ADI. There is only a difference of four hundred TV households between the present 100th market (El Paso) and the present 101st market (Colorado Springs - Pueblo).[2] Such a shift could cause the market once again to drop below the top 100, thereby once again entitling the station to protection out to a fifty-five mile radius. Then the cycle could be repeated again in subsequent years. Obviously, unnecessary and arbitrary disruptions of this sort in viewing habits, as well as in station-CATV

[2] The difference between the 91st market (Youngstown) and the 101st market is less than forty thousand TV Households.

system relations and in the viewership patterns on the basis of which television stations sell advertising time, would serve no useful purpose and would be contrary to the public interest.

III. The Commission Should Grandfather Existing Network Non-Duplication Rights Until It Has An Opportunity to Give Them the Substantive Consideration They Require, Unless It Is Prepared To Do That Now.

Rather than allow the disruptions which would occur by virtue of using a different methodology than was used in 1971 to "update" Section 76.51, the Commission should grandfather existing territorial protection rights until it is prepared to give specific consideration to these matters. This is particularly true since the impact of the currently proposed change would be greatest in the smaller markets, which presumably need network non-duplication protection the most. However, if the Commission is prepared to consider radical restructuring of network non-duplication protection rights now, WCYB-TV suggests the following changes:

a. The outer limits of protection for which a station should be allowed to contract with its network should extend to its entire ADI.

The present thirty-five and fifty-five mile zones extending from designated ADI communities are purely arbitrary constructs, and do not reflect market realities to a greater extent than would any other purely arbitrary convention -- such as squares sixty-two or ninety-seven miles on a side[3] centered in the

[3] A protection zone with a 35 mile radius encompasses 3,846 square miles, as does a square 62.02 miles on a side; a protection zone with a 55 mile radius encompasses 9,498 square miles, as does a square 97.46 miles on a side. A station in a market reclassified from a small market to a top 100 market would, in either event, lose protection in 5,652 square miles, a loss in area of nearly sixty percent.

designated communities. In some cases, population densities are greatest in the vicinity of the communities which define the markets, in some cases they are not. In some cases, the thirty-five and fifty-five mile protection zones are completely within one ADI, in some cases they are not. Sales of television advertising time are geared to ADIs, not to thirty-five or fifty-five mile zones.[4] Unlike the present thirty-five and fifty-five mile zones, ADIs are predicated on changing television viewing preferences, and include all counties in which market stations' viewing is predominant. They are, therefore, substantially less arbitrary than the present thirty-five and fifty-five mile zones, and reflect the realities in which television stations function. Those same realities will determine mandatory carriage rights under the new rules. Therefore, territorial exclusivity rights should be based on current ADIs, without the arbitrary complication of mileage zones. This would be consistent with the new mandatory carriage requirements.

b. In the few markets with multiple affiliates of the same network, the affiliate which is required to be carried should have network non-duplication rights against any other affiliate of the same network which is carried voluntarily.

Some ADIs are very large, and in a few cases multiple affiliates of the same network are located within the same ADI. Under the new mandatory carriage provisions of the Act, CATV systems' carriage obligations are limited to "local stations," defined as those located in the same market as the CATV system (Section 614(h)(1)). In the few cases where there are two affiliates of the same

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[4] It seems unlikely that television stations derive much benefit from their existing non-duplication rights on CATV systems which are within their thirty-five or fifty-five mile protection zones but outside their ADIs. Time sales tend to be geared to ADIs.

network in the same market, the CATV system must carry the one closest to its principal headend (Section 614(b)(1)(B)). The CATV system is not required to carry multiple affiliates of the same network (Section 614(b)(5). In these circumstances, it seems obvious that if multiple affiliates of the same network are carried by a CATV system, the station which is required to be carried should have non-duplication rights against the station or stations which are carried voluntarily. Otherwise, the purposes of Section 614(b)(1)(B) would be frustrated.[5]

c. Consideration should be given to eliminating the "significant viewing" concept as a basis for limiting network non-duplication rights.

Currently, network non-duplication protection is not available against stations which are "significantly viewed" in the county (or community) where the CATV system is located. The present list of significantly viewed signals is, for the most part, based on obsolete off-air viewing patterns as they developed in the years before CATV existed, arbitrarily fixed in position as they were more than two decades ago. At the time when the "significant viewing" patterns were embedded in the rules, there were 892 television stations in operation and only 7.4 percent of all TV Households were served by cable. Today, there are 1,488 television stations in operation and the market in the Continental United States with the **least** CATV penetration (Wausau-Rhinelander) has a penetration rate of 43.7 percent. Nationwide, the penetration rate exceeds sixty percent. In the Bristol-Kingsport-Johnson City ADI, the penetration rate is 73.65 percent, ranging

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[5] The Commission should, of course, reserve the right to expand or contract exclusivity rights in individual cases, using its petition for special relief procedures.

from 50.4 percent in Ashe County, North Carolina to 97.2 percent in Knott County, Kentucky.

In many cases, it is likely that viewing to a distant network affiliated station was due primarily to the unavailability of that station's network programming from a local station. Now that there are more stations, and network programming is more readily available from local stations, it is likely that many distant stations' off-air viewing has diminished below "significant viewing" levels. Moreover, in some cases, distant stations which are listed as significantly viewed were affiliated with one network at the time when the listing was prepared, but are now (more than twenty years later) affiliated with a different network. In all of these circumstances, the significant viewing limitation on network non-duplication protection addresses a need which no longer exists.[6]

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[6] As the Commission notes, significantly viewed status has historically conferred certain carriage rights under the rules (FCC 92-499, n. 22). However, under the new rules mandated by the Act, that will no longer be the case, see FCC 92-499, n. 22. The Commission also notes that Section 6124(h)(1)(C) requires "local television viewing patterns" to be considered when defining markets, and asks whether the significant viewing list should be used for that purpose (FCC 92-499, n. 22). The viewing patterns referred to by the Act are those in "cable and noncable households." Since the significant viewing list is (with some exceptions) more than two decades old and (with no exceptions) expressly excludes viewing in all cable households -- which are now in the majority -- it is difficult to see how that list could be of much use in defining markets pursuant to the requirements of the Act. However, even if the significant viewing list might have some utility in such determinations in some cases, that does not mean that the significant viewing concept retains any value in the network non-duplication context.

We do not here address the implications of "significant viewing" for copyright purposes, on the assumption that the whatever actions the Commission takes in response to the Act will to the extent possible be reflected in appropriate changes in copyright liability. Until such changes are made, the significant

(continued...)

While there have been numerous *ad hoc* revisions **adding** new stations to the list of significantly viewed stations over the years, no stations have ever been **deleted** from the list. Even as to the addition of new stations, it has become increasingly difficult to conduct the required surveys of non-CATV households in cable communities (See Section 76.54(b)), because there are so very few of them left. It is highly likely that most of the remaining non-CATV Households are not in cable communities; to update the list of significantly viewed signals now would be impossible, or nearly so.

Limitations on the availability of network non-duplication protection on the basis of significant viewing made sense earlier, when off-air viewing was predominant and the list of significantly viewed stations was current. However, neither of those conditions exists today. If network non-duplication rights are henceforth to be governed by updated market rankings and definitions reflective of current realities, continuing to limit those rights on the basis of off-air viewing patterns as they were fixed in time two decades ago, when CATV was in its infancy and there were many fewer stations than there are now, would make little sense except in one circumstance: Despite their relative antiquity and failure to reflect current realities, the significant viewing limitations do continue to provide a species of "rough justice" where non-duplication rights cross ADI boundaries, as the thirty-five and fifty-five mile zones can easily do under the present rules.

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[6](...continued)
viewing concept should continue to play whatever role is necessary to prevent unintended alterations of copyright liabilities. Even in this context, however, the Commission should consider updating the list to add or delete stations on the basis of Arbitron's Annual County Coverage reports for cable controlled counties.

A station in a given ADI has a substantial economic interest in resisting the grant of non-duplication protection by a CATV system within its ADI to a station outside its ADI, because advertising sales are generally based on viewing within the ADI. A loss of viewing within a station's ADI is highly significant economically, but a gain (or loss) of viewing outside the ADI is not.

However, if the proposal here advanced -- to have non-duplication rights (like carriage rights) made coterminous with and confined to ADIs -- is adopted, and those rights thereby become consistent with the new mandatory carriage requirements, limitations based on significant viewing will generally become unnecessary, for the very same reason. Moreover, the concerns expressed by the Commission (FCC 92-499, ¶23) that some stations which are entitled to carriage would be subject to network non-duplication would be obviated. Therefore, consideration should be given (perhaps in a separate proceeding if that is deemed necessary to full consideration of the matter) to eliminating significant viewing as a basis for limiting network non-duplication rights.

Conclusion

In 1988, the Commission proposed to expand the geographic areas within which territorial exclusivity would be permitted (3 FCC Rcd 6171, 6177). WCYB-TV encourages the Commission to do so, along the lines suggested here. In any event, the Commission should not allow the modifications of Section 76.51, mandated by the Congress, to impact on network non-duplication rights in an

irrational manner neither required nor contemplated by the Congress. Therefore, if the Commission is not now prepared to consider substantive revisions of the sort here suggested, it should as a minimum grandfather existing network non-duplication rights until it has an opportunity to do so, based on a full record.

Respectfully submitted,

Appalachian Broadcasting Corp.

By /s/ Herbert D. Miller, Jr.
Herbert D. Miller, Jr.

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