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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Definition of Markets for Purposes of the)
Cable Television Mandatory Television)
Broadcast Signal Carriage Rules)

CS Docket No. 95-178

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COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

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February 5, 1996

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EXECUTIVE SUMMARY

The National Association of Broadcasters (“NAB”) urges that: 1) the must carry market definition rules be amended to substitute use of Nielsen Media Research’s “Designated Market Areas” (“DMAs”) for the now defunct Arbitron “Areas of Dominant Influence” (“ADI”); 2) substitution of 1995-1996 DMAs for ADIs should be completed in time for use in the must carry/retransmission consent elections required by October 1, 1996, and; 3) individual ad hoc market modification decisions that have been issued pursuant to Section 614(h) of the Communications Act be kept in force unless or until another interested party can demonstrate that changed circumstances justify an alteration to such modifications.

Adoption of a policy that would perpetuate, and freeze in time, 1991 ADI market definitions would be unwise, inconsistent with Congressional intent, and an unexplained departure from the Commission’s 1993 decision to fashion a must carry/retransmission consent election process designed to update markets to reflect changing market realities.

The Commission’s experience with other rules in which it both has used updated market designations, and has continued to rely on stale market designations, supports the

conclusion that reliance on periodically updated markets is preferable and will not cause undue disruption.

Not only will a conversion to updated DMAs not cause disruption to operation of the cable compulsory license, the Copyright Office clearly anticipates that the Commission will make the conversion, and appears prepared to accept DMA designations as the delineation of stations' local service areas.

Stations' must carry zones should reflect as much as is practicable, the current local programming and advertising markets in which they actually operate. Clearly those markets do not remain static. Accordingly, the Commission should convert to Nielsen DMAs; those designated market areas in which programming and advertising are actually sold.

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COMMENTS OF THE
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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (“NAB”)¹ hereby submits these comments in response to the *Notice of Proposed Rule Making* (“Notice”) in the above-captioned proceeding.² In the *Notice*, the Commission seeks comment on proposed revisions to the market definition process use in conjunction with the cable television broadcast signal carriage (“must carry”) rules.

¹ NAB is a nonprofit, incorporated association of television and radio stations and networks which serves and represents the American broadcast industry.

² See *Notice* in CS Docket No. 95-178, released December 8, 1995.

NAB is firmly of the view that: the must carry market definition rules should be amended to substitute use of Nielsen Media Research's "Designated Market Areas" ("DMAs") for the now defunct Arbitron "Areas of Dominant Influence" ("ADI"); that substitution of 1995-1996 DMAs for ADIs should be completed in time for use in the must carry/retransmission consent elections required by October 1, 1996; and that individual ad hoc market modification decisions that have been issued pursuant to Section 614(h) of the Communications Act should be kept in force unless or until another interested party can demonstrate that changed circumstances justify an alteration to such modifications.

The Commission has expressed a tentative preference to retain use of Arbitron's 1991-92 ADIs based on the view that it would provide "stability in the television broadcast signal carriage process."³ Adoption of a policy that would perpetuate, and freeze in time, markets as defined in 1991, by a company no longer in the business of designating and publishing such markets, would appear to be neither wise nor consistent with Congressional intent. Stations' must carry zones should reflect as much as is practicable, the current local programming and advertising markets in which they actually operate. Clearly those markets do not remain static. Far more preferable would be conversion to Nielsen DMAs; those designated market areas in which programming and advertising are actually sold.

³ Notice at ¶7.

II. CONVERSION TO DMAS WOULD FULFILL CONGRESS' INTENT THAT STATIONS BE CARRIED IN THE MARKET AREAS WHERE THEY CURRENTLY ARE VIEWED, FOR WHICH THEY ACQUIRE PROGRAMMING, AND IN WHICH THEY COMPETE FOR ADVERTISING

“Congress’ objective” in establishing the areas in which stations’ are entitled to must carry rights was “to ensure that television stations be carried in the areas which they serve and which form their economic market.”⁴

Specifically, the reasons Congress designated use of Arbitron’s ADIs were that:

... ADI lines establish the markets in which television [sic] buy programming and sell advertising. ADI lines are currently used by the FCC to determine television markets for purposes of its national multiple ownership rules. The Committee believes that ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition.⁵

Additional reasons why Congress chose the ADI as the basis for the must carry zone were that it generally:

encompasses the area in which most television stations would be considered local and is the area to which most television stations’ public service programming is directed. By the same token, stations that serve the same market as a cable system are the ones which most likely compete with the cable systems for local advertising and are thus the stations which the cable system has

⁴ H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992) (hereinafter “House Report”).

⁵ *Id.* See House Report at 66 (The ADI is “the most common industry definition of a television market and one used by the FCC for many years in regulations.”)

the greatest financial incentive to drop from carriage.⁶

Clearly no one, including Congress, anticipated that Arbitron would cease its designation and publication of ADI market areas subsequent to adoption of the Cable Television Consumer Protection and Competition Act of 1992 (“The Act”). In responding to this unanticipated event, the Commission should seek to adopt the alternative mechanism best suited to achieve Congress’ objectives. Continued use of obsolete ADIs will not serve these objectives. Adoption of Nielsen’s most recent DMAs clearly will.

First, as set forth in the Declaration of Gerald G. Hartshorn, NAB’s Director of Audience Measurement and Policy Research, (“Hartshorn Declaration”) attached hereto as Appendix A, contrary to Congress’ intent, Arbitron’s 1991-92 Television Market ADIs no longer represent stations’ “economic markets” in general nor, specifically, the markets in which they “buy programming and sell advertising.” Rather, program acquisition, advertising sales, and network compensation are now negotiated by reference to DMAs.

In comparing Nielsen’s 1995-96 DMAs with Arbitron’s 1991-92 ADIs, it is estimated that approximately 126 markets would be affected by switching to DMAs, with approximately 79 markets gaining counties and 83 markets losing counties.⁷ While many of these changes are attributable to slight differences in the methodologies and criteria used by Arbitron and Nielsen, others reflect shifts in viewing patterns and markets that will

⁶ *Id.* at 66.

⁷ These numbers are necessarily estimates in that no attempt has been made to incorporate the results of ad hoc Section 614(h) adjustments to markets. Some of the 126 markets affected both gain and lose counties.

fail to be recognized and accommodated in cable's must carry obligations if obsolete ADI market designations continue to be utilized.⁸

A second reason articulated by Congress for expressing a preference for using ADIs is that, at the time it was considering the issue, ADIs were the mostly widely accepted industry definition of television markets. Currently, and in the foreseeable future, ADIs not only are not the market definition most commonly used by the affected industries, such definitions are no longer used at all! They have been supplanted by DMAs⁹.

Congress was also inclined toward the use of ADIs because of convenience; namely that historically they have been used by the Commission in its rules, to which reference could be made in the statute. Presumably, the Commission used ADIs in its ownership and other rules because, at the time the rules were promulgated, ADIs were the most widely used and accepted in the industry. As previously discussed no such justification any longer exists.

Finally, Congress used ADIs because it felt they defined the markets in which stations were likely to be competing with cable for advertising. While competition between broadcast and cable for advertising has increased since passage of the 1992 Cable Act, it is now the DMA that defines the market within which cable competes with local stations. One of the major changes in the cable industry has been the regional concentration or "clustering" of cable systems under common ownership. Among the

⁸ See Hartshorn Declaration.

⁹ *Id.*

reasons for this market phenomenon is the simple fact that cable systems can more effectively sell advertising on their cable networks in competition with local broadcasters if they can offer coverage of substantially all of the broadcasters' market. That market is now the DMA. Advertising is most commonly planned and purchased based on these DMA television marketplaces, and sales presentations by a cable system will be more persuasive if it can offer a sale across such markets.

As the foregoing demonstrates, conversion to DMAs at this time is compelled by the fact that current DMAs far more accurately reflect the current economic markets in which stations buy programming, sell advertising and otherwise compete; the very markets in which Congress intended stations be carried. In this regard, it should be noted that there is no specific Congressional prohibition against conversion to DMAs. As previously noted, Congress' preference for the ADI standard was in lieu of an arbitrary mileage-based definition"¹⁰ and not because Congress disfavored DMAs. Indeed, in an analogous context to the current situation, when ADIs were not designated for Alaska and Hawaii, the Commission had no difficulty finding the authority to use DMAs.¹¹

III. RETAINING USE OF ADIS FAILS TO ACCOMMODATE CHANGING MARKET REALITIES

The major justification provided by the Commission in the Notice for retaining use of the 1991-92 ADIs is that it ostensibly "has the advantage of providing stability in the

¹⁰ See House Report at 97.

¹¹ See Report and Order in MIM Docket 92-259, 8 FCC Rcd. 2965-2975 (1993) ("[W]e believe that Nielsen's DMAs, which are developed in a manner similar to ADIs, should be used"); Notice at footnote 8.

television broadcast signal carriage process.”¹² But precisely the same proposal, namely that the then current list of ADI county assignments be frozen and used perpetually in the name of stability, was considered and rejected by the Commission in 1993.¹³ The Notice provides no explanation for its proposed change of heart.

In rejecting perpetual use of the 1991-92 ADIs, the Commission adopted the reasoning of NAB and others that the issue of how changes in ADI configurations should be accommodated should not be viewed in isolation, but rather as part of the broader question of how to fashion the triennial must carry/retransmission consent election process.¹⁴ Specifically, the Commission established a scheme whereby ADI designations were to be updated every three years to coincide with the must carry/retransmission consent elections. The Commission correctly found that “this procedure will allow us to take into account changing markets while at the same time providing stability for the affected parties.”¹⁵ Again, the Notice fails to explain why the balance the Commission appropriately struck in 1993 between providing both stability and a mechanism to update and reflect changing market realities is no longer warranted, or how its proposal will account for changing market realities.

In this regard, the change in market realities since 1991-1992 have been considerable. A number of significant and previously unprecedented events have taken

¹² *Notice* at ¶7.

¹³ *Report and Order*, supra note 11, 8 FCC Rcd at 2975.

¹⁴ NAB Comments at MM Dkt. No. 92-259 at 10-11.

¹⁵ *Report and Order*, supra note 11, 8 FCC Rcd at 2975.

place in the broadcast television industry whose effects would not be reflected by continuing the use of the 1991-92 Arbitron market definitions. First, any additional viewing to the many broadcast television stations which, as a result of must carry, are now for the first time being carried on cable systems is not considered in the Arbitron market definitions. Additionally, many former independent stations now carry programming from the United Paramount and Warner Brothers networks--neither of which was available in 1991-1992. And too, there have been changes in ownership and programming of other formerly independent stations which are now operating as satellites, carrying the network programming of their respective parent stations to new viewers. Moreover, subsequent to the 1991-1992 Arbitron market definitions, there have been substantive changes in station viewing patterns in numerous markets resulting from an unprecedented number of network affiliation changes during the period.¹⁶

It is expected that the television environment of the late '90s and into the next century will remain in flux as broadcasters transition from an analog single channel to digital transmission and HDTV. Continued use of ADIs will fail to reflect any of the market dynamics brought about by these technological changes, and attempts to convert to DMAs later will simply be more painful and disruptive.

The answer to accommodating such changing markets cannot and should not be the arduous and expensive Section 614(h) ad hoc procedures. Such procedures often take months to resolve and appear to require considerable expenditures by multiple parties. Moreover, Section 614(h) proceedings are designated to make adjustments on a station

¹⁶ Between the Fall of 1993 and December 1995, NAB is aware of affiliation changes affecting some 75 stations in 41 separate markets (nearly one of every four television markets).

specific, community-by-community basis, rather than on a county-by-county, all-stations-in-the-market basis such as that which would be accomplished through triennial updates of DMA designations.¹⁷

IV. THE COMMISSION'S EXPERIENCE WITH OTHER RULES INVOLVING THE USE OF AUDIENCE RESEARCH ORGANIZATION DATA SUPPORTS USE OF UPDATED DMA MARKET DESIGNATIONS

The Commission's experience with other rules in which it both has used updated market designations, and has continued to rely on stale market designations, supports the conclusion that reliance on periodically updated markets is preferable and will not cause undue disruption.

First, and foremost, Section 73.3555 (e)(3)(i) of the Commission's rules, on which Section 614(h)(1)(C) of the Communications Act relies to determine must carry markets, requires use of "ADI data at the time of a grant, transfer or assignment of a license." Hence, the dictates of the very rule referenced in the applicable statute are to use current market data.¹⁸

With respect to the Prime Time Access Rule,¹⁹ the Commission for years, and with no apparent adverse effects, triennially updated its list of the top fifty markets whose stations were subject to the rules in order to strike a balance between having the rule reflect market realities and not unduly disrupting programming acquisitions. Similarly, no

¹⁷ See *Report and Order*, *supra* note 11, 8 FCC Rcd at 2977.

¹⁸ In considering waivers to the multiple ownership rules in the top 25 television markets, the Commission also uses "the most recent Arbitron Ratings Television ADI market guide." See Section 73.3555 Note 7(2).

¹⁹ Section 73.658(k) and Note 1 [This section was repealed effective August 30, 1996].

apparent disruption has been caused by the Commission's use of the most recent ARB Television Market Analysis in determining hyphenated markets in hundred plus markets for purposes of the non-network territorial exclusivity rule.²⁰

By contrast, except for market changes resulting from a costly and time consuming special petition process, the Commission's list of top 100 markets in Section 76.51 of the rules, which was derived largely from Arbitron's 1970 prime time household rankings, is now hopelessly out of date. Specifically, the Commission compared the Section 76.51 list with 1987-1988 market designations and found that: eleven markets on the list were no longer actually in the top 100 markets; 23 other designated communities on the original list had changed; and in 18 cases where the market names differed, the 76.51 list included communities not included in Arbitron's 1987-1988 list.²¹ Not surprisingly, upon reviewing this situation, the Commission expressed its belief that "it may be appropriate to update the list of television markets applicable to this rule to reflect current market designations".²²

Continued reliance on Arbitron's 1991-1992 market designations will inevitably lead to the same unfortunate set of circumstances confronting those who must rely on Section 76.51, as well as the operation of Section 76.54,²³ of the Commission's rules.

²⁰ Section 73.658(m).

²¹ *Further Notice of Proposed Rule Making*, Gen. Dkt. No. 87-24, 3 FCC Rcd 6171, 6176 (1988).

²² *Id.* See *Notice of Inquiry and Notice of Proposed Rule Making*, Gen Dkt. No. 87-24, 2 FCC Rcd 2393, 2403 (1987). ("At a minimum, if a territorial exclusivity rule is retained for non-network program agreements, revision of the [Section 76.51] list as presently constructed and/or application to territorial exclusivity is necessary")

²³ Section 76.54 defines the manner in which stations are designated significantly viewed. The principal basis for such designations, indeed the exclusive means of such designations on a county wide basis for most stations, is derived from a 1971 American Research Bureau viewing survey.

Either they must live with what will become increasingly obsolete and inaccurate market designations, or be required to institute expense and time consuming ad hoc procedures to have the rules reflect current market realities. Moreover, as use of the antiquated market designations becomes more entrenched and relied upon, it will become increasingly difficult and disruptive to update them in the future on a wholesale basis.

V. **CONVERSION TO UPDATED DMAs SHOULD NOT AFFECT THE RESULTS OF ANY PREVIOUSLY DECIDED SECTION 614(H) MARKET MODIFICATIONS**

There appears to be no reason why a conversion to updated DMA designations should alter previously adjudicated cases decided pursuant to Section 614(h), or why any changes would be required to the existing “home county” exception to the standard market designation rule.²⁴

Admittedly, the use of either ADIs or DMAs to establish must carry zones provide only rough justice through the use of mechanisms that were not created or designed expressly for the purposes Congress intended for must carry.²⁵ Indeed, by including Section 614(h), Congress expressly recognized and sought to accommodate that reality. While ideally each station should presumably undergo the more precise and exacting 614(h) analysis with respect to each cable system (or vis versa), such a scheme is hardly

²⁴ Indeed, there would appear to be no need to amend in any way §76.55(e)(3) which simply provides that the county in which a station’s community of license is located is always considered in its market regardless of which ADI (or DMA) it is located.

²⁵ C.f. 3 FCC Rcd 6171, 6176 (“We further observe that the market areas defined by the rating services, the ADI and DMA, while readily available, are intended to serve the needs of the clients of these organizations”)

practical. Where, however, a station or cable system has been subjected to an extensive station specific, community-by-community Section 614(h) must carry analysis (all of which have been conducted within the last 3 years), those determinations should remain in effect, unless or until a subsequent Section 614(h) proceeding demonstrates that a further modification is required. In other words, for example, if a station has obtained a Section 614(h) determination that cable systems in a specific community are a part of its market, such a determination would prevail regardless of its assignment to a DMA outside of where that community was located.

VI. CONVERSION TO DMAS WILL NOT CAUSE DISRUPTION TO OPERATION OF THE CABLE COMPULSORY LICENSE

Not only will a conversion to updated DMAs not cause disruption to operation of the cable compulsory license, the Copyright Office clearly anticipates that the Commission will make the conversion, and appears prepared to accept DMA designations as the delineation of stations' local service areas.

In a *Notice of Policy Decision* released last month,²⁶ the Copyright Office determined that it would use the same market designation list as that used by the Commission for the Commission's must carry/retransmission consent elections, in determining the local service (copyright free) area of television stations. The *Copyright Office Notice* acknowledged that Arbitron had discontinued publication of its Market Guide, and noted the Commission would have to establish new criteria for designating markets, which the Copyright Office stated, would "presumably [be] Nielsen's Designated

²⁶ *Notice of Policy Decision*, Copyright Office Docket No. 95-8, 60 F.R. 65072 (December 18, 1995) ("Copyright Office Notice").

Market Area.”²⁷ Hence, in instructing cable systems, with respect to 1996 accounting periods, to make reference to “the ADI (or replacement) list used by the Commission for the must carry/retransmission consent election,”²⁸ the Copyright Office has clearly anticipated the possibility of a conversion to DMAs.

VII. CONCLUSION

For the reasons set forth above, the Commission should immediately amend its must carry market definition rules to substitute the use of DMAs for ADIs such that 1995-1996 DMAs will be the basis for television station October 1996 must carry/retransmission consent elections. Such an amendment, together with provisions for subsequent triennial updates of the operative DMA market designations to coincide with future elections, will best achieve the proper balance between providing stability in the television broadcast signal carriage process and to a great extent, designating the actual “economic markets” within which Congress genuinely intended to require cable carriage.

The conversion to DMAs should in no way affect past Section 614(h) determinations in which market areas have been revised with respect to particular stations and particular communities. Such determinations, which were made subject to Congressionally-mandated, must carry-specific criteria should be modified only by a subsequent Section 614(h) proceeding.

²⁷ *Id.* 60 F.R. at 65073 n. 2.

²⁸ *Id.* 60 F.R. at 65073.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
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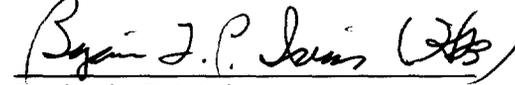
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February 5, 1996

APPENDIX A

DECLARATION OF GERALD HARTSHORN

My name is Gerald Hartshorn. I am Director of Audience Measurement and Policy Research in the Research and Planning Department of the National Association of Broadcasters (NAB). For the past six years, my duties at NAB have included monitoring audience measurement issues and providing its members with analysis of the activities of broadcast research vendors. I serve as a staff liaison for NAB's audience research committees: Committee on Local Television Audience Measurement (COLTAM) and Committee on Local Radio Audience Measurement (COLRAM) and represent the association on several industry-wide committees, including the Electronic Media Rating Council. Prior to joining NAB, I spent nine years in the Television Product Group of The Arbitron Company where, among other duties, I was involved in several years' market update analyses and the writing of Arbitron's *Description of Methodology*. I hold a M.A. in Mass Communications Research from University of Maryland and a B.A. from Penn State.

Prior to 1994, television broadcasters had the choice of subscribing to either the local market ratings service provided by The Arbitron Company or the Nielsen Media Research or possibly both vendors' services. A station's decision to use Arbitron's or Nielsen's data was historically based first on economics and then on market forces. Those stations—typically in larger markets—which could financially afford to do so, or because their client advertisers demanded, subscribed to both Arbitron's and Nielsen's products. The remaining stations generally selected one service or the other based on market-related forces (chiefly the demand for data from one service or the other by local and regional

advertisers), the cost of the services provided or other market issues, including the respective ratings service's market definition.

In October 1993, Arbitron announced that it was discontinuing its television ratings service at the end of the calendar year. As a result, Nielsen Media Research effectively became the sole *de facto* standard of the television industry for defining television markets. From that point forward, television broadcasters no longer had any choice but to use Nielsen's market definitions—Designated Market Areas (DMAs)—for all facets of their business. The Nielsen-defined DMA replaced Arbitron's Area of Dominate Influence (ADI) as the standard for defining television markets.

While there are over 1,100 commercial television stations on air, all of these stations do not compete against each other. Local television stations compete with stations in their local market. These local stations measure that competition.¹ by the most recent syndicated ratings reports. These “report cards” are determined quarterly, during what is commonly referred to as the “sweeps periods.” These evaluations on the stations' performances are determined over the Nielsen DMAs. The viewership information that stations use daily are determined from surveys for those geographic areas. In their selling of advertising time, stations sales personnel use viewership information for that geographic area, the Nielsen DMA. In their evaluation of how well a specific program has done, station program personnel use viewership information for that geographic area, the

¹ For its annual financial survey conducted with Broadcast Cable Financial Management Association (BCFM), NAB uses Nielsen DMAs as the relevant geographic markets for which market totals are generated. These market totals are used extensively by the television stations to measure their past years' performances with the performances of the *markets*.

Nielsen DMA. In fact, the selling of programs by syndicators are also based on the Nielsen DMA geographic area. One only has to look at advertisements (see e.g., *Broadcasting and Cable*, January 15, 1996, "The New Crop at NATPE") for syndicated programs to see this point most clearly. In all of these advertisements on where certain programs have been sold, you will always see the listing of markets associated with *one* station's call letters. These companies view these DMAs as relevant markets.

Since the Fall of 1993, Nielsen's DMA has been the sole standard used by the broadcast television industry for the purposes of benchmarking the value of television advertising time, the value of network compensation for affiliates, and the cost of acquiring syndicated programming. Were the Commission to continue the use of ADIs rather than adopt DMAs at this time for cable carriage purposes, it would penalize broadcasters by not recognizing the fact that the Nielsen-defined DMA has been the *de facto* standard market definition for their business since 1994.



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February 5, 1996