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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Definition of Markets for)	CS Docket No. 95-178
Purposes of the Cable)	
Television Mandatory Television)	
Broadcast Signal Carriage Rules)	DOCKET FILE COPY ORIGINAL

MOTION TO ACCEPT LATE-FILED COMMENTS

The National Cable Television Association, Inc. ("NCTA") hereby requests the Commission to accept these comments, filed one day after the public comment date. NCTA had completed the comments in time for filing, but a computer system breakdown precluded access to the document for final printing. By the time the document was retrievable, it was too late for the messenger service to make the Commission's 5:30 p.m. deadline.

We regret any inconvenience to the Commission and respectfully request that the comments be accepted in the above-captioned proceeding.

Respectfully submitted,



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February 6, 1996

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**COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA") hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry, representing the owners and operators of cable systems serving 80 percent of the nation's 60 million cable households. Its members also include cable programming networks, cable equipment manufacturers and others affiliated with the cable television industry.

INTRODUCTION

In its Notice of Proposed Rulemaking, ("Notice"), the Commission seeks comment on a revised method of defining markets for purposes of the cable television broadcast signal carriage rules. Under the 1992 Cable Act and its implementing rules, a commercial television station is entitled to assert

mandatory carriage rights on cable systems located within the station's "Area of Dominant Influence" ("ADI"), as published in Arbitron's Television ADI Market Guide. Every three years broadcast stations elect whether to be carried pursuant to the must carry provisions or the retransmission consent provisions of the Act. The initial 1993 must carry/retransmission consent election was based on Arbitron's 1991/92 ADI list. The 1996 election was to be based on Arbitron's updated 1994-95 list but Arbitron recently discontinued its designation and publication of ADI market areas.

The Notice seeks comment on a new mechanism for defining "local" market areas which television stations may use for asserting mandatory carriage rights. The Commission outlines several options: (1) substitute Nielsen "Designated Market Areas" or "DMAs" for Arbitron "ADIs"; (2) continue to use Arbitron's 1991-92 Television ADI Market Guide to define market areas, subject to individual review and refinement through the Section 614(h) process; or (3) retain the existing market definitions for 1996 and switch to DMAs thereafter.

The Commission believes that the preferred approach is the second option because it will maintain stability in the broadcast signal carriage process. NCTA agrees that the 1991/92 ADI market system combined with the section 614 modification process continues to be a sound approach to

ensuring that broadcast stations are carried in the relevant markets, while avoiding unnecessary disruption in the public's viewing patterns and protracted administrative burdens for the Commission, cable operators and broadcasters.

DISCUSSION

A. The Commission Should Avoid Instability and Disruption In Viewing Patterns

In implementing the 1992 Cable Act's must carry rules, the Commission recognized that "[m]ost importantly, subscribers have an interest in certainty of service and minimal disruption."¹ Although the ADI and DMA market lists are somewhat similar, switching to the DMA market list would create widespread dislocations in certain market areas for both broadcasters and cable operators. In Denver, Colorado, for example, eleven additional counties would be added under the DMA definition, and four counties would be excluded. A market-by-market DMA analysis reveals that many markets would gain and/or lose at least three or four counties as compared to the current ADI definition.²

¹ Report and Order, MM Docket No. 92-259, FCC 93-144, 8 FCC Rcd 2965 (1993) at ¶ 124.

² See e.g., Albuquerque-Santa Fe; Anchorage, AK; Atlanta, GA; Glendrise, MT; Indianapolis, IN; Mankato, MN; St. Joseph, MO; Washington, D.C.

The disruption that would occur from reshuffling and revamping station line-ups to comply with the new standard will only confuse and alienate the viewing public. The implementation of the 1992 must carry and retransmission consent provisions illustrates the enormous downside of changing established viewing patterns. During that period, viewers were subjected to extensive channel realignments and service changes, as little-watched broadcast stations exercising newly-acquired must carry rights were added, and as popular cable programming services were dropped to make room.³ Many viewers expressed anger and frustration to their local cable operator, local franchising authority and the Commission.

In the past, the FCC has avoided such upheaval by freezing market designations at a certain date to maintain stability and predictability in the application of its rules. In adopting signal carriage rules for the top 100 television markets in 1972, the Commission found:

The list is derived largely from the American Research Bureau's primetime households ranking. The list will not be revised each time new rankings are issued: There must be stability in this area, so that plans and investment can go forward with confidence. A contrary approach would be disruptive to the viewing public.⁴

³ See e.g. "Channel 65 Lands Spot on Cable", Orlando Sentinel, September 10, 1994 at D1.

⁴ Cable Television Report and Order, FCC 72-108, 36 FCC 2d 171, 172 (1972) at ¶75.

This list is still in place today, even though the markets have changed in the past 25 years. Similarly, in the 1972 reconsideration of its signal carriage and other cable television rules, the Commission decided to continue to use county-wide data in determining a television station's "significantly viewed" status in order to provide certainty, despite concerns that such data failed to sufficiently account for differences in viewing within counties and may not have adequately indicated actual viewing.⁵ The Commission stated:

we nevertheless determined that these disadvantages [in using county-wide survey data] were outweighed by the desirability of certainty and were not of sufficient magnitude to preclude use of the data to cure a signal carriage problem where an uncertain standard and the possibility of protracted hearings had created years of uncertainty for both broadcasters and cable operators. The course petitioners ask us to take would completely defeat our goal of providing certainty, with no significant public benefits.⁶

The same considerations apply in this proceeding. Changing from the established ADI definition to the new DMA definition would send broadcasters and cable operators back to square one in their dealings on signal carriage issues. The uncertainty and instability that would result from upending established relationships will have no corresponding public benefit.

⁵ Memorandum Opinion and Order on Reconsideration, FCC 72-530, 36 FCC 2d 326 (1972) at ¶ 52, aff'd sub nom. American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975).

⁶ Id. (emphasis added).

B. The Commission May Review Individual Market Designations Under Section 614(h)

If the Commission continues to use the 1991/92 ADI market designation for the 1996 must carry/retransmission consent election and thereafter, there is no question that it will promote continuity of service. But the Commission also questions “whether changing from ADIs to DMAs and revising market boundaries every three years based on shifting audience patterns, involves any systematic improvement in market definitions.”⁷ As the Commission notes, such changes may represent nothing more than random statistical variations based upon transitory changes in audience levels.

The ADI market list has changed little over the ten-year period between the 1981-82 ADI market designations and the 1991-92 designations.⁸ But some will undoubtedly argue that population growth and other changes will warrant future modification of the ADI market list. We submit that such changes can be readily accommodated, as they have since 1992, through “individual review and refinement” in the section 614(h) process.⁹ Indeed,

⁷ Notice at ¶7.

⁸ Cox Comments at 3.

⁹ Notice at ¶6.

Congress designed the current ADI system to be flexible enough to incorporate changed circumstances.

Changing from one market definition system to another may be inconsistent with the section 614(h) individual ad hoc market modifications. It could be detrimental to market areas that have already been revised under section 614(h) for particular stations and particular communities.¹⁰ And, given the large number of market modification cases already adjudicated by the Commission, it would throw into question the continued validity of these rulings in those cases.

C. The Market Definition Should Not Change to Benefit Individual Stations

Some broadcast stations are likely to wholeheartedly endorse a change from the ADI market designation to the DMA market system. Not surprisingly, these stations would gain a windfall in viewers by dramatically expanding their must carry rights. For example, station KEYC in Mankato, MN would stand to double its television households by switching from ADI to DMA, expanding from three to over six counties.¹¹ Station WHAG in Hagerstown, MD would benefit greatly from a change in market definition.

¹⁰ Id.

¹¹ See also WYOU-Scranton, PA (additional county containing 22,600 TV households); WPDE-Florence, SC (additional county containing 12,280 TV households).

WHAG is part of the Hagerstown ADI (45,200 ADI TV households). Under the DMA system, WHAG would be included in the Washington, D.C. DMA because Hagerstown does not have its own DMA -- and would thereby gain over 1.5 million additional TV households. The addition of WHAG to the Washington DMA cable systems translates into channel line-up changes, dropped cable programming services and overall disruption for cable subscribers in this market.

As a policy matter, the Commission should not revise its market definition mechanism to suit the desires of any particular broadcast station or group of stations. The public interest in maintaining stability and some degree of certainty should govern here.

D. Changing to DMA Would Create Administrative Burdens and Affect Copyright Liability

As the Commission points out, changing from the ADI definition to the DMA definition will not only affect the must carry status of broadcast stations, but will determine whether a station is “local” or “distant” for copyright purposes.¹² Thus, cable operators and broadcast stations would have to reevaluate copyright liability for the carriage of every station on every cable system nationwide. It could also put cable operators in the

¹² Notice at ¶ 3.

unfortunate position of having to incur further copyright fees for certain stations or otherwise risk subscriber ire by dropping stations that subscribers have been accustomed to viewing.

The administrative costs and burdens associated with reopening the signal carriage market definition also weigh against changing to the DMA system. Cable operators and broadcasters will be forced to reassess the must carry status of every station, including undergoing a station renotification process, reviewing geographic coordinates of cable headends and the signal strength of individual stations. The Commission too will be faced with a new round of market modification petitions, complaints and requests for clarification under the revised rules, with no assurance that in the end the DMA approach provided a better system.

CONCLUSION

For the foregoing reasons, we urge the Commission to adopt its proposal in the Notice to retain the current ADI market definition standard in its broadcast signal carriage rules for the 1996 must carry/retransmission consent election and for future elections.

Respectfully submitted,



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