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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)	
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Definition of Markets for Purposes of the)	
Cable Television Mandatory Television)	CS Docket No. 95-178
Broadcast Signal Carriage Rules)	
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**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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1771 N Street, N.W.
Washington, D.C. 20036

Henry L. Baumann
Benjamin F.P. Ivins

Counsel

Mark Fratrick, Ph.D.
Vice President, Economist

Gerald Hartshorn, Dir. of Audience Measurement
and Policy Research

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The National Association of Broadcasters (“NAB”)¹ hereby submits these reply comments in the above-captioned proceeding.

INTRODUCTION

In its comments in the proceeding,² NAB urged the Commission to amend its rules to substitute the use of Nielsen Media Research’s “Designated Market Areas” (DMAs) for the now defunct Arbitron “Areas of Dominant Influence” (ADIs) in time for use in the

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

² *Comments of the National Association of Broadcasters* in CS Docket No. 95-178, filed February 5, 1996 (hereafter “NAB Comments”).

must carry/retransmission consent elections required by October 1, 1996. NAB also recommended that individual ad hoc market modifications issued pursuant to Section 614(h) of the Communications Act should be kept in force unless or until changed circumstances were demonstrated to justify alternations to such modifications.

An overwhelming number of parties filing comments in this proceeding concurred with the view that the time to convert to DMAs was now, and the recommendation to leave in tact presently existing Section 614(h) market modifications appears to have been unanimous. The legal and practical common sense rationales supporting conversion to DMAs are irrefutable. The objections to such a conversion, expressed almost exclusively by cable interests, are based on the same hackneyed excuses that have been raised repeatedly in response to virtually every proposal to regulate cable in the last ten years, namely: “it will be too disruptive”; “it will confuse subscribers”; and “it will cost too much.”³ The sky did not fall (as predicted) with the adoption of the syndicated exclusivity rules; it did not fall (as predicted) with the revision of the network non-duplication rules; it did not fall (as predicted) with the expeditious implementation of the must carry rules, and it will not fall with the conversion to DMAs.

ARGUMENT

The legal compulsion to convert to DMAs is straightforward. One of Congress’ major purposes in adopting mandatory cable carriage requirements was to ensure that stations have access to cable subscribers within their actual market areas, that is, the actual

³ About the only traditional argument missing from this litany of oppositions is that conversion to DMAs would be an unconstitutional intrusion into cable’s first amendment rights.

market for which they acquire programming and in which they sell advertising. This purpose cannot be served by relying on five year old market designations that grow staler every year.

Paragraph 7 of the *Notice* in this proceeding hints that “[t]o the extent that there are substantive and systematic differences in the standards used by Arbitron and Nielsen in defining markets,” the Communication Act’s Section 614(h)(1)(c)’s reference to Section 73.3555 (d)(3)(i) (redesignated Section 73.3555(e)(3)(i)) might create legal impediments to converting to DMAs, presumably because of that rule’s specific reference to ADIs. But any doubt about such an impediment was removed by Congress with passage of the Telecommunications Act of 1996, which struck references to the Commission’s rule, and replaced it with language directing the Commission “where available [to use] commercial publications which delineate television markets based on viewing patterns”⁴ in establishing stations’ must carry zones. Since Nielsen DMA information is now the only available commercial publication delineating viewing patterns, the Commission must use it to define such zones.

Not only is there a legal imperative to convert to DMAs, adoption of the Commission’s proposal in the *Notice* perpetually to use the 1991-1992 ADIs would itself raise serious legal questions. As noted in NAB’s Comments (p.7), precisely the same proposal was considered and rejected by the Commission in 1993. Neither the *Notice*, nor the comments filed herein, provide any basis, rational or otherwise, for the abrupt policy change from a rule that takes into account changing markets to one that does not. In so

⁴ Telecommunications Competition and Deregulation Act of 1996, Public Law 104-104, 110 Stat. 56 1966 Section 301(d)(1).

reversing itself, the Commission must “supply a reasoned analysis indicating that its prior policy and standards are being deliberately changed and not casually ignored.”⁵ It thusfar has not done so.

In addition to the legal imperatives to convert to DMAs, there are also substantial practical reasons to do so. As noted in the Comments of Diversified Communications, “[t]o not adopt use of the updated Nielsen DMAs is essentially to invite administrative burdens in that many broadcast licensees will be required to file Section 614(h) special relief appeals to protest the retention of ADI boundaries that are over five years old and do not reflect the current viewing patterns of a given geographic area.”⁶ And, of course, it is not just broadcast licensees that will be forced to rely on burdensome and time consuming Section 614(h) proceedings to update the realities of their market. Cable systems will be required to do so as well.

Cable interests advocating continued reliance on outdated and stale ADIs in the name of minimizing costs and subscriber disruption base their objections to converting to DMAs on dubious and sparse factual underpinnings.

NCTA, for example, alleges that switching to DMAs would “create widespread dislocations in certain market areas for both broadcasters and cable operators,” but then cites nothing more in support of this proposition than that many markets would lose or gain counties resulting in the rule change.⁷ The worst case scenario provided is Denver

⁵ *Action for Children’s Television v. FCC*, 821 F. 2d 741, 745 (D.C. Cir. 1987); *see United Video v. FCC*, 890 F. 2d 1173, 1182 (D.C. Cir. 1989).

⁶ *Comments of Diversified Communications* in CS Docket No. 95-178 filed January 19, 1996, at 5.

⁷ *Comments of the National Cable Television Association, Inc.* in CS Docket No. 95-178 filed February 6, 1996 at 3 (“NCTA Comments”).

where it is claimed that eleven counties would be added and four counties excluded. But absent from NCTA's analysis is consideration of a slew of mitigating factors that may result in little or no disruption to cable operators in those counties. How many of the cable systems in the "gained" counties are already carrying Denver stations and, of those, how many will now benefit because the Denver stations will now be copyright free? How many systems in the "lost" counties are already carrying the stations into whose DMA they would be transferred? How many systems will be left unaffected as a result of the rule only requiring carriage of the affiliate closest to the headend, or the rules not requiring carriage of stations not copyright free, or unable to provide a good quality signal to the headend, or the rules not requiring carriage of stations with duplicative programming or duplicative networks? How many of these counties would have "flipped" under the existing rule requiring use of updated ADI markets?⁸ How many cable systems will be unaffected by a switch to DMAs because of previous Section 614(h) adjudications? Since the counties Denver is losing would all transfer to DMAs with fewer stations, would not cable systems in those counties "benefit" in that their must carry obligations would be reduced?

Perhaps the most blatant example of the practical effect of failing to consider these factors is NCTA's reliance on WHAG-TV, Hagerstown, Maryland. NCTA bitterly complains that WHAG would derive tremendous benefits from a DMA change in market definition by becoming part of the Washington, DC DMA, thereby gaining over 1.5

⁸ There is reason to believe that at least four counties would have changed under the existing rules because of new networks and other changes in viewing patterns since 1991-1992.

million households.⁹ A review of WHAG-TV's Comments,¹⁰ however, reveals that had NCTA properly taken into account the closest affiliate to the headend rule, the limitation not requiring carriage of two affiliates of the same network, the good quality signal requirement and grandfathering the results of earlier Section 614(h) market definitions, the practical effect on cable systems of a switch to DMAs with respect to WHAG would be negligible.¹¹

Similar flaws and omissions abound in the Comments of the Small Cable Business Association. No specifics, hard data, or concrete examples are provided for the bold assertions that conversion to DMAs will impose substantial burdens or costs on smaller systems, or that the impact will require smaller systems disproportionately to shoulder such burdens and costs. A number of facts make these assertions suspect.

First, even if the Association's assertion that many of its member systems serve less densely populated areas isolated from major markets is true, it is hard to believe they are not already carrying many of the stations in the major market into whose DMA they would fall. DMAs are, after all, determined in part by the viewing habits of their subscribers.

⁹ NCTA Comments at pp. 7&8.

¹⁰ Comments of Great Trails Broadcasting Corp. in CS Docket No. 95-178 filed January 27, 1996 at 6.

¹¹ Another flaw in NCTA's analysis is its citation to Anchorage as an example that would gain/lose counties by converting to DMAs. Since Arbitron never provided for ADIs in Alaska, the Commission is already using DMAs for Anchorage.

Second, all of the cost categories enumerated by the Association that its members allegedly would have to incur by a switch to DMAs would apply equally under the existing rules resulting from updated ADIs.

Third, it is passing strange that cable interests that have complained bitterly about having to carry broadcast stations at all, and are challenging the constitutionality of such a requirement, are now heard to complain about the costs of negotiating with stations which they desire to carry. Such costs are, of course, totally discretionary. It is also unclear how the Association determined that the cost of initial retransmission consent agreements is higher than renewal agreements, since the first renewal cycle is still forthcoming.

Fourth, the Association's comments are devoid of any suggestion, much less analysis, of situations where conversion to DMAs may result in a realization, in some smaller cable systems, of reduced carriage obligations and compulsory license payments.

Balanced against these vague and speculative increased burdens on smaller cable systems, must be the interests of television stations in smaller markets that are being prejudiced by not converting to DMAs.

A salient example is found in the comments of United Communications Corporation, licensee of stations in Mankato, Minnesota and Watertown, New York which demonstrate how:

A static set of market boundaries for purposes of the must carry rules would act as a disincentive to the provision of improved service through new stations and better facilities for existing stations. The negative effect of such a rule would be especially pronounced in the case of new stations in rural areas, which would not be able to

establish their own markets in the eyes of the Commission.¹²

Finally, it is odd that an association of small cable operators acutely concerned with cost containment would advocate as an alternative to updating markets in a single and unified fashion, expensive and time consuming ad hoc community-by-community adjudications.

CONCLUSION

The legal policy and common sense rationales for converting to DMAs now are compelling. The objections to doing so are based on assertions of untoward costs, disruptions and confusion that are vague and unsubstantiated, from sources whose similar prior dire predictions in related contexts have seldom proved accurate. In accord with an overwhelming consensus, the Commission should immediately amend its must carry definition rules to substitute the use of DMAs for ADIs, and should continue to recognize past Section 614(h) determinations.

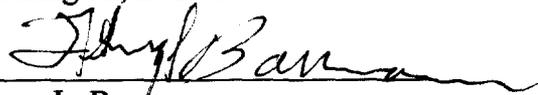
¹² *Comments of United Communications Corp.* CS Docket No. 95-178, filed January 19, 1996 at 3. *see Comments of Desoto Broadcasting, Costa de Ore Television, and SL Communications, Inc* in this proceeding.

Respectfully submitted,

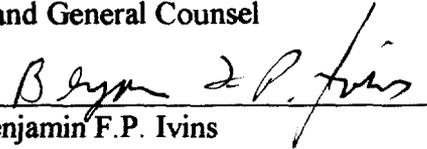
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