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

In the Matter of:	)	
	)	
Amendment to the Commission's Rules Concerning Market Modification	)	MB Docket No. 15-71
	)	
Implementation of Section 102 of the STELA Reauthorization Act of 2014	)	

REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association (NCTA)[1] hereby submits reply comments in the above-referenced proceeding[2] implementing Section 102 of the Satellite Television Extension and Localism Act (STELA) Reauthorization Act of 2014 ("STELAR").[3]

DISCUSSION

Prior to STELAR, the cable carriage provisions of the 1992 Act established four factors for the Federal Communications Commission ("Commission") to consider in determining whether to modify a particular television station's television "market" to "include additional communities within its television market or to exclude communities from such station's television market to better effectuate the purposes of [the mandatory cable carriage provisions of

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[1] NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 80 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $230 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 28 million customers.

[2] *See In re Amendment to the Commission's Rules Concerning Market Modification: Implementation of Section 102 of the STELA Reauthorization Act of 2014*, Notice of Proposed Rulemaking, 30 FCC Rcd 3039 (2015) ("*Notice*").

[3] Satellite Television Extension and Localism Act (STELA) Reauthorization Act of 2014 ("STELAR"), Pub. L. No. 113-200 § 102, 128 Stat. 2059, 2060-62 (2014) (codified at 47 U.S.C. § 338(l)).

the Act]."[4] Comments filed in this proceeding, among other things, address how to evaluate the fifth factor added by STELAR – namely, "whether modifying the local market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence."[5]

While promoting access to in-state programming is one factor in the market modification process, Congress preserved the other four factors as well. In evaluating any market modification petitions going forward, therefore, the Commission must consider all of the factors. As the Commission has explained in assessing market modification petitions,

> [W]e believe that it is inappropriate to state that one factor is universally more important than any other, as each is valuable in assessing whether a particular community should be included or excluded from a station's local market, and the relative importance of particular factors will vary depending on the circumstances in a given case.[6]

This type of approach is especially warranted when evaluating petitions for carriage filed by previously uncarried in-state television stations. Based on the statutory text, the Commission cannot disproportionately weigh the in-state television factor in a market modification proceeding, as doing so would undermine the careful balancing that Congress established under the multi-prong test.

The Commission should also carefully evaluate whether granting the petition of a broadcast station materially advances the purposes underlying the in-state factor. In particular,

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[4] 47 U.S.C. § 534(h)(1)(C)(i). The factors are (1) whether the station or other stations in the same area have been historically carried by the cable system, (2) whether the station provides local coverage of the community, (3) whether other stations in the local market provide coverage of news, sports, and other issues of concern to the cable community, and (4) evidence of viewing patterns in cable and noncable households within the areas served by the cable system. *See* § 534(h)(1)(C)(ii).

United Communications Corp.'s ("UCC") Comments note that stations licensed to a different state may well provide local coverage of events across state boundaries. *See* UCC Comments at 6.

[5] STELAR § 102(b)(1)(C) (codified at 47 U.S.C. § 534(h)(1)(C)(ii)(III)); *see also Notice* ¶ 5.

[6] *In re Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report & Order, 14 FCC Rcd 8366 ¶ 59 (1999).

the Commission should assess whether cable customers already receive television stations that provide in-state coverage.[7] As part of that assessment, the petitioning broadcast station should demonstrate a historical pattern of providing significant in-state programming that is not otherwise available on the local DMA broadcast stations (or on any other station already carried on the system).

The Commission should also consider the interplay between other Commission rules and any market modification that would require cable carriage of an out-of-market in-state station. For example, the network non-duplication and syndicated exclusivity rules[8] (or a station's programming affiliation agreements), may require a petitioning station to black out much of its broadcast day. Mandating such partial carriage is likely to frustrate, rather than benefit, cable customers.[9] Indeed, the Commission should take these practical considerations into account in evaluating the strength of the in-state factor.[10]

Finally, the Commission should consider the potential disruption to cable customers that could be caused by wholesale changes to markets. Market changes that would require operators to delete one group of broadcast stations in favor of another could upset long-established cable

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[7] *See Notice* ¶ 13. Cable operators often offer in-state television stations in "orphan counties" – counties located in one state that are assigned by Nielsen to a DMA located in a different state. *See generally In re In-State Broadcast Programming: Report to Congress Pursuant to Section 304 of the Satellite Television Extension and Localism Act of 2010*, Report, 26 FCC Rcd 11919, App. F (2011) (case studies of certain orphan counties).

[8] *See* 47 C.F.R. §§ 76.92, 76.101.

[9] Further, the Commission should consider whether such carriage would implicate increased retransmission consent costs. Dish Network notes that "a market modification could result in, among other things, two different stations affiliated with the same broadcast network" being assigned to the same geographic area, which "in turn, could result in a satellite carrier being required to pay retransmission consent fees to a station newly added to a given geographic area." Dish Network Comments at 9. Allowing a county to be considered located in two different DMAs might require a cable operator to provide two stations from a single network. And, as Dish explains, this could mean "that for each subscriber in that county, the [MVPD] would pay retransmission consent fees to two different affiliates of the same network." *Id.*

[10] The Commission has flexibility to evaluate the merits of a market modification petition based on particularized circumstances. According to the Second Circuit, the statutory factors "are not intended to be exclusive . . . ." *WLNY-TV, Inc. v. FCC*, 163 F.3d 137, 145 (2d. Cir 1998).

customer viewing patterns.[11] Alternatively, requiring operators to add more television stations on top of their existing television station line-up could strain limited channel capacity. Even relatively modest adjustments to carriage rights could lead to channel line-up changes to accommodate new carriage and channel positioning requests, and could crowd out other services.[12]

CONCLUSION

For the foregoing reasons, the Commission should carefully evaluate all factors prior to modifying a market for purposes of cable carriage requirements.

Respectfully submitted,

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[11] *See generally* NCTA Comments, filed in MB Docket No. 10-238 at 2-3 (Jan. 24, 2011). For must carry purposes, while cable operators are not required to carry duplicating stations or more than one local station affiliated with a particular network, if a cable system declines to carry duplicating stations, it must carry the station closest to the principal headend of the cable system, even if that station is from another state. *See* 47 C.F.R. § 76.56(b)(5).

[12] *See* NCTA Comments, *supra* note 11, at 4.