

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Media Bureau Seeks Comment for Report)	MB Docket No. 15-43
Required by the STELA Reauthorization Act)	
of 2014)	
)	

**Reply Comments of
WTA – Advocates for Rural Broadband**

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EXECUTIVE SUMMARY

The current DMA system is flawed particularly when it concerns small, rural communities located beyond the range of off-air commercial TV stations as a result of the circular impact that DMA assignments have on actual viewing patterns and the technical capabilities of Direct Broadcast Satellite services. As a result, consumers in affected communities are left with irrelevant “local” programming or alternatively must pay for multiple broadcast stations in order to have their station of interest. Cable operators serving these communities lack a true remedy that would enable them to meet their customers’ needs due to the existing costly, inefficient, and often ineffective, market modification process.

The Commission should recommend to Congress several common sense reforms to the use of DMAs as proposed in WTA’s initial comments. Congress should consider allowing cable operators to “re-associate” with a DMA that it believes better serves its customers while providing affected broadcasters the opportunity to rebut a presumption of validity in the re-association. Congress should also take steps that would allow cable operators to negotiate for retransmission consent with two or more DMAs and for consumers to select and pay only for broadcast stations that meet their local programming needs.

These reforms to the DMA system would provide more consumer choice, and would better ensure that rural consumers that cannot receive free over-the-air broadcast signals are not unduly burdened by the consequences of DMA assignments on which they can have no impact. Such reforms would also have a minimal effect on broadcast ratings due to the relatively small number of impacted viewers and could ultimately increase the value of advertising on broadcast stations because the local programming and advertising would be more relevant to the remaining viewers, fostering rather than hindering local programming in the process.

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WTA – Advocates for Rural Broadband (“WTA”) hereby submits these reply comments in response to the Media Bureau’s Public Notice¹ seeking comment in preparation for a report to Congress as required by the STELA Reauthorization Act of 2014 (“STELAR”)² on designated market areas (“DMAs”) and considerations for fostering increased localism and comments filed in the captioned proceeding. WTA notes that comments in the record acknowledge that some communities are assigned to DMAs whose television stations do not carry local programming of interest to their residents.³ Although one commenter believes that current mechanisms are sufficient to address DMA assignment issues,⁴ the current state of play leaves small rural cable operators and their customers without a true remedy.

¹ Media Bureau Seeks Comment for Report Required by the STELA Reauthorization Act of 2014, MB Docket No. 15-42, Public Notice, DA 15-253 (rel. Feb. 25, 2015) (“Public Notice”).

² STELA Reauthorization Act of 2014, Pub. L. No. 113-200 (“STELAR”), § 109, 128 Stat. 2059, 2065 (2014).

³ See Comments of Cherie Logmuir (May 26, 2015); Comments of Oregon Public Broadcasting (May 12, 2015); Comments of Pam Mathrewson (May 11, 2015); Comments of Kyle Ramie (May 6, 2015); Comments of Timothy Brastow (Mar. 24, 2015).

⁴ Comments of National Association of Broadcasters (May 12, 2015) at 3 (“NAB Comments”).

WTA proposed in its initial comments to allow an MVPD to associate itself with the DMA having broadcast stations that provide programming truly of interest to its customers. The typical cable operators and rural communities most likely to be interested in associating with a different DMA are small systems located far outside the Grade B service contours of the stations serving their current DMA, and often in a different state. They generally serve only a tiny portion of the television homes in their current DMA such that the impacts upon viewing audiences and advertising revenues of modifying DMAs will be immaterial in the vast majority of instances. Furthermore, even a perceptible impact on broadcaster viewership and advertising revenue would be outweighed by the benefits to consumers of greater choice, satisfaction, and access to more relevant and timely local programming. Hence, the marketplace disruptions alleged by the National Association of Broadcasters (“NAB”) in its comments are overstated.⁵ Simply put, cable providers and their customers should not be forced to pay for two broadcast stations affiliated with the same national network in order to obtain the local programming they desire.

I. Statements of Account Filed With the Copyright Office Could Provide a Comprehensive Listing of all Broadcast Stations Carried by Cable Operators but Are Not Reported on DMA or State Basis.

As stated in its initial comments, WTA is unaware of a comprehensive data set beyond Form 325 data that would provide comprehensive insight to the availability of out-of-market broadcast stations. While NAB correctly highlights that cable companies must file semi-annual Statements of Account with the Copyright Office listing all television stations they carry, it also recognizes that such data are not reported on a DMA

⁵ NAB Comments at 23.

or state basis, a factor complicating any comparisons and analysis.⁶ Accordingly, WTA suggests that the Bureau use a case study approach similar to the approach used in the 2011 STELA Report to assess areas where consumer access to local programming is most likely to be impacted by unwanted and inefficient DMA assignments and use the Copyright Statements of Account to provide more corroborating details about the availability of programming in impacted areas.

II. The Existing DMA System and Market Modification Process Are Flawed and Impede the Ability of Small Cable Operators to Meet Consumer Local Programming Needs.

a. DMA Boundaries Based on “Actual” Viewing Patterns Are Self-Perpetuating and Distorted by Existing DMA Assignments.

The current DMA and market modification regimes together impede the ability of cable operators to respond to the local programming needs of their customers and preclude consumers in rural areas from having a voice the programming to which they can subscribe. As NAB explained in its comments, developing DMAs necessarily entails drawing boundaries between geographic areas of social and economic integration.⁷ Nielsen attempts to address the challenge of accurately drawing boundaries of social and economic integration in rural areas (where populations are spread across far distances) by splitting large rural counties and assigning different sections to different DMAs “so as to accurately reflect viewing patterns.”⁸ NAB also notes that DMAs are not static, and that Nielsen “makes changes as warranted by actual viewing data” each year.⁹ However, Nielsen’s responsive approach does not truly provide a remedy for rural cable operators

⁶ NAB Comments at 6, n. 12.

⁷ *Id.* at 9-10.

⁸ *Id.* at 10.

⁹ *Id.*

and customers assigned to a DMA that does not accurately represent a true “community of interest” for several reasons.

As a practical matter, the viewing patterns on which Nielsen bases its DMA system are themselves distorted by existing DMA assignments and signal carriage on DBS and MVPD systems that result from such DMA classifications, and as a result are, to a certain extent, self-perpetuating. In addition to directing the Commission to develop the instant report, STELAR expanded the availability of the market modification process to DBS providers. Until now, millions of DBS subscribers have received and watched “local” broadcast stations without any remedy if they do not identify with the “local” stations which they are provided. For example, DBS providers serve approximately 80 percent of one WTA member’s service territory that is currently assigned to an improper DMA. Accordingly, it is reasonable to conclude that the “actual viewership patterns” used as the basis for DMA assignments align more with the DMA to which viewers are already assigned rather than the DMA they would *prefer* because it provides the most relevant local programming.

Although the market modification process has been expanded to include DBS providers, comments filed by DirecTV indicate that this change is not a panacea for rural consumers, particularly in towns of low population where it would be cost prohibitive or technically infeasible for a DBS provider to modify its spot beam.¹⁰ Given the administrative and technical costs of pursuing a market modification, it is highly unlikely that a DBS provider would expend resources to pursue a formal market modification and

¹⁰ See Comments of DirecTV (May 12, 2015) at 1-3 (stating that DirecTV designed its distribution system around existing DMAs and “cannot provide service to DMA ‘alternatives,’ regardless of what other merits they might have” and that it “cannot effectively enlarge the area served by a spot beam without reducing the number of stations the beam carries; nor can it move a spot beam without obviously unacceptable consequences.”).

associated technical changes to provide alternative broadcast channels for a town with only a few hundred potential customers.

Additionally, and as NAB recognizes, “viewing choices are influenced by the actual reach of stations’ signal and size of their coverage area.”¹¹ Consumers in rural areas served by WTA members are often situated far from broadcast towers, and are thus unable to receive quality, viewable broadcast signals over-the-air. It is therefore unlikely that these consumers can watch the more relevant local programming over-the-air and have an influence on changes to Nielsen’s DMA boundaries. Combined with the fact that DBS providers are unlikely to pursue market modification, impacted consumers are left with the status quo: little to no access to the local programming they actually desire. Because DMA assignments are self-perpetuating due to reliance upon existing viewership patterns resulting from lack of choice, adherence to DMA boundaries is flawed and does not ensure that workable modification procedures are in place to facilitate more accurate evaluations of and response to consumer preferences.

b. The Market Modification Process is Too Costly and Uncertain for Small Cable Operators to Benefit from Pursuing Market Modification.

As WTA stated in its initial comments, the current market modification process is too convoluted and expensive for small, rural cable operators. Several WTA members have noted that they have been advised by their respective attorneys against pursuing a modification due to the low chance of success and the fact that others who have pursued the expense of seeking a modification were unsuccessful. Small cable operators and their attorneys have to engage in extensive and expensive research in order to meet the current

¹¹ NAB Comments at 10, n. 30.

requirements for a market modification. By way of illustration, one WTA member company submitted a petition seeking a market modification exceeding 70 pages that was rejected for failing to provide sufficiently-detailed evidence for each broadcast station in the market. The first attempt alone cost \$12,000 for the cable operator serving approximately 400 subscribers. Other small cable operators have experienced similar results or have not pursued a modification after hearing about the negative experiences of other companies. Companies opting not to pursue a formal market modification often attempt to negotiate carriage with out-of-market stations but face resistance stemming from provisions in network affiliation agreements and an inability to obtain reasonable retransmission consent prices. Furthermore, even if an operator is successful in negotiating carriage rights, it (and ultimately its customers) must then pay for the same network affiliate from two markets in order to get the local programming they truly desire in addition to the national network programming.

As previously discussed, although STELAR extended the current market modification process to DBS providers, national DBS providers are unlikely to respond to the demands of relatively small numbers of residents in various small rural communities to repeatedly initiate market modification proceedings. As a result, and in combination with the fact that broadcast signals are not receivable in many remote and rural areas, small cable operators are the last source for consumers to obtain live local broadcast programming. Although NAB is correct to note the increase in the number of local broadcasters that make their programming available online,¹² as a practical matter not all broadcast stations air all of the programming broadcast by the station online.

¹² NAB Comments at 4.

Moreover, reliance upon online availability of local programming disregards the continuing needs of customers for video content, particularly live content and advertising,¹³ provided by MVPDs. Rather than allowing consumers to obtain local and national network programming from one source, NAB's assertion that online content is sufficient would require consumers to piece services together in order to get truly relevant local programming. Congress and the Commission should at a minimum work to develop a more workable and simplified modification process that would provide the market assignment flexibility that is particularly important for cable operators serving rural America.

III. With No Feasible Substitute, Changes to Existing Processes are Necessary to Better Accommodate Rural Americans' Viewing Preferences and Foster Localism.

a. Any Potential Harm to Broadcasters Under a Revised Market Modification Process is Outweighed by the Public Interest and Consumer Benefits.

It is clear from the legislative history that Congress specifically intended that the Commission adopt a consumer benefit driven approach to developing and analyzing proposed alternatives to the current DMA system -- as opposed to focusing solely or primarily on the impact such alternatives may have on broadcast television stations.¹⁴

Accordingly, whether proposed modifications to existing processes have a positive or

¹³ Furthermore, reliance on online distribution to resolve the DMA issue presumes that high-capacity broadband services capable of seamless live video streaming are available nationwide. As the Commission has previously noted, a gap remains in broadband services and speeds available in rural areas despite best efforts from WTA members and other rural telecommunications providers to upgrade their facilities.

¹⁴ See U.S. Senate, Committee on Commerce, Science, and Transportation. Satellite Television Access and Viewer Rights Act (S. Rpt. 113-322), at 15 (2014) (stating that “[t]he Committee also intends that the analysis concerning alternatives to the DMA system should explore in detail the merits and advantages to those alternatives to consumers, and not just the impact those alternatives may have on broadcast television.”). Furthermore, in directing the Commission to implement changes to the market modification process the Committee instructed that the FCC should consider the plight of these consumers when judging the merits of a [market modification] petition . . . , even if granting such modification would pose an economic challenge to various local television broadcast stations.” *Id.* at 11.

negative impact¹⁵ on broadcast station viewership totals and advertising revenues, the Commission should focus its paramount concern upon how proposed modifications can improve the consumer experience by providing increased choice and more relevant and timely local programming and advertising to consumers, rather than unproven harms to broadcast stations.

WTA recognizes that although the current DMA system is imperfect, it works relatively well for a large proportion of the country and that the broadcast and advertising industries have long relied on Nielsen's DMAs. In light of existing industry reliance on the current system, a more targeted market modification process for small, rural cable operators would more effectively and efficiently alleviate existing harms to consumers lacking access to "local" programming through their MVPD. Congress could establish a presumption that a cable operator's proposed revised DMA is in the best interests of its customers and place the burden of disproof on affected broadcast stations in the former DMA. Establishing such a presumption would enable cable operators that serve small rural communities to be more responsive to their customers' needs without requiring consumers to pay substantially more for broadcast programming. A streamlined re-association process would allow consumers (via their cable operators) more control and choice over what content they are paying for and watching with their cable subscriptions.

The impact on broadcasters will be negligible because the cable operators and rural communities most impacted generally serve a tiny and generally immaterial portion of a broadcast station's total potential audience. For example, one WTA member who

¹⁵ NAB Comments, Attachment A, Norman Hecht Research, Inc., Designated Market Areas: How They relate to Viewers and a Vital Local Television Marketplace, at 3 (May 2015) (explaining the impact of changing viewership patterns on DMA assignment and ranking and attendant impacts on advertising revenues).

decided to forgo the market modification process serves fewer than 200 subscribers in a DMA comprised of over 1.5 million television households. Furthermore, just as one cable operator might elect to disassociate with a DMA, another cable operator might associate with that DMA resulting in no net growth or reduction in the size of a given DMA. Advertisers and broadcasters would also benefit by reaching the *right* viewers rather than viewers that do not find the advertising on a broadcast station to be relevant due to the fact that they are located out-of-state or otherwise outside the market areas of the DMA communities. More relevant programming and advertising for viewers would make advertising more effective and more valuable, leading to increased advertising rates and revenues as well as benefits for consumers and the advertising businesses.

b. Consumers and Small Cable Operators Should Not Have to Pay Broadcasters Twice to Receive Desired and Relevant Local Programming.

NAB argues that cable operators already have the ability to negotiate with broadcast stations for the rights to retransmit only the local programming from distant (yet more relevant) broadcast stations and that the cable operators simply make the “business decisions” not to pursue carriage of in-state local programming to in-state, out-of-market subscribers.¹⁶ Furthermore, NAB alleges that MVPDs could easily pursue private marketplace transactions “at no cost to any of the parties.”¹⁷ However, this position ignores the reality facing cable operators and their customers. In NAB’s view, cable operators (and their customers) should be required to first pay for “local” programming they do not want or find relevant in order to get local programming they do want. The fact that one broadcast station would lose revenues to another broadcast

¹⁶ NAB Comments at 17.

¹⁷ *Id.* at 16.

station demonstrates the need for free-market reforms to the existing system and would provide consumers with more choice and control by allowing them to support investment in news and other local programming relevant to them.¹⁸

Furthermore, carrying only the local programming from the “out-of-market” station in addition to the full broadcast feed from the “in market” station would likely lead to consumer confusion, particularly during the majority of the day when network programming is aired and the channel with the “relevant” local programming would be dark. Contrary to NAB’s contention, paying broadcast stations in two markets in order to get relevant local programming imposes unnecessary costs upon consumers and benefits only the broadcast stations for whom retransmission consent fees are essentially guaranteed in a given market by network exclusivity agreements that designate that broadcast station as the DMA’s sole source of popular network programming.

In order to achieve the goal of providing consumers with the most relevant and timely local broadcast programming possible, the Commission should allow small cable operators to select the appropriate DMA to which they will be assigned and in which they will have signal carriage rights and obligations.¹⁹ Such an approach would better meet

¹⁸ Although NAB argues that broadcast stations make efforts to provide programming relevant to all areas of its assigned market, WTA members repeatedly hear complaints from customers about the lack of representation on the local news and other programming. For example, a common complaint is that listing the name of a remote town or city on a weather map might be the extent to which a broadcast station includes that town or city in the weather coverage of a large DMA.

¹⁹ In the alternative, small cable operators lying outside the Grade B signal contours of all commercial television stations should be permitted to negotiate for carriage of commercial network broadcast stations from two or more DMAs, and only pay (and pass along to customers) the per-subscriber retransmission consent fees for the station to which a customer actually subscribes.

the needs of consumers—particularly those in rural areas—while still protecting broadcast stations’ right to free-market negotiation for retransmission consent.²⁰

IV. Conclusion

The current DMA system is flawed particularly when it concerns small, rural communities located beyond the range of off-air commercial TV stations as a result of the circular impact that DMA assignments have on actual viewing patterns. As a result, consumers in these communities are left with irrelevant “local” programming or must pay for multiple broadcast stations in order to have their station of interest. Cable operators serving these communities lack a true remedy due to the existing costly, inefficient, and often ineffective, market modification process.

The Commission should consider and recommend to Congress several common sense reforms to the use of DMAs proposed in WTA’s initial comments. Congress should consider allowing cable operators to “re-associate” with a DMA that it believes better serves its customers while providing affected broadcasters the opportunity to rebut a presumption of validity in the re-association. Congress should also take steps to allow cable operators to negotiate for retransmission consent with two or more DMAs and for operators and consumers to select and pay only for broadcast stations that meet their local programming needs.

These reforms to the DMA system would provide more consumer choice, foster the development of local programming, and better ensure that rural consumers that cannot receive free over-the-air broadcast signals are not unduly burdened by the consequences of existing DMA assignments. Such reforms would also have a minimal

²⁰ See NAB Comments at 30 (urging the Commission to refrain from altering retransmission consent and program exclusivity rules to provide).

effect on broadcast ratings due to the relatively small number of impacted viewers and could ultimately increase the value of advertising on broadcast stations because the local programming and advertising would be more relevant to the remaining viewers.

Respectfully Submitted,

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