

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Petition for Rulemaking to Amend	)	MB Docket No. _____
47 C.F.R. §§ 76.64, 76.93, and 76.103 of the	)	RM No. 11203
Commission's Rules	)	
	)	
	)	

To: The Commission

**COMMENTS OF DUHAMEL BROADCASTING ENTERPRISES**

Duhamel Broadcasting Enterprises (“Duhamel”), by its attorneys hereby comments in opposition to the above-captioned Petition for Rulemaking (the “Petition”) filed by the American Cable Association (“ACA”). ACA proposes that broadcast television stations that elect to enforce their rights under the retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992<sup>1</sup> should be denied their rights to network non-duplication and syndicated exclusivity. As Duhamel has said before, the Commission’s program exclusivity provisions strike an important balance among the many parties with interests in the marketplace for video programming.<sup>2</sup> Any changes made to advantage one party can have profound impacts on the entire marketplace. In this case, ACA has proposed a rule modification which would have far-reaching impact on a variety parties, but ACA has failed to convincingly justify its proposal. Accordingly, Duhamel concurs with the National Association of

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<sup>1</sup> 47 U.S.C. §325 *et al.*

<sup>2</sup> See Comments of Duhamel Broadcasting Enterprises, MB Docket No. 05-28 (March 1, 2005) which are incorporated herein by reference.

Broadcasters, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association, and The Walt Disney Company in urging the Commission to dismiss or deny the Petition.

The crux of ACA's argument is that changes in the marketplace have resulted in a situation in which broadcasters, particularly network affiliates, have undue economic power over small, rural cable operators. Specifically, ACA claims that consolidation has created a situation in which network affiliates are owned by conglomerates whose large holdings and ability to negotiate carriage agreements with major MSOs allows them to withstand the lack of carriage by individual small cable operators, while those small cable operators are defenseless and unable to survive without access to vital network programming. Duhamel operates in markets such as those where ACA members who presumably would be covered by the rules proposed also operate.<sup>3</sup> As a result, Duhamel's experiences are instructive in this inquiry.

Duhamel is the licensee of four ABC Television affiliates in the Rapid City, South Dakota and Cheyenne, Wyoming – Scottsbluff, Nebraska Nielsen Designated Markets ("DMAs"), the 178th and 195th DMAs, respectively.<sup>4</sup> The area that the stations serve is vast, covering parts of South Dakota, Colorado, Wyoming, and Nebraska, an area roughly from the New England states to Washington, D.C. Yet the potential viewing audience in this vast area consists of only 147,140 television households.<sup>5</sup> To reach viewers in this large, sparsely

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<sup>3</sup> It is noted that ACA does not provide any guidance as to how big a cable system could be and still be considered a "small" cable operator entitled to the advantage ACA proposes.

<sup>4</sup> Television and Cable Factbook, Vol. 73 at A-5-6 (Warren Publishing, 2005).

<sup>5</sup> *Id.* at A-6.

populated area, Duhamel operates four VHF stations: KOTA-TV, Rapid City, South Dakota; KHSD-TV, Lead, South Dakota; KSGW-TV, Sheridan, Wyoming; and KDUH-TV, Scottsbluff, Nebraska.

Because of the extremely large viewing area of the Duhamel markets and the mountainous terrain in the area, MVPD distribution is vital to Duhamel's ability to reach viewers. In this environment, the cable operator has considerable "gatekeeper" power over the Duhamel stations, whether that power is exercised by denying carriage entirely or importing duplicating programming from another station. Given the relatively small audience base that the stations start with, the loss of even a few subscribers would impact the stations and their ability to continue to provide local service.

Nor is Duhamel the media conglomerate that ACA posits. To the contrary, Duhamel must negotiate for cable carriage with national and regional cable operators many times its size. In its markets, Duhamel must negotiate, for example, with Comcast, a publicly-traded operator with systems in some 40 states and the District of Columbia,<sup>6</sup> Charter, an operator with systems in approximately 36 states,<sup>7</sup> Midcontinent Media, an operator with systems in Minnesota, Nebraska, North Dakota, and South Dakota,<sup>8</sup> and Bresnan Communications, an operator with systems in Colorado, Montana, Utah, and Wyoming.<sup>9</sup> Thus, while there may be situations in which "mom and pop" cable operators must negotiate with broadcast conglomerates, there are certainly situations in which the reverse also occurs. ACA has not shown in any way that the

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<sup>6</sup> *Id.* at D-1827-28.

<sup>7</sup> *Id.* at D-1824-25.

<sup>8</sup> *Id.* at D-1845.

<sup>9</sup> *Id.* at D-1819.

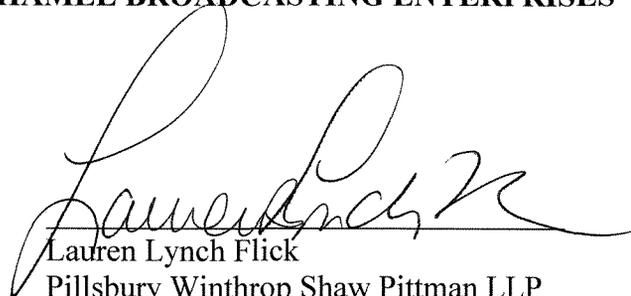
few examples it has offered reflect a malfunction in the operation of the video marketplace in general.

At bottom, the ACA Petition must fail because it treats all network affiliates and their programming as fungible. This approach overlooks the importance of local programming to viewers, the detriment to that programming that the importation of distant signals represents, and the myriad ways that the Commission's rules serve to protect that programming. Accordingly, Duhamel joins with the National Association of Broadcasters, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association, and The Walt Disney Company in urging the Commission to dismiss or deny the Petition.

Respectfully submitted,

**DUHAMEL BROADCASTING ENTERPRISES**

By:



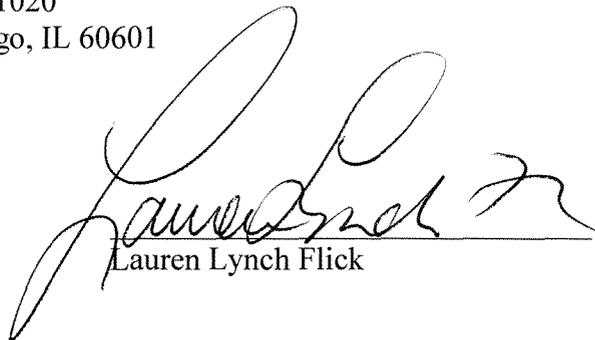
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Dated: April 18, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on this 18<sup>th</sup> day of April 2005, I caused a copy of the foregoing "Comments of Duhamel Broadcasting Enterprises" to be served by 1<sup>st</sup> Class, U.S. Mail, postage paid, upon the following:

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