



In its broadcast localism Notice of Proposed Rulemaking (“Localism NPRM”) in the above-captioned proceeding, the Commission stated its intent to open a rulemaking to consider the possibility of requiring that cable and satellite subscribers “have access to television broadcast stations licensed to communities within the viewers’ home state.”<sup>1</sup> The Commission has not yet issued this new rulemaking, and, in any event the Commission’s Localism NPRM made clear that this issue is to be considered in the new rulemaking, not in the above-captioned proceeding.<sup>2</sup> The Reply Comments of the American Cable Association (“ACA”)<sup>3</sup> in this proceeding encourage the Commission to launch this new rulemaking and thereby address certain retransmission consent issues. The National Association of Broadcasters (“NAB”) here points out the serious fallacies in ACA’s Reply Comments.<sup>4</sup>

ACA’s mission, as evidenced in repeated pleadings before the Commission and numerous legislative initiatives, is to erode or gut the retransmission consent principle that Congress enacted in 1992. The Commission confirmed this principle to be effective and beneficial two years ago in its report to Congress.<sup>5</sup> In its latest assault on the Congressionally-mandated retransmission consent principle in this proceeding, ACA uses as its stalking horse the

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<sup>1</sup> *In the Matter of Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 F.C.C. Rcd. 1324, ¶ 50 (rel. Jan. 24, 2008) (hereinafter “Broadcast Localism Report”).

<sup>2</sup> Broadcast Localism Report at ¶ 46.

<sup>3</sup> Reply Comments of the American Cable Association, *in the Matter of Broadcast Localism*, MB Docket No. 04-233 (filed June 11, 2008) (“ACA Reply Comments”).

<sup>4</sup> Rather than waiting until this stage of the proceeding, ACA could have, or rather should have, filed initial comments. By waiting until the reply comment stage, it has forced NAB to file its response outside of the prescribed pleading cycle.

<sup>5</sup> See *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, at ¶¶ 46, 87 (September 8, 2005) (concluding that retransmission consent rules are part of a “carefully balanced combination of laws and regulations governing carriage of television broadcast signals” and declining to change the current retransmission consent rules) (available at <http://www.fcc.gov/mb/policy/shvera.html>).

desirability of allowing cable systems to carry in-state but distant *local and regional* “news, sports, weather, [and] public affairs programming.”

The plea may sound good, but is hollow. Cable systems can today, without any change in the law, carry such programming. They only need to license carriage of the news programming by the station that they wish to carry. What ACA is really after is to bring into a local market the *national* network programming of a distant affiliate in order to thwart the ability of the local affiliate of that network to negotiate fair retransmission compensation for the cable system’s carriage of its programming, including its *national* network programming. That local affiliate has traded millions of dollars of advertising time to the network in exchange for the exclusive right to distribute the national network’s programming locally. ACA wishes to break down that network/affiliate bargain and thereby undercut localized broadcast service.

**I. NOTHING CURRENTLY PREVENTS CABLE OPERATORS FROM CARRYING IN-STATE, OUT-OF-MARKET LOCAL PROGRAMMING.**

ACA claims that “current retransmission consent practices restrict cable customers’ access to important regional and local programming” because the “Big Four” broadcast networks and their affiliates “prevent many cable customers from receiving in-state broadcast signals.”<sup>6</sup> This statement is factually and legally incorrect. Although the networks may prevent their affiliates from granting retransmission consent outside their given DMA or significantly viewed areas with respect to broadcast signals of *national network programming*, nothing prevents an affiliate from granting retransmission consent with respect to *regional and local programming*. If a cable operator in one market wants to carry the local programming from an in-state/out-of-market station, it may obtain consent to do so from the station in

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<sup>6</sup> ACA Reply Comments at 1. It also asserts that the rulemaking is needed in order to address cable customers’ restricted access to “important regional and local programming.” *Id.*

question. A simple license agreement for the desired programming would accomplish the goal. Nothing in the law or in any network affiliation agreement precludes cable systems from entering such arrangements.<sup>7</sup> Nor does ACA recite a single incident where a cable system has sought to secure such a license arrangement and has been denied.

Furthermore, market boundaries do not strictly limit what signals are available in particular areas within a given market. Cable operators routinely carry signals from other markets where such signals are significantly viewed, and local stations cannot block carriage of these signals in these areas.<sup>8</sup> The Commission's significantly viewed rules reflect the public's actual viewing practices, as does the Nielsen definition of markets. They are based on the realities of viewer behavior.

In short, the Commission's significantly viewed rules already permit carriage of distant in-state signals (including both local and national network programming) where viewers watch those signals. And even where this is not the case, there is nothing to prevent cable systems from obtaining the rights to carry the local programming of distant, in-state signals that are not significantly viewed.

## **II. ACA'S PROPOSALS WOULD ARTIFICIALLY AND UNNECESSARILY DISRUPT NUMEROUS MARKETS AND SUBSTANTIALLY HARM THE PUBLIC.**

Permitting a cable operator to carry the signal of an in-state but out-of-market station affiliated with the same network as a much closer, in-market, but out-of-state station

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<sup>7</sup> See, e.g., *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion & Order, ¶ 102 (rel. Nov. 4, 1994) (“[W]here the broadcaster’s signal is not eligible for must-carry rights . . . the broadcaster’s right to freely negotiate for the carriage of that signal pursuant to retransmission consent includes the rights to negotiate for partial carriage of the signal.”).

<sup>8</sup> See 47 C.F.R. § 76.92(f) (noting that, as an exception to network non-duplication rules, “a community unit is not required to delete the duplicating network programming of any television broadcast station which is significantly viewed in the cable television community”).

would cause a drastic upheaval in television markets all over the United States. Ninety-seven of the country's 210 DMAs cross state lines.<sup>9</sup> In many cases, large percentages of DMAs are located across state lines -- 30%, 40% or more. Many markets are hyphenated between two or more cities located in different states. In other cases, stations' transmitter sites are, for good reasons -- topography, zoning, Federal Aviation Administration considerations or simply site availability -- located in different states from their studios or communities of license. ACA's proposal would run roughshod over all of these marketplace realities.

Moreover, in these situations the nearest in-state/out-of-market station often is far more removed geographically and culturally than the in-market but out-of-state station affiliated with the same network. For example, Boise City in the Oklahoma panhandle receives information about local news, sports, weather and school closings from television stations licensed to Amarillo, Texas. Boise City is within the Amarillo DMA and the Amarillo major network affiliates have reporters and salespersons who cover Boise City and other communities in the Oklahoma panhandle. Under ACA's proposal, however, Boise City residents would receive signals from affiliates in Oklahoma City, which is nearly four times further away from them than Amarillo. Oklahoma City television stations provide little coverage of Boise City or the panhandle area generally.

The public would suffer immensely in this situation. If enacted, ACA's proposal would deter the Amarillo stations from providing emergency information, school closings, weather reports, local news and political coverage to Boise City and other panhandle communities that would then receive the signal of the distant Oklahoma City affiliate. The withdrawal of resources from these nearby communities because of an in-state preference --

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<sup>9</sup> See [http://www.truckads.com/licensed\\_affiliates1.asp#usamap](http://www.truckads.com/licensed_affiliates1.asp#usamap).

despite the geographic, economic and cultural ties that have caused these Texas and Oklahoma communities to be assigned to the same market -- would directly harm localism in the panhandle area. Understandably, the Oklahoma City stations would not pick up the slack. Local businesses in the Oklahoma panhandle seeking to reach their local communities would be forced to pay the higher advertising rates of the far-away Oklahoma City stations, and would lose access to nearby customers in northern Texas.

This fracturing of local service and coverage would endanger the public. In the current example, Boise City residents who watch stations based in Oklahoma City will not receive important information about weather and other emergencies taking place in their immediate vicinity. Such emergencies are not contained by state lines.

The Boise City-Oklahoma City-Amarillo example is just one of many markets where ACA's proposal would disrupt current DMAs and disserve the public. A resident of Arlington, Virginia, who can see Washington, D.C. from his or her apartment window, would receive "local" news, weather, and emergency information from Richmond, Virginia, stations 110 miles to the south. Similarly, residents of Asheville, North Carolina, would receive stations from Charlotte, 130 miles to the east, at the cost of eroding its truly local service from the stations in Greenville, South Carolina, just down the road but over the state border.

The current DMA system is based on Nielsen's careful annual examination of viewership. Counties are assigned to DMAs based on established viewing patterns in every county in the United States. And these market definition judgments are reexamined every year. Disrupting current DMAs on the basis of state lines and eroding truly local service would have a disastrous effect on the public's current localized television service.

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ACA's efforts to wrap itself in the Commission's localism policies are a sham. Contrary to its claims, its members do not seek authority to carry distant in-state stations' *local* programming coverage of state capital events or state-wide issues. The Commission's rules and the broadcast industry's affiliation and other practices interpose *no* barrier to cable carriage of this kind of programming. No, ACA's goal is to weaken broadcast localism by breaking down the truly local affiliates' exclusive rights (for which they have paid valuable consideration) to air *national network* programming from distant affiliates of the same network. The Commission should not be so misled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jonathan D. Blake", is written over a horizontal line. The signature is cursive and extends below the line.

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