

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

In the Matter of)
)
Report Required By the Satellite) MB Docket No. 10-238
Television Extension and Localism Act)
On In-State Broadcast Programming)

To: The Media Bureau

**REPLY COMMENTS OF THE
JOINT TELEVISION NETWORK AFFILIATES**

Wade H. Hargrove
David Kushner
BROOKS, PIERCE, MCLENDON, HUMPHREY &
LEONARD LLP
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street
Raleigh, NC 27602
919-839-0300

*Counsel for the ABC Television Affiliates
Association*

Jonathan D. Blake
Jennifer A. Johnson
Eve R. Pogoriler
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401
202-662-6000

*Counsel for the CBS Television Network
Affiliates Association and the NBC
Television Affiliates*

February 22, 2011

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SUMMARY

The Designated Market Area (“DMA”) system benefits viewers, and the government should not intrude on this free-marketplace system. The record in this proceeding shows that stations serve their viewers regardless of state lines. They provide local news, weather, sports, and emergency information on a comprehensive basis to viewers in their markets. In addition, the current legal framework already provides cable and satellite operators with the flexibility to import the local programming of in-state but out-of-market stations. There are numerous examples of operators doing so today, and further expanding viewers’ access to in-state local programming is within the power of cable and satellite operators. The legal changes sought by certain operators in this proceeding therefore are not necessary. In fact, they will harm viewers by undermining the DMA system that is the basis for the local television advertising market, the revenues from which underwrite stations’ investments in providing local news and other local programming.

DMAs reflect cohesive communities. They are shaped by market and economic realities, as well as social and geographic affinities and viewing patterns. Government intrusion into these natural markets would be harmful and destabilizing. It would undercut local economies, jeopardizing the health of local businesses and decreasing local employment opportunities, and would harm stations’ ability to provide local news, weather, sports, and emergency information. The Commission should reject calls to undermine this important, free-marketplace system. It also should preserve the significantly viewed rules, both because of statutory constraints on amending them and because gutting these rules ultimately would harm viewers.

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The ABC Television Affiliates Association, CBS Television Network Affiliates Association, and the NBC Television Affiliates (collectively, the “Joint Television Network Affiliates”) reply to comments filed in the above-referenced proceeding. Based on the comments and data filed in the proceeding, it is clear that the Designated Market Area (“DMA”) system serves viewers and that viewers have broad access to local-market programming and to in-state programming. The FCC should report to Congress that viewers benefit from the DMA system and that the current system should not be modified.

As shown in the comments filed by the National Association of Broadcasters (“NAB”), consumers have over-the-air access to 12.2 in-state full-power television stations and 3.8 out-of-state full-power stations, on a weighted average basis.¹ The vast majority of viewers (97.8%) have access to at least one in-state full power station.² Further, the comments show that stations provide comprehensive service to their markets, regardless of state lines. For example,

¹ NAB Comments at 2 (January 24, 2011).

² *Id.*

the Local Television Broadcasters provided numerous examples to this effect.³ The Joint Television Network Affiliates endorse the positions set forth in the NAB Comments and also agree with the Local Television Broadcasters that stations provide in-market news and other coverage without regard to state lines. Undermining the DMA system, which is a free-market system, would imperil local television stations' advertising revenues, which are essential to support the production of local news, weather, public affairs, emergency information, and other local programming, and would in other respects disserve the public interest. It also would impair local economies, jeopardizing local businesses and local employment opportunities.

The Joint Television Network Affiliates reply here to several false assertions contained in the comments filed by certain cable and satellite companies. Among these are: (1) that stations do not provide "local" service to their viewers who reside across state lines; and (2) that, in the absence of a change in the DMA structure, cable and satellite operators lack the ability to provide the local programming of in-state broadcasters to viewers located in distant markets. As explained below, neither of these assertions is accurate.

I. STATIONS PROVIDE BROAD SERVICE TO VIEWERS IN THEIR MARKETS, REGARDLESS OF THE LOCATION OF THOSE VIEWERS.

Cablevision posits that viewers in DMA counties served by stations across state borders do not receive programming "that the subscribers really consider 'local'"—programming that Cablevision asserts can be provided only by in-state stations.⁴ And DIRECTV labels the DMA system an "anachronism."⁵ These views are mistaken.

³ See Comments of the Local Television Broadcasters (January 24, 2011).

⁴ Cablevision Comments at 1 (January 24, 2011).

⁵ DIRECTV comments at 3 (January 24, 2011).

The reality is that television service is not limited by state lines and that the markets defined by DMAs reflect cohesive communities. They reflect market and economic realities as they actually exist. They also reflect social and geographic ties and current viewing patterns. The government should not override the natural television markets that have been developed over decades by these ties and by effectively functioning, local economic markets. Government intervention will be harmful and destabilizing because government officials cannot arbitrarily define a market better than the market itself.

The economic and cultural affinities that underlie the definitions of DMAs, and the use of DMAs in the advertising market, provide stations with an economic incentive to serve all of their viewers. As illustrated in the comments filed by NAB and the Local Television Broadcasters, stations do not limit their service to areas defined by state lines. The service provided by stations to viewers in their markets is “local” in fact, not just in name.

Many of the comments filed in this proceeding recognize the reality that service provided by a station in the viewer’s market, regardless of the location of state lines, is genuinely local service and is more relevant to viewers than service provided by an in-state station that serves a distant market. For example, NCTA noted concerns that modifying the current system could cause subscribers to lose access to “out-of-state broadcast stations more local to the community – stations that might carry news, sports, and other programming more of interest to those viewers than programming carried on in-state stations more distant from that community.”⁶

DIRECTV also acknowledged that “one could only imagine, for example, the reaction of

⁶ See NCTA Comments at 5-6 (January 24, 2011), citing the disruptions that would be caused by a “wholesale change in the way that markets are defined.”

Arlington, Virginia residents to the news that Richmond stations are now ‘local’ to them but Washington, D.C. stations are not.”⁷

The Commission and other government entities have recognized that culturally and economically contiguous geographic areas regularly cross state boundaries. For instance, DMAs are not the only Commission-recognized markets that cross state lines. Since the inception of Cellular Market Areas in 1982, the Commission has assigned area-based licenses, a number of which include geographical territories that cross state lines.⁸ Additionally, for purposes of the Census, OMB appropriately recognizes that Metropolitan Statistical Areas can and do cross state lines.⁹

Moreover, Cablevision should not presume that providing viewers with the programming of distant, in-state stations would promote localism. In many cases, the nearest in-state station is very distant geographically and located in an area defined by different social, economic, and weather patterns. For example, the closest in-state station to Boise City in the Oklahoma Panhandle is in Oklahoma City, nearly 350 miles away, while KVII-TV is located in Amarillo, Texas, just 118 miles away. Reflective of the fact that they are in the same DMA as

⁷ DIRECTV Comments at 8.

⁸ Area-based licenses which cross state lines include those based upon, *inter alia*, Basic Trading Areas (for the Multipoint Distribution Service, Narrowband and Broadband Personal Communications Service, and the Local Multipoint Distribution Service); licenses based on Major Trading Areas (for the Narrowband and Broadband PCS as well as Specialized Mobile Radio); and licenses based upon Economic Areas (for the General Wireless Communications Service, Specialized Mobile Radio, and Location and Monitoring Service). *See* Market Boundary Files, http://wireless.fcc.gov/geographic/index.htm?job=market_boundary_files.

⁹ *See* OMB Bulletin 10-02, Update of Statistical Area Definitions and Guidance on Their Uses (2009), available at www.whitehouse.gov/sites/default/files/omb/assets/bulletins/b10-02.pdf (defining current Metropolitan Statistical Areas and other similar geographic areas); *see also* Census Bureau, *Geographic Areas Reference Manual* 13-1 to -12 (1994), available at www.census.gov/geo/www/garm.html (explaining role of Metropolitan Statistical Areas in census operations).

Boise City, the Amarillo stations have sales and news bureaus in the Oklahoma Panhandle and cover its weather, school closings, and other local matters of interest to Panhandle residents.

KVII-TV alone maintains six weather stations throughout the Oklahoma Panhandle, providing critical, real-time weather data relied upon by local officials and over 27,400 area residents.

Another example that illustrates well how broadcasters are driven to serve their entire television market, regardless of state lines, is the service KTBS-TV provides in the Shreveport DMA to its viewers located in seven counties in southwest Arkansas. The family-owned station has invested heavily in state-of-the-art news-gathering technology that allows the station both to cover news and sports in southwest Arkansas. KTBS has a full-time reporter dedicated solely to news in this straddle area, and can and does deploy additional personnel and resources as needed for coverage of major stories.¹⁰ The station also provides custom newscasts for southwest Arkansas viewers who subscribe to Cable One, the predominant cable operator in the area.¹¹ KTBS also engages in extensive community outreach in southwest Arkansas, because those areas are truly part of the local market,¹² and the station provides in-depth coverage of southwest Arkansas high school football every Friday night during football season.

The simple fact is that television stations provide service to viewers in their local

¹⁰ The reporter shoots video with a high-definition digital camera and produces news reports on her laptop. She can also e-mail, Skype, ftp, and edit stories remotely.

¹¹ These stories are made available on the station's website and are used in other newscasts as relevant.

¹² For example, two teachers in southwest Arkansas received \$1,000 from KTBS's One Class at a Time project. These teachers were able to implement projects in their classrooms that they could not have done without One Class at a Time. The KTBS 3 Community Caravan traveled to southwest Arkansas on numerous occasions during the year to meet with and listen to viewer concerns in communities throughout the region. KTBS has been running an annual blood drive in southwest Arkansas communities for more than 25 years. During the station's Spirit of Christmas project, the station established a Texarkana drop-off location for the Marines' Toys for Tots program.

market without regard to the state in which those viewers happen to reside.

II. THE CURRENT REGULATORY FRAMEWORK PROVIDES CABLE AND SATELLITE OPERATORS WITH THE FLEXIBILITY TO PROVIDE VIEWERS WITH THE LOCAL PROGRAMMING OF IN-STATE BUT OUT-OF-MARKET STATIONS.

Several multichannel video programming distributors (“MVPDs”) incorrectly assert that the current legal framework must be changed to permit them to provide out-of-market viewers with in-state stations’ local programming. The assertion is simply not true. It is belied by the facts. For example, Cablevision points to the example of Colorado’s La Plata and Montezuma counties, which are located in the Albuquerque, New Mexico DMA. It claims that “existing rules, such as the network non-duplication rules, prevent Cablevision from satisfactorily resolving this situation by carrying the Colorado broadcast stations of interest to many subscribers.”¹³ A number of other commenters also cited this example, with DIRECTV asserting that federal law “denies” certain subscribers in certain DMAs access to in-state programming.¹⁴ DIRECTV argues that, “under the current regime,” cable and satellite providers serving residents of Johnson and Campbell counties in Wyoming “cannot provide them with programming from Wyoming broadcast stations.”¹⁵ And DISH asserts that there are households that are “ineligible to receive in-state programming by satellite because of their orphan status.”¹⁶

As shown above and in NAB’s Comments, viewers across the country already have access to the programming of in-state television stations. The *only* reason that the *local*

¹³ Cablevision Comments at 1-2.

¹⁴ DIRECTV Comments at 6-7. *See also* Letter from Representative Scott Tipton *et al.* to Chairman Genachowski (Feb. 16, 2011) (stating that La Plata and Montezuma counties are “denied the ability to obtain in-state broadcasts”).

¹⁵ *Id.* at 5.

¹⁶ DISH Comments at 3.

programming of additional in-state stations is not carried more broadly on MVPDs' systems is that the MVPDs have declined to provide it—a situation that will not be resolved by the proposals of Cablevision, DISH, and DIRECTV to modify television markets to permit, but not require, carriage of in-state television signals. It is abundantly clear what the real interests of these three MVPDs are: to artificially redefine local television markets to allow MVPD importation of duplicating *national* programming and thereby secure a competitive negotiating advantage in retransmission consent negotiations for carriage of in-market stations. The loss by local stations of program exclusivity for *national* programming will undermine the economics of local television service and the vital (and expensive) local program services that these stations provide to their communities.

The current legal framework *already* provides cable and satellite operators with all the flexibility needed to carry the *local* programming of out-of-market, in-state stations. As NCTA recognizes, “[c]able operators already have the right in theory to carry any broadcast signal, local or distant, in-state or out-of-state, provided they comply with certain carriage-related rules.”¹⁷ For example:

- The Bresnan cable system serving Durango, Colorado (located in La Plata County and thus a part of the Albuquerque DMA) carries the local programming from *five* Denver stations: KUSA, KCNC, KWGN, KRMA,

¹⁷ NCTA Comments at 6. *See also* NAB Comments at 30-33 (explaining that pay-TV providers have the necessary tools under the Communications Act and the Copyright Act to retransmit local programming to distant, in-state viewers).

and KMGH.¹⁸ In fact, all of the cable systems in these counties import the news programming of the major Denver stations.¹⁹

- DIRECTV carries the local news, weather information, sports, and other programming from KATV (the Little Rock, Arkansas ABC affiliate) in the southern Arkansas Counties of Ashley, Columbia, Hempstead, Howard, Lafayette, Little River, Miller, Sevier, and Union.²⁰ These counties are located in the Shreveport DMA and Monroe-El Dorado DMA.²¹
- The Local Television Broadcasters provided a non-comprehensive list of in-state, out-of-DMA carriage by MVPDs in their Comments, including the following examples²²:
 - * Comcast subscribers in the Chattanooga, TN market, which includes the Georgia counties of Dade, Walker, Catoosa, Whitfield, and Murray, receive the local newscasts of WXIA-TV and WGCL-TV, which are located in the Atlanta market.
 - * The Comcast cable systems in Abington, Glade Springs, and Saltville, Virginia (in the Tri-Cities TN-VA market) import the local newscasts of WDBJ-TV, which is in the Roanoke, VA, television market.
 - * Comcast imports the local news and weather programming of KOAT-TV, Albuquerque, New Mexico, into Las Cruces, New Mexico, in the El Paso, TX, television market.
 - * Time Warner Cable, in Robeson and Scotland Counties, North Carolina, both of which are located in the Myrtle Beach, SC, television market, imports into those two North Carolina

¹⁸ See, e.g., the channel line-up for zip code 81301, available at www.bresnan.com/services/digital_cable_with_on_demand/channel_line-up. The Denver stations are affiliated with ABC (KMGH); CBS (KCNC); NBC (KUSA); CW (KWGN); and PBS (KRMA). For zip code 81328 (part of Mancos, Colorado, located in Montezuma County), the Bresnan system carries all of these stations except for KMGH. *Id.*

¹⁹ See Comments of the Local Television Broadcasters at 12.

²⁰ Given that DIRECTV currently carries this programming to viewers in Arkansas but outside of KATV's DMA, it is perplexing that it claims to need a "solution" to allow it to do so. See DIRECTV Comments at 7.

²¹ KATV, "KATV Now Available on DIRECTV in South Arkansas," (Oct. 19, 2010), *available online at*: www.katv.com/Global/story.asp?S=13349515.

²² See Local Television Broadcasters Comments at 11-12 and n.3.

counties the local news and weather programming of in-state WECT-TV, Wilmington, North Carolina.

- * Cable companies in Montezuma and La Plata counties, Colorado, in the Albuquerque, NM television market, import local news programming from Denver television stations.
 - * Time Warner Cable in Palm Springs, California, imports the local news of the Los Angeles stations.
 - * The Charter cable systems in Bristol, Johnson City, and Kingsport, Tennessee (in the Tri-Cities TN-VA market) import the local newscasts of WBIR-TV, which is in the Knoxville, TN, television market.
- Twelve cable providers in northwest Wisconsin, serving Wisconsin counties that are located in the Minneapolis-St. Paul DMA, carry the signal of WQOW, Eau Claire, Wisconsin (located in the La Crosse-Eau Claire DMA) for its local news, weather, and sports programming.
 - Ten cable systems in Oklahoma carry the local programming of KTUL, Tulsa, Oklahoma, outside of KTUL's Tulsa DMA. Seven cable providers in DMAs such as Wilkes-Barre-Scranton and Johnstown-Altoona-State College provide the local programming of WHTM, Harrisburg, Pennsylvania to viewers in Pennsylvania located in these other DMAs. WSET, Lynchburg, Virginia, in the Lynchburg-Roanoke DMA, is carried by cable systems in the Richmond-Petersburg and the Raleigh-Durham DMAs. Five cable systems in Alabama outside of the Birmingham DMA carry the local programming of stations WCFT, WJSU, and WBMA.

DISH advocates for “a state-wide license to permit satellite carriers to provide in-state local broadcast stations to residents of orphan counties.”²³ What DISH actually is requesting is the right to retransmit the *duplicating national* programming of in-state stations to in-state viewers that are in another station's DMA. For the reasons described above, current law already provides DISH (and cable companies) with the flexibility to carry *non-duplicating local* programming from in-state stations to out-of-market, in-state viewers. Further, it is striking that DISH's focus is directed to carriage of duplicating *national* programs, when, in fact, DISH has

²³ DISH Comments at 6.

been unwilling to carry the *non-duplicating local* programming offered by broadcast stations. The purported concern for in-state viewers is uncoupled from any proposal that MVPDs be *required* to carry the non-duplicating local programming of in-state stations to in-state viewers.²⁴

The references to the network non-duplication rules in comments such as Cablevision's are *non sequiturs*. The network non-duplication rules require operators to black out *national* programming that *duplicates* programming already available from the local affiliate. The network non-duplication rules apply only if a network has granted non-duplication rights and only within limited geographic areas. There is no public interest justification and no demonstrated need for a cable or satellite company to import a distant station's *duplicative* national network programming when a local station already broadcasts the very same programming, and there are many reasons why the importation of duplicative national programming would harm viewers.²⁵

DIRECTV's inclusion of a list of DMAs in which it retransmits significantly viewed signals—signals for which DIRECTV would not have to black out duplicative national programming—shows how little real interest these MVPDs have in actually providing in-state stations to subscribers located in DMAs that are primarily located in another state—except when it suits their purposes. DIRECTV's own half-page list shows that it exports but a handful of stations across state lines from only nine DMAs, even though current law plainly provides it with

²⁴ In any event, if the “license” that DISH proposes would give operators a right to carry a station beyond the scope of the station's grant of retransmission consent—this is not clear from DISH's comments—such a license would be contrary to the statutory provisions and policy judgments that underlie the retransmission consent regime. STELA is not intended to undermine retransmission consent, and the FCC should not recommend the creation of a statutory license that would do so.

²⁵ See NAB Comments at 27-29 and Local Television Broadcasters Comments at 2 and 12-13.

a compulsory copyright license to do so.²⁶

III. THE FCC SHOULD NOT ALTER ITS SIGNIFICANTLY VIEWED RULES.

DISH proposes that the FCC establish a presumption that an out-of-market, but in-state station is significantly viewed in distant counties belonging to markets containing no in-state stations. It proposes in the alternative that the FCC exercise its waiver authority to expand petitioners' ability to show that a station is significantly viewed in those counties on the basis of viewing data from all television households, not just over-the-air households.²⁷ The FCC should reject DISH's proposal, which is contrary to the governing statutory provision and the very concept of significant viewership.

By statute, the relevant standards for establishing significantly viewed status are the ones in effect as of April 15, 1976.²⁸ As the Commission has recognized, this provision “requires that the Commission use the same rules in considering such petitions that were in effect as of April 15, 1976.”²⁹ Thus, the Commission has rejected proposals to substantively modify the process for making significantly viewed determinations.³⁰ Even if DISH's proposals could be characterized as merely procedural—which they are not—they would be contrary to § 122(a)(2), which cites *all* of the “rules, regulations, and authorizations” in effect as of 1976, not just the “substantive” ones.

²⁶ See DIRECTV Comments, Appendix A.

²⁷ DISH Comments at 2 and 7-8.

²⁸ See 17 U.S.C. § 122(a)(2), formerly codified at § 119(a)(3)(A), referring to “a community in which the signal has been determined by the Federal Communications Commission, to be significantly viewed in such community, pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976.”

²⁹ Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, *Report and Order*, 20 FCC Rcd 17278, at para. 24 (2005).

³⁰ See, e.g., *id.* at paras. 29 and 35-36.

Not only would adopting DISH's proposal be contrary to the Copyright Act, it would be inconsistent with the concept of significant viewership, and it would harm viewers.

First, the significantly viewed provisions are premised on the principle that a community should not be deprived of access to a program delivered over pay-TV if the program has a baseline level of over-the-air viewership in the community. A waiver mechanism that would permit a showing based on viewing data from all television households, as opposed to over-the-air households, would turn the rule on its head and completely gut what it means for a station to be "significantly viewed" in communities outside of its DMA.³¹ Further, the level of over-the-air viewership is a factual question that must be answered by a petitioner, and one that is highly dependent on the distance between the originating station and the county or community at issue. It would not be procedurally or substantively sound to "presume" significant viewership without any empirical showing. It would be a fiction.

Second, DISH's proposal would cause unnecessary harm to viewers. The ultimate effect would be to permit pay-TV providers such as DISH to import duplicating *national* programming, via the "significantly viewed" exceptions to the network non-duplication and syndicated exclusivity rules, which they will be incentivized to do in order to avoid or minimize retransmission consent payments to *local* stations.³² DISH's proposal also is

³¹ "The concept of significant viewing is directly related to whether an otherwise distant station's broadcast signal is viewable over-the-air in a cable community unit. The significantly viewed exception to the exclusivity rules is meant to insure that any programming that is available terrestrially in a community from an over-the-air station will not be blacked out on a community's cable system." *Implementation of the Satellite Home Viewer Improvement Act of 1999*, Notice of Proposed Rulemaking, 15 FCC Rcd 434, at para. 18 (Feb. 28, 2000).

³² See NAB Comments at 27-29 and Local Television Broadcasters Comments at 2 and 12-13 for a discussion of the harms that would arise under that approach.

unnecessary because the rules already provide flexibility to pay-TV operators to carry local programming in distant counties.

The underlying intent of DISH's proposal regarding significantly viewed showings and the other proposals made by MVPDs in this proceeding is artificially to improve pay-TV providers' leverage in retransmission consent negotiations. This is especially apparent given that the MVPDs' proposals to override program contracts negotiated in a free marketplace are unaccompanied by any corresponding commitment to carry the local programming that purportedly is of concern to them.

IV. PRESERVATION OF PRIVATELY CONTRACTED PROGRAM EXCLUSIVITY FOR NATIONAL PROGRAMS IS ESSENTIAL TO THE CONGRESSIONAL MANDATE TO ESTABLISH AND SUPPORT A LOCAL TELEVISION BROADCAST SERVICE.

The Commission's program exclusivity rules are designed to recognize the private contractual rights that broadcasters purchase in a competitive marketplace for the exclusive right to televise their programs in their local markets. The exclusive right to provide national programming is essential to the economics of local broadcast service and is the economic linchpin of localism. The Commission has long held that program exclusivity "insure[s] the continued supply of television programming" which, the Commission has noted, is "fundamental to the continued functioning of broadcast and cable television alike."³³ The Commission has observed:

For competition to maximize consumer benefits, it is important that a property rights framework be applied that permits markets to operate effectively. Failure to supply an appropriate structure of rules and regulations will lead to market failures in satisfying

³³ *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Cable Television Report and Order, 36 FCC 2d 143 (1972), at para. 73.

consumer preferences. To ensure free and efficient functioning of competitive market processes, the Commission seeks to permit equality, to the extent possible within our regulatory framework, of contractual opportunity among competing modes of distribution. In the instant setting, that means permitting broadcasters to acquire and enforce the same kinds of exclusive performance rights that competing suppliers are now permitted to exercise. Failure to supply parity in contractual freedom will bias the nature of competitive rivalry among competing suppliers in ways not grounded in operating efficiencies but instead based on artificial handicaps exacerbated by disparate regulatory treatment.³⁴

Indeed, the Commission has stated that broadcasters' "inability to enforce exclusive contracts puts them at a competitive disadvantage relative to their rivals who can enforce exclusive contracts; their advertisers' abilities to reach as wide an audience as possible are impaired; and consumers are denied the benefits of full and fair competition: higher quality and more diverse programming, delivered to them in the most efficient possible way."³⁵

³⁴ *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rule Making, 2 FCC Rcd 2393 (1987), at para. 12.

³⁵ *Cable Television Syndicated Program Exclusivity Rules*, Report and Order, 79 FCC 2d 663 (1980), at para. 62. The Commission found the illogic of the lack of syndex protection particularly telling:

Normally, firms suffer their most severe losses to competitors when they fail to offer the services most desired by the public. In the absence of syndicated exclusivity, extensive duplication reverses this relationship for broadcasters—they suffer their most severe loss precisely when they offer programming most desired by audiences; thus diversion is an indication of a competitive imbalance that results from the absence of the rules. Firms that choose to exhibit programming on an enforceable exclusive basis (e.g., cablecasters) generally do not face the problem of audience diversion to duplicative product. The fact that only broadcasters suffer this kind of diversion is stark evidence, *not* of inferior ability to be responsive to viewers' preferences, but rather of the fact that broadcasters operate under a different set of competitive rules. All programmers face competition from alternative sources of

(continued...)

This is a key consideration in assessing the merits of market modification proposals. To rule affirmatively that television broadcast stations cannot contract for program exclusivity, or to create a system that has that effect, would undermine the Commission’s stated goal of “permitting broadcasters to acquire and enforce the same kinds of exclusive performance rights that competing suppliers are now permitted to exercise.”³⁶ In turn, this would lead to the migration of national programming to pay-TV platforms, and viewers would be left with little choice but to subscribe to pay-TV service—a result hardly in the interest of viewers.

Beyond ensuring parity in contractual freedom, program exclusivity constitutes an essential component of the network-affiliate system and, more importantly, the American broadcasting system’s structure of licensing free, over-the-air television stations to serve *local* communities.³⁷ Congress has found that exclusivity “is an integral part of today’s network-affiliate relationship”³⁸ and that:

historically and currently the network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby the special

programming. Only broadcasters face, and are powerless to prevent, competition from the programming they themselves offer to viewers.

Id. at para. 42 (emphasis in original).

³⁶ *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, *supra* n. 34, at para. 12.

³⁷ See, e.g., FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) (“2005 FCC Retransmission Consent Report”), at para. 50; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), at para. 114; S. REP. NO. 102-92 (1991), at 38. See also NAB Comments at 27.

³⁸ H.R. REP. NO. 100-887, pt. 2 (1988), at 20.

strengths of national and local program services support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well.³⁹

Without the ability to contract in a competitive market for program exclusivity, the economic foundation of local, over-the-air television service would be undermined, thereby threatening free, over-the-air, local news, local emergency information, local weather and public safety information, local political debates, local public affairs programming, local public service announcements, local political advertising for local candidates, and local commercial advertising for local merchants. We fail to see how this result would serve the public interest.

Plainly, the importation by cable and satellite of duplicating programming does not contribute to program diversity. Superimposing state boundaries on top of natural television market boundaries would deprive free, local, over-the-air television stations of the right to enter into exclusive programming television contracts for national network and syndicated programming. Such an asymmetrical and anti-competitive regulatory scheme cannot be squared with the public interest.

V. THE DMA SYSTEM SUPPORTS AND PROMOTES LOCAL MARKETS AND THEREBY CONTRIBUTES VITALLY TO THE HEALTH OF LOCAL ECONOMIES AND TO JOB RETENTION AND EXPANSION.

Local-area broadcast advertising is vital for local businesses to provide information about their goods and services to consumers. The DMA system is the foundation for local television advertising. Alternatives to the present system “would result in less rational and less useful markets, ones essentially untethered to viewing and population patterns and the

³⁹ H.R. REP. NO. 100-887, pt. 2 (1988), at 20.

economics of the television marketplace.⁴⁰ Modifying or eliminating the current system would disrupt local advertisers' ability to reach consumers, thus diminishing their economic vitality, ability to launch innovative new products and services, and employment of local workers. One concrete example is that of Kansas City, Missouri, and Kansas City, Kansas, which for most purposes constitute a single economic market. If MVPDs had their way, television advertisers would have to purchase two flights of commercial spots, one on Kansas stations and one on Missouri stations, in order to cover that unitary commercial market, whereas today, they need only to purchase spots in a single DMA. Such an irrational intrusion by the government in today's free marketplace cannot be justified, and certainly would not be contemplated for the newspaper, cable, or Internet advertising marketplace.

Earlier this year, the President began an initiative to reduce burdensome regulation, noting that the federal government's regulatory system should promote "economic growth, innovation, competitiveness, and job creation."⁴¹ Chairman Genachowski has endorsed this initiative, stating that the FCC "will continue our work to promote innovation inside and outside government and to spur economic growth and job creation, while ensuring that the benefits of our rules outweigh the costs and burdens."⁴² The Commission should not adopt or recommend any measure that would substitute government-defined markets for existing, natural markets and that would undermine the DMA-based advertising system that is so important for local businesses and local jobs.

⁴⁰ NAB Comments at 23.

⁴¹ Executive Order, "Improving Regulation and Regulatory Review," at § 1 (Jan. 18, 2011).

⁴² Howard Buskirk, Jonathan Make, and Adam Bender, "Genachowski Endorses Obama Stance on Regulation," *Communications Daily*, at 1 (Feb. 7, 2011).

VI. CONCLUSION

As ACA has stated, “Congress is most concerned” about *local* programming.⁴³

We agree. Increasing access to in-state local programming, however, is within the power of MVPDs today, under the existing legal framework, and it will not be facilitated by the proposals of certain MVPDs in this proceeding. In fact, the proposals suggested by certain MVPDs would impose a host of harms on viewers.

Operators that purport to be concerned about providing local, in-state programming to out-of-market viewers have: (1) failed to provide a single example of a situation in which they have sought and been denied the right to provide in-state programming to “orphan counties” in order to serve this need; (2) have in certain circumstances refused offers to allow them to carry such programming; and (3) have in no circumstance suggested or accepted that the right to import out-of-market but in-state stations be coupled with any corresponding carriage obligations. For the reasons described above, creating such a right or obligation would be harmful to local broadcasters, but these facts do expose that the real interest of commenters such as Cablevision, DISH, and DIRECTV is not in importing *local* in-state programming, but in importing duplicative *national* programming. They want this right because they can and will use it to undercut local stations’ ability to bargain for fair and reasonable retransmission consent compensation for their programming services, which in turn supports the production of local news, sports, weather, and emergency programming. This issue is not about in-state programming, which can be imported under current law and which is provided by local television stations whose service is not defined by state lines. It is about the local stations’

⁴³ ACA Comments at 3.

ability to enforce their programming rights, for which they have negotiated in good faith and in a free marketplace.

Respectfully submitted,

THE ABC TELEVISION AFFILIATES
ASSOCIATION
THE CBS TELEVISION NETWORK AFFILIATES
ASSOCIATION
THE NBC TELEVISION AFFILIATES

By:

/s/
Wade H. Hargrove
David Kushner
BROOKS, PIERCE, MCLENDON, HUMPHREY &
LEONARD LLP
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street
Raleigh, NC 27602
919-839-0300

*Counsel for the ABC Television Affiliates
Association*



Jonathan D. Blake
Jennifer A. Johnson
Eve R. Pogoriler
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401
202-662-6000

*Counsel for the CBS Television Network
Affiliates Association and the NBC
Television Affiliates*

February 22, 2011