

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

In the Matter of)	
)	
Media Bureau Seeks Comment for)	MB Docket No. 10-238
Report Required by the Satellite)	
Television Extension and Localism Act)	
on In-State Broadcast Programming)	

REPLY COMMENTS OF DISH NETWORK L.L.C.

I. INTRODUCTION AND SUMMARY

DISH Network L.L.C. (“DISH”) submits these reply comments to support adjustments to the designated market area (“DMA”) system that could bring in-state local broadcast stations to millions of orphan county residents. The vagaries of the DMA system strand some Americans in nearly all 50 States without access to a full selection of in-state local broadcast stations. As DISH, DirecTV, and the American Cable Association (“ACA”) have pointed out, targeted adjustments to the system would bring valuable, in-state programming to these orphan county residents. Alternative schemes proposed by the National Association of Broadcasters (“NAB”) are premised on unfounded fears about disruption of local broadcasting and would require unworkable, inefficient, and non-consumer-friendly steps by satellite carriers. In short, residents of orphan counties, members of Congress, state legislators, local government leaders, public interest groups, and multichannel video programming distributors (“MVPDs”) of every size want to help residents of orphan counties; the only significant opposition to targeted reforms comes from the broadcasters.

II. THE RECORD SUPPORTS ACTION TO ADDRESS THE ORPHAN COUNTY PROBLEM

The record contains ample support for both Congress and the Commission to address the orphan county problem. To begin with, the record sheds light on the extent of the problem: millions of consumers lack access to a full slate of in-state local broadcast stations because of DMA boundaries that straddle states, and the out-of-market stations those consumers receive do not always meet their needs.¹ The NAB acknowledges that DMAs can and often do cross state boundaries, and that communities might be assigned to an out-of-state DMA simply because of topology (*e.g.*, mountain ranges) between the community and in-state broadcasters.² This system serves as an artificial constraint in setting the boundaries for the provision of local broadcast stations by cable and satellite providers. Residents of La Plata and Montezuma counties in Colorado, for example, cannot receive in-state local broadcast stations over-the-air because of interposed mountain ranges. But this should not mean that they are foreclosed from receiving such stations via cable or satellite distribution, for which the mountain ranges do not always

¹ *See, e.g.*, Comments of State Senator Ellen Roberts (lamenting the 20 year struggle of the residents of Montezuma and La Plata Counties in Colorado to receive local, in-state programming); Comments of Oregon Public Broadcasting at 6-8 (decrying the inability of over 111,000 Oregonians in Umatilla, Wallowa, and Malheur Counties to receive in local in-state programming); Letter from Mike Ross, United States Representative for the Fourth District of Arkansas, to Marlene H. Dortch, FCC, MB Docket No. 10-238 (Jan. 25, 2011) (expressing concern for “thousands of [his Arkansas] constituents [who only] receive Louisiana news, weather, and sports”); Letter from Gorman E. Getty III, Board of County Commissioners of Garret County, Maryland to Marlene H. Dortch, FCC, MB Docket No. 10-238, at 1 (Feb. 14, 2011) (noting that 30,000 Garret County, Maryland residents are denied access to in-state broadcast services); Letter from Roscoe Bartlett, United States Representative for the Sixth District of Maryland, to Marlene H. Dortch, FCC, MB Docket No. 10-238 (Feb. 15, 2011) (noting that it is “unfair and rightfully frustrating” that constituents in Garrett County, Maryland can only receive Pennsylvania local news stations). *See also* Comments of DirecTV at 7 (“For federal law to deny additional in-state local choices to subscribers in places like Johnson and Campbell Counties, Wyoming; Clay County, North Carolina; and Montezuma and La Plata Counties, Colorado, [is] unjustifiable . . .”).

² *See* NAB Comments at 8-9.

present the same physical challenge. As DISH, DirecTV, and Cablevision point out, toeing strictly to the DMA approach has led to incongruous results, where consumers must rely on out-of-state local broadcast stations for their “local” information, despite a half century of advancement in the technology and business model of video distribution.³

The public, members of Congress, state legislators, local government leaders, public interest groups, and MVPDs of every size all support adjustments to the current system to allow orphan county residents to access in-state local broadcast stations. DirecTV urges policymakers to “consider permissive and flexible solutions that afford options in addition to those already allowed by the existing regime.”⁴ Cablevision encourages the Commission to “explore its own ability to amend or waive rules to enable cable operators immediately to carry the in-state broadcasters our *subscribers* – not Nielsen – consider local.”⁵ The entire Colorado Congressional Delegation laments that orphan counties “are currently denied the ability to obtain in-state broadcasts due to the existing inflexibility and structure of the [DMAs],” and encourages the Commission to “address this matter in an expeditious and pragmatic manner.”⁶ The entire Wyoming Congressional Delegation has noted that “16 of Wyoming’s 23 counties are orphaned,” with the result that “nearly 55% of all Wyoming television households cannot receive Wyoming-based news, weather, sports, or emergency alerts from their satellite subscription.”⁷

The League of Women Voters of La Plata County notes that even though La Plata County

³ See DISH Comments at 1; DirecTV Comments at 3-6; Cablevision Comments at 1.

⁴ DirecTV Comments at 7.

⁵ Cablevision Comments at 2 (emphasis in original).

⁶ Letter from Colorado Congressional Delegation to Chairman Julius Genachowski, FCC (February 16, 2011).

⁷ Letter from Wyoming Congressional Delegation to Chairman Julius Genachowski, FCC (December 1, 2010).

residents “vote on Colorado candidates and Colorado issues,” they are only able to receive New Mexico broadcast stations via MVPDs.⁸

The record also reflects agreement on the need to emphasize access to in-state local broadcast stations with “Big 4” affiliations. In its Comments, DISH encouraged the Commission to define orphan counties as those counties in which citizens cannot receive a substantially complete package of local broadcast stations from Big 4 broadcasters within their own state.⁹ The ACA also supports just such a focus on the Big 4 networks because, as the ACA notes, these stations “typically produce more local news, sports, weather, and public affairs content than other broadcast stations in a market.”¹⁰ DISH also urged the Commission to count consumers as underserved with respect to in-state local broadcast stations when they lack access to the same via one or more of the major distribution means: over-the-air, cable, or satellite.¹¹ ACA again agrees that the Commission’s report should break out cable, satellite, and over-the-air access.¹² As DISH has noted, the Commission and Congress can maximize competition and consumer choice by ensuring that in-state local broadcast stations are available from whichever type of video programming distributor a consumer chooses. In accord with Cablevision, DISH also identified the resources available to the Commission for mitigating the orphan county issue.¹³

⁸ Letter from the League of Women Voters of La Plata County to the FCC, MB Docket No. 10-238 (Jan. 20, 2011).

⁹ DISH Comments at 2.

¹⁰ ACA Comments at 3.

¹¹ *See* DISH Comments 3.

¹² *See* ACA Comments at 5.

¹³ *See* Cablevision Comments at 1; DISH Comments at 7-9.

Specifically, DISH pointed out that some of these resources are within existing Commission authority.¹⁴

III. TARGETED ADJUSTMENTS TO THE CURRENT SYSTEM WILL NOT UPSET THE MARKET

NAB posits unsupported doomsday scenarios in response to reasonable solutions to fix the orphan county problem. They falsely equate improvements to the system, which are necessary, with outright abandonment. DISH and other commenters ask the Commission to recommend to Congress targeted measures to address the legitimate grievances of the Commission's primary constituency – the public. A statewide license to enable MVPDs to provide in-state local broadcast stations to orphan counties, as well as use of the Commission's current waiver or evidentiary rulemaking powers to adjust the rules for significantly viewed stations,¹⁵ are incremental adjustments to the system that address these grievances without upsetting the established expectations of the marketplace.

Contrary to NAB's assertions, there is no basis for claiming that bringing more in-state programming to orphan county residents would "imperil the efficient functioning of the local television marketplace."¹⁶ In the Copyright Act, Congress established four test cases in Mississippi, New Hampshire, Oregon, and Vermont where satellite carriers are authorized to provide in-state local broadcast stations to subscribers in orphan counties in those states.¹⁷ Yet

¹⁴ See DISH Comments at 7-9.

¹⁵ See *id.*; see also Comments of DISH Network L.L.C. at 11-12, MB Docket No. 10-148 (filed Aug. 17, 2010); Notice of Ex Parte of DISH Network L.L.C. at 1-2, MB Docket No. 10-148 (filed Aug. 23, 2010).

¹⁶ NAB Comments at 2.

¹⁷ Pursuant to 17 U.S.C. § 122(a)(4), four states (acknowledged as Mississippi, Oregon, New Hampshire and Vermont) enjoy an exception to the DMA system, and satellite carriers are permitted to supply certain orphan county residents of those states with the signals from select in-state local broadcast stations.

local broadcast stations have continued to exist without peril even in the DMAs that have benefitted from these statutory test cases. Moreover, NAB fails entirely to appreciate the pro-localism spirit of the targeted reforms proposed by DISH, DIRECTV and others. DISH's proposed statewide license to enable MVPDs to provide in-state local broadcast stations to orphan counties would not supplant the broadcast stations from within the consumer's assigned DMA – instead, the additional in-state local broadcast stations would be complementary, and would be available only to consumers already subscribed to receive their in-DMA stations.

It may be true that some orphan county residents, once given access to in-state local broadcast stations, will prefer these stations to their out-of-state counterparts. But, as the NAB points out, the locus of most DMAs lies within a “core urban area” that represents a “substantial population nucleus.”¹⁸ This means that the orphan counties represent a small portion of these DMAs' population, and that the bulk of a DMA's population typically resides within the same state as the station in question. Bringing more viewing options to consumers in outlier portions of the DMA should have relatively small effects on the total viewership of the relevant stations. Of course, any shift that does occur is likely to be gradual, and to reflect the preference of these residents for their in-state local broadcast stations. Stations and their advertisers should be able to adjust to take advantage of these new viewing patterns.

IV. THE BROADCASTERS' “SOLUTION” TO THE PLIGHT OF ORPHAN COUNTIES IS UNWORKABLE, WOULD CONFUSE CONSUMERS, AND SQUANDER SCARCE SPECTRUM RESOURCES

Offering a complement of in-state local broadcast stations to orphan county residents is an incremental adjustment to the current market structure, one that is less disruptive and more consumer-friendly than other alternatives offered in the record. NAB suggests that satellite

¹⁸ NAB Comments at 8.

carriers make private copyright agreements with in-state local broadcasters to provide solely their local news, weather, and public affairs programming to orphan county residents.¹⁹ To implement this solution, DISH would have to set aside a new, dedicated channel to provide the local programming for orphan county residents. And because most content carried by local network affiliates is national programming, this channel would be dark 80 to 90 percent of the day. Satellite carriers do not have the capability to substitute programming in place of the blacked out programming. From a consumer perspective, providing a blacked-out channel in a 100+ channel environment has the practical effect of denying access altogether. Consumers will not be interested in viewing a channel that is consistently blacked out.

Moreover, a blackout of all network programming would also deprive consumers of emergency warnings whenever regular programming is interrupted (*e.g.*, to warn residents of floods, tornados, or other manmade or natural disasters), undercutting one of the prime motivations behind providing consumers in-state local broadcast stations. A further complicating factor is that local broadcast stations may not always have copyright authority for all non-duplicative content, including, for example, local advertisements or national news clips embedded in local programming. NAB fails to address this problem, and its comments concede that the Copyright Act can only enable private copyrights that cover “station-produced in-state programming.”²⁰ Any solution proposed by the Commission in its report to Congress should be consumer-friendly and not cause greater consumer frustration than the current state of affairs.

In addition, NAB’s proposed “solution” is unworkable from an operational standpoint. It is not practical for a national DBS provider like DISH to block programming on a station-by-

¹⁹ *Id.* at 32 (arguing that the FCC’s “exclusivity rules do not preclude MVPDs from providing non-duplicative programs, including station-produced news and informational programming”).

²⁰ *Id.*

station basis across all markets in order to comply with private copyright agreements that cover only a station's non-duplicative, local content. DBS systems do not have a means to track and react real-time to broadcaster schedule changes, such as a case where an afternoon NFL football game runs late and cuts into the local evening news time slot. Nor can DISH accommodate a separate blacked out feed in each market, given that its spot beams are effectively at capacity today. DISH's proposed solution, on the other hand, would enable satellite carriers to provide residents of orphan counties a package of in-state local broadcast stations that are already carried on a spot beam that serves those counties, which uses no additional spectrum resources. The operational and logistical barriers to implementing the complex scheme suggested by NAB would effectively preclude DISH from offering relief to orphan counties, frustrating Congress's objective in launching this very inquiry to get more in-state local news, weather, and political coverage to consumers.

The NAB also points to the proliferation of alternative delivery means for local content, such as the Internet.²¹ Even if this is the case, however, MVPDs should have the opportunity to provide in-state local broadcast stations to their customers rather than hoping that all orphan county residents also have broadband connections sufficient to support such online access. Relegating orphan county residents to finding in-state local programming on the Internet will only persist in maintaining the artificial separation between orphan county residents and the rest of their in-state brethren. Moreover, by ensuring that all MVPDs have a workable and efficient path to provide in-state local broadcast stations to orphan county residents, Congress guarantees a level playing field across all video providers.

²¹ *See id.* at 35.

V. CONCLUSION

DISH respectfully submits the above reply comments to assist the Commission in composing a comprehensive and granular report for Congress on the availability of in-state local broadcast stations, as well as in considering the use of its existing authority until Congress acts.

Respectfully submitted,

/s/

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