

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

In the Matter of)	
)	
Media Bureau Seeks Comment for Report Required by the STELA Reauthorization Act of 2014)	MB Docket No. 15-43
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**REPLY COMMENTS OF ITTA –
THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES**

ITTA – The Voice of Mid-Size Communications Companies (“ITTA”) hereby submits its reply comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) February 25, 2015 Public Notice¹ seeking comment for use in preparation of a report required by the STELA Reauthorization Act of 2014 (“STELAR”) on designated market areas (“DMAs”) and recommendations for fostering increased localism.² Recognizing the shortcomings of the current DMA system, particularly in rural areas, Congress directed the FCC to examine the extent to which consumers have access to broadcast stations located outside their local markets and whether there are any technologically and economically feasible alternatives to DMAs that would provide more programming options to consumers.³ Congress also directed the Commission to make recommendations on how to foster increased localism in counties served by out-of-state DMAs.⁴

While DMAs provide a method to define local markets for purposes of facilitating the buying and selling of television advertising time, strict adherence to the DMA system can be problematic, especially in rural communities served by ITTA member companies. In many cases, these

¹ “Media Bureau Seeks Comment for Report Required by the STELA Reauthorization Act of 2014,” Public Notice, MB Docket No. 15-43, DA 15-253 (rel. Feb. 25, 2015).

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

³ *Id.* at §§ 109(a)(1)(A)-(B).

⁴ *Id.* at § 109(a)(2).

communities are assigned to DMAs in which local programming available from in-market stations does not serve the needs or interests of affected viewers. Thus, Section 109 of STELAR directs the FCC to place particular focus on the impact that DMAs have “on local programming in rural areas” in making recommendations for fostering localism.⁵

As other commenters have explained, defining local markets in rural areas is complex.⁶ For example, it may be difficult to determine the importance of available in-market programming to viewers in rural communities that are far removed from the urban or economic centers where such programming originates. Depending on geographic location, consumers in one part of a large, rural county might choose to associate with a different DMA than those in other parts of the same county. Certain viewers also may prefer weather programming provided by a station in an adjacent DMA, particularly if the local station does not provide important weather-related information or if weather programming from an adjacent market is more relevant based on historical weather patterns in that area. In addition, consumers might live in one DMA and commute to work in an adjacent DMA such that they prefer programming from one DMA over another or desire to watch programming provided by stations in both markets.

Unfortunately, existing mechanisms, such as the market modification process, multichannel video programming distributor (“MVPD”) carriage of out-of-market signals pursuant to private contractual negotiations, and MVPD delivery of significantly viewed signals, are insufficient to fully address concerns about access to relevant local programming in certain markets. The current market modification process is a time consuming and uncertain undertaking that is cost prohibitive for many smaller MVPDs. It is difficult for many providers to justify the expenditure of limited resources on

⁵ See STELAR at § 109(b)(2). See also S. Rep. No. 113-222, at 15 (2014).

⁶ See Comments of WTA – Advocates for Rural Broadband, MB Docket No. 15-43 (filed May 12, 2015) (“WTA Comments”), at 8.

pursuing market modification relief when those resources would be better spent on network investment and deployment of advanced communications services to consumers.

Negotiating for carriage of out-of-market signals through private contractual arrangements has its own challenges. Often, provisions in network affiliation agreements prevent a station from consenting to out-of-market carriage, even when its local programming is more relevant to affected consumers than programming available from the in-market station. Even if the MVPD is successful in negotiating carriage for the distant station, it must then pay retransmission consent and copyright fees for two network affiliates. Moreover, the distant signal copyright fees for the out-of-market station are exponentially higher than for the local station, which in and of itself may deter carriage of the distant station.

MVPDs' ability to deliver significantly viewed signals also does not offer a complete remedy to issues arising from rigid application of the current DMA system. Although STELAR took the positive step of preventing broadcasters from interfering with MVPDs' ability to carry significantly viewed stations,⁷ the record clearly demonstrates that there are numerous stations that are considered truly local to viewers that are not included on the significantly viewed list.⁸

To address the shortcomings of the DMA system, ITTA urges the Commission to consider two areas of reform that would foster increased localism. First, the FCC should recommend to Congress that it adopt a regime that would allow consumers to select and pay only for those stations that provide local programming that is most relevant to them. As part of this proposal, consumers would be able to choose programming provided by either a local or adjacent out-of-market station, or both, if they desire, and would have greater ability to view programming provided by the in-market

⁷ See STELAR at § 103(b) (“prohibit[ing] a television broadcast station from limiting the ability of a multichannel video programming distributor to carry into the local market... of such station a television signal that has been deemed significantly viewed”).

⁸ See, e.g., Comments of Kyle Ramie, MB Docket No. 15-43 (filed May 6, 2015); Comments of Timothy Brastow, MB Docket No. 15-43 (filed Mar. 24, 2015); Comments of Spencer Karter, MB Docket No. 15-43 (filed Mar. 6, 2015).

station over-the-air so they do not have to rely exclusively on an MVPD for access to such programming. Second, the network non-duplication and syndicated exclusivity rules should be repealed. Each of these areas of reform is addressed in turn below.

I. CONSUMERS SHOULD HAVE GREATER CHOICE IN SELECTING THE PROGRAMMING THAT IS RELEVANT TO THEM

Congress should adopt a regime that gives consumers the opportunity to choose the broadcast programming that is most responsive to their needs and interests. Specifically, Congress should adopt an approach similar to the Local CHOICE proposal that Senate Commerce Committee Chairman Thune and former Senate Commerce Committee Chairman Rockefeller circulated to industry in August of 2014.⁹ Under the Local CHOICE proposal, local commercial broadcast stations may annually opt for Must Carry status or elect retransmission consent by demanding carriage as a Local CHOICE station in exchange for payment at a uniform per subscriber fee that applies to all MVPDs within the market. Consumers then select which stations they want to purchase from the MVPD and the MVPD collects and remits those fees to the relevant broadcaster.

The Local CHOICE proposal gives consumers the choice of whether or not to receive and pay for local broadcast stations based on their individual preferences and prevents them from being used as pawns by broadcasters in contentious retransmission consent negotiations. MVPDs would merely collect the fee that is established by the local broadcaster and pass it through to the consumer. Another benefit of this proposal is that it would enhance transparency. The consumer would know how much the broadcaster is charging for “free over-the-air” signals, and would have the ability to reduce his/her cable bill by choosing not to take a signal.

⁹ See Brian Fung, “What if you could pick and choose which broadcast TV channels you get?” *The Washington Post*, Aug. 11, 2014, available at: <http://www.washingtonpost.com/blogs/the-switch/wp/2014/08/11/what-if-you-could-pick-and-choose-which-broadcast-tv-channels-you-get/> (last visited: June 11, 2015) (describing the Local CHOICE proposal).

In order to maximize consumers' ability to obtain local programming of interest to them, however, Congress should include in the Local CHOICE proposal a provision that MVPDs be allowed to give consumers the choice of bringing in an adjacent out-of-market station that may be more geographically relevant to them. That is, an MVPD should be permitted at its discretion to offer an adjacent out-of-market signal affiliated with the same network as any Local CHOICE station based on consumer demand. Consumers should have the choice of subscribing to the Local CHOICE station, the out-of-market station, or both. Consumers would pay the same fee as in-market subscribers of the out-of-market station and the process for collecting and remitting payment would otherwise remain unchanged. Assuming, *arguendo*, that the program exclusivity rules remain in place (which they should not, as discussed below), broadcasters would be responsible for implementing those rules under this proposal. And assuming, *arguendo*, that Congress does not address reforms to the compulsory copyright license regime (which it should, as discussed below), the distant signal copyright fee applicable to cable operators would apply and be passed through to consumers consistent with the Local CHOICE framework.¹⁰

In addition, Congress should include in the Local CHOICE proposal language that prevents a broadcaster from charging consumers who live outside of the broadcaster's digital contour and would not receive the content but for the MVPD's distribution network. Today, many of the geographic areas within which ITTA members provide video service are outside the local broadcaster's digital contour. As a general matter, ITTA believes that Congress should ensure that broadcasters are delivering digital signals to all households inside their DMA. However, in instances where a broadcaster is unable, or unwilling, to deliver a digital signal to certain households within its DMA, the signal could convert to Must Carry status. This approach would avoid rewarding the broadcaster

¹⁰ As explained in Section II below, ITTA strongly supports repeal of the program exclusivity rules. ITTA also urges Congress to consider appropriate changes to the compulsory copyright regime, which impedes MVPDs' ability to import out-of-market programming desired by consumers.

by permitting it to collect exorbitant retransmission fees for households that, absent an MVPD, would be unable to receive the broadcaster's signal.

The above-described approach is similar to a proposal advanced by WTA in this proceeding, which would allow MVPDs to provide choice and let consumers select and pay only for broadcast stations from the most relevant DMA.¹¹ A second option WTA suggests is for Congress to retain the current DMA system and allow MVPDs to re-associate with a more relevant DMA.¹² In addition to ITTA's proposal, both options suggested by WTA merit further consideration as the Commission recommends changes to the DMA system that would advance localism and allow MVPDs to better respond to consumer needs.

II. THE PROGRAM EXCLUSIVITY RULES SHOULD BE REPEALED

ITTA also strongly believes that the network non-duplication and syndicated exclusivity rules should be repealed. As the Commission has acknowledged, the program exclusivity rules are an "unnecessary regulatory intrusion" that have outlived their intended purpose.¹³ We continue to support the Commission's March 2014 proposal to eliminate the exclusivity rules, and encourage the FCC to extend such relief to all MVPDs.¹⁴

As ITTA explained in its comments in that proceeding, changes in the video programming industry since the exclusivity rules were put in place have undercut the basis for these protections.¹⁵ When the Commission first promulgated the exclusivity rules, cable operators held a monopoly on

¹¹ See WTA Comments at 11-12.

¹² See *id.* at 9-11.

¹³ See *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Further Notice of Proposed Rulemaking, FCC 14-29, ¶ 55 (rel. Mar. 31, 2014).

¹⁴ ITTA continues to believe that the Commission's video policies, particularly those relating to retransmission consent, are in dire need of reform, and that the Commission should move forward expeditiously to restore balance to a marketplace that unjustly favors broadcasters.

¹⁵ Comments of ITTA, MB Docket No. 10-71 (filed June 26, 2014).

video distribution. Since then, DBS providers, telco-based video distributors, and cable overbuilders have entered the marketplace to create the vibrant retail competition that exists today. Four decades ago when the exclusivity rules were first put into place, broadcasters had an incentive to cover local news, weather, traffic, and community activities because broadcast television and radio were virtually the only means available for Americans to receive local news in a time sensitive manner. Broadcasters' business models largely depended on revenue derived from local advertising. Today, Americans typically obtain local news and other local content from a wide range of sources and, consequently, depend far less on their local television or radio station for coverage of local news and events. Local broadcasters today also depend far less on local advertising for revenue and instead receive a significantly increasing amount of revenue from retransmission consent fees.¹⁶ Moreover, as NAB pointed out, the market conditions that promote availability of local programming – i.e., a larger population base and thus greater potential advertising revenue – do not exist in rural markets.¹⁷ Thus, if there was any compelling reason to preserve the DMA system, it has little to no relevance when it comes to local programming access in rural areas.

Given the expected continued escalation in retransmission consent fees and the fact that local broadcasters are spending less time and fewer resources on local content, ITTA recommends that the Commission move forward with its proposal to repeal the network non-duplication and syndicated exclusivity rules and allow MVPDs to import broadcast programming from out-of-market stations to provide public interest benefits to consumers.

¹⁶ According to analysis by SNL Kagan, retransmission consent fee revenues grew by 45.8 percent in 2013 alone. At \$3.3 billion, such revenue represented 18.5 percent of total broadcast television station industry revenue in 2013, double the figure from 2012. It is anticipated that retransmission consent revenue will continue to grow exponentially, escalating to \$7.6 billion in 2019. Mike Reynolds, "Station Retrans Fees to Reach \$7.6B in 2019: SNL Kagan," *Multichannel News*, Nov. 22, 2013, available at: <http://www.multichannel.com/news/content/station-retrans-fees-reach-76b-2019-snl-kagan/356879> (last visited: June 10, 2015).

¹⁷ See Comments of the National Association of Broadcasters, MB Docket No. 15-43 (filed May 12, 2015) ("NAB Comments"), at 26-27.

Allowing MVPDs to import distant signals would afford consumers greater choice. Consumers, not broadcasters, would decide which signal is most valuable and relevant based on their individual needs and preferences. These rule changes would, in addition, lead to a more balanced retransmission consent fee negotiation process between broadcasters and MVPDs, provided there are measures in place to prevent broadcast networks and their affiliates from creating contractual restrictions or engaging in other practices that would circumvent such relief. In addition, repealing the exclusivity rules and allowing the importation of distant signals by MVPDs would ensure that broadcasters face enhanced regional competition that should encourage the development of compelling local program offerings and result in lower retransmission consent fees.

In fact, it is disingenuous for broadcasters to argue that repeal of the exclusivity rules would undermine localism or result in a spate of distant signal importations.¹⁸ The Commission has consistently found that greater competition among broadcasters promotes localism by providing “added incentives to respond to conditions in local markets.”¹⁹ Thus, the exclusivity rules undermine the Commission’s interest in promoting localism by blocking competition from out-of-market stations that would enhance the quality of local broadcast programming. Additionally, as indicated above, to the extent the local broadcaster offers local news, public affairs, and other compelling community interest programming desired by consumers, it would put pressure on the MVPD to negotiate for carriage of the local station as opposed to an out-of-market station.

Furthermore, the Commission must bear in mind that carriage of an out-of-market station typically entails carriage of a “distant” signal that requires significant additional royalty fees under the compulsory copyright license for cable systems. Essentially, any out-of-market station that is not

¹⁸ See, e.g., NAB Comments at 30-31.

¹⁹ *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order on Reconsideration, 23 FCC Rcd 2010, ¶ 97 (2008); see also *id.* at ¶ 101 (concluding that “competition, and not concentration of market players, leads to better programming”).

permitted as a distant signal, or whose market has not been modified by the FCC to qualify as a local signal, constitutes a distant signal that triggers an additional 3.75 percent fee on the cable system's gross revenues. This can be a disincentive – among others – for cable systems to carry out-of-market signals that the FCC has not established as significantly viewed or otherwise local (unless copyright law also recognizes the signal as local). Thus, to the extent that the Commission and Congress consider reforms to promote localism by permitting MVPDs greater flexibility to carry out-of-market stations, the interplay with existing Copyright Act provisions must also be considered and those provisions potentially modified to ensure that copyright law aids and does not undermine those reforms.²⁰

In short, the exclusivity rules and related laws prevent MVPDs from purchasing programming from an alternative source even if it is consistent with customer preferences. It is hard to see how rules that prevent an MVPD from importing an out-of-market signal to provide must-have programming to subscribers are in any way beneficial to consumers. On the other hand, allowing MVPDs to import network and syndicated programming from a station outside the DMA would promote competition among broadcasters. It also could bring customers more viewing options and increase the value of their video service without dramatic increases in cost. The Commission should repeal its program exclusivity rules. In addition, modifications to Copyright Act provisions that act as an impediment to distant signal importation should be considered to ensure they do not detract from these public interest benefits.

²⁰ As part of such review, Congress should consider ways to harmonize copyright fees paid by non-satellite MVPDs as compared to their DBS competitors. Today, non-satellite MVPDs pay a much higher out-of-market compulsory license fee to import distant signals than satellite providers making it cost prohibitive for non-satellite MVPDs to bring in out-of-market station programming that is relevant to and desired by consumers. ITTA recommends that Congress amend the Copyright Act to allow all MVPDs to import an out-of-market signal at the same rate paid by satellite TV providers.

III. CONCLUSION

Rigid application of the current DMA system can be problematic, especially as it relates to access to relevant local programming for consumers in rural areas of the United States. In many cases, rural communities are assigned to DMAs in which local programming available from in-market stations does not serve the needs or interests of affected viewers. To overcome these shortcomings and promote access to local programming and choice for consumers, Congress should adopt a regime that would allow consumers to select and pay only for those stations that provide local programming that is most relevant to them. In addition, the network non-duplication and syndicated exclusivity rules should be repealed, and appropriate changes to Copyright Act provisions should be considered to ensure that distant signal copyright fees do not impede MVPDs' ability to respond to consumer needs.

Respectfully submitted,

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