

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Update to Publication for Television Broadcast)	MB Docket No. 22-239
Station DMA Determinations)	
for Cable and Satellite Carriage)	
)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)¹ hereby replies to comments filed in response to the Federal Communications Commission’s (FCC or Commission) Notice² seeking comment on updating its regulations to reference a new publication for use in determining a television station’s Designated Market Area (DMA) for satellite and cable carriage. As discussed further below and in a previous filing attached hereto, NAB opposes the proposal filed by the Massachusetts Department of Telecommunications and Cable (MDTC).³

In its filing, MDTC renews a previous proposal that the Commission adopt a blanket modification to the markets of television broadcast stations to move “orphan” counties into Nielsen DMAs within their states.⁴ As NAB explained when MDTC advanced the same proposal in another proceeding, granting MDTC’s request would be contrary to the

¹ NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Update to Publication for Television Broadcast Station DMA Determinations for Cable and Satellite Carriage*, Notice of Proposed Rulemaking, MB Docket No. 22-239, FCC No. 22-55 (rel. July 14, 2022) (Notice).

³ Comments of MDTC, MB Docket No. 22-239 (Aug. 29, 2022) (MDTC Comments), attaching Comments of MDTC, MB Docket Nos. 20-73, 17-105 (May 14, 2020) (MDTC SV Comments).

⁴ *Id.*

Communications Act of 1934, as amended, the Administrative Procedure Act, and the public interest.⁵ For these reasons, NAB urged the Commission to deny MDTC's request at that time, and, for the same reasons, NAB urges the Commission to deny the instant MDTC request. We have attached our previous filing on this matter explaining the legal and policy issues raised by MDTC's proposal.

In addition to its previous arguments, MDTC contends that its proposal is relevant to the current proceeding because the Notice invites comment on ways to advance digital equity for all, including persons who live in rural areas.⁶ The FCC's request for comment on digital equity issues in this proceeding does not expand its statutory authority to allow the adoption of a blanket change affecting multiple markets, as MDTC supports,⁷ nor does it enlarge the scope of this narrowly-focused proceeding to encompass any such broad changes.⁸

Moreover, as NAB previously explained, changing the signal carriage markets for numerous stations in many communities could impact numerous relationships between broadcasters and multichannel video programming distributors (whether must-carry or retransmission consent) and affect stations' ability to attract local audiences. This would, in turn, affect their ability to attract advertising revenues (or underwriting for noncommercial stations). These sources of income support the local news and public affairs programming

⁵ Reply Comments of NAB, MB Docket Nos. 20-73, 17-105 (June 15, 2020) (NAB SV Reply Comments), attached hereto as Attachment A.

⁶ MDTC Comments at 1-2, citing Notice ¶ 7. MDTC asserts that orphan county residents often live in rural areas and are underserved because they lack access to in-state news and other programming. *Id.*

⁷ See NAB SV Reply Comments at 3-5 (discussing how the proposed adoption of sweeping modifications to multiple markets is contrary to section 614, 47 U.S.C. § 534).

⁸ See NAB SV Reply Comments at 5-6 (discussing how the MDTC proposal was beyond both the scope of the proceeding and the scope of the concern expressed by MDTC).

MDTC wants the affected Massachusetts counties to access.⁹ Without an analysis of evidence specific to individual stations, audiences and communities, any benefits to the public from the changes MDTC seeks—either generally or with respect to a particular underserved group—could be far outweighed by the potential harms.

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September 26, 2022

⁹ NAB SV Reply Comments at 6.

Attachment A

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Significantly Viewed Stations)	MB Docket No. 20-73
)	
Modernization of Media Regulation Initiative)	MB Docket No. 17-105
)	
)	

**REPLY COMMENTS OF THE
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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby replies to comments filed in response to the Notice in the above-referenced proceedings.² In the Notice, the Commission seeks comment on whether to modernize its methodology for determining whether a television broadcast station is “significantly viewed” in a community outside of its local television market and thus may be treated as a local station in that community, permitted under the Commission’s rules to be carried by cable systems and satellite operators.³ NAB members have expressed a range of views in their comments, with one strongly urging the Commission to allow the use of Longley-Rice data as a proxy for the traditional viewership showing in significantly viewed analysis,⁴ another strongly opposing the use of Longley-Rice

¹ NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Significantly Viewed Stations; Modernization of Media Regulation Initiative*, Notice of Proposed Rulemaking, FCC No. 20-41, MB Docket Nos. 20-63 et al. (rel. Mar. 31, 2020) (Notice).

³ *Id.*

⁴ Comments of Gray Television, Inc., MB Docket Nos. 20-73 et al. (May 14, 2020).

data for this purpose,⁵ and multiple others contending that alternative showings should be permitted only if viewing data is unavailable.⁶

NAB does not take a position on whether or how the Commission should modify its current methodology for assessing a station's significantly viewed status.⁷ Rather, our reply comments focus on the request of the Massachusetts Department of Telecommunications and Cable (MDTC) that the Commission essentially redraw the boundaries of Nielsen Designated Market Areas (DMAs) to move "orphan" counties into DMAs within their states.⁸ As discussed further below, granting MDTC's request would be contrary to the Communications Act of 1934, as amended, and the Administrative Procedure Act (APA). Even if it were lawful, such an action would not serve the public interest. Accordingly, MDTC's request must be denied.

II. AN ACROSS-THE-BOARD ACTION TO MOVE ALL ORPHAN COUNTIES IN-STATE WOULD BE CONTRARY TO THE COMMUNICATIONS ACT, THE ADMINISTRATIVE PROCEDURE ACT, AND THE PUBLIC INTEREST

MDTC is concerned about access to in-state programming for two Massachusetts counties that are assigned to DMAs that primarily cover communities in neighboring states—

⁵ Comments of Hubbard Broadcasting, Inc., MB Docket Nos. 20-73 et al. (May 14, 2020).

⁶ Comments of Sagamore Hill Midwest, LLC, SagamoreHill of Columbus GA, LLC, and SagamoreHill Broadcasting II, LLC (Sagamore), MB Docket Nos. 20-73 et al. (May 14, 2020); Comments of Jonesboro TV, LLC, Star City Broadcasting, LLC, SagamoreHill of Jackson, LLC, Vision Communications, LLC, WGBC-TV, LLC, WHPM-TV, LLC, WMDN-TV, LLC, and WYDC, Inc. (Star City, et al.), MB Docket Nos. 20-73 et al. (May 14, 2020).

⁷ In its comments, NCTA-The Internet and Television Association (NCTA) observes that waivers of the exclusivity exception under the current significantly viewed rules do not impact a station's significantly viewed status, and that the Notice restates this policy, but "also loosely refers to a station 'los[ing] its significantly viewed status' when a waiver is granted." Comments of NCTA, MB Docket Nos. 20-73 et al. (May 14, 2020) at FTN 19 (citing Notice at ¶ 5 and note 22). NAB agrees with NCTA that the Commission should reaffirm that a station does not lose its significantly viewed status, even when it loses its exception from the exclusivity rules.

⁸ Comments of MDTC, MB Docket Nos. 20-73 et al. (May 14, 2020) (MDTC Comments).

Berkshire County, MA (assigned to the Albany-Schenectady-Troy, NY DMA), and Bristol County, MA (assigned to the Providence, RI-New Bedford, MA DMA).⁹ To address its concerns, MDTC urges the Commission to modify the definition of the term “significantly viewed” to “include signals from broadcast stations in the nearest in-state television market for any orphan county.” MDTC believes this will “ensur[e] that cable and satellite television providers offer such counties stations from the nearest in-state television market.”¹⁰ As an alternative, MDTC urges the Commission to “consider altering television market assignments for orphan counties” by amending the definition of the term “television market” so it no longer relies on Nielsen DMAs, or conduct a wholesale override of DMA designations to “annex each orphan county to an adjoining in-state television market.”¹¹ Whether the Commission were to undertake the action urged by MDTC by changing the definition of “significantly viewed” or by overriding DMA boundaries, the effect—modifying the markets of dozens of stations with respect to numerous communities in one fell swoop—is beyond the Commission’s authority.

MDTC’s proposal is contrary to statutory provisions governing market definition for purposes of broadcast signal carriage. Congress requires the Commission to determine television stations’ markets for purposes of signal carriage “by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns . . .”¹² The statute contains a single exception to this requirement – the market modification process. Specifically, Section 614 states that “following a written request, the Commission may, with respect to a *particular television broadcast*

⁹ MDTC Comments at 1-3.

¹⁰ MDTC Comments at 4-5.

¹¹ MDTC Comments at 4-5.

¹² 47 U.S.C. § 534(h)(1)(c)(i).

station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section."¹³ Congress identifies five specific factors the Commission must use in modifying individual television stations' markets to add or delete individual communities,¹⁴ and the Commission's rules specify that market modification petitions must include certain evidence designed to permit it to assess each of these factors.¹⁵

MDTC's proposal would affect numerous stations, hundreds (if not thousands) of communities, and countless local television viewers. It would bypass a highly individualized, evidence-based, case-by-case analysis of each potentially affected television station and community with a single, sweeping action. The market modification process is longstanding and reflects decades of Commission precedent and court opinions upholding Commission decisions.¹⁶ Significantly, Congress only recently re-examined the market modification process when, in 2014, it expanded the process to allow modifications for carriage of local stations via direct broadcast satellite (DBS) and to require Commission consideration of access to in-state programming as a factor in deciding market modification petitions – a change specifically designed to address the orphan county issue.¹⁷ By specifying a general

¹³ 47 U.S.C. § 534(h)(1)(c)(i) (emphasis added).

¹⁴ In considering market modification requests, the Commission “shall afford particular attention to the value of localism” by taking into account the following factors: (i) whether the station has been historically carried via MVPDs in the community; (ii) whether the station provides coverage or other local service to the community; (iii) whether modifying the station's market would promote consumers' access to in-state programming; (iv) whether any other station eligible to be carried in the community provides news coverage and sports programming of interest to the community; and (v) evidence of viewing patterns in the community. 47 U.S.C. § 534(h)(1)(c)(ii).

¹⁵ 47 C.F.R. § 76.59(b)(1)-(7).

¹⁶ See, e.g., *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83 (2d Cir. 2009).

¹⁷ The STELA Reauthorization Act of 2014 (STELAR), §§ 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (codified at 47 U.S.C. § 338(l)). The FCC held a rulemaking

standard for market definition with a single exception that can only be met through a showing specific to each relevant station and community, Congress foreclosed the sweeping, generalized change MDTC seeks. Had Congress intended the FCC to address orphan county issues with across-the-board actions such as those proposed by MDTC, it would not have simply added in-state programming to the list of factors for the Commission to consider in acting on market modification petitions.

Even if MDTC's request is not foreclosed by Section 614, it is also inconsistent with administrative law and contrary to the public interest. The relief MDTC seeks is beyond both the scope of this proceeding and the scope of the problem MDTC identifies. The Commission sought comment on whether and how to update its methodology for determining whether a particular station is significantly viewed, not whether it should re-define the terms "significantly viewed" or "television market" to make sweeping changes affecting numerous communities, stations, and MVPDs.¹⁸ The relief requested also is far beyond the scope of the concern expressed by MDTC. It would be arbitrary and capricious for the Commission to make modifications that affect every orphan county in the country (and all of the relevant

proceeding to implement STELAR § 102 (titled "Modification of television markets to further consumer access to relevant television programming"), 128 Stat. at 2060-62, and the related statutory copyright license provisions in STELAR § 204 (titled "Market determinations"), 128 Stat. at 2067 (codified at 17 U.S.C. § 122(j)(2)(E)). *Amendment to the Commission's Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014*, Report and Order, 30 FCC Rcd 10406 (2015). As part of this proceeding, the FCC held that county governments can petition the FCC for satellite market modifications. *Id.*; 47 C.F.R. § 76.59(a).

¹⁸ Under the APA, an agency's rulemaking notice must "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (citations omitted). See also 5 U.S.C. § 553(b)(3) (notice must include either the "terms or substance of the proposed rule" or a "description of the subjects and issues involved").

local TV stations) because of concerns raised about two counties in a single state.¹⁹

Changing the signal carriage markets for numerous stations in many communities could impact numerous broadcaster-MVPD relationships (whether must-carry or retransmission consent) and affect stations' ability to attract local audiences, which would, in turn, affect their ability to attract advertising revenues (or underwriting for noncommercial stations). These sources of income support the local news and public affairs programming MDTC wants the affected Massachusetts counties to access. Without an analysis of evidence specific to individual stations and communities, any benefits to the public from the changes MDTC seeks could be far outweighed by the potential harms.

III. CONCLUSION

NAB appreciates the Commission's ongoing efforts to modernize its regulations affecting broadcasters and other media outlets. While NAB does not take a position on whether or how the Commission should update its methodology for determining a station's significantly viewed status, we oppose MDTC's proposal for across-the-board modifications to numerous television stations' markets. The disruptive change MDTC seeks is contrary to statutory provisions governing signal carriage, the Administrative Procedure Act, and the public interest.

¹⁹ It is also not clear that the change MDTC seeks would address the problem it has identified. Changing a station's significantly viewed status with respect to a particular geographic area (or its assigned market) does not guarantee it will be carried by MVPDs in that area. Affected broadcasters and MVPDs would still have to negotiate in good faith for such carriage and reach an agreement (unless the affected station elects must-carry).

Respectfully submitted,

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