

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

In the Matter of)	
)	
The Media Bureau Seeks Comment for)	MB Docket No. 15-43
Report Required by the STELA)	
Reauthorization Act of 2014)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ submits these reply comments concerning the report on Designated Market Areas (DMAs) that Section 109 of the STELA Reauthorization Act of 2014 (STELAR) requires the Commission to prepare.² NAB initially observes that no commenter has proposed any “technologically and economically feasible alternatives” to DMAs for defining television markets.³ Indeed, the only commenter directly focusing on the technological feasibility of altering the DMA system asserted that it cannot provide local service if markets are defined in terms other than DMAs.⁴

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

² Pub. L. No. 113-200, § 109, 128 Stat. 2059, 2065 (2014); see *Media Bureau Seeks Comments for Report Required by the STELA Reauthorization Act of 2014*, Public Notice, MB Docket No. 15-43, DA 15-253 (Feb. 25, 2015) (Notice).

³ STELAR § 109(a)(1)(B).

⁴ Comments of DIRECTV, LLC, MB Docket No. 15-43, at 2-3 (May 12, 2015) (stating that its satellite spot beams are designed based on existing patterns of DMAs and that it cannot reconfigure them to provide local service if new markets are created) (DIRECTV Comments).

The single commenter in this proceeding proposing specific changes to the DMA system presents two options, both designed with the sole aim of enhancing the commercial interests of cable operators. The record here, moreover, shows that the current DMA system has sufficient flexibility to address concerns about access to in-state broadcast programming (including locally produced news) in certain markets. Thus, the Commission should once again decline to endorse alternatives to DMAs,⁵ as the DMA system remains the only “technologically and economically feasible” method available for defining local markets.

II. The Commission Should Summarily Reject Proposed Alternatives To Defining Television Markets

The only commenter presenting specific proposals for altering television markets, WTA – Advocates for Rural Broadband, makes incorrect assumptions and misleading assertions and omissions in arguing that the FCC should endorse major changes to the DMA system.⁶ These proposals amount to thinly disguised attempts to give multichannel video programming distributors (MVPDs) more leverage in retransmission consent negotiations. WTA’s proposals also are highly complex and impracticable, and the Commission should not support them as feasible alternatives to the DMA system.

WTA suggests, for example, that DMAs are determinedly indifferent to viewers’ wishes or simply “illogical,”⁷ while, in reality, DMAs reflect consumers’ actual viewing patterns and population and economic realities.⁸ In addition, WTA inaccurately assumes that programming

⁵ See In-State Broadcast Programming: Report to Congress Pursuant to Section 304 of the Satellite Television Extension and Localism Act of 2010, MB Docket No. 10-238, DA 11-1454 (Aug. 29, 2011) (FCC 2011 DMA Report).

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

⁷ WTA Comments at iii, 2-3.

⁸ See Comments of NAB, MB Docket No. 15-43, at 9-11 (May 12, 2015) (NAB Comments).

from in-market, but out-of-state stations, is “irrelevant” to viewers and that programming from an in-state station is automatically more relevant.⁹ Numerous real-world examples from markets large and small belie that claim.¹⁰ WTA specifically complains that DMAs impede the provision of “local” programming in a number of counties in rural areas including, for example, Dixon County, Nebraska, which is included in the Sioux City, Iowa DMA.¹¹ Yet Ponca, Nebraska, the county seat of Dixon County, is only 16 miles away from Sioux City, much closer than to either Lincoln or Omaha, Nebraska, and is more economically and socially integrated with Sioux City.¹² Taken to its logical conclusion, WTA’s argument would mean that DMA boundaries should be based on state lines – a position that both broadcast and MVPD commenters have consistently opposed and that the FCC declined to endorse in 2011.¹³

Significantly, WTA downplays or ignores mechanisms available under the current system for increasing viewers’ access to broadcast stations and programming. For example,

⁹ See WTA Comments at iii; 3 & n.5, 13.

¹⁰ Programming from Washington, DC stations is obviously not “irrelevant” – indeed, it is the most relevant – to residents of Alexandria, VA and Bethesda, MD. Similarly, programming from stations in Spokane, WA is highly relevant to residents of Coeur d’Alene, in northern Idaho, many of which commute the 30 miles to Spokane for work, entertainment and shopping. It denies reality to assume that programming from stations in Boise, Idaho, 282 miles (and a time zone) away must be more relevant to residents of Coeur d’Alene because those stations fall within the same state’s boundaries. See also BIA/Kelsey, *Analysis of In-State and Out-of-State Reach by Local Television Stations*, at 24-25, Att. A to NAB Comments, MB Docket No. 10-238 (Jan. 24, 2011) (providing additional similar examples) (BIA 2011 Study).

¹¹ WTA Comments at 5.

¹² Sioux City is located in the northwest corner of Iowa, very close to the Nebraska border. Given that nine Nebraska counties are in the Sioux City DMA, stations in that DMA – even though located a few miles across the Iowa state line – have clear incentives to serve viewers and local advertisers in those Nebraska counties.

¹³ See FCC 2011 DMA Report at ¶¶ 26, 53 (also finding that 99.98 percent of all U.S. households have access to at least one in-state TV station); NAB Reply Comments, MB Docket No. 10-238, at 2, 4-5 (Feb. 22, 2011) (finding that consumers across all counties nationwide received over the air, on a weighted average basis, 17.6 in-state TV stations and an additional 4.5 out-of-state stations, when all stations, including Class A, low power and translators, were considered).

WTA dismisses the FCC's market modification mechanism, which Congress recently expanded, as costly and ineffective¹⁴ – a judgment inconsistent with the FCC's own.¹⁵

WTA also fails to discuss that its members may deliver – without incurring any additional copyright fees – “significantly viewed” signals to consumers residing in a DMA adjacent to the DMA from which a signal originated. This omission is curious, given that this option clearly addresses WTA's stated concerns by increasing consumer access to out-of-market, but in-state, stations.¹⁶ Indeed, WTA goes so far as to identify as problematic several specific cases where viewers receive, via cable, broadcast stations from adjacent markets.¹⁷ Instead of showing a problem, a number of WTA's examples, if anything, demonstrate that the existing DMA system has the flexibility to increase viewers' options in rural areas.¹⁸ WTA's real complaint here appears to be one of commercial self-interest. Rather than observing, for instance, that viewers in Boone and Marion counties, Arkansas, which are assigned to the Springfield, Missouri DMA, benefit from the receipt of both Missouri and out-of-market Arkansas stations, WTA expressly notes a member's report that its “[c]able competitor . . . carries both Missouri and Arkansas stations.”¹⁹

¹⁴ WTA Comments at 3, 9.

¹⁵ See FCC 2011 DMA Report at ¶ 56 (stating that FCC has granted a “significant number of market modifications, successfully modifying the market definition for cable operators and broadcasters in specific jurisdictions”).

¹⁶ See NAB Comments at 13-14 & n. 42 (discussing the significantly viewed standard).

¹⁷ See WTA Comments at 5-6. WTA identifies specific counties in several markets (including Boone and Marion counties, AR; Otter Tail county MN; Hubbard county MN; Clinton county, IA; Phillips, Smith, Jewell and Republic counties, KS; Kittitas county, WA; and Lincoln county, MT) where cable operators are able to carry TV stations from adjacent markets, likely because those stations meet the “significantly viewed” standard.

¹⁸ As NAB noted previously, cable operators under the current system frequently carry out-of-market TV stations, thereby increasing viewers' access to both in-state and out-of-state programming. See NAB Comments at 7, *citing* BIA 2011 Study at 12 (of the 12,931 “distant” TV stations from other markets carried by local cable system reporting units, 6,983 (54 percent) were in-state stations).

¹⁹ WTA Comments at 5 (emphasis added).

WTA similarly underplays other options for bringing in-state news, political information, sports and weather to viewers residing in out-of-state DMAs. As NAB explained, television stations own the copyrights to their locally produced programming; MVPDs may accordingly secure a private copyright license from out-of-market stations to import their non-duplicative local news and informational programming *and* avoid payment of the distant signal compulsory copyright license fee.²⁰ Importantly, WTA members with fewer than 1,000 subscribers are not subject to the FCC’s program exclusivity rules.²¹ These many small systems therefore may provide viewers *all* the programming of an in-state, out-of-market station (including the network and syndicated programming). Because WTA’s members are small systems, most, if not all, would incur little or no additional copyright costs for carrying all the programming of these in-state, out-of-market stations.²²

Given these options for providing viewers with additional in-state, out-of-market television stations, and the increasing accessibility of stations’ local news and informational programming online,²³ WTA has shown no compelling reasons to substantially modify the DMA system, let alone seriously disrupt the existing video and advertising marketplaces. Moreover, the two specific proposals WTA offers appear designed to promote the commercial interests of cable providers, rather than the interests of consumers.

Under WTA’s first proposal, a cable operator would be permitted to “re-associate” with a different DMA in the same state in which it provides cable service, and this “re-association”

²⁰ See NAB Comments at 15-16.

²¹ See 47 C.F.R. §§ 76.95(a), 76.106(b). According to SNL Kagan’s 2015 Media Census data, 41.1 percent of cable systems serve less than 1,000 subscribers.

²² See 17 U.S.C. §§ 111(d)(1). As noted above, if the in-state station is a “significantly viewed” one, the cable system would incur no additional cable royalty obligation.

²³ See NAB Comments at 17-21.

would be *presumed* to be “in the best interests of its customers.”²⁴ NAB doubts that redefining markets based on the self-interested choice of cable operators would reflect consumer preferences (or objective reality) more accurately than DMAs based on actual viewing patterns and population and economic factors.

This proposal, moreover, is a thinly veiled attempt to alter the current retransmission consent system and give cable operators significantly increased competitive leverage in negotiations with local broadcast stations.²⁵ The Commission should reject this “re-association” proposal that has little to do with “reforming” the DMA system and everything to do with enhancing cable operators’ bottom lines. And, even aside from these objections, WTA’s proposal is fraught with so many practical problems and unaddressed questions that the Commission should decline to endorse it on grounds of infeasibility alone.²⁶

The second proposal for “reforming” the DMA system would cause even greater disruption to the video marketplace. Despite WTA’s reluctant recognition that the current DMA

²⁴ WTA Comments at 10. Affected broadcast stations could attempt to disprove this presumption, but would bear the burden of proof. *Id.* While WTA seems to assume that only a limited number of small cable operators would take advantage of this ability to choose a different DMA, *id.* at 3, 10, the proposal contains no real limiting principles.

²⁵ Under WTA’s proposal, rather than negotiate in good faith with a network affiliated station in its own DMA, a cable operator could re-associate with a different DMA, override a local station’s bargained for program exclusivity rights, and negotiate instead with a station affiliated with the same network in that DMA. A cable operator could be particularly tempted to re-associate if, for example, the in-market station was especially strong, with the top-rated local news and/or more desirable local sports and syndicated programming, and the station in the re-associated DMA was competitively weaker or otherwise less likely to drive a “hard bargain” in retransmission consent negotiations. Even if a cable operator did not actually re-associate with a different DMA, it could, explicitly or implicitly, threaten to do so, thereby increasing its negotiating leverage over stations in its existing DMA, to the ultimate detriment of local stations’ service. See NAB Comments at 30; *infra* at 8.

²⁶ For instance, would all stations in the new DMA with which a cable system re-associates have must carry rights on that cable system, and if not, why not? Would the cable operator insisting on re-association be financially responsible for delivering to its principal headend a good quality signal from the stations in the re-associated DMA? See 47 C.F.R. § 76.55(c)(3). What channel positioning rights would these newly assigned stations have? Would these stations have program exclusivity rights with respect to the cable system that exercised its re-association “rights”? These are but a sample of the complex questions and implementation problems raised by the re-association proposal.

system “works relatively well for a large proportion of the country,”²⁷ it offers a discriminatory “a la carte” proposal that would distort competition in numerous markets to the advantage of the cable industry and to the disadvantage of local broadcast stations and their viewers.

Under this scheme, a cable operator would be allowed to pick and choose stations in “two or more DMAs” with which to negotiate for retransmission consent, but only pay for those stations that their subscribers affirmatively select.²⁸ Although couched in terms of consumer choice, NAB observes that the proposal actually provides choice to the cable operator, which initially “negotiate[s] carriage with *what it believes* to be ‘local’ stations for its customer base.”²⁹ And, of course, cable operators would continue to select all of the dozens (if not hundreds) of non-broadcast channels that they charge subscribers for carrying. This quasi-a la carte system applicable only to broadcast stations would distort the video marketplace by competitively disadvantaging broadcasters offering the very local content that WTA purports to value and favoring non-broadcast channels that consumers would have no real option but to “choose.”³⁰

²⁷ WTA Comments at 9.

²⁸ WTA Comments at iii, 11. Obviously, WTA’s proposal raises a host of complex questions, particularly with regard to the programming and advertising marketplaces. How, for instance, would TV stations negotiate prices with their program suppliers in these markets when neither party will have the slightest idea what the audience will be? How would advertising be sold under such uncertainty? What record keeping and auditing functions would be needed to verify the number of subscribers signed up for each station at any given time?

²⁹ WTA Comments at 4 (emphasis added). WTA does not say whether a broadcast station would have any right to challenge the cable operator’s choice or if there would be any significant limits to the cable operator’s discretion.

³⁰ As NAB understands this piecemeal a la carte approach, consumers would have to affirmatively request to receive various broadcast channels, apparently at specifically identified prices, while they would not be able to request or reject individual cable channels, which would not have any specific prices attached to them. One does not need to be an economist to understand that this scheme discriminates against broadcasters, would drive down stations’ viewership and hurt their attractiveness to local advertisers, all to the advantage of local cable systems, which compete with stations for local advertising, and of cable programming channels, which compete with broadcast channels for viewers and advertising.

Like the “re-association” approach discussed above, the piecemeal a la carte proposal is not really a DMA modification proposal, but rather a proposal to fundamentally undermine the retransmission consent system. Permitting a cable operator to selectively pick multiple stations in multiple DMAs (including those affiliated with the same network) with which to negotiate retransmission consent would obviously tilt the negotiating playing field heavily in the operator’s favor.³¹ Ultimately, this approach would undermine the economic support for broadcast programming, including local news production. Indeed, a recent study found that, “in the absence of retransmission consent compensation broadcasters would have . . . to reduce the amount they spend producing content by more than a third.”³² In particular, retransmission consent compensation has “resulted in a significant increase in spending on (and number of hours of) news and other public interest programming.”³³ WTA’s proposal would harm, not foster, the local service that broadcast stations provide to viewers in communities of all sizes, especially (and ironically) in smaller markets.³⁴

³¹ A broadcast station would be extremely cautious about negotiating with a cable operator in its market, including with regard to levels and type of compensation, if that operator could unilaterally determine that one or more additional stations from other DMAs would serve the “local” interests of any of its customers and import these distant stations into the local market, in contravention of the local station’s program exclusivity rights.

³² J.A. Eisenach, Ph.D., *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, NERA Economic Consulting, at 28 (July 2014) (finding that in 2013, the retransmission consent revenues TV stations received “accounted for 34 percent of their spending on programming”).

³³ *Id.* at ii; see also *id.* at 29-30.

³⁴ As NAB has documented, TV stations in small markets have a very limited pool of advertising dollars available to them, and the profit margins of even network affiliated stations in these markets are often razor thin (e.g., below six percent in DMAs 176-210, according to NAB’s 2014 Television Financial Survey). They are consequently less able to afford the types of local news and informational programming that the FCC and Congress value. See NAB Comments at 27; 29. Increasing cable operators’ bargaining power in retransmission negotiations would further reduce the already limited resources available to struggling small market TV stations, to the ultimate detriment of their viewers.

Finally, WTA's quasi-a la carte proposal flies in the face of Congress' intent in adopting its "if local, no distant" policy under which, if a DBS subscriber resides in a market with local-into-local satellite service, then the subscriber is not eligible to receive distant signals.³⁵ Congress' clear intent and preference under this policy is for subscribers to view their local network affiliates, and not to have MVPDs, as WTA proposes, provide both the local and a distant affiliate of the same network so that the MVPD can play the two stations off against each other. The Commission should not endorse a proposal directly contrary to expressed congressional intent.

III. CONCLUSION

In short, the record here presents no technologically, economically or practically feasible alternatives to the use of DMAs for defining television markets. The only commenter supporting specific alterations to the DMA system consistently downplayed existing targeted mechanisms for increasing viewers' access to in-state broadcast programming, instead offering highly complex and impracticable proposals that would seriously disrupt the structure of TV markets and the advertising marketplace.³⁶

³⁵ See 47 U.S.C. § 339(a)(2); 17 U.S.C. § 119(a)(3). The Senate Commerce Committee's Report on STELAR expressly discussed Congress' adoption of this "if local, no distant" rule. S. Rep. No. 113-222, at 4 (2014).

³⁶ Public television entities expressed concern in this proceeding about cases where DBS subscribers are unable to view signals of their in-state public television networks. See Comments of Association of Public Television Stations and the Organization of State Broadcasting Executives, MB Docket 15-43 (May 11, 2015). A change in the law in 2010 enabled DBS providers to carry on a permissive basis noncommercial educational station signals that are part of a statewide public TV network system, but these public television commenters' expectations that DBS providers would voluntarily carry state public TV network signals have not been met. The issue here is not the DMA system, but the reason that DBS providers are either unwilling or unable to carry those signals. See DIRECTV Comments at 3 (asserting that it cannot carry statewide networks of public TV stations due to its inability to reconfigure its satellites and its lack of additional capacity on its spot beams).

Moreover, as NAB previously explained, the challenges broadcast TV stations face in providing local service in rural markets stem from the basic economics of television broadcasting in areas with limited populations. To promote broadcast service in smaller markets and rural areas, the Commission, among other actions, should adopt rational ownership and other rules that recognize the special challenges faced by TV station in small markets.³⁷ It should also decline to endorse proposals for altering the DMA system that would harm the ability of broadcast TV stations to offer locally relevant programming. Such action would be contrary to Congress' directive in STELAR to foster localism, including in rural areas.

Respectfully submitted,

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June 11, 2015

³⁷ See NAB Comments at 26-32.