



Before the
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559

In the Matter of)
)
Retransmission of Digital Broadcast Signals) Docket No. 2005-5
Pursuant to the Cable Statutory License)
)

**REPLY COMMENTS
OF THE
ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES,
THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION,
AND THE
RURAL INDEPENDENT COMPETITIVE ALLIANCE**

I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO),¹ the National Telecommunications Cooperative Association (NTCA),² and the Rural Independent Competitive Alliance (RICA)³ (collectively the Associations) hereby submit these reply comments in response to the Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.⁴

¹ OPASTCO is a national trade association representing over 600 small incumbent local exchange carriers serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 5.5 million customers. Almost all of OPASTCO's members are rural telephone companies as defined in 47 U.S.C. § 153(37).

² NTCA represents more than 570 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service incumbent local exchange carriers and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Telecommunications Act of 1996.

³ RICA is a national association of competitive carriers that are affiliated with rural incumbent local exchange carriers. RICA members provide facilities-based telecommunications and video services in rural areas over modern facilities to residential and business subscribers in underserved rural areas.

⁴ *Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License*, Docket No. 2005-5, Notice of Proposed Rulemaking, 73 Federal Reg. 31399 (2008).

Video services are an increasingly important part of rural local exchange carriers' (LECs') service offerings. Roughly half of the Associations' members serve as Multichannel Video Programming Distributors (MVPDs) in small markets using a variety of delivery mediums, including digital subscriber line (DSL) and fiber-to-the-home technologies which are also used to provide high-speed data services. Thus, video services offered by rural LECs play an important role in spurring additional broadband investment in rural areas, in addition to bringing greater choice to video consumers.

The small providers represented by the Associations operate in markets that are difficult to serve due to their sparse populations, relative isolation, difficult terrain, and other factors. Rural LECs that operate as MVPDs, or are actively considering doing so, are predominately located in areas outside of top Designated Market Areas (DMAs). Many rural LEC customers are beyond the effective broadcast ranges of the broadcast station signals within their respective DMAs, making the availability of viable MVPD services all the more imperative.

The NPRM sought comment on a tentative conclusion that would require MVPDs to pay a 3.75 percent penalty for most out of market multicast broadcast streams. The Associations oppose this unjustified penalty because it would impede rural LECs' entry into the MVPD market, which provides consumers with critical access to video content while encouraging investment in broadband infrastructure. The Associations also urge the Copyright Office (Office) to continue using Grade B contours to determine the local service areas of digital signals.

II. THE IMPOSITION OF A 3.75 PERCENT PENALTY FOR DISTANT SIGNALS ON SMALL MVPDS IS NOT REQUIRED OR JUSTIFIED, AND WOULD IMPEDE OTHER CONGRESSIONAL GOALS

The NPRM contemplated treating all distant multicast streams above the market quota limitations established by the Federal Communications Commission (FCC) as separate distant signal equivalents (DSEs).⁵ The NPRM sought comment on its proposal to subject each of these DSEs to a 3.75 percent penalty payment.⁶ The Associations urge the Copyright Office to not impose this penalty on small MVPDs serving rural areas.

The NPRM recognized that applicable law “does not require additional compensation” for multicast signals.⁷ As the Office noted, the law was adopted at a time when multicasting was not available or considered.⁸ Since additional compensation for copyright holders is not required by law, the next logical question to address is whether additional compensation is justified. However, the NPRM simply asserted, without support, that the most reasonable interpretation “is one that best compensates copyright holders.”⁹ After acknowledging that the law is silent in this case, the NPRM did not explain why providing copyright holders with the best compensation trumps other considerations. Additional factors demonstrate why the penalty should not be imposed on small MVPDs serving rural markets.

As the National Cable and Telecommunications Association aptly noted, the Office should not regard the maximization of payments to copyright holders to be its

⁵ NPRM, pp. 31408–31409.

⁶ *Ibid.*

⁷ NPRM, p. 31408.

⁸ NPRM, p. 31405.

⁹ *Id.*

paramount concern; rather, a balance of interests should be considered.¹⁰ While copyright holders should receive just compensation for the use of their materials, the Supreme Court has established that the ability of consumers to “benefit by the wider dissemination of works carried on television broadcast signals” is of equal importance.¹¹

Ever-increasing programming costs are having a chilling effect on the ability of LECs to enter the video market. A press report from earlier this year describes how factors such as increasingly burdensome programming costs are even leading some existing small cable companies to contemplate selling or simply shutting down operations.¹² Other small MVPDs are considering eliminating video services from their service offerings, focusing on the provision of alternative services.¹³ Highlighting the situation of consumers located furthest from large DMAs, the FCC has recognized that “in some areas, due to poor over-the-air reception, loss of a small cable system could mean loss of any access to some or all broadcast signals as well.”¹⁴

Another important factor to consider is how the penalty would impede broadband deployment in rural areas. The FCC has recognized that there is an intrinsic link between video and broadband deployment.¹⁵ Indeed, LECs of all sizes have found that when video services are offered along with broadband Internet services, consumers subscribe to

¹⁰ Comments of the National Cable & Telecommunications Association, pp. 4-5 (fil. Jul. 31, 2008) (NCTA).

¹¹ *Id.* (citation omitted).

¹² Linda Moss, “No Country for Old Systems: There Is No Clear Getaway for Small Cable Operators,” *Multichannel News* (Feb. 23, 2008), <http://www.multichannel.com/article/CA6534824.html>.

¹³ *Id.*

¹⁴ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket 98-120, Fourth Report and Order, FCC 08-193 (rel. Sept. 4, 2008), ¶7.

¹⁵ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶62 (2007).

more of each. This makes it more economically feasible to invest in the infrastructure necessary to deploy video and broadband services of higher quality, and to more consumers. Therefore, additional impediments to the provision of MVPD services also demonstrably impede additional broadband investment and deployment.

Furthermore, ubiquitous broadband availability is a national goal established by Congress.¹⁶ Were the Office to impose the 3.75 percent penalty, rural MVPDs' efforts to remain viable and deploy broadband to additional consumer would be impeded.¹⁷ The Congressional goal of widespread broadband availability should not be diminished in favor of maximizing payments to copyright holders through regulation.

The NPRM's proposal to impose the 3.75 percent penalty would further imperil the viability of small MVPDs serving sparsely populated markets. It would erect an additional, unnecessary regulatory barrier to rural LECs' efforts to deploy video services as well as continued investment in broadband infrastructure. Therefore, the 3.75 percent penalty should not be imposed on small MVPDs.

¹⁶ See the Telecommunications Act of 1996, 47 U.S.C. § 254(b)(2), which declares that access to "advanced telecommunications and information services should be provided in all regions of the Nation;" 47 U.S.C. § 254(b)(3), which declares that consumers in rural areas should have access to comparable advanced telecommunications and information services as those in urban areas; and 47 U.S.C. § 706, which encourages the removal of barriers to investment in advanced telecommunications infrastructure. The Office should not impose new barriers to advanced service investment and deployment, when Congress has expressed its desire for such barriers to be removed.

¹⁷ As it stands, rural LECs face higher operating costs due to sparse populations and a lack of economies of scale, among other factors. In order to cover basic equipment costs, it is not uncommon for several rural LECs to band together to spread the costs of a head-end or transport networks. Even then, video is often a break-even proposition at best for rural LECs. Yet many rural LECs find that bundling broadband with video is the most efficient way to serve their communities, if they can overcome these significant challenges.

III. THE OFFICE SHOULD CONTINUE TO USE GRADE B CONTOURS TO DETERMINE THE LOCAL SERVICE AREAS OF DIGITAL SIGNALS

The NPRM contemplated eliminating the existing Grade B contour criteria used to determine a broadcast station's local television market.¹⁸ Yet as NCTA noted, this rule change would alter the status of signals that are now classified as "local" or "permitted" into "distant" or "non-permitted" signals.¹⁹ NCTA correctly warned that this change would result in significantly higher copyright payments that would disrupt channel line-ups and consumer expectations.²⁰ As illustrated above, it would also serve to impede LEC entry into the MVPD market while reducing incentives to invest in broadband infrastructure. In order to avoid these unnecessary harms to consumers and to Congress's goals of additional competition in the video market and the further deployment of broadband, the Office should continue to use Grade B contours to determine the local service areas of digital signals.

IV. THE NPRM'S REGULATORY FLEXIBILITY ACT STATEMENT IS INCORRECT

Although not required to consider comments in accordance with the Regulatory Flexibility Act (RFA), the NPRM offered interested parties the opportunity to file comments demonstrating that the proposed rule changes could result in substantive burdens to smaller businesses.²¹ As part of its analysis, the NPRM pointed out that the Register of Copyrights determined that the proposed amendments would not have a significant economic impact on a substantial number of small businesses because the

¹⁸ NPRM, p. 31408.

¹⁹ NCTA, p. 9.

²⁰ *Id.* NCTA also addressed the NPRM's statutory concerns at pp. 10 – 11.

²¹ NPRM, p. 31415.

NPRM clarifies the application of existing law to changes in the cable industry.²² This analysis is in error.

The Regulatory Flexibility Act defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²⁴ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²⁵ The SBA has developed a small business size standard for Cable and Other Program Distribution, which is all such firms having \$13.5 million or less in annual receipts.²⁶ The vast majority of the Associations’ members are “small businesses” under this definition.

The NPRM’s proposed “clarification” is, in effect, a substantial change to the current rules. The proposal is an attempt to modify rules in reaction to technological advances not anticipated at the time of adoption. It is illogical to assert that rules can be clarified in a manner that creates obligations that come from no plausible reading of current language. This clarification will result in affected MVPDs paying tens of thousands more in copyright royalties than they do today. The profitability of many

²² *Id.*

²³ 5 U.S.C. § 601(6).

²⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²⁵ 15 U.S.C. § 632.

²⁶ 13 C.F.R. § 121.201 (2002 NAICS code 517510).

small video operators is marginal at best, and they could not have anticipated the proposed substantial fee hikes. The increased royalty payments could force operators out of business or, at the very least, divert precious resources away from further broadband deployment.²⁷ The proposal's economic impact would be substantial.

Having established that a rule change that would cause substantial economic impact on small businesses is under consideration, the Copyright Office must consider certain steps to lessen the burden of the rules on small entities, if it is to comply with the RFA.²⁸

The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁹

The Associations propose that given the totality of circumstances, if the proposed rule changes are adopted, small MVPDs should be exempt from complying. The balancing of interests as described above dictates this result. The penalty as proposed is substantial and will negatively impact small cable operators' ability to stay in business or

²⁷ Further, programmers typically require cable operators to carry and pay for multiple channels in order to have access to the primary channel. The proposed rule change will penalize MVPDs for carrying channels they may not desire in an environment with an already risky business case.

²⁸ The Copyright Office invitation for comment on the RFA indicates that such comments will be considered and addressed (NPRM, p. 31415).

²⁹ 5 U.S.C. § 603(c).

advance broadband deployment plans. Unless or until Congress makes it clear that additional royalty payments should be required under the rules, the changes should not apply to the Associations' members. The potential harm to small businesses is far too great for the Copyright Office to adopt new rules and impose substantial new fees in an effort to address technological advances.

IV. CONCLUSION

There is no justification to impose a 3.75 percent penalty for distant multicast signals on small MVPDs. This penalty would damage the ability of rural LECs to serve as MVPDs to consumers in sparsely populated markets, and would impede the deployment of broadband infrastructure, contrary to Congressional goals. Contrary to the NPRM's Regulatory Flexibility Act statement, the penalty would disproportionately impact the small MVPDs serving customers in the most remote markets. For the same reasons, Grade B contours should continue to be used to determine the local service areas of digital signals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen Pastorkovich, hereby certify that a copy of the comments by the Organization for the Promotion and Advancement of Small Telecommunications Companies, the National Telecommunications Cooperative Association, and the Rural Independent Competitive Alliance was sent by first class United States mail, postage prepaid, or via electronic mail, on this, the 16th day of September, 2008, to those listed on the attached sheet.

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