Before the
LOCAL Television Loan Guarantee Board
Washington, D.C. 20250

In the Matter of	)	
	)	
LOCAL Television Loan	)	RIN 0572-AB82
Guarantee Program	)	

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits its comments on the LOCAL Television Loan Guarantee Board's (the "Board") proposed regulations implementing the LOCAL Television Loan Guarantee Program ("LOCAL TV Program").[1] NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television operators serving more than 90 percent of the nation's cable television households, including many operators that serve rural and small communities throughout the nation. NCTA also represents cable programmers, equipment suppliers, and others affiliated with the cable industry.

NCTA previously filed comments in response to Notices issued by the Rural Utilities Service ("RUS") regarding the LOCAL TV Program. In those comments, NCTA emphasized the fact that, in establishing the LOCAL TV Program, Congress expressly adopted a policy of technological neutrality to ensure that all potential providers of local broadcast signals, including cable operators, are eligible to participate in the loan guarantee program.

DISCUSSION

The "Launching Our Communities' Access to Local Television Act of 2000" (the "Act")

[1] 68 Fed. Reg. 48814 (Aug. 15, 2003).

was designed to facilitate access, on a technologically neutral basis, to signals of local television stations for households located in "nonserved" and "underserved" areas. The Act sets forth a variety of different considerations for the Board to use in assessing and funding proposed projects. Among other things, the Act incorporates priorities to ensure that government funding is directed first to projects that serve areas that are most in need – the "nonserved" areas that have no local television signals available either over-the-air or from a multichannel video programming distributor ("MVPD") and then "underserved" areas with only limited access to local TV service via over-the-air reception or from an MVPD.[2]

Aspects of a proposed project that do not serve the Act's purposes are not to be funded by the program. Thus, to the extent that a project plans to serve households beyond those in nonserved and underserved areas, or to provide service in addition to local television service, Congress ensured that the guarantees would be apportioned to exclude uses not covered by the LOCAL TV Program.[3] Furthermore, the Act established as a prerequisite to approval of any loan guarantee that the proposed project "is not likely to have a substantial adverse impact on competition that outweighs the benefits of improving access to the signal of a local television station in a nonserved area or underserved area…."[4]

As described below, certain aspects of the proposed rules should be clarified and strengthened to ensure that implementation of the loan guarantees tracks the Act's core purposes.

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[2] 47 U.S.C. § 1004 (e) (1)(A) ("To the maximum extent practicable, the Board shall give priority in the approval of loan guarantees under this Act in the following order: (i), First, to projects that will serve households in nonserved areas…. (ii) Second, to projects that will serve households in underserved areas").

[3] Id., subsection (f)(2) ("if only a portion of a loan meets the requirements of [subsection (d)(2)(A)], the Board shall determine that percentage of the loan meeting such requirements (the "applicable portion") and may issue a loan guarantee in an amount not exceeding 80 percent of the applicable portion").

[4] Id., subsection (d)(2)(c).

In addition, the Board should modify its definitions of "nonserved" and "underserved" areas to take into account communications laws and policies.

1. The Application Process Should Be Modified

The proposed regulations establish criteria that the Board will use to evaluate the relative merits of each application and sets out information that each application should include. These regulations should be modified to ensure that the loan program works as the Act envisions.

First, the loan guarantee program cannot be used to fund projects that propose service to areas that are already served by more than one commercial, for-profit MVPD offering local broadcast signals.[5] Moreover, priority must be given to projects that intend to serve "nonserved areas" – which, by definition, cannot include areas where a cable operator or other MVPD already offers such service.

As proposed, there is no express requirement that applications reveal the extent of MVPD activity in the area intended to be served.[6] Section 2201.11 of the rules should be modified to require applicants to explicitly include this information so that the Board can make this threshold determination.

To protect against potential abuse of the program, applicants should be required to certify that they have researched the question of MVPD availability and list those multichannel providers in their proposed service area and whether they provide access to local television broadcast signals. They should further certify if, upon due inquiry, they have located no multichannel provider in the area providing local television broadcast signals. Absent this

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[5] 47 U.S.C. § 1010 (3)(definition of "underserved area").

[6] Nor does there appear to be any express obligation for applicants to provide the Grade A or Grade B coverage information necessary to show whether the areas proposed to be covered by the project fall inside or outside those contours. Presumably, this would require applicants to submit coverage maps for the DMA proposed to be served.

applicant-conducted research, the rules contain no mechanism for ensuring that funds are directed only to areas Congress intended to reach.

This information will also be necessary to assess the effect on competition of the proposed loan guarantee. The proposed rules track the statutory requirement that the Board consult with NTIA to determine that the project "is not likely to have a substantial adverse impact on competition that outweighs the benefits of improving access to Local Television Broadcast Signals in a Nonserved Area or Underserved Area…." But the regulations do not lay out how that determination will be made. Congress did not intend through its loan guarantee program to jeopardize businesses that already provide these services.

In short, the application process should be clarified and strengthened at the outset to ensure that the Board has all the information necessary to determine whether the Act's purposes will be served. Furthermore, a public notice process should be put in place so that affected participants in the designated market area ("DMA") are aware that the application has been filed.[7]

Second, the regulations do not specify how loan applications that include both permitted and non-permitted purposes will be evaluated. Specifically, the proposed regulations leave to the Board's determination how to apportion loans when only part of the loan proceeds will be used for authorized projects.[8] But it is important to establish parameters to guide these determinations to provide applicants with an understanding regarding the amount of support they can expect to receive.

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[7] For example, the RUS could post notice of applications on its Local TV Act website.

[8] Proposed section 2201.10(b)(2).

Third, the regulations suggest that there might be multiple application windows, each of 120 days' duration, in which to submit applications.[9] It is not clear how the priority to serve nonserved areas can be maintained, given the fixed amount of the loan guarantee program, in the event that multiple application rounds are permitted. For example, how will the Board prioritize extending the loan guarantees in the event that no qualifying applications to provide service to nonserved households are received during the initial window? The Board should establish regulations that will maintain this priority and avoid a situation where the lion's share of the loan guarantee funds is directed to projects that are not the funds' priority, only to freeze out opportunities to provide service to nonserved areas that might be proposed in later application rounds.

2. The Definition of "Local Television Broadcast Signals" Should Take into Account Communications Law and Policy

The Act defines a "nonserved area" to mean any area that is outside the grade B contour of "the local television broadcast signals serving a particular designated market area and does not have access to such signals by any commercial, for profit, multichannel video provider."[10] An "underserved area" is outside of the grade A contour of "local television broadcast signals serving a particular designated market area and has access to local television signals from not more than one commercial, for-profit multichannel video provider."[11] The Board proposes to adopt rules implementing these definitions. However, NCTA submits that the proposed rules do not fully take into account communications law and policy and may have the effect of giving

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[9] Proposed section 2201.17(b) ("Application deadline. One or more application windows will be announced. The duration of each application window for submission of applications will be approximately 120 days. Notice of an application window will be published in the Federal Register.")

[10] 47 U.S.C. § 1010(2)(A) and (B).

[11] Id. § 1010 (3)(A) and (B).

projects designed to serve areas with substantial over-the-air access to local television programming equal priority with projects designed to serve areas that are more truly "underserved."

First, noting that the term "local television broadcast signals" is not defined in the Act, the Board proposes to incorporate a definition based on the availability of television signals affiliated with ABC, NBC, CBS and FOX.[12] Although the proposed rules and the Board's explanation thereof are not completely free of ambiguity, it appears that an area could be considered to be "nonserved" or "underserved" if even a single one of the local "big four" network affiliates broadcasting in the DMA does not place a signal of the requisite strength over the area in question.

The Board's rationale for its decision to define the term "local television broadcast signals" by reference to ABC, CBS, NBC, and FOX points to the use of the plural in the Act's reference to "signals" and to the FCC's recognition of these four networks in certain of its rulings.[13] However, the legislative history of the Act indicates that Congress' concern was with areas that receive "no" local television signals.[14] And, while the Board implicitly suggests that the availability of a full complement of local stations affiliated with ABC, NBC, CBS, and FOX is "most likely to provide the local news, weather, sports and other programming of local interest that are the reason people need access to local signals,"[15] the fact is that there is no universally applicable definition of what constitutes a national broadcast network.[16]

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[12] Proposed Section 2201.1 (definition of "Local Television Broadcast Signals").

[13] 68 Fed. Reg. at 48816.

[14] S. Rep. 106-243, 106th Cong. 2d Sess. 4 (Mar. 25, 2000).

[15] Id.

[16] Compare 17 U.S.C. § 111 (f) with 17 U.S.C. § 119 (d)(2) (definitions of network station).

Moreover, under the Board's proposed rule, a project proposing to deliver local signals to an area that is outside the Grade A contour of a single local affiliate but within the Grade A contours of a multiplicity of local television stations would nonetheless be "underserved" and thus equal in priority to a project designed to bring local signals to an area that is outside the Grade A contour of any broadcast television stations (assuming that, in both instances, there was no more than one MVPD serving the area). The Act does not contemplate areas with substantial access to a variety of local broadcast signals to be considered underserved.

Second, apart from any revisions to the over-the-air reception prong of the definitions of "underserved" and "nonserved" areas, the Board should give further consideration to the MVPD element of these terms. In virtually all cases where local stations are available, cable systems will carry them. But there are exceptional cases where, in accordance with communications law and policy, cable operators do not carry a full complement of what might otherwise be considered local stations.

As background, cable operators carry local commercial broadcast stations either pursuant to the so-called "must carry" rules[17] or "retransmission consent."[18] Commercial broadcast stations may elect cable carriage pursuant to one statutory right or the other. If they choose must carry, the Communications Act establishes the station's carriage rights. If the station chooses retransmission consent, the cable operator and the broadcast station must negotiate over the terms and conditions of carriage.

Non-carriage of a station within its DMA can occur in a few circumstances where a station opts for must carry. For example, non-carriage might be the result of the failure of a

[17] 47 U.S.C. §§ 614 and 615.

[18] 47 U.S.C. § 325.

broadcaster to deliver a good quality signal to the headend of the cable operator located in its market.[19] Non-carriage might also occur where the FCC has modified a television station's market for purposes of the mandatory carriage rules.[20] Congress and the FCC determined that while a cable system might serve a community that technically is located in a station's DMA, the particular television station may not in fact provide coverage, including local news or weather information, to the cable community. In such cases, Congress authorized the FCC to "modify the market," allowing the cable operator not to carry that television signal. Finally, cable operators with limited channel capacity might not be required to carry all local television stations where doing so would occupy more than a third of the system's channel capacity.[21] In all these situations under the must carry law, Congress carved out exceptions from the general rule that cable systems must provide their customers with all local commercial television stations in the DMA choosing "must carry."

Non-carriage of a particular local commercial broadcast station might also happen if a broadcaster chooses carriage pursuant to retransmission consent. A local television station and cable operator might not be able to reach agreement for marketplace carriage arrangements. The operator therefore might not have permission to carry the station and could not carry the local network affiliate.

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[19] See 47 U.S.C. § 614(h)(1)(B)(iii) (excluding from definition of local commercial television stations entitled to mandatory cable carriage those stations that fail to deliver to the cable headend a signal with the requisite signal strength.)

[20] See id. at (h)(c)(factors to be used to consider requests for modifying a station's market).

[21] Id., § 614(b)(1)(B)("a cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system").

In sum, there are a variety of situations that are contemplated by communications law and policy where a cable operator might not be carrying all local broadcast stations, or all four local network affiliates. Non-carriage in these instances should not trigger a finding that an area is "nonserved" or "underserved." Government funds should not be used to unfairly subsidize competition where a cable operator is carrying local broadcast stations in full compliance with its obligations under the Communications Act.

3. The Board Should Establish a Mechanism to Determine Whether Sufficient Households Have Access to Local Television Stations

Finally, the Board's authority to guarantee loans under the program expires on the earlier of the date that the Secretary of Agriculture determines that at least 75 percent of the Designated Market Areas, other than the top 40 DMAs, have access to local television broadcast signals for virtually all households or December 31, 2006.[22]

As of September 2003, EchoStar and DirecTV already provide local-into-local service in 45 markets below the top 40. DBS' local broadcast service continues to grow, and is expected to increase even by year end.[23] Cable systems offer television signals throughout all 210 DMAs in the United States. Currently, nearly 97 percent of television households have access to cable systems, which by law must carry local broadcast stations.[24]

Given the amount of existing MVPD local signal carriage, and the anticipated growth in such signal availability under the Program, it appears that this "access to local broadcast signal" threshold could be met even before the 2006 statutory cut-off date. The proposed regulations,

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[22] 68 Fed. Reg. at 48815.

[23] www.directv.com/dtvapp/LocalChannelsAction.do#soon DirecTV's website lists local stations now available and the markets in which service will be available by year-end 2003.

[24] Kagan World Media, Broadband Cable Financial Databook 2003, p. 11 (homes passed data); Nielsen Media Research (television households).

though, appear to contain no mechanism for determining whether this point has been reached, which would cause the program to terminate. The Board should adopt procedures to monitor this rapidly changing environment and to terminate the program when the statute's threshold is reached.

CONCLUSION

For the foregoing reasons, the Board should clarify its proposed rules to ensure that government funds are used in the manner intended by the Act.

Respectfully submitted,

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