

**Before the
United States Copyright Office
Washington, DC**

Retransmission of Digital Broadcast)
Signals Pursuant to the Cable) Docket No. RM 2005-5
Compulsory License)

COMMENTS OF PUBLIC TELEVISION

To ensure that cable subscribers do not lose access to the programming and services of public television stations, the Public Broadcasting Service (“PBS”)¹ and Association for Public Television Stations (“APTS”)² (collectively, “Public Television”) file these comments concerning the Copyright Office’s Notice of Proposed Rulemaking (“*NPRM*”) in the above-referenced proceeding.³ Specifically, Public Television urges that the Copyright Office continue to allow use of predicted service contours in defining the local service area of Public Television Stations. The *NPRM*’s tentative conclusion to the contrary would convert many signals that are today deemed local into “distant” signals. Such a result would frustrate the plain meaning of the Copyright Act and in some cases could lead to decreased availability of Public Television programming to cable subscribers.

¹ PBS is a media enterprise that serves 355 public noncommercial television stations and reaches nearly 73 million people each week through on-air and online content. A trusted community resource, PBS uses the power of noncommercial television, the Internet and other media to enrich the lives of all Americans through quality programs and education services.

² APTS is a non-profit organization whose membership comprises the licensees of nearly all of the nation’s CPB-qualified noncommercial educational television stations. The APTS mission is to support the continued growth and development of a strong and financially sound noncommercial television service for the American public.

³ 73 Fed. Reg. 31399 (June 2, 2008) (“*NPRM*”).

Elimination of the use of the Grade B service contour — or its counterpart in the digital-signal context, the noise limited service contour — will uniquely disadvantage Public Television Stations. In contrast to commercial broadcast stations, a cable system may always rely on a Public Television Station’s Grade B service contour in determining the station’s local service area.⁴ The *NPRM*, however, proposes to eliminate use of service contours in defining the “local service area” of a Public Television Station. Thus, as even the *NPRM* recognizes, the proposed re-definition of “local service area” is “especially critical for noncommercial television stations.”⁵

Use of a station’s service contour to define its local service area forms an important piece of the statutory structure by which the American public receives virtually universal access to the programming and services of Public Television Stations. In many cases, the Grade B service contour for a station extends for tens of miles beyond a 35-mile zone. The same is true for the noise limited service contour, which equates generally to the Grade B service contour.⁶ Thus, if the Office were to eliminate use of service contours (whether Grade B or noise-limited) in defining a station’s local service area, it would convert signals that have long been carried by cable systems as local into “distant” signals subject to payment of royalties. Of course, many cable systems today carry distant signals of Public Television Stations, and are

⁴ As the *NPRM* notes, in contrast to the rules in place for noncommercial stations, the Grade B contour may be used to determine the status of network and independent stations only in cable communities located “outside all markets.” *NPRM* at 31408, *citing* 47 C.F.R. § 76.59 (1981).

⁵ *Id.*

⁶ *See, e.g., Technical Standards for Determining Eligibility for Satellite-Based Network Signals Pursuant to SHVERA*, Notice of Inquiry, 20 FCC Rcd 9349, 9352 ¶ 6 (2005) (explaining that “[t]he Commission has established a DTV Table of Allotments, which specifies channels for use by DTV stations in individual communities, using a procedure that closely replicates the service areas of the existing Grade B contours for analog TV stations.”)

willing to pay the associated royalty fees, but the Office should not assume that the cable community in general will be able to bear such a significant and unanticipated increase in the number of distant signals. Such action would create needless uncertainty in the marketplace. In some cases, carriage of Public Television Stations could be disrupted or ended.

Any disruption or cessation in carriage of Public Television Stations would frustrate the long-standing, statutory policy of making Public Television programming and services universally accessible to the American public. For example, in the 1992 Cable Act, Congress required carriage of Public Television Stations by cable systems. The House Report to that Act explained, “As cable penetration increases, and as more American television viewers rely on cable to deliver television services, ensuring carriage of public television stations on cable systems will be critical.”⁷ More generally, Congress has established as federal policy that “it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.”⁸ The FCC has implemented this policy as well. Throughout the transition to digital television, the FCC has underscored its “commitment to noncommercial educational television service” and its intention to “provide special relief measures to assist them in the transition to DTV.”⁹ Any action by the Office that would deprive

⁷ H.R. Rep. No. 102-628, at 69 (also noting that “Congress long has advocated broad access to public television services, regardless of the technology used to deliver those services, in order to advance the compelling governmental interest in increasing the amount of educational, information and local public interest programming available to the nation’s audiences”).

⁸ 47 U.S.C. § 396(a)(9).

⁹ *Advanced Television Systems and Their Impact on the Existing Television Service*, 12 FCC Rcd 12809, 12852 ¶ 104 (1997).

any member of the public of access to Public Television Stations — particularly as a result of the transition to digital television — would flatly contradict this federal policy.

In addition to the public interest harms described above, the *NPRM*'s proposed elimination of service contours in defining a local service area would contradict the Copyright Act. Section 111(f) of the Copyright Act provides that a “local service area . . . in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being re-transmitted by a cable system pursuant to the rules, regulations, and authorization of the [FCC] in effect on April 15, 1976.”¹⁰ The creation of digital channels does not change the “area within which” a station was entitled to carriage under the must-carry rules of 1976; that area remains the area within which the station is predicted to provide service.

The *NPRM* is thus incorrect in its assertion that “there is no statutory basis” for the Office to continue to use a station’s service contour for purposes of defining a station’s local service area.¹¹ This interpretation overemphasizes the significance of the adjective “Grade B,” as used in the 1976 must-carry rules.¹² Both Grade B and noise-limited service contours are terms that *describe*, rather than *define*, the area within which the station is predicted to provide service. As the FCC has explained:

The locus of points at the outer edge of the area served by a TV station is termed the station's ‘service contour’ and corresponds to the range at which reception is noise-limited. At locations within its service contour, a station's signal is generally assumed to be receivable. TV service contours are defined on the basis of field strengths. For analog TV stations, service areas are based on the

¹⁰ 17 U.S.C. § 111(f).

¹¹ *NPRM* at 31408.

¹² For noncommercial stations, those 1976 rules granted must-carry rights to noncommercial stations “within whose Grade B contours the community of [a] cable system is located, in whole or in part.” 47 C.F.R. § 76.59 (1976).

‘Grade B’ contour . . . [and] for DTV stations service areas are based on the noise-limited contour.¹³

Thus, it is the operating parameters established by the FCC for each station which ultimately define the scope of the station’s service contour. In establishing those operating parameters for each television station’s digital channel, the FCC made clear that it sought to achieve a “replication goal” whereby “each DTV channel allotment was chosen to best allow its DTV service to match the Grade B service of the [analog] station with which it was paired.”¹⁴ While a digital channel’s service contour is not described with reference to a “Grade B” signal, the concept is the same: when operating according to certain parameters set by the FCC, a broadcast television station will be predicted to provide service at a certain level along a certain area. As articulated in Section 111(f), that area remains the area within which a station could demand must-carry status under the rules in effect on April 15, 1976.

¹³ *Initial Evaluation of the Performance of Prototype TV-Band White Space Devices*, OET Report, FCC/OET 07-TR-1006 (July 31, 2007).

¹⁴ *Review of Commission’s Rules and Policies Affecting Conversion to Digital Television*, 15 FCC Rcd. 5257, 5263 ¶ 16 (2000).

CONCLUSION

The *NPRM*'s proposed elimination of service contours in defining a station's local service area would convert signals that Congress intended to be deemed local into "distant" signals subject to royalty payments. In some cases, this change in status could deprive cable subscribers of access to Public Television signals. Accordingly, PBS and APTS urge the Office to reverse the *NPRM*'s tentative finding and clarify that cable systems may continue to rely on a Public Television Station's service contour in defining its local service area.

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