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VIA ECFS

William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: *Ex Parte* Communication of the American Cable Association; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71.

Dear Mr. Lake:

Last month, Chairman Wheeler announced that he intends to put forth a proposed order repealing what he characterized as the “outdated” syndicated exclusivity and network non-duplication (“broadcast exclusivity”) rules.¹ In response, various broadcast interests have mounted an opposition campaign based on, among other things, the proposition that the Commission lacks the authority to take such action. The linchpin of the broadcasters’ argument, as exemplified in an article written by broadcast industry veteran Preston Padden (and echoed in various *ex parte* filings submitted by other broadcast interests), is that the cable compulsory copyright license and the broadcast exclusivity rules go together like “ham and eggs” and that it would be “unthinkable” for the Commission to repeal the broadcast exclusivity rules so long as the compulsory license remains in effect.²

¹ Official FCC Blog, FCC Chairman Tom Wheeler, *Upgrading Media Rules to Better Serve Consumers in Today's Video Marketplace* (Aug. 12, 2014), <https://www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace>.

² Preston Padden, *Past time to repeal cable/satellite copyright subsidy*, The Hill, Aug. 24, 2015, available at <http://thehill.com/blogs/congress-blog/technology/251613-past-time-to-repeal-cable-satellite-copyright-subsidy>. Mr. Padden subsequently filed “informal comments” reiterating his claim that it is “unthinkable” for the Commission to repeal the program exclusivity rules while the compulsory license remains in effect. Letter from Preston Padden to Marlene Dortch, Secretary, FCC, MB Docket No. 10-71 (Sept. 8, 2015). *See also* Letter from Anne Lucey, CBS Corporation, to Marlene Dortch, Secretary, FCC, MB Docket No. 10-71 (Sept. 2, 2015); Letter from David Donovan, New York State Broadcasters Assoc., Inc., to Marlene Dortch, Secretary, FCC, MB Docket Nos. 10-71, 14-29, 12-268 (Sept. 1, 2015), Letter from Wade Hargrove, NBC Television Associates, to Marlene Dortch, Secretary, FCC, MB Docket No. 10-71 (Aug. 25, 2015).

Undoubtedly, there is significant interplay between the compulsory license and the various statutory provisions and Commission rules governing cable's carriage of broadcast signal. For example, the amount of royalty fees that a cable system owes under the compulsory license is affected by whether, under various Commission rules, the signals carried by the system are "local" or "distant." However, for the reasons stated below it also is clear that the broadcasters' claim that the Commission "cannot eliminate the exclusivity rules without also eliminating the compulsory license"³ is flatly contradicted by the historical record. The Commission has both the authority and the duty to revisit the broadcast exclusivity rules in light of changes in the video marketplace and to make such changes in those rules as are necessary to ensure that the public interest is being served.

First, it is in no way "unthinkable" for the Commission to repeal (or otherwise modify) the broadcast exclusivity rules absent the repeal of the compulsory license. As the broadcasters must know, the Commission already has done so once before. In 1980, the Commission repealed the syndicated exclusivity rules.⁴ The broadcasters argued then, as they do now, that the compulsory license was premised on maintaining the Commission's framework for regulating cable's carriage of broadcast signals, including the broadcast exclusivity rules, and that the legislative scheme would not tolerate the repeal of those rules.⁵ The Commission and the U.S. Court of Appeals for the Second Circuit rejected this argument, citing provisions of the Copyright Act that expressly empowered the Copyright Royalty Tribunal to make adjustments to the compulsory license royalty rates in the event the Commission changed certain of its rules, including the syndicated exclusivity rules.⁶ As the court stated, "[t]hough Congress was aware

³ Letter from David Donovan, *supra*, at 4.

⁴ *Cable Television Syndicated Exclusivity Rules*, Report and Order, 79 FCC 2d 663 (1980). In 1988, the Commission reinstated syndicated exclusivity rules. *Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries*, Report and Order, 3 FCC Rcd 5299 (1988). That decision was based on the Commission's policy judgment that the rules benefitted competition, not that the Commission had lacked the authority to repeal them in 1980. In light of the radical changes that have occurred in the video marketplace in the ensuing twenty-seven years, the Commission has an obligation to review its past policy judgments regarding the broadcast exclusivity rules and change them to the extent necessary to ensure the public interest is being served. *See also* Exec. Order No. 13,579, § 2, 76 Fed. Reg. 41,587 (July 14, 2011) ("To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.").

⁵ *See Malrite T.V. of New York v. FCC*, 652 F. 2d 1140, 1147 (2d Cir.), *cert. denied*, 454 U.S. 1143 (1982).

⁶ *Malrite T.V. of New York v. FCC*, *supra* 652 F. 2d at 1147-48. *See also Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries*, *supra*, 3 FCC Rcd at 5321 ("The Copyright Act thus did not supplant FCC authority over program exclusivity provisions; rather, it accommodated our authority within the statutory scheme of the Copyright Act....Congress recognized, however, that communications policy makers have a legitimate interest in program exclusivity arrangements. Therefore, it expressly permitted modifications to the compulsory license scheme through amendments to the FCC's program rules"). In accordance with the statutory scheme, the Copyright Royalty Tribunal responded to the 1980 repeal of the syndicated exclusivity rules by imposing on cable operators a "syndicated exclusivity" surcharge. *Adjustment of Royalty Rate for Cable Systems; Federal Communication Commission's Deregulation of the Cable Industry*, 47 Fed.Reg. 52,146 (1982). Moreover, because the version of the syndicated exclusivity rules adopted by the Commission in 1988 differed in some respects from the version repealed in 1980, there are still instances in which a cable operator may be required to pay the syndicated exclusivity surcharge. *Adjustment of the Syndicated Exclusivity Surcharge*, 55 Fed. Reg. 49,999 (1990).

of the underlying regulations restricting cable transmissions when it adopted the compulsory licensing system, it also recognized the legitimacy within the statutory plan of FCC modifications of that regulatory structure.”⁷ Simply put, the suggestion that the Copyright Act created a mandate for the retention of the program exclusivity rules is groundless.

Second, in his article, Mr. Padden places great emphasis on the November 1971 “Consensus Agreement” and on the preservation of the “carefully balanced” regulatory scheme contemplated by that agreement.⁸ The “Consensus Agreement” was a White House-brokered compromise between broadcasters, cable operators, and program producers that was intended to facilitate the enactment of copyright legislation that would, for the first time, impose liability on cable operators for retransmitting broadcast signals.⁹ The broadcasters’ sudden and recent demands for fealty to that four-decade old agreement are disingenuous to say the least. The ink on the Consensus Agreement was barely dry when the broadcasters began proposing and/or supporting the imposition of additional limitations on cable’s carriage of broadcast signals that went well beyond those contemplated by the Consensus Agreement.

The most significant of these additional limitations is, of course, retransmission consent. While proposals for the establishment of a retransmission consent regime were on the table in the years leading up to the consensus agreement, no such requirement ended up as part of the “carefully balanced” regulatory plan agreed to in 1971. But that did not stop the broadcasters from continuing their efforts to change the law. For example, in the late 1970s, broadcasters supported proposals for the adoption of rules that would have layered a retransmission consent requirement on top of the compulsory license. Although the Commission rejected that proposal,¹⁰ failure did not stop the broadcasters, who finally convinced Congress to give them retransmission consent rights in 1992.¹¹

It is beyond question that the enactment of the retransmission consent regime was inconsistent with the compromises struck in the 1971 Consensus Agreement. Indeed, as far back as the mid-1960s, some broadcasters acknowledged that if cable operators had to obtain retransmission consent, there would be no need for broadcast exclusivity rules.¹² Moreover, in

⁷ *Malrite T.V. of New York v. FCC*, *supra* 652 F. 2d at 1147-48.

⁸ Preston Padden, *The Hill*, *supra*.

⁹ The Commission attached the “Consensus Agreement” as an appendix to its 1972 order adopting, *inter alia*, rules governing cable’s carriage of broadcast signals. *Cable Television Report and Order*, 36 FCC 2d 143, 284-286 (1972). The key elements of the Consensus Agreement included the adoption by the FCC of limits on the number of distant signals that a cable system could carry, revisions to the Commission’s existing broadcast exclusivity rules, and the enactment by Congress of a compulsory copyright license for local and distant signals. *Id.*

¹⁰ See *Cable Television Syndicated Exclusivity Rules*, *supra*, 79 FCC 2d at 769-813.

¹¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1482-83 (1992).

¹² It should be noted that the broadcast exclusivity rules did not originate with the Consensus Agreement as Mr. Padden and some broadcasters seem to suggest. The Commission first adopted broadcast exclusivity rules in 1965. *Amendment of Subpart L, Part 91, to adopt rules and regulations to govern the grant of authorizations in the Business Radio Service for microwave stations to relay television signals to community antenna systems, et al.*, First Report and Order, 4 RR2d 1725 (1965). At the time, even some broadcasters admitted that the adoption of a retransmission consent requirement giving stations retransmission consent rights would “obviate the need for [non-duplication] regulations.” *Amendment of Subpart L, Part 91, to adopt rules and regulations to govern the grant of*

affirming the Commission's decision not to adopt retransmission consent in 1980, the Second Circuit found that "retransmission consents would undermine compulsory licensing because they would function no differently from full copyright liability."¹³

The adoption of the retransmission consent regime is just one example of the additional limitations on cable's carriage of broadcast signals that the broadcasters have proposed and/or supported since 1971. In the early 1970s, the broadcasters supported the adoption of sports blackout rules, even though those rules represented a new limitation on the retransmission of broadcast signals that was not mentioned in the Consensus Agreement.¹⁴ And although the Consensus Agreement specified that network non-duplication protection would apply only on a "simultaneous" basis, the broadcasters were front and center in pushing the Commission to expand the duration of non-duplication protection in 1988.¹⁵

Finally, as indicated above, no one disputes that there is interplay between the compulsory copyright license and the federal regulatory regime governing cable's carriage of broadcast signals. Indeed, the American Cable Association ("ACA"), as part of the Rural MVPD Group, has pointed to that interplay in opposing proposals to repeal the compulsory license without simultaneously considering revisions to the totality of this regulatory structure.¹⁶ But there is no inconsistency in ACA's support of the compulsory license and its defense of the Commission's authority to repeal or modify the broadcast exclusivity rules.¹⁷ ACA's position is premised on the fact that proposals to repeal the compulsory license would subject cable to full copyright liability while simultaneously imposing on the industry existing duplicative copyright

authorizations in the Business Radio Service for microwave stations to relay television signals to community antenna systems, et al., Second Report and Order, 6 RR2d 1717, ¶ 32 (1966). See also Joint Comments of Mediacom Communications Corp. et al., MB Docket No. 10-71 (filed June 26, 2014).

¹³ *Malrite T.V. of New York v. FCC*, *supra* 652 F. 2d at 1148. See also *Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries, supra*, 3 FCC Rcd at 5321 ("the Copyright Act forecloses only FCC rules, like retransmission consent proposals, that fundamentally change the compulsory license scheme").

¹⁴ *Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs on Cable Television Systems*, Report and Order, 54 FCC 2d 265 (1975).

¹⁵ *Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries, supra*, 3 FCC Rcd at 5319. Given their track record, it is not surprising that the broadcasters' inconsistency when it comes to the Consensus Agreement continues to this day. Mr. Padden and others acknowledge that even if the broadcast exclusivity rules are repealed, broadcasters could still seek to enforce contractual exclusivity provisions in court, but complain that litigation is a slow and inefficient process. Preston Padden, *The Hill, supra*; Letter from David Donovan, *supra*. What these commenters fail to acknowledge is that the Consensus Agreement itself expressly contemplated that broadcasters "would have the right to enforce exclusivity rules through court actions for injunction and monetary relief." *Cable Television Report and Order, supra*, 36 FCC 2d at 285.

¹⁶ *In the Matter of Section 302 Report to Congress*, Copyright Office Docket RM-2010-10, Comments of the Rural MVPD Group (filed April 25, 2011) at 9-11.

¹⁷ To be clear, in filing this letter, ACA is defending the Commission's *authority* to repeal the broadcast exclusivity rules it has adopted. In this proceeding, ACA has argued that if the Commission takes this action, it should preserve the ability of cable operators to continue to import certain distant signals into communities where they have been historically made available. See generally *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No 10-71, ACA Comments (filed June 26, 2014); see also *id.*, ACA Comments (filed May 27, 2011) at 26-62; *id.*, ACA Reply Comments (filed June 7, 2011) at 42-61.

surrogates in the form of retransmission consent and broadcast exclusivity. Repeal of the compulsory license also would create a conflict between the Copyright Act and the Communications Act's must carry requirements.¹⁸

In conclusion, the Commission clearly has the authority to repeal or make changes to its broadcast exclusivity rules, and the obligation to consider such changes in light of current marketplace conditions. Thus, in deciding what action to take, the Commission should not look backwards to a four-decade old agreement that the broadcasters' themselves tore up years ago. Rather, the Commission's should focus on whether the public interest today would be served by making changes in the broadcast exclusivity rules.¹⁹

Sincerely,

A handwritten signature in black ink, appearing to read "Ross J. Lieberman". The signature is fluid and cursive, with the first name "Ross" being particularly prominent.

Ross J. Lieberman

cc: Maria Kirby
Chanelle Hardy
Valery Galasso
Matthew Berry
Alison Nemeth
Robin Colwell
Michelle Carey

¹⁸ The proposals opposed by ACA would put cable operators who were unable to negotiate copyright clearances for every program on stations electing must carry in the untenable position of having to choose between violating the FCC's rules or committing copyright infringement.

¹⁹ As ACA has explained, eliminating the exclusivity rules would likely result in greater broadcast network interference in retransmission consent negotiations between local cable operators and out-of-market stations (such as significantly viewed stations and stations that serve orphan counties). To address this concern, the Commission should adopt a new rule that would prohibit, as a *per se* good faith violation, any agreements – legally-binding or otherwise – that have the effect of limiting the ability of a station to grant retransmission consent to an MVPD to serve an out-of-market community where the station's entire programming stream, including its network and syndicated programming, has been made historically available by a cable operator, whether through an outright prohibition, a grant of a veto/pre-approval power before the execution of an agreement, or any other means that has the purpose of influencing or disincentivizing the station's grant of retransmission consent in such areas. Alternatively, the Commission could clarify that Section 76.65(b)(i), which prohibits as a violation of the good faith obligation the refusal by a Negotiating Entity to negotiate retransmission consent, applies to any circumstances in which a broadcaster has permitted the network with which it is affiliated to influence its exercise of retransmission consent to an MVPD to serve an out-of-market community where the station's entire programming stream, including its network and syndicated programming, has been made historically available by a cable operator.