



September 17, 2015

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Notice of Ex Parte Communication, MB Docket No. 10-71

Dear Ms. Dortch:

This letter responds to the arguments presented in a pair of recent filings by the American Cable Association (ACA).¹ In those letters, ACA argues that if the Commission tosses aside the program exclusivity rules that have served to promote localism for decades, it should also impose new, more invasive rules that would affirmatively restrict the ability of broadcasters and networks to freely negotiate private contracts and to control the distribution of their signals and the content carried therein. Thus, ACA does not support the Chairman's asserted deregulation of private contractual arrangements; but rather, ACA is asking the Commission to eliminate regulations *but only so it can re-regulate* exclusive agreements in a manner baldly serving the interests of pay TV operators.

Echoing broadcasters, ACA argues that elimination of the network non-duplication and syndicated exclusivity rules will cause consumers to lose access to "vital weather information, in-state news and relevant political advertising."² While broadcasters agree with this point, ACA then goes on to argue that the solution is to impose new regulations barring local stations and networks from negotiating any kind of exclusivity arrangements in their affiliation agreements. We appreciate ACA's concern for consumers' access to relevant news

¹ See *Ex Parte* Letter from Mary C. Lovejoy, Vice President of Regulatory Affairs, American Cable Association in MB Docket No. 10-71 (filed Sept. 1, 2015) ("Sept. 1 ACA Letter"); see also *Ex Parte* Letter from Mary C. Lovejoy, Vice President of Regulatory Affairs, American Cable Association in MB Docket No. 10-71 (filed Sept. 11, 2015) ("Sept. 11 ACA Letter").

² Sept. 1 ACA Letter at 2.

1771 N Street NW
Washington DC 20036 2800
Phone 202 429 5300

and information, but their proposal would wildly exacerbate the very problem they are purportedly seeking to solve.

ACA's request reveals the true motivation driving the cable industry's push to eliminate the exclusivity rules. Rather than merely cleaving "outdated" regulations from the books, eliminating the rules would in fact handicap broadcasters' ability to negotiate with program suppliers for exclusivity in their local markets. The next logical step in ACA's mind would free cable operators to import broadcast signals from local markets across the country with no restriction or recourse. Far from protecting consumer interests, adoption of ACA's proposed prohibition on exclusivity would eviscerate localism, substantially depress the market value of syndicated and network programming, and increase consumer confusion and frustration.

ACA mischaracterizes its proposal as a solution to "network interference" with retransmission consent negotiations, arguing that geographic limits on the distribution of certain content should be a violation of the good faith rules.³ But the crux of their proposal is clear – they seek to ban any kind of exclusive contracts between broadcasters and their program suppliers. Adopting this proposal would not only unjustifiably interfere with private rights of contract, it runs contrary to well-established economic thinking on the benefits of exclusive arrangements.

As the record in this proceeding shows, exclusivity encourages investment by ensuring creators and distributors that the substantial sunk costs necessary to produce and market a product will not be undermined by the opportunistic behavior of other firms, otherwise known as the free-rider problem.⁴ In the context of the television industry specifically, exclusivity promotes the development of high-quality programming by the upstream creator (the networks and syndicators) while also driving demand-enhancing investments by the downstream distributor – the local TV stations.⁵ Giving an MVPD the ability to undermine that exclusive arrangement – or worse, as ACA proposes, enacting regulations that would prohibit exclusive arrangements altogether – would incentivize opportunistic behavior by MVPDs and out-of-market TV stations, both of which can free-ride on the investments made by the networks and local TV stations. Ultimately, such free-riding would disincentive program suppliers and local broadcasters from investing in both national and local programming, to the ultimate detriment of consumers.⁶

Any rule by the Commission that would have the effect of limiting a network or other program supplier from controlling exclusivity with respect to the distribution of its content

³ *Id.* at 4. Although not stated explicitly, presumably ACA's proposed new rules would also prohibit a syndicated programmer from including exclusivity provisions in its agreements with local stations.

⁴ See, e.g., Declaration of Mark Israel and Allan Shampine Before the Federal Communications Commission, Appendix B to Comments of the National Association of Broadcasters in MB Docket No. 10-71 (filed June 26, 2014).

⁵ *Id.* at 9-14.

⁶ *Id.* at 6 ("If exclusivity were eliminated or weakened, the incentives for local broadcast stations to invest in local content, and for broadcast networks and syndicators to invest in content, would be diminished.").

would also violate the copyright owner's exclusive rights under the Copyright Act and Congress' explicit admonition that retransmission consent not in any way impinge upon private program licensing agreements. Section 106(4) of the Copyright Act provides copyright owners with the "exclusive rights to do or to authorize" the public performance of motion pictures and other audiovisual works.⁷ That is precisely what network affiliate and syndicated program contracts do.

In establishing retransmission consent in the 1992 Cable Act, moreover, Congress carefully distinguished between the right granted to broadcasters to consent or withhold consent for the retransmission of their signals, "and the interest of copyright holders in the programming contained in the signal."⁸ Congress emphasized that it did not intend to "abrogate or alter existing program licensing agreements between broadcasters and program suppliers, or to limit the terms of existing or future licensing agreements,"⁹ and it expressly relied on the protections "afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules," which prevent the importation of distant signals carrying duplicative programming into local markets.¹⁰ In short, ACA is proposing that the Commission violate the Copyright Act and the strictures Congress imposed in the 1992 Cable Act.

ACA does raise legitimate concerns about the distorting effect on the marketplace if the Commission were to eliminate the program exclusivity rules.¹¹ Broadcasters have raised similar concerns to those expressed by ACA that removing the exclusivity rules may incentivize large market stations to infringe upon nearby smaller markets, undermining the smaller market stations' ability to sell advertising and finance local news.¹²

There is, however, a much easier and obvious solution to this potential problem than the one proposed by ACA. Rather than impose intrusive, legally-questionable and economically inefficient limitations on the ability of broadcasters and program suppliers to contract for exclusive distribution of content, the Commission should simply keep the existing rules in place. They impose no costs on consumers or the Commission.

For these reasons, we ask that the Commission maintain the existing program exclusivity rules rather than impose the unnecessary new regulations proposed by cable advocates.

⁷ 17 U.S.C. § 106(4).

⁸ S. Rep. No. 102-92, at 36 (1991).

⁹ *Id.*

¹⁰ *Id.* at 38.

¹¹ Sept. 1 ACA Letter at 2.

¹² See, e.g., *Ex Parte* letter from Anne Swanson, Exhibit B at 2-3, in MB Docket No. 10-71 (filed Sept. 9, 2015) ("Stations in smaller markets located near or adjacent to urban markets would likely suffer immediate harm as larger stations in urban markets would seek to expand their reach through retransmission consent.").

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal flourish extending to the right.

Rick Kaplan
Executive Vice President and General Counsel
Legal and Regulatory Affairs