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*Via ECFS*

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Notice of Ex Parte Communications  
MB Docket No. 10-71  
MB Docket No. 15-216

Dear Ms. Dortch:

On September 16, 2015, representatives of the NBC Network and the NBC Television Affiliates participated in the following meetings to discuss the Commission's proposal to eliminate the network nonduplication rule (the "Rule"):

- Mitch Rose (Senior Vice President, Government Relations, NBCUniversal); Margaret Tobey (Vice President, Regulatory Affairs, NBCUniversal); Don Richards (Group Vice President -- Television, Raycom Media, Inc.); and Mark Prak (Partner, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, counsel to the NBC Television Affiliates) (referred to collectively as the "NBC Parties") met with Commissioner Jessica Rosenworcel and Valery Galasso (Policy Advisor).
- Mr. Rose, Ms. Tobey, Mr. Richards and Mr. Prak met with Commissioner Ajit Pai and Alison Nemeth (Interim Legal Advisor, Media).
- Mr. Rose, Ms. Tobey, Mr. Richards and Mr. Prak met with Commissioner Michael O'Rielly and Robin Colwell (Chief of Staff and Senior Legal Advisor, Media).
- Ms. Tobey, Mr. Richards and Mr. Prak met with Chanelle Hardy, Chief of Staff and Media Legal Advisor, Office of Commissioner Mignon Clyburn.

During each of the meetings, the NBC Parties explained that the broadcast network/affiliate distribution model has been incredibly successful for decades because it supports the delivery of both locally focused content and high-quality network programming to viewers of affiliated

stations across the country, thus fulfilling Congress's and the Commission's goals of localism and diversity. The protection against duplication of network programming supported by the Rule is a core component of this distribution system because it preserves the full value of the network programming for each affiliate. That value is fundamental to the dual-revenue stream – comprised of advertising revenues and retransmission consent fees – that local broadcasters rely on to finance local program production and acquisition and to help offset network programming production and acquisition costs, including obtaining the broadcast rights for major sports and special events programming, such as NFL games and the Olympics, made available for free over-the-air broadcasting. Nonduplication protection within a station's local market allows the station to avoid the audience fragmentation that occurs when multiple network-affiliated stations with duplicative programming serve the same market.

The NBC Parties also addressed the arguments advanced by the Commission and certain parties that, following codification of retransmission consent in 1992, the Rule is not needed to offset the effects of the compulsory copyright licenses<sup>1</sup> and that the Rule is superfluous because local stations have private means of enforcing their nonduplication rights. In fact, the Rule serves as an essential counterweight to the compulsory copyright licensing regime and provides the most direct and efficient means of protecting those rights.

We explained that the Rule is an integral part of the complex web of compulsory copyright licenses, retransmission consent rules and program exclusivity rights that govern the distribution of broadcast programming by MVPDs. Indeed, when Congress codified retransmission consent in 1992, it pointed to the protections afforded to local stations by the exclusivity rules and cautioned that “[a]mendments or deletions of the [exclusivity rules]” would be “inconsistent with the regulatory structure” of the statute, including retransmission consent.<sup>2</sup> Further, Congress relied on the continued existence of network nonduplication in renewing the DBS distant signal license and has required, *by statute*, that the Commission adopt similar protections in the satellite context.

With respect to the efficacy of private contractual remedies, we explained that, in the absence of the compulsory license, if NBC as a copyright holder or licensor grants nonduplication protection to a station in a market, and a cable operator in that market imports a distant station affiliated with the same network, the local station either has a breach of contract claim against NBC *or* NBC has a copyright infringement claim against the cable system. It's that simple – the cable operator either has permission from NBC to retransmit the network content

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<sup>1</sup> See Official FCC Blog, “The Time Has Come to End Outdated Broadcasting Exclusivity Rules,” by Bill Lake, Media Bureau Chief, posted Sept. 22, 2015 (available at <https://www.fcc.gov/blog/time-has-come-end-outdated-broadcasting-exclusivity-rules>); Letter from Mary C. Lovejoy, American Cable Association (“ACA”), to William Lake in MB Docket No. 10-71 (filed Sept. 16, 2015).

<sup>2</sup> S. Rep. No. 102-92, at 38. See *also* attached summary “The Statutory Mandate for the Program Exclusivity Rules,” which the NBC Parties distributed in their meeting with Commissioner Rosenworcel and Ms. Galasso. This summary was also submitted as an attachment to the letter from Wade Hargrove, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, counsel to the NBC Television Affiliates, to Marlene H. Dortch in Docket MB-10-71 (filed Aug. 25, 2015).

via a distant station, which constitutes a breach of NBC's agreement with the local station, or the cable operator lacks such permission, which constitutes an infringement of NBC's copyright. Either way, the breach of the in-market station's rights can be remedied without the need for any other contracts in place beyond the one that gives the station its bargained-for nonduplication protection.

With the compulsory license in place, however, the cable operator doesn't need NBC's permission as the copyright holder to retransmit in the territory – the government has given it that permission through the statutory license, and it simply needs retransmission consent from an out-of-market station, which is neither a breach of NBC's exclusive license to the local station nor an infringement. Therefore, to enable affiliates to enforce their nonduplication rights in court, all network affiliation agreements would have to prohibit affiliates and the networks' owned stations from granting retransmission consent outside of their markets, and each affiliate would have to be a third-party beneficiary under the other affiliates' agreements. Each affiliate would also need to obtain a contractual commitment from local MVPDs not to carry duplicating programming from a distant network station – a contract term that is now prohibited under STELAR with respect to “significantly viewed and other television signals.”<sup>3</sup> Thus, the government, given the presence of the compulsory license, has made private enforcement of the contracted-for protection virtually impossible.

Moreover, the ability to enforce these rights – or even to create them by contract in the first instance – may be further constricted by calls to prohibit some of the very contractual provisions that support nonduplication protection. ACA, for example, has asked the Commission to “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, 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 out-of-market.”<sup>4</sup>

The Commission has now teed up for comment in its recently adopted “Totality of the Circumstances” *Further Notice of Proposed Rulemaking* in MB Docket No. 15-216 whether terms in agreements that impose certain limits on the grant of out-of-market retransmission consent are evidence of bad faith.<sup>5</sup> It is a hollow argument to suggest that the Commission's limited role in enforcing nonduplication protection is no longer needed<sup>6</sup> because the parties can craft private remedies and then, in a separate and ongoing proceeding, propose to eviscerate those same private remedies.

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<sup>3</sup> See Order, Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014, Sec. C & ¶ 5, MB Docket No. 15-37 (rel. Feb. 18, 2015).

<sup>4</sup> Letter from Mary C. Lovejoy, ACA, to Marlene H. Dortch in MB Docket No. 10-71 (filed Sept. 11, 2015).

<sup>5</sup> See *Implementation of Section 103 of the STELA Reauthorization Act of 2014 (Totality of the Circumstances Test)*, *Further Notice of Proposed Rulemaking*, MB Docket No. 15-216, ¶ 17 & n.93 (released Sept. 2, 2015).

<sup>6</sup> We also noted that the Commission has not been overly burdened with requests over the years to enforce the Rule.

This disjunction also underscores a fundamental *process* flaw with respect to any action taken *now* to eliminate the Rule. There are several ongoing proceedings that could have a direct impact on whether the Rule should be retained. In addition to the *Further Notice of Proposed Rulemaking* in MB Docket No. 15-216 discussed above (for which the comment and reply comment deadlines have not even been set), the GAO has just commenced a proceeding to consider whether the compulsory copyright licenses should be phased out. Because, as we explained, the Rule acts as a counterweight to the statutory licenses, the conclusions reached in that study will be relevant to the role played by the Rule in this complex statutory and regulatory ecosystem. Likewise, reply comments have just been filed in the Commission's annual video competition inquiry, resulting in a substantial record on the video programming marketplace structure and function that must be analyzed and reported on to Congress. Accordingly, the NBC Parties urged, first and foremost, that the Rule be retained and in any case that no action be taken on the Rule until these related proceedings have been completed.

This letter is being submitted electronically in the above-referenced dockets pursuant to Section 1.1206(b) of the Commission's rules. Questions with respect to this submission should be directed to the undersigned.

Respectfully submitted,

/s/ Margaret L. Tobey

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cc: Commissioner Jessica Rosenworcel  
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## The Statutory Mandate for the Program Exclusivity Rules

### I. The Commission's Statutory Obligation

1. It is a *core* statutory responsibility of the Commission under Sections 303(g) and 307(b) of the Communications Act to establish and promote a nationwide system of *local* broadcast service. In adopting the Program Exclusivity Rules in 1965, the Commission said:
  - “The fundamental statutory responsibilities of the Commission are clear. The Commission is charged with the duty of executing the policy of the Communications Act to ‘make available, so far as possible, to all people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communications service’ (47 U.S.C. 151) and ‘generally to encourage the larger and more effective use of radio in the public interest’ (47 U.S.C. 303(g)). The Commission is also required to ‘make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.’” (47 U.S.C. 307(b)). *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, First Report and Order, 30 Fed. Reg. 6038, 6044, 38 F.C.C. 683, ¶ 40 (1965) (“*1965 Network Exclusivity Order*”).
  - “The Commission’s statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis (Secs. 1 and 307(b) of the Communications Act).” *1965 Network Exclusivity Order*, 30 Fed. Reg. at 6044, ¶ 44.
  - “Authority for the rules adopted herein is contained in sections 4(1), 303, 307(b), 308, 309, 310, and 319 of the Communications Act of 1934, as amended.” *1965 Network Exclusivity Order*, 30 Fed. Reg. at 6060, ¶ 162.
2. Moreover, Congress directed the Commission in Section 303(h) “to establish areas or zones to be served by any station.” 47 U.S.C. § 303(h). It also authorized the Commission to “to make special regulations applicable to radio stations engaged in chain broadcasting”—that is, to establish rules for network broadcasting. 47 U.S.C. § 303(i).
3. The Commission recognized in 1965, when it first implemented program exclusivity rules, that program exclusivity serves the public interest:

- “Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station’s ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system’s failure to carry the signal of a local station is inherently contrary to the public interest.” *1965 Network Exclusivity Order*, 30 Fed. Reg. at 6047, ¶ 57(footnote omitted).

## II. Congress Enacted the Cable Compulsory License in Reliance on the Commission’s Program Exclusivity Rules

- “[A]s the *Malrite* [*T.V. of N.Y. v. FCC*, 652 F.2d 1140 (2d Cir. 1981)] court observed, the Copyright Act expressly recognizes the ‘legitimacy within the statutory plan’ of FCC modifications to the compulsory licensing system through revisions to its program exclusivity rules. *Id.* at 1147. Thus, prior to passage of the Copyright Act, the Commission urged that a revised copyright law leave detailed regulation of cable television signal carriage to administrative control, because ‘[e]xclusivity is a complex, dynamic subject that is most appropriately a matter for agency action.’ In response, Congress deliberately chose to leave regulatory responsibility over matters like program exclusivity to this agency. Thus, section 111(c)(1) of the Copyright Act grants cable systems a compulsory license to retransmit broadcast signals the carriage of which is ‘permissible under the rules, regulations or authorization of the Federal Communications Commission,’ 17 U.S.C. Section 111(c)(1). In discussing this provision, the House Report explained that

any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulation adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC’s rules or which might be characterized as affecting ‘communications policy,’ the Committee has been cognizant of the interplay between the copyright and communications elements of the legislation.”

“Congress was thus aware that there is close interplay between communications policy and the intellectual property issues addressed in the Copyright Act, concluding, in effect, that cable operators should not receive the benefits of a compulsory license for the carriage of signals that the Commission deems impermissible for communications policy purposes. Apart from the basic compulsory license scheme, however, Congress did not statutorily define the boundaries of intellectual property issues and communications policy concerns. Instead, recognizing our legitimate interest in this area, Congress removed itself from this arena and left enactment of any program exclusivity rules to our future

discretion.” *1988 Program Exclusivity Order*, 3 FCC Rcd at 5321, ¶129 (quoting 252 H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976)) (footnotes omitted).

- “Furthermore, Congress was aware of the Commission’s syndicated exclusivity rules and expressly accommodated them within the new Copyright law. Thus, section 801(b)(2)(c) gives the Copyright Royalty Tribunal authority to adjust royalty payments for the compulsory license in order to reflect any subsequent changes in the Commission’s 1972 syndicated exclusivity rules. The House Report explained that “[i]f these rules are changed in the future to relax or increase the exclusivity restrictions, . . . the royalty rates paid by cable systems should be adjusted to reflect such changes.” 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. In short, the Copyright Act forecloses only FCC rules, like retransmission consent proposals, that fundamentally change the compulsory license scheme. 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. *1988 Program Exclusivity Order*, 3 FCC Rcd at 5321, ¶ 130 (footnotes omitted).
- “Although cable systems pay compulsory license fees when they carry distant signals, these fees bear no direct relationship to the value of specific programs carried on specific distant signals. Thus, distant stations will be carried as long as their value to the cable operator exceeds the compulsory license fee, even if the value of these distant signals to viewers is less than the value of the alternative programs that cablecasters would carry if broadcasters could exercise exclusive rights, so that cable operators would have to negotiate to obtain the right to show duplicative programming.” *1988 Program Exclusivity Order*, 3 FCC Rcd at 5310, ¶ 69.

### **III. The Basis for the Commission’s Decision to Reinstate the Syndicated Program Exclusivity Rules Subsequent to an Earlier (and, In Its Own Words, “Misdirected”) Decision by the Commission to Repeal Those Rules**

1. The Commission’s 1988 decision to reinstate the syndicated program exclusivity rules just 8 years after it had repealed them emphasized that the Rules promote competition in the local television distribution market and thereby serve the public interest:
  - “Further analysis leads us to conclude, moreover, that the reasoning that shaped the 1980 decision to repeal the syndicated exclusivity rules was flawed in two significant respects. First, the Commission justified the rules’ repeal based on an analysis of how their repeal or retention would affect particular competitors, rather than competition itself, in the local television distribution market. We now recognize that the focus of our inquiry was misdirected to the extent that it

examined the effects of repeal or retention on individual competitors rather than on the manner in which the competitive process operates. Second, the Commission failed to analyze the effects on the local television market of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights when they had to compete with cable operators who could enter into such contracts.” *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, 5303, ¶ 23 (1988) (footnote omitted) (“1988 Program Exclusivity Order”).

- “Nevertheless, it should be clearly understood that in addition to the deleterious effects on the competitive process, as outlined in the remainder of this paragraph, individual firms that would have benefited from playing by the same rules as their competitors are nevertheless harmed by the absence of syndicated exclusivity protection. *1988 Program Exclusivity Order*, 3 FCC Rcd at 5303, ¶ 23, n.52.
- “We are, therefore, no longer prepared to conclude, as we did in 1980, that the impact of repealing syndicated exclusivity rules on program supply would be small; we believe instead that, while that impact cannot be precisely ascertained, it could be quite significant. The consequence for broadcasters and viewers alike from any such effects on incentives to produce original cable programming, and real diversity for viewers that may occur are clearly harmful.” *1988 Program Exclusivity Order*, 3 FCC Rcd at 5307, ¶ 44 (footnote omitted).
- “Similarly, by repealing syndicated exclusivity in 1980, the Commission mistakenly cast the argument in terms of whether broadcasters could survive in an environment in which they could not enforce exclusive contracts. Perhaps they can, but the proper question is not whether broadcasters can survive. The proper question is: how does the presence or absence of syndicated exclusivity affect the viability and strength of competition, and through this, achieve various consumer benefits, including program choice?” *1988 Program Exclusivity Order*, 3 FCC Rcd at 5308, ¶ 52 (footnotes omitted).
- “In fulfilling our responsibility under Sections 301, 307(b), and 309, we believe the public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations. An essential element of this responsibility is to create a local television market that allows local broadcasters to compete fully and fairly with other marketplace participants. Promoting fair competition between free, over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible. Local broadcast signals make a significant contribution to this diverse mix. As we documented previously, the absence of syndicated exclusivity places local broadcasters at a competitive disadvantage. Lack of exclusivity protection distorts the local television market to the detriment of the viewing public, especially those who do not subscribe to cable. Our regulatory

scheme should not be structured so as to impair a local broadcaster's ability to compete, thereby hindering its ability to serve its community of license. Restoration of our syndicated exclusivity rules will provide more balance to the marketplace and assist broadcasters in meeting the needs of the communities they are licensed to serve." *1988 Program Exclusivity Order*, 3 FCC Rcd at 5311, ¶ 74.

- "Our analysis demonstrates that syndicated exclusivity rules are an important component of a sound communications policy designed to foster full and fair competition among competing television media. Without syndicated exclusivity, there is a likelihood that programs will not be distributed efficiently among alternative outlets and that viewers will not get the most efficient quantity and diversity of programming." *1988 Program Exclusivity Order*, 3 FCC Rcd at 5311, ¶ 75.
- "The ability of broadcasters to compete at optimum levels, free of unfair competitive burdens, is a proper concern of this agency insofar as such policies are designed to improve communications services to the public. We need not demonstrate that the very survival of broadcasting is at risk in the absence of syndicated exclusivity rules in order to conclude that the competitive well-being of broadcasters, a concern certainly within our jurisdiction, will be enhanced by the adoption of such rules. We have already explained why adoption of these rules will eliminate a competitive advantage held by cable that undermines our reliance on full and fair competition to achieve our statutorily mandated goals. We have also explained why elimination of that imbalance should lead to greater diversity in the programming available to the viewing public -- whether that public does its video viewing on cable or broadcasting stations. Accordingly, we think the matters addressed in these rules are squarely within our jurisdiction." *1988 Program Exclusivity Order*, 3 FCC Rcd at 5321, ¶ 131 (footnotes omitted).

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