



October 8, 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:

On Wednesday, October 7, 2015, Scott Goodwin and the undersigned of the National Association of Broadcasters ("NAB"), met with Matthew Berry, chief of staff to Commissioner Ajit Pai, to discuss broadcasters' ongoing concerns regarding the Chairman's proposal to eliminate the program exclusivity rules. In particular, we discussed some of the practical difficulties associated with eliminating the rules, especially the significant challenges broadcasters would face in addressing exclusivity breaches through litigation and the Copyright Royalty Board's inability to curtail distant signal importation through rate adjustments.

The Chairman and his staff have suggested on various occasions that the exclusivity rules should be eliminated because they are "unnecessary." Without any serious analysis, they claim that broadcasters and networks can easily facilitate exclusivity through contracts, and enforce those contracts, if necessary, through the courts. As Media Bureau Chief William Lake stated recently: "Networks, syndicators, and broadcast stations that choose to create exclusive distribution rights may effectively safeguard those rights through privately negotiated affiliation and syndication agreements."¹

This argument is simply incorrect, and it is telling that the Commission has yet to provide any detail on exactly how these contracts can be readily enforced. It overlooks the practical

¹ See "The Time Has Come to End Outdated Broadcasting Exclusivity Rules," William Lake, FCC Media Bureau Chief, Official FCC Blog (Sept. 22, 2015). The only explanation of why the Chairman believes private enforcement to be straightforward is Mr. Lake's statement that broadcasters "may choose to include provisions in their agreements geared to facilitating enforcement, such as provisions for private arbitration, fee shifting, choice of law, and third-party beneficiary rights." *Id.*

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

challenges that make it difficult and costly to maintain the equilibrium that exists today.² Most notably, the lack of privity between the aggrieved station and the offending station (let alone the cable company instigator), make any attempt to prevent signal importation complex and uncertain.

The notion that third-party beneficiary clauses provide a panacea is misplaced. While the local station could theoretically sue a distant station under a third-party liability clause, this approach would not address the underlying problem. Even setting aside the fact that this route would still involve litigation and consumer disruption, and even if the local station wins that lawsuit, the matter would not be settled. Another third party – the cable operator – is not bound by the court’s decision. The distant offending station would then need to sue or somehow otherwise stop the cable operator from exporting the station’s signal into another market. That may be difficult or impossible, however. If the cable operator is exporting the station into a distant market in accordance with a valid retransmission consent agreement, there’s nothing that station can do, sued or otherwise.³

At this point, the aggrieved party – the distant station whose exclusivity is being violated – is out of options. Some have argued that the network or syndicator could step in and – if possible under the station’s agreement – terminate its contract with the distant offending station. That would not be in the public interest, however, as then viewers in two different markets would be denied that network’s or syndicator’s programming. It would be odd to say the least for the FCC to promote a “solution” that required more markets to lose local programming than under the current, stable regime.

Liquidated damages clauses have also been touted as a straightforward way to solve the admitted challenges with private exclusivity enforcement. Courts tend to disfavor liquidated damages provisions, however, especially when they operate as a penalty rather than as a means to provide well-tailored compensatory damages.⁴ Moreover, liquidated damages provisions are typically used in agreements where the monetary damages are easy to quantify. This is not the case where a network sues its affiliate for breach of contract for allowing its signal to be retransmitted into another station’s exclusive market. Even if a court were to uphold a liquidated damages provision and the network ultimately (after years of litigation) received some form of payment for the breach, that does not solve the problem for the public that remains underserved by an out-of-market TV station. Thus, the Commission’s

² See Ex Parte Letter of the American Cable Association, Time Warner Cable Inc. and Mediacom Comm. Corp. in MB Docket No. 10-71 (filed Oct. 5, 2015). In the letter, ACA *et al.*, argue that with the rules in place, the FCC “places its thumb on the side of local broadcasters” and, as a result, cable operators are “saddled with costly obligations [to protect exclusive rights] for which they receive no commensurate consideration.” Unsurprisingly, they provide absolutely no accounting or even an example of the types of “costs” they apparently incur because of the rules.

³ See *Nexstar Broad., Inc. v. Time Warner Cable, Inc.*, 524 Fed. Appx. 977 (5th Cir. Tex. 2013).

⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981) (Comment (a) notes: “[P]arties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy.”).

proposed “solution” would be for the network or syndicator to receive compensation through the courts, but the local station and public to be left worse off.

Some have also claimed that broadcasters will not be harmed as a result of eliminating the rules because the Copyright Royalty Board (“CRB”) will simply adjust the royalties paid by cable operators for carriage of distant signals and their discourage them from importing distant signals. This is not only wrong, but also introduces far more complications and costs into the process.

The CRB’s rate adjustment authority in 801(b)(2)(C) only applies to changes made with respect to the syndicated exclusivity rules; not the network non-duplication rules. Therefore, CRB cannot adjust for the absence of the network non-duplication rule, especially as it relates to the programming provided by NBC, ABC and CBS, for which no royalties are paid if carried on a distant station. Further, even accounting only for elimination of the syndicated exclusivity rules, the Copyright Royalty Tribunal’s past actions suggest that the CRB is likely to look only at the incremental difference in overall value to the cable operator resulting from its retransmission of the full schedule of the distant signal rather than having to black out the few syndicated programs for which the local station could otherwise assert exclusive rights. That incremental, government-set increase would not produce anything close to a market value rate for the distant signal. Cable operators would still enjoy the below-market rates set by Congress, and thus any new rate would be unlikely to deter importation by the cable operator.

In addition, an increase in the cable distant signal rate would not offset the local station’s loss in the event a cable system carries a duplicating distant signal because the additional royalties would go to owners of *programs* retransmitted on the distant signals. The local station being harmed by the loss of exclusivity would not be an obvious recipient. If the syndicator received the increased royalties, it would conceivably be paid twice – once by the local station who bought exclusive rights, and another by collecting distant signal royalties.

All of this begs a simple question about the current proposal: Why would the Commission upset the current balance and create all these new uncertainties and complexities? No one has provided a remotely compelling rationale. It is not enough to say that private contracts can conquer all. As detailed above, were the rules to be eliminated, the broadcasters’ ability to enforce privately negotiated exclusivity rights would be in jeopardy. There are zero costs today to the public, the Commission and to industry to maintain the current rules. There are many public costs should they be rescinded.

Respectfully submitted,

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

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