Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules Related to Retransmission Consent	))	MB Docket No. 10-71

COMMENTS OF AT&T[1]

I. Introduction

The *Exclusivity Rules FNPRM* seeks comment on whether the Commission should eliminate or modify its network non-duplication and syndicated exclusivity rules (collectively, "exclusivity rules").[2] The Commission's exclusivity rules are designed to serve as a regulatory means of enforcing, within certain specified geographic zones, contractual exclusivity agreements between television broadcasters, which purchase the distribution rights to video programming, and networks and syndicators, which supply the video programming.[3]

In a nutshell, the exclusivity rules require the relevant multichannel video programming distributor ("MVPD"), upon proper request from a local television broadcaster with contractual exclusivity rights regarding particular programming, to refrain from transmitting any distant

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[1] AT&T Services, Inc., on behalf of the subsidiaries and affiliates of AT&T Inc. (collectively, "AT&T"), respectfully submits these comments in response to the Commission's Further Notice of Proposed Rulemaking seeking information regarding the Commission's network non-duplication and syndicated exclusivity rules. *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 10-71, FCC 14-29 (rel. Mar. 31, 2014) ("*Exclusivity Rules FNPRM*").

[2] *See, e.g.*, *Exclusivity Rules FNPRM* at ¶ 40.

[3] *See, e.g.*, *Exclusivity Rules FNPRM* at ¶ 41. For purposes of the exclusivity rules, it is the specified geographic zones referenced above that distinguish between "local" and "distant" (i.e., "out-of-market") programming signals. *See, e.g.*, *id.* at ¶ 42.

signals containing that programming into the broadcaster's local protection zone. By imposing this requirement, the Commission's exclusivity rules provide an extra-contractual mechanism for television broadcasters to enforce their contractual exclusivity rights against MVPDs.[4] The Commission's exclusivity rules may be invoked by a television broadcaster that has elected retransmission consent in its local market, even if the broadcaster refuses to allow the relevant MVPD to carry the broadcaster's local signals.[5]

The Commission's core question in this proceeding – which is asked almost rhetorically – is the following: "Is there *any legitimate* reason that the Commission should provide a regulatory mechanism for enforcement of private exclusivity agreements?"[6] The answer is no. Accordingly, the Commission should eliminate, or at a minimum significantly modify, its exclusivity rules, for the reasons explained below.

II. Discussion

A. The Commission Has Authority to Eliminate or Modify the Exclusivity Rules.

As an initial matter, AT&T agrees with the Commission's tentative conclusion that the Commission has the authority to repeal or modify the exclusivity rules regarding all applicable MVPDs.[7] In fact, given the close interplay between the exclusivity rules and the retransmission consent regime (described below), the Commission has bases for authority to repeal or modify

[4] *See, e.g., Exclusivity Rules FNPRM* at ¶ 41.

[5] *See, e.g., Exclusivity Rules FNPRM* at ¶ 41. The exclusivity rules have a few exceptions and apply disparately to different kinds of MVPDs; but none of those exceptions and differences matters to the issues addressed herein. *See, e.g., Exclusivity Rules FNPRM* at ¶¶ 41-53.

[6] *Exclusivity Rules FNPRM* at ¶ 66 (emphasis added).

[7] *Exclusivity Rules FNPRM* at ¶¶ 55-57.

the exclusivity rules not mentioned in the *Exclusivity Rules FNPRM* – specifically, the statutory authority to implement retransmission consent properly.[8]

B. Eliminating or Modifying the Exclusivity Rules Would Promote Video Consumer Welfare by Helping to Restore Balance in the Retransmission Consent Regime.

The Commission adopted and refined the exclusivity rules in the 1960s -1980s to protect local television broadcasters from the perceived potential for unfair competition from cable operators, which then had exclusive local non-broadcast video distribution franchises in most parts of the country.[9] As explained below, substantial changes in both the law and the video market since the 1980s have rendered the exclusivity rules' rationale moot and their effects counterproductive. Consequently, those rules should be wholly repealed or limited to circumstances where a retransmission consent agreement between a television broadcaster and an MVPD has been reached.

Regarding changes in the law, local television broadcasters now have statutory and regulatory retransmission consent rights, which prohibit MVPDs from carrying the signals of local television broadcasters without permission, and allow television broadcasters to insist upon in-kind and/or cash compensation in exchange for such permission.[10] Regarding changes in the video market, cable operators no longer have exclusive local video distribution franchises, but instead face competition from direct broadcast satellite networks and wireline providers, as well

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[8] *See*, *e.g.*, Comments of AT&T, MB Docket No. 10-71 (filed May 27, 2011) (stating that sections 325(b)(3), 309(a), 303(r), and 4(i) of the Communications Act authorize the Commission to effectuate changes to retransmission consent procedures, including eliminating the exclusivity rules).

[9] *See*, *e.g.*, *Exclusivity Rules FNPRM* at ¶¶ 43, 48-49.

[10] *See, e.g.*, *Exclusivity Rules FNPRM* at ¶ 58.

as from nascent, yet growing, "over-the-top" entities such as Netflix, Amazon, Hulu, Roku, and Google.[11]

These legal and market developments have shattered any balance in the bargaining power between television broadcasters and MVPDs regarding the sale/purchase of the broadcasters' programming and tipped the scales dramatically in favor of the broadcasters. Television broadcasters can now compete with both arms swinging, whereas MVPDs must try to respond with one arm tied legally behind their backs. In particular, a local television broadcaster can now whipsaw an MVPD competing against other MVPDs in that local market by threatening to withhold must-have broadcast programming (in addition to cable networks controlled by the broadcaster) made available to the other local MVPDs. And instead of facing a risk of losing access to many local MVPD subscribers if its retransmission consent compensation demands are unreasonable, a television broadcaster can and does play multiple MVPDs off one another, and credibly threatens, *seriatum*, to go dark on an MVPD absent agreement to pay new or increasingly large retransmission consent compensation.

The Commission's exclusivity rules are not only unnecessary, but artificially exacerbate this anti-competitive dynamic. As described above, those rules typically block an MVPD from contracting with an out-of-market television station to acquire popular network or syndicated programming also offered by the local television station – no matter how unreasonable the local television broadcaster's retransmission consent demands may be. Thus, this potentially vital competitive backstop is barred. In turn, today's retransmission consent regime, combined with the Commission's exclusivity rules, leaves MVPDs with little choice but to accept the local television station's terms.

[11] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496 at ¶¶ 17-144, 219-319 (2013).

This unfair situation has predictably resulted in harmful outcomes. First, retransmission fees have gone through the proverbial roof. Such fees were virtually non-existent in the 1990s, but rose rapidly in the 2000s, quadrupling from $215 million in 2006 to over $1 billion in 2010.[12] In 2011, industry analysts estimated that retransmission fees would more than triple during the next six years – to approximately $3.6 billion in 2017.[13] Yet even such recent and large growth estimates have already proven to be grossly low. In 2013, retransmission fees exceeded $3 billion; and such fees are now projected to pass $6 billion by 2018.[14] MVPDs cannot simply absorb such swift and huge increases in costs without impacting consumer prices.

Moreover, during retransmission consent negotiations, given the expanding number of competitive video distribution outlets, television broadcasters now have far greater latitude to threaten to withdraw their signals from MVPDs – and to follow through on those threats. MVPDs and their customers had to endure 12 blackouts in 2010, 51 in 2011, 91 in 2012, and an astounding 127 in 2013.[15] The television broadcasters' possession of such a powerful weapon in their bargaining arsenal facilitates the steep rise in retransmission consent fees described above. As a result, MVPD customers must suffer not only higher prices, but also substantial confusion, disruption, uncertainty, and inconvenience regarding the scope of their MPVD service, whether or not signals are ultimately withdrawn.

Furthermore, in the context of retransmission consent negotiations with MVPDs,

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[12] *See, e.g.*, Comments of AT&T, MB Docket No. 10-71, at 2 (filed May 27, 2011).

[13] *See, e.g.*, Comments of AT&T Inc., MB Docket No. 12-203 (filed Sept. 10, 2012) at 4 (and sources cited therein); Letter dated January 30, 2014 from Matthew Brill, Latham & Watkins, on behalf of Time Warner Cable, American Cable Association, Charter Communications, DIRECTV, DISH Network, and New America Foundation, to Marlene Dortch, FCC, MB Docket Nos. 10-71, 09-182 ("Video Distributors Letter") at 4 (and sources cited therein).

[14] *See, e.g.*, Video Distributors Letter at 4 (and sources cited therein).

[15] *See, e.g.*, Video Distributors Letter at 3 (and sources cited therein).

television broadcasters presently possess the strength to link retransmission consent to carriage of affiliated non-broadcast networks. These "in-kind" demands saddle MVPDs with yet another cost that causes upward pressure on customer prices and, by consuming both channel capacity and programming budgets, hinder the ability of MVPDs to carry independent programming that may be in greater demand by their customers or would offer greater diversity of perspectives.

Clearly, today's retransmission consent regime, as buttressed by the Commission's exclusivity rules, substantially favors television broadcasters over MVPDs, diminishes video competition, and thereby harms video consumers. But the harm does not end there – it extends to the broadband market, too. As the Commission has often recognized, today's marketplace increasingly requires communication providers to compete via bundles of voice, video, and broadband. Thus, a provider's ability to competitively offer video service and to deploy broadband networks are closely linked. "This secondary effect heightens the urgency of Commission action" to help foster consumer welfare and competition in both the video distribution market *and* the broadband market.[16]

One such action would be to repeal the exclusivity rules or limit them to circumstances where the television broadcaster and the MVPD have reached a retransmission consent agreement. Doing so would help to restore much needed balance to retransmission consent negotiations by clearing obstacles to an MVPD obtaining must-have programming from a distant television broadcaster if a local television broadcaster is unreasonable. Removing these unnecessary, regulatorily-imposed obstacles to true commercial negotiations would permit

[16] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* First Report and Order, 25 FCC Rcd 746, 771-72 at ¶ 36 (2010) ("*2010 Program Access Order*"), *affirmed in part and vacated in part sub nom. Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) ("*Cablevision II*"). *See, e.g., id.* at 765, ¶ 29.

MVPDs a potential market-based alternative that could reduce a local broadcaster's incentive and ability to demand unreasonable retransmission consent compensation in the first place.

C. Eliminating the Exclusivity Rules Would Allow Courts – With Unique Contract Expertise – to Evaluate the Lawfulness of Exclusivity Contracts.

To be sure, eliminating or modifying the exclusivity rules would not be a panacea. As the Commission observes, even if the exclusivity rules were eliminated or modified, negotiations between broadcasters and networks or syndicated program suppliers would continue to determine the exclusivity terms of affiliation and syndicated programming agreements, and broadcasters and MVPDs would continue to conduct retransmission consent negotiations in light of these privately negotiated agreements.[17] Nevertheless, removing or narrowing the Commission's imprimatur on such exclusivity agreements would appropriately make exclusivity a term for negotiation between the parties rather than continuing as an artificial thumb on the scale to the benefit of one party, perhaps reshaping the scope of future broadcaster/network/syndication agreements in pro-competitive ways. Furthermore, eliminating or limiting the exclusivity rules would promote the principle that the Commission should intrude upon, or impose barriers to, free market negotiations (here, between MVPDs and all television broadcasters, both local and distant) only when necessary to protect the public interest.

More concretely, and perhaps most importantly, eliminating or limiting the Commission's exclusivity rules would require parties to agreements providing for network non-duplication or syndicated exclusivity to try to enforce those agreements through normal contractual means, subject to the standard grounds on which the enforcement of exclusive contracts can be challenged. Specifically, parties seeking to enforce contractual network non-

[17] *See, e.g.*, *Exclusivity Rules FNPRM* at ¶ 66.

duplication or syndicated exclusivity provisions would need to seek recourse from the courts (or, if a contract permits, an alternative dispute resolution mechanism) rather than the Commission.[18]

This change in enforcement venue from the Commission to the courts would make tremendous sense. Courts have extensive experience evaluating the lawfulness of contracts, in general, and of territorial exclusivity contracts, in particular. It is way past time to allow such vast judicial expertise to be applied to the contracts at issue here.

Concerns that obtaining court review of an MVPD's importation of distant signals would be unduly cumbersome are misguided.[19] Local television stations, networks, and syndicators surely are sophisticated enough to draft contracts that would permit efficient judicial review, and many existing contracts likely already do so.[20]

D. Eliminating or Narrowing the Exclusivity Rules would Not Harm Localism.

Concerns that eliminating or narrowing the Commission's exclusivity rules would undermine localism are also misguided. Several factors would continue to strongly discourage MVPDs from importing a distant station's signal unless they were faced with a blackout in the context of a retransmission consent negotiation impasse, and even in that event would continue to strongly encourage MVPDs to return to the local signal as quickly as financially feasible. First, many customers will still prefer access to local content (e.g., local news/sports/weather coverage). Second, absent copyright reform, importing distant signals would cost more due to higher copyright license fees and also potentially due to retransmission consent fees that are

[18] *See, e.g.*, *Exclusivity Rules FNPRM* at ¶¶ 66-67.

[19] *See, e.g.*, *Exclusivity Rules FNPRM* at ¶ 66.

[20] *See, e.g.*, *Exclusivity Rules FNPRM* at ¶ 66; Restatement (Second) of Contracts, Chapter 14 (Contract Beneficiaries). In this regard, AT&T notes that, if the Commission were to eliminate or substantially narrow the exclusivity rules, AT&T would not oppose the Commission allowing a reasonable amount of time for parties to amend existing network non-duplication contracts or syndicated exclusivity contracts to effectuate any change-of-law provisions. *See, e.g.*, *Exclusivity Rules FNPRM* at ¶ 68.

higher than a reasonable fee for a local signal. Finally, an MVPD would have to expend time, effort, and resources to make the necessary operational arrangements to receive a distant signal. And in a different vein, with the loss of local MVPD distribution a real possibility, television broadcasters would likely invest in more and better local programming.

III. Conclusion

For the reasons explained above, the Commission should repeal its rules regarding network non-duplication and syndicated exclusivity. At a minimum, the Commission should limit the application of its rules regarding network non-duplication and syndicated exclusivity to situations where the relevant television broadcaster and MVPD have reached a retransmission consent agreement.

Respectfully submitted,

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