

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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

**COMMENTS OF THE FBC TELEVISION AFFILIATES ASSOCIATION**

The FBC Television Affiliates Association (“Fox Affiliates”)<sup>1</sup> hereby file these comments in response to the FCC’s decision to “undertake a more comprehensive review” of its network non-duplication and syndicated exclusivity rules (collectively, the “Exclusivity Rules”)<sup>2</sup> to determine whether the rules are still necessary today.

**I. INTRODUCTION.**

The Fox Affiliates submit that it has been, and upon compiling a full record in this proceeding, it will continue to be abundantly clear that the Exclusivity Rules continue to be vitally important to this country’s television ecosystem and to the FCC’s longstanding goal of promoting localism in broadcasting. In fact, the Exclusivity Rules are an excellent example of good government at work, and any thought of rescinding or modifying those rules makes very little sense. As the FCC learned through the exhaustive public commentary on this issue over the past several years, the Exclusivity Rules provide a clear and streamlined procedural path for local broadcasters to utilize contractually bargained-for in-market exclusivity, which both Congress and the Commission have

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<sup>1</sup> Fox Affiliates is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are affiliated with the Fox television network.

<sup>2</sup> See 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) (the “FNPRM”); Comment Period Extended for Further Notice of Proposed Rulemaking on Network Non-Duplication and Syndicated Exclusivity Rules, *Public Notice*, MB Docket No. 10-71, DA 14-525 (Apr. 22, 2014).

recognized is a keystone of America's local television broadcasting system.<sup>3</sup> In cases of exclusivity violations, the Exclusivity Rules replace what would otherwise be lengthy and fiscally draining court battles, with a much simpler administrative process at lower cost to taxpayers and parties that determines each party's rights more quickly and efficiently. Frankly, the FCC should look to the Exclusivity Rules as a model for how it should do business rather than as candidates for modification or repeal.

Substantively, the Exclusivity Rules play an important part in the complex matrix of laws and regulations that govern multi-channel video programming distributors' ("MVPDs") carriage of television broadcasting signals. Those laws were designed by Congress and have been administered by the FCC to ensure that the growth of MVPD subscribership does not undermine the local television broadcasting system that provides free over-the-air access to local news, sports, and emergency information to television viewers across the country.<sup>4</sup> And the Exclusivity Rules are an integral part of a long history of rules and policies designed to ensure that each licensed station remains economically healthy and capable of serving its licensed community.<sup>5</sup> The Exclusivity

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<sup>3</sup> See, e.g., Comments of the National Association of Broadcasters, MB Docket No. 10-71, at 55-61, filed May 27, 2011; Joint Comments of Barrington Broadcasting Group, LLC, Bonten Media Group, LLC, Dispatch Broadcast Group, Gannett Co., LLC, Post-Newsweek Stations, Inc., and Raycom Media, Inc., MB Docket No. 10-71, at 3-13, filed May 27, 2011; see also *FNPRM* at ¶¶ 64 (citing Congress's recognition that the Exclusivity Rules are a key component of the retransmission consent regime enacted in 1992), 65 (noting the FCC's recognition that Congress expected the Exclusivity Rules to be available to broadcasters), 70 & n.261 (citing FCC statements acknowledging importance of Exclusivity Rules to protecting localism).

<sup>4</sup> See S. Rep. No. 102-92 (1991), at 35 (noting the retransmission consent was designed to address distortions in the "video marketplace [that] threatens the future of over-the-air broadcasting), 38 (stating that both retransmission consent and the Exclusivity Rules "promote the continued availability of the over-the-air television system"); H. R. Conf. Rep. No. 102-862 (1992), at 58 (noting that absent retransmission consent, broadcasters are forced to subsidize cable operators' development of competing programming).

<sup>5</sup> See, e.g., 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620 ¶ 75 (2003) ("2003 Ownership Order") (citing protection of local TV stations' markets as "the organizing principle of the plan" for the nationwide TV system and quoting Congress's admonition from the Telecommunications Act of 1996

Rules are a key to protecting the local over-the-air broadcasting system, and the FCC should not act in a way that undermines the economics of an industry that remains the main distributor of local news, sports, and emergency information in every community in the United States.<sup>6</sup>

Of course, the dispute over the Exclusivity Rules isn't just about good government or sound localism policy, it's about some MVPDs' long-running effort to dismantle the retransmission consent system that Congress enacted and that the FCC, thus far, has reasonably administered. Some MVPDs dream out loud of the day when they can hammer local broadcasters in retransmission consent negotiations by simply importing a television signal from another DMA to replace them.<sup>7</sup> Rather than pay a fair price for local television signals as Congress intended, these MVPDs would rather force customers to accept distant stations that offer little or no programming of any relevance to the news and information needs of the cable communities they claim to serve. Even if the Exclusivity Rules weren't good policy on their own terms (and they surely are), the FCC should be very wary of accepting proposals from MVPDs who openly proclaim that the only reason they want

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that “[l]ocalism is an expensive value [, but] [w]e believe it is a vitally important value . . . that should be preserved and enhanced as we reform our laws”).

<sup>6</sup> See, e.g., 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Further Notice of Proposed Rulemaking and Report and Order*, MB Docket No. 14-50, *et al.*, FCC 14-28, ¶130 (rel. Apr. 15, 2014) (quoting STATE OF THE NEWS MEDIA 2012 at Local TV Essay; THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS (2012), available at <http://www.people-press.org/files/legacy/pdf/2012%20News%20Consumption%20Report.pdf>: “local TV remains America’s most popular source of local news and information” and citing STEVE WALDMAN AND THE WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FCC, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE at 84 (2011) (“INFORMATION NEEDS OF COMMUNITIES”), available at [http://transition.fcc.gov/osp/inc-report/The\\_Information\\_Needs\\_of\\_Communities.pdf](http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf): 78% of Americans obtain local news from local television stations daily).

<sup>7</sup> See, e.g., Letter from Joseph E. Young, Senior Vice President, General Counsel & Secretary, Mediacom to Marlene H. Dortch, MB Docket No. 10-71, filed Mar. 14, 2014; Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 22-27, filed May 27, 2011; Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 13-16, filed June 27, 2011; See Letter from Matthew A. Bill to Marlene H. Dortch, MB Docket No. 10-71, filed Jan. 30, 2014 (letter describing meeting with FCC staff involving Charter Communications, DirecTV, DISH Network, Time Warner Cable, and New America Foundation in which the MVPDs argued that the Exclusivity Rules “support government-sanctioned monopolies” and “impede MVPDs’ ability to mitigate the effects of a blackout” of a local TV station).

to get rid of those rules is so that they can replace local programming (including local news, sports, and emergency programming) with programming from distant markets.

No good result will come from eliminating the Exclusivity Rules. It is possible that modification or repeal of the rules will lead local broadcasters to lose network and syndicated exclusivity, and with it, the ability to continue providing high-quality local news, sports, and emergency programming to the great detriment of television viewers everywhere. It is also possible that some or most stations will retain exclusivity under differently-negotiated contractual provisions that would require lengthy and expensive court proceedings for the enforcement of their rights. In that case, today's straightforward, well-understood, and reasonably efficient system will be replaced with one that is much less predictable and much more expensive to the American taxpayers, broadcasters, and MVPDs. Neither of these changes would serve the public interest. Harming consumers and broadcasters to serve the interests of certain MVPDs is not how government is supposed to work. The FCC should conclude this proceeding by reaffirming the need for, and benefits arising from, the current Exclusivity Rules.

## **II. THE EXCLUSIVITY RULES CONTINUE TO PLAY AN IMPORTANT ROLE IN ENSURING HIGH-QUALITY LOCAL TELEVISION SERVICE.**

Fox Affiliates represents 187 independently-owned local television stations affiliated with the Fox television network. Our members' stations serve markets of all sizes across the country, providing local news, sports, and emergency programming to millions of U.S. television viewers. As the Commission knows, providing the local television service that Fox Affiliates' member stations offer in individual markets is an extremely expensive undertaking that requires stations to generate substantial amounts of revenue.<sup>8</sup> Historically that revenue came in the form of advertising sales and compensation from the networks for carrying network programming. Stations were licensed to

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<sup>8</sup> See, e.g., INFORMATION NEEDS OF COMMUNITIES at 158-59; 2003 *Ownership Order* at ¶¶ 166-169.

individual communities, the FCC watched carefully to ensure that each community had only as many television stations as it could economically support.<sup>9</sup> Each station’s economic market was protected by exclusivity rules that prohibited in-market broadcasters from rebroadcasting the network and syndicated programming broadcast in distant markets.<sup>10</sup> This historical network and syndicated exclusivity was purposefully designed to protect each television stations’ local economic market and to ensure fair competition; not to create “monopolies,” but to ensure that local communities receive the local service they deserve.

With the rise of MVPDs and the fundamental economic change in the network/affiliate economic relationship, affiliates now rely on a combination of advertising and retransmission consent fees to generate the revenue necessary to continue serving their communities. But exclusivity continues to play the same key role in helping broadcasters remain financially capable of providing local service. The current Exclusivity Rules recognize this fact by prohibiting importation of distant signals where local television stations have secured contractual exclusivity. And Congress has recognized the important role that the Exclusivity Rules play in the television broadcasting system by explicitly stating that importation of distant signals is inconsistent with the carefully balanced rights reflected in its cable retransmission consent system, and by directing the FCC to ensure that the exclusivity rules for satellite conform to those applicable to cable operators.<sup>11</sup>

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<sup>9</sup> 2003 *Ownership Order* at ¶¶ 74-75 (citing *Sixth Report and Order*, 17 Fed. Reg. 3905 (1952)) (“dispersed allotments ‘protect[] the interests of the public residing in smaller cities and rural areas more adequately than any other system.’”).

<sup>10</sup> See *CATV Non-Duplication Rules, First Report and Order*, 52 FCC 2d 519 ¶¶ 2-3 (1975) (explaining the origin of network non-duplication rules in 1962 as an expression of the FCC’s desire to protect stations from importation of distant signals by cable operators that could have a “sufficiently adverse economic impact on that station to cause its demise”); *Program Exclusivity in the Cable and Broadcast Industries, Report and Order*, 3 FCC Rcd 5299 ¶¶ 3-6 (1988) (explaining the need to protect syndicated exclusivity rights to maintain a level competitive playing field between broadcasters and cable operators).

<sup>11</sup> See *FNPRM* at ¶ 65 (quoting S. Rep. No. 102-92, at 38).

This system works. Broadcasters and MVPDs have a clear picture of their rights and responsibilities, and the Exclusivity Rules give the parties a ready and efficient tool for enforcing those rights. Because this well-designed system leaves little doubt about what the rules are, exclusivity violations are relatively rare. Indeed the Exclusivity Rules are a model for carefully crafted regulations that are accomplishing precisely the goals that Congress and the FCC have set without confusion or unintended consequences. They should be celebrated, not modified or repealed.

### **III. THE ASSAULT ON THE EXCLUSIVITY RULES HAS NOTHING TO DO WITH SERVING CONSUMERS.**

The only reason a review of the Exclusivity Rules is under discussion right now is because the retransmission consent system that Congress established is working exactly the way Congress intended, and certain MVPDs don't like it. They have pitched repeal of the Exclusivity Rules as a way to keep retransmission consent fees – and, they say, customer rates – low by adding the threat of distant signal importation to their arsenal of weapons in retransmission consent negotiations. This claim is both disingenuous and contrary to Congress's will.

First, retransmission consent fees have nothing to do with increasing MVPD service rates. MVPDs' monthly fees have risen faster than the fees for just about any other consumer service for many, many years, including during the lengthy period between 1992 and about 2007 when television broadcasters did not receive cash compensation for retransmission consent.<sup>12</sup> Blaming retransmission consent for increasing cable rates is like blaming retransmission consent for the setting of the sun or global warming. MVPDs established long ago that they would keep increasing customer rates for as long as they could irrespective of retransmission consent or the Exclusivity Rules. Repealing or modifying the Exclusivity Rules will not lower customer cable rates; it won't

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<sup>12</sup> See, e.g., Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, *Report on Cable Industry Prices*, ¶ 2 (2012) (noting that over preceding 15 years, cable rates had increased at more than double the rate of inflation); Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, *Report on Cable Industry Prices*, 21 FCC Rcd 15087 ¶ 2 (2005) (noting that cable prices rose more than 93% between 1996 and 2005).

even reduce the rate of increase. MVPDs' history of exponential rate increases leaves it with no credibility to even raise this argument.

Second, eliminating the Exclusivity Rules as an attempt to lower retransmission consent fees presupposes that retransmission consent fees are too high – which is demonstrably false. Programming like that aired by the Fox Affiliates remains among the highest rated programming on television, but MVPDs pay considerably more for satellite-delivered programming like ESPN and Discovery than they pay for local television stations. If retransmission consent rates are “too high,” then that goes double for non-broadcast programming. If the FCC were going to change its rules to attack customer MVPD rates by regulating programming costs, it should start with satellite-delivered cable networks, not with comparatively inexpensive television broadcast programming.

Third, eliminating the Exclusivity Rules to change the negotiating balance in retransmission consent disputes wrongly presumes that the current balance is different than the one Congress intended. In fact, Congress specifically recognized and approved the Exclusivity Rules when it enacted cable retransmission consent in 1992.<sup>13</sup> Congress again recognized and approved those rules when it instructed the FCC to apply commensurate rules to satellite providers when it approved distant signal importation for DBS.<sup>14</sup> And Congress has been lobbied extremely hard by the MVPD industry to change the retransmission consent system for the past several years. Those efforts have failed, and the reason they've failed is that the current system of fair and free market negotiations works. There is simply no evidence that the retransmission consent system isn't functioning in the manner Congress intended and there is no justification for putting the FCC's thumb on the scales on the side of MVPDs by changing the Exclusivity Rules.

Fourth, repealing the Exclusivity Rules will result in an uneven playing field for programming acquisition (particularly local sports programming acquisition) that will favor MVPDs

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<sup>13</sup> *See id.*

<sup>14</sup> *See* 47 U.S.C. §§ 339(b), 573(b)(1)(d).

and harm viewers. Congress and the FCC have recognized that the migration of sports programming from free broadcast television to pay television is not a welcome development.<sup>15</sup> Draining resources from local television broadcasters will only ensure that they exit the market for carrying local professional and major college sports programming, leaving MVPDs to dominate that market and make all local sports a pay-to-watch phenomenon. Sports programming that was once free to any consumer who chose to view it would now be available only to consumers who purchase MVPD services. That result is flatly inconsistent with what Congress intended.

The only possible beneficiary of a change in the Exclusivity Rules would be MVPDs. And the main benefit they would derive is a stronger competitive position through the weakening of the over-the-air broadcast television system. That result is not in the public interest by any reasonable calculation.

#### **IV. REPEALING THE EXCLUSIVITY RULES DURING RETRANSMISSION CONSENT DISPUTES WOULD DEFEAT THE LOGIC OF THE RULES.**

The *FNPRM* again seeks comment on whether the Exclusivity Rules should be enforced during periods when a local television broadcaster has not granted retransmission consent to an MVPD.<sup>16</sup> This idea is entirely inconsistent with the design of Congress's retransmission consent regime. Exclusivity gives MVPDs the incentive to bargain fairly for carriage of local television stations because if they don't reach a marketplace deal, they have no alternative for network or high-value local or syndicated programming. Again, Congress explicitly intended this result, stating that it "relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules," and that "[a]mendments or deletions of these rules in a manner which would allow distant stations to be submitted [sic] on cable systems for carriage or [sic] local

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<sup>15</sup> See, e.g., Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., *Memorandum Opinion and Order*, 26 FCC Rcd 4238 ¶ 161 (2011) (adopting conditions designed to slow migration of sports programming from NBC network to cable).

<sup>16</sup> See *FNPRM* at ¶ 73.

stations carrying the same programming would, in the Committee’s view, be inconsistent with the regulatory structure” created by the retransmission consent provisions of the 1992 Cable Act.<sup>17</sup>

Jeopardizing network and syndicated exclusivity during retransmission consent disputes would greatly diminish MVPDs’ incentive to engage in good faith negotiations for carriage of local television stations. Repealing the Exclusivity Rules during retransmission consent disputes will simply create opportunities and incentives to import signals based on dubious legal authority in order to gain the upper hand in retransmission consent negotiations. MVPDs have done this in the past, and repeal of the Exclusivity Rules will only encourage the same behavior in the future.<sup>18</sup> Such gamesmanship distracts both parties from the business of negotiating a fair retransmission consent agreement, leading to significant consumer harm.

The logic of exclusivity is that MVPDs know who they need to negotiate with to obtain certain programming, and refusing to enforce that exclusivity during disputes only ensures more disputes. And the logic of the Exclusivity Rules is to eliminate all doubt about whether contractual exclusivity will be enforced. Removing these rules during retransmission consent disputes would lead only to uncertainty and further delay in the conclusion of retransmission consent agreements according to the incentives that Congress enacted.

## **V. PIECEMEAL CHANGES TO THE RETRANSMISSION CONSENT SYSTEM WILL NOT SERVE THE PUBLIC INTEREST.**

The FCC should resist all pressure to make piecemeal changes to the retransmission consent rules like modification or repeal of the Exclusivity Rules. The retransmission consent system is a carefully balanced and intertwined web of laws and regulations, many of which the FCC can’t change. Trying to isolate and change one small part of the rules is likely to have far-flung

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<sup>17</sup> See S. Rep. No. 102-92, at 38

<sup>18</sup> See, e.g., Eriq Gardner, *Time Warner Cable Sued for Allegedly Stealing CBNS, NBC Signals*, THE HOLLYWOOD REPORTER, July 17, 2012, available at <http://www.hollywoodreporter.com/thr-esq/time-warner-cable-sued-cbs-nbc-signals-350320>.

consequences that are hard to predict. The *FNPRM* seeks to establish the FCC's authority to change the Exclusivity Rules, but even assuming it has such authority, changing the rules would be unwise and, at a minimum, inconsistent with the spirit of the laws Congress has enacted.

As the FCC knows, comprehensive reform of the retransmission consent laws has been under more or less constant consideration by Congress for the past several years. Unlike the FCC, Congress has the capacity to *comprehensively* reform the retransmission consent system if it determines that reform is necessary and in the public's best interests. Unlike the FCC, Congress could, for example, balance modification or repeal of the Exclusivity Rules with a repeal of the compulsory copyright license that deprives television stations of the exclusivity they would otherwise enjoy under copyright law. However it turns out, such comprehensive reform would be infinitely preferable to small piecemeal changes by the FCC that will increase turbulence in local retransmission consent markets and a disruption of our world-acclaimed local television broadcasting system.

## **VI. CONCLUSION**

For the reasons set forth above, Fox Affiliates request that the FCC retain its Exclusivity Rules and reject requests for their modification or repeal.

Respectfully submitted,

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