

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington DC 20554**

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

To: The Commission

**COMMENTS OF  
THE CBS TELEVISION NETWORK AFFILIATES ASSOCIATION**

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## SUMMARY

The CBS Television Network Affiliates Association opposes the elimination or modification of the network nonduplication and syndicated exclusivity rules. Dismantling exclusivity would *not* create more of a free market — the exclusivity rules are a measured means of enforcing privately negotiated exclusivity rights of which stations are otherwise deprived through the statutory copyright licenses that allow importation of distant signals. Local market exclusivity, bargained for in the market and supported by the network nonduplication and syndicated exclusivity rules, is central to our nation’s vital system of local broadcasting. In the face of a decline in local news from other sources and mergers among multichannel video programming distributors (“MVPDs”), the exclusivity rules are more necessary than ever. The loss of the exclusivity rules would severely impair local broadcasters’ ability to underwrite the substantial costs associated with providing high quality free over-the-air programming as well as strong and unique local news and other local programming of interest. The enforcement mechanism afforded by the exclusivity rules avoids wasteful duplication and acts as a counterweight to the compulsory copyright for distant signals. Because it lacks authority to revise significant portions of the complex legal framework governing retransmission of distant signals, the Commission should defer to Congress, the only entity with authority to consider all of the relevant laws as a whole.



exclusive arrangements, and repeal of the exclusivity rules would mean that broadcasters alone lack a means of enforcing exclusivity.

The exclusivity protected by the network nonduplication and syndicated exclusivity rules is a core facet of the high quality service provided by local stations to their communities. The rules' enforcement mechanism benefits the public by promoting the creation and distribution of local and other programming, and it promotes robust competition in the video programming marketplace. Since the Commission lacks authority over copyright law, it should not repeal or revise the exclusivity rules and thereby undermine the market envisioned by Congress. Instead, it should defer to Congress, since only it has oversight over the entire legal superstructure of local market exclusivity.

**I. THE NETWORK NONDUPLICATION AND SYNDICATED EXCLUSIVITY RULES SERVE THE PUBLIC INTEREST.**

The exclusivity rules are both necessary and beneficial. They serve the public interest by promoting localism, keeping high-quality programming free, and supporting diversity through the avoidance of wasteful duplication of programming.

The exclusivity rules provide important support for broadcasters' ability to provide programming of local interest.<sup>2</sup> These rules provide a necessary means of enforcing the exclusivity rights that stations have negotiated with their program suppliers. Exclusivity within a market allows stations to maximize viewership and local advertising revenues, and thereby to invest further in quality local programming. Local advertising sales, which are based on local broadcast markets, are the single most important revenue source that stations use to support

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<sup>2</sup> See *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 2206070, at ¶ 33 (2005) ("2005 Report to Congress") (noting that the exclusivity rules "protect localism").

investments in the television service upon which the public relies. Approximately 88 percent of commercial television broadcast stations' revenue is derived from advertising.<sup>3</sup> CBS affiliates rely on advertising revenues to invest in providing local news, public affairs, investigative journalism, weather coverage, and emergency information.

Given the decline in circulation of local newspapers and other factors, broadcasters' role in providing local news and related programming is “[i]n many ways . . . more important than ever.”<sup>4</sup> Broadcasters increasingly “fill the void” in investigative journalism left by changes in other media sectors.<sup>5</sup> Given this growing void, it is remarkable that the number of television stations originating local news went up this year.<sup>6</sup> Indeed, “local TV remains a top news source for Americans, with almost three out of four U.S. adults (71%) watching local television news.”<sup>7</sup> Further, broadcasters' reliable one-to-many transmissions enable them to play a uniquely important role in emergency situations.<sup>8</sup> When duplicating *national* programming is

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<sup>3</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, at ¶ 178 (2013).

<sup>4</sup> S. Waldman, *The Information Needs of Communities*, at 13 (2011), available at <http://www.fcc.gov/info-needs-communities>.

<sup>5</sup> Barb Palser, *A Promising New Venue: TV stations and their digital outlets may play a more prominent role in investigative reporting*, *American Journalism Review*, Aug. 27, 2012, <http://ajrarchive.org/Article.asp?id=5376>.

<sup>6</sup> Bob Papper, *More Stations Producing Local News*, RTDNA (June 16, 2014), [http://rtdna.org/article/more\\_stations\\_producing\\_local\\_news](http://rtdna.org/article/more_stations_producing_local_news).

<sup>7</sup> Katerina Eva Matsa, *Local TV Audiences Bounce Back*, Pew Research Center (Jan. 28, 2014), <http://www.pewresearch.org/fact-tank/2014/01/28/local-tv-audiences-bounce-back/>.

<sup>8</sup> For example, the Commission and FEMA called on citizens to “[t]une in to your local television or radio stations . . . for important news alerts” related to Hurricane Sandy. *FCC Provides the Public With Important Tips for Communicating in the Aftermath of Hurricane Sandy*, Advisory, (Oct. 31, 2012), <http://tinyurl.com/FCCSandy>. Further, “[n]early all television broadcast transmitters stayed on the air before, during and after Superstorm Sandy struck, regardless of whether or not their transmitters continued to receive power from the grid.” Comments of the Mobile EAS Coalition, PS Dockets No. 13-239 and 11-60, at 4 (Jan. 17, 2014).

imported into a market, such as by carriage of a distant CBS station's signal, the duplication fractures the audience for the local station's programming and consequently results in substantially reduced advertising revenue for the local station.<sup>9</sup> Therefore, the loss of exclusivity would severely impair local broadcasters' ability to underwrite the substantial costs associated with providing strong and unique local news and other local programming, a vital public service provided by CBS affiliates and other commercial television broadcast stations.

Nonduplication rights are critically important for ensuring that communities in smaller markets have access to local service. When stations in smaller markets including Harrisonburg, Virginia, Parkersburg, West Virginia and Panama City, Florida became new CBS affiliates, for example, they were able to rely on non-duplication rights to ensure that MVPDs did not import duplicating network programming from CBS affiliates in larger, adjacent markets.<sup>10</sup> These rights were granted to the stations by CBS, but because of the compulsory licenses, could be enforced by those stations only through the exclusivity rules. Without the ability to enforce exclusivity, these newer CBS affiliates would not be able to provide their local communities with new jobs or with local news, weather, sports, and widely-viewed, appealing local advertising opportunities.

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<sup>9</sup> See *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, at ¶¶ 36-41 (1988) ("*1988 Exclusivity Report and Order*") (discussing loss of advertising revenue when duplicating syndicated programming is imported); *recon. denied in pertinent part*, Memorandum Opinion and Order, 4 FCC Rcd 2711, ¶ 24 (1989) ("In reinstating our syndex rules, we are attempting to remove unnecessary impediments on broadcasters' right to contract (thereby enhancing competition) and to provide an environment that is more conducive over the long run to the production, diversity, responsiveness, quality and distribution of programming in order to ensure that consumers receive an optimal mix of programming"); *aff'd United Video Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989).

<sup>10</sup> See generally TVNewsCheck, *Three Gray Stations Sign CBS Affiliations* (July 17, 2012), <http://www.tvnewscheck.com/article/60825/three-gray-stations-sign-cbs-affiliations>.

The exclusivity rules also serve the public interest by keeping high-quality programming free, a crucial goal. Approximately 22.4 million American households, accounting for nearly 60 million people, rely exclusively on over-the-air television.<sup>11</sup> Thirty percent of households with annual incomes under \$30,000 rely exclusively on over-the-air television, and minority groups make up 41% of broadcast-only households.<sup>12</sup> The exclusivity rules keep programming free by supporting advertising revenue, which finances program acquisition costs, including those associated with acquiring syndicated programming, obtaining the rights to local and regional sporting events, and contributing to network program acquisition costs. Loss of advertising revenue would diminish the ability of stations to underwrite these investments. It also could result in further migration of programming from broadcast to pay-TV services. For example, CBS affiliates help to support the network's expenditures in purchasing the broadcast rights for major sports and special events programming, such as NFL and NCAA games. If cable networks are able to outbid CBS and other broadcast networks for this programming, it will be available on a subscription basis only, and will no longer be available on a free, over-the-air basis, as has happened already with many sports programs. Consumers will lose, and competition between free over-the-air television and pay television will diminish.

As the House Committee on Energy and Commerce recognized in connection with the 1992 Cable Act, “[a] significant reduction in the quality or quantity of sports programming available on free television, whether professional or collegiate, would be of great

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<sup>11</sup> Press Release, National Association of Broadcasters, Over-the-Air TV Renaissance Continues as Pay TV Cord-Cutting Rises (June 21, 2013), <http://www.nab.org/documents/newsroom/pressRelease.asp?id=3168> (citing GfK Media & Entertainment, *The Home Technology Monitor* (2013)).

<sup>12</sup> *Id.*

concern.”<sup>13</sup> The Commission too has observed that “broad and economical access to a variety of sports programming is instrumental to the Commission’s goal of ensuring the availability of diverse programming.”<sup>14</sup> Thus, for example, in its approval of the Comcast-NBCU merger, the Commission imposed a condition designed to prevent “migration of major sporting events from broadcast to cable,” noting that, absent the condition, “the Applicants would have an increased incentive and ability to migrate marquee sports programming from NBC and the NBC O&Os to Comcast’s cable networks, and that such action would harm consumers who rely exclusively on OTA broadcasting.”<sup>15</sup>

Finally, the exclusivity rules promote diversity. By avoiding “wasteful duplication of programming,” the exclusivity rules “provide proper market incentives for video outlets to deliver the programming that will maximize consumer benefits”<sup>16</sup> and avoid “asymmetric treatment of competitors.”<sup>17</sup> MVPDs and programming services that are negotiating for carriage may negotiate for exclusive rights. The Commission has studied this issue and, based on that study, has pointed out that depriving broadcasters of the ability to negotiate for exclusive rights would create a competitively unbalanced market and undermine

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<sup>13</sup> H.R. Rep. No. 102-628, at 126 (June 29, 1992).

<sup>14</sup> Final Report, *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Inquiry Into Sports Programming Migration*, 9 FCC Rcd. 3440, at ¶ 180 (1994).

<sup>15</sup> See *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238 at ¶ 161 (rel. Jan. 20, 2011).

<sup>16</sup> *1988 Exclusivity Report and Order* at ¶ 1.

<sup>17</sup> *Id.* at ¶ 5. See also *id.* at ¶ 23 (acknowledging that prior repeal of syndicated exclusivity rules “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”).

broadcasters' ability to serve as an effective competitor to cable.<sup>18</sup> Thus, the Commission reversed its 1980 decision to repeal the syndicated exclusivity rules, noting that the effect of the repeal was anti-competitive, reduced the diversity of programming options, and harmed consumers.<sup>19</sup> The Commission reaffirmed the importance of the network nonduplication rules, noting that “many of the same policy concerns about fair competition, and enhancing diversity of programming and efficient distribution raised with respect to syndicated programming apply here [to the network nonduplication rules] as well.”<sup>20</sup>

Nothing has changed to alter that conclusion. As recently as 2005, the Commission advised Congress that it “cannot endorse or recommend” modification of the exclusivity rules “that would supersede contract arrangements between broadcasters and their programming suppliers . . . . *The legislative history of the 1992 Act indicates that the network non-duplication and syndicated exclusivity rules were viewed as integral to achieving congressional objectives.*”<sup>21</sup> In an era of MVPDs engaging in transactions that substantially increase vertical and horizontal concentration in the marketplace, ensuring that local broadcasters remain a vibrant source of diverse programming and competition continues to be of paramount importance.

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<sup>18</sup> *Id.* at ¶¶ 31-32. *See also id.* at ¶ 74 (“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.”).

<sup>19</sup> *See id.* at ¶ 68 (noting that repeal of syndicated exclusivity rule did not expand “the richness and diversity of programs available to viewers”).

<sup>20</sup> *Id.* at ¶ 110.

<sup>21</sup> *2005 Report to Congress* at ¶ 50 (emphasis added).

In sum, the exclusivity rules play a core role in facilitating the free, high quality service provided by local stations to their communities, and abandoning or altering them would harm the public and the Commission's goals of localism, diversity, and competition.

**II. EXCLUSIVITY AND COPYRIGHT ARE DEEPLY INTERTWINED, AND SINCE IT CANNOT AMEND THE COPYRIGHT ACT, THE COMMISSION SHOULD NOT ALTER ITS EXCLUSIVITY RULES.**

The exclusivity rules and copyright law, in particular the compulsory distant signal licenses, operate as a whole. Dismantling the network nonduplication and syndicated exclusivity rules would not create more of a free market. The exclusivity rules are a measured means of enforcing privately negotiated exclusivity rights of which stations are otherwise deprived through the operation of a web of other rules and restrictions, most notably the statutory copyright licenses for importation of distant signals.<sup>22</sup> MVPDs tremendously benefit from compulsory copyright licenses for the programming contained in local and distant broadcast television signals,<sup>23</sup> and understandably they consistently have defended those compulsory licenses.<sup>24</sup> The distant signal compulsory copyright licenses undermine the local market exclusivity for which broadcasters have negotiated, and the Commission's exclusivity rules do nothing more than give broadcast the means to enforce their bargained-for exclusivity.<sup>25</sup> In the absence of exclusivity rules, the distant signal licenses deprive broadcasters of the means of

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<sup>22</sup> See *2005 Report to Congress* at ¶ 17 (“the Commission’s network non-duplication and syndicated exclusivity rules provide a regulatory means for broadcasters to prevent MVPDs from undermining their contractually negotiated exclusivity rights”).

<sup>23</sup> See Sections 111, 119, and 122 of the Copyright Act, 17 U.S.C. §§ 111, 119, and 122. These government-created licenses are not the product of a free market.

<sup>24</sup> See, e.g., *infra* notes 31 & 33.

<sup>25</sup> We note, however, that the Commission’s rules limit those rights, such as by prohibiting their exercise outside of limited geographic “zones of protection” and by exempting “significantly viewed” signals from their application.

enforcing the local market exclusivity for which they have negotiated and which underpins our network-affiliate system of high-quality local broadcast service. The exclusivity rules allow for a functioning market by providing broadcasters with a limited means of asserting their local exclusivity in the face of a government-created compulsory license.

History confirms that Congress's enactment of the distant signals licenses depended upon on the existence of the exclusivity rules. The Commission first promulgated network nonduplication rules and syndicated exclusivity rules for cable MVPDs in 1965 and 1972, respectively.<sup>26</sup> Congress enacted the cable distant signal compulsory license in 1976 against this backdrop.<sup>27</sup> In enacting the Satellite Home Viewer Improvement Act of 1999, Congress explicitly acknowledged that exclusivity and the compulsory copyright licenses are inexorably bound together. The legislative history states that

the Conference Committee is aware that in creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and that it therefore needs to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market . . . . In this context, the broadcast television market has developed in such a way that copyright licensing practices in this area take into account the national network structure, which grants exclusive territorial rights to programming in a local market to local stations either directly or through affiliation agreements. The licenses granted in this legislation attempt to hew as closely to those arrangements as possible . . . . [A]llowing the importation of distant or out-of-market network stations in derogation of the local stations' exclusive right—bought and paid for in market-negotiated

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<sup>26</sup> See *FNPRM* at ¶¶ 43, 48.

<sup>27</sup> See *id.* at ¶ 53.

arrangements—to show the works in question undermines those market arrangements.<sup>28</sup>

The Commission, too, has long recognized the interrelatedness of the copyright and communications provisions and policies in ensuring a functioning and free marketplace, stating for example that “deleting syndicated exclusivity, given the existence of the compulsory license, moved the marketplace *further away* from effective freedom of contract.”<sup>29</sup>

Congress has relied on the exclusivity provisions in other foundational communications statutes. In particular, the Senate Report accompanying the 1992 Cable Act emphasizes that “the Committee has relied on the protections which are afforded local stations by the FCC’s network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee’s view, be inconsistent with the regulatory structure created in” the Act.<sup>30</sup>

Remarkably, MVPDs agree that copyright, the Communications Act, and the exclusivity rules are deeply intertwined. For example, the National Cable & Telecommunications Association (“NCTA”) has stated that “the compulsory license has been and continues to be inextricably intertwined with a broad array of communications laws and

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<sup>28</sup> H.R. Conf. Rep. No. 106-464, 106th Cong., 1st Sess. (1999), reprinted at 145 Cong. Rec. 29238 (1999), at \*92-\*93; *see also id.* at \*100 (noting that availability of § 119 license is contingent on compliance with FCC rules, including exclusivity rules).

<sup>29</sup> *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rule Making, 2 FCC Rcd 2393, at ¶ 26 (1987) (emphasis added).

<sup>30</sup> S. Rep. No. 102-92 at 38 (1991).

policies regarding cable's carriage of television broadcast stations"<sup>31</sup> and argued that the copyright and communications frameworks, including the nonduplication rules, are interrelated.<sup>32</sup> Rural cable operators also have asserted that carriage of broadcast signals "occurs within a complex web of interrelated regulations," including the compulsory copyright licenses, retransmission consent, network nonduplication, and syndicated exclusivity,<sup>33</sup> and have characterized the copyright and communications regimes as "intertwined."<sup>34</sup>

In the absence of exclusivity rules, MVPDs will have much greater incentive and ability to import distant signals with duplicative national and syndicated programming, upending a functioning market and unraveling Congress's design. There is no reason to rely on MVPDs' convenient and self-serving assertion that they "would be unlikely to seek to import a distant station's signal unless they are faced with a blackout situation during an impasse in retransmission consent negotiations and that any such importation would probably be of limited duration."<sup>35</sup> Basic economic logic and recent history confirm that MVPDs *will* import distant signals whenever it serves their interests. Moreover, the use of distant signals to manipulate retransmission consent negotiations with local television stations thwarts the exclusivity bargained for by the local affiliate, enables MVPDs to insist on sub-market retransmission consent terms, and deprives local viewers and advertisers of the benefits of local service. As merely one example, Time Warner Cable ("TWC") exploited a loophole in its retransmission

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<sup>31</sup> Comments of NCTA before the Library of Congress Copyright Office, Docket No. RM 2010-10 (Section 302 Report to Congress), at 2 (April 25, 2011).

<sup>32</sup> *Id.* at 16-18.

<sup>33</sup> Comments of the Rural MVPD Group before the Library of Congress Copyright Office, Docket No. RM 2010-10, at 9-10 (April 25, 2011).

<sup>34</sup> *Id.* at 19-21.

<sup>35</sup> *FNPRM* at ¶ 62.

consent agreement with Nexstar to justify retransmission of Nexstar's signals outside of the applicable local markets.<sup>36</sup> TWC's willingness to go through extensive and costly litigation to exploit this loophole shows how far MVPDs are willing to go to engage in distant signal importation. The case also exemplifies the ineffectiveness of private contracts, alone, to prevent exploitation. In the absence of exclusivity, MVPDs will have all the more incentive to find and aggressively exploit loopholes and gaps, which are inevitable since contracts run for many years and are staggered across the various MVPDs and broadcasters.

Given the intertwined nature of exclusivity and copyright and the harm that would arise from eliminating only one piece of the framework, the Commission should defer to Congress. The Commission's limited authority in this area can be exercised only as to one portion of a complex legal framework. Further, as has been shown, the exercise of that limited authority proposed here would undo the careful structure created by Congress, which understood the exclusivity rules to be integral to the laws it enacted in this area. Only Congress has the authority to oversee the entire legal framework for retransmission of broadcast signals, and only Congress should tinker with that structure. Accordingly, the Commission should retain its existing rules, as Congress has intended.

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The local television markets advance stations' ability to provide viewers with competitive, diverse, responsive, and local programming. Elimination of the network nonduplication and syndicated exclusivity rules would undermine the market structure established by Congress, to the detriment of the viewing public. Accordingly, the Commission

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<sup>36</sup> See *Nexstar Broadcasting, Inc. v. Time Warner Cable, Inc.*, 524 F. App'x 977 (5th Cir. 2013).

should leave the exclusivity rules unaltered and thereby defer to Congress, which is the only entity that has authority to amend the intertwined communications *and* copyright laws.

Respectfully submitted,

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