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

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

COMMENTS OF THE WALT DISNEY COMPANY

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Executive Summary

The Walt Disney Company ("Disney") respectfully submits the instant comments ("Comments") in the above-captioned proceeding in which the Federal Communications Commission ("FCC" or "Commission") seeks comment on whether the network non-duplication and syndicated exclusivity rules ("Exclusivity Rules" or "Rules") should be modified or eliminated. These Comments make the following points:

- The Exclusivity Rules are intrinsically intertwined with the cable compulsory license and retransmission consent, a fact that those calling for elimination or modification of the Rules have routinely recognized in other contexts. Indeed, the very existence of the cable compulsory license impacts the nature of the remedies available to copyright holders.

- In the absence of the Exclusivity Rules that enable administrative enforcement of the contractual arrangements between rights holders and broadcasters, it would be more difficult, inefficient, and costly for rights holders to use the judicial system to enforce their contractual rights to exclusivity. Network affiliation agreements, for example, do not provide a local station with any direct means by which to enforce its contractual rights in the courts because they establish contractual privity only between the local station and the network. They do not include provisions that authorize local stations to initiate a judicial action against a third party that infringes upon the station's exclusive rights to broadcast network. Even if network affiliation or syndicated programming agreements were to include contractual provisions permitting third-party claims, it is not clear whether such claims would be justiciable. And, even if they were, given that many seeking repeal of the Rules stress that they only want to import distant signals during retransmission consent negotiations, judicial relief would be awarded long after any retransmission consent negotiations would be concluded.

- Those calling for repeal or of the Exclusivity Rules have consistently criticized the substantive contractual relationships between copyright holders and broadcasters. Program exclusivity is established not by regulation, but through privately-negotiated agreements. The question before the Commission is not whether to invalidate private contractual relationships between broadcasters and program suppliers, but rather whether to repeal or modify the workable administrative remedy to enforce contracted-for rights.

- The fact that a network or programmer makes programming available on platforms other than broadcast television does not impact broadcasters' rights to broadcast such programming over-the-air, and should not dilute any procedural remedies. Throughout the history of the Rules, the FCC has always anticipated alternative distribution streams for the underlying content and those alternatives have not diminished the need for an efficient, procedural remedy. Indeed, the FCC's own competition policy for decades has encouraged these new platforms. For the FCC to rely on alternative distribution methods as a basis for repealing or modifying the Rules would create a perverse penalty for copyright holders who are innovating to meet changing viewer demands.

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The Walt Disney Company ("Disney")[1] respectfully submits the instant comments ("Comments") in the above-captioned proceeding in which the Federal Communications Commission ("FCC" or "Commission") seeks comment on whether the network non-duplication and syndicated exclusivity rules ("Exclusivity Rules" or "Rules") should be modified or eliminated.[2] As discussed in these Comments, the Exclusivity Rules are intrinsically intertwined with both the cable compulsory license and retransmission consent. Indeed, the very existence of the cable compulsory license impacts the nature of the remedies available to copyright holders. In turn, the Exclusivity Rules enable administrative enforcement of the contractual arrangements between rights holders, networks, and broadcasters. The terms of any contractual exclusivity or network first-call rights are not established by regulation, but are negotiated in the private market and are already limited in many ways (e.g., geographically, length of time). In the absence of the

[1] Disney files these comments on behalf of itself, as well as the ABC Television Network and the ABC Owned Television Stations. The ABC Owned Television Stations are located in the following markets: New York (WABC-TV), Los Angeles (KABC-TV), Chicago (WLS-TV), Philadelphia (WPVI-TV), San Francisco (KGO-TV), Houston (KTRK-TV), Raleigh-Durham (WTVD(DT)), and Fresno (KFSN-TV).

[2] *See Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (rel. March 31, 2014) ("*FNPRM*").

Rules, it would be more difficult, inefficient, and costly for broadcasters and rights holders to use the judicial system to enforce their contractual rights. Notably, rather than focus on alleged harms stemming from the procedural nature of the remedy provided by the Rules, proponents of eliminating the rules have historically instead criticized the underlying contractual arrangements regarding program exclusivity. The Commission should not proceed to modify or eliminate the Exclusivity Rules because they still serve their intended purpose.

I. THE EXCLUSIVITY RULES ARE PART OF A COMPLEX LEGISLATIVE AND REGULATORY REGIME AND ARE INTERWOVEN WITH THE CABLE COMPULSORY COPYRIGHT LICENSE

In the *FNPRM*, the Commission seeks comment on the effect of the compulsory license scheme on broadcasters' rights to program exclusivity if the Exclusivity Rules are eliminated or modified, as well as on the relationship between the Exclusivity Rules and the retransmission consent regime.[3] As discussed below, the Exclusivity Rules are intrinsically intertwined with both the cable compulsory license and retransmission consent. While the *FNPRM* briefly discusses the legislative and regulatory regime governing cable carriage of broadcast signals and associated copyright matters, it does not contain any substantive analysis of the complex interplay among the Exclusivity Rules, the cable compulsory licensing scheme, and the retransmission consent regime.

As an initial matter, the very existence of the cable compulsory license impacts the nature of the remedies and the contractual options available to copyright holders. In the absence of a government-conferred copyright license, content owners (e.g., television networks) would negotiate directly with licensees (e.g., broadcast affiliates) to determine the extent to which the underlying copyrighted content could be distributed, if at all, to third parties. Copyright holders would have a copyright action against cable companies carrying copyrighted content without a

[3] *FNPRM* at para. 65.

license. However, with respect to cable television, Congress enacted the cable compulsory licensing scheme to provide cable television systems with the ability to import distant broadcast signals into a station's local market, without copyright liability, subject to payment of statutory royalty fees. Accordingly, content owners do not have the ability to assert a direct, copyright-based claim against a cable system carrying broadcast content, which is instead covered by the cable compulsory license.[4]

The adoption of the Exclusivity Rules to promulgate administrative procedures to enforce exclusivity was critical to the establishment of the cable compulsory licensing scheme. Specifically, the Commission enacted the first syndicated program exclusivity rule based upon a consensus agreement ("Consensus Agreement") among the cable, broadcast, and programming industries to facilitate the subsequent passage of legislation enacting a cable compulsory license.[5] Prior to the Consensus Agreement, there had been significant controversy among interested parties as to how to provide cable with the ability to carry broadcast signals without jeopardizing the viability of over-the-air television services, particularly given that "program exclusivity, as it is affected by cable carriage, is a matter that has both copyright and regulatory implications."[6]

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[4] Broadcasters and networks and syndicators have included in network affiliation and programming agreements provisions governing the geographical scope for which broadcasters may grant retransmission consent for selected programming. These provisions do not impact broadcasters' ability to distribute their local news and other local content.

[5] *See Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to the Community Antenna Television Systems, Cable Television*, Report and Order, 36 FCC 2d 143, 165-68, paras. 61-67 (1972) ("*Syndicated Program Exclusivity Order*"). Prior to adoption of the 1972 syndicated program exclusivity rule, in 1965, the Commission adopted a predecessor to the network non-duplication program exclusivity rule. *See 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, 38 FCC 683, fn. 37 (1965) ("*First Exclusivity Order*") (stating that "reasonable non-duplication requirements will serve, in part, to achieve the equalization of competitive conditions at which the 'rebroadcasting consent' proposal is, in large part, aimed.").

[6] *Syndicated Program Exclusivity Order*, 36 FCC 2d at 261, Appendix C. At the time the Commission considered the Consensus Agreement, it was weighing the regulatory and copyright

The Consensus Agreement served to settle the complex issues relating to copyright matters and the carriage of distant television signals.[7] The compulsory license was driven as a means to streamline the process of clearing the rights to copyrighted programming; it was not intended to impact any contractual exclusivity. Specifically, the Consensus Agreement expressly contemplated that the FCC would adopt regulations pursuant to which broadcasters would be entitled to enforce their contracted-for rights to exclusivity, and that program suppliers could control the distribution of their content through contractual exclusivity. At the time, Chairman Burch said that "the core of the consensus agreement is the exclusivity protection that will be afforded to non-network programming – protection for local broadcasters against distant stations and, more fundamentally, for the owner's rights to control the use of his product."[8]

The parties to the Consensus Agreement agreed to support the enactment of cable copyright legislation that would permit cable operators to retransmit broadcast signals without copyright liability, subject to compliance with the FCC rules governing carriage of broadcast signals.[9] Indeed, the two concepts were—and continue to be—directly tied, to the extent that the cable compulsory license could otherwise enable cable operators to import distant signals without regard to broadcast exclusivity.[10] In short, the Exclusivity Rules are "uniquely tied by their relationship to the Copyright Act's compulsory license".[11]

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implications of program exclusivity, such as how best to balance the cable industry's desire to obtain a compulsory license to carry broadcast signals and the broadcast industry's concerns that such a license could significantly compromise the over-the-air broadcast system to the extent cable operators could import duplicative programming without copyright liability or compensation to broadcasters. *See id.* at 164-65, paras. 57-60.

[7] *Syndicated Program Exclusivity Order*, 36 FCC 2d at 147, para. 10.

[8] *Syndicated Program Exclusivity Order*, 36 FCC 2d at 292.

[9] To avail itself of the compulsory cable license, a cable operator would be required to pay royalty rates established by the Copyright Office (rather than the market) for the carriage of any distant broadcast signals.

[10] To this end, the Commission observed that, in enacting cable copyright legislation pursuant to the Consensus Agreement, Congress would be affirming the Commission's

Similarly, the existence of the Exclusivity Rules was important to Congress's enactment of the retransmission consent legislation in 1992 to correct, to some extent, the market imbalance created by the existence of the compulsory license.[12] Specifically, in establishing the statutory retransmission consent regime, Congress sought to enable broadcasters to be compensated for the retransmission of their signals. Because the value of a broadcast signal is reliant upon the value of the programming carried in the signal,[13] a cable operator's ability to import distant signals pursuant to the cable compulsory license has a negative and direct impact on the effective operation of the "marketplace for the disposition of the rights to retransmit broadcast signals."[14]

Indeed, those calling for elimination of the Exclusivity Rules have routinely recognized the interrelationship among the Exclusivity Rules and the compulsory licensing and retransmission consent regimes. For example, the American Cable Association has explained that "changes to the compulsory license cannot be done in isolation. As the Copyright Office and the Federal Communications Commission have long recognized, the compulsory license is intertwined with key broadcast regulations, such as retransmission consent, must carry, network

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recognition of the importance of contractual exclusivity to the cable-broadcast regulatory scheme. *Syndicated Program Exclusivity Order*, 36 FCC 2d at 167, para. 65 ("[T]he enactment of cable copyright legislation by Congress -- with the Commission's program [for regulating cable] before it -- would in effect reaffirm the Commission's jurisdiction to carry out that program"). The Commission's cable regulatory program included, *inter alia*, proposals aimed at resolving "the problem of exclusivity protection for programs imported from distant cities by cable television systems and to open the way for resolution of the long-standing dispute over copyright payments." 36 FCC 2d at 164, para. 58.

[11] *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, para. 153 (1988) ("*Program Exclusivity R&O*").

[12] *See* S. Rep. No. 102-92 at 38 (1991) ("Senate Report") (explaining that Congress "relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules" when it enacted retransmission consent).

[13] *See* Copyright Office Section 302 report from 2011 (explaining that, although retransmission consent is distinct from copyright to the extent that a cable operator may rely on the Section 111 license to carry either a local or distant signal without copyright liability, the retransmission consent and cable copyright licensing schemes are inherently linked).

[14] *See* Senate Report at 36.

nonduplication, and syndicated exclusivity. Elimination of the compulsory license must coincide with reform of these broadcast rules and laws."[15] Similarly, the Rural MVPD Group (comprised of the American Cable Association, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, and the Western Telecommunications Alliance) has stated recently that broadcasting carriage occurs within a complex web of interrelated regulations that include the Section 111 compulsory license. These regulations include: must carry; retransmission consent; network nonduplication; syndicated exclusivity . . . ."[16] Notwithstanding these clear acknowledgements that the Rules do not exist in a vacuum, many entities seek to focus solely on elimination of the Exclusivity Rules in this proceeding as a means to change the nature of the contractual relationship between broadcasters and program suppliers.[17]

In sum, the Exclusivity Rules serve as an indispensable element of a regulatory regime and cannot be repealed or modified in isolation from that overall regime. Local broadcasters can rely on the Exclusivity Rules to enforce their first-call or exclusive rights against a cable operator directly in an administrative forum. By contrast, given the challenges with enforcing contractual exclusivity and first-call rights in the courts,[18] in the absence of the Rules, some distributors may

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[15] *U.S. Copyright Office Section 302 Report Hearing* at 2 (June 10, 2011) (statement of Ross J. Lieberman, Vice President of Government Affairs, American Cable Association), *available at* http://www.copyright.gov/docs/section302/testimony/witness/rmg-testimony.pdf (last accessed May 21, 2014).

[16] Comments of the Rural MVPD Group, In the Matter of Section 302 Report to Congress, Library of Congress Copyright Office Docket No. RM-2010-10 (filed April 25, 2011). See also Reply Comments of the Rural MVPD Group, In the Matter of Section 302 Report to Congress, Library of Congress Copyright Office Docket No. RM-2010-10 (filed May 25, 2011) ("[t]he compulsory license does not exist in isolation; it is inextricably linked to a complex web of broadcast signal carriage laws, regulations, and deeply rooted policies.").

[17] *See infra* Section III.

[18] *See infra* Section II.

be incentivized to import duplicative programming from a distant station,[19] at least for short periods of time before a judicial remedy can be issued. In sum, elimination of the Exclusivity Rules would upset Congress's deliberate balancing of the compulsory copyright license, retransmission consent and communications policy.[20]

II. THE EXCLUSIVITY RULES CREATE A MORE EFFICIENT AND EXPEDIENT ENFORCEMENT PROCESS THAN RELYING ON THE COURT SYSTEM TO ENFORCE CONTRACTUAL NON-DUPLICATION RIGHTS

The *FNPRM* seeks comment on whether judicial enforcement of the first-call or exclusivity provisions in programming or affiliation agreements would adequately protect the interests of local broadcasters if the Exclusivity Rules were to be eliminated, and whether broadcasters' lack of direct contractual privity with cable operators importing distant signals would impact the use of the judicial system to enforce exclusivity or first-call provisions in network affiliation or syndicated programming agreements.[21] In the absence of the Exclusivity Rules that enable administrative enforcement of the contractual arrangements between rights holders and broadcasters, it would be more difficult, inefficient, and costly for rights holders – and certainly broadcasters - to use the judicial system to enforce their contractual rights.

With respect to the network-affiliate system, a television network, like ABC, enters into an affiliation agreement directly with a local broadcast station on an individualized basis. As described above, the contractual terms include the first-call right to broadcast programming over-the-air, in pattern, in a local station's geographic market. The network affiliation agreement does not provide that cable operators or other local network affiliates will be third-party beneficiaries or otherwise be made parties to the agreement. To this end, the network affiliation agreement does not include any provisions that would authorize a local broadcast station to initiate a

[19] *See FNPRM*, 29 FCC Rcd at 3387, para. 58 & n.221.
[20] *See generally Program Exclusivity R&O*, 3 FCC Rcd 5299.
[21] *See FNPRM*, 29 FCC Rcd at 3387, 3392, paras. 58, 66.

judicial action against a third-party that infringes upon the station's first-call rights to broadcast network programming. Accordingly, because there is no contractual privity between a local network affiliate and a cable operator importing distant signals, if a cable operator relies on the cable compulsory license to import a distant broadcast signal containing duplicative network programming into a local station's market, the local station cannot initiate a breach of contract suit against the cable operator to enforce its first-call rights under the network affiliation agreement. Similarly, due to lack of privity, the local station cannot rely on its network affiliation agreement to enforce its rights against the distant station whose programming was imported. Thus, network affiliation agreements provide a local station with no direct means by which to enforce its contractual rights in the courts. Importantly, even if network affiliation agreements were to include contractual provisions permitting third-party claims, it is not clear whether such claims would be justiciable[22] and, at a minimum, as part of a court proceeding, it is highly foreseeable that some cable operators could challenge such claims on procedural grounds, resulting in a slow, inefficient, and impractical remedy.

To demonstrate the complexities and inefficiencies involved with judicial enforcement of contractual exclusivity or first-call rights, assume that a cable operator has received, or asserts that it has received, retransmission consent from an out-of-market broadcaster to import distant duplicative network programming into another broadcaster's local market, pursuant to the cable compulsory license. In this case, because the carriage of the underlying copyrighted broadcast

[22] Generally speaking, a contract may contain a provision enabling a third party to enforce the contract to which it is not a party under certain circumstances. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."); RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (detailing the requirements under contract law for the creation of intended and incidental beneficiaries). However, contract law does not generally provide that the parties to the agreement, in this case, the local station and the network, can bring contractual claims against the third party beneficiary, i.e., the cable operator.

content is permitted under the cable compulsory license, the television network or copyright holder would have no direct copyright claim against the cable operator.[23] In addition, neither the television network nor the local broadcaster would have direct recourse against the cable operator under the network affiliation agreement.[24] As a result, to enforce network first-call rights, the local broadcast station could reach out to the television network to request that the network initiate a contractual claim against the out-of-market station that allegedly authorized the carriage in violation of its affiliation agreement, or the network could, *sua sponte*, initiate such a claim. However, if past is prologue, there is likely to be a legal defense raised by the cable operator as to whether the out-of-market broadcaster had, in fact, authorized the cable operator to import its signal outside of the broadcaster's local market.[25] The evaluation of the issue not only would be slow, but would be unlikely to be resolved before resolution of the event

[23] *See supra* Section I (demonstrating a copyright holder's lack of a direct copyright claim against a cable system carrying broadcast content under the cable compulsory license). Although a television network may attempt to bring a third party claim against the cable operator, it is not clear whether such an action would be justiciable. *See supra* note 23.

[24] Additionally, the local affiliate may not be able to proactively include provisions in a retransmission consent agreement that would prevent a cable operator from importing a distant station in order to protect its own contracted-for exclusivity rights. *See Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2733, para. 27 (2011) (seeking comment on whether a broadcaster's request to condition retransmission consent on a cable operator's agreement not to import a distant significantly viewed station should be deemed a *per se* violation of the good faith negotiation rules).

[25] *See, e.g.*, *Nexstar Broadcasting, Inc. v. Time Warner Cable, Inc.*, No. 3-12-CV-2380-P (N.D. Tex. Sep. 5, 2012), *aff'd*, 524 Fed.Appx. 977 (5th Cir. 2013) (*Nexstar*) (denying an injunction against Time Warner Cable for importing a Nexstar station's out-of-market signal during Time Warner Cable's retransmission consent dispute with the Hearst Corporation); *Emergency Petition for Prohibition of Carriage in Violation of the Commission's Rules*, CSR-8382-C, 3 (filed Dec. 18, 2010) (asserting that Time Warner Cable retransmitted Nexstar and Mission Broadcasting stations "without notification, consent or authority . . . to gain leverage in its retransmission consent disputes with Smith").

that led the cable operator to carry the out-of-market station in the first place.[26] Even if a cable operator is carrying a distant signal without authorization in clear violation of Section 325 of the Communications Act of 1934, as amended, then a television network or syndicator may nonetheless be forced to first initiate a claim against the out-of-market station which, in turn, could (but is not required to) initiate a claim against the cable operator for carrying its signal without consent.

Importantly, unlike the Exclusivity Rules, reliance on judicial remedies does not enable the local station or the television network or syndicator to enforce directly their contracted-for first call or program exclusivity rights vis-a-vis the cable operator. Because cable operators can – and often do – pick up a broadcast signal over-the-air, contracts simply cannot provide for an expedient or narrow remedy, particularly if a cable operator were to import a distant signal for a limited duration or purpose, such as during retransmission consent negotiations. Rather, the only immediate remedy available to a television network or syndicator would be, at a minimum, to cease delivery of network or syndicated programming to the distant station's local market, and, perhaps, to the entire group of stations. Such a remedy, however, could result in the loss of network or syndicated programming to a significant number of viewers. This is not a result that the FCC should seek to promote via repeal of the Exclusivity Rules.

At a minimum, even if possible, a network's or syndicator's ability to obtain judicial relief (e.g. specific performance to prevent a cable operator from carrying programming for which another broadcaster has first-call or exclusive rights) would be costly and time-

[26] Indeed, this was the case with the Time Warner Cable-Hearst retransmission dispute matter as Time Warner Cable and Hearst reached an agreement shortly after Nexstar initiated litigation against Time Warner Cable.

consuming.[27] Based on their own statements, some operators seek to carry distant signals only for short periods, perhaps during retransmission consent negotiations or during any retransmission consent disputes.[28] In such situations, the ability to obtain relief in the courts is highly unlikely given that retransmission consent negotiations are likely to be resolved more expeditiously than the judicial process. To the extent that the goal of any proponent of repealing the rules could be to delay or even avoid complying with well-established contractual provisions in order for that entity to gain leverage in their own private contractual negotiations, that should not serve as any sort of basis for the FCC to repeal or modify the Rules. The Exclusivity Rules are still warranted and serve as an appropriate procedural remedy.

III. PROPONENTS OF ELIMINATION OF THE RULES SEEK TO LIMIT OR UNDERMINE THE CONTRACTUAL RELATIONSHIPS BETWEEN PROGRAMMERS AND BROADCASTERS

In calling for repeal or modification of the Exclusivity Rules, many focus on the exclusivity that forms the basis of the network-affiliate and syndicated programming relationship, rather than upon the procedural nature of the Rules. Indeed, proponents of elimination of the Exclusivity Rules have consistently focused on criticizing the substantive contractual relationships between content owners and broadcasters. For example, the American Cable Association has argued that "unjustifiable increases in retransmission consent revenue provides further evidence of the market power broadcasters exploit through the broadcast exclusivity regulations – network non-duplication and syndicated exclusivity". Similarly, Mediacom has asserted that "[r]etransmission consent negotiations would be more balanced and

[27] In the absence of the Exclusivity Rules, the costs of litigation to enforce exclusivity would be imposed entirely upon the broadcasters and the network, notwithstanding that it is the cable operator's actions that would lead to violation of the local broadcaster's exclusivity rights.

[28] *See infra* Section III, nn.32-33; *see also FNPRM*, 29 FCC Rcd at 3387, para. 58 & n.221 (citing comments from cable operators and MVPDs demonstrating interest in eliminating the Exclusivity Rules for purposes of importing distant signals during retransmission consent disputes).

fair if network affiliates faced competition from affiliates in nearby markets. However, the Commission's network non-duplication rules, together with concerted action by broadcasters and networks to contractually limit the station's right to grant retransmission consent outside its DMA, effectively operate to prevent MVPDs from seeking out a substitute for a local broadcaster."[29] Others have claimed that the Rules are no longer necessary because they "impede MVPDs' ability to mitigate the effects of a blackout of network programming . . . and exacerbate[] the problems associated with the retransmission consent rules."[30] These assertions all have one common theme – namely, the purported impact of the Exclusivity Rules in the context of retransmission consent negotiations.[31] It is worth stressing that to the extent that there is are different goals, e.g., to import distant or nearby news programming into a local market, the Exclusivity Rules do not address the ability of broadcasters and distributors to enter into private agreements to distribute local news.

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[29] *See* Letter from Seth A. Davidson, Counsel for Mediacom Communications Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 10-71, 09-182, 07-294, 12-68, 07-18, 05-192, at 2-3 (filed Sep. 27, 2012). *See also* Letter from Joseph E. Young, Senior Vice President, General Counsel & Secretary, Mediacom Communications Corporation, to William T. Lake, Chief, Media Bureau, FCC, MB Docket Nos. 09-182, 10-71, at 6 (filed Dec. 7, 2011) ("[B]roadcasters are insulated from competition by contractual exclusivity rights given the force of law by the Commission's network non-duplication and syndicated exclusivity rules, and a station that is not carried by an MVPD because of a negotiating deadlock does not have to fear a permanent loss of viewers to an out-of-market station with the same network affiliation temporarily substituted by an MVPD."); Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc., MB Docket No. 10-71, at ii (filed May 27, 2011) ("The exclusivity rules allow broadcast stations to be the sole over-the-air source of network programming within their market.").

[30] Letter from Matthew A. Brill to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 10-71, 09-182, at 5 (filed Jan. 30, 2014) (summarizing an *ex parte* meeting between representitives of the American Cable Association, Charter Communications, DIRECTV, DISH Network, New America Foundation, Time Warner Cable, and FCC staff).

[31] *See FNPRM*, 29 FCC Rcd at 3387, para. 58 ("Commenters argue that MVPDs are unlikely to seek to import a distant station's signal today unless they are faced with a blackout of a local station as a result of a retransmission dispute, and that any such importation would be limited in duration.").

The criticism of the substantive contractual relationships between content owners and broadcasters ignores that the Exclusivity Rules merely provide an administrative remedy to enforce contractual rights that have been negotiated in the private market. And, to be clear, those exclusivity rights are already limited by contract (and by the FCC's rules), in that they only cover the airing of broadcast programming in-pattern within certain geographic limits. While some entities argue that the Rules create "artificial rights" for broadcasters, this argument misses the point because the program exclusivity is established not by regulation, but through privately negotiated agreements between broadcasters and programmers.[32] As the Commission has explained, "[C]able operators' ability to retransmit duplicative distant broadcast signals is governed in the first instance by the contract rights negotiated between broadcasters and their programming suppliers. If networks and syndicators have entered into contracts with broadcasters that limit broadcasters' exclusivity such that a duplicative distant signal could be imported by a [cable operator] without blacking out the duplicative programming, the Commission's rules would not prevent that result. Conversely, where exclusivity contracts exist, repeal of the Commission's rules would not necessarily be sufficient to enable the retransmission of duplicative programming."[33] In short, the Exclusivity Rules do not confer any artificial rights

[32] *See* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* at 27, para. 49, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf ("*2005 Report to Congress*") ("[C]able operators' ability to retransmit duplicative distant broadcast signals is governed in the first instance by the contract rights negotiated between broadcasters and their programming suppliers. If networks and syndicators have entered into contracts with broadcasters that limit broadcasters' exclusivity such that a duplicative distant signal could be imported by an MVPD without blacking out the duplicative programming, the Commission's rules would not prevent that result. Conversely, where exclusivity contracts exist, repeal of the Commission's rules would not necessarily be sufficient to enable the retransmission of duplicative programming.").

[33] *Id.*

upon broadcasters, but rather simply "provide a regulatory means for broadcasters to prevent MVPDs from undermining their contractually negotiated exclusivity rights."

The question before the Commission is not whether to invalidate private contractual relationships between broadcasters and program suppliers, but rather whether to repeal or modify the administrative remedy to enforce contracted-for rights. Accordingly, arguments – based on limiting or modifying the exclusive nature of the relationship between broadcasters and program suppliers – must be rejected, as they are simply not germane to the issue of whether the procedural Exclusivity Rules should be eliminated. The fact that some purport to avoid complying with contractual exclusivity only in the context of retransmission consent negotiations and only for a limited amount of time underscores the importance of the Exclusivity Rules, which provide the only efficient procedural remedy for broadcasters and programmers to enforce their rights. Indeed, the focus of some who support elimination of the Exclusivity Rules appears to not be on whether there should be an administrative or judicial remedy to enforce exclusivity, but rather upon achieving the ability to avoid a procedural remedy, which would delay enforcement of contractual provisions, in order that the distributor could gain leverage in their own negotiations of private contractual rights. This is not a sufficient public interest basis upon which to repeal or modify the Rules, especially where the Rules continue to serve their role as an appropriate and efficient procedural remedy.

IV. DISTRIBUTION OF PROGRAMMING VIA ALTERNATIVE PLATFORMS HAS NO RELEVANCE TO THE ISSUE OF WHETHER PROGRAMMERS AND BROADCASTERS SHOULD BE ENTITLED TO ENFORCE PRIVATELY NEGOTIATED CONTRACTUAL RIGHTS

In the *FNPRM*, the Commission seeks comment on "the extent to which program suppliers currently dilute broadcasters' exclusive rights by making their programming available

through multiple outlets."[34] Disney firmly believes that content owners should be permitted to determine the best means by which to distribute content to viewers, and that the decision to make content available on a variety of platforms and at a variety of times in no way means that the Commission should not respect the first-call or other rights negotiated in private agreements between broadcasters and networks and syndicators. Indeed, the FCC should refrain from taking any action in this proceeding that would or could undermine the ability of a distributor of copyrighted programming to offer such programming in the way that it deems appropriate for consumers. Indeed, for the FCC to rely on alternative forms of distribution as a basis for repealing or modifying the Rules would be a perverse penalty for copyright holders who have continued to explore ways to serve viewers' changing demands.

With respect to over-the-air television, television networks have historically determined that the best way to distribute network programming is through providing affiliates with contractually-negotiated rights to the first-call of programming within a specified geographic territory. Again, these rights are not and have never been boundless. The rights at issue involve in-pattern distribution within a local market. And they have always existed as part of a framework that includes other methods of distributing the same content. Indeed, as the Commission has recognized, networks and affiliates are free to "determine, based on their own best business judgment, what degree of programming exclusivity will best allow them to compete in the marketplace and most efficiently serve their viewers."[35]

The fact that a network makes programming available on platforms other than broadcast television has no impact on broadcasters' first-call rights to broadcast such programming over-the-air. Indeed, the fact that even the FCC has referred to those rights as "first call" implies that

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[34] *FNPRM*, 29 FCC Rcd at 3390, para. 62.
[35] *Program Exclusivity R&O*, 3 FCC Rcd at 5319, para. 120.

the FCC has always assumed that the programming will air on other platforms.[36] Network affiliation agreements are typically structured to provide local television stations with first-call rights to air network programming in accordance with a specific schedule established by the network. For example, the ABC Television Network distributes prime time network programming to its East Coast affiliates for broadcast during the hours of 8 p.m. and 11 p.m., Eastern Time. To the extent the ABC Television Network makes its programming available via alternative platforms, there is absolutely no impact on the broadcaster's contractual rights vis-à-vis other broadcasters to distribute the program to its viewers in accordance with its network affiliation agreement.[37]

Moreover and importantly, when seeking comment on whether programmers somehow dilute the value of broadcasters' contractually-negotiated exclusivity by making content available through multiple outlets, the *FNPRM* overlooks that there have always been alternative revenue streams for broadcast content, such as sale into syndication. Yet, the FCC has never taken the existence of these revenue streams into account when considering the Exclusivity Rules. Indeed, with respect to syndicated programming, the Commission specifically adopted the syndicated exclusivity rule to protect contractually-negotiated exclusivity between program suppliers and broadcasters, thereby demonstrating that potential "dilution" of broadcasters' contracted-for rights to network exclusivity was of no concern.[38]

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[36] 47 CFR Section 73.658(b).

[37] For example, the ABC Television Network offers "live streaming" of network programming to viewers via its WATCH ABC service. Live streaming of ABC network programming via WATCH ABC is offered on a local market basis and such viewers seeking to access ABC network programming via WATCH ABC live streaming must be physically located in the geographic market of a specific ABC owned television station.

[38] A network program that is sold into syndication qualifies as a "syndicated program" under the FCC's rules because, once syndicated, the program is not "delivered simultaneously to more than one broadcast station." 47 C.F.R. § 76.5(m).

In sum, the FCC cannot justify the repeal or modification of the Exclusivity Rules based on the mistaken belief that the availability of programming on alternative platforms somehow dilutes broadcasters' privately-negotiated rights. To do so would run counter to the FCC's own long-standing public policy interest in encouraging competition through the distribution of programming on new or alternative platforms. As demonstrated herein, non-broadcast distribution of programming should in no way dilute the on-air program exclusivity rights that are privately negotiated by networks, syndicators and their affiliates.

V. CONCLUSION

For the reasons set forth herein, Disney urges the Commission to retain the Exclusivity Rules in their current form.

Respectfully submitted,

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