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	)	

JOINT COMMENTS OF
BONTEN MEDIA GROUP, LLC,
DISPATCH BROADCAST GROUP,
GANNETT CO., INC.,
POST-NEWSWEEK STATIONS, INC.,
RAYCOM MEDIA, INC., AND
TRIBUNE BROADCASTING COMPANY, LLC

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Summary

By protecting financial investments in acquired programming, the network non-duplication and syndicated exclusivity rules enable local broadcasters to invest in local news, investigative journalism, emergency weather, and public affairs programming, to support acquisition of broadcast rights for popular national programming like the Olympics and Super Bowl, and to acquire syndicated programming. Repealing or diluting these protections would undermine the business model that supports local broadcast journalism, and the beneficiaries of any such repeal or dilution of these rights would be pay-TV providers, not viewers.

A distant broadcast signal is no replacement for local broadcaster's programming. Within local communities, broadcasters provide coverage of local emergencies, including life-saving information about weather emergencies and other crises, and are a unique source of local investigative journalism, local sports coverage, and other local programming tailored to the needs of a community. The impact on localism includes, although is not limited to, the complete loss of this high value local programming by pay-TV subscribers whose providers import a distant signal rather than carrying the local signal. This shift is not only antithetical to localism, a longstanding cornerstone of broadcast regulation, but it is wholly unnecessary — today, retransmission consent impasses are exceedingly rare and those that do occur are quickly resolved. And such rule changes would have unintentional, detrimental impacts, including by threatening to lead to more such impasses and prolong those that occur, thereby denying pay-TV subscribers access to local news, weather, and public affairs programming.

Moreover, the impact on localism would be suffered by pay-TV subscribers and over-the-air viewers alike, as repeal of the exclusivity rules fundamentally undermines the business model that enables broadcasters to invest in the high value local programming described above. There is a strong tradition in this country of broadcasters acquiring and investing in programming that is tailored to the needs and tastes of their communities, but that longstanding model would be upended by repeal of the exclusivity rules. Further, the repeal or dilution of these rules would disrupt the local advertising market. Because advertising in distant markets has little or no value to local advertisers, repeal of the exclusivity rules would undermine delivery of advertising targeted to local viewers, harming local businesses and competition.

As part of the regulatory and statutory landscape that permits pay-TV providers to retransmit station signals without adhering to the usual rules of copyright, the network non-duplication and syndicated exclusivity rules are essential components of the television marketplace. Congress created the retransmission consent regime on the basis of these rules, and their repeal would not only contravene the design of Congress's framework, but it would harm viewers — whether they rely on over-the-air broadcasting or pay-TV services.

The Commission has experimented with repeal of the syndicated exclusivity rules in the past at the behest of cable providers, and concluded it was a mistake. Indeed, the Commission found that the absence of such protections compromised investments in programming and localism and, on that basis, restored the syndicated exclusivity rules and affirmed the importance of the network nonduplication rules. It would be folly to repeat the mistakes of the past in light of this experience.

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The 133 television broadcast stations of Bonten Media Group, LLC, Dispatch Broadcast Group, Gannett Co., Inc., Post-Newsweek Stations, Inc., Raycom Media, Inc., and Tribune Broadcasting Company, LLC (the "Joint Broadcasters") serve the public in some 104 communities, large and small, across the United States. Based on our combined experience in serving our communities of license and viewers through both over-the-air broadcasts and through our relationships with pay-TV providers, it is clear to us that proposals to eliminate or dilute the program exclusivity rules would undermine the economic and market basis for local television programming distribution and impair broadcasters' ability to serve their communities of license.[1]

The network non-duplication and syndicated programming exclusivity rules are part of the regulatory and statutory landscape that existed at the time Congress created the

[1] *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rule Making, FCC 14-29 (rel. Mar. 31, 2014) ("*FNPRM*").

retransmission consent regime, and they form a crucial part of the system of rules that is required for the broadcast television marketplace to function effectively. The importation of duplicating distant signals into local markets fundamentally threatens localism and jeopardizes the richness and diversity of television programming generally. As local broadcasters, we are tasked with airing programming that is responsive to the needs and issues of our communities of license. Pay-TV subscribers would lose access to this valuable content if their providers were permitted to import a distant signal rather than carrying a local signal. And over-the-air viewers would also suffer. These essential rules are the basis on which we are able to provide every public service that we provide to our viewers and communities. If we could not negotiate for and enforce exclusivity in our markets, we would become much less attractive to advertisers and, as a result, could not afford to invest in local journalism and public affairs programming or support the broadcast distribution of sports and major events. The loss of advertising revenues would be compounded by the loss of retransmission consent revenues that would result if we could not negotiate for exclusivity with respect to the network and syndicated programming we purchase and air. And, of course, repeal of the rules would undermine the economics of prior transactions through which we have contracted for network and syndicated programs for years into the future in reliance on the existence and enforceability of the exclusivity protections. For these reasons, we strongly oppose proposals to eliminate the exclusivity rules or to modify them.

I. As The Commission Has Recognized, The Exclusivity Rules Are A Foundational Element of Localism And Key To Supporting Investment In Important Programming.

Our broadcast regulatory framework is designed to "foster a system of local stations that respond to the unique concerns and interests of the audiences within the stations' respective service areas" — a principle that derives from the Communications Act of 1934, as amended (the "Communications Act") and is echoed throughout long-standing Commission policies and rules.[2] We take seriously this obligation to serve our communities — including both pay-TV subscribers and over-the-air viewers who consume and rely on our programming. Yet the proposed repeal or dilution of the exclusivity rules would have consequences antithetical to long-standing policies in support of localism. Any repeal would undermine pay-TV subscribers access to local content by encouraging providers to import distant signals (which are responsive to the concerns and interests of *different* communities).

Repeal or dilution of these rules also would impair the broadcast model that supports our ability to invest in this valued local programming. The program exclusivity rules are a mechanism for value to be created, without which syndicated and network programming might not recover their full value and broadcast stations would not be able to support sports and special events programming or produce uniquely valued local investigative journalism, news, weather and public affairs programming. As the Commission has recognized, in the absence of exclusivity protections, the local television marketplace would be rendered less efficient and less capable of supporting local, network, and syndicated programming for viewers.[3] Changes to the exclusivity rules would not only directly compromise the dual revenue streams that allow broadcasters to invest in such programming, but the disruptive changes to the local advertising and television marketplaces would be a net loss for the broadcast industry since broadcast

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[2] *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, MB 04-233, 23 FCC Rcd 1324, at para. 6 (2007).

[3] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Report and Order*, Gen. Docket No. 87-24, 3 FCC Rcd 5299, at para. 57 (1988) ("*1988 Report and Order*") ("Without syndicated exclusivity rules, program suppliers are likely to receive less than the full market value of programs broadcast on distant signals that are retransmitted by cable, and therefore will not get good price information about the value of such programs to cable viewers.").

television content would not have the same value proposition if carried as a distant signal. Rather, the changes would reduce the value of the overall pie and thereby diminish incentives to invest in valued and diverse programming.

A. Supported By Investments In Important Programming, Stations Are An Important Source Of Local Programming.

Broadcasters are, with few exceptions, the only participants in the television marketplace that produce and distribute highly valued local investigative journalism, news, weather, and public affairs programming. A study by the National Association of Broadcasters found that local television stations spend approximately $3.1 billion annually in operating expenses and $545 million in capital funds, and dedicate roughly 83 million employee-hours per year, to produce and broadcast local news alone.[4] To cite just a few examples, local broadcast stations regularly commit significant resources to long-term, team investigations of important community issues; cover not only the high-profile issues that might be the most heavily discussed online, but also the day-to-day issues that are of great importance to our communities; and expose serious deficiencies in local law enforcement and safety regulation.[5]

Local broadcast programming is particularly critical to both over-the-air viewers and pay-TV subscribers alike when it comes to local emergency information and alerts. In case after case, local television journalists provide life-saving information about weather emergencies and other crises, including season-after-season coverage of hurricanes, tornadoes, flooding, snow storms, and wildfires. If a San Diego resident watching television on the evening of Wednesday,

[4] *See The Economic Realities of Local Television News – 2010: A Report for the National Association of Broadcasters*, at 3, 13-14 (Apr. 30, 2010) (attached as Attachment B to the Comments of the National Association of Broadcasters in Gen. Docket No. 10-25 (May 7, 2010)).

[5] *See* Comments of Joint Broadcasters, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, Gen. Docket No. 10-25 at 3-5 (May 7, 2010).

May 14, 2014, had been watching an evening newscast of a distant FOX affiliate imported into the San Diego market, he or she would not have received the hyper local emergency coverage delivered by the local FOX affiliate, KSWB, about the proximity to individual streets and neighborhoods of the wildfires that struck that city.[6] Likewise, viewers in Sioux Falls, South Dakota cannot receive the same coverage of the area's recent record rainfall and flooding from a distant television affiliate as their local, community broadcasters. Nor would distant broadcast stations provide viewers in Nebraska, Ohio, Oklahoma and Pennsylvania the same targeted, emergency coverage and life-saving information about devastating tornadoes as local broadcast stations.

Broadcasters also invest in and support other valuable programming, from sports and special events programming to network and syndicated programming.[7] Numerous commenters, members of Congress, and the Commission have expressed concerns about the continued availability of highly valued sports programming on free, over-the-air television in light of the trend in sports properties migrating to cable networks and pay television.[8] College

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[6] Wildfires got national coverage and coverage on Los Angeles stations, but the local stations provided depth and local detail and emergency information not available elsewhere.

[7] See Reply Comments of National Football League*, Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, at 5 (June 3, 2010) ("[T]o air popular programming, such as entertainment, news and sports, broadcasters must either pay to create it or acquire the rights to it – including NFL games."); Comments of CBS Corp., Fox Entertainment Group, Inc. and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., the Walt Disney Company, and Univision Communications Inc.*, Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, at 16 (May 18, 2010) (noting retransmission consent fees support "the higher quality national programming that a station can acquire").

[8] *Consumers Competition, and Consolidation in the Video and Broadband Market, Hearing Before the S. Comm. on Commerce, Sci. and Transp.*, 111th Cong. (Mar. 11, 2010) (Statement of Sen. Amy Klobuchar) ("[S]ome people have even said that we in the not-too-distant future will be watching the Super Bowl on cable, which means that we'll paying for the Super Bowl as opposed to having an advertising model, which would give access to a broader number of (continued…)

bowl games, NBA playoff games, World Cup events, and other highly demanded sporting events now regularly appear on cable networks, such as TBS and ESPN, which are able to outbid the broadcast television networks for the rights to these events (even though broadcast networks can assure larger audiences and ubiquitous access) due to a strong dual revenue stream that permits them to pay more for sports rights than broadcast networks and television stations.[9] Without a comparably strong dual revenue stream from both advertising and retransmission consent, broadcast stations are not able to invest in and compete for this high value programming.

B. Investment In Programming By Broadcasters Would Be Impaired Without A Strong Dual Revenue Stream.

As described below, repeal or dilution of exclusivity protections would impair the economic model that supports local broadcasters and, in turn, impair their ability to invest in quality local programming, as well as the national and syndicated programming, described above. In the short term, local broadcasters would be deprived of the economic bargains that

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people."); *Competition in the Media and Entm't Distribution Market: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (Feb. 25, 2010) (Statement of Congressman Bob Goodlatte) (noting that the migration of sports programming "would decrease viewers and revenues and thus could severely impact the ability of these local stations to deliver local news and information"); Final Report, *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Inquiry Into Sports Programming Migration*, PP Docket No. 93–21, 9 FCC Rcd. 3440, at para. 180 (1994) ("[B]road and economical access to a variety of sports programming is instrumental to the Commission's goal of ensuring the availability of diverse programming.").

[9] One recent comparison indicates that cable networks such as ESPN can garner $5.54 per-subscriber, per-month carriage fees, while many network affiliates average approximately $1 per subscriber. Marszalek, Diana, *Station Retrans Fees Up, But ESPN Still King*, TVNewsCheck (June 6, 2013), http://www.tvnewscheck.com/article/68076/. Cable operators pay these higher per-subscriber fees for cable networks that consistently receive considerably *lower* ratings than local television stations. NAB has observed that "many local television stations are *20 times* more popular than some of the most popular satellite-delivered cable networks, yet broadcasters only ask for a fraction of the relative value of what MVPDs willingly pay in arm's length transactions for far less popular cable programming." *See* Reply Comments of National Association of Broadcasters, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, at 10, MB Docket No. 07-29 (Feb. 12, 2008).

they have made with respect to network and syndicated programs they have licensed in reliance on the existence and enforceability of the exclusivity rules. And, in the long term, a repeal of exclusivity protections would undermine *both* advertising and retransmission consent revenues and thereby erode dramatically the quality of programming available to both our over-the-air and pay-TV subscribers.

Advertising Revenues. As the Commission has recognized, eliminating the exclusivity rules causes stations to lose audience and thus advertising revenues, and the loss of such advertising revenues compromises the ability of local stations to sustain investments in programming. In restoring the syndicated exclusivity rules in 1988,[10] the Commission explained, "[w]hen the same program a broadcaster is showing is available via cable transmission of a duplicative signal, the broadcaster will attract a smaller audience, reduce the amount of advertising revenue it can garner and . . . reduce the amount it will be willing to pay for the program."[11] Put simply, duplication reduces viewers, which in turn reduces station ratings and revenue potential.

Moreover, if the Commission were to repeal the program exclusivity rules, the attendant loss in advertising revenues would not be shifted from local broadcast stations to distant broadcast stations. Advertising in distant markets has little to no value to local advertisers since local businesses seek locally targeted advertising.[12] In the fourth quarter of

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[10] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Memorandum Opinion and Order, 4 FCC Rcd 2711, para. 23 (1989) ("*1989 Memorandum Opinion and Order*").

[11] *1988 Order and Report*, at para. 62.

[12] *See* Ex Parte filed by Joint Television Network Affiliates, *Report Required By the Satellite Television Extension and Localism Act On In-State Broadcast Programming,* MB Docket No. 10-238 (May 3, 2011). *See also* Reply Comments of Steve Lonzano, President and CEO, TVB, *Report Required By the Satellite Television Extension and Localism Act On In-State Broadcast* (continued…)

2013, local spot television advertising generated approximately $4.5 million from local advertisers seeking to deliver advertising to a local audience.[13] However, local advertisers in a distant station's home market will not be willing to pay to reach distant viewers with whom they have little or no prospect of doing business. The repeal or dilution of the program exclusivity rules would thereby result in a substantial net loss in advertising revenues for the broadcast industry and undermine the efficient delivery of such advertising targeted to local viewers.

In addition to the economic impact on the local advertising market and the economics of local broadcasting, repeal of the exclusivity rules would deprive local businesses of needed access to their local communities and deprive local viewers of information with respect to the businesses in the markets where they live. Producers and program suppliers will seek other distribution outlets and thereby accelerate the migration of popular programming from free broadcast outlets to subscriber-based services. This shift would disproportionately impact low income, elderly, and minority communities who rely on over-the-air broadcasting.

Retransmission Consent Revenues. Moreover, without exclusivity, stations would lose competitive retransmission consent revenues — a revenue impact that would compound, not offset, losses to station advertising revenues. Put simply, stations' bargaining positions in retransmission consent negotiations would be further eroded if video distributors could import highly demanded network and syndicated programming, for which local broadcasters have

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Programming, MB Docket No. 10-238, at 2 (Feb. 22, 2011) (noting that advertisers "want to be able to purchase exposure to households that are likely patrons of their businesses, and the desired exposure corresponds to economic and social realities [that are embodied in local markets]").

[13] TVB, *Q4 2013 and Full Spending Summary: Top 25 Local Broadcast Categories and Advertisers, available at* http://www.tvb.org/trends/KantarQ4_summary.

negotiated and paid a premium, from a distant station.[14] This would, of course, put broadcast stations at a further competitive disadvantage as compared to cable networks, at a time when broadcasters are already under new and significant pressure as a result of reverse compensation payments they increasingly must make to broadcast networks to maintain their affiliations.

Congress had a strong set of policy reasons for mandating retransmission consent in 1992, and ensuring that local stations are able to recover competitive retransmission consent fees remains an important public interest. As Congress and the Commission have consistently recognized, the ability of stations to negotiate for exclusivity is critical to the ability of broadcast stations to serve local communities.[15] Broadcast stations need and use retransmission consent fees to sustain their local news operations and invest in other high value programming that contributes to the richness and diversity of television programming generally.

The Commission should avoid taking steps at the behest of pay-TV providers to disrupt the marketplace framework established by Congress. Among the unintended detrimental effects of any such repeal of the exclusivity rules, it would prevent broadcast stations from developing strong dual revenue streams necessary to support enterprise journalism, sports coverage, and other high value content.[16] The modest subscriber fees that broadcast stations

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[14] *See Am. Broad. Cos., Inc. v. AEREO, Inc.*, 874 F. Supp. 2d 373, 398 (SDNY 2012), *rev'd on other grounds*, -- S.Ct. --, 2014 WL 2864485 (2014) (finding that broadcasters would suffer irreparable harm to ability to negotiate retransmission consent agreements, as well as their ability to negotiate with advertisers due to siphoning of viewers).

[15] *See, e.g.*, FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of SHVERA*, at para. 50 (Sept. 8, 2005) ("*2005 FCC Retransmission Consent Report*"); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, *Broadcast Signal Carriage Issues, Memorandum Opinion and Order*, MM Docket 92-259, 9 FCC Rcd 6723, at para. 114 (1994) ("*2004 Implementation Order*"); S. Rep. No. 102-92, at 38 (1991).

[16] One recent study found that more stations are producing local news for the first time in nearly ten years. *See* Robert Papper, *More Stations Producing Local News*, *RTDNA/Hofstra University* (continued…)

receive from cable and satellite operators are critical to stations' ability to finance their local service for the future. For broadcast stations that must hedge against the increasing financial stress in the media marketplace, retransmission consent revenues are a critical piece of the economic puzzle that permits stations to invest in important programming.[17] Repeal of the exclusivity protections would undermine *both* advertising and retransmission consent revenues and thereby threaten a dramatic disruption to the local broadcaster economic model and the quality of broadcast station and network programming.

II. The Exclusivity Rules Are Essential Elements Of Inter-Related Provisions Of The Communications Act And Copyright Act.

Repealing or diluting the network non-duplication and syndicated exclusivity rules would undermine the interrelated copyright and communications policies that govern carriage of local broadcast signals on cable and satellite systems, and would gravely disrupt the marketplace. Cable and satellite carriers have made two types of arguments that seem to be in direct tension: (1) that local stations should not be the exclusive source of network and syndicated programming (and pay-TV providers should be free to import distant signals) and (2) that exclusivity can be sufficiently enforced through private contract and civil litigation, notwithstanding the absence of the usual rules of copyright and the absence of privity between relevant parties. Both arguments simply ignore the long-standing historical role of the

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Survey (2014). Another study found that local stations actually increased the amount of local news programming they ran by an average of 24 minutes per weekday due in large part to a steady, non-advertising revenue stream of retransmission consent fees. *See* Robert Papper, *TV and Radio Staffing and News Profitability Survey 2010*, *RTDNA/Hofstra University Survey* (2010).

[17] *See* Press Release, FCC, *FCC Launches Initiative to Examine Future of Media*, GN Docket No. 10-25 (Jan. 21, 2010) ("Rapid technological change in the media marketplace has created opportunities for tremendous innovation. It has also caused financial turmoil for traditional media, calling into question whether these media outlets will continue to play their historic role in providing local communities with essential news and civic information.")

exclusivity protections as essential components of our system's copyright and communications policies.

A. For So Long As Cable And Satellite Operators May Avoid The "Usual Requirements Of The Copyright Law," Protecting Broadcaster Exclusivity Remains Critical.

The network non-duplication and syndicated exclusivity rules are a foundational element of the broadcast television marketplace created by Congress through inter-related provisions of the Communications Act and Copyright Act. By virtue of statutory copyright licenses, cable operators and satellite operators may retransmit local station programming to viewers without separately negotiating for the rights to such programming from rights-holders, such as broadcast networks and syndicators. In the absence of a need by operators to negotiate for authorization from rights-holders, however, the network non-duplication and syndicated exclusivity rules play a crucial role in ensuring that cable operators do not import duplicative distant programming instead of, or in addition to, retransmitting local programming. Then-Chief of the Mass Media Bureau Roy Stewart explained this relationship in written testimony to Congress: "because the compulsory copyright license exempts cable operators from 'the usual requirements of the copyright law,'" it becomes "the Commission's job to enforce rules designed to assure that the exclusive rights in programming purchased by local stations [are] respected."[18]

The retransmission consent framework, which is closely interrelated to the compulsory copyright license, also is predicated upon the exclusivity rules and protections, as described in greater detail below. However, neither the health of the retransmission consent framework nor the presence of a retransmission consent requirement impacts or undermines the

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[18] *FCC Syndicated Exclusively Rules*, Hearing before the Subcomm.on Commc'ns of the S. Comm. on Commerce, Sci. & Transp. 1st Cong., 7 (Mar. 21, 1990) Statement of Roy J. Stewart, Chief Mass Media Bureau, FCC

role of the exclusivity rules with respect to copyright policy. In the absence of the usual rules of copyright, local broadcasters need the ability to negotiate for and enforce exclusivity protections. Indeed, the Commission's early efforts to facilitate the development of the cable industry by addressing the copyright challenges faced by cable operators presumed, and were based on, the ability of local stations to negotiate to exclusively distribute broadcast network, syndicated, and sports programming.[19] Even today's exclusivity rules are directly tied to whether a local broadcast station has successfully negotiated for "protections against duplication of programming imported *under the Statutory Copyright License* . . . [or as provided in the FCC's satellite network non-duplication or syndicated exclusivity rules.]"[20] (Cable and satellite operators presumably could seek to import distant signal programming by clearing the requisite copyrights for the programming without implicating FCC rules, although the fact that they have not pursued this strategy emphasizes that they are seeking to have their cake — a statutory copyright license — and eat it too — not pay content owners for it.) Suggestions by those in the cable industry that the exclusivity protections are less important today than in prior years are red herrings: so long as cable and satellite operators may avoid the "usual requirements of the copyright law," exclusivity protections remain essential.

Finally, the exclusivity rules are a highly efficient mechanism to enable local broadcasters to negotiate for the exclusivity rights that enable them to derive an economic benefit or return, thereby allowing them to invest in quality programming tailored to the needs and tastes of their communities. The Commission expends virtually no resources in enforcing the

[19] *See, e.g.,* Cable Television Report and Order, 36 FCC.2d 141 (1972).

[20] 47 C.F.R. § 76.124 (emphasis added and internal quotation marks omitted).

exclusivity rules, and they are far more efficient than the blunt instrument of copyright infringement litigation.

B. Exclusivity Protections Also Are A Critical Component Of The Retransmission Consent Framework Designed By Congress, Which The FCC Is Charged With Implementing.

Congress doubled down on the important role of network non-duplication and syndicated exclusivity protections in mandating retransmission consent in 1992 and seeking to create a marketplace in which local stations are able to recover competitive retransmission consent fees. The retransmission consent marketplace is only recently working as Congress intended due to the fact that cable operators are only recently facing modest competition from satellite distributors and telcos (although the recently announced merger between AT&T and DIRECTV moves in the opposite direction). The introduction of such competition does not call into question the ongoing need for exclusivity rules to support a healthy retransmission consent market, and repealing or diluting the exclusivity rules would seriously disrupt the marketplace that Congress envisioned in 1992.

In adopting the retransmission consent framework, Congress expressly "relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules."[21] As the Commission has recognized, Congress expressly noted that "[a]mendments or deletions of these rules in a manner which would allow distant stations to be [substituted] on cable systems for carriage [of] local stations carrying the same programming would . . . be inconsistent with the regulatory structure . . . ."[22] Accordingly, repeal of the exclusivity rules would be inconsistent with the 1992 amendments to the Communications Act

[21] S. Rep. No. 102-92, at 38

[22] *Id*.

(if not the letter of the statute, then the design of the retransmission consent scheme),[23] as well as Congress' separate directives to the Commission to impose exclusivity protections with respect to satellite and telecommunications operators.[24]

Further, any suggestion that the exclusivity rules do not serve a purpose in the event of a retransmission consent negotiation impasse gets it exactly backwards. Retransmission consent negotiation impasses remain exceedingly rare, and this group of station groups has successfully completed literally thousands of retransmission consent negotiations over the past 21 years. (Indeed, studies indicate that the average household is roughly 24 times more likely to be without electricity than it is to be deprived of a local television broadcast channel due to an impasse.[25]) However, the threat of subscriber losses (*i.e.*, "churn") during a retransmission consent negotiation impasse is implicit in Congress's design in seeking to create a healthy retransmission consent marketplace in which local broadcasters could recover fees comparable to their cable programming siblings. It simply cannot be the case that Congress, in designing a system of "marketplace negotiations"[26] between local broadcasters and cable systems (and, as noted above, expressly stating its reliance on Commission-enforced exclusivity rules in support of such system) intended that cable operators systematically import distant broadcast station signals in the context of retransmission consent negotiations. Accordingly, prohibiting or

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[23] *See id.* (noting Congress's expectation that the "FCC [would] undertake to promulgate regulations which will permit the fullest applications of whichever rights each television station elects to exercise").

[24] *See* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong., 145 Cong. Rec. H11793, H11796 (daily ed. Nov. 9, 1999); Telecommunications Act of 1996, Pub. L. No 104-104, 110 Stat. 56 (1996); *see also* 47 U.S.C. § 573.

[25] *See* Jeffrey A. Eisenach & Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply To Compass Lexecon*, at 18 (April 2010) (attached as Appendix A to the Comments of the National Association of Broadcasters in MB Docket No. 10-71 (May 18, 2010)).

[26] S. Rep. No. 102-92, at 36.

undermining the ability of broadcast television stations to exercise their contractual exclusivity rights in the context of negotiations with cable and satellite operators is not just a solution in need of a problem, but would directly undermine broadcast stations in these negotiations and therefore the health of the overall market—as designed and contemplated by Congress in 1992.

Such proposals would also have unintentional, detrimental impacts on the marketplace. For example, repeal of the exclusivity protections threatens to lengthen the infrequent disputes and impasses that have occurred. Today, on those rare occasions on which broadcasters and systems cannot successfully resolve an agreement prior to the expiration of a system's retransmission consent agreement, the parties typically resolve the issue and enter into a new agreement within days, if not hours (with a very small number of exceptions). Permitting a cable system to import a distant signal during such time would have unintentional, detrimental consequences, including potentially undermining the incentives of both parties to promptly resolve the issue and thereby create a risk of lengthy, if not permanent, loss to subscribers of important local programming and services.

III. The FCC Has Experimented With Eliminating The Exclusivity Rules, And Those Experiments Clearly Failed With Harmful Collateral Consequences.

The present proceeding is not the first time that large cable operators have urged the Commission to repeal the exclusivity rules.[27] Any repeal or dilution of the exclusivity rules would repeat the Commission's prior mistakes, which the Commission itself has acknowledged were based on flawed analyses and an erroneous understanding of local television marketplaces. Rather, the natural experiment that the Commission conducted between 1980 and 1988 (during which time the syndicated exclusivity rules were repealed) make clear the exclusivity rules are

[27] *See, e.g., Cable Television Syndicated Program Exclusivity Rules*, Gen. Docket No. 20988, 29 FCC 2d 663 (1980).

critical to supporting the diversity of programming choices and localism, along with the health of over-the-air broadcasting.

In 1980, at the behest of cable operators, the Commission repealed the syndicated exclusivity rules.[28] However, within a few years, the Commission found that the "[l]ack of exclusivity protections distorts the local television market to the detriment of the viewing public."[29] In restoring the syndicated exclusivity rules, the Commission emphasized that repeal had undermined the ability of local broadcast stations to serve their communities. The ability of local stations to attract local and national advertisers — and thus sustain revenue streams that support programming investments — requires the existence of local marketplaces for programming.[30]

In 1988, when the Commission restored the syndicated exclusivity rules, it looked closely at how its 1980 repeal impacted the supply and diversity of programming demanded by viewers. Based on its experience, the Commission concluded that "the removal of syndicated exclusivity lessened the ability of independent broadcasters to compete for the best programming and hence reduced their ability to meet their viewers' demands. Thus, rather than expanding the richness and diversity of programs available to viewers, . . . the elimination of syndicated exclusivity protection increased the likelihood that programming less valued by viewers would

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[28] *Cable Television Syndicated Program Exclusivity Rules, Report and Order*, Docket 20988, 79 FCC 2d 663 (1980); *see also Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Report and Order*, Gen. Docket No. 87-24, 3 FCC Rcd 5299, at para. 52 (1988) ("*1988 Report and Order*").

[29] *Id.* at para. 74.

[30] *Id.* at para. 62; *see also id.* at para. 23 ("[The flawed] 1980 analysis led the Commission to mischaracterize the role that exclusivity rules play in the functioning of the local television market.").

be substituted for more highly valued programming."[31] Concluding that the "syndicated exclusivity rules are an important component of a sound communications policy designed to foster full and fair competition among competing television media,"[32] the Commission re-adopted the syndicated exclusivity rules. To the extent that broadcasters exercise their syndicated exclusivity rights even more today, the detrimental impacts of repeal on the television marketplace would be that much greater than they were during the Commission's prior experiment.

In addition to undermining advertising revenues that support investment in high quality programming, repeal of the exclusivity rules removed competitive incentives for operators to distribute diverse and valuable programming to subscribers. Based on its failed natural experiment, the Commission concluded that, "[e]xemption from compliance with normal exclusivity rules permits — indeed encourages — cable system operators to distribute programming that duplicates what is already available in the local market rather than searching out programming which is different and more valuable to subscribers."[33] Specifically, the Commission noted that without the exclusivity rules, system operators did not have sufficient incentives to select and purchase programming that was highly valued by subscribers: "Which particular programs will most satisfy the interests of subscribers is simply not an issue for the system operator when the system operator is able to ignore legitimately acquired exclusivity and

[31] *Id.* at para. 68. The Commission added that, "[a]part from its direct effect on station revenues and the ability to obtain programming, program exclusivity may have a further value to broadcasters if it allows them to create a distinctive public image in order to attract viewers." *Id.* at para. 61.

[32] *Id.* at para. 75.

[33] FCC Syndicated Exclusively Rules, Hearing before the Subcomm. on Communc'ns of the S. Comm. on Sci. and Transp., 101st Cong., 10 (Mar., 21, 1990) (Statement of Roy J. Stewart, Chief Mass Media Bureau, Federal Communications Commission).

acquire programming without the permission of its owners."[34] The *FNPRM* requests comment on whether the exclusivity rules "are still needed to . . . . ensure that program suppliers have sufficient incentives to develop new and diverse programming."[35] As described in Section III, categorically, yes, the exclusivity rules remain essential to supporting investment in new and diverse programming. Further, the premise of the question ignores the role of the exclusivity rules to ensure system operators select and carry high value, diverse programming.

In the same 1988 proceeding in which the Commission restored the syndicated exclusivity rules, it re-examined and reaffirmed the role of the network nonduplication rules. It noted 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."[36] The Commission noted:

> There is evidence that importation of duplicating network signals can have severe adverse effects on a station's audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience. Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network. Thus, an effective non-duplication rule continues to be necessary.[37]

The Commission determined that the public interest required it to re-introduce and expand network programming exclusivity protections in 1989, permitting parties to negotiate for the appropriate period of exclusivity.

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[34] *Id.*

[35] *FNPRM*, at para. 55.

[36] *1988 Report and Order,* at para. 110.

[37] *Id.* at para. 117.

The Commission's findings in reinstating these rules apply with equal force to today's television marketplace. As recognized by the Commission, the ability of broadcasters to negotiate for exclusivity in their marketplaces cultivates a sustainable local television market for viewers and advertisers, which is even more essential in today's market. Any proposal that undermines these rules would upend the broadcast model through which local stations are able to provide viewers local news, weather, and public affairs programming and support major sports and special events programming. It would be folly for the Commission to repeat its prior mistakes, which the Commission itself described through the record it developed in 1988 (and reaffirmed in 1989).[38]

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[38] *See Id.* at para. 57 ("Without syndicated exclusivity rules, program suppliers are likely to receive less than the full market value of programs broadcast on distant signals that are retransmitted by cable, and therefore will not get good price information about the value of such programs to cable viewers."); *see also 1989 Memorandum Opinion and Order,* at para. 24 (noting that Commission developed "substantial (and on some points indisputable) empirical evidence" of the critical role of the exclusivity rules).

We urge the Commission to maintain the syndicated exclusivity and network nonduplication rules, and to resist the call to tamper with a system that is remarkably efficient and effective at producing high value local and national programming. Upending this system would harm viewers, and benefit only pay-TV providers.

Respectfully submitted,

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