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

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

## COMMENTS OF ITTA

ITTA hereby submits its comments in response to the *Further Notice of Proposed Rulemaking* ("*FNPRM*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[1] In the *FNPRM*, the Commission seeks comment on whether it should eliminate its network non-duplication and syndicated exclusivity rules (the "exclusivity rules") in light of dramatic changes in the video marketplace since their adoption.[2]

ITTA agrees with the Commission that the exclusivity rules are an "unnecessary regulatory intrusion" that have outlived their intended purpose.[3] We support the Commission's proposal to eliminate the exclusivity rules, and encourage the FCC to extend such relief to all multichannel video programming distributors ("MVPDs").[4]

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

[2] *See id*. at ¶ 55.

[3] *See id*. ITTA commends the Commission for moving forward on its strategy to identify and eliminate outdated FCC rules, consistent with the Commission's own objectives and those set forth by the current Administration. *See* Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011) ("EO 13579"); Federal Communications Commission, *Final Plan for Retrospective Analysis of Existing Rules*, May 18, 2012, *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314166A1.pdf (last visited: Feb. 20, 2014).

[4] ITTA continues to believe that the Commission's video policies, particularly those relating to retransmission consent, are in dire need of reform, and that the Commission should move forward expeditiously to restore balance to a marketplace that unjustly favors broadcasters due to increased competition among distributors of video programming.

## DISCUSSION

*Background*. The Commission first promulgated the exclusivity rules more than four decades ago, when cable operators held a monopoly on video distribution.[5] At the time, cable operators were allowed to import broadcast signals from one market into another without the consent of the broadcaster or program supplier. The Commission was concerned that cable systems' importation of distant stations carrying network or syndicated programming would adversely impact local broadcast stations by diverting the station's audience to the distant station, resulting in a reduction of the local station's advertising revenues, essentially the only source of revenue for stations at the time.[6] The Commission also feared that cable systems' importation of distant signals would threaten the continued supply of television programming.[7]

The Commission adopted the exclusivity rules to protect broadcasters' ability to compete in the video marketplace and to ensure that program suppliers have sufficient incentives to develop new and diverse programming.[8] By providing program exclusivity and other protections for local television stations, the Commission sought "to equalize the conditions under which cable systems and broadcasters compete[], and to ameliorate the risk that cable television would have a future adverse economic impact on television broadcasting service."[9]

Changes in the video programming industry since the exclusivity rules were put in place, however, have undercut the basis for these protections. Since the exclusivity rules were adopted, DBS providers, telco-based video distributors, and cable overbuilders have entered the marketplace to create

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[5] The Commission first promulgated the network non-duplication rules in 1965; it first adopted the syndicated exclusivity rules in 1972. *See FNPRM* at ¶¶ 43, 48.

[6] *See id*. at ¶ 58.

[7] *See id*. at ¶ 48.

[8] *See id*. at ¶ 55.

[9] *Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Programming Exclusivity Protection by Cable Television Systems*, First Report and Order, 52 FCC2d 519, ¶ 2 (1975).

the vibrant retail competition that exists today.[10] Likewise, broadcasters no longer rely almost exclusively on advertising revenue for income. Retransmission consent allows stations to control transmission of their signals and to seek compensation to offset any loss of territorial exclusivity occasioned by distant signal importation. Broadcasters increasingly have sought and received monetary compensation in exchange for MVPD carriage of their signals. According to analysis by SNL Kagan, retransmission consent fee revenue grew by 45.8 percent last year.[11] At $3.3 billion, such revenue now represents 18.5 percent of total broadcast television station industry revenue, double the figure for 2012 (9.4 percent).[12] It is anticipated that retransmission consent revenue will continue to grow exponentially, escalating to $7.6 billion in 2019.[13]

Based on these marketplace developments, there no longer is a need for the government to place its thumb on the scale in favor of broadcasters by providing them with exclusivity for network and syndicated programming. Doing so shields broadcasters from competition, leads to exorbitant demands for retransmission consent fees through "take it or leave it" negotiation tactics, and ultimately harms consumers. Accordingly, the Commission should repeal its network non-duplication and syndicated exclusivity rules to restore some balance to retransmission consent negotiations.

*Impact on Retransmission Consent Negotiations*. The Commission seeks comment on the impact of eliminating the exclusivity rules on retransmission consent negotiations and whether doing so would

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[10] As new entrant MVPDs that compete head-to-head against both DBS providers, at least one (and in some cases two or three) incumbent cable operators, and online video providers in the areas they serve, ITTA members exemplify the presence of robust competition in today's video distribution marketplace. *See* Letter from Micah M. Caldwell, ITTA, to Marlene H. Dortch, FCC, MB Docket No. 14-16 (filed June 9, 2014), at 1.

[11] *See* Remarks of Commissioner Michael O'Rielly, Media Institute Luncheon (June 19, 2014) ("O'Rielly Remarks"), at 4.

[12] *See id.*; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, ¶ 209 (2013).

[13] Mike Reynolds, "Station Retrans Fees to Reach $7.6B in 2019: SNL Kagan," *Multichannel News*, Nov. 22, 2013, *available at*: http://multichannel.com/news/content/station-retrans-fees-reach-76b-2019-snl-kagan/356879 (last visited: June 22, 2014).

remove a government-imposed barrier to free market negotiations.[14] The record in this proceeding makes clear the exclusivity rules have a distorting effect on retransmission consent negotiations.[15] By preventing MVPDs from importing a distant signal carrying duplicative network and syndicated programming, the rules ensure that a local broadcaster is the sole supplier of such programming in a particular geographic area.[16] In effect, the exclusivity rules have created "hundreds of local, government-sanctioned monopolies for network and syndicated programming across the country."[17] This one-sided protection creates artificially inflated bargaining leverage for broadcasters in retransmission consent negotiations. MVPDs, particularly smaller and new entrant providers like ITTA's members, must pay whatever retransmission consent rates are demanded by the local station.

The Commission itself has recognized that MVPDs "negotiating retransmission consent with a

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[14] *FNPRM* at ¶ 65.

[15] *See, e.g.*, Comments of Starz Entertainment, LLC in Response to Notice of Proposed Rulemaking, MB Docket No. 10-71 (filed May 27, 2011), at 8-9; Comments of SureWest Communications, MB Docket No. 10-71 (filed May 27, 2011) ("SureWest Comments"), at 15; Comments of Time Warner Cable Inc., MB Docket No. 10-71 (filed May 27, 2011) ("TWC Comments"), at 22-23; Comments of the United States Telecom Association, MB Docket No. 10-71 (filed May 27, 2011), at 23; Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71 (filed June 27, 2011) ("TWC Reply"), at 16-17 (arguing, among other things, that the exclusivity rules are anticompetitive and give broadcasters an unfair advantage in retransmission consent negotiations). *See also* Comments of Cablevision Systems Corporation, MB Docket No. 10-71 (filed May 26, 2011), at 24; Comments of Discovery Communications LLC, MB Docket No. 10-71 (filed May 27, 2011), at 13; Comments of the National Taxpayers Union, MB Docket No. 10-71 (filed May 27, 2011), at 3; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, *et al*., MB Docket No. 10-71 (filed May 27, 2011), at 21, 23; Reply Comments of the American Public Power Association, *et al*., MB Docket No. 10-71 (filed June 3, 2010), at 12; Reply Comments of AT&T, MB Docket No. 10-71 (filed June 27, 2011), at 7; Reply Comments of the Knology Companies, MB Docket No. 10-71 (filed June 27, 2011), at 8 (arguing that elimination of the exclusivity rules would minimize regulatory intrusion and better enable free market negotiations to set the terms for retransmission consent); SureWest Comments at 16; TWC Reply at 16 (arguing that increasing the difficulty and expense of enforcing contractual exclusivity would give stations a disincentive to use, or threaten to use, their exclusivity rights).

[16] The network non-duplication rules, codified at 47 C.F.R. §§ 76.92-76.94, permit a broadcast station with exclusive rights to network programming to assert its contractual rights within a specified geographic zone to prevent an MVPD from carrying the same network programming from a distant network television station. Similarly, the syndicated exclusivity rules, codified at 47 C.F.R. §§ 76.101-76.110, allow a broadcast station with exclusive rights to syndicated programming to assert its contractual rights within a specified geographic zone to prevent an MVPD from carrying the same syndicated programming from an out-of-market station.

[17] TWC Comments at 22.

local network affiliate may face greater pressure to reach agreement by virtue of the [MVPD's] inability to carry another affiliate of the same network if retransmission consent negotiations fail."[18] Such inequity is exacerbated by the fact that an in-market station that fails to reach an agreement for retransmission consent and subsequently refuses to permit an MVPD to carry its signal can still invoke the exclusivity rules to require the blackout of network and syndicated programming that would otherwise be provided by the in-market station.

Furthermore, the exclusivity rules prevent MVPDs from purchasing programming from an alternative source even if it is consistent with customer preferences and could be obtained more affordably. It is hard to see how rules that prevent an MVPD from importing an out-of-market signal to provide must-have programming to subscribers, whether due to an impasse in retransmission consent negotiations with a local station or other considerations, are in any way beneficial to consumers. On the other hand, allowing MVPDs to import network and syndicated programming from a station outside the DMA would promote competition among broadcasters. It also could bring customers more viewing options and increase the value of their video service without dramatic increases in cost.

That is not to suggest that repeal of the rules would result in a spate of distant signal importations. Eliminating the exclusivity rules would not decrease incentives for MVPDs to reach retransmission consent agreements with the local broadcaster. Given the higher copyright fees associated with distant signal importation, MVPDs would continue to have an incentive to reach a retransmission consent agreement with the local station. They also would remain under pressure to reach an agreement with the local station if the broadcaster is providing local affairs, news, and community interest programming consumers in that market demand. In addition, carriage of multiple local and distant signals containing the same programming would consume bandwidth on capacity-strained MVPD systems, decreasing the likelihood that such duplication would occur.

*Impact on Localism*. The Commission requests comment on the impact of eliminating the

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[18] *See In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, FCC 11-31, ¶ 42 (rel. Mar. 3, 2011).

exclusivity rules on localism.[19] The Commission has consistently found that greater competition among broadcasters promotes localism by providing "added incentives to respond to conditions in local markets."[20] Thus, the exclusivity rules undermine the Commission's interest in promoting localism by blocking competition from out-of-market stations that would enhance the quality of local broadcast programming. Additionally, as indicated above, to the extent the local broadcaster offers local news, public affairs, and other compelling community interest programming desired by consumers, it would put pressure on the MVPD to negotiate for carriage of the local station as opposed to an out-of-market station.[21]

The fact is, it is disingenuous for broadcasters to argue that repeal of the exclusivity rules would undermine localism. Increasingly, broadcasters are scaling back the amount of local programming they provide, even as retransmission consent fees continue to skyrocket. Rather than utilizing this rapidly growing source of revenue to improve local programming, broadcasters are directing increasing amounts of such fees to the networks for development of network programming. SNL Kagan projects that reverse compensation payments from local affiliates back to the networks will double from $1.02 billion in 2014 to $2.25 billion in 2019.[22] Research also shows that network reverse compensation will grow to 50% of affiliates' retransmission consent payments over time, even as local stations' monthly network affiliation fees increase in the coming years.[23]

The best way for the Commission to promote localism and ensure that broadcasters are meeting their public interest obligations is to eliminate, not preserve, the outdated exclusivity rules. Given the current state of the video marketplace, any localism concerns are outweighed by the competitive and

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[19] *FNPRM* at ¶ 70.

[20] *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order on Reconsideration, 23 FCC Rcd 2010, ¶ 97 (2008); *see also id*. at ¶ 101 (concluding that "competition, and not concentration of market players, leads to better programming").

[21] As the Commission observes, viewers tend to prefer their local stations over out-of-market stations affiliated with the same network. *See FNPRM* at n. 221.

[22] *See* n. 13, *supra.*

[23] *Id*.

public interest harms the exclusivity rules cause by diminishing broadcasters' incentives to create compelling local content, providing stations with undue leverage to extract exorbitant prices for retransmission consent, and preventing consumer access to alternative options for broadcast programming.

*Impact on Programming Supply*. The Commission seeks comment on whether the exclusivity rules are still needed to provide incentives for program suppliers to produce syndicated and network programming and promote program diversity.[24] Repealing the exclusivity rules would not negatively impact programmers' incentives to supply new and diverse programming. Broadcast networks continue to compete aggressively with one another to achieve high ratings among viewers. MVPDs have expanded and upgraded their networks to provide hundreds of non-broadcast channels in competition for those same viewers. The Internet also is a seemingly infinite source of video and entertainment options, and, increasingly, consumers are subscribing to online video distributors such as Netflix, Apple TV, Hulu, and Amazon Prime Instant Video.

As competition for viewers has increased, so has the quality of programming. As Commissioner O'Rielly recently observed, content providers "are working harder than ever to distinguish themselves by offering more high quality original programming."[25] There are countless examples of this trend, such as *True Blood* and *Game of Thrones* on HBO, *Homeland* on Showtime, *The Americans* and *Fargo* on FX, and *Mad Men*, *Breaking Bad*, and *The Walking Dead* on AMC. Online video distributors also are investing significantly in exclusive original programming. For instance, Netflix, which introduced *House of Cards* and *Orange is the New Black*, has indicated that it will spend $ 3 billion on content in 2014 and $6 billion in the next three years.[26]

All of these cable network and online programs are in direct competition for viewership with

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[24] *FNPRM* at ¶¶ 61-62.

[25] *See* O'Rielly Remarks at 2.

[26] Mark Sweney, "Netflix to Spend $3bn on TV and Film Content in 2014," *The Guardian*, Feb. 5, 2014, *available at*: http://www.theguardian.com/media/2014/feb/05/netflix-spend-3-billion-tv-film-content-2014 (last visited: June 22, 2014).

popular broadcast programs. Even without exclusivity protections for broadcasters, this race to create high quality programming is likely to continue based on consumer demand for compelling television entertainment, regardless of its source. As Viacom's Sumner Redstone said, "people don't watch CBS, they watch CSI," demonstrating that the key to popular programming is great storytelling, which is only enhanced by competition among video content providers.[27]

*Benefits of Repealing the Exclusivity Rules*. The Commission seeks comment on the costs and benefits of eliminating the exclusivity rules on interested parties, including MVPDs, broadcasters, programmers, and most importantly, consumers.[28] Eliminating the exclusivity rules would facilitate a freer market for retransmission consent negotiations, benefiting consumers in multiple ways. It would result in more balanced negotiations between broadcasters and MVPDs, ensuring that customers have access to desired programming at a lower cost. It would foster regional competition among broadcasters, which would enhance local programming offerings and have a disciplining effect on fees for broadcast signals. It also would provide viewers with an alternative source for programming they desire, which is particularly important in the event of a retransmission consent impasse with the local network affiliate.

In a truly free market, MVPDs confronting unreasonable demands for retransmission consent payments would be able to negotiate with out-of-market stations to import must-have network and syndicated programming. Tipping the scale to favor the local broadcaster as the monopoly provider of network and syndicated programming has resulted in ever-increasing retransmission consent payments and service disruptions that harm consumers. Limiting MVPDs to one source of programming when other sources are available is inconsistent with ensuring a competitive marketplace and consumers' preferences for diverse programming. Thus, the Commission should eliminate the exclusivity rules to put broadcasters and MVPDs on more equal footing.

To be truly meaningful, however, repeal of the exclusivity rules must be accompanied by other

[27] "I Am American Business: Sumner Redstone," CNBC.com, Apr. 27, 2012, *available at*: http://www.cnbc.com/id/100000726 (last visited: June 22, 2014).

[28] *FNPRM* at ¶ 64.

measures to prevent broadcast networks and their affiliates from engaging in anticompetitive practices that would circumvent such relief. These practices include demanding provisions in retransmission consent or network affiliation agreements that prevent an MPVD from carrying an out-of-market affiliate of the same network (either generally or on the condition that the MVPD carries the local station as well) and that prohibit an MVPD from importing significantly-viewed stations. Contractual restrictions of this nature frustrate the ability of MVPDs to negotiate carriage agreements with out-of-market stations when doing so would benefit viewers. To ensure that eliminating the exclusivity rules achieves the desired pro-consumer effects, the Commission must also prohibit networks and affiliates from placing such restrictions on MVPDs. Thus, any agreement that restrains an MVPD from negotiating carriage of competing programming should be deemed unlawful.[29]

Should the Commission decline to repeal the exclusivity rules at this time, it must, at a minimum, modify its rules to permit an in-market station to invoke exclusivity protections only when it is actually carried by the MVPD.[30] Adopting this measure would help restore balance in retransmission consent negotiations, given that the MVPD could negotiate with more than one network affiliate for popular programming. Should the Commission pursue this approach however, it must ensure, as discussed above, that broadcast networks and stations do not evade the spirit or intent of the rule by privately agreeing to exclusive territorial arrangements.

Moreover, any relief adopted by the Commission in this proceeding should be applied to all MVPDs that are impacted by the rules. As the Commission pointed out, Congress did not specifically direct the Commission to adopt the exclusivity rules.[31] However, Congress did later direct the Commission to extend the exclusivity rules it had adopted for cable operators to DBS and open video system providers to establish regulatory parity between cable operators and other MVPDs. Thus, when

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[29] Time Warner Cable agrees that "the Commission should not only rescind its rules authorizing exclusivity agreements, but affirmatively ban such agreements." TWC Comments at 24. According to TWC, such agreements constitute unreasonable restraints on trade that would violate traditional antitrust principles if subjected to judicial scrutiny. *See* TWC Reply at 17.

[30] *See FNPRM* at ¶ 73.

[31] *Id.* at ¶ 56.

the Commission repeals or modifies the exclusivity rules, or grants any other relief requested herein, it should provide the same relief to all MVPDs to avoid creating anti-competitive disparities among such entities.

## CONCLUSION

The record in this proceeding has established that the exclusivity rules are no longer useful given changes to the video distribution marketplace in the 40-plus years since the rules were originally adopted. Given the harms the rules cause consumers, there would be significant benefits to the public if they were repealed. Accordingly, the Commission should move forward to eliminate the syndicated exclusivity and network non-duplication rules. Taking such action would facilitate fair and balanced negotiations for content and give MVPDs the flexibility to enter into arrangements to provide alternative broadcast programming desired by and relevant to consumers. The Commission also should prohibit broadcast licensees, singularly or in concert, from creating restrictions on such private arrangements. Should the Commission decline to eliminate the exclusivity rules, it must, at a minimum, modify its rules to permit an in-market station to invoke exclusivity protections only when it is actually carried by the MVPD. Moreover, any relief adopted by the Commission in this proceeding must apply to all MVPDs.

Respectfully submitted,

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June 26, 2014