

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

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

**COMMENTS OF THE  
ABC TELEVISION AFFILIATES ASSOCIATION**

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## SUMMARY

The ABC Television Affiliates Association respectfully urges the Commission, for the following reasons, to retain, without modification, the cable television network non-duplication and syndicated exclusivity rules.

First, it is questionable, given the complex interplay between these rules and the carefully crafted statutory scheme of copyright and communications regulatory law and policy, whether the Commission has authority to repeal or materially modify the exclusivity rules. At a minimum, modification or repeal of the rules, without the consent of Congress, would constitute an affront to the unmistakable will of Congress. Repeal of the rules would be patently inconsistent with the carefully constructed copyright and communications statutory scheme enacted and reenacted by Congress over a 38-year period. The Commission's program exclusivity rules have been—and still are—a key element of the statutory cable compulsory copyright license. Indeed, Congress has repeatedly acknowledged this fact by expressly tying the compulsory copyright license to the existence of the Commission's television broadcast program exclusivity rules. And the Commission, itself, has repeatedly recognized that its exclusivity rules are necessary to correct a competitive imbalance that would otherwise exist between cable systems and television broadcast stations as a result of the statutorily mandated free and/or discounted copyright fees paid by cable for the importation of duplicating distant stations.

Second, the program exclusivity rules represent an acknowledgment by the Commission of its longstanding Section 307(b) statutory mandate to foster and promote a nationwide system of "local" television broadcast service, a bedrock principle of Congressional communications law and policy. Repeal of the rules would facilitate the immediate importation of duplicating

programs from distant stations, fragmenting viewership of those same programs from local stations, and impairing the ability of local stations to negotiate at arms-length for cable retransmission fees and, in so doing, undermine the economic viability of “local” television broadcast service. In the absence of program exclusivity, stations in smaller markets located near or adjacent to urban markets would suffer immediate harm, with eventual replacement of “local” television service in local markets throughout the country with cable retransmission of a handful of distant superstations (perhaps network owned) in every local market.

There is nothing new here. These issues have been considered and reconsidered time and time again by Congress and the Commission, leading each time to the inescapable conclusion that in the absence of protected program exclusivity, neither local television broadcast service nor the nation’s network/affiliate broadcast system (which Congress has noted “serves the nation well”) could continue to exist.

Third, elimination of the cable program exclusivity rules would create an unfair and inexplicable regulatory and competitive imbalance between cable systems and satellite carriers, whose retransmission of television broadcast signals is subject to the statutory exclusivity provisions of 17 U.S.C. § 119. Notwithstanding years of lobbying by satellite carriers, Congress has steadfastly refused to repeal the program exclusivity provisions applicable to satellite carriers. Accordingly, on what rational basis could the Commission justify repeal of its cable program exclusivity rules to create a wholly asymmetrical and unfair regulatory/copyright scheme between cable systems and satellite carriers?

The Commission asks whether alternatives exist that would enable local stations to protect the exclusivity of their programs in the absence of the Commission’s program exclusivity rules. The answer is no—both in terms of timely, practical, and cost-efficient enforcement and

in terms of the provisions embodied in the Commission's rules restricting the permissible geographic area of program exclusivity. Here's why:

The exclusivity rules consist of two components: First, they provide a forum—the Commission—in which to adjudicate and enforce the program exclusivity agreed to by the parties. Second, the rules limit and restrict the geographic area in which a television station can obtain program exclusivity.

Congress, as part a consensus compromise reached in 1976 by cable systems, program producers, and broadcast stations, enacted the cable compulsory copyright license in reliance on the fact that the FCC—the specific federal agency charged by Congress with regulating the cable and broadcast industries—would serve as the exclusive forum in which program exclusivity disputes would be adjudicated and that the rule would protect a 35/55 mile maximum geographic area of program exclusivity (with an exception for nearby “significantly viewed” stations to reflect, as nearly as possible the natural geographic restrictions in the over-the-air presence of local station signals). In the absence of the Commission's exclusivity rules, stations would be free to negotiate with networks and syndicators for *larger* geographic areas of exclusivity which would, of course, lead eventually to the replacement of “local” television stations and local television service by cable carriage with a handful of distant superstations. The fact Congress expressly looked to and relied upon the Commission—not the courts or any other federal agency—to implement the consensus compromise to facilitate cable carriage of local stations is further affirmation of the Commission's statutory responsibility to retain these rules.

Virtually every network affiliation agreement and syndicated program license agreement (each of which is, in effect, a copyright “license” agreement), is predicated on the existence of and incorporates the Commission's program exclusivity rules. But even if time were allowed to

amend these agreements following a repeal by the Commission of its exclusivity rules, no practical or cost-efficient means exists for local stations to enforce program exclusivity contractual provisions subsequently entered into by stations and program suppliers.

Other enforcement mechanisms to assure program exclusivity simply will not work in the context of the cable compulsory copyright license scheme. The compulsory copyright license forecloses at the outset the ability of local stations to enforce their exclusivity rights against offending cable systems on a theory of “beneficial” holder of a protected copyright license. Nor would any other contractual remedy be effective against third parties. And, even if a viable litigation strategy could be devised, judicial copyright and contract litigation is beyond the financial reach of most stations, and by the time a final judicial decision is reached, irreparable damage to local television service will have been done. Moreover, conflicting court decisions would produce a patchwork of inconsistent case law throughout the country—not unlike that in the Aereo litigation, for example—all of which would be at odds with the intent of Congress to foster and maintain a national cable/broadcast copyright and regulatory policy.

The network non-duplication and syndicated exclusivity rules provide effective, cost efficient, and uniform enforcement. The rules ensure an efficient mechanism for self-enforcement across jurisdictions. The paucity of disputes and cases adjudicated by the Commission is testament that the rules work, as intended, with a minimum burden imposed on the Commission, cable systems, broadcast stations, and taxpayers. The Commission’s regulatory scheme effectively serves to deter violations by cable systems and, in so doing, avoids the expense and uncertainty of litigation for the parties. Under the current regime, cable systems are understandably reluctant to import distant signals in violation of Commission rules and their compulsory copyright licenses which are dependent on their compliance with Commission rules.

The exclusivity rules achieve their intended effect. Removing the exclusivity rules would indisputably result in a more litigious, more expensive, and less certain enforcement process.

In short, the current rules are not broken—the cable industry’s transparently self-serving proposal to “fix” the system is a classic attempt to unfairly advantage one competitor at the expense of another through regulatory arbitrage. The program exclusivity rules are self-policing as evidenced by the paucity of cases that have come before the Commission; they place little burden on the Commission, the regulated parties, or taxpayers; and they go to the heart of the Congressional mandated copyright and regulatory scheme. Without the Commission’s rules, the nation’s television viewers would be deprived of a rich diversity of national and local television broadcast programming.

Accordingly, repeal or material modification of the rules would constitute an abdication by the Commission of its most fundamental statutory responsibility.

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**COMMENTS OF THE  
ABC TELEVISION AFFILIATES ASSOCIATION**

The ABC Television Affiliates Association<sup>1</sup> (“ABC Affiliates”) submits these comments in response to the Further Notice of Proposed Rulemaking (“*Notice*”), released March 31, 2014, seeking comment on whether the Commission’s network non-duplication and syndicated exclusivity rules (collectively, the “exclusivity rules” or “program exclusivity rules”) should be modified or eliminated.<sup>2</sup> For the reasons discussed below, ABC Affiliates urges the Commission to retain the exclusivity rules without modification.

**I.  
Introduction**

For decades, the network non-duplication and syndicated exclusivity rules have served an indispensable role in maintaining a competitive market in the distribution of television programming. As the Commission recognized in its 2005 report to Congress, the rules exist “to protect the exclusive contractual rights of local broadcast stations in network programming from

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<sup>1</sup> The ABC Television Affiliates Association is a non-profit trade association whose members as of June 2014 consist of 164 local television broadcast stations throughout the country affiliated with the ABC Television Network.

<sup>2</sup> See *Amendment to the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014) (“*Notice*”).

the importation of non-local network stations by cable systems and thus to provide appropriate protections and incentives to program producers and distributors to provide the programming desired by viewers.”<sup>3</sup> Importantly, the Commission’s rules themselves do not provide program exclusivity. Instead, the rules provide (a) a forum for enforcement of the program exclusivity the parties agree upon, (b) limits on the geographic scope of exclusivity a program supplier and station can agree to, and (c) procedures for the exercise of exclusivity rights.<sup>4</sup> The rules are critical, given the existence of the cable compulsory copyright license, to the ability of local television stations to protect their contractually negotiated program exclusivity rights, their economic viability, and their ability to provide television programs responsive to the specific needs and interests of the local communities they are licensed to serve.<sup>5</sup>

The *Notice* seeks comment on whether the network non-duplication and syndicated exclusivity rules should be modified or eliminated. As stated above and discussed in further detail below, ABC Affiliates respectfully urge the Commission to retain the exclusivity rules without modification. First, the legislative and regulatory history makes clear that the rules should be retained. Again and again, Congress has relied on the Commission’s program exclusivity rules to achieve a competitive balance in the video marketplace, and the rules are

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<sup>3</sup> *2005 Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (2005) (hereinafter, “*2005 Report to Congress*”), ¶ 19; see also *Cable Television Syndicated Program Exclusivity Rules*, Report, 71 F.C.C. 2d 951 (1979) (hereinafter, “*1979 Syndex Report*”), ¶¶ 33, 42 (discussing syndicated program exclusivity); *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rulemaking, 2 FCC Rcd 2393 (1987) (hereinafter, “*1987 Syndex NOI*”), ¶ 48 (“The main purpose and effect [of the network non-duplication rule] is to allow the local affiliates to protect their revenues in order to make them better able to fulfill their responsibilities as licensees of the Commission.”).

<sup>4</sup> See *Notice*, ¶¶ 41, 42, 47.

<sup>5</sup> See *2005 Report to Congress*, ¶ 17.

needed for this purpose as much now (if not more so) as in the past. It is doubtful the Commission has the authority to repeal the program exclusivity rules which form an integral part of a complex statutory copyright/communications regulatory scheme. The questionable nature of the Commission's authority is underscored by Congressional action making the exclusivity rules indisputably part of the statutory scheme governing copyright and communications policy,<sup>6</sup> as discussed in Section II below. At a minimum, elimination of these rules by the Commission would be an affront to the longstanding will of Congress and inconsistent with the carefully balanced framework constructed by Congress to achieve a competitive balance between the respective program services provided by cable systems and local television stations. To the extent any Commission authority does exist to eliminate the exclusivity rules, eliminating or weakening the rules in the face of the governing statutory scheme and significant reliance by industry participants would be arbitrary and capricious.<sup>7</sup>

Second, the Commission's exclusivity rules are an essential component of the regulatory structure that furthers broadcast "localism"—and, as such, are derived from a Congressional mandate to the Commission to foster and maintain a nationwide system of *local*, over-the-air television broadcast service. The Commission, itself, has repeatedly acknowledged the necessity of assuring program exclusivity to implementation of the Congressionally mandated system of *local* broadcast service.

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<sup>6</sup> See, e.g., 47 U.S.C. § 111; Satellite Home Viewer Act of 1988, Pub. L. No. 100-667 (1988); Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113 (1999); Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447 (2004); Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175 (2010).

<sup>7</sup> See *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

Third, elimination of the network non-duplication rules would impair the network-local affiliate relationship and lead to a loss of high-quality, local news and public interest programming provided by local television stations.

Fourth, and finally, the exclusivity enforcement mechanisms embodied in the rules work as intended and serve as an efficient—indeed, the most efficient—means of enforcing program exclusivity rights contracted for by television stations.

## **II.**

### **Modification Or Repeal Of The Network Non-Duplication And Syndicated Exclusivity Rules Would Be An Affront To The Will Of Congress**

#### **A. The Network Non-Duplication And Syndicated Exclusivity Rules Are An Essential Part Of A Complex Regulatory Structure Created By Congress**

The network non-duplication and syndicated exclusivity rules are part of a complex tapestry of national copyright and communications law and policy. These two areas of law and policy, together, govern retransmission by cable systems of broadcast signals, and elimination of either of the exclusivity rules would disrupt and upend the intricate statutory and regulatory structure that has been carefully developed by Congress and the Commission over decades. If the Commission pulls the thread, the tapestry unravels. Accordingly, it is for Congress, not the Commission, to make changes (if any) to the program exclusivity rules.

The intersection of copyright and communications law and policy is reflected in the legislative history of the cable and satellite compulsory copyright licenses. In enacting the 1976 Copyright Act,<sup>8</sup> the genesis of the compulsory licenses applicable to cable retransmission of television broadcast stations, Congress explicitly recognized the “interplay” between copyright and the Commission’s program exclusivity rules in the cable retransmission of broadcast signals,

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<sup>8</sup> See General Revision of Copyright Law, Pub. L. 94-553 (Oct. 19, 1976).

with the House Judiciary Committee stating: “any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry.”<sup>9</sup> The Committee’s report clearly demonstrates Congressional reliance on the Commission’s program exclusivity rules, in particular:

We would, therefore, caution the Federal Communications Commission, and others, who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulations in areas where the Congress has not resolved the issue. Specifically, *we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals.* These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.<sup>10</sup>

The Commission, itself, has recognized and acknowledged the interrelationship of the statutory compulsory copyright license and the Commission’s program exclusivity rules. The Commission in 2005 wrote to Congress:

It is essential to bear in mind that the four rules considered in this Report do not operate in a vacuum. *They are part of a mosaic of other regulatory and statutory provisions (e.g., territorial exclusivity, copyright compulsory licensing, and mandatory carriage) to implement key policy goals.* For example, territorial exclusivity protects localism by preventing local broadcasters from contracting for exclusivity outside their local markets, while network non-duplication and syndicated exclusivity protect localism by facilitating enforcement of contractual arrangements that limit importation of duplicative distant broadcast signals into local markets. Thus, these rules complement one another. Similarly, copyright law and retransmission consent rules operate in a complementary fashion. The statutory compulsory license compensates rights holders for use of their property, while permitting MVPDs to retransmit their programming without costly and time-consuming negotiations with individual copyright holders. Further, the government-established copyright fee for distant signals, which is higher than that for local stations, operates together with the network non-duplication and syndicated exclusivity rules to encourage MVPD carriage of local broadcast signals. Finally,

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<sup>9</sup> H.R. REP. NO. 94-1476 (1976), 89.

<sup>10</sup> H.R. REP. NO. 94-1476 (1976), 89 (emphasis added).

broadcast mandatory carriage rights, which promote localism and ensure the viability of free, over-the-air television, complement the retransmission consent regime. Together, must-carry and retransmission consent provide that all local stations are assured of carriage even if their audience is small, while also allowing more popular stations to seek compensation (cash or in-kind) for the audience their programming will attract for the cable or satellite operator. Must-carry alone would fail to provide stations with the opportunity to be compensated for their popular programming. Retransmission consent alone would not preserve local stations that have a smaller audience yet still offer free over-the-air programming and serve the public in their local areas. *Because of the interplay among these various laws and rules, when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination.*<sup>11</sup>

Elimination or modification of the network non-duplication and syndicated exclusivity rules would disrupt not only bargained-for exclusivity rights, but the entire statutory structure embodied in the compulsory copyright license scheme.<sup>12</sup> The Commission's cable exclusivity rules were intended by Congress and the Commission to correct the obvious competitive imbalance that would otherwise exist between cable systems and local television stations as a result of cable's statutory compulsory copyright license. Any action by the Commission to reinstate this competitive imbalance by repeal or modification of its program exclusivity rules would plainly be contrary to Congressional intent.

**B. Congress Has Repeatedly Relied On The Existence Of The Commission's Exclusivity Rules To Balance Competition Between MVPDs And Broadcast Stations**

Cable systems and satellite providers are able to exploit for profit the retransmission of local broadcast signals as a result of a combination of retransmission consent and statutory compulsory copyright licenses. In 1965, confronted with the growth of cable systems, the Commission adopted the first exclusivity rule for network programming to balance competition

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<sup>11</sup> 2005 Report to Congress, ¶ 33 (emphases added).

<sup>12</sup> See 17 U.S.C. § 111 (cable); § 119 (satellite distant signal); § 122 (satellite local signal).

between local television stations and cable systems, which otherwise, prior to the rule, could retransmit distant signals to local markets.<sup>13</sup> Then, in 1972, the Commission adopted the first syndicated exclusivity rule for syndicated (non-network) programming.<sup>14</sup> The new rule was believed necessary to protect local broadcast stations from unfair competition from cable systems and ensure the continued local availability of television broadcast programming.<sup>15</sup> The 1972 syndicated exclusivity rule was adopted following a “Consensus Agreement” reached among broadcast stations, cable companies, and program producers that, for a time, resolved the dispute among the parties over copyright liability for retransmission of broadcast signals (which contain copyrighted content owned by third parties) by cable systems and paved the way for comprehensive copyright legislation.<sup>16</sup> In the 1976 Copyright Act, Congress endorsed the industry Consensus Agreement and enacted the cable compulsory license scheme to allow cable systems to retransmit both local and distant broadcast signals without securing the consent of the copyright holders of the programming contained in the signals.

At the time the Section 111 cable compulsory copyright license was enacted in 1976, Congress was aware of and acknowledged the interrelationship of the license and the

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<sup>13</sup> 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 F.C.C. 683 (1965).

<sup>14</sup> See *Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems*, Report and Order, 36 F.C.C. 2d 143 (1972) (hereinafter, “1972 Report”).

<sup>15</sup> See 1972 Report, ¶ 73.

<sup>16</sup> See 1987 Syndex NOI, ¶ 19 (“The legislative history demonstrates that this tradeoff reflected congressional acquiescence to the cable operators’ argument that it would be impractical for them to negotiate copyright clearances for individual programs on distant television broadcast signals. . . . The copyright [owner], however, was to be compensated, albeit at a rate not set by the market, for the adverse effects that distant signal carriage of non-network programming might have on the value of copyright works.”)

Commission's network non-duplication and syndicated exclusivity rules.<sup>17</sup> Congress went to considerable lengths to assure that cable's Section 111 compulsory copyright license was conditioned upon compliance by a cable system with the Commission's cable regulations, including the program exclusivity rules:

Secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) *where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.*<sup>18</sup>

In granting the Section 111 license, Congress was aware that it was conferring a competitive advantage on cable systems, so it expressly conditioned the license on cable's compliance with Commission's rules.<sup>19</sup> The compulsory license limits the right of a copyright owner to set the terms for use of copyrighted materials, but the rights bestowed on cable companies were "tempered" by compliance with, *inter alia*, the Commission's cable program exclusivity rules.<sup>20</sup>

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<sup>17</sup> See, e.g., H.R. REP. NO. 94-1476 (1976), 89. ("The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.") For example, Section 801(b)(2)(c) of the 1976 Copyright Act gave the Copyright Royalty Tribunal authority to adjust royalty payments for the compulsory license to reflect any subsequent changes in the Commission's 1972 syndicated exclusivity rules. The House Report observed that "[i]f these rules are changed in the future to relax or increase the exclusivity restrictions, . . . the royalty rates paid by cable systems should be adjusted to reflect such changes." See *id.* at 176.

<sup>18</sup> General Revision of Copyright Law, Pub. L. No. 94-553 (1976) ("1976 Copyright Act"), Sec. 111(c)(1), codified at 17 U.S.C. § 111(c)(1) (emphasis added).

<sup>19</sup> See *id.*; 1987 Syndex NOI, ¶ 21.

<sup>20</sup> 1987 Syndex NOI, ¶ 20.

From the outset, the network non-duplication and syndicated exclusivity rules have been an integral component of the Congressional effort to balance the right of cable operators to retransmit television broadcast programs without obtaining the consent of the copyright holders and the right of broadcast stations to protect the contracted-for program exclusivity in their programming.<sup>21</sup>

When Congress was considering the 1992 Cable Act,<sup>22</sup> it, again, relied on the Commission's program exclusivity rules to achieve competitive balance between cable systems and broadcast stations. The legislative history of the 1992 Cable Act demonstrates Congressional concern for a distorted marketplace in the absence of a regulatory structure that included program exclusivity. The Senate Committee on Commerce, Science, and Transportation, in considering retransmission consent legislation, recognized that cable systems carry both local and distant signals, but that broadcast signals, and especially local signals, are the most popular programming carried on cable—and that it logically follows that a “very substantial portion” of the fees consumers pay to cable companies is attributable to the value consumers receive from watching local television stations.<sup>23</sup> At the time, however, neither consent to the retransmission of the originating broadcast station or payment for the value of the programming (other than below-market compulsory license fees) had been required. The 1992 Cable Act was enacted to correct a “distortion in the video marketplace” in which local broadcast

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<sup>21</sup> See 1976 Copyright Act § 111(c); H.R. Rep. 94-1476 (1976), 89.

<sup>22</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (Oct. 5, 1992).

<sup>23</sup> S. REP. NO. 102-92 (1991), 35 & n.85; *see also* H.R. CONF. REP. 102-862 (1992), 58.

stations were subsidizing their cable competitors.<sup>24</sup> And Congress relied upon the Commission’s program exclusivity rules for the regulatory re-balancing: “[t]he Committee has relied on the protections which are afforded local stations by the FCC’s network non-duplication and syndicated exclusivity rules. *Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee’s view, be inconsistent with the regulatory structure created in S. 12.*”<sup>25</sup>

Moreover, Congress has relied on the existence of the Commission’s program exclusivity rules in authorizing and reauthorizing the distant signal compulsory copyright license enacted in 17 U.S.C. § 119 for satellite.<sup>26</sup> In fact, Congress “premised” the grant of the satellite compulsory copyright license on “the existence of appropriate safeguards to protect the rights” of broadcast stations.<sup>27</sup> In particular, the unserved household limitation of the Satellite Home Viewer Act of 1988 (“SHVA”)<sup>28</sup> restricted the importation of distant duplicating network signals to households that cannot receive a good, over-the-air signal from a local affiliate of the same network. In considering reauthorization of SHVA in 1999, the House Energy and Commerce Committee stated:

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<sup>24</sup> S. REP. NO. 102-92 (1991), 35; *see also* H.R. CONF. REP. 102-862 (1992), 58.

<sup>25</sup> S. REP. NO.102-92 (1991), 38 (emphasis added).

<sup>26</sup> *See* 47 U.S.C. § 119; *Implementation of the Satellite Home Viewer Improvement Act of 1999*, Report and Order, 15 FCC Rcd 21688 (2000), ¶ 5.

<sup>27</sup> H.R. Rep. No. 100-887, Part 2 (1988), 27; *see also* H.R. REP. NO. 106-79, Part 1 (1999), 15 (“[T]he unserved household limitation served a valuable purpose: to preserve local affiliates’ bargained-for exclusivity, and promote the development of local programming and free, over-the-air television.”).

<sup>28</sup> *See* Satellite Home Viewer Act of 1988, Pub. L. No. 100-667 (1988).

Broadcast networks give local affiliates an exclusive license to distribute network programming in a given market. Local affiliates, in turn, rely upon and market this exclusivity to attract commercial advertisers. Because advertising revenue is its only source of revenue, a local broadcast station strives to reach as many households as possible within its market. Thus, when a satellite television operator distributes out-of-market, or distant, network signals to households that can otherwise receive local signals over the air, the local broadcast station's viewership (and hence, advertising revenue) necessarily declines. *The unserved household limitation therefore has helped to preserve local affiliates' bargained-for exclusivity, and in doing so, promoted the development of local programming and free, over-the-air television.*<sup>29</sup>

In fact, the satellite unserved household limitation was adopted as a “surrogate” for the cable network non-duplication rules—it was created to protect, in the context of satellite carriers, the historic network-affiliate relationship and network program exclusivity enjoyed by local broadcast stations under the Commission's cable program exclusivity rules.<sup>30</sup> Notably, SHVA, with its broadcast station program exclusivity provisions, has been repeatedly reauthorized by Congress.<sup>31</sup>

In addition, in 1999, Congress specifically directed the Commission to apply the network and syndicated program exclusivity protections to satellite retransmission of superstations.<sup>32</sup> The House Committee explained that Congress' intent with this directive was that “the [satellite]

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<sup>29</sup> H.R. Rep. No. 106-79, Part 1 (1999), 13 (emphasis added).

<sup>30</sup> Register of Copyrights, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* (2008), 151.

<sup>31</sup> See Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113 (1999); Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447 (2004); Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175 (2010).

<sup>32</sup> See 47 U.S.C. § 339(b)(1)(A) (“Extension of protections. Within 45 days after the date of the enactment of the Satellite Home Viewer Improvement Act of 1999 [enacted Nov. 29, 1999], the Commission shall commence a single rulemaking proceeding to establish regulations that--(A) apply network nonduplication protection (47 CFR 76.92) syndicated exclusivity protection (47 CFR 76.151), and sports blackout protection (47 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers . . .”)

rules should be as similar as possible to that applicable to cable services.”<sup>33</sup> If the Commission were to eliminate or modify the network non-duplication and syndicated exclusivity rules for cable, the result would be an obvious and irrational competitive imbalance between satellite carriers and cable systems. There can be no justification for the Commission to create a wholly asymmetrical, anticompetitive regulatory/copyright scheme as between cable systems and satellite carriers.

In summary, Congress has relied again and again on the existence of the Commission’s long-standing network non-duplication and syndicated exclusivity rules in enacting pro-competitive communications and copyright laws related to MVPDs and the retransmission of broadcast signals. For the Commission to change or eliminate the exclusivity rules would be both inconsistent with its own pro-competitive regulatory policies and with the unmistakable will of Congress.

### **C. The Commission Has Repeatedly Determined That The Exclusivity Rules Are Necessary To Achieve Competitive Balance**

In 1979, the Commission repealed its syndicated program exclusivity rules.<sup>34</sup> Roughly eight years later, the Commission reversed itself and initiated a proceeding to reinstate the rules. The rulemaking was prompted in part by what the Commission acknowledged as “troubling anomalies” that had emerged in the competitive video market following repeal of the rules, with a significant and unfair, competitive advantage having been extended to cable over broadcast.<sup>35</sup>

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<sup>33</sup> H.R. CONF. REP. NO. 106-464 (1999), 103.

<sup>34</sup> *See 1979 Syndex Report.*

<sup>35</sup> *1987 Syndex NOI*, ¶ 11.

The Commission affirmed that, in order to carry out its statutory mandate to serve the public interest, it should adopt rules to maximize diversity of programming.<sup>36</sup> The Commission believed diversity of programming could be achieved by ensuring (1) that its regulations foster a level playing field among competitors, including those who produce and those who distribute; and (2) that freedom of contract, and thus private property rights, are unimpeded by the Commission’s regulation or deregulation of the industries.<sup>37</sup> The agency stated its belief that the public interest would best be served by facilitating a market not skewed toward any competitor, and that the goal of re-imposing syndicated exclusivity would be to foster parity in competition between cable and broadcast service within the context of the compulsory license scheme.<sup>38</sup> Ultimately, the Commission concluded that syndicated program exclusivity rules would foster competition and fair and efficient use of video technologies.<sup>39</sup> The Commission went on to reinstate the syndicated program exclusivity rules, observing that the rules would enhance competition and increase incentives for program providers to supply programs that viewers want<sup>40</sup>—and the public, in turn, benefits, as the Commission observed, from “richer and more diverse” programming.<sup>41</sup> The Commission further noted that elimination of the syndicated

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<sup>36</sup> See 1987 *Syndex NOI*, ¶ 5.

<sup>37</sup> See 1987 *Syndex NOI*, ¶ 5.

<sup>38</sup> See 1987 *Syndex NOI*, ¶¶ 24, 36.

<sup>39</sup> See *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299 (1988) (hereinafter, “1988 *Syndex Order*”), ¶ 51.

<sup>40</sup> See 1988 *Syndex Order*, ¶ 72.

<sup>41</sup> 1988 *Syndex Order*, ¶ 89.

program exclusivity rules improperly favored one competitor (cable) over another, rather than promoted competition.<sup>42</sup>

The same policy goals that prompted the Commission in 1988 to reinstate the syndicated program exclusivity rules remain today—namely, maintaining competitive balance and ensuring a rich and diverse supply of programming for the public.<sup>43</sup>

### **III. Network Non-Duplication And Syndicated Program Exclusivity Are Critical Components Of Broadcast Localism**

The core purpose of the network non-duplication rule, as the Commission, itself, has acknowledged, is “the preservation of local television service.”<sup>44</sup> Similarly, the Commission has observed that the syndicated exclusivity rules were adopted to protect local broadcast service and ensure the continued availability of television programming, both of which are “fundamental” to cable and broadcast television.<sup>45</sup> When it reinstated the syndicated exclusivity rules in 1988, the Commission emphasized the importance of exclusivity in the overall regulatory structure:

The Commission, pursuant to Section 307(b) of the Communications Act, has been charged with the responsibility of developing an orderly system of local broadcasting. Our country has made a substantial investment in free, local, over-the-air service that has and continues substantially to promote the public interest.

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<sup>42</sup> See *1988 Syndex Order*, ¶ 23 (“First, the Commission justified the rules’ repeal based on an analysis of how their repeal or retention would affect particular competitors, rather than competition itself, in the local television distribution market.”); see also *Notice*, ¶ 49.

<sup>43</sup> See *Notice*, ¶ 64 (recognizing (1) fair competition between broadcast stations and MVPDs and (2) diversity and supply of programming as goals to be “ensure[d]” in this proceeding).

<sup>44</sup> *Amendment of Subpart F of Part 76 of the Commission’s Rules and Regulations with respect to Network Program Exclusivity Protection by Cable Television Systems*, First Report and Order, 52 F.C.C. 2d 519 (1975), ¶ 18.

<sup>45</sup> *Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems*, Report and Order, 36 F.C.C. 2d 143 (1972), ¶ 73.

From a regulatory standpoint, broadcasters are governed by unique regulatory mechanisms that are designed to ensure they will serve their communities of license. In short, the Communications Act and our regulations [have] held broadcasters to a standard of operating in the public interest, convenience and necessity, with obligations to serve their local communities.

In fulfilling our responsibility under Sections 301, 307(b), and 309, we believe the public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations. *An essential element of this responsibility is to create a local television market that allows local broadcasters to compete fully and fairly with other marketplace participants.* Promoting fair competition between free, over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible. Local broadcast signals make a significant contribution to this diverse mix. As we documented previously, the absence of syndicated exclusivity places local broadcasters at a competitive disadvantage. *Lack of exclusivity protection distorts the local television market to the detriment of the viewing public, especially those who do not subscribe to cable. Our regulatory scheme should not be structured so as to impair a local broadcaster's ability to compete, thereby hindering its ability to serve its community of license.* Restoration of our syndicated exclusivity rules will provide more balance to the marketplace and assist broadcasters in meeting the needs of the communities they are licensed to serve.<sup>46</sup>

This statement is as true today as it was in 1988. Exclusivity protection is an essential component of the statutorily mandated system of local television broadcast service.

Section 307(b) of the Communications Act of 1934, as amended, provides: “In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the *several States and communities* as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”<sup>47</sup> As the Commission has acknowledged, the concept of localism has been a “cornerstone of broadcast

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<sup>46</sup> 1988 *Syndex Order*, ¶¶ 73-74 (emphasis added).

<sup>47</sup> 47 U.S.C. § 307(b) (emphasis added).

regulation for decades.”<sup>48</sup> In carrying out the localism mandate of Section 307(b), the Commission has long recognized that “every community of appreciable size has a presumptive need for its own transmission service.”<sup>49</sup> Broadcast stations are licensed on a *community-by-community* basis. In exchange for a license to operate, each television broadcast licensee is required by FCC rules to serve the public interest, convenience, and necessity of its *local* community.<sup>50</sup> For example, a broadcast station must place a specified signal contour over its *local* community of license to ensure that *local* residents receive a good signal;<sup>51</sup> a station must maintain its main studio in or near its community of license to facilitate interaction between the station and the members of the *local* community it is licensed to serve;<sup>52</sup> and television stations must maintain a *local* public inspection file online, which must include a list of programs that have provided the station’s most significant treatment of community issues” for each calendar quarter.<sup>53</sup>

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<sup>48</sup> *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 (2004), ¶ 1.

<sup>49</sup> *Pacific Broadcasting of Missouri LLC*, Memorandum Opinion and Order, 18 FCC Rcd 2291 (2003), ¶ 7 (quoting *Public Service Broadcasting of West Jordan, Inc.*, Decision, 97 FCC 2d 960 (Rev. Bd. 1984), ¶ 3); see also *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324 (2008), ¶ 5.

<sup>50</sup> See 47 U.S.C. §309(a); see also *2005 Report to Congress*, ¶ 50 (stating, “the Commission has a longstanding policy favoring the provision of local broadcast service to communities, and the Commission expects and indeed requires broadcasters to serve the needs and interests of their local communities.”); FCC, *The Public and Broadcasting: How to Get the Most Service from Your Local Station at 6*, available at <[https://apps.fcc.gov/edocs\\_public/attachmatch/DA-08-940A2.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-08-940A2.pdf)> (July 2008) (discussing the “essential obligation of licensees that their stations serve their local communities”).

<sup>51</sup> See 47 C.F.R. § 73.685(a).

<sup>52</sup> See 47 C.F.R. § 73.1125.

<sup>53</sup> See 47 C.F.R. § 73.3526(e)(11).

In fact, the network non-duplication and syndicated exclusivity rules limit the geographic zone of permissible exclusivity in a manner that reinforces the principle of localism. A local television station's zone of exclusivity is, by Commission rules, designed to replicate each station's *local*, over-the-air reception.<sup>54</sup> A local station cannot contractually obtain exclusivity protection against another station whose signal can be received over-the-air.<sup>55</sup>

The exclusivity rules with their restrictions on the maximum geographic area in which exclusivity may be obtained and enforced by the Commission, are integral to Congressionally mandated localism because they protect the integrity of the viewership, advertising revenues, and retransmission consent fees negotiated at arms-length by local stations—all of which underwrite the cost of acquiring, creating, and distributing quality broadcast programming directed to the specific needs and interests of the local community. Local news and public affairs programming do not necessarily pay for themselves,<sup>56</sup> yet stations are licensed by the Commission to provide

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<sup>54</sup> The maximum geographic zone permitted for exclusivity of syndicated programming is 35 miles from the station's community of license. *See* 47 C.F.R. §§ 76.101 (note); 76.120(e)(2); 73.658(m). If the station is located in a hyphenated market, the 35 mile zone applies to each named community in the hyphenated market. *See* 47 C.F.R. §§ 76.101 (note); 76.120(e)(2). The maximum geographic zone permitted for exclusivity of network programming is 35 miles for stations in the top 100 markets, as enumerated in 47 C.F.R. § 76.51, and 55 miles for all other stations. *See* 47 C.F.R. §§ 76.92 (note); 76.120(e)(1); 73.658(m). For stations in hyphenated markets, the 35 or 55 mile zone applies to each named community in the hyphenated market. *See* 47 C.F.R. §§ 76.92 (note); 76.120(e)(1).

<sup>55</sup> "Significantly viewed" signals are an exception to network non-duplication and syndicated exclusivity protections. *See* 47 C.F.R. §§ 76.92(f); 76.106(a); *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Systems*, Memorandum Opinion and Order, 36 F.C.C. 2d 326 (1972).

<sup>56</sup> The true value of local programming is not necessarily reflected in the number of people who view it or in the advertising revenue generated by such programming. *See Cable Television Syndicated Program Exclusivity Rules*, Notice of Proposed Rulemaking, 71 F.C.C. 2d 1004 (1979), ¶ 51.

programming that serves the unique program needs and interests of their local communities.<sup>57</sup> If the exclusivity rules were eliminated or weakened, the continued economic viability of local stations and their *local* program service would be threatened. Repeal of the program exclusivity rules would facilitate immediate importation of duplicating programs from distant stations. Local broadcasters, no longer able to effectively exercise exclusivity, would not be able to command the same (higher) advertising prices during network and syndicated programming. Advertisers pay for delivery of viewers, and the loss of program exclusivity would result in the fragmentation and diversion of viewership to the duplicating programming of distant stations.<sup>58</sup> The loss of advertising revenue means that local stations would be unable to pay for the costs of national network and syndicated programming or produce local programming directed to local needs and interests. Stations in smaller markets located near or adjacent to urban markets would suffer immediate harm, with the eventual replacement of local television service in local markets throughout the country with retransmission by cable of distant superstations in every local market. Cable systems and a handful of distant superstations would be competitively advantaged at the expense of local stations and the local television broadcast service they provide. Such a result is precisely the competitive imbalance the Commission, itself, determined would occur in the absence of its program exclusivity rules.

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<sup>57</sup> *See, e.g.*, 47 U.S.C. § 309(a).

<sup>58</sup> *See 1988 Syndex Order*, ¶ 41.

**IV.**  
**Elimination Of The Network Non-Duplication Rule  
Would Undermine The Network-Affiliate Relationship**

Networks were originally created, first for radio and later for television, in response to the economic challenges of producing quality programming. The concept of networking was developed to (1) amortize the costs of program acquisition and production over multiple stations and (2) maximize the sale of national and local advertising for networks and local stations around the country.

Congress has repeatedly acknowledged the public interest benefits that flow from the national network/local affiliate business model and created program exclusivity by statute for satellite carriage of television broadcast stations. For example, in enactment of the initial Satellite Home Viewer Act, the House Energy and Commerce Committee observed:

This television network-affiliate distribution system involves a unique combination of national and local elements, which has evolved over a period of decades. The network provides the advantages of program acquisition or production and the sale of advertising on a national scale, as well as the special advantages flowing from the fact that its service covers a wide range of programs throughout the broadcast day, which can be scheduled so as to maximize the attractiveness of the overall product. But while the network is typically the largest single supplier of nationally produced programming for its affiliates, the affiliate also decides which network programs are locally broadcast, produces local news and other programs of special interest to its local audiences, and creates an overall program schedule containing network, local and syndicated programming.

The Committee believes that historically and currently the network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby the special strengths of national and local program service support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well.<sup>59</sup>

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<sup>59</sup> H.R. REP. NO. 100-887, Part 2 (1988), 20.

The Commission, too, has acknowledged the public benefits of the network-affiliate relationship which has assured access by viewers to high-quality, national and local news, entertainment and sports programming from local stations.<sup>60</sup>

The Commission's network non-duplication rules are critical to the economics of the network-affiliate partnership. The House Energy and Commerce Committee recognized exclusivity as "integral" to the network-affiliate relationship, and noted that "the exclusivity provided an affiliate as the outlet for its network in its own market is an *essential element* of the overall [network-affiliate] system" and that "exclusivity increases the affiliate's resources and incentive to support and promote the network in its competition with the other broadcast networks and the other nationally distributed broadcast and nonbroadcast program services."<sup>61</sup> Moreover, Congress has long recognized that allowing a distant network signal into a local market, in derogation of the local affiliate's contractually acquired exclusivity rights, undermines market-negotiated network-affiliate arrangements.<sup>62</sup> Indeed, the carriage of signals other than those to unserved households "runs afoul of congressional policy that recognizes the importance of the network-affiliate exclusive licensing relationship, which is intended to promote the

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<sup>60</sup> See, e.g., *Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas*, Report, 2 FCC Rcd 1669 (1987), ¶ 159 ("The network-affiliate relationship is a true partnership serving the interest of both partners and the public interest by combining efficiencies.").

<sup>61</sup> H.R. REP. NO. 100-887, Part 2 (1988), 20 (emphasis added).

<sup>62</sup> See H.R. CONF. REP. NO. 106-464 (1999), 93. The goal of the unserved household Section 119 license is to allow for "lifeline" network television service to homes that cannot otherwise receive a local network affiliate. Congress was aware of the interrelationship between the communications policy of localism and property rights considerations in copyright law, and sought a proper balance between them in adopting the unserved household limitation. *See id.*

continued production and dissemination of local programming.”<sup>63</sup> Particularly in the face of increasing competition in the video marketplace, local stations must be able to obtain the exclusivity they bargained for as a part of the overall terms of their network affiliation contracts.

**V.**  
**The Commission Should Maintain Enforcement  
Of The Exclusivity Rules Instead Of  
Shifting Enforcement To Copyright Or Contract Litigation**

The *Notice* asks if alternative means are available to protect the exclusivity of broadcast programming. The answer is no—not in any pragmatic, cost efficient, or timely manner.

*First*, as discussed above, Congress has expressly directed the Commission—not the courts or other agencies of government—to foster and promote a system of local television broadcast service. And as noted above, program exclusivity is essential to the national system of *local* broadcast service. Repeal or material modification of the program exclusivity rules would thus constitute an abdication by the Commission of its core statutory responsibility.

*Second*, affiliation agreements with the ABC Network currently in effect grant network non-duplication rights specifically in terms of the Commission’s rules. A typical ABC Network affiliation agreement provides, in pertinent part, as follows:

Station shall be entitled to assert Network non-duplication protection against duplication of other television Stations’ digital broadcast of Network Programs, to the extent provided by Sections 76.92 through 76.95 and Section 76.120 through 76.122 of the FCC rules and as follows: (1) The geographic zone of Network non-duplication protection shall be the Designated Market Area (“DMA”) (as defined by Nielsen) in which Station is located, or any lesser zone pursuant to any geographic restrictions contained in the Section 73.658(m) FCC rules and regulations, now or as subsequently modified. . . .

In other words, the ABC Network grants exclusivity rights in a manner that expressly incorporates and relies on the Commission’s rules. Indeed, all network affiliation agreements

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<sup>63</sup> H.R. REP. NO. 108-660 (2004), 11.

currently in place are predicated on existence of the Commission's network non-duplication exclusivity rules. Without the rules, the contractual grant of rights would be meaningless. If the Commission eliminated the exclusivity rules, the network affiliation agreement of each member station of ABC Affiliates would have to be rewritten to achieve exclusivity, if possible, in some other manner.

*Third*, it remains true today that “for a market to function efficiently, in addition to having a competitive environment, property rights of all participants must be well specified and enforceable at reasonable costs.”<sup>64</sup> A meaningful and efficient enforcement mechanism is part of the complex balance of competitive interests Congress weighed and relied on in enacting the compulsory licenses and retransmission consent regime.

*Fourth*, as discussed above, the exclusivity rules actually limit the scope of program exclusivity parties may legally agree to by contract. If the exclusivity rules are eliminated, the geographic limitation will disappear. In the absence of the rules, cable systems will import distant duplicating stations with the result that the local programming services provided by local stations will be replaced by a distant television station's service—again, contrary to the will of Congress and the carefully competitively balanced copyright/regulatory scheme.

*Fifth*, the network non-duplication and syndicated exclusivity rules provide effective, cost efficient, and uniform enforcement. The rules ensure an efficient mechanism for self-enforcement across jurisdictions. The paucity of disputes and cases adjudicated by the Commission is testament that the rules work, as intended, with a minimum burden imposed on the Commission, cable systems, broadcast stations, and taxpayers. The Commission's regulatory scheme effectively serves to deter violations by cable systems and, in so doing, avoids the

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<sup>64</sup> 1987 *Syndex NOI*, ¶ 31.

expense and uncertainty of litigation for the parties. Under the current regime, cable systems are understandably reluctant to import distant signals in violation of Commission rules and their compulsory copyright licenses which are dependent on their compliance with Commission rules. The exclusivity rules achieve their intended effect. Removing the exclusivity rules would indisputably result in a more litigious, more expensive, and less certain enforcement process.

The current rules also provide a more uniform result—consistent with the goals of Congress’s national copyright/regulatory policy. In the absence of the Commission’s exclusivity rules, disputes would likely result in conflicting decisions in different jurisdictions. The ongoing Aereo litigation, which has been occupying federal courts for more than two years and resulted in federal court splits of authority that ultimately required resolution by the U.S. Supreme Court, provides a meaningful preview of what could be expected if the uniform enforcement mechanism currently in place is removed.<sup>65</sup> For stations that elect to pursue litigation to enforce their exclusivity rights—even if they can be enforced, which is problematic—the expense of litigation would be a significant financial commitment, particularly for small-market stations in litigation with well-heeled national cable companies. Funds otherwise available for local

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<sup>65</sup> See *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (denying injunction against Aereo); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012) (granting injunction in favor of broadcast stations); *Fox TV Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30 (D.D.C. 2013) (granting injunction); *Hearst Stations Inc. d/b/a WCVB-TV v. Aereo, Inc.*, No. 13-11649-NMG, 2013 U.S. Dist. LEXIS 146825 (D. Mass. Oct. 8, 2013) (denying injunction); *Community TV of Utah d/b/a KSTU Fox 13 v. Aereo, Inc.*, No. 2:13-cv-910, 2014 U.S. Dist. LEXIS 21434 (D. Utah Feb. 19, 2014) (granting injunction); *FilmOn X, LLC v. Window to the World Communications, Inc.*, No. 1:13-cv-08451 (N.D. Ill.) (stayed pending review by United States Supreme Court). Following numerous appeals in various Circuit Courts of Appeals, the series of conflicting decisions has culminated in review and decision by the United States Supreme Court. See *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (U.S. S. Ct.) (June 25, 2014).

programming and service to their communities would be diverted to litigation—all of which is easily avoided by retention of the current Commission rules.

Furthermore, any notion that program exclusivity rights could be effectively “enforced” through private litigation is illusory. The exclusivity rules, as they exist today, provide *the primary*—perhaps, *only*—practical means by which a local broadcast station can efficiently and adequately stave off the improper importation of a distant signal into its DMA. Indeed, the Commission’s expertise in the retransmission consent regime, the cable compulsory license, and the exclusivity rules—as well as practical legal problems with enforcing exclusivity rights in court—makes the agency the only viable forum for resolution of program exclusivity matters.

There is simply no satisfactory answer to the question of how a local station seeking to enforce an exclusivity agreement would proceed, as a practical matter, in the absence of the exclusivity rules, against an MVPD that is importing the duplicative programming of a distant station.<sup>66</sup> The interplay between the exclusivity rules, retransmission consent, and the cable compulsory licensing regime presents the first obstacle. Because of the cable compulsory license, the program provider that granted exclusivity rights would have no direct copyright claim against an offending cable system. The compulsory copyright license specifically removes any theory of copyright liability from the list of viable legal claims a local station could make.

Another barrier to enforcing exclusivity rights in court, in the absence of the exclusivity rules, is third-party beneficiary jurisprudence. A theory of third-party beneficiary liability fares no better than copyright infringement for at least two reasons. First, network affiliation and syndicated programming license agreements do not typically, if ever, contain third-party beneficiary language. Second, third-party beneficiary law varies from state to state and

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<sup>66</sup> *See Notice*, ¶ 66.

jurisdiction to jurisdiction. The concept of a uniform *national* communications policy would be thoroughly undermined by the application of disparate state law principles of third-party beneficiary rights to program exclusivity provisions that should be uniformly applied and interpreted.

Significantly, the lack of contractual relationships between the local station and the cable operator<sup>67</sup> or between the program provider (network or syndicator) and the cable operator means there would be no direct recourse against the cable system for those parties.<sup>68</sup> This privity problem would prevent a local broadcast station from successfully enjoining a cable system that is importing a distant station and undermining the exclusivity rights because litigants generally cannot seek to enforce contractual rights against one who is not a party to the contract.<sup>69</sup> Given the fact that, as the Commission recognizes, cable systems “are not parties to [the] exclusivity agreements” between a local station and a network or program syndicator, the local station would have to “get to” the importing cable system, if at all, through causes of action brought against others—namely, the network or syndicator or the distant station.<sup>70</sup> These third parties

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<sup>67</sup> The Commission’s acknowledgement that the typical situation in which an MVPD is likely to import a distant station’s signal is when it is “faced with the blackout of a local station as a result of a retransmission dispute,” *Notice*, ¶ 58; *see id.* ¶ 62, during an impasse in retransmission consent negotiations aptly illustrates the contractual privity problem.

<sup>68</sup> Of course there would similarly be a privity problem as between the local station and distant station who would not be mutual parties to a contract either.

<sup>69</sup> An exception to this rule is that an intended third-party beneficiary to a contract may have what amounts to a cause of action pursuant to such contract, but such exception would likely be of little help to a local broadcast station here, for the reasons discussed above.

<sup>70</sup> Eliminating the exclusivity rules and imposing an judicial enforcement regime that would often require litigation amongst affiliates and either their networks or their fellow affiliates is not only flawed from a legal perspective—it also undermines the long-established affiliate-network structure that has served the public well for decades. *See, e.g., In Re Inquiry*

would then be required to proceed against the offending cable system.<sup>71</sup> Even if the local station had a cognizable claim against the network or syndicator or the distant station, such a lawsuit would be “two steps removed” from the conduct the local broadcast station would seek to have enjoined (it would neither be against the distant station nor, more importantly, the MVPD).

Moreover, as illustrated in a case less than a year ago,<sup>72</sup> any litigation strategy also suffers the flaw of delay. If a cable system imports a distant signal during a retransmission consent impasse with a local station, the damage to local service is likely to have been done long before any litigation is heard in court.

To the extent that elimination of the exclusivity rules would be “deregulatory,” it would be so in form only, not in substance. Elimination of one component of the carefully-hewn retransmission consent, cable compulsory license, and program exclusivity regulatory scheme would create a severe competitive imbalance and add new and significant financial burdens to parties—programmers and local stations—who seek to enforce their bargained-for exclusivity rights. The program exclusivity rules work; they are not burdensome for the Commission to administer, and the parties have structured their contracts in reliance on these rules. In short, there is no public interest justification for disrupting the efficient enforcement mechanism that the Commission’s rules currently provide.

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*into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas*, Report, 2 FCC Rcd 1669 (1987), ¶ 159.

<sup>71</sup> *Accord* Comments of Sinclair Broadcast Group, Inc. (filed May 27, 2011), 22-23.

<sup>72</sup> *See Nexstar Broadcasting, Inc. v. Time Warner Cable, Inc.*, No. 3-12-CV-2380-P (N.D. Tex. Sept. 5, 2012), *aff’d*, 524 Fed. Appx. 977 (5th Cir. 2013).

**VI.**  
**Conclusion**

For the foregoing reasons, ABC Affiliates respectfully urges the Commission to retain the network non-duplication and syndicated exclusivity rules in their current form.

Respectfully submitted,

**ABC TELEVISION AFFILIATES  
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