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

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EXECUTIVE SUMMARY

The American Cable Association ("ACA") provides further comment on proposals before the Commission to improve the functioning of its rules concerning or affecting the exercise of retransmission consent, including whether to eliminate or amend its broadcast exclusivity rules and the relationship between the exclusivity rules and the retransmission consent regime. ACA commends the Commission on beginning the retransmission consent reform process by prohibiting coordinated negotiations by separately owned top-four rated stations in the same market in order to facilitate the fair and effective completion of retransmission consent negotiations.

Commission action on the remaining issues in this rulemaking should similarly focus on restoring balance to marketplace negotiations to ensure a fair and competitive market for the disposition of rights to carry broadcast signals, preferably in advance of the upcoming three-year retransmission consent cycle. Nearly every smaller cable operator will be negotiating retransmission consent agreements between October and December 2014.

Prohibiting Third-Party Interference. As the Commission continues its reform of the good faith negotiation rules, ACA urges that it seek to preserve, to the greatest extent possible, the ability of multichannel video programming distributors ("MVPDs") to negotiate retransmission consent with willing sellers for out-of-market signals that in the MVPD's view best satisfies consumer needs. To this end, ACA reiterates its call for the Commission to prohibit all forms of television network and local station interference with the exercise of retransmission consent by stations otherwise willing to grant out-of-market carriage and with the ability of MVPDs to carry out-of-market stations under such circumstances. These actions lie well within the Commission's general authority to govern the exercise of retransmission consent and its specific authority to impose rules intended to ensure good faith negotiations under Section 325(b)(3)(C).

Balancing Policy Goals to Protect Consumer Access. In considering whether to eliminate the exclusivity rules, the Commission must recognize that these rules serve two separate goals – to provide local broadcasters an extra-contractual means of enforcing their private rights, but also to limit the geographic zone in which exclusivity can be enforced. In deciding what action to take, the Commission must consider what is gained and what is lost with respect to both of these purposes. If the Commission alters the status quo, it must ensure that reform does not lead to more consumers losing access to distant network.

To the extent the Commission is contemplating eliminating its exclusivity rules, it must ensure that networks cannot interfere with the ability of MVPDs to secure retransmission consent from an out-of-market station, especially to protect subscribers from losing access to network programming during retransmission consent impasses. Where a broadcast station has withdrawn its consent for carriage and cannot, by law, be carried by the cable system, the rationale for creating a regulatory enforcement mechanism to protect the station against the importation of duplicated network and syndicated programming disappears. MVPDs should have the right to provide subscribers with access to network programming during a negotiating impasse without the threat of the local station asserting its exclusive network rights. This would provide consumers the opportunity to continue receiving network programming while the local station and MVPD work out their differences. It is axiomatic that MVPD subscribers should no longer be held hostage and subjected to broadcaster blackouts during retransmission consent negotiating impasses. The Commission cannot achieve this goal unless it also prohibits network interference with the right of a station to grant out-of-market retransmission consent.

Should the Commission retain the exclusivity rules, it should also (i) retain the small cable system exemption and raise the cap from 1,000 to 2,500 subscribers, excluding cable systems affiliated with multiple system operators ("MSOs") serving more than 10% of the market; (ii) modify the rules to apply only where the local station is carried by the MVPD; and (iii) harmonize the geographic reach of the network non-duplication and syndicated exclusivity rules.

Raising the Small System Exemption. The Commission has adjusted its small cable system exemption in the past as market conditions have changed, and should do so again. Today, the risk of harmful competition to local broadcasters from small cable systems importing out-of-market stations is greatly diminished. At the same time, the cost of compliance continues to fall most heavily on small systems. Unlike the 1970s, when the Commission established the 1,000 subscriber limit, and estimated that cable systems serving fewer than 1,000 subscribers comprised 14.7% of all cable subscribers, the numbers today are dramatically lower. By 2011, NCTA estimated that 3,681 cable systems (not affiliated with MSOs serving more than 10% of the market) served 2,500 or fewer subscribers, totaling 2,345,916 subscribers, or only 4.0% of all cable subscribers. Even taking into account that the Commission's 14.7% estimate was generously large, today the number of total subscribers that receive service from these cable systems serving fewer than 2,500 subscribers is significantly lower. According to Nielsen estimates, these systems would comprise only about two percent of all television households, and in reality, the number is likely far less. Accordingly, raising the small system exemption to 2,500 (excluding major MSOs) would be comparable to 1/69th of total television households today, the same percentage the Commission has found acceptable in the past.

Limiting Rules Where Station is Not Carried. The network non-duplication and syndicated exclusivity rules should apply only where the local station has granted retransmission consent to, and is carried by, the MVPD. Again, the rationale for a zone of exclusivity disappears where the local station is not carried by the MVPD. A station in such a situation should not be able to block (or threaten to block) access to other sources of network programming in order to extract a higher retransmission consent price from the cable operator.

Harmonizing Geographic Reach of the Exclusivity Rules. Finally, should the exclusivity rules be retained, ACA reiterates its strong support for extension of the Grade B or noise limited signal contour exception to the network non-duplication rules. Broadcast stations should have no reasonable expectation of exclusivity against adjacent-market stations receivable over-the-air in the community. Longstanding Commission policy supports applying a Grade B or noise limited service contour exception to the Commission's network non-duplication rules. Allowing broadcast stations to block cable customers from receiving network programming available over-the-air squarely conflicts with this policy and should no longer be permitted.

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COMMENTS

I. INTRODUCTION AND SUMMARY

The American Cable Association ("ACA") submits these comments in response to the Commission's Report and Order and Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding seeking additional comment on whether its broadcast exclusivity rules should be eliminated or amended and the relationship between the exclusivity protections and the retransmission consent regime.[1] ACA begins by commending the Commission on its recognition that the video marketplace has changed in significant ways since the adoption of the retransmission consent rules in 1992 and its decision to prohibit, under the good faith negotiation rules, the practice of separately owned top-four rated broadcast stations in the same market coordinating their retransmission consent negotiations. This action, designed to "facilitate the fair and effective completion of retransmission consent negotiations," was an excellent first step in a much needed comprehensive reform of the retransmission consent

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

rules.[2] Prompt Commission action on the remaining pending issues should similarly focus on restoring balance to marketplace negotiations to ensure a fair and competitive market for the disposition of rights to carry broadcast signals, preferably well in advance of the initiation of the upcoming three-year retransmission consent cycle in October. Nearly every small cable operator will be renegotiating all of its retransmission consent agreements between October and December of 2014.

As the FNPRM recognizes, the potential elimination of the exclusivity rules raises complex issues in terms of impact on affected parties and to date, the Commission has not had a record sufficient for it make a determination on the question of elimination versus retention and modification.[3] In considering whether to eliminate the exclusivity rules, the Commission must recognize that the rules serve two separate goals. First, the rules provide local broadcasters an extra-contractual means of enforcing their private rights. Second, the rules limit the geographic zone in which exclusivity can be enforced under the rules. Accordingly, in deciding what action to take, the Commission must consider what is gained and what is lost with respect to both purposes. If action is taken by the Commission to alter the status quo, the Commission must ensure that reform does not come at the cost of an expansion of the geographic zones in which exclusivity rights can be exerted against the signals of other stations.

Notwithstanding the geographic limitation on the protectable zone of exclusivity under the Commission's rules and other indications that Congress expected distant signals to be made available to consumers, broadcast networks and local stations have been increasingly eliminating distant or "out-of-market" signal carriage. The decreasingly availability of out-of-market signals is harming and disappointing consumers who value receipt of signals which are considered "distant" solely because of designated market area ("DMA") boundaries, rather than

[2] Joint Negotiation Order, ¶ 1.

[3] FNPRM, ¶ 40.

proximity or relevance to the affected community. Networks can, and many times do, prevent stations from granting out-of-market rights to a multichannel video programming distributor ("MVPD"), thus interfering with the station's ability to negotiate freely with an MVPD for out-of-market carriage. Local stations can also interfere with the ability of an MVPD to import an out-of-market distant signal by conditioning their grant of retransmission consent on the agreement of the MVPD not to do so, even where the distant signal is significantly viewed in the community or the MVPD's system in the DMA is closer to the distant station's community of license. The fact that a signal is deemed "distant" not because of the station's distance from the MVPD's customers but rather because the DMA boundary perverts the ability of the MVPD to provide consumers with the signals they desire and in some cases need for purposes of weather alerts and news pertaining to the state in which they reside. In some cases, the "distant" signal is available to the MVPD over-the air and the "local" station is not, thus requiring either a fiber connection or arrangement with a satellite company to deliver the "local" signal, both adding to the cable operators' cost of providing service to their customers, and these costs are ultimately borne on the consumers in the operator's service area.

As the Commission moves forward with retransmission consent reform, it should seek to preserve to the greatest extent possible the ability of MVPDs to negotiate with willing sellers for distant signals to best satisfy consumer needs. To this end, the Commission must prohibit all forms of television network and local station ("third-party") interference with the exercise of retransmission consent by stations otherwise willing to grant out-of-market retransmission consent.[4] A prohibition on third-party interference will be especially important in preserving the ability of MVPDs to continue serving consumers outside of their local stations' zone of exclusivity to negotiate for distant signal carriage.

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[4] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011) ("NPRM" or "2011 NPRM").

To the extent the Commission is contemplating eliminating its exclusivity protections to permit MVPDs the opportunity to secure retransmission consent from an out-of-market station to protect subscribers from losing access to network programming during retransmission consent impasses pending resolution of the bargaining impasse, it must ensure that they are able to do so without network interference. Such negotiations should be between the out-of-market station and the MVPD and not between the MVPD and the network acting through its affiliate or the network holding a veto right over the out-of-market carriage. The Commission cannot achieve its consumer protection goal unless it also prohibits network interference with the right of a distant station to grant retransmission consent.

Further, should the Commission retain the exclusivity rules, it should also (i) raise the limit of the small cable system exemption from 1,000 subscribers to 2,500 subscribers, excluding cable systems affiliated with multiple system operators ("MSOs") serving more than 10% of the market; (ii) modify the rules to apply only where the local station is carried by the MVPD; and (iii) harmonize the geographic reach of the network non-duplication and syndicated exclusivity rules.

II. THE COMMISSION SHOULD CLARIFY THAT THIRD-PARTY INTERFERENCE IS A VIOLATION OF THE RETRANSMISSION CONSENT GOOD FAITH RULES TO PRESERVE AND EXPAND OPTIONS FOR OUT-OF-MARKET CARRAIGE

The 2011 NPRM appropriately sought comment on two important reforms to the good faith rules that would address third-party interference:

- Whether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.[5]
- Whether a broadcaster's request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market "significantly viewed" station violates Section 76.65(b)(1)(iv) of the Commission's rules.[6]

[5] NPRM, ¶ 22.

[6] *Id.*, ¶ 27.

Relatedly, the FNPRM observes that contractual arrangements between networks and their affiliates may bar a broadcaster from agreeing to the importation of its distant or out-of-market signal, and seeks comment on this practice.[7]

In its comments and reply comments filed in response to the 2011 NPRM,[8] ACA supported several of the Commission's proposed reforms, including its proposals to prohibit, as a *per se* violation of the good faith negotiating obligation, certain forms of interference with the conduct of retransmission consent negotiations by broadcast networks and stations.[9] Each type of third-party interference with the negotiation of retransmission consent between a station and an MVPD harms the MVPD and its subscribers and is inconsistent with the core statutory obligation on broadcasters to negotiate in good faith. Such third-party interference should be prohibited outright by the Commission.

A. The Broadcast Signal Carriage Rules Were Designed to Protect Distant Signal Carriage in Certain Circumstances to the Benefit of Consumers, Particularly those Residing in Smaller and Rural Markets.

In its comments, ACA reviewed the federal government's 40 year history of balancing a broadcaster's right to be protected from unfair cable competition against a cable operator's or MVPD's right to negotiate carriage of both local and distant signals to best serve the needs of

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[7] FNPRM, ¶ 58.

[8] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71, Comments of the American Cable Association, MB Docket No. 10-71, at 26-66 (filed May 27, 2011) ("ACA NPRM Comments"); Reply Comments of the American Cable Association, MB Docket No. 10-71 at 2-41 (filed June 27, 2011) ("ACA NPRM Reply Comments").

[9] NPRM, ¶¶ 21, 27. Specifically, the NPRM proposed prohibiting, as a per se violation of the good faith obligation, (i) a broadcast station's agreement to give its affiliated network the right to approve its retransmission consent agreements with MVPDs and (ii) a broadcast station's conditioning its grant of retransmission consent on an MVPD's agreement not to carry an out-of-market "significantly viewed" signal. As explained in ACA's Comments and Reply Comments, the Commission's proposed rule changes are a good start, but as worded, do not go far enough to address the full scope of third-party interference experienced by MVPDs attempting to negotiate retransmission consent agreements. To afford adequate relief, as discussed below, the Commission must go further in any final rules adopted in this proceeding. *See* ACA NPRM Comments at 54-61; ACA NPRM Reply Comments at 72–76.

the consumer, particularly in rural markets.[10] The rules enacted protect contractual rights to programming exclusivity, but only to the limited extent necessary to achieve an appropriate competitive equipoise. Thus, the Commission's exclusivity rules allow commercial television stations[11] to protect only the exclusive distribution rights they have negotiated with broadcast networks and syndicated programmers, which the rules limit to a specified geographic zone of 35 miles (55 miles for network programming in smaller markets) (i.e. zone of exclusivity).[12] ACA detailed how the Commission's recognition of the value to MVPD subscribers of distant signals under certain circumstances underlays its careful crafting of the exclusivity rules, which permit carriage of duplicative programming from a distant signal where a cable community unit is: (i) outside the local's market's protected zone of exclusivity;[13] (ii) is within the zone but the station is either significantly viewed;[14] or (iii) the cable community unit falls, in whole or in part, within the Grade B contour of the station (syndicated programming only).[15]

Similarly, ACA and others have documented the valuable consumer benefits that accrue from the ability of MVPDs to carry "distant" broadcast stations, particularly for those who reside in rural areas where the local broadcaster's signals are unavailable over-the-air, including instances where the signals are unavailable even to the MVPD over-the-air, or the number of signal options is more limited.[16] This benefit was also recognized for compulsory copyright

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[10] ACA NPRM Comments at 27-39.

[11] Low power broadcast stations do not have network non-duplication or syndicated exclusivity rights. *In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Further Notice of Proposed Rulemaking, 3 FCC Rcd 6171, ¶ 44 (1988) ("1988 Syndex FNPRM") ("We also observe that none of these rules apply to low power television (LPTV) stations.").

[12] ACA NPRM Comments at 57.

[13] 47 CRFR §§ 76.92(a), 76.101.

[14] 47 CFR §§ 76.92(f), 76.106(a).

[15] 47 CFR § 76.106(a).

[16] See ACA NPRM Comments at 40-43; *In the Matter of Section 302 Report to Congress*, Reply Comments of the Rural MVPD Group, Docket No. RM-2010-10, at 7-8 (filed May 25, 2011).

purposes.[17] Under the Commission's exclusivity rules, "local" for purposes of exclusivity enforcement is essentially defined as within the 35/55 mile radius of the point of reference for the local broadcast station, rather than extending DMA-wide.

As ACA explained in its comments, the rules were intended to act as an affirmative limitation on the scope of exclusivity enforceable through Commission processes so as to balance the interests of broadcasters and MVPDs.[18] Network and station practices that prevent a community in which an out-of-market station is significantly viewed or outside the local stations' zone of exclusivity from continued receipt of those signals by its MVPD frustrates the Commission's intent in limiting the enforceable zone of an in-market stations' right to programming exclusivity to 35/55 miles.[19] Unfortunately, networks generally affiliate themselves with only a single broadcaster per DMA, and thus "local" is contractually defined in network-affiliate agreements as anywhere within DMA boundaries, irrespective of other more important indicia of which station should be considered "local" to a community, including state boundaries or even whether the station actually provides a signal in the area, or other factors important to consumers of broadcast signals.

ACA's comments also discussed various ways in which the government's public policy of enabling cable subscribers to receive out-of-market signals in certain areas has benefited the residents of those areas. For example, in larger DMAs, which can extend 150 – 250 miles beyond a central metropolitan area, there inevitably will be consumers on the outer edges of the market who reside closer to the central metro area of a smaller neighboring market. If carriage of signals deemed "distant" under this legal framework is inhibited where weather typically travels from west to east, consumers who live more than 55 miles west of a "local" metropolitan area have far less time, if any, to react to a "local" meteorologist's report that a potentially

[17] *See* ACA NPRM Comments at 36-37.

[18] *Id.* at 57.

[19] *Id.* at 57-61.

dangerous weather system is approaching. By the time a "local" station reports that a severe storm is threatening the station's community of license, people living far west of that city likely are already experiencing severe weather conditions, with little or no advanced warning. Being able to make a geographically closer metropolitan area's "distant" signal available to subscribers enables rural MVPDs to better serve their communities.[20]

In addition, it is reported that some member companies cannot receive the "local" in-market station over-the-air and must either pay for a fiber connection to provide the signal, or purchase the signal from a DBS provider. If a station is not providing local signal coverage to the MVPD, the MVPD should have the right to negotiate with any station affiliated with the same network without the network's interference and without the out-of-market station's grant of retransmission consent conditioned on the MVPD's carriage of the in-market affiliate as well. This is especially true where the out-of-market station can provide an adequate over–the-air signal to the MVPD. These practices harm consumers and should not be countenanced under the Commission's good faith rules.

ACA observed how today, broadcasters and networks are interfering with the rights of MVPDs to carry distant signals and prohibiting out-of-market broadcasters from entering into retransmission consent agreements where such carriage otherwise would be permitted.[21] These practices distort the marketplace and undermine well-established policies set by Congress and the Commission regarding the permissible, and desirable, extent of protectable programming exclusivity. In its 2011 Comments, ACA stated that its members have experienced numerous instances where an adjacent-market broadcast station wishes to grant retransmission consent to a cable operator, but cannot because its network affiliation agreement

[20] *Id.* at 40-43.

[21] *Id.* at 56-58.

expressly prohibits the station from granting retransmission consent outside of its DMA, even where the station would be deemed significantly viewed in another community.[22]

Another form of harmful third-party interference occurs when local stations restrict or limit an MVPD's right to carry other network-affiliated stations, especially in cases where the MVPD might have systems throughout the DMA, including systems much closer to another out-of-DMA stations community of interest.[23] Additionally, MVPDs often must agree to give a broadcaster a general termination right for out-of-market carriage that the broadcaster can exercise upon notice, a provision routinely defended as necessary by the broadcast station in the event the network disallows the out-of-market carriage.[24]

B. The Record in Response to the 2011 NPRM Supports Prohibition of Third-Party Interference with Retransmission Consent for Out-of-Market Carriage through the Good Faith Rules.

The record in response to the 2011 NPRM supports prohibition of the two forms of third-party interference with the exercise of retransmission consent and ACA urges the Commission to move ahead with its earlier proposals to prohibit this behavior under the good faith rules.[25]

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[22] *Id.*at 56.

[23] See ACA NPRM Comments at 59-60; *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc., at 15, 18 (filed May 27, 2011) ("Joint Cable Comments").

[24] *See, e.g.,* Declaration of Lanier Dunn, ¶ 12 (attached as Exhibit B) ("Dunn Declaration") (describing how in-market broadcaster forced the out-of-market station to be dropped).

[25] ACA NPRM Comments at 56-58; ACA NPRM Reply Comments at 60; Joint Cable Comments at 9-13; (describing a situation in which a Fox affiliate sought to reserve the right to revoke its retransmission consent to Mediacom if Fox so directed); *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of DISH Network L.L.C. at 16 (filed May 27, 2011) ("DISH Comments") (describing a Fox affiliate's inability to agree to DISH's requested rate because Fox offered "no flexibility on the rates that [the affiliate has] to pass through to Fox"); *In the Matter of Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103, Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, Petition for Rulemaking of the American Cable Association, RM 11-203 (filed Mar. 2, 2005) ("2005 ACA Petition"); *In the Matter of: Monroe, Georgia Water Light and Gas Commission d/b/a Monroe Utilities Network v. Morris Network, Inc., owner of WMGT, Channel 41, Macon, Georgia and Morris Network, Inc., owner of WMGT, Channel 41, Macon, Georgia v. Monroe, Georgia Water Light and Gas Commission d/b/a Monroe Utilities Network*, Memorandum Opinion and Order, 19 FCC Rcd 13977 (2004).

Nearly all MVPDs and public interest commenters support a broad prohibition on a network having any say in an affiliated station's retransmission consent negotiations, whereas ACA more narrowly focused on network interference with retransmission consent for out-of-market signals.[26] Nothing in the record supports a public policy that permits network interference with an MVPD's ability to negotiate in good faith with a willing station for out-of-market station for carriage of a signal to better serve its customer's needs, particularly for carriage outside the local broadcasters' zone of exclusivity or when the distant signal is significantly viewed. Although several broadcasters have protested that the Commission lacks authority to take action to prohibit this practice under the good faith rules, ACA has already responded at length to these arguments.[27]

In its reply comments, however, Fox addressed a somewhat different argument advanced by DirecTV that a station abdicates control of its license in violation of Section 310(d) by permitting network interference with retransmission consent.[28] In response, Fox reiterated its arguments that the Commission has previously found nothing in the legislative history or text of the Act to indicate an affirmative congressional intent "to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate's

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[26] *See* ACA NRPM Reply Comments at 47, n.96.

[27] ACA NPRM Reply Comments at 45-73; *see also In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Reply Comments of DirecTV, Inc., at 5-8 (filed June 27, 2011) ("DirecTV NPRM Reply Comments") (Fox's selective quotations from Commission decisions do not accurately reflect the limited holdings of the cases cited, which were limited to an MVPD's attempt to negotiate rights to all or part of a signal outside of its home market and went no further than holding that an affiliation agreement limiting the station's retransmission consent rights to in-market carriage does not improperly usurp the station's authority or conflict with the good faith negotiation obligation). *See Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, ¶¶ 20, 31-35 (2005) ("2005 Good Faith Order") ; *see also* In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, Memorandum Opinion and Order, 9 FCC Rcd 6723, ¶¶ 102-107 (1994) (discussing negotiating for carriage of less than the contents of the entire signal).

[28] CBS also put forth a similar argument. *See In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Reply Comments of CBS Corporation, at 11-14 (filed June 27, 2011).

right to redistribute affiliated programming," so that the practice cannot possibly be found to violate Section 310(d) of the Act.[29]

ACA is not arguing that a station that permits its affiliated network to interfere with the station's exercise of retransmission consent constitutes a violation of Section 310(d). Rather, ACA asserts that it should be a violation of the obligation to negotiate in good faith for a station to enter into a legally binding or non-legally binding agreement with its affiliated network that has the effect of limiting the ability of, or creating disincentives for, the station to grant retransmission consent to any MVPD for out-of-market carriage under Section 325(b)(3)(C). Nothing that Fox has cited in support of its argument would prevent the Commission from prohibiting stations from entering into agreements with their affiliated networks that would limit their ability or create disincentives for the station to grant out-of-market retransmission consent under that provision. The right of retransmission consent was explicitly granted to the licensee broadcast station, not the broadcast network.[30] Further, the duty to negotiate retransmission consent in good faith attaches to any retransmission consent negotiation regardless of where the MVPD and the broadcaster are situated,[31] and the statute does not and should not be read

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[29] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Comments of Fox Entertainment Group and Fox Television Stations at 14-15, 20 (filed May 27, 2011); Reply Comments of Fox Entertainment Group and Fox Television Stations, at 8-9 (filed June 27, 2011). Fox further argues that Congress created a retransmission consent right that "'may be freely bargained away in future programming contracts'" and because that the Commission has previously found that the good faith bargaining obligation was not intended to "'preclude specific terms contained in network-affiliate agreements,'" it "cannot possibly be that a network exercising its rights permitted by the retransmission consent statute violates Section 310(d)."

[30] ACA NPRM Comments at 56; ACA NPRM Reply Comments at 35; *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, United States Telecom Association Comments, at 26 (filed May 27, 2011) ("The Communications Act is explicit in that the right of a broadcast station to grant retransmission consent rights to an MVPD resides solely with the broadcast licensee.").

[31] 2005 Good Faith Order, ¶¶ 26-27 ("There is no statutory or regulatory distinction between in-market carriage and out-of-market carriage pursuant to retransmission consent.").

to subordinate this duty to the terms of network-affiliate contracts.[32] Rather, the obligation to negotiate in good faith stands on its own. The Commission's current good faith rules also require broadcast stations (as well as MVPDs) to designate a representative with authority to make binding representations on retransmission consent and not unreasonably delay negotiations.[33] In the 2011 NPRM, the Commission recognized that its rules could arguably be read to cover such behavior today, without indicating any view that such an interpretation would be contrary to congressional intent:

> If a station has granted a network veto power over any retransmission consent agreement with an MVPD, then it has arguably impaired its own ability to designate a representative who can bind the station in negotiations, contrary to our rules.[34]

Moreover, when seeking comment on adoption of an explicit prohibition on network interference under the good faith rules in 2011, the Commission – which must be charged with knowledge of its own precedents – made absolutely no reference to prior statutory interpretations or decisions that might pose a bar to its adoption of the prohibition under consideration.[35] This strongly suggests, as DirecTV has observed, that Fox's attempt to "universalize these narrow holdings to support its broad assertion that a network could '*completely ba*n a station from granting retransmission consent to an MVPD' . . . cannot support such a sweeping power grab by networks at the expense of local stations."[36]

In summary, ACA submits that there is no precedential impediment to adoption of a prohibition on network interference with a station's exercise of retransmission consent under the good faith rules. Notwithstanding selected statements in the legislative history cited by Fox

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[32] To the extent the Commission agrees, as Fox has argued, that prior Commission decisions suggest such a reading, they should be expressly disavowed in light of changed market conditions. *See* ACA NPRM Reply Comments at 64-72.

[33] 47 C.F.R. § 76.65(b)(1)(ii)-(iii).

[34] 2011 NPRM, ¶ 22.

[35] *Id.*

[36] DirecTV NPRM Reply Comments at 6.

indicating a general intent to preserve the market relationships reflected in network-affiliate agreements, nothing about a rule preventing network interference in market negotiations between willing seller in one DMA and a willing buyer in another would seriously undermine the network-affiliate relationship.[37] Accordingly, the record overwhelmingly supports a prohibition on legally-binding and non-legally binding network-affiliate agreements that have the effect of limiting the ability of, or creating disincentives for, a station to grant retransmission consent to any MVPD for out-of-market carriage.

Similarly, the record overwhelmingly supports a prohibition on a broadcast station conditioning retransmission consent on an MVPD's agreement not to carry out-of-market stations.[38] As ACA noted in its 2011 Reply Comments, the record is devoid of evidence and analysis supporting station interference with out-of-market signal carriage in otherwise allowable instances.[39]

Unless third-party interference is prohibited, networks and stations will increasingly impede the ability of MVPDs to negotiate for distant signals and offer them to consumers who want to receive them. Ultimately, this may lead to MVPDs who currently offer out-of-market signals to their subscribers no longer being able to do so as a result of third-party interference.

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[37] *See* ACA NPRM Reply Comments at 69-70 ("Two points bear repeating [concerning Fox's arguments]: (i) the obvious incompatibility between an interpretation of the good faith obligation that permits contractual or informal preclusion of a broadcaster's ability to grant out-of-market retransmission consent and the Commission's recognition of the broadcaster's reciprocal good faith bargaining obligation with regard to all MVPDs—in-market as well as out-of-market; and (ii) the fact that although the Commission did not find evidence that Congress, through the good faith and reciprocal bargaining obligations, specifically intended to restrict the rights of networks and their affiliates to agree to limit an affiliate's right to redistribute the network's programming, neither did it find that either SHVIA or SHVERA prohibit the agency from restricting the ability of a broadcaster station agree to limitations on its ability to grant retransmission consent to any MVPD."); *see also* ACA NPRM Comments at 47-50 ("After passage of *SHVERA*'s reciprocal good faith obligation, the Commission found it expeditious to simply extend its existing good faith bargaining rules to MVPDs, while explicitly recognizing that the reciprocal bargaining obligation applies to retransmission consent negotiations between <u>all</u> broadcasters and MVPDs <u>regardless of the DMA in which they are located</u>.")(emphasis in original).

[38] *See* ACA NRPM Reply Comments at 73-76 (broadcasters have offered little in the way of defense of this practice).

[39] *Id.* at 74.

The loss of access to valued signals caused by these practices harm subscribers and their providers and cannot be justified as a desirable public policy outcome.

C. The Commission Should Prohibit these Network and Broadcast Station Practices as *Per Se* Violations of the Obligation to Negotiate in Good Faith.

In order to curb widespread and growing third-party interference in retransmission consent negotiations, ACA reiterates its call for the Commission to flatly prohibit as a *per se* violation of the duty to negotiate in good faith (i) a station agreeing to permit its affiliated network to interfere with the station's exercise of retransmission consent for out-of-market carriage; and (ii) any request or requirement by an in-market broadcast station that an MVPD refrain from carrying an out-of-market broadcast station as a condition of the granting of retransmission consent.

Network Interference. As ACA has shown, any agreement, formal or informal, that deters or prevents an affiliate from granting retransmission consent to cable operators outside the station's DMA, even where carriage of the signal would not violate another station's network non-duplication or syndicated exclusivity rights, is exactly the type of third-party understanding that should be found to violate the current good faith standards.[40] Restrictions emerging from the network-affiliate relationship that prevent or dis-incent a station from granting retransmission consent to an out-of-market MVPD cannot co-exist with the station's statutory duty to negotiate with an MVPD for retransmission consent in good faith. Such restrictions are also inconsistent with longstanding federal policies that distant signals be available for carriage on MVPD systems under appropriate circumstances.

Specifically, the Commission can accomplish a prohibition on network interference by either:

- Adopting and amending the rule proposed in the NPRM to prohibit as a *per se* violation of the good faith obligation both legally-binding and non-legally binding

network-affiliate agreements that have the effect of limiting the ability of a station to grant retransmission consent to any MVPD, whether in the form of an outright prohibition, a network's prior "consent" or "approval" or "veto" right or other means that has the purpose of influencing or dis-incenting the station's grant of retransmission consent out-of-market; or

- Re-interpreting the scope of the prohibition in Section 76.65(b)(vi) on agreements preventing a broadcaster from granting retransmission consent to an MVPD, whether in the form of an outright prohibition, a network's prior "consent" or "approval" or "veto" right or other means that has the purpose of influencing or dis-incenting the grant of retransmission consent for the station's signal within its DMA and by re-interpreting the prohibition in Section 76.65(i) on refusals to negotiate to permit a network to influence a station's exercise of retransmission consent for distant carriage, whether in the form of an outright prohibition, a network's prior "content" or "approval" or "veto" right or other means that has the purpose of influencing or dis-incenting the station's ability to grant retransmission consent for distant carriage; or
- Both adopting a new prohibition and expanding the scope of the existing prohibitions.[41]

Broadcast Station Interference. Consistent with its analysis of network interference, ACA submits that it cannot be consistent with any plausible conception of "good faith" for a broadcast station to interfere with the right of an MVPD to negotiate a mutually agreeable arrangement with a "distant" signal to satisfy its subscriber needs and desires. The record supports ACA's call for the Commission to flatly prohibit as a *per se* violation of the good faith negotiation obligation any request by a broadcast station that an MVPD refrain from carrying or otherwise dis-incent carriage of an out-of-market broadcast station signal, whether embodied in a written agreement or suggested orally during negotiations.

In the 2011 NPRM, the Commission asked whether it should deem a broadcaster's "request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market 'significantly viewed' ("SV") station violates Section 76.65(b)(1)(vi) of our rules.[42]"

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[41] *See* ACA NPRM Reply Comments at 71-72; 47 C.F.R. § 76.65(i) & (vi). ACA has also noted that the record supports a finding that a station that has granted a network veto power or a say over any retransmission consent agreement with any MVPD has impermissibly impaired its own ability to designate a representative who can bind the station in negotiations, contrary to Section 76.65(b)(ii). *Id.* at 71.

[42] 2011 NPRM, ¶ 27. Section 76.65(b)(1)(vi) provides that "[e]xecution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires the Negotiating Entity not to enter into a retransmission consent agreement with any other television station or multichannel video programming distributor" violates the Negotiating Entity's duty to negotiate in good faith.

The Commission can address the harmful practice of broadcast station interference with the ability of an MVPD to negotiate retransmission consent with an out-of-market station by either interpreting its current good faith standards more broadly, or by adopting its proposed prohibition, or by doing both.

The current Section 76.65(b)(vi) prohibition against execution of an agreement not to enter into an retransmission consent agreement with any other station or MVPD can be easily interpreted more expansively to preclude a broadcast station prohibiting or dis-incenting an MVPD from carrying an out-of-market station that might otherwise be available to consumers as a partial substitute for the in-market station's programming, whether embodied in a written agreement or suggested orally during negotiations, as a condition of granting retransmission consent for in-market carriage. This includes out-of-market stations that are: (i) significantly viewed; (ii) may not be deemed significantly viewed, but are nonetheless of interest to residents in an MVPD's service area; or (iii) are outside the local broadcasters' zone of exclusivity, including any request by a broadcast station that an MVPD refrain from carrying a distant signal, whether suggested orally during retransmission consent negotiations, embodied in a legally-binding written agreement or a non-legally binding agreement of the parties.[43]

III. THE COMMISSION MUST TAKE ACCOUNT OF ALL VARIABLES IN DETERMINING WHETHER THE EXCLUSIVITY RULES CONTINUE TO SERVE THE PUBLIC INTEREST

The Commission's exclusivity rules were created to protect local broadcast stations from competition from cable operators in the carriage of programming during the period of time prior to stations gaining retransmission consent rights. At the same time, as discussed above, the rules were balanced to protect the right of cable operators to carry distant signals outside of exclusive zones, which in some DMAs can be quite extensive. This regulatory enforcement

[43] ACA NPRM Comments at 54-61; ACA NPRM Reply Comments at 72–76.

mechanism plays a key role in ensuring that consumers in smaller and rural markets receive valued out-of-market station signals consistent with long-standing policy goals of Congress and the Commission.

A. The Commission Must Consider How to Protect the Right to Negotiate Retransmission Consent for Out-of-Market Stations Among Willing Participants Should it Determine its Exclusivity Rules Are No Longer Necessary to Protect Broadcasters from Local Cable Competition.

The FNPRM notes broadcaster views that because most broadcast network affiliation and syndicated exclusivity agreements grant exclusivity in the entire DMA, which is usually well beyond the scope of exclusivity protected by the FCC's rules, elimination of the exclusivity rules would likely result in a substantial expansion of exclusivity coverage and seeks comment on whether this argues in favor of or against elimination.[44] The interests of consumers in MVPDs being able to offer out-of-market stations in areas beyond the zone of protection remains constant, and this could be threatened by expansion of a station's zone of exclusivity throughout its entire DMA, which in some cases can be well over 100 miles.

Should the Commission determine that it no longer needs to offer an extra-contractual means of enforcing exclusivity rights purchased by local stations from networks and syndicated programming vendors it nonetheless must take into account how to preserve the important geographic limitation on the exercise of exclusivity that constrained the exercise of these rights to protect out-of-market signal importation in certain areas beyond the zone of exclusivity. It is important that the Commission acknowledge the risks of elimination and seek to mitigate the consequences to consumers, particularly those in rural areas who stand to lose access to valued out-of-market stations.

[44] FNPRM, ¶ 65.

B. Elimination of the Exclusivity Rules Will Fail to Protect Consumers During Retransmission Consent Blackouts Without Additional Commission Action to Prohibit Network Interference with the Exercise of Retransmission Consent.

The FNPRM seeks comment on the relationship between the exclusivity protection and the retransmission consent regime, and suggests that the concern with the importation of distant programming undergirding the rules does not extend to retransmission consent negotiating impasses, where the local station pulls its station from an MVPD's line-up.[45] This suggests a Commission view that eliminating the exclusivity rules will permit MVPDs to negotiate with an out-of-market affiliate of network and thus be able to continue offering access to this network programming pending resolution of the negotiating impasse with the local affiliate. ACA would welcome Commission action designed to permit MVPDs to engage in such negotiations to protect their subscribers from being held hostage during broadcast blackouts, but cautions that elimination of the exclusivity rules alone will not achieve this goal and be an empty gesture with respect to improving the retransmission consent negotiating environment unless the Commission also prohibits network interference with a station's grant of out-of-market retransmission consent.

As the FNPRM suggests, the rationale for creating a regulatory enforcement mechanism to protect stations against the risk of duplicated network and syndicated programming through distant signal importation disappears where the local station pulls its station from a cable system or other MVPD.[46] Above all else, MVPDs should have the right to provide subscribers with access to network programming during a negotiating impasse without the threat of the local station requesting the MVPD to delete a distant station's network programming should the MVPD successfully enter into a retransmission consent agreement with an out-of-market

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[45] *Id.*

[46] *Id.*

affiliate of the network.[47] This would provide consumers the opportunity to continue receiving the network programming broadcast by the out-of-market affiliate while the local station and MVPD work out their differences over retransmission of the local signal. It is axiomatic that MVPD subscribers should no longer be held hostage and subjected to broadcaster blackouts during retransmission consent negotiating impasses.

Elimination of the exclusivity rules alone, however, will fail to protect consumers during broadcast blackouts because the local stations will simply enforce their exclusivity rights against other distant stations directly or through their affiliated network. Thus, even if the exclusivity rules are eliminated, the Commission will still be left with the problem of how to protect consumers from being held hostage during a negotiation impasse unless it also prohibits network interference with the exercise of retransmission consent by an affiliated out-of-market station. Only by taking this action can the Commission assure MVPDs and their subscribers of the opportunity to provide replacement programming pending resolution of a negotiating impasse.

IV. THE EXCLUSIVITY RULES SHOULD BE MODIFIED IF RETAINED

The FNPRM seeks comment on whether the Commission should modify rather than eliminate the exclusivity rules.[48] Comment is sought on a number of specific modifications, including whether (i) the small cable system exemption should be retained;[49] (ii) broadcast stations should be prohibited from asserting their exclusivity rights when the station is not

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[47] The retransmission consent rules apply without distinction to in-market and out-of-market broadcast stations. See ACA NPRM Comments at 49-50; ACA NPRM Reply Comments at 48.

[48] FNPRM, ¶ 73 ("[W]e request comment on whether, as an alternative to elimination of the exclusivity rules, we should make modifications to these rules.").

[49] *Id.*, ¶ 69 ("[T]he exclusivity rules currently exempt certain small MVPDs. Should those exemptions be retained if we decide to retain the exclusivity rules?") (citations omitted).

carried by the cable system;[50] and (iii) the Grade B or noise limited service contour exception for syndicated exclusivity should be applied to the network non-duplication rules.[51] Should the exclusivity rules be retained, ACA strongly urges the Commission to modify its rules as described further below. Specifically, the Commission should:

- Retain the small cable system exemption and raise the cap to 2,500 subscribers excluding cable systems affiliated with MSOs serving more than 10% of the market;
- Modify the network non-duplication and syndicated exclusivity rules to apply only where the local station has granted retransmission consent to, and is carried by, the MVPD; and
- Permit carriage of a station's network programming on MVPD systems located, in whole or in part, within such station's Grade B or noise limited service contour.

The Commission has adjusted its exclusivity rules from time to time in the past as market conditions changed. Today's changed market conditions provide overwhelming evidence that if the Commission retains the exclusivity rules, ACA's proposed modifications are warranted.

A. The Commission Should Raise the Limit of its Small Cable System Exemption from 1,000 to 2,500 Subscribers, Excluding Systems Affiliated with MSOs serving more than 10% of the Market.

The FNPRM sought comment on whether the Commission should continue to exempt cable systems serving fewer than 1,000 subscribers from the obligation to delete duplicative network or syndicated programming.[52] To reflect current market conditions, ACA submits that not only should the Commission retain this small cable exemption, it should increase the cap on

[50] *Id.*, ¶ 73 ("We also seek comment on whether we should modify the network non-duplication and syndicated exclusivity rules to apply only where the local station has granted retransmission consent to, and is carried by, the MVPD.").

[51] *Id.*, ¶ 73 (seeking comment on the proposal of ACA and Block Communications, Inc. ("Block") to harmonize the exclusivity rules by applying the Grade B or noise limited service contour exception for syndicated exclusivity to the network non-duplication rules).

[52] *Id.*, ¶ 69. Under the Commission's exclusivity rules, cable television systems serving fewer than 1,000 subscribers are not required to delete duplicative network or syndicated programming. *See* 47 C.F.R. §§ 76.95(a), 76.106(b).

the exemption to 2,500 subscribers, excluding cable systems affiliated with MSOs serving more than 10% of the market.

1. The Commission has historically adjusted the exclusivity rules to minimize their impact on small cable systems.

A review of Commission actions in establishing the small cable system exemption shows that increasing the small cable system exemption aligns with the Commission's intent when it established, and later increased, the exemption.

Only three years after the Commission first promulgated network non-duplication regulations for microwave-fed cable systems in 1965, it relieved small cable systems from the burdens of compliance by implementing a modified procedure for processing waiver requests.[53] Under this procedure, the Commission deferred action on cases involving cable systems having fewer than 500 subscribers, on the grounds that such systems would be least likely to have any substantial adverse economic impact on broadcasters and would be most likely to present persuasive cases of hardships that would warrant a waiver.[54] Six years later, the Commission observed that there had been no harmful effects on broadcasters as a result of program duplication by cable systems serving fewer than 500 subscribers, and found, again, that the costs of equipment and manpower needed by small systems in order to comply with the non-duplication rules had a substantial financial impact on such systems. Accordingly, the

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[53] *In the Matter of Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave States to Relay Television Signals to Community Antenna Systems*, First Report and Order, 38 FCC 683 (1965). In 1966 these regulations were expanded to all cable systems. *In the Matter of Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems; Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters*, Second Report and Order, 2 FCC 2d 725, ¶¶ 19, 46 (1966) ("1966 Cable Carriage Order").

[54] *In the Matter of Amendment of Section 74.1103 of the Commission's Rule and Regulations as it Relates to CATV Systems with Fewer Than 500 Subscribers*, Report and Order, 46 FCC 2d 94, ¶ 18 (1974) ("1974 Small System Exemption Order").

Commission codified its informal policy and adopted an exemption from the exclusivity rules for cable systems serving fewer than 500 subscribers.[55]

One year later, in 1975, the Commission raised the exemption threshold further to 1,000 subscribers, after again balancing the costs of inconvenience and compliance for small cable systems against the harm to broadcasters resulting from the loss of exclusivity.[56] This time, the Commission's assessment included the total number of cable systems, an analysis of the number of systems serving fewer than 1,000 subscribers, and the total number of cable subscribers and television households affected.[57] The Commission set the exemption at 1,000 subscribers after determining that it would affect only 14.7% of cable subs and 1/69th of total television households.[58] In short, the Commission weighed the relatively small overall impact of the subscriber exemption on broadcasters against the high cost and inconvenience of compliance for small cable systems, and found that increasing the exemption would serve the public interest.

Finally, when the Commission reinstated the syndicated exclusivity rules in 1988, it found that the costs of obtaining switching equipment examined on a per-subscriber basis fell more heavily on smaller systems and therefore extended the 1,000 subscriber network non-duplication exemption to the reinstated syndicated exclusivity rules as well.[59] At that time, the

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[55] *Id.*, ¶¶ 20-22.

[56] *In the Matter of 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; Amendment of Section 74.1103 of the Commission's Rules and Regulations as it Relates to CATV Systems with Fewer than 500 Subscribers*, First Report and Order, 52 FCC 2d 519, ¶ 71 (1975) ("1975 Small System Exemption Order").

[57] *Id.*, ¶ 71. The Commission determined that the number of cable systems serving fewer than 1,000 subscribers was 1,428. The Commission also assumed that each of these systems served 999 subscribers, resulting in a total of 1,426,572 subscribers affected by a 1,000 cable system exemption or 14.7 percent of all cable television subscribers.

[58] *Id.*

[59] *In the Matter of 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, ¶ 86 (1988) ("1988 Syndex Order").

Commission found that systems serving fewer than 1,000 subscribers comprised 5.1% of all cable households.[60] As this history demonstrates, the Commission has adjusted its small cable system exemption as market conditions changed. Today, market conditions again warrant an upward adjustment.

2. Changed market conditions support an exemption from the network non-duplication and syndicated exclusivity rules for cable systems that serve fewer than 2,500 subscribers excluding cable systems affiliated with MSOs serving more than 10% of the market.

The Commission set the small cable system exemption by balancing the harms to broadcasters that would result from their loss of exclusivity against the cost of compliance for small cable systems. In today's marketplace, however, the risk of harmful competition from small cable systems to broadcast stations has greatly diminished. On the other hand, the cost of complying with the exclusivity rules continues to fall most heavily on smaller cable systems. Accordingly, the Commission should provide added relief to operators of small cable systems by increasing the exemption to 2,500 subscribers, excluding cable systems affiliated with MSOs serving more than 10% of the market.

The television marketplace has changed significantly over the last few decades. Today consumers overwhelmingly receive their television service from an MVPD. In June 2012, cable served 58.5 million households, more than 10 times as many households as cable television served in 1975.[61] As cable service became more popular where it was available, and newer technologies permitted systems to serve more customers over larger geographies, the number of consumers receiving service from small cable systems significantly diminished. Where the Commission estimated that 14.7% of cable subscribers received service from a cable system with 1,000 or fewer subscribers in the 1970s, the numbers today are dramatically lower even

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[60] *Id.*

[61] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, ¶ 3 (2013).

when compared to small cable systems serving fewer than 2,500 subscribers, excluding the systems owned by cable operators with more than 10% of the MVPD marketplace.

According to NCTA, 3,681 cable systems (not affiliated with MSOs serving more than 10% of the market) served 2,500 or fewer subscribers in 2011.[62] These systems served a combined total of 2,345,916 subscribers,[63] or 4.0% of the total number of cable subscribers in that year.[64] Even taking into account that the Commission's 14.7% estimate was generously large, the number of total subscribers that receive service from a cable system with 2,500 or fewer subscribers, excluding those affiliated with MSOs serving more than 10% of the market, is significantly lower today. This amount is even lower than 5.1% of total cable subscribers that the FCC found received service from a cable system with fewer than 1,000 subscribers in 1988.

With Nielsen estimating 116.3 million television households in 2014,[65] systems with fewer than 2,500 subscribers excluding systems owned by operators with more than 10% of the market, represented approximately two percent of all television households. ACA believes that the number of cable systems actually serving 2,500 or fewer subscribers in 2014 that would be eligible for the expanded exemption has decreased since 2011. ACA recently provided the Commission with evidence that the number of smaller cable systems in the market is trending downward.[66] Specifically, since NCTA's data was compiled, ACA has reported that 129 cable

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[62] *Carriage of the Transmissions of Digital Television Broadcast Stations: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, NCTA Comments at 23 (filed Mar. 12, 2012).

[63] *Id.* at 24.

[64] According to SNL Kagan, the total number of actual subscribers to cable's basic service was 56.4 million in 2012. *See* Robin Flynn, *U.S. Multichannel Subscriber Update and Programming Cost Analysis*, SNL KAGAN, June 2013, *available at* http://go.snl.com/rs/snlfinanciallc/images/SNL-Kagan-US-Multichannel-Subscriber-Update-Programming-Cost-Analysis.pdf.

[65] *See Nielsen Estimates 116.3 Million TV Homes in the U.S., up 0.4%*, May 5, 2014, *available at* http://www.nielsen.com/us/en/newswire/2014/nielsen-estimates-116-3-million-tv-homes-in-the-us.html (for 2014, the number of TV households has remained relatively stable at 116.3 million homes).

[66] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, Comments of the American Cable Association, at 7 (filed Mar. 21, 2014) ("1,078 small and rural cable systems, serving approximately 50,000 subscribers, have ceased providing video

systems closed in 2012 and 133 systems closed in 2013.[67] Moreover, since 2011 small and medium-sized cable operators across the board have generally lost subscribers so that the number of cable systems that would qualify for the exemption would each likely have fewer subscribers.[68] ACA believes that the number of television households affected by raising the small system exemption to 2,500 (excluding those affiliated with major MSOs) would be comparable to 1/69th of total television households, the same percentage the Commission found acceptable in 1975, and less than half of the 5.1% percentage in 1988.

While much has changed in the cable industry over the last four decades, one thing has remained consistent – the cost of complying with the Commission's exclusivity rules are disproportionately higher for small cable systems. It is well established that small businesses are less able to bear the costs of regulation than larger businesses.[69] For small cable system operators, the Commission's regulations can have an especially high impact, especially those that require the purchase of new headend equipment, because cable operators must spread these costs over far fewer customers.

The Commission's exclusivity rules apply on a per-headend basis, which requires operators of small cable systems that do not currently meet the 1,000 subscriber exemption cut-off to install switching equipment in each headend. This can be a substantial cost, as small

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service in their communities since 2008.)." ACA reported the following system closures by year: 133 closed in 2013 (8,061 subscribers); 129 closed in 2012 (4,050 subscribers); 179 closed in 2011 (7,684 subscribers); 148 closed in 2010 (6,389 subscribers); 282 closed in 2009 (9,309 subscribers); and 207 closed in 2008 (14,503 subscribers). *See id.* at 7, n. 18.

[67] *See id.* at 7, n.18.

[68] In 2011, ACA had more than 7.6 million cable subscribers. Today, ACA has nearly 7 million cable subscribers. *See* Press Release, American Cable Association, *American Cable Association Disappointed With Supreme Court Ruling In Aereo Case* (rel June 25, 2014).

[69] Small Business Administration studies show that regulatory compliance costs per employee are 42 percent higher in small companies (defined as those with fewer than 20 employees) compared with mid-sized firms (defined as those with between 20 and 499 employees), and 36 percent higher in small firms than in large firms (defined as those with 500 or more employees). *See* Nicole V. Crain, W. Mark Crain, Lafayette College, *The Impact of Regulatory Costs on Small Firms*, Small Business Administration, Office of Advocacy, pp. 54-55 (rel. Sept. 2010).

cable systems are less likely to own switching equipment. For example, although the Commission has stated the equipment that can perform local advertising insertions can also function as switching equipment for exclusivity blackouts,[70] many small cable systems do not own this equipment because they do not insert their own advertising. Among operators with fewer than 2,500 subscribers that insert advertising, they predominantly rely on third-party advertising insertion companies such as Comcast Spotlight or Viamedia. With these comments, ACA provides evidence that the equipment needed to black out duplicative network programming costs about $1,500 per channel.[71] Moreover, these small cable systems must also ensure that staff at each system program equipment for required deletions, and respond to consumer questions about blackouts. This can add up to five hours per week to review the programming schedules and correctly program the deletions.[72] And if a program runs long, or the network changes its schedule, customers blame the cable system for deletion the programming, even if the schedule error is the station's or network's fault, which is an additional economic cost to the operator.[73]

In summary, for small cable systems, the cost of compliance with the Commission's exclusivity rules far outweighs the harm to broadcast stations from the loss of exclusivity. Current marketplace data supports the Commission increasing the small cable system exemption to 2,500 subscribers, excluding cable systems affiliated with MSOs serving more than 10% of the market.

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[70] 1988 Syndex Order, ¶ 84.

[71] Dunn Declaration, ¶ 12; Declaration of Eddie Russell, ¶ 10 (attached as Exhibit C) ("Russell Declaration").

[72] Declaration of John Strode, ¶¶ 11-12 (attached as Exhibit A) ("Strode Declaration"); Dunn Declaration, ¶ 13; Russell Declaration, ¶ 11.

[73] ACA also notes that when the Commission adopted the 2,500 subscriber exemption (excluding MSOs that serve more than 10% of the market) from the digital must carry HD carriage requirement, it did so based on the cost to the operator to purchase equipment. *See Carriage of Digital Television Broadcast Signals*, Fourth Report and Order, 23 FCC Rcd13618, ¶ 7 (2008).

B. The Commission Should Modify the Network Non-Duplication and Syndicated Exclusivity Rules to Apply Only Where the Local Station is Carried by the MVPD.

The FNPRM seeks comment on whether the Commission should modify the network non-duplication and syndicated exclusivity rules to apply only where the local station has granted retransmission consent to, and is carried by, the MVPD.[74] Again, the answer is emphatically, yes.

The Commission's rules unfairly permit local affiliates to exercise network non-duplication and syndicated exclusivity rights even where the station is not carried by the MVPD in its local market.[75] As ACA explained in its earlier filings, subscribers are put at greater risk of disruption when an MVPD and in-market network affiliate fail to come to agreement on retransmission consent because the operator has lost access to the alternative network programming feed, no other station is able to grant consent, and the consumer, in many cases, cannot receive the local station over-the-air.[76] The calculus of harm due to pulled signals in rural areas where over-the-air signals are not available is significantly worse than in areas where there is over-the-air service.[77]

The Commission previously recognized exactly this problem of consumer disruption and lack of alternatives when it originally declined to extend network non-duplication rights where the local station is not carried.[78] When broadcasters block access to other sources of network

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[74] FNPRM, ¶ 73.

[75] Under the Commission's exclusivity rules, blackout protection extends throughout any community that is "located in whole or in part" with a broadcast station's protected zone. 47 C.F.R. §§ 76.92, 76.101. The broadcast station has the right to assert its exclusive rights against any cable system, in whole or in part within the station's protected zone, based on the broadcast station's contractual relationship with the network or syndicated programmer, regardless of whether the cable system actually retransmits the broadcast station to its subscribers. *See* FNPRM, ¶ 65.

[76] ACA NPRM Comments at 56; ACA NPRM Reply Comments at 60-61.

[77] *Id*.

[78] ACA NPRM Comments at 58 (*citing* 1966 Cable Carriage Order, ¶¶ 19, 46).

programming from smaller operators, it is precisely to threaten disruption and inconvenience subscribers.

As discussed in Section III.B, supra, the Commission has noted that the rationale for a zone of exclusivity disappears where the local station is not carried by the MVPD in its own market.[79] This is undoubtedly true, and provides a solid basis for this reform. The Commission's justification for the exclusivity rules – namely, to protect stations from competition that would reduce advertising revenue – does not apply when the local station refuses to grant retransmission consent to the cable operator. A station in such a situation should not be able to hide behind the exclusivity rules, and block (or threaten to block) access to other sources of network programming in order to extract a higher retransmission consent price from the cable operator.

Removing the right to block network programming when a station is not carried would also protect consumers from harm in the case of an impasse or threatened impasse in retransmission consent negotiations, and ensure that MVPDs and broadcast stations negotiate on a level playing field. ACA has repeatedly noted that the exclusivity rules were created to protect local broadcast stations from competition from cable operators prior to stations gaining retransmission consent rights.[80] Unlike then, MVPDs cannot now retransmit a broadcast station signal without that station's consent, and are required to enter into good faith negotiations and reach a written agreement before retransmitting the station's signal. This ensures that MVPDs cannot simply use the threat of carriage of another affiliate of the same network as undue leverage against the local broadcast station. Instead, adopting this modification would restore balance to retransmission consent negotiations. MVPDs could negotiate with more than one

[79] FNPRM, ¶ 65 ("Congress appeared to be concerned with the importation of distant programming that would compete with local programming carried by the cable system. Arguably, that concern does not extend to retransmission consent negotiation impasses, where the local broadcaster pulls its station from a cable system or other MVPD.") (citations omitted).

[80] 2005 ACA Petition at 18; ACA NPRM Comments at 28-29.

network affiliate without the threat of the local station pulling its signal and, at the same time, blocking (or threatening to block) duplicative programming.

Again, to fully effectuate modification of the exclusivity rules to prevent stations from exercising their exclusivity rights when the station is not carried by the MVPD, the Commission must also affirmatively ban third-party interference with retransmission consent negotiations. Similar to the necessity for such a prohibition to ensure that consumers are protected from loss of network and syndicated programming during broadcast blackouts arising from negotiating impasses, this modification of the exclusivity rules is needed to prevent network and broadcast stations from effectively circumventing any new restriction on a broadcast station's exclusivity rights when the station is not carried by the MVPD, for whatever reason. Without this ban on third-party interference, networks and stations will be able to continue to impede the ability of MVPDs to negotiate for carriage of distant signals, even when the local broadcast station refuses to grant retransmission consent to the MVPD or the MVPD simply wishes to contract with another station carrying the same programming.

C. The Commission Should Adopt Additional Restrictions on the Exercise of Network Non-Duplication by Harmonizing the Geographic Reach of the Network and Syndicated Programming Exclusivity Rules.

The FNPRM seeks comment on the proposal of ACA and Block that the Commission apply the Grade B or noise limited signal contour exception for syndicated programming to the network non-duplication rules.[81] Should the exclusivity rules be retained, ACA reiterates its strong support for extension of the Grade B or noise limited signal contour exception to the network non-duplication rules.

Broadcast stations should have no reasonable expectation of exclusivity against adjacent-market stations receivable over-the-air in the community.[82] Longstanding Commission

[81] FNPRM, ¶ 73.

[82] ACA NPRM Comments at 67-68.

policy supports applying a Grade B or noise limited service contour exception to the Commission's network non-duplication rules, and allowing broadcast stations to block cable customers from receiving network programming available over-the-air squarely conflicts with this policy. In fact, when a broadcast station asserts its right to network non-duplication against a signal otherwise received over-the-air the effect is precisely the opposite of what the Commission intended. As ACA has previously pointed out, the Commission articulated its policy underlying the network non-duplication rules as "reproduc[ing] in cable households the same ability to view network programming that noncable subscribers in the same locality have."[83] Moreover, applying the syndicated Grade B or noise limited signal contour exception for syndicated programming to the network non-duplication rules will protect consumers and promote the efficient working of the retransmission consent framework, as explained in ACA's earlier filings, including protecting consumers from loss of network programming via their subscription service during negotiating impasses.[84]

In response to ACA's and Block's comments, only NAB opposed applying the syndicated Grade B or noise limited signal contour exception for syndicated programming to the network non-duplication rules. In its 2011 reply comments, NAB claimed that a Grade B service contour exception for duplicative network programming is not needed because the network non-duplication rules include an exception for significantly viewed stations, and, according to NAB, this is intended generally to address the same issue.[85] NAB's argument misses the mark for two reasons. First, NAB neglects to mention that Section 76.106(a) of the syndicated exclusivity

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[83] *Id.* at 67.

[84] *Id.* at 66-67 (cable operators want to carry programming that is of interest to their subscribers and that broadcast signals receivable over-the-air in the community served by a cable operators meet that criterion; consumers would be harmed less by any impasse or threatened impasse because they would no longer face the prospect of losing network programming that otherwise would be receivable over-the-air during retransmission consent negotiations).

[85] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Reply Comments of the National Association of Broadcasters, at 60-61 (filed June 27, 2011).

rules exempts syndicated programming from deletion when the station is significantly viewed in the cable community or when the cable community falls within the station's Grade B contour.[86] Conversely, Section 76.92(f) of the network non-duplication rules only provides an exemption for significantly viewed stations.[87] As described above and in ACA's prior filings in this docket, no Commission policy justifies this obvious disparity.

In addition, contrary to NAB's claims, the significantly viewed and Grade B exemptions do not provide the same protection. The Commission originally determined which stations were significantly viewed on a county-by-county basis in 1972.[88] Importantly, a station need not be receivable over-the-air to be significantly viewed in a community.[89] Broadcast stations launched since the Commission compiled the initial list in 1972 may be added; however this requires an affirmative showing at the Commission. Filing such a petition can be a lengthy and expensive proposition for a station (or cable operator). Therefore, it is possible that a station is receivable-over-the-air in a community, but not significantly viewed. Broadcast stations may also petition to remove a station's significantly viewed status in a community. As Block thoroughly described in its 2011 comments, there is only reason for a station to attack the significantly viewed station of another station: to block a competitor so as to gain retransmission consent leverage and extract

[86] 47 C.F.R. § 76.106(a) ("Notwithstanding the requirements of §§ 76.101 through 76.105, a broadcast signal is not required to be deleted from a cable community unit when that cable community unit falls, in whole or in part, within that signals grade B contour, or when the signal is significantly viewed pursuant to § 76.54 in the cable community.")

[87] 47 C.F.R. § 76.92(f) ("A community unit is not required to delete the duplicating network programming of any television broadcast station which is significantly viewed in the cable television community pursuant to § 76.54.")

[88] *See In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Memorandum Opinion and Order on Reconsideration of the Cable Television Repot and Order, 36 FCC 2d 326 (1972).

[89] *Id.*, ¶ 58 (1972) ("The use of a significant viewing test beyond the predicted Grade B contour of a station has also been objected to, but we think without good cause. It is clearly not uncommon for stations to have audience beyond their Grade B contour, and if this is the case, the rationale for using the viewing test is applicable regardless of the location of the station's contour.").

higher fees.[90] This broadcaster practice directly undermines the Commission's intent, and can be at least partially addressed by extending the Grade B contour exception to the network non-duplication rules.

In summary, the Commission should adopt ACA's and Block's proposal, and include in the network non-duplication regulations an exemption for cable communities that fall with a station's Grade B or noise limited signal contour.[91]

V. CONCLUSION

As the Commission continues reform of its retransmission consent good faith rules, ACA urges that it seek to preserve, to the greatest extent possible, the ability of MVPDs to negotiate retransmission consent with willing sellers for out-of-market signals that in the MVPD's view best satisfy consumer needs. To this end, ACA reiterates its call for the Commission to prohibit all forms of television network and local station interference with the exercise of retransmission consent by stations otherwise willing to grant out-of-market retransmission consent and with the ability of MVPDs to carry out-of-market stations under such circumstances. These actions lie well within the Commission's general authority to govern the exercise of retransmission consent and its specific authority to impose rules intended to ensure good faith negotiations under Section 325(b)(3)(C). Prohibiting network and local station interference will be especially important should the Commission decide to eliminate its broadcast exclusivity rules with the aim of permitting MVPDs the opportunity to secure retransmission consent from an out-of-market

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[90] *See In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of Block Communications, Inc., at 4-5 (filed May 27, 2011).

[91] In 1988, shortly after reinstituting its syndicated exclusivity rules, the Commission adopted and released a Further Notice of Proposed Rulemaking seeking to, among other things, "develop a consistent policy across all of [the Commission's exclusivity rules]." Specifically, the Commission noted that "both [the network non-duplication and syndicated exclusivity rules] prohibit stations from exercising exclusivity rights against other signals that are significantly viewed in the relevant cable community and, additionally, the new syndicated exclusivity rules ban exclusivity against other stations placing a Grade B signal over the cable community." The Commission concluded that the "program exclusivity rules should [not] differentiate between program types and distribution technologies", and "propose[d] to modify each of [the exclusivity] rules…." More than 25 years later, the proceeding remains pending. 1988 Syndex FNPRM, ¶ 41.

station to protect subscribers from loss of access to network programming during a negotiating impasse with the local affiliate.

If the Commission retains the exclusivity rules, it should also (i) raise the limit of the small cable system exemption from 1,000 subscribers to at least 2,500 subscribers, excluding cable systems affiliated with “MSOs serving more than 10% of the market; (ii) modify the rules to apply only where the local station has granted retransmission consent to, and is carried by the MVPD; and (iii) harmonize the geographic reach of the non-duplication and syndicated exclusivity rules.

These actions are squarely aimed at achieving the goals the Commission has articulated for this rulemaking: allowing the market-based retransmission consent negotiations contemplated by Congress to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers from loss of access to broadcast signals. Once again, ACA implores the Commission to adopt these amendments to its retransmission consent and related rules as expeditiously as possible, but in any event, in time for consumers to benefit from the rule changes before the upcoming commencement of the 2014 negotiating cycle.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

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June 26, 2014

EXHIBIT A

DECLARATION OF JOHN STRODE

1. My name is John Strode and I am Vice President – External Affairs of Ritter Cable Corporation d/b/a Ritter Communications ("Ritter").

2. Ritter, through subsidiaries and its sister company Millington CATV, provides video, broadband Internet, and telephone service to numerous small communities in northeastern Arkansas and western Tennessee.

3. In my capacity as Vice President – External Affairs, I bear the primary responsibility for managing Ritter's video business, which includes negotiating retransmission consent agreements and reviewing network non-duplication and syndicated exclusivity requests.

4. Ritter's Marked Tree system serves 13,812 subscribers across communities in four DMAs: (i) Jonesboro, Arkansas; (ii) Little Rock-Pine Bluff, Arkansas; (iii) Memphis, TN; and (iv) Cape Girardeau, Missouri-Paducah, Kentucky-Harrisburg, Illinois.

5. The Marked Tree system has traditionally carried broadcast stations from Jonesboro, Arkansas, Little Rock, Arkansas, and Memphis, Tennessee. This includes (i) KATV, the ABC affiliate in Little Rock, Arkansas; (ii) KAIT, the ABC affiliate in Jonesboro, Arkansas; and (iii) WANT, the ABC affiliate in Memphis, Tennessee.

6. The Marked Tree system is a technically integrated cable system that is served off the Marked Tree headend. Due to the infrastructure and configuration of the Marked Tree system, Ritter cannot segregate blackouts on a community-by-community basis, even though the Marked Tree system extends far beyond the areas over which broadcast stations in each market may assert their network non-duplication or syndicated exclusivity rights.

7. Because the Marked Tree system is technically integrated, Ritter must blackout duplicative network and syndicated programming that airs on KATV for all its subscribers even though KAIT's exclusive rights only would cover 2,826 subscribers residing in the affected communities.

8. To segregate blackouts on a community-by-community basis would require Ritter Communications to modify the Marked Tree system's existing plant and purchase upgraded equipment.

9. The cost to redesign the plant and purchase upgraded equipment would amount to more than $100,000.

10. Should Ritter subsequently lose consent to retransmit the out-of-market station, Ritter's investment in equipment purchased to comply with the Commission's broadcast exclusivity rules would be lost.

11. Apart from equipment costs, the on-going costs of compliance include the time spent by our technicians to program our equipment to delete the duplicated network and syndicated programming requested by the local station. This includes a weekly

examination of the station's programming grid to determine where duplicated programming is scheduled for broadcast. During the week, network programming times are fairly consistent, but on the week-ends, network programming line-ups change, particularly to accommodate sports programming. Although this generally takes only 1 to 2 hours per week, the time can increase when targeted blocking is required.

12. Syndicated programming schedules require even more time to review for deletions, as they are scattered through many day-parts. We have one headend technician devoted to this task, and this is just one of the many roles he performs. To avoid diverting too much of our technician's time to this effort, for ease of administration we delete more programming than we are required to do, allowing only the local programming through, despite the fact that we pay retransmission consent fees for the entire signal.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

John Strode

John Strode
Vice President-External Affairs
Ritter Cable Corporation

June 26, 2014

EXHIBIT B

DECLARATION OF LANIER DUNN

1. My name is Lanier Dunn, and I am the City Manager for the City of Elberton, Georgia ("Elberton Utilities").

2. Elberton Utilities provides video, broadband Internet, and telephone service in and around the City of Elberton, Georgia. Overall, Elberton Utilities serves about 2,600 video subscribers.

3. Elberton, Georgia is a small city in Elbert County, Georgia, about 35 miles east of Athens, Georgia, and 100 miles east of Atlanta, Georgia, near the Georgia-South Carolina border.

4. In my capacity as City Manager, I bear the primary responsibility for managing Elberton Utilities' video business, which includes negotiating retransmission consent agreements and reviewing network non-duplication and syndicated exclusivity requests.

5. Elbert County is part of the Greenville-Spartanburg-Anderson, South Carolina-Asheville, North Carolina DMA.

6. Even though Elbert County is part of the Greenville-Spartanburg-Anderson, South Carolina-Asheville, North Carolina DMA, our subscribers prefer to receive Atlanta broadcast stations.

7. Because Elbert County is part of a hyphenated DMA, stations can assert their network non-duplication and syndicated exclusivity rights within 35 miles of Asheville, Anderson, Greenville, and Spartanburg.

8. Elberton, Georgia is about 30 miles from Anderson. Accordingly, if an in-market station asserts its network non-duplication or syndicated exclusivity rights, we must honor those rights. We must honor these rights even though none of the in-market stations are licensed to Anderson. These stations are licensed to Greenville (70 miles away), Spartanburg (90 miles away) and Asheville (115 miles away).

9. We currently carry WAGA, the FOX affiliate in Atlanta, even though we are required to black out duplicative network programming that airs on WAGA.

10. In the early 2000s, the in-market CBS affiliate, WSPA, which operates out of Spartanburg, South Carolina, exercised its network non-duplication rights. After much consideration and expense, we concluded that we had to drop WGCL, the Atlanta CBS affiliate. In 2007, we were forced to drop WSB, the ABC affiliate out of Atlanta, at the request of the in-market ABC, WLOS, which operates out of Asheville, North Carolina. Our subscribers were not happy at the loss of the Atlanta stations.

11. Because we must black out duplicative programming, our subscribers do not receive breaking weather alerts when severe storms, such as tornadoes, large hail events, and squall lines move into our area from the west. This is a major concern in our community since the in-market network affiliates often do not provide us with sufficient advanced

warning of severe storms. These stations are far to our north and east, and do not consider Elbert County, due to its small population and distance, to be an important viewing area.

12. We use regular analog equipment to schedule the deletions of the duplicative programming based on the weekly programming grids. We also use this equipment to perform other functions. A switch costs approximately $1,500 per channel. When that equipment is in use for those other functions, we must manually program it for the deletions.

13. Apart from equipment costs, the on-going costs of compliance include the time spent by our technicians to program our equipment to delete the duplicated network and syndicated programming requested by the local station. This includes a weekly examination of the station's programming grid to determine where duplicated programming is scheduled for broadcast. Our technicians spend approximately 4 hours per week to perform the deletions.

14. Syndicated programming schedules require even more time to review for deletions, as they are scattered through many day-parts.

15. To avoid manually programming the deletion equipment, we would have to purchase upgraded equipment. We estimate this equipment would cost $15,000 per channel, or about $5.77 per subscriber, a cost our small system cannot absorb.

16. We also pay full retransmission consent fees for the entire signal, even though we black out the duplicative network programming.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Lanier Dunn

Lanier Dunn
City Manager
City of Elberton

June 26, 2014

EXHIBIT C

DECLARATION OF EDDIE RUSSELL

1. My name is Eddie Russell and I am Cable Services Manager for the Electric Plant Board of the City of Glasgow.

2. Glasgow provides video and broadband Internet service, along with electric service, in and around the City of Glasgow, Kentucky. Overall, we serve just under 7,000 video subscribers.

3. Glasgow is a city of 15,000 people in Barren County, Kentucky, about 90 miles south of Louisville, Kentucky, 90 miles north of Nashville, Tennessee, and about 35 miles east of Bowling Green, Kentucky.

4. In my capacity as Cable Services Manager, I bear the primary responsibility for managing Glasgow's video business, which includes negotiating retransmission consent agreements and reviewing network non-duplication and syndicated exclusivity requests.

5. Barren County is part of the Bowling Green, Kentucky DMA. However, even though Barren County is part of the Bowling Green, Kentucky DMA, many of our customers are originally from the Louisville and Nashville areas and want us to carry stations from those two cites. Louisville and Nashville are also the nearest large markets, and offer more robust local programming than the Bowling Green stations.

6. Because Glasgow is within 35 miles of Bowling Green, we must honor the Bowling Green stations' network non-duplication and syndicated exclusivity rights if they assert them against our cable system.

7. The big-four network affiliated stations (ABC, CBS, FOX, and NBC) in Nashville are each significantly viewed in Barren County. Accordingly, we are not required to black out duplicative network or syndicated programming that airs on these stations. However, no such protection extends to the Louisville big-four affiliated stations.

8. Currently, we are required to black out duplicative network programming that airs on WHAS, the ABC affiliate in Louisville, and WDRB, the FOX affiliate in Louisville.

9. Before 2011, we retransmitted the signals of six out-of-market broadcast stations from Nashville and Louisville. In 2011, we were forced to drop three of these stations – WAVE (NBC) and WLKY (CBS) out of Louisville, and WSMV (NBC) out of Nashville.

10. We use an electronic switcher to schedule the deletions of the duplicative programming based on the weekly programming grids. A switch costs approximately $1500 per channel.

11. Apart from equipment costs, the on-going costs of compliance include the time spent by our technicians to program our equipment to delete the duplicated network and syndicated programming requested by the local station. This includes a weekly examination of the station's programming grid to determine where duplicated programming is scheduled for broadcast.

12. Our technicians spend up to five hours per week to perform the deletions. Since we have less than ten employees in our video and Internet division, complying with the Bowling Green stations' exclusivity requests is a major drag on our resources.

13. Syndicated programming schedules typically require three times as long as network programming schedules to review for deletions, as they are scattered through many day-parts.

14. We also pay full retransmission consent fees on the WHAS ABC signal, even though we black out the duplicative programming.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Eddie Russell
Cable Services Manager
Glasgow Electric Plant Board

June 26, 2014