

**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)	
)	

**REPLY COMMENTS OF
KETCHIKAN PUBLIC UTILITIES**

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July 23, 2014

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The City of Ketchikan, Alaska, d/b/a Ketchikan Public Utilities (“KPU”), files these comments in reply to the opening comments filed in response to the Federal Communications Commission’s (“FCC” or “Commission”) Further Notice of Proposed Rulemaking in the above-captioned docket, which sought comment on whether the FCC should eliminate or modify its network non-duplication and syndicated exclusivity rules.¹

KPU strongly supports the positions taken by the American Public Power Association (“APPA”) in this rulemaking,² as well as the positions of several other commenters that advocated repeal of, or significant expansion of the exceptions to, the network non-duplication rules. KPU explains and expands upon its support for those commenters as follows.

INTRODUCTION AND SUMMARY

Ketchikan, located on an island in Southeast Alaska approximately 700 miles north of Seattle and 800 miles south of Anchorage, is a unique market. Over-the-air reception of local broadcast stations is virtually non-existent, and consequently cable penetration is over 90

¹ Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71 (March 31, 2014) (“FNPRM”).

² Comments of the American Public Power Association, MB Docket No. 10-71 (filed June 26, 2014) (“APPA Comments”).

percent. Ketchikan residents must rely exclusively on multichannel video program distributors (“MVPD”), and in particular cable service, to receive television network broadcast programming to connect them to the outside world.

Additionally, unlike many markets of its small size, Ketchikan is served by two cable operators: KPU and General Communications, Inc. (“GCI”). KPU is a municipally-owned utility with annual revenue of about \$14 million. GCI is the incumbent cable operator, has more subscribers than KPU, and has annual Alaska-wide revenues of nearly \$800 million. GCI is also the dominant cable operator in the state of Alaska, passing roughly 90 percent of Alaska’s households with a statewide penetration rate of over 60 percent.

There is only one major TV network affiliate that is both licensed to Ketchikan and delivers a signal that is technically receivable over-the-air in Ketchikan, and thus subject to full must-carry/retransmission consent and network non-duplication protection in Ketchikan: KUBD, a CBS network affiliate. In May 2014, the FCC consented to the assignment of the license of KUBD to Denali Media Juneau, Corp. (“DMJ”), which is an indirect wholly-owned subsidiary of GCI.³ Thus, the only affiliate subject to network non-duplication protection in Ketchikan is owned by GCI, KPU’s far larger cable competitor. As a result, KUBD is KPU’s exclusive source of CBS broadcast network programming, which is essential to KPU’s ability to compete with GCI in the Ketchikan cable market.

This combination of unique circumstances for KPU creates a situation that starkly demonstrates the competitive harms that continued application of the Commission’s non-duplication rules can cause in a local MVPD market. Currently, KUBD exercises the must-

³ Memorandum Opinion and Order, *In the Matter of Ketchikan TV, LLC and Denali Media Juneau, Corp.*, File Nos. BALCDT-20131209XYP & BALCDT-20131209XYQ, Facility ID Nos. 60520 & 60519 (May 15, 2014) (“*KUBD Order*”).

carry option with respect to carriage on KPU, but KUBD's must-carry election expires on December 31, 2014. Effective at the end of this year, KUBD will be able to shift from must-carry to retransmission consent with respect to carriage of KUBD on KPU's cable system. Now that GCI indirectly controls KUBD, there is every reason to expect that GCI will cause KUBD to make the shift to retransmission consent.⁴ By shifting KUBD from must-carry to retransmission consent, GCI will be able either to (1) withhold KUBD's signal from KPU, giving GCI exclusive rights to CBS network programming in Ketchikan and thereby providing GCI with a substantial competitive advantage over KPU in the Ketchikan MVPD market; or (2) increase its MVPD rival KPU's programming costs. GCI would be able to increase KPU's costs either by (a) charging KPU a discriminatorily higher retransmission consent fee than KUBD charges GCI, or (b) charging both itself (GCI) and KPU an excessively high retransmission consent fee that GCI could better absorb, due both to its immense size relative to KPU and to its ability to merely shift GCI's excessive retransmission consent fee costs from GCI's pocket to the revenue pocket of its subsidiary, KUBD.

The network non-duplication rule rewards—indeed, makes possible—this type of anticompetitive MVPD vertical foreclosure behavior, because it leaves a smaller, non-vertically integrated MVPD competitor like KPU without any available relief. The exclusivity rule precludes KPU from obtaining CBS network programming from anywhere other than the local broadcast station (KUBD) owned by its larger cable competitor, GCI. If the rule were repealed, and as APPA wisely urges, network affiliation contract exclusivity provisions were preempted,

⁴ In fact, DMJ's promises to the Commission that, if its acquisition of KUBD were approved, it would upgrade the station and undertake news coverage initiatives in Southeast Alaska, see *Joint Opposition to Comments and Request for Conditions of Ketchikan Public Utilities* at 3, *In the Matter of Ketchikan TV, LLC and Denali Media Juneau, Corp.*, File No. BALCDT-20131209XYP, Facility ID No. 60520 (filed Jan. 27, 2014), would make no economic sense unless DMJ intends to shift from must-carry to retransmission consent at the end of this year.

KPU would have competitive alternative sources of CBS programming. In particular, KPU would have access to the programming of CBS's Seattle affiliate, KIRO. KPU's subscribers wish to have access to Seattle network affiliate programming, and carrying Seattle programming would provide Ketchikan viewers with a competitive viewing alternative to GCI's largely Anchorage-based television broadcast network programming.

KPU therefore urges the Commission to repeal the network non-duplication rules. Alternatively, if the Commission were unwilling to do that, it should adopt several modifications to the rules that would alleviate some of the anticompetitive abuses they would otherwise foist upon smaller competitive MVPDs like KPU. The Commission should adopt (1) an exemption from the rules where the network affiliate imposes discriminatory retransmission consent terms and conditions on different MVPDs, (2) an expansion of the small system exception, and (3) an exemption from the rules in cases where a local broadcaster and a local cable operator are commonly owned.

I. THE NETWORK NON-DUPLICATION RULES SHOULD BE REPEALED.

KPU supports APPA's comments urging the Commission to repeal the non-duplication rules. There have been significant changes in the landscape of video distribution since the rules were originally adopted. In particular, publicly-owned cable operators such as KPU have emerged, providing viewers with a genuine MVPD competitive alternative to large incumbent cable operators like GCI in the communities in which they operate. As APPA points out, broadcasters have substantially more bargaining power over MVPDs, especially smaller ones like KPU, than when the rules were adopted.⁵ KPU's situation, described above, illustrates this point: KUBD, now owned by GCI, KPU's far larger, incumbent cable operator competitor, is

⁵ APPA Comments at 9.

positioned to demand excessive retransmission consent fees after KUBD's current must-carry election expires in December 2014. Broadcasters have "cavalierly" publicized their growing revenues from retransmission consent fees,⁶ and it is smaller, new-competitor entrant MVPDs such as KPU that are most harmed, with resulting harms to MVPD competition and the viewing public.

The network non-duplication rules allow broadcasters to "hold all the cards."⁷ Where, as in Ketchikan, a network affiliate is also owned by KPU's incumbent cable operator competitor, GCI, the network non-duplication rule also gives the KUBD-GCI combination all of the chips, the card dealer and the card table. If KPU does not pay whatever retransmission consent fee KUBD-GCI demands,⁸ KPU will not be able to provide CBS network programming to its subscribers at all, because the non-duplication rule would bar KPU from obtaining CBS programming elsewhere. KPU will have an incentive to negotiate with KUBD in order to carry CBS programming,⁹ but KUBD-GCI would have little or no incentive to negotiate in good faith with KPU, because if agreement is not reached and KPU does not carry KUBD, GCI would end up with exclusive access to CBS network programming in Ketchikan, giving it a unique and powerful competitive advantage over KPU.

The network non-duplication rules now undermine, rather than promote, the original rationale behind the must-carry/retransmission consent rules: the non-duplication rules now work to deprive many local communities of access to the very "diversity of voices" and diversity in

⁶ APPA Comments at 9-10; Comments of the United States Telecom Association at 4-5, MB Docket No. 10-71 (filed June 26, 2014) ("USTelecom Comments").

⁷ APPA Comments at 10.

⁸ See Comments of NTCA-The Rural Broadband Association at 5, MB Docket No. 10-71 (filed June 26, 2014).

⁹ See also Comments of CenturyLink at 6, MB Docket No. 10-71 (filed June 26, 2014) ("CenturyLink Comments").

local programming that the rules were initially aimed to promote and protect.¹⁰ KUBD, as an indirect subsidiary of GCI, the incumbent cable operator, can hardly be thought of as a disadvantaged local broadcaster that the network non-duplication rules were originally adopted to protect from cable monopolists. To the contrary, KUBD's owner, GCI, is the dominant cable operator in Ketchikan. Additionally, KUBD's programming is not particularly local; it is mainly network programming and syndicated programming, not locally-originated programming. As the record reflects, KPU is not alone in feeling the very real and anti-competitive impacts of the operation of the network non-duplication rules in today's changed markets.¹¹

When the Media Bureau consented to the assignment of the license of KUBD to DMJ, it stated that if KPU believed that changes in the video marketplace warranted action to address KPU's policy concerns involving the retransmission consent process, "the appropriate place to seek such a change would be an industrywide proceeding."¹² This *FNPRM* presents just such an industrywide proceeding, and it is time for the Commission to recognize the harms of the current rules and to rectify them.

Elimination of the network non-duplication rules would give small competitive MVPDs, such as KPU, a fair opportunity to obtain network programming on reasonable terms and conditions in the retransmission consent process, because it would provide them with competitive alternatives to the local network affiliate. The current rules, in contrast, operate to shift all bargaining power to the network affiliate, and to give an overwhelming competitive advantage to vertically integrated cable operators like GCI that own a local network affiliate.

¹⁰ APPA Comments at 10, 18-19; USTelecom Comments at 7-8.

¹¹ CenturyLink Comments at 4.

¹² *KUBD Order* ¶ 10.

KPU also agrees with APPA and CenturyLink that, as a complementary and necessary measure, the Commission should preempt the enforcement of provisions in network affiliation contracts that preclude the importation of distant network affiliate signals.¹³

II. IF NOT REPEALED, THE NON-DUPLICATION RULES ARE IN NEED OF SUBSTANTIAL NARROWING.

If the Commission does not act to repeal the non-duplication rules entirely, it should substantially modify, and narrow, those rules to ameliorate many of the unfair and anti-competitive practices that the current rules sanction. KPU generally endorses APPA's proposed exemptions and modifications to the rules.¹⁴ KPU highlights a couple of APPA's proposed modifications below.

A. Non-Duplication Rule Application Should Be Contingent on Non-Discrimination.

APPA argues that the network non-duplication rules should not be available unless the network affiliate offers retransmission consent on rates, terms and conditions that are the same to all MVPD providers in the community.¹⁵ KPU endorses such an exemption. It would permit

¹³ See APPA Comments at 19-20; CenturyLink Comments at 18.

¹⁴ KPU notes that one of APPA's proposed exemptions—allowing MVPDs to import distant station signals outside of a designated market area (“DMA”) that are within the home state of the MVPD—would not address the problem KPU faces in Ketchikan. APPA Comments at 21-22. Given Ketchikan's location midway between Seattle and Anchorage in Southeast Alaska, Ketchikan residents' viewing interests are shared between Seattle and Anchorage. Some residents prefer Seattle, others Anchorage. In KPU's experience, there is strong demand among Ketchikan residents for Seattle programming. Because there are no local NBC, ABC or Fox affiliates in Ketchikan, KPU has chosen to carry those networks' Seattle affiliates. GCI, in contrast, carries the Anchorage or Juneau affiliates of ABC and Fox. Notably, while GCI carries the NBC Anchorage affiliate on its Anchorage system, in Ketchikan (where there is no NBC affiliate), GCI has elected to carry the Seattle NBC affiliate. The result is that Ketchikan residents enjoy a competitive choice of Seattle, Juneau and Anchorage distant affiliate stations, a choice that promotes programming diversity and MVPD competition in Ketchikan. That would be lost if KPU could only import in-state Anchorage or Juneau affiliate programming. CenturyLink also gave the example in its comments of retirees in Florida or Arizona who might have a particular interest in the local programming from distant communities where they previously lived (e.g., New York or Chicago), another situation where communities might want access to out-of-state signals. CenturyLink Comments at 17.

¹⁵ APPA Comments at 22; see also Comments of Cablevision Systems Corporation and Charter Communications, Inc. at 12-13, MB Docket No. 10-71 (filed June 26, 2014); CenturyLink Comments at 5-6.

MVPDs to import distant signals if the local station did not charge substantially the same retransmission consent rates, terms and conditions on all competing MVPDs serving a local community. Without such an exemption, KPU faces the very real risk that KUBD will agree to retransmission rates, terms or conditions with GCI, its indirect corporate parent, that are more favorable than those it demands from KPU, GCI's direct cable competitor in the Ketchikan market. This type of discrimination would serve only improper anticompetitive purposes, and thus prohibiting that discrimination in order for a station to be able to invoke the non-duplication rule would prevent this inherently unfair and anticompetitive practice.¹⁶

B. Expansion of the Small System Exception.

KPU supports APPA's proposal that the Commission expand the small system exception—currently applicable to cable systems with less than 1,000 subscribers—to include MVPDs with 25,000 subscribers or less.¹⁷ “[T]he original rationale for the small system exception was based on the relative cost of compliance compared to such systems’ gross revenues[.]”¹⁸ Recognizing the changing market and definition of what is a “small system” by expanding the small system to 25,000 subscribers is in line with the original intent to allow small systems to compete against massive MVPD and broadcast combinations without being disproportionately burdened by compliance costs.

¹⁶ KPU notes, however, that even this proposed non-discrimination rule would not completely protect KPU against anticompetitive network non-duplication practices from a combined KUBD-GCI. Because of KUBD's common ownership with GCI, KUBD could charge facially non-discriminatory, but exorbitant, retransmission consent fees to both KPU and GCI that, in practice, would not impact GCI at all, but would inflict great competitive injury on KPU. KPU's proposal in Part III below is necessary to solve this problem.

¹⁷ APPA Comments at 23-24.

¹⁸ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, 65 Fed. Reg. 68,082, 68,092 (Nov. 14, 2000).

KPU would fall within the small system exception, if amended as APPA suggests. KPU plainly does not have the size or scale of its far larger incumbent cable operator competitor, GCI, to negotiate retransmission consent fees. Nor does it have the scale or resources of the GCI-owned KUBD, with which it must negotiate carriage. Moreover, Ketchikan is a very small market, and thus KPU's potential subscriber base is small. This inequity in negotiating power is compounded by the corporate combination of KUBD and GCI, the dominant cable operator throughout Alaska.

III. CHANGING CIRCUMSTANCES WARRANT A NEW EXCEPTION FROM THE NETWORK NON-DUPLICATION RULES WHERE A LOCAL NETWORK AFFILIATE AND THE LOCAL CABLE OPERATOR ARE COMMONLY OWNED.

In addition to supporting several of APPA's proposed exemptions, KPU believes the Commission should adopt another new, needed exemption from the exclusivity rule: where the local network affiliate and the local cable operator are commonly owned. Under this new exemption, the exclusivity rules would not apply in any market where the local network affiliate is commonly owned with a local cable operator.

The justification for this new exemption should be obvious: where a local station and local cable operator are commonly owned, the network non-duplication rules inherently give the local broadcast/cable combination the ability, and an inherent and powerful incentive, to engage in vertical foreclosure practices against all competing MVPDs in the local market.¹⁹

¹⁹ The Commission has recognized that cable/broadcast combinations create powerful economic incentives to engage in these types of competing MVPD vertical foreclosure practices in the retransmission consent process, and that these foreclosure practices are inconsistent with Commission policies favoring competition, diversity and localism. *See* note 20 *infra*. In consenting to the assignment of the license of KUBD to DMJ, the Commission "agree[d] with KPU that harms arising from vertical foreclosure may not merely be private harms; they may also be public harms." *KUBD Order* ¶ 8.

As noted above, KPU confronts this very problem: The network non-duplication rules leave KPU with no source of CBS network programming other than KUBD, which happens to be owned by GCI, KPU's incumbent cable operator competitor. In such circumstances, the KUBD-GCI combination has a powerful incentive to engage in anti-competitive vertical foreclosure practices, as the Commission has already recognized in analogous contexts.²⁰

KPU's choices will be to pay whatever retransmission consent rate KUBD-GCI demands, no matter how high it is, or to forego CBS network programming, in which case GCI becomes the sole source of CBS network programming for Ketchikan cable subscribers and therefore gains subscribers from KPU. Either way, the KUBD-GCI combination wins, and KPU—as well as Ketchikan subscribers who want MVPD competition—lose.

Although KPU's situation involves a small and isolated market, the incentives created by the exclusivity rules for vertical foreclosure practices by local affiliate/cable operator combinations are present in any market where such a combination exists. Regardless of scale (local, regional or nationwide), a network affiliate/cable combination's incentives to engage in vertical foreclosure practices, and the resulting harms to the competing MVPDs and the viewing public, are the same for the adversely affected viewers and competing MVPDs. The public interest analysis of the potential vertical market foreclosure harms from these sorts of local cable-broadcast combinations is no different, and those harms should no more be tolerated, when

²⁰ See *In the Matter of Applications of Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc.*, 26 FCC Rcd. 4238, 4252-53, ¶¶ 34 (2011) (noting “Congress was concerned that vertically integrated program suppliers have the ability and incentive to favor their affiliated cable operators, allowing them to impair competition from existing competitors, new entrants, and new technologies”). The Commission has recognized that “the vertical integration of certain video program networks with a particular MVPD would harm MVPD competition and enhance the integrated MVPD's market power despite the Commission's rules.” *Id.* at 4253, ¶ 35.

the harms are felt in a single market like Ketchikan rather than in multiple markets across the country.²¹

KPU's proposed new exception from the network non-duplication rule in cases of local affiliate/cable operator combinations would not prohibit such combinations, and KPU is not seeking resurrection of the broadcast/cable cross-ownership prohibition. Rather, KPU is merely proposing that, in light of the inherent risk of anticompetitive MVPD vertical foreclosure practices, local station/local cable operator combinations should not be entitled to the benefits of the network non-duplication rules, which make such vertical foreclosure practices possible. KPU's proposed exception would prohibit application of the exclusivity rule only when the application of such rule would neither provide protection for local programming nor promote competition, as application of the rules would inevitably, and inherently, fail to do where the local station and local cable operator are commonly owned. The Commission has previously recognized that the vertical integration of a local network affiliate and an MVPD is a circumstance where the inherent risks of anticompetitive MVP vertical foreclosure practices are too great to tolerate.²² In such circumstances, continued application of the network non-duplication rule would only serve to exacerbate these anticompetitive effects.

CONCLUSION

KPU supports the Commission's proposals in the *FNPRM* to consider eliminating, or substantially narrowing, the network non-duplication and syndicated exclusivity rules. As discussed in APPA's opening comments and above, and as illustrated by KPU's situation, in

²¹ *Id.* at 4254-55, ¶¶ 36-39.

²² In the context of Comcast's acquisition of NBC, the Commission found that the transaction "gives Comcast an increased ability to disadvantage some or all of its video distribution rivals by exclusion, causing them to become less effective competitors." *Id.* at 4254, ¶ 36.

today's environment those rules serve only to undermine MVPD competition and are therefore no longer in the public interest. KPU therefore urges the Commission to repeal those rules and to preempt exclusivity provisions in network affiliation agreements.

If the Commission nevertheless were to decide that eliminating the rules is not appropriate at this time, KPU urges the Commission to (1) make the rules' application contingent on a network affiliate providing retransmission consent to all local MVPDs on non-discriminatory rates, terms and conditions; (2) increase the small system exemption to 25,000 subscribers; and (3) make the rules inapplicable where a network affiliate and the local cable operator are commonly owned.

Respectfully submitted,

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