Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association ("APPA") submits these reply comments in response to the Commission's request for further comments in its on-going rulemaking on retransmission consent. The Commission issued the *Further Notice of Proposed Rulemaking* ("*FNPRM*") in order to undertake a more comprehensive review of the broadcast television network non-duplication rules[1] and their impact on the retransmission consent process under which multichannel video program distributors ("MVPDs") obtain the right to carry broadcast television stations.

As discussed below, a broad array of commenters, ranging from cable operators, satellite providers, and small rural telephone companies, all agree with APPA that the network non-duplication rules are exacerbating the problems in an already broken retransmission consent system. These commenters uniformly echo APPA in urging the Commission to act quickly and decisively in

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[1] *See* 47 C.F.R. § 76.92 et seq. The *FNPRM* relates to both the network non-duplication rules and the FCC's syndicated exclusivity rules, 47 C.F.R. § 76.101 et seq. The syndicated exclusivity rules are similar in operation to the network non-duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming. APPA's reply comments focus on the network non-duplication rules.

adopting its proposed measures as necessary first steps in reforming the retransmission consent process. Indeed, the only commenters that oppose a reexamination and reform of the existing non-duplication rules are the broadcasters that benefit from the current rules.

Moreover, the broadcasters never address or even acknowledge the fact that the network non-duplication rules, when coupled with the unfair negotiation advantages that broadcasters already possess under the current retransmission consent structure, are disproportionately harmful to small, competitive, facilities-based MVPD providers, such as the public entities in APPA. APPA reiterates that the Commission should move forward and adopt rules modifying the inherent inequities in the current retransmission consent structure and should remove the regulatory and other barriers that prevent the retransmission consent process from being truly competitive. In particular, given the strong support and evidence in the record that the combination of the retransmission consent rules and the network non-duplication rules have the practical effect of impeding competition for video programming, the Commission should modify its rules appropriately and preempt the enforcement of non-duplication contracts.

I. THE COMMENTS DEMONSTRATE BROAD SUPPORT FOR ELIMINATION OF THE NETWORK NON-DUPLICATION RULES

A. Repeal of the Network Non-Duplication Rules Is a Necessary Step in Correcting the Broken Retransmission Consent Process

Like APPA, a large and diverse group of commenters strongly supports the elimination or modification of the non-duplication and syndicated exclusivity rules. Again and again, these commenters note that there is ample evidence in the record that these rules currently provide broadcasters a one-sided level of protection, as well as artificially-inflated bargaining leverage in

retransmission consent negotiations. The non-duplication rules provide what Time Warner Cable aptly labeled a "thumb on the scale in favor broadcasters" in retransmission consent negotiations."[2]

Virtually all commenters, other than broadcasters, are united in maintaining that the network non-duplication and syndicated exclusivity rules compound the flaws in the retransmission consent process by depriving MVPDs of competitive choices. Specifically, the inability of MVPDs to import a distant when the local broadcaster and the MVPD are unable to reach a retransmission consent agreement denies the MVPD a competitive alternative and effectively holds the MVPD (and its consumers) hostage to the whims of the local station. This is particularly true when the MVPD is a small provider, such as the members of APPA, that is attempting to compete against a large incumbent MVPD that has been able to use its larger resources and scale to reach a carriage agreement with the local broadcaster. In such circumstances, with no ability to import a distant station, the competitive new entrant has no real choice but to also agree to carry that local broadcaster, even if it means acceding to the demands of the local station at prices many times higher than the incumbent MVPD.

As APPA argued, allowing MVPDs to import distant station signals would provide a critical "safety valve" against unreasonable retransmission consent demands of local broadcasters. Other commenters agree with APPA. For example, Verizon states that eliminating the non-duplication and syndication exclusivity rules may temper broadcaster demands by "inject[ing] a competitive factor into the conditions under which MVPDs negotiate retransmission consent with broadcast stations."[3]

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[2] Time Warner Cable, at 2.

[3] Verizon, at 8.

B. Broadcaster Arguments About Localism and Competition Are Misplaced

While broadcasters put forward various legal and policy arguments for leaving the network non-duplication rules in place, none have merit. Chief among the arguments raised by broadcasters in opposition to repeal of the network non-duplication rules is that the rules are necessary to foster local programming and competition. For example, CBS argues that "[a]ny shift in viewers from a local broadcaster to a distant station providing duplicative programming only harms the ability of the local station to provide locally responsive programming."[4] Similarly, the National Association of Broadcasters (NAB) argues that the exclusivity rules are procompetitive, and foster investment in local programming and enhancing competition among broadcasters and between broadcasters and other programming providers, ultimately "increasing viewer and advertiser welfare."[5]

The record does not bear out the broadcasters' claims. As Time Warner notes, despite having territorial exclusivity, "many stations increasingly are curtailing local news operations and original reporting and consolidating operations with competing stations."[6] Similarly, the United States Telephone Association (USTA) cites a study that found that less than 30 seconds of a 30-minute newscast is devoted to coverage of local government, and a Commission study found that 32 percent of local broadcast stations "did not air a single minute of news programming."[7]

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[4] CBS, at 3.

[5] NAB, at 4.

[6] Time Warner Cable, at 13.

[7] USTA, at 7, citing Martin Kaplan, Ph.D., Matthew Hale, Ph.D., *Local TV News in the Los Angeles Media Market: Are Stations Serving the Public Interest?* http://www.learcenter.org/pdf/LANews2010.pdf); and an FCC Media Ownership Study #4, Office of Strategic Planning and Policy Analysis, *Local Information Programming and*

Similarly, broadcaster claims about the pro-competitive benefits of the non-duplication rules contradict the Commission's findings that "*greater* competition among broadcasters promotes localism" by providing "added incentives to respond to conditions in local markets."[8] Thus, as Time Warner Cable notes, if anything, broadcasters' exclusivity rights, and the rules used to enforce them, are fundamentally *in tension* with localism and competition.[9] Moreover, broadcaster arguments in favor of retaining the non-duplication rules in order to preserve localism and protect "consumer welfare" ring all the more hollow given their ever increasing willingness to hold consumers hostage to spiraling retransmission fee increases and station blackouts.

APPA agrees with commenters that the Commission's tentative conclusion in the *FNPRM* that it has authority to eliminate its network non-duplication rules is clearly correct, and that the Commission's goals of promoting competition and localism actually weigh against, rather than in favor of, the continued application of these protectionist rules. The Commission therefore can and should repeal its network non-duplication rules, and should do so promptly to avoid any further harms to consumers or competition.

C. In Order to Be Effective, Elimination of the Network Non-Duplication Rules Would Have to Be Coupled with a Prohibition on the Enforcement of Exclusivity Clauses in Network Agreements

Commenters also agree with APPA's view that, to be effective, the Commission's elimination of the non-duplication rules would have to be coupled with concrete actions to block

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the Structure of Television Markets, p. 21, May 20, 2011, https://apps.fcc.gov/edocs_public/attachmatch/DOC-308508A1.doc)

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entry into, and enforcement of, contracts between national networks and local affiliates that act to preclude the importation of distant duplicate signals. As APPA noted, elimination of the network non-duplication rule would be an ineffective step unless coupled with a prohibition on enforcement of contracts between national networks and local affiliates that act to preclude the importation of distant duplicate signals. Removing the non-duplication rules alone could exacerbate problems with the retransmission consent rules by allowing networks to contractually expand the geographic range of exclusivity beyond that allowed under the Commission's rules. As the American Cable Association (ACA) notes, broadcasters should not be able to use contract limitations to interfere with negotiations between MVPDs and distant stations.

> 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.[10]

APPA reiterates its belief that Sections 309(a) and 3259b)(3)(A) of the Communications Act provide the Commission broad authority, indeed a mandate, to take actions to ensure that broadcast licensees operate in a manner consistent with the "public interest, convenience, and necessity" and "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent." Given the harm to consumers and competition caused by such non-duplication contractual provisions, the Commission is well within its authority to prohibit the enforcement of such contractual clauses. In analogous circumstances, where the Commission has used its authority to prevent anticompetitive conduct, the Commission has also invoked its authority to prohibit enforcement of *existing* agreements. For example, when the

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[10] ACA, at 10.

Commission found multi-dwelling unit exclusivity agreements to be anticompetitive, it also barred the enforcement of existing agreements. In this context, the same considerations should apply, and the Commission should ban the continued enforcement of the underlying anticompetitive non-duplication and syndicated exclusivity agreements.[11]

Finally, as APPA previously noted, exclusivity agreements could be viewed as unreasonable restraints on trade under traditional antitrust and unfair competition principles. The Commission should find that such agreements are presumptively anticompetitive and force broadcasters to defend them either before the Commission or in court.

II. Alternate Modifications to the Non-Duplication Rules

While APPA believes that an outright repeal of the network non-duplication rules coupled with a prohibition on the enforcement of contractual exclusivity provisions is the most effective and efficient means to address the inequities and distorting effects that such practices have on retransmission consent, there are alternate measures that the Commission could take that would provide some relief.

A. At a Minimum, a Broadcaster Must Actually Carried by an MVPD in Order to Assert Network Non-Duplication Rights

As discussed above, the exclusivity rules do not foster localism, competition, or the consumer interest, and are an anathema to free-market forces that the broadcasters claim to embrace. If the Commission nevertheless decides to retain these rules, the Commission should, at a minimum, revise the rules so that they are not available to a television station that has not actually

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[11] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 20235 ¶ 55 (2007) ("[T]he law affords us wide authority to prohibit the enforcement of such clauses where, as here, the public interest so requires."), *aff'd sub nom Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

granted retransmission consent, but merely wants to cut off an MVPD's choice. Thus, a television station would only be permitted to assert network non-duplication protection if it is actually carried on the MVPD. If a local broadcaster and an MVPD are unable to reach an agreement, the MVPD should be free to enter into an agreement with a distant station. Again, to be effective, such a rule change would need to be accompanied by a prohibition on the enforceability of contractual exclusivity provisions between the network and its affiliates, if the "local" station is not being carried by the MVPD.

B. M s Should Be Permitted to Import Distant Station Signals if the Local Stations Do Not Deliver a Clean Signal

APPA reiterates that the Commission's rules should clarify that in order to assert network non-duplication rights, the local station must be able to deliver a consistent quality signal to the MVPD. As APPA reported, in many instances its members report an inability to obtain a quality signal from the "local" broadcast station following the digital broadcast transition. If an MVPD is unable to carry the station without frequent loss of signal, the MVPD should be allowed to import a duplicate distant station signal, particularly if the MVPD can receive a better signal from the "distant" station.

C. Be Permitted to Import Distant Station Signals Outside of a DMA That Are Within the Home State of the MVPD

Given the concern that broadcasters have expressed about ensuring that consumers obtain access to local programming, the Commission should take steps to allow a community to more easily obtain in-state television programming where its current DMA provides for carriage of closer out-of-state television programming. Specifically, APPA renews its recommendation that the Commission take this opportunity to modify the network non-duplication rules to permit MVPDs to carry distant in-state broadcast networks even if they duplicate some of the

programming of an out-of-state network affiliate. Such a change is necessary to ensure that communities can more easily obtain in-state news, sports, political coverage, and other programming that is of importance to their residents.

D. Network Non-Duplication Should Not Apply to a Distant Station That Places a Grade B Signal Contour Over the Cable Community

APPA joins the ACA in supporting a rule change that would exempt a distant broadcast station from the network non-duplication rules if such station places a Grade B contour signal over the cable community.[12] APPA supports such a rule, not as an alternative, but as a supplement to elimination of non-duplication rules. Local broadcast stations should have no reasonable expectation of exclusivity against adjacent-market stations receivable in the community over-the-air.

E. Network Non-Duplication Should Not Be Available Unless the Station Offers Rates on Terms and Conditions That Are the Same to All Providers in the Community

Finally, APPA renews its recommendation that, in addition to conditioning the ability to enforce non-duplication rules and contractual provisions on a requirement that the local station actually be carried on the MVPD, the Commission should also make the ability to enforce non-duplication contingent on the local station applying substantially similar fees, terms, and conditions on all MVPDs serving the same cable community. Small local operators can only remain competitive with the national, vertically, and horizontally integrated MSOs if they can be assured of paying per-person retransmission fees similar to those negotiated by the huge MSOs

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[12] A "Grade B contour" is a signal strength benchmark defined by the FCC. The signal contour indicates the approximate extent of signal coverage over average terrain in the absence of interference from other television stations.

with which they must compete. The terms of these contracts must be transparent in order to provide the required assurance that rates are substantially similar.

Again, if the non-duplication rules are truly intended to protect "local" broadcast interests, then there can be no basis for allowing stations to provide volume-based discounts to MSOs. The only market that should be at issue is the local community. If a station (or a network) seeks to negotiate different rates based on regional or national volume, they should not be able to assert non-duplication rights within those markets.

IV. CONCLUSION

APPA joins the majority of commenters in urging the Commission to take actions consistent with its proposals in the *FNPRM* in order to address some of the fundamental barriers that the non-duplication rules impose on the retransmission consent process from functioning in a manner that provides for greater parity in the negotiation process, including small to medium MVPDs.

Respectfully Submitted,

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