

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

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

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**REPLY COMMENTS OF AT&T**

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**I. Introduction and Summary**

AT&T appreciates the opportunity in this proceeding to focus on one aspect of today’s deeply flawed retransmission consent regime: whether the Commission should eliminate or modify its network non-duplication and syndicated exclusivity rules (collectively, “exclusivity rules”) so that exclusivity contracts between local broadcasters and networks and syndicators can become subject to judicial review.<sup>2</sup> Like many other commenters, however, AT&T believes that elimination or modification of the Commission’s exclusivity rules should constitute just one of many simultaneous actions taken by the Commission to fundamentally reform the retransmission consent regime in an omnibus fashion.<sup>3</sup> Only such a comprehensive overhaul will achieve some of the changes necessary to make the retransmission consent regime more compatible with the sweeping alterations in the dynamic video marketplace that have occurred since the current

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<sup>1</sup> AT&T Services, Inc., on behalf of the subsidiaries and affiliates of AT&T Inc. (collectively, “AT&T”), respectfully submits these reply comments in response to the Commission’s Further Notice of Proposed Rulemaking seeking information regarding the Commission’s network non-duplication and syndicated exclusivity rules. *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014) (“*Exclusivity Rules FNPRM*”).

<sup>2</sup> See, e.g., *Exclusivity Rules FNPRM* at ¶ 40. See also, Comments of AT&T, MB Docket No. 10-71 (filed June 26, 2014) (“AT&T Comments”). Unless otherwise indicated, all references herein to “Comments” refer to comments filed on June 26, 2014 in MB Docket No. 10-71.

<sup>3</sup> See, e.g., Comments of Cablevision Systems Corporation and Charter Communications, Inc. (“Cablevision/Charter Comments”) at 10-16; Comments of Verizon (“Verizon Comments”) at 9-11; Comments of Time Warner Cable Inc. (“TWC Comments”) at 17-22; Comments of The United States Telecom Association (“USTA Comments”) at 2-11, 15-16; Comments of DIRECTV, LLC and DISH Network L.L.C. (“DIRECTV/DISH Comments”) at 1-8.

regime was initially constructed – including the advent of meaningful competition in the multichannel video programming provider (“MVPD”) market.

For example, at the same time that the Commission repeals or narrows its exclusivity rules, the Commission should also (1) establish a formal process to provide for interim carriage by an MVPD of a local television station’s signal pending resolution of retransmission consent negotiations and/or disputes, and (2) strengthen its good faith negotiation requirements by, among other things, (i) prohibiting local broadcasters from demanding both cash compensation and carriage of affiliated non-broadcast network programming for retransmission consent,<sup>4</sup> and (ii) barring local broadcasters from terminating retransmission consent shortly in advance of significant and popular cultural or sporting events (such as the Super Bowl, Academy Awards, College Football Bowl Games, or March Madness).<sup>5</sup> The Commission should further consider other solutions raised in the record that would for all MVPDs remove the artificial advantages granted to television broadcasters under the current rules and strengthen broadcasters’ obligations under the existing “good faith standard”. The goal of these and other changes proposed by pro-reform commenters is to craft a fair, balanced, technology/platform-neutral process that ultimately benefits consumers by curtailing the excessive, government-goosed bargaining power presently wielded by local television broadcasters during retransmission consent negotiations that results in skyrocketing fees and exponentially more blackouts.

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<sup>4</sup> In other words, during retransmission consent negotiations, local television broadcasters should be precluded from both demanding cash compensation and bundling their local broadcast programming with that of affiliated regional or national non-broadcast network programming, such as (in random order) regional sports networks, USA, FX, ESPN channels, MSNBC, CNBC, CBS Sports, Fox Sports 1, Fox Sports 2, FX Movie Channel, Fox Deportes, Fox College Sports, FXX, Fox Soccer Plus, Disney XD, NatGeo, NatGeo Wild, Fusion, Chiller, Cloo, and Mun2. Accordingly, if a local television station elects to demand cash compensation for retransmission consent, it should be prohibited from tying any other programming assets (such as cable programming channels) into the negotiations for retransmission consent.

<sup>5</sup> See, e.g., Comments of AT&T, MB Docket No. 10-71, at 2 (filed May 27, 2011); Reply Comments of AT&T, MB Docket No. 10-71, at 2 (filed June 27, 2011).

Regarding the exclusivity rules in particular, the Commission has authority to repeal or narrow them. Moreover, doing so would advantage consumers by creating the potential for judicial leveling of the retransmission consent playing field, without harming localism. And a judicial forum for evaluation of exclusivity contracts between local television broadcasters and networks and syndicators would work better than the present one-sided administrative approach. Accordingly, the Commission should eliminate, or at a minimum significantly modify, its exclusivity rules, for the reasons explained below.

## **II. Discussion**

### **A. The Commission Has Authority to Eliminate or Modify its Own Exclusivity Rules.**

AT&T reiterates its agreement with the Commission's tentative conclusion that the Commission has the authority to repeal or modify its own exclusivity rules regarding all applicable MVPDs.<sup>6</sup> Broadcaster commenters contest this conclusion primarily by relying on several statements regarding the Commission's exclusivity rules in the legislative history of various video-related statutes, and on statutory provisions essentially directing the Commission to apply whatever cable exclusivity rules exist to direct broadcast satellite ("DBS") service and open video systems ("OVS").<sup>7</sup> The Commission anticipated and correctly rejected those contentions in the *Exclusivity Rules FNPRM*.<sup>8</sup>

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<sup>6</sup> *Exclusivity Rules FNPRM* at ¶¶ 55-57.

<sup>7</sup> See, e.g., Comments of The National Association of Broadcasters ("NAB Comments") at 6-14; Comments of LIN Television Corporation d/b/a LIN Media ("LIN Comments") at 18-32.

<sup>8</sup> *Exclusivity Rules FNPRM* at ¶¶ 55-57.

Specifically, when the Commission first adopted certain exclusivity rules in 1965, it provided clear notice that it might modify or rescind the rules in light of future market developments. Then the Commission actually did change the rules in 1972, 1980, and 1988. Notwithstanding these plain declarations and actions, Congress has never enacted a statute (i) requiring the Commission to retain exclusivity rules or (ii) containing exclusivity rules of its own. At most, Congress has only statutorily directed the Commission to maintain exclusivity parity between cable and DBS (and OVS).<sup>9</sup> Congress has also never enacted a statute that limits the Commission’s general rulemaking power regarding the exclusivity rules; and in fact, Congress *has* adopted laws in the inextricably intertwined area of retransmission consent that afford the Commission wide latitude to implement retransmission consent properly.<sup>10</sup> If Congress intended for the exclusivity rules to become permanent, it could have adopted them as statutory requirements, which it has never done. As a result, the Commission has legal authority to repeal or narrow the exclusivity rules so that exclusivity contracts between local broadcasters and networks and syndicators can receive judicial scrutiny.<sup>11</sup>

**B. Eliminating or Modifying the Exclusivity Rules Would Promote Video Consumer Welfare by Allowing the Possibility of Judicial Restoration of Balance in the Retransmission Consent Negotiation Process.**

As AT&T and other non-broadcast commenters have explained, by reinforcing a contractual web that prevents MVPDs from turning to alternative sources of must-have

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<sup>9</sup> In that regard, AT&T notes that DISH and DIRECTV support repeal or narrowing of the exclusivity rules, arguing that the Commission can and should simultaneously exercise its statutory authority to adopt rules allowing the Commission to accomplish such a repeal or narrowing of the exclusivity rules in a technology-neutral way (i.e., in a way that maintains parity between technology platforms, such as cable and DBS). DIRECTV/DISH Comments.

<sup>10</sup> *See, e.g.*, Comments of AT&T, MB Docket No. 10-71 (filed May 27, 2011) (stating that sections 325(b)(3), 309(a), 303(r), and 4(i) of the Communications Act authorize the Commission to effectuate changes to retransmission consent procedures, including eliminating the exclusivity rules).

<sup>11</sup> *See, e.g.*, Comments of CenturyLink (“CenturyLink Comments”) at 6-10, 19-22; TWC Comments at 15-17; *cf.*, Comments of The American Public Power Association (“APPA Comments”) at 3-8.

programming when faced with unreasonable retransmission consent demands by local television broadcasters, the Commission's exclusivity rules interfere with market (dis)incentives, ensure the absence of competition-based backstops, and thereby substantially and artificially skew the parties' respective bargaining powers in favor of the local television broadcasters.<sup>12</sup> In turn, the exclusivity rules, when combined with the advent of meaningful MVPD competition in the mid-2000s, has facilitated disastrous consequences for consumers and competition in the video market: the number of blackouts has risen sharply, and retransmission consent fees have exploded – at 119 times the rate of inflation<sup>13</sup> – with no end in sight and the projected slope for future fees expected to remain steep.<sup>14</sup>

Many broadcast commenters essentially ignore those inconvenient facts.<sup>15</sup> A few acknowledge them, and a couple even link them temporally to the beginning of MVPD competition.<sup>16</sup> Yet broadcast commenters contend that current retransmission consent fees do not stem from newly superior bargaining power, but merely reflect what Congress intended all along (despite the decades-long delay), and stand at reasonable levels because they help local broadcasters and national broadcast networks (with whom local broadcasters apparently share retransmission consent fees) pay for the rising costs of local, sports, special-event, and other

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<sup>12</sup> *See, e.g.*, AT&T Comments at 3-6; Joint Comments of Mediacom Communications Corporation, Cequel Communications, LLC d/b/a/ Suddenlink Communications and Bright House Networks, LLC (“Mediacom/Suddenlink/ BHN Comments”) at 2-14; Cablevision/Charter Comments at 1-8; CenturyLink Comments at 3-6, 10-18; Comments of ITTA (“ITTA Comments”); Verizon Comments at 2-8; TWC Comments at 4-14; DISH/DIRECTV Comments at 1-8; USTA Comments at 2-8; APPA Comments at 9-14.

<sup>13</sup> TWC Comments at 8.

<sup>14</sup> *See, e.g.*, Verizon Comments at 4; TWC Comments at 8.

<sup>15</sup> *See, e.g.*, NAB Comments.

<sup>16</sup> *See, e.g.*, LIN Comments at 13-15; Comments of Broadcasters for the Preservation of Free, Local Television (“Free TV Comments”) at 22-24; Joint Comments of Bonten Media Group, LLC, Dispatch Broadcast Group, Gannett Co., Inc., Post-Newsweek Stations, Inc., Raycom Media, Inc., and Tribute Broadcasting, LLC (“Joint Broadcasters Comments”) at 13.

programming.<sup>17</sup> Thus, in the broadcast commenters' view, the exclusivity contracts between local broadcasters and networks and syndicators should remain off-limits to judicial fora.

Those contentions are absurd. First, as described by AT&T and other non-broadcast commenters, the Commission's purpose in adopting the exclusivity rules was to protect broadcasters from the perceived threat of monopoly power by cable operators; it was not to create a new revenue stream for broadcasters untethered to that threat. Now that MVPD competition has developed to an extent sufficient to allow local broadcasters to "whipsaw" MVPDs into paying astonishingly high retransmission consent fees, the rationale for the exclusivity rules no longer exists, i.e., broadcasters no longer need "protection" from MVPDs, certainly not in the form of the exclusivity rules. At a minimum, the exclusivity contracts between local broadcasters and networks and syndicators no longer need shielding from judicial review.

Second, the record evidence that local programming has increased and improved at the same time as retransmission consent fees have risen is limited and contradictory.<sup>18</sup> In any event, the broadcast commenters do not argue that any increase or improvement in local programming is commensurate with the staggering and supersonic increases in retransmission consent fees.

Third, even assuming, *arguendo*, that local broadcasters use retransmission consent fees primarily to help pay for various kinds of programming -- rather than to pad their bottom lines -- the Commission still should repeal or narrow the exclusivity rules. Again, as AT&T and other non-broadcast commenters have explained, in the context of today's MVPD market, the exclusivity rules have so skewed retransmission consent negotiating power in favor of local

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<sup>17</sup> See, e.g., Joint Broadcasters Comments at 6-10.

<sup>18</sup> E.g., compare TWC Comments at 13-14, with Joint Broadcasters Comments at 4.

broadcasters that fees and blackouts have increased monumentally, and way out of proportion to what one might expect based on objective metrics, such as the CPI.<sup>19</sup> These increases substantially harm consumers and MVPD competition. Regarding consumers, there is upward pressure on retail MVPD rates; and confusion, disruption, and inconvenience result when blackouts are threatened or occur. Regarding MVPD competition, most if not all operators may find it difficult to manage such large escalations in their fixed costs. And as the Commission has acknowledged, when MVPD competition suffers, broadband competition suffers, too, given that video growth plays a substantial role in facilitating broadband growth.

Indeed, in the very same release containing the *Exclusivity Rules NPRM*, the Commission rejected the argument that preserving local broadcaster revenues is a sufficient public good as to outweigh the consumer and competition harms arising from “supra-competitive retransmission consent fees”.<sup>20</sup> The Commission stated: “We reject the suggestion that the public interest is served merely because an arrangement generally increases the funds available to broadcasters, if that arrangement otherwise is anticompetitive and potentially harmful to consumers.”<sup>21</sup> The record plainly indicates that the contractual arrangements enforced by the Commission’s exclusivity rules are, in today’s video market, certainly anticompetitive and harmful to

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<sup>19</sup> One broadcast commenter argues that growing retransmission consent fees cannot be a cause of upward pressure on MVPD retail rates, because those rates were rising before retransmission consent fees began their stunning ascent. Comments of FBC Television Affiliates Association (“Fox Affiliates Comments”) at 6-7. That same commenter unwittingly refutes its own argument by observing that program content fees outstrip retransmission consent fees, *id.* at 7, which actually helps explain why retail rates had to increase even prior to the meteoric rise of retransmission consent fees. Moreover, just because MVPDs face multiple input rate hikes does not mean that the Commission should refrain from action that could dampen one of them.

<sup>20</sup> *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 at ¶ 17 (2014). *See id.* at ¶¶ 13-17.

<sup>21</sup> *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 at ¶ 17 (2014).

consumers. Thus, at a minimum, shielding the exclusivity contracts between local broadcasters and networks and syndicators from judicial examination is no longer warranted.

Broadcast commenters further defend the Commission’s exclusivity rules on the ground that they remain necessary to help protect them from the bargaining power of MVPDs determined to import distant signals. Such MVPDs allegedly are typically much larger than local television broadcasters, compete more strongly than ever, and have greater ability than local broadcasters to withstand blackouts.<sup>22</sup> As purported proof, broadcast commenters assert that the largest MVPDs are involved in most of the blackouts, and a blackout deprives an MVPD of only one channel, whereas it deprives a local television broadcaster of a substantial portion of its audience.<sup>23</sup>

These contentions, too, are absurd. Bargaining power may depend to some degree on the size of the parties, but in this context where the Commission’s rules effectively provide broadcasters with a local monopoly, it depends far more on the value of what the respective parties control. Here, broadcast commenters essentially acknowledge that the network channels they control contain “must-have” programming.<sup>24</sup> Thus, despite having what broadcaster commenters describe as “hundreds” of channels, MVPDs will suffer competitively without access to all of the Big Four network channels and perhaps other significant broadcast channels. Moreover, when blackouts occur, MVPDs often lose not just one broadcast network channel, but also affiliated non-broadcast channels bundled with that channel, some of which are themselves highly valuable to consumers (such as ESPN channels, regional sports networks, USA, FX,

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<sup>22</sup> *See, e.g.*, LIN Comments at 3-18.

<sup>23</sup> *See, e.g.*, LIN Comments at 10.

<sup>24</sup> *See, e.g.*, Free TV Comments at 16 n.34 (stating that “nearly all of the most watched programs on television are on broadcast networks”); Comments of NBCUniversal Media, LLC (“NBCU Comments”) at 1 (stating that “prime-time programming on the major broadcast networks has been – and remains – the most popular consumer choice”).

CNBC, CBS Sports, and Fox Sports 1). In addition, during blackouts, MVPDs lose customers to other MVPDs, often permanently, whereas when someone switches MVPDs in those circumstances, the local television broadcaster regains that customer; and of course, even if a person sticks with the blacked-out MVPD, she still has potential access over-the-air to the broadcaster at issue and thus is not necessarily a lost customer to that broadcaster.

In sum, the exclusivity rules play a substantially detrimental role in the retransmission consent negotiation process, which damages consumer welfare and harms competition. Thus, the time is now for meaningful retransmission consent reform, including the repeal or narrowing of the exclusivity rules so that judicial review can potentially re-balance the retransmission consent negotiation process via examination of the exclusivity contracts between local broadcasters and networks and syndicators.

### **C. Eliminating or Narrowing the Exclusivity Rules Would Not Harm Localism.**

Broadcaster commenters argue that eliminating or narrowing the exclusivity rules would harm localism, primarily because production of local programming purportedly depends heavily on local advertising revenues, and any audience fragmentation caused by importation of distant signals – or even the *potential* for such fragmentation in the event the Commission allows exclusivity issues to migrate to the judiciary -- would allegedly reduce advertising revenue precipitously.<sup>25</sup> That argument lacks merit.

First, as described above and by other non-broadcast commenters, the Commission has held that preservation of broadcaster revenue cannot justify continuation of a practice/rule/policy

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<sup>25</sup> See, e.g., NAB Comments at 15-24.

that otherwise harms consumers and competition.<sup>26</sup> Second, AT&T and other non-broadcast commenters have observed that several factors would continue to strongly discourage MVPDs from importing a distant station's signal unless they were faced with a blackout, and even in that event would continue to strongly encourage MVPDs to return to the local signal as quickly as possible: Most powerfully, many customers will still prefer access to local content (e.g., local news/sports/weather coverage). In addition, absent copyright reform, importing distant signals would cost more due to higher copyright license fees; and MVPDs would still face the risk of attempting to successfully negotiate reasonable retransmission consent fees with the distant provider. Furthermore, an MVPD would have to expend time, effort, and resources to make the necessary operational arrangements to receive a distant signal.

Thus, there is no localism concern that justifies precluding from judicial evaluation exclusivity contracts between local broadcasters and networks and syndicators. Indeed, by raising the possibility of distant signal importation, repealing or narrowing the exclusivity rules could actually improve localism by encouraging local broadcasters to distinguish their product by enhancing its local attributes.

**D. Eliminating the Exclusivity Rules Would Allow Courts – With Unique Contract Expertise – to Evaluate the Meaning and Lawfulness of Exclusive Contracts Between Local Broadcasters and Networks and Syndicators.**

Eliminating the exclusivity rules would not, of course, vitiate the underlying exclusive contracts between local broadcasters and networks and syndicators. Instead, eliminating the exclusivity rules would simply shift the contract enforcement venue from the Commission to the

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<sup>26</sup> See, e.g., *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 at ¶ 17 (2014). See *id.* at ¶¶ 13-17; TWC Comments at 12-13.

courts.<sup>27</sup> Such a shift would be a significant step in the right direction. As AT&T has previously explained, courts have profound experience and expertise regarding evaluating contracts, in general, and territorial exclusivity contracts, in particular. The sooner such experience and expertise can be brought to bear here, the better.

Broadcasters complain that a judicial remedy would be too slow, expensive, complicated, prone to differing results, and perhaps not truly available at all.<sup>28</sup> Those complaints are misguided.

First of all, no system could be as “efficient” as the current process, because the current process is so one-sided in favor of the broadcasters that hardly anyone has bothered to bring a complaint for decades.<sup>29</sup> As a broadcast commenter observes, the current enforcement mechanism “eliminate[s] all doubt about whether contractual exclusivity will be enforced.”<sup>30</sup> Moreover, to the extent that eliminating or narrowing the exclusivity rules could potentially result in a more costly and less predictable dispute resolution process, the need to invoke the process at all might be minimal, because parties on both sides could be deterred from taking unduly aggressive bargaining positions and impasses could thus become rarer. In any event, the key substantive, procedural, and remedial concerns raised by broadcaster commenters -- such as third party beneficiaries, injunctive relief, and fee shifting -- could be readily addressed via inclusion of appropriate contractual language (to the extent that existing contracts do not already contain sufficient language). In addition, courts have ample authority to issue temporary

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<sup>27</sup> *Exclusivity Rules FNPRM* at ¶¶ 66-68.

<sup>28</sup> *See, e.g.*, NAB Comments at 59-69; LIN Comments at 38-40; NBCU Comments at 5-6; Comments of The Walt Disney Company (“Disney Comments”) at 7-11.

<sup>29</sup> *See, e.g.*, *Exclusivity Rules FNPRM* at n.249.

<sup>30</sup> Fox Affiliates Comments at 9.

restraining orders and preliminary injunctions where appropriate. And what price is too much to pay for fairness? Indeed, given that the repeal or narrowing of the exclusivity rules would not itself require any particular substantive outcome, but would merely make the contracts at issue subject to judicial evaluation, one wonders if the broadcasters are protesting too much (e.g., 132 pages from NAB alone).<sup>31</sup>

### **III. Conclusion**

For the reasons explained above, the Commission should pursue fundamental retransmission consent reform, including the repeal of its rules regarding network non-duplication and syndicated exclusivity. At a minimum, the Commission should limit the application of its rules regarding network non-duplication and syndicated exclusivity to situations where the relevant television broadcaster and MVPD have reached a retransmission consent agreement.

The Commission also should (1) establish a formal process to provide for interim carriage by an MVPD of a local television station's signal pending resolution of retransmission consent negotiations and/or disputes, and (2) strengthen its good faith negotiation requirements by, among other things, (i) prohibiting local broadcasters from demanding both cash compensation and carriage of affiliated non-broadcast network programming for retransmission consent, and (ii) barring local broadcasters from terminating retransmission consent shortly in advance of significant and popular cultural or sporting events (such as the Super Bowl, Academy Awards, College Football Bowl Games, or March Madness). The Commission should further consider other solutions raised in the record that would for all MVPDs remove the artificial

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<sup>31</sup> See, e.g., NAB Comments.

advantages granted to television broadcasters under the current rules and strengthen  
broadcasters' obligations under the existing "good faith standard".

Respectfully submitted,

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