

**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)
)

To: The Commission

**REPLY COMMENTS OF THE
ABC TELEVISION AFFILIATES ASSOCIATION**

The ABC Television Affiliates Association¹ (“ABC Affiliates”) submits these comments in reply to the Further Notice of Proposed Rulemaking (the “*Notice*”) seeking comment on whether the Commission’s network non-duplication and syndicated exclusivity rules (collectively, the “exclusivity rules” or “program exclusivity rules”) should be modified or eliminated.²

**I.
Introduction**

Comments filed by MVPDs in response to the *Notice* offer no rational justification for elimination or modification of the Commission’s program exclusivity rules. In contrast, the record contains compelling factual, legal, and policy reasons to retain the exclusivity rules in their current form. Comments filed by various pay TV distributors reflect a self-serving effort to exploit the proceeding to secure an unfair competitive advantage against *free*, over-the-air

¹ The ABC Television Affiliates Association is a non-profit trade association whose members consist of some 164 local television broadcast stations throughout the country affiliated with the ABC Television Network.

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

broadcast service. Pay TV distributors, predictably, echo their oft repeated and misleading, conclusionary argument that so-called “blackouts” and growing pay TV subscription fees are the direct result of the Commission’s exclusivity and retransmission consent rules. The facts, however, show otherwise. The term “blackout,” itself, is a misnomer. Television broadcast programming (unlike other subscription-based programming) is *always available for free* over-the-air. Even if unavailable from one cable system, local television broadcast signals are universally available *free* over-the-air and also available in all 210 markets from at least one competing satellite carrier.³ In 98.64% of all TV households local television broadcast signals are also available from a *second* satellite carrier, and, in a growing number of markets, local broadcast signals are also available from a telephone MVPD.⁴ In short, each local television broadcast station—even during a short, interim disruption of service from a retransmission consent negotiation impasse—is always accessible and always available from at least three—in some cases, four—alternative sources. Additionally, retransmission consent fees attributable to broadcast stations are not responsible for higher pay TV subscription fees that are charged to consumers by pay TV distributors.⁵ Retransmission fees paid by MVPDs for broadcast signals are but a fraction of the fees MVPDs pay for other channels of programming and are

³ Press Release, DISH Network to Become First Pay-TV Provider to Offer Local Broadcast Channels in All 210 Local Television Markets in the United States (May 27, 2010), *available at* <http://about.dish.com/press-release/programming/dish-network-become-first-pay-tv-provider-offer-local-broadcast-channels-a> (last visited July 24, 2014).

⁴ *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496 (2013), ¶ 36. According to the Commission, in 2011, approximately 98.64% of homes in the U.S. had access to at least three MVPDs. *See id.*

⁵ *See* Supplemental Comments of the National Association of Broadcasters at 3-5 (and sources cited therein).

substantially less on a per-subscriber basis taking viewership and ratings into account.⁶ In 2013, MVPDs paid \$32.1 billion to basic cable/satellite networks for programming, but only one-tenth of that amount (\$3.3 billion) was paid in retransmission fees to local television stations.⁷

Pay TV commenters urge the Commission to “reform” the retransmission consent regime by enactment of sweeping proposals that are clearly beyond the scope of this proceeding. Numerous MVPD commenters argue for new standards applicable to the good faith negotiation rule and intrusive regulation of the terms and provisions of private contracts entered into at arm’s length by program providers and broadcast stations. Most—if not all—of these so-called “reforms” have been previously considered and rejected by the Commission. Even so, they are beyond the scope of the *Notice*, and if addressed by the Commission at all, they must, under the Administrative Procedure Act (“APA”), be subject to a separately issued Notice of Proposed Rulemaking and opportunity for comment.

The *Notice* requests comment on the network non-duplication and syndicated exclusivity rules; it does not open the docket for changes sought by MVPDs in the good faith negotiation rule and other regulations. For the Commission to revise its retransmission consent rules based on these MVPD proposals would be a violation of the notice and comment requirements of the APA.⁸ As the D.C. Circuit has stated:

⁶ See Robin Flynn, *Putting Retrans Fees in Perspective Following FCC’s Recent Retrans Ruling*, SNL Kagan (Apr. 14, 2014); Diana Marszalek, *Ryvicker: Stations Losing \$10.4B in Retrans*, TVNewsCheck (Sept. 18, 2013).

⁷ See Opinion, *The Higher Math of Retrans*, TV NewsCheck, available at <http://www.tvnewscheck.com/assets/files/ExO-Winter2014-LoRes-pg6.pdf> (last visited July 16, 2014) (citing a 2013 Kagan Study).

⁸ See 5 U.S.C. § 553(b) and (c).

It is an elementary principle of rulemaking that a final rule need not match the rule proposed, indeed must not if the record demands a change. The reason is plain enough. Agencies should be free to adjust or abandon their proposals in light of public comments or internal agency reconsideration without having to start another round of rulemaking. *The necessary predicate, however, is that the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed.* The adequacy of the notice depends, according to our precedent, on whether the final rule is a “logical outgrowth” of the proposed rule. . . . Something is not a logical outgrowth of nothing.⁹

Here, the Commission has proposed the elimination or modification of the exclusivity rules. The *Notice* contains absolutely no suggestion of the specific changes to the good faith negotiation rule and other rules governing retransmission consent advocated by the MVPDs. The MVPDs' proposals are, therefore, *not* a logical outgrowth of the rules proposed in the *Notice* and, therefore, cannot be adopted now consistent with the requirements of the APA.

II. Discussion

A. The Commission Is Without Authority To Adopt MVPDs' Retransmission Consent “Reforms”

A common theme among pay TV commenters is a call for the Commission to make wholesale changes in its retransmission consent rules—changes not specifically identified by the Commission in the *Notice*.¹⁰ For example, the American Cable Association (“ACA”) and

⁹ *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (internal citations omitted) (reversing and remanding lower court decision with instructions to set aside agency action where the agency failed to observe the requirements of Section 553 of the APA); *see also Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003) (vacating FCC rule and stating, “[s]uffice it to say, there can be no ‘logical outgrowth’ of a proposal that the agency has not properly noticed”); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 86 (U.S. Dist. Ct. D.C. 2007) (“The logical-outgrowth doctrine typically applies where an agency publishes a notice of proposed rulemaking (‘NPRM’), receives comments, and issues a final rule whose contours differ substantially from those described in the NPRM.”).

¹⁰ Presumably, the MVPDs making these arguments took the Commission's relatively limited request for comment on other modifications to consider if the rules are retained, *see Notice*, ¶ 73, as an open invitation to ignore the targeted request for comment on the program

satellite carriers DISH and DIRECTV ask the Commission to declare certain bargained-for exclusivity rights obtained in arm's-length program contractual negotiations to be *per se* violations of the good faith negotiation rule.¹¹ Verizon argues that the Commission should “strengthen” the good faith negotiation rules, for example, by requiring parties to engage in retransmission consent negotiations at least 60 or 90 days before expiration of a current agreement and adoption of a “mandatory standstill, interim carriage and cooling off period” for a “reasonable” period of time after a retransmission agreement expires.¹² Similarly, Cablevision and Charter argue for broad retransmission consent “reforms,” such as (a) “clarifying” that the obligation to negotiate in good faith requires broadcasters to offer a reasonable standalone rate for broadcast signals, not tied to or discounted for carriage of any other programming or non-cash compensation, (b) disclosure of retransmission consent fees paid to other MVPDs, and (c) mandatory non-discriminatory rates applicable to MVPDs in the same local market.¹³ DISH and DIRECTV ask the Commission to adopt a new methodology for predicting unserved households.¹⁴ CenturyLink goes so far as to argue that Congress intended the exclusivity rules to apply only to stations electing “must carry,”¹⁵ conspicuously ignoring that the Senate Committee

exclusivity rules and to flood the docket with unrelated requests for changes to the retransmission consent regime.

¹¹ See Comments of American Cable Association (hereinafter, “ACA Comments”) at 14-16; Comments of DIRECTV, LLC and DISH Network L.L.C. (hereinafter, “Satellite Comments”) at 4, 6-7.

¹² Comments of Verizon at 10-11.

¹³ See Comments of Cablevision Systems Corporation and Charter Communications, Inc. (hereinafter, “Cablevision and Charter Comments”) at 10-18.

¹⁴ See Satellite Comments at 5-6.

¹⁵ See Comments of CenturyLink at 9.

on Commerce, Science, and Transportation expressly stated in its Report accompanying enactment of Section 325's retransmission consent requirement that Congress, in adopting the retransmission requirement, "has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules" and that "amendments or deletions of these of these rules which would allow distant stations" to be substituted for local stations carrying the same programs would be "inconsistent" with Section 325 of the Cable Act of 1992.¹⁶

Some MVPDs argue that the exclusivity rules should not be enforceable if an MVPD is not retransmitting a station's signal. But the Commission has repeatedly rejected this argument, noting that "it is not necessary that the broadcast station or rights holder asserting protection actually be carried on the cable system in question, nor is it required that the rights holder asserting its rights actually display the programming for which it asserts protection."¹⁷

A common characteristic of various MVPD proposals is that each seeks to tip the balance in retransmission consent negotiations to enhance the retransmission consent negotiating leverage for MVPDs. These proposals repeatedly ignore the fact Congress has directed the Commission not to make any change in these rules that would disrupt the carefully constructed competitive balance the exclusivity rules provide between MVPDs and local broadcast stations. As noted in our Comments, the Commission's exclusivity rules were enacted to correct the competitive imbalance created by cable's compulsory copyright license. And Congress

¹⁶ S. REP. NO. 102-92 (1991), 38 (emphasis added).

¹⁷ *Implementation of the Satellite Home Viewer Improvement Act of 1999*, Report and Order, 15 FCC Rcd 21688 (2000), ¶ 19; see also *2005 Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (2005), ¶ 17.

expressly incorporated exclusivity rules for satellite carriage, comparable to those enacted by the Commission for cable television, when it, in 1988, extended the substantial benefits of the compulsory copyright license to satellite carriers.¹⁸

ABC Affiliates and other commenters have demonstrated—and MVPDs have uniformly failed to show otherwise—that the program exclusivity rules are an integral part of the statutory and regulatory structure governing retransmission by MVPDs of broadcast signals that was carefully developed by Congress and the Commission over decades.¹⁹ Any action by the Commission to repeal or modify its program exclusivity rules would be patently contrary to congressional intent.

Finally, even if the Commission did have authority, which it does not, to adopt the sweeping proposals put forward by pay TV distributors, there is no evidence in the record to support a need for such change. In fact, David Cohen, Executive Vice President of Comcast, the nation’s largest MVPD, in Congressional testimony just this month commented on the healthy state of video competition and noted, in particular, that the Commission’s retransmission consent rules are working to the benefit of consumers. He stated:

The vibrancy of today’s video marketplace . . . refutes any notion that there is a general “market failure” warranting government intervention in the wholesale programming business or further regulation of contractual arrangements between MVPDs and programmers. . . .

We enjoy positive relationships on all sides in retransmission consent negotiations. We have not lost the signal of any major local broadcaster in a dispute over retransmission consent fees.

¹⁸ See ABC Affiliates Comments at 10-12.

¹⁹ See ABC Affiliates Comments at 4-14; *see also* Comments of National Association of Broadcasters at 6-13 and Appendix A; Comments of LIN Television Corporation d/b/a LIN Media at 18-32; Comments of CBS Television Affiliates at 9-10; Comments of NBC Television Affiliates at 7-9; Comments of the Walt Disney Company at 2-7.

Consumers today have access to an unprecedented number of video programming choices, and broadcast television continues to be a significant source of programming for tens of millions of households. Broadcasters and MVPDs have, in the vast majority of cases, succeeded in negotiating retransmission consent agreements that allow for the carriage of broadcast programming to MVPD households across the country. We believe that most parties involved in such negotiations will continue to act responsibly and bargain in good faith and in a manner that reflects consumers' best interests. And when parties fail to do so, consumers can switch – and have switched – to other providers. The marketplace thus remains the best forum where any disputes can and should be resolved, without further regulatory intervention.²⁰

Thus, a senior executive of the nation's number one pay TV provider told Congress fewer than 10 days ago that there is no need for retransmission consent "reform." In addition, NBCUniversal, which is owned by Comcast, filed comments in this proceeding in support of retention of the Commission's program exclusivity rules.²¹ NBCUniversal wrote:

Opponents of the Rule claim that it provides broadcasters with artificial rights that are antithetical to free marketplace negotiations between television stations and MVPDs and tip the scale in favor of the stations. In fact, the Rule serves as a counterweight to some of the potentially adverse effects on broadcasters of the compulsory copyright system, which allows MVPDs to import duplicating network and syndicated programming under the distant signal copyright license.²²

In short, there is no factual evidence of record to justify adoption of any of the extreme, self-serving, anti-competitive proposals advocated by various MVPDs.

²⁰ Written Statement of David L. Cohen, Executive Vice President, Comcast Corporation, to the U.S. Senate Committee on Commerce, Science, & Transportation Hearing on "At A Tipping Point: Consumer Choice, Consolidation and the Future Video Marketplace, (July 17, 2014), *available at* <http://corporate.comcast.com/images/written-statement-july-16-2014.pdf> (last visited July 17, 2014).

²¹ *See* Comments of NBCUniversal Media, LLC.

²² Comments of NBCUniversal Media, LLC at 4.

B. The Commission Lacks Authority To Override Statutory Retransmission Negotiation Requirements

Several pay TV commenters urge the Commission to interfere in the private contractual relationships between local television stations and their affiliated networks and between local stations and MVPDs, by prohibiting program exclusivity outright or proscribing the exercise of program exclusivity rights at certain times. For example, as discussed above, the ACA urges the Commission to prohibit television stations and networks from restricting, as a negotiated term of an affiliation agreement, network-affiliated stations from granting retransmission consent outside their DMAs and to prohibit local stations and MVPDs in retransmission consent agreements from agreeing that an MVPD will not retransmit an out-of-market station.²³ Time Warner Cable and others ask the Commission to prohibit local stations from exercising their bargained-for exclusivity rights during a retransmission consent negotiation impasse.²⁴ Similarly, some MVPDs ask that the exclusivity rules only apply when a local station has consented to carriage.²⁵ Other MVPDs argue the Commission should prohibit outright any program exclusivity arrangement between networks and local stations.²⁶

Aside from the lack of merit in these arguments, the Commission is without the authority to interfere in these private contractual relationships or the exercise of privately negotiated rights

²³ See, e.g., ACA Comments at 13; see also Satellite Comments at 7; Cablevision and Charter Comments at 5 (banning contracts that prohibit importation of out-of-market signals); Comments of NTCA – Rural Broadband Association at 6 (prohibiting affiliation agreements that preclude a local station from allowing its signal to be imported by a distant cable operator).

²⁴ See Comments of Time Warner Cable Inc. at 16.

²⁵ See ACA Comments at 20; Comments of AT&T at 6; *contra Implementation of the Satellite Home Viewer Improvement Act of 1999*, Report and Order, 15 FCC Rcd 21688 (2000), ¶ 19.

²⁶ See Comments of CenturyLink at 18; Cablevision and Charter Comments at 8-9.

in the manner advocated by MVPDs. First, as discussed above, these proposals have not been raised in the *Notice* and are, therefore, beyond the scope of this phase of the proceeding. Adoption of these MVPD proposed “reforms” would contravene the notice-and-comment rulemaking requirements of the APA.

Second, the Commission lacks authority to materially alter the retransmission consent rules. Having relied on the Commission’s exclusivity rules in enacting various regulatory and copyright statutes, it is within the province of Congress, not the Commission, to modify or eliminate these rules.²⁷ Given Congress’ express acknowledgement that exclusivity is a key component of the statutory compulsory license and statutory retransmission consent regime, Commission action to eliminate or restrict exercise of the exclusivity rules would be an affront to the express will of Congress.

Third, the Commission has recognized Congress did not intend for the FCC to play an “intrusive role” in the retransmission consent process.²⁸ Rather, “when Congress intends the Commission to directly insert itself in the marketplace for video programming, it says so with specificity.”²⁹ Congress clearly has *not* directed the Commission either to adopt rules that ignore program exclusivity acquired by contract or that limit the ability of a local station to protect or exercise its exclusivity by agreeing, as part of the give-and-take of negotiation with an MVPD, to limit the importation of distant signals.

²⁷ See ABC Affiliates Comments at 4-12. The cases cited by Cablevision and Charter involve distinguishable contracts and do not involve Congressional reliance on the existence of such contracts as is this case here. See Cablevision and Charter Comments at n.24.

²⁸ See *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445 (2000) (hereinafter, “*Good Faith Negotiation Order*”), ¶¶ 13-14.

²⁹ *Good Faith Negotiation Order*, ¶ 23.

As noted earlier, the Commission’s program exclusivity rules were an integral part of the “grand consensus” when the cable compulsory license was enacted by Congress in 1976. These rules were in full force and effect when Congress adopted the Cable Act in 1992, and when Congress enacted comparable exclusivity rules to satellite carriers in extending the compulsory copyright license to satellite carriers in 1988.

Plainly, Congress did not intend for the FCC to skew its rules to competitively disadvantage broadcast stations in retransmission consent negotiations. In 2000, acting pursuant to the congressional mandate in the Satellite Home Viewer Improvement Act of 1999,³⁰ the Commission adopted good faith negotiation rules applicable to all MVPDs.³¹ The Commission recognized Congress intended the gravamen of the good faith negotiation mandate to be a direction “that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.”³² The two-part good-faith standards ultimately adopted by the Commission focus on these principles—not on setting the substantive terms and conditions of retransmission consent and certainly not on program exclusivity.³³ Specifically, the enumerated standards adopted by the Commission constituting violations of the good faith negotiation requirement are “intended to identify those situations in which a broadcaster did not enter into negotiations with the sincere intent of trying to reach an agreement

³⁰ See Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113 (1999).

³¹ See *Good Faith Negotiation Order*, ¶ 12. In doing so, the Commission determined that it should rely on the analogous provisions of the Taft-Hartley Act for guidance in setting good faith negotiation standards. See *id.*, ¶ 22.

³² See *Good Faith Negotiation Order*, ¶ 24.

³³ See *Good Faith Negotiation Order*, ¶ 39.

acceptable to both parties.”³⁴ Thus, Commission authority to adopt rules to implement the statutory good faith negotiation mandate does not include authority to rewrite or prohibit private contractual exclusivity arrangements.

Significantly, in establishing the regulatory framework for good faith negotiations, the Commission *rejected* outright the notion that a local station would violate the duty to negotiate in good faith if it proposed, in the course of negotiation, to prohibit an MVPD from carrying a duplicating signal as a term of retransmission consent. The Commission wrote:

“[W]e believe the following examples of bargaining proposals presumptively are not consistent with competitive marketplace considerations and the good faith negotiation requirement: (1) Proposals that specifically foreclose carriage of other programming services by the MVPD *that do not substantially duplicate the proposing broadcaster’s programming . . .*”³⁵

In other words, the Commission specifically carved out of this example of a violation of good faith a local station “foreclosing” carriage by an MVPD of programming of a substantially duplicating signal. This makes perfect sense, given Congress’ and the Commission’s reliance on the exclusivity rules in developing and maintaining the compulsory copyright license and retransmission consent regime. Had Congress intended program exclusivity to be encompassed in the good faith negotiation requirement, it could have, and, indeed, it would have, said so.³⁶

In the absence of specific direction from Congress, and given the Commission’s own decisions concerning application of the statutory duty of good faith, the Commission lacks

³⁴ *Good Faith Negotiation Order*, ¶ 39. See 47 C.F.R. § 76.65(b).

³⁵ See *Good Faith Negotiation Order*, ¶ 58 (emphasis added).

³⁶ See, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) (“This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.”).

authority to interfere in private exclusivity contracts or in the terms and conditions of retransmission consent negotiations as requested by MVPDs.

C. DISH And DIRECTV Agree That The Commission Should Not Eliminate The Exclusivity Rules For Satellite And Create A Competitive Imbalance Among MVPDs

DISH and DIRECTV point out, correctly, that the network non-duplication and syndicated exclusivity rules existed for cable at the time the statutory cable compulsory copyright license was adopted by Congress and were, indeed, part of the “mosaic” of cable/broadcast regulatory and copyright reform enacted at that time, but network non-duplication and syndicated exclusivity requirements for satellite consumers were adopted by statute.³⁷ As discussed in our Comments, Congress expressly stated that the program exclusivity requirements applicable to satellite were intended to be “as similar as possible to that applicable to cable services.”³⁸ Elimination of the rules for cable would, necessarily, as DISH and DIRECTV correctly state, competitively disadvantage satellite vis-à-vis cable and expressly violate the expressed will of Congress for symmetrical program exclusivity requirements among all MVPDs.

³⁷ Satellite Comments at 2; *see also* ABC Affiliates Comments at 6-9, 10-12 (discussing Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113 (1999); Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447 (2004); Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175 (2010)).

³⁸ H. R. CONF. REP. NO. 106-464 (1999), at 103; *see also Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, Report and Order, 15 FCC Rcd 21688, ¶ 22 (2000) (“Congress directed the Commission to make the rules ‘as similar as possible’ to the cable rules and to protect the contractual exclusivity rights purchased by broadcasters and sold by program rights holders. The statute specifically cites the existing network non-duplication and syndicated exclusivity rules as guidance.”).

D. Broadcast Stations Do Not Have A “Monopoly” On Network And Syndicated Programming

Several MVPD commenters argue that the exclusivity rules grant broadcasters a monopoly on “must have” network and syndicated programming.³⁹ No such “monopoly” exists. Exclusivity rights in programming are not unusual. Indeed, MVPDs, themselves, acquire exclusive rights to highly valued programming, such as DIRECTV’s NFL Sunday Ticket and AMC’s “The Walking Dead,” with regularity.

MVPDs are able to compete—indeed they do compete—in the highly competitive market for popular video programming and are able to buy the same programming from program producers that the broadcast television networks and program syndicators buy and license to television broadcast stations. The production and distribution of television programming is highly competitive. The abundance of original, high-quality programming distributed through cable channels like FX, USA, and AMC, satellite services like NFL Sunday Ticket, as well as through online video distributors like Netflix and Amazon, demonstrates the highly competitive nature of the programming marketplace and that quality entertainment (including traditional broadcast linear programming) and sports programming are readily available for purchase by non-broadcast networks and syndicators. In other words, MVPDs compete directly with networks, syndicators, and local broadcast stations in the program acquisition market. In some cases, vertically integrated MVPDs do produce their own programming, but, in other instances, they elect not to. Presumably, MVPDs make a business judgment that it is more profitable to allow broadcast networks, syndicators, and broadcast stations to take the risk on expensive, untested broadcast programming, and pay modest retransmission consent fees to local broadcast stations for the right to resell that programming to their subscribers. In fact, David Nevins, the

³⁹ *See, e.g.*, Comments of CenturyLink at 4; Cablevision and Charter Comments at 8.

President of Showtime Networks, one of the most popular cable programming channels, acknowledged “enjoying an edge in certain areas over his broadcast competitors when it comes to programming.”⁴⁰ Arguments advanced by MVPDs in this proceeding for an FCC-mandated government subsidy for acquisition of broadcast television entertainment and sports programming borders on the absurd.

Although the MVPDs cast the exclusivity rules as anti-competitive, as noted earlier, Congress has repeatedly recognized the pro-competitive nature of the Commission’s exclusivity rules by relying on the rules to correct the competitive imbalance between MVPDs and broadcast stations created by the statutory compulsory copyright license.⁴¹ And, as noted in our original Comments, the Commission, itself, has acknowledged that these rules foster—rather than impair—competition among MVPDs and broadcast stations. The Commission, reinstating the syndicated exclusivity rules in 1988, stated:

Competition among program suppliers ensures that exclusive contracts will be sought only for programs that will benefit from the extra promotion exclusivity allows. Naturally, many of these will be programs with substantial mass appeal, but some may also be programs that would not be produced or broadcast at all without the protection afforded by exclusivity. As long as there is reasonable competition among suppliers and distributors, *exclusivity is a competitive tool that fosters the efficient channeling of programming to its most appropriate outlets, thereby maximizing the extent and diversity of programming available to viewers.*⁴²

In summary, the exclusivity rules do not create a monopoly, but, rather, contribute to a more competitive marketplace.

⁴⁰ *Showtime’s Nevins Touts Advantages Over Broadcast*, Broadcast & Cable Daily Briefing (July 21, 2014), at 4.

⁴¹ *See* ABC Affiliates Comments at 6-12.

⁴² *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299 (1988), ¶ 64 (emphasis added).

E. The Commission Cannot Trump The Right Of Copyright Holders To License The Distribution Of Their Programming

Some MVPDs urge the Commission to prohibit stations from entering into exclusivity arrangements with networks and other program providers and to protect networks and program syndicators from restricting the geographic area in which a local station may grant retransmission consent. In short, these MVPDs are asking the Commission to override copyright law, force program rights holders to expand the geographic area in which they license their programming, and dictate the terms of their program license agreements and how their program content may be distributed. This is, truly, an extraordinary proposal for expansion of the Commission's regulatory authority, and it is plainly inconsistent with the law. The exclusive right of the creator of intellectual property and the terms and conditions under which its authorized licensees may perform and distribute it is fundamental to copyright law.⁴³ Congress never intended for either retransmission consent or copyright law to abrogate the other.

As discussed in the Commission's 1993 order implementing the 1992 Cable Act, retransmission consent and copyright are two distinct and unique rights.⁴⁴ Section 325(b) of the Communications Act, as amended, recognizes the statutory right of a local station to consent to retransmission of its signal. But Section 325(b)(6) expressly states, "[n]othing in this section shall be construed as . . . affecting existing or future video programming licensing agreements between broadcasting stations and video programmers."⁴⁵ In the FCC proceeding implementing

⁴³ See, e.g., 17 U.S.C. § 106.

⁴⁴ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 (1993) (hereinafter, "1993 Order").

⁴⁵ 47 U.S.C. § 325(b)(6).

the new retransmission consent statute, the Commission affirmed that “just as Congress made a clear distinction between television stations’ rights in their signals and copyright holders’ rights in programming carried on that signal, we intend to maintain that distinction as we implement the retransmission consent rules.”⁴⁶ Thus, the Commission, itself, has plainly recognized that copyright and retransmission consent are distinct rights that exist independently of each other, and the retransmission rules do not provide a vehicle for abrogation of the right of program content providers to license and control the distribution and exhibition of their copyright protected programming. Accordingly, the Commission must reject MVPDs’ requests to restrict in any way the exclusive right of copyright holders to license the distribution, performance, and exhibition of their copyrighted works.

F. MVPDs Fundamentally Misstate The Purpose And Effect Of The Rules

Several MVPDs fundamentally misstate the purpose and effect of the Commission’s program exclusivity rules. For example, AT&T states that the rules act as an “artificial thumb on the scale to the benefit of one party,”⁴⁷ while Verizon argues that the rules “effectively make one broadcast station the sole source of certain programming.”⁴⁸ The rules do not grant exclusivity. Exclusivity is a creature of private contractual negotiations, not FCC regulation. The exclusivity rules simply (a) provide a forum—the Commission—in which to adjudicate and enforce the program exclusivity agreed to by contract, (b) limit the geographic area in which a television station can obtain program exclusivity, and (c) prescribe procedures governing the exercise by

⁴⁶ *1993 Order*, ¶ 173.

⁴⁷ Comments of AT&T at 7.

⁴⁸ Comments of Verizon at 5.

broadcast stations of their exclusivity rights.⁴⁹ As noted earlier, the exclusivity rules protect MVPDs from the effects of overreaching geographic areas of exclusivity by setting reasonable limits (35 and 55 miles) on the geographic scope of exclusivity. Without the rules, local stations and their networks or syndicators could agree, to the extent otherwise consistent with anti-trust law, to greater geographic exclusivity areas than the rules currently permit. In short, the exclusivity rules promote—rather than impair—the competitive balance between MVPDs and broadcast stations.

G. The Rules Provide The Only Effective Means Of Providing Program Exclusivity

Virtually every network affiliation agreement and syndicated program license agreement (each of which is, in effect, a copyright “license” agreement) is predicated on the existence of and incorporates the Commission’s program exclusivity rules. But even if time were allowed to amend these agreements following a repeal by the Commission of its exclusivity rules, no practical or cost-efficient means exists for local stations to enforce program exclusivity contractual provisions subsequently entered into by stations and program suppliers.

Other enforcement mechanisms to assure program exclusivity simply will not work in the context of the cable compulsory copyright license scheme. The compulsory copyright license forecloses at the outset the ability of local stations to enforce their exclusivity rights against offending cable systems on a theory of “beneficial” holder of a protected copyright license. Nor would any other contractual remedy be effective against third parties. And, even if a viable litigation strategy could be devised, judicial copyright and contract litigation is beyond the financial reach of most stations. By the time a final judicial decision is reached, irreparable damage to local television service will have been done. Moreover, conflicting court decisions

⁴⁹ See ABC Affiliates Comments at 2 (citing *Notice*, ¶¶ 41, 42, 47).

would produce a patchwork of inconsistent case law throughout the country—not unlike that in the Aereo litigation, for example—all of which would be at odds with the intent of Congress to foster and maintain a national cable/broadcast copyright and regulatory policy.

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

In short, the program exclusivity rules are self-policing, and they place little burden on the Commission, the regulated parties, or taxpayers.

H. The Commission’s Statutory Mandate

Finally, the program exclusivity rules represent an acknowledgment by the Commission of its longstanding Section 307(b) statutory mandate to foster and promote a nationwide system of “local” television broadcast service, a bedrock principle of congressional communications law and policy. Repeal of the rules would facilitate the immediate importation of duplicating programming from distant stations, transforming the nation’s “local” television broadcast service into a “national” (or at least “regional”) television broadcast service. These issues have been

considered and reconsidered time and time again by Congress and the Commission, leading each time to the inescapable conclusion that in the absence of protected program exclusivity, neither local television broadcast service nor the nation's network/affiliate broadcast system (which Congress has noted "serves the nation well") could continue to exist.

III. Conclusion

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

Respectfully submitted,

ABC TELEVISION AFFILIATES ASSOCIATION

/s/
Wade H. Hargrove
Mark J. Prak
Elizabeth Spainhour

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Suite 1600
Wells Fargo Capitol Center
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Its Attorneys

July 24, 2014