

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

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

To: The Commission

REPLY COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

Sinclair Broadcast Group, Inc. (“Sinclair”) hereby responds to the Commission’s request in the above-referenced proceeding to refresh the record regarding its program exclusivity rules.¹ Sinclair respectfully responds directly to the comments filed by the American Cable Association (“ACA”)² during the initial comment period.³

¹ *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-29, ¶¶ 40-73 (released March 31, 2014) (“Further Notice”). *See also* Public Notice, DA 14-525 (released April 22, 2014) (extending the deadline for Reply Comments to July 24, 2014).

² *See* Comments of the American Cable Association, MB Docket No. 10-71 (filed June 26, 2014) (“ACA Comments”).

³ Although these Reply Comments primarily address the ACA Comments, Sinclair also strongly disagrees with other commenters that argued for the FCC to undermine or prohibit market exclusivity agreements between networks and affiliates. *See, e.g.*, Comments of American Public Power Association, MB Docket No. 10-71, at 17 (filed June 26, 2014) (broadcasters have unfair leverage in retransmission consent negotiations); Comments of AT&T, MB Docket No. 10-71, at 3 (filed June 26, 2014) (“Eliminating or modifying the exclusivity rules would promote consumer welfare by helping to restore balance in the retransmission consent regime”); Comments of Cablevision and Charter Communications, MB Docket No. 10-71, at 6-8 (filed June 26, 2014) (The exclusivity rules should be repealed because “they no longer serve their intended purpose” and “The Commission also should ban contractual exclusivity agreements”); Comments of CenturyLink, MB Docket No. 10-71, at 18 (filed June 26, 2014) (“The Commission should prohibit exclusivity agreements because they are contrary to the public interest”); Comments of DIRECTV and DISH Network, MB Docket No. 10-71, at 2 (filed June 26, 2014) (Elimination of the exclusivity rules “would remove two of the regulatory barriers that allow one broadcast station to prevent other stations from competing for [MVPD] carriage in a given market”); Comments of Independent Telephone and Telecommunications Alliance, MB Docket No. 10-71, at 7 (filed June 26, 2014) (“Repealing the exclusivity rules would not negatively impact” programming supply); Comments of Mediacom, Cequel/Suddenlink, and Bright House Networks, MB Docket No. 10-71, at 1 (filed June 26, 2014) (“The Commission should ensure that if viewers are denied access to a local station’s signal . . . because of a deadlock in retransmission consent negotiations”, the station should not be permitted to invoke the non-duplication rule); Comments of Montana Sky West, MB Docket No. 10-71, at 2 (filed June 26, 2014) (Montana Sky West “believes that it should be allowed to carry network stations from” other parts of Montana, and therefore supports repeal of the exclusivity rules);

ACA's most recent filing in this docket consists of nothing more than a request that the government, in the form of the FCC, prohibit commercially standard, privately negotiated agreements in order to benefit the ACA's member organizations.⁴ Despite the length of the ACA's filing and the disingenuous attempts to obfuscate the impact of its anti-free market comments in a cloak of purported consumer protection, ACA's comments actually boil down to asking the FCC to exceed its authority and take the outrageous action of outlawing the common practice of a property owner deciding the terms under which it is willing to license its protected property.⁵

Companies are free to, and commonly do, enter into agreements granting geographic exclusivity to others in an attempt to maximize the value of their product. Television stations pay significant consideration to program suppliers (including, but not limited to, networks) in

Comments of NTCA – The Rural Broadband Association, MB Docket No. 10-71, at 2 (filed June 26, 2014) (“To address the inherent inequities in the current retransmission consent process, the FCC should revise its rules so that small and rural MVPDs have the option to receive broadcast content from neighboring MVPDs”); Comments of Time Warner Cable, MB Docket No. 10-71, at 5 (filed June 26, 2014) (The exclusivity rules are outdated and should be repealed); Comments of United States Telecom Association, MB Docket No. 10-71, at 2 (filed June 26, 2014) (“The current retransmission consent framework is broken,” and broadcasters are abusing their bargaining power); Comments of Verizon, MB Docket No. 10-71, at 9 (filed June 26, 2014) (“the exclusivity rules are no longer” necessary). It is neither lawful nor appropriate for a government agency to attempt to give one party to a market-based retransmission consent negotiation process a helping hand by effectively permitting the infringement of a third party’s intellectual property – which is exactly the result MVPDs are seeking here.

⁴ Ample evidence exists to suggest the MVPDs routinely increase their subscription rates far in excess of increased costs of programming, so the FCC should give no credence to ACA’s position that lower costs of programming would serve to benefit the MVPDs’ subscribers, rather than leading to higher profits for the MVPDs themselves. Moreover, ACA’s claims regarding the need to carry distant signals in order to provide vital information, such as emergency weather information, to their subscribers, is clearly not a valid argument given that the Network Non-Duplication and Syndicated Exclusivity rules do not in any way prohibit an MVPD from negotiating for the right to carry the local news programming of a station outside of its market. *See* ACA Comments at 7-8.

⁵ In addition to its efforts to eliminate the right of private parties to contractually agree on the permitted use of copyrighted materials, ACA also weighs in on its belief that the enforcement mechanism of the Network Non-Duplication rules should be eliminated, but in a further display of clear self-interest asks that the protection that MVPDs receive under those rules – certain limitations, such as geographic restrictions, on the ability of broadcasters to enforce such privately negotiated exclusivity rights – should be preserved and in fact extended. *See, e.g.*, ACA Comments at 17. It bears noting that, as ACA acknowledges, the Network Non-Duplication rules are merely an enforcement mechanism, not the creation of an independent right of exclusivity, and one should question why ACA would seek to eliminate such an enforcement mechanism unless its members intend to violate the contractual rights of parties and simply want to avoid being subject to sanctions when they do so. *Id.* at 18.

order not only to obtain programming, but also to obtain the exclusive rights to that programming in a Designated Market Area (“DMA”). In the absence of such exclusivity, such programming would be worth far less and broadcast stations would not be willing to pay the same amount for the programming.⁶ This is no different than when, for example, McDonalds grants a franchise to a company and agrees that there will be no other McDonalds within a certain geographic radius of the franchisee’s location.

Although ACA claims that a broadcast television station’s need for exclusivity rights should exist with respect to an MVPD only when the MVPD is carrying such station,⁷ ACA’s argument conveniently ignores that a broadcast station has two different customer bases. The first of these is the advertising community; ACA correctly understands that protection against viewers having more than one location on an MVPD’s channel lineup to view a station’s programming is important to protecting the value of the programming when selling rights to run commercials in such programming. The second customer base of a broadcast station, however, is composed of MVPDs, and the time when exclusivity protection with respect to MVPDs is needed is precisely when ACA suggests it shouldn’t exist. It is easy to understand why a buyer would like to have a myriad of sources from which to purchase a particular product. It is less clear, however, why ACA thinks the FCC has the right or the inclination to interfere with

⁶ The unintended consequences of the continued efforts of ACA and others to eliminate the Congressionally created system of free-market negotiations for retransmission consent will be the continued migration of high quality programming away from free over-the-air broadcast stations to cable networks (which do negotiate for carriage in a free-market environment without government intervention) -- tipping the scales in favor of the MVPDs. Not coincidentally, cable service can only be received by paying to subscribe to the very parties that are asking the FCC to hobble the efforts of free over-the-air-broadcasters to seek appropriate market-driven compensation for their programming. To the extent that the FCC thinks eliminating the exclusivity rules will help consumers, it is simply missing these unintended consequences and the fact that cable bills will go up, not down, as MVPDs are able to hold their customers hostage by removing the limiter on cable subscription rates provided by the currently ability to watch significant amounts of quality programming over-the-air for free.

⁷ ACA Comments at 8.

privately-negotiated rights pursuant to which the owners of the copyrights in television programming license such programming to distributors.⁸

It is worth pointing out that the geographic exclusivity provided by contract to broadcast stations simply places such stations in a similar position in terms of negotiating for carriage as exists for cable channels. Cable channels do not have affiliates, but instead are generally licensed across the entire country directly to MVPDs without the existence of an intervening party, such as a local station. As a result, if an MVPD is unable to reach agreement to carry a cable channel, for example ESPN or TNT or FOX News, with the owner of such a network, the MVPD has no other alternative to seek to acquire such programming. The exclusivity rights included in network affiliation agreements do nothing more than create the same limitation with respect to broadcast networks and their affiliates as is enjoyed by cable networks. Broadcast networks should not be penalized in the sale of their valuable copyrighted programming simply because a different ecosystem exists for the distribution of that programming, an ecosystem which not insignificantly has existed for more than 60 years, for the benefit of the American public, than exists for programming on cable networks.

In the end, it is clear when one parses through the ACA's legal rhetoric and self-serving demands for government intervention that its members simply miss the halcyon days when first government fiat, and later monopoly power of cable providers, allowed them to use broadcast station content to attract and retain subscribers without having to pay for that content. Not even a request that the FCC erode the rights that virtually all copyright holders have to determine

⁸ Sinclair is not the only participant in this proceeding of the opinion that broadcasters must be permitted to enter into private contracts on terms they and their counterparties find acceptable. *See, e.g.*, Comments of the National Football League, MB Docket No. 10-71, at 2 (filed June 26, 2014) ("Elimination of the exclusivity rules would undermine the privately negotiated agreements that enable broadcasters to provide . . . programming to viewers at no charge").

through private contractual negotiations the terms under which it will allow such rights to be used is seen as too outrageous for ACA to make in seeking a return to the past when the cable industry was allowed to build its business on the back of broadcast stations. The Commission should, however, recognize the ACA's filings for what they are and dismiss their proposals in their entirety.

Respectfully submitted,

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