



July 13, 2015

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Notice of Ex Parte Communication, MB Docket No. 10-71

Dear Ms. Dortch:

On Thursday, July 9, 2015, Rick Kaplan, Scott Goodwin and the undersigned of the National Association of Broadcasters met with Bill Lake, Michelle Carey, Nancy Murphy, Mary Beth Murphy, Diana Sokolow, and Kathy Berthot of the Media Bureau to discuss the importance of the Commission's network nonduplication and syndicated exclusivity rules. A summary of our points regarding exclusivity can be found in the attached presentation that was distributed at the meeting.

NAB representatives also discussed the Commission's implementation of Section 103(c) of the STELA Reauthorization Act of 2014 (STELAR).¹ We discussed the many challenges the Commission faces should it attempt to delve into the heart of private market retransmission consent negotiations. Not only would administering any new rules be difficult, but opening the Pandora's Box in the first instance – and failing to close it – will undoubtedly have the effect of drawing flies to the retransmission consent regulation fly paper.²

Indeed, we noted that while nearly all retransmission consent agreements conclude in a manner seamless for consumers, some in the pay TV industry appear to have developed a strategy of manufacturing retransmission consent disputes to spur the government to regulate more heavily in this arena. The Commission should thus not be surprised by an uptick in pay TV-manufactured disputes as it launches its Section 103 proceeding. The Commission should keep a close eye on this trend, as bad actors should not be rewarded with government assistance, especially when those actions come, yet again, at consumers' expense.

¹ See Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014) (“[n]ot later than 9 months after the date of the enactment of this Act, the Commission shall commence a rulemaking to review its totality of the circumstances test for good faith negotiations”).

² See, e.g., Petition for Rulemaking of Mediacom Communications Corporation, MB Docket No. 12-1 (Jul. 8, 2015).

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Finally, we explained that retransmission consent fees are not even close to a leading factor in the cost of consumer bills, let alone even programming costs, citing recent SNL Kagan data.³ As the Commission begins its totality of the circumstances inquiry, we urged it to use this opportunity to focus on the pay TV issues that actually impact consumers, including, but not limited to, dismal pay TV customer service, over-charging consumers, sky-high equipment fees and questionable billing practices. Making a difference in these areas is what will truly add value for consumers.

Respectfully submitted,



Erin L. Dozier
Senior Vice President and Deputy General Counsel
Legal and Regulatory Affairs

Enc.

cc: Bill Lake, Michelle Carey, Nancy Murphy, Mary Beth Murphy, Steven Broeckaert,
Diana Sokolow, Raelynn Remy, Kathy Berthot

³ According to a recent analysis by SNL Kagan, programming dollars are *overwhelmingly* spent on cable programming (including regional sports networks)—at \$43.9 billion. Multichannel video programming distributors spend just \$6.3 billion on retransmission consent fees—a small fraction of overall programming costs. See SNL Kagan, *Broadcast Retransmission Fees vs. Basic Cable and RSN Programming Fees* (June 2015).



Network Non-Duplication & Syndicated Exclusivity:

**If the FCC eliminates its exclusivity rules,
consumers pay the price**

What Is “Exclusivity”?

Two rules:

- Network Non-Duplication
 - Protects a local broadcast TV station’s right to be exclusive distributor of network programming within specified zone
 - Allows local broadcast TV stations to protect exclusive distribution rights they negotiated with broadcast networks in geographic zone not to exceed 35 miles (55 miles in smaller markets)
- Syndicated Exclusivity
 - Similar to the network non-duplication, but applies to exclusive contracts for syndicated, rather than network, programming

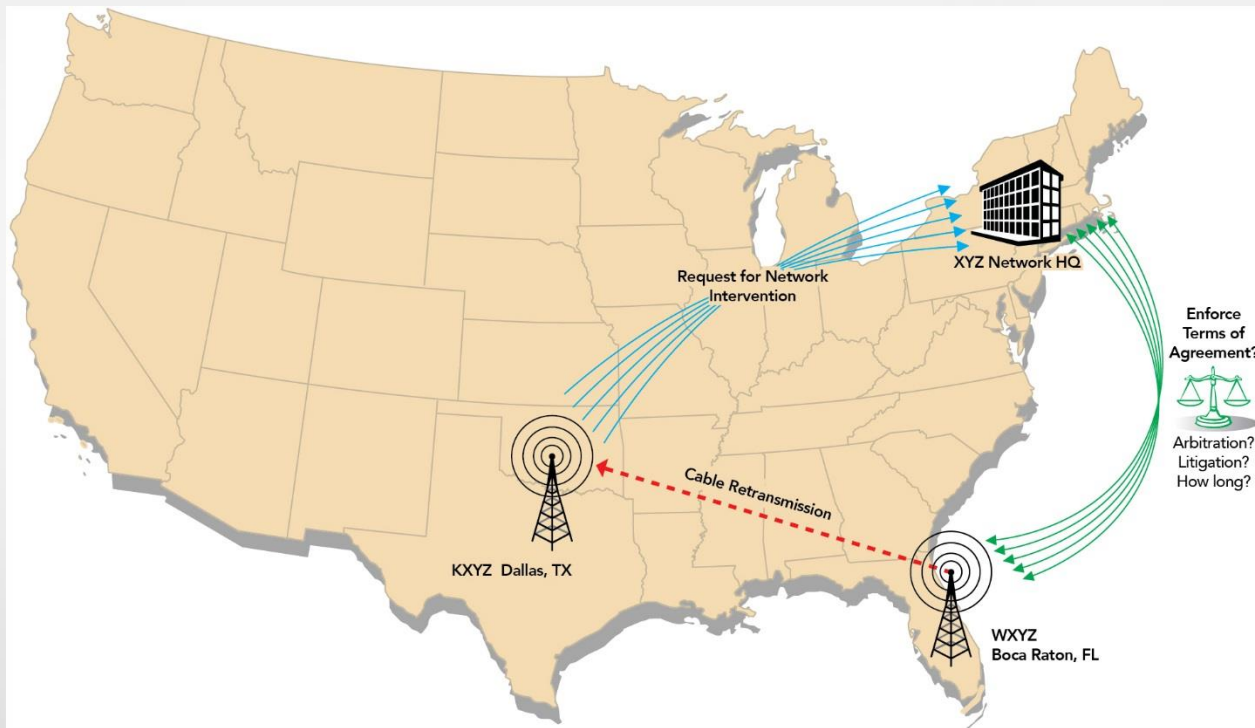
Why Exclusivity Matters

What is the impact of the FCC's exclusivity rules?

- Without them, localism fades
 - Stations need a meaningful remedy as litigation not practical
 - Contractual remedies fall short, given a lack of privity, litigation expense and conflicting incentives for enforcement
 - Without rules, larger stations have ability to expand reach to detriment of small-market stations
- Serve as a counterweight to the government's significant compulsory copyright subsidy to the cable industry
- Protect consumers from disruption, confusion

Meaningful Remedy

- Exclusivity rules are an essential enforcement mechanism; boundary enforcement far less practical without FCC mechanism



Small Market Issues

- Today, FCC rules protect local TV exclusivity within 35 or 55 miles of the community of service
- Broadcasters have incorporated this rule into their network contracts and, because of the rules, stations do not negotiate for coverage beyond that distance
- Eliminating the rule could incentivize stronger, large-market stations to seek to expand their exclusive service areas

Government's Cable Subsidy

- Compulsory licenses are an exception to exclusive right of copyright owners to choose whether to license their content and to negotiate terms and conditions for such licenses in marketplace
- The cable distant signal license is a significant subsidy for cable industry
- The FCC:
 - “[C]able operators need not negotiate or acquire performance rights for broadcast programming they wish to retransmit. This is because cable retransmissions of broadcast programming are subject to the compulsory license. The compulsory license . . . thus elevates the interests of cable system operators over those of a competing distributor of video product. For example, under the compulsory license, broadcasters are precluded from acquiring effective rights to exclusive performance, while cable is permitted to obtain and enforce such rights. To the extent that cable system and television station operators compete with one another for both programming and audience, the ability of cable operators to offer exclusivity and the inability of broadcasters to do likewise may benefit the former and disadvantage the latter.” 2 FCC Rcd 2387, 2388 (1987)

Thumb on the Scale for Cable

Eliminating exclusivity rules will eliminate the balance that to some degree mitigates this government-granted subsidy

- Absent compulsory licenses, cable would have to negotiate with all of the parties with copyrighted material in distant signals before importing them into other markets
 - Makes it more difficult for them to use it as a sword
- Government should not, on one hand, make it incredibly convenient and inexpensive for cable to import distant signals while, on the other, make it incredibly difficult for broadcasters to find a way to enforce their market-negotiated exclusive rights

Consumers and Exclusivity

Consumers will be harmed without FCC enforcement of exclusivity rules. Their repeal would lead to:

- Less localism in an increasingly homogenized news landscape
- More frequent and protracted retransmission consent disputes
- More consumer confusion
- More of the same rising cable bills they've been saddled with for decades

Exclusivity and Localism

What do the FCC's exclusivity rules do for localism?

- What if importation became the norm?
 - Stations providing local content will take a back seat to national powerhouses
- Local stations rely upon status as exclusive supplier of certain network and syndicated content to attract viewers and, in turn, advertisers
 - Advertising revenue constitutes approximately 85% of revenues
- Eliminating the exclusivity rules will diminish stations' primary revenue stream for investing in the local content which they alone provide
 - As the FCC has recognized repeatedly in the past, if networks and syndicators cannot be assured of exclusive arrangements, programming will shift to pay platforms

Protracted Retrans Disputes

- By making distant signal importation easier, the FCC will facilitate longer, more frequent disruptions
 - Cable operators will have a tremendous advantage over local broadcasters, and will threaten to import out-of-market signals
 - Broadcasters will be forced to hold out and engage local viewers to stop the importation of distant signals
 - Cable operators will feel emboldened to leave in place the distant signal as viewers will still be receiving national content
- Viewers are caught in the crosshairs more than ever as a result

Protracted Retrans Disputes

- Cable companies have an incentive for consumer disruption through importing distant signals
 - Cable operators have an economic incentive to import distant signals in lieu of local signals: cable ops compete head-to-head with local television broadcasters for advertising dollars
 - Importing distant signals in lieu of carrying local stations can place new advertising dollars directly into the pockets of MVPDs through their interconnects
 - Creating an atmosphere of uncertainty about whether local broadcasters can consistently reach their entire local markets gives advertisers an incentive to choose outlets other than local broadcasting

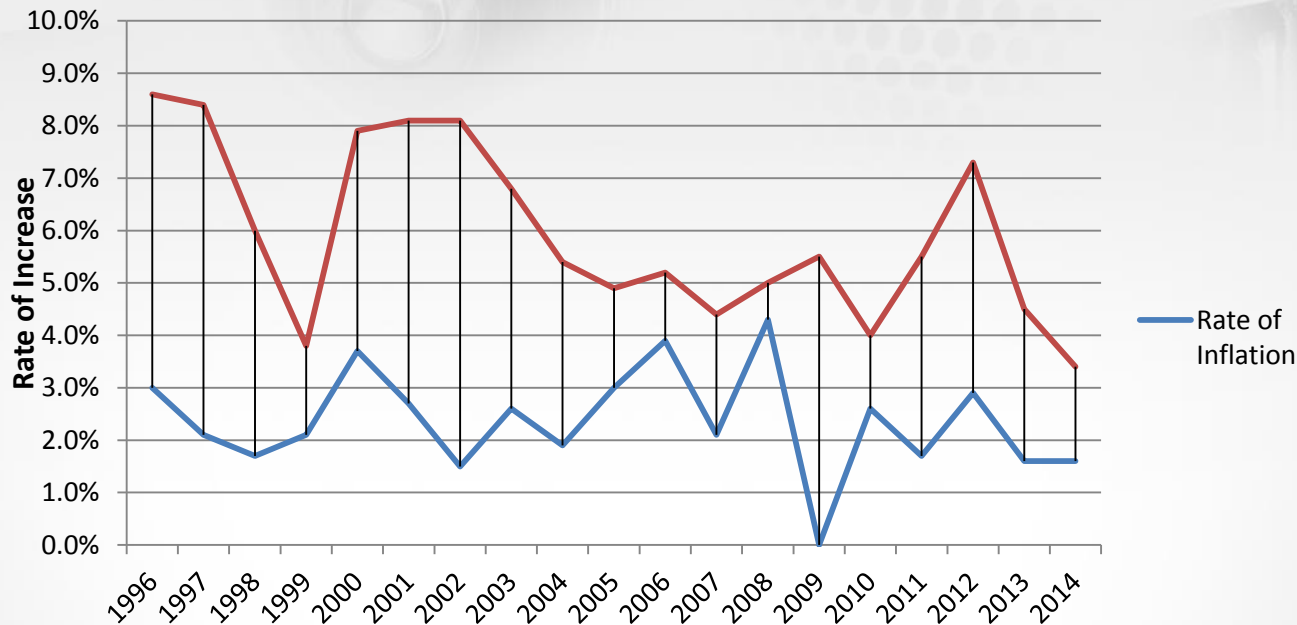
Consumer Confusion

- When distant signals are pulled into the local market, what is the impact on consumers?
 - How will viewers react to out-of-market news, weather and sports information?
 - What happens if emergencies arise in the distant or local market? Will viewers have the accurate information?
- What rules will the FCC put in place to require cable operators to protect consumers from harm due to out-of-market signal importation?

Cable Prices Nothing New

- Cable prices have long been outpacing the price of inflation, but now cable wants the FCC to believe that its high prices are related to retransmission consent fees
- Has the FCC explored what makes up a consumer's cable bill?
 - A tiny percentage would be attributable to broadcast TV, by far the most-watched stations across the board
- Has the FCC explored questionable cable billing practices?
 - Cable industry consumer failings are well documented; that is the place for FCC involvement if consumers really matter

Cable's Longstanding Rate Rise



	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Cable Rate Increase	8.6 %	8.4 %	6.0 %	3.8 %	7.9 %	8.1 %	8.1 %	6.8 %	5.4 %	4.9 %	5.2 %	4.4 %	5.0 %	5.5 %	4.0 %	5.5 %	7.3 %	4.5 %	3.4 %
Rate of Inflation	3.0 %	2.1 %	1.7 %	2.1 %	3.7 %	2.7 %	1.5 %	2.6 %	1.9 %	3.0 %	3.9 %	2.1 %	4.3 %	0.0 %	2.6 %	1.7 %	2.9 %	1.6 %	1.6 %

Source: FCC Report on Cable Industry Prices; released December 15, 2014. Expanded Basic Service.

Money Meet Mouth

If cable truly believes that eliminating exclusivity will help them lower rates, then FCC should ensure that any cost savings go to consumers and not cable operators:

- Cable operators that import distant signals should be required to identify the amount they “saved” on consumer bills as a result of exclusivity rules changes and reduce consumer bills by that amount
- FCC should require such disclosure as a matter of truth-in-billing