Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

July 24, 2014

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Executive Summary

The Commission should reject MVPD commenters' calls for elimination or modification of the Exclusivity Rules, all of which disregard the essential role played by the Rules in the legal paradigm governing the creation and distribution of television programming. MVPD commenters ignore the *statutory* source of exclusivity applicable to satellite carriers, the affirmatively pro-competitive effects of the Exclusivity Rules, the necessity for the Rules to counterbalance the effect of the below-market statutory copyright licenses, the critical role played by the Rules in promoting the core value of localism, the importance of the Rules as an efficient and cost-effective enforcement mechanism for the privately-negotiated contractual exclusivity rights, and the substantial reliance interests of industry participants. As NAB's opening comments showed, the Rules play an indispensable part in the carefully balanced arrangement of statutes and regulations that govern the distribution of television programming.

The voluminous history recounted in NAB's opening comments makes clear the important role played by the Exclusivity Rules in the complex legal mosaic that governs the television programming distribution marketplace. More specifically, that history underscores that the Exclusivity Rules are inextricably intertwined with the statutory copyright licenses, the retransmission consent regime, and the mandatory carriage rules, none of which can be altered or eliminated without careful consideration of each of the other closely-related components of the governing legal framework.

MVPDs have it totally backwards when they assert that elimination of the Rules would enhance competition and localism. As NAB has shown, and the Commission has recognized, program exclusivity affirmatively fosters competition and promotes localism. The Rules foster the ability of local stations to reach audiences, thereby providing a valuable service for which advertisers are willing to pay, and which, consequently, generates the revenues necessary for stations to create and distribute high-quality, locally-oriented programming. Elimination of the Rules would dramatically hinder, not further, localism.

Calls for elimination of the Rules in order to eliminate the supposedly "anti-competitive" effects of exclusivity similarly miss the mark because exclusivity rights derive from privately-negotiated contracts, not from the Rules themselves. The Rules are an efficient administrative enforcement mechanism for those privately-negotiated exclusivity rights. Contrary to MVPD commenters' argument, Congress has given no indication, in Section 325 of the Communications Act or otherwise, that it wants or has authorized the Commission to interfere with or invalidate privately-negotiated contracts containing valid exclusivity provisions.

MVPDs' alternative arguments for limiting the application or force of the Exclusivity Rules are no more compelling. Contrary to MVPDs' arguments, application of the Rules should not depend upon actual carriage of the local station. To the contrary, the Commission has long made clear that carriage is *not* a prerequisite to enforcement of exclusivity rights. In particular, calls to suspend exclusivity in the event of a retransmission consent dispute or impasse should be rejected. Such an action is likely to produce more impasses and serious adverse consequences for local viewers.

MVPD commenters' attempts to eliminate or restrict the operation of the Exclusivity Rules represent transparently self-serving attempts to undermine the retransmission consent regime, which they describe as "broken" based on specious arguments about supposedly "excessive" retransmission consent fees and increased "blackouts." The former argument is based on a refusal to acknowledge both (1) that the market is only now beginning to reflect the true value of broadcast signals and (2) that retransmission consent fees are but a small fraction of MVPD subscription rates. The "blackout" argument is no more availing: The local station's signal is not "blacked out" at all, even when the parties have not been able to reach a retransmission consent agreement, because it remains available at all times over the air and via other MVPDs in the market.

Aware that the elimination of the Exclusivity Rules applicable to cable alone would cause a substantial regulatory imbalance, satellite carrier commenters request special changes to benefit their side of the ledger. For example, they urge the Commission to meddle with the predictive model used to identify "unserved households." Of course, no such regulatory action is necessary because satellite carriers offer local-to-local service to more than 99% of all television households and the "if local, no distant" principle embedded in the statutory structure precludes importation of distant network signals in nearly all instances. Moreover, the very premise for the requested action is mistaken because the ILLR predictive model used by the Commission does *not*, in fact, under-predict lack of service. Moreover, the statute itself includes a fail-safe in the form of a provision for individual subscribers to request an actual test of signal strength. In short, no sound reason supports replacement of a model that does not, in fact, over-predict unserved households with any alleged detriment to satellite carriers.

MVPD commenters did not limit themselves to arguments directed to the discrete issue raised in the *Exclusivity Notice*: whether the Commission should modify or eliminate the Exclusivity Rules. Rather, their opening comments seek a litany of other sweeping "reforms" of the retransmission consent process. Those requests reiterate numerous proposals that have been repeatedly considered and rejected by the Commission as beyond the scope of its statutory authority, inconsistent with Congressional intent, contrary to the public interest, or all of these. The Commission should decline even to consider these proposed "reforms" in the context of this aspect of the proceeding, but they should be rejected for the reasons NAB has articulated here and in many prior proceedings. They are unwarranted attempts to tip the retransmission consent balance even further in favor of MVPDs and away from local broadcasters. These proposals for "reform" all ignore the competitive balance carefully struck and repeatedly refined by Congress and the Commission over several decades.

The only novel argument presented by MVPDs is related to broadcasters' digital content. MVPDs ask the Commission to adopt a new regulation that would limit local stations' ability to exercise full control over video content on their websites by prohibiting Internet "blocking" of online content. No content provider is under any legal or regulatory obligation to offer online content, and the Commission lacks any authority to compel broadcasters to do so. The Commission should reject this proposal.

In sum, elimination of the Exclusivity Rules would destroy the closely intertwined statutory and regulatory "mosaic" that governs the distribution of television programming, would harm local television stations and the important public interest they serve, and would usurp the only viable and efficient enforcement mechanism for contractual exclusivity rights. For all these reasons, calls for elimination or modification of the Rules should be rejected, as should MVPDs' transparent proposals for Commission interference in the operation of the retransmission consent marketplace seeking a government thumb on the scale in favor of MVPDs.

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REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these reply comments in response to comments filed pursuant to the Report and Order and Further Notice of Proposed Rulemaking ("*Exclusivity Notice*" or "*Notice*")[2] asking whether the Commission should modify or eliminate its network non-duplication and syndicated exclusivity rules (collectively, the "Exclusivity Rules" or "Rules").[3] For the reasons discussed below and in NAB's opening comments, the Commission should reject calls for elimination or modification of the Exclusivity Rules and other proposals for "reforms" of the Commission's retransmission consent rules.

[1] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the FCC and other federal agencies, and the courts.

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

[3] *See Exclusivity Notice* at ¶¶ 1, 40, 55, 73.

Introduction

MVPD commenters urge the significant modification, if not wholesale elimination, of the Exclusivity Rules.[4] They claim that the Rules tip the retransmission consent balance unfairly in favor of broadcasters and that their elimination is necessary to restore equity and to promote the unimpeded operation of market forces in the retransmission consent marketplace. Focused only on their own desire to gain leverage in retransmission consent negotiations, MVPD commenters' arguments ignore the abundant legislative and regulatory history recounting: (i) the essential role played by the Exclusivity Rules in the legal paradigm governing the creation and distribution of television programming; (ii) the *statutory* source of exclusivity applicable to satellite carriers; (iii) the affirmatively pro-competitive effects of the Exclusivity Rules; (iv) the necessity for the Exclusivity Rules to counterbalance the effect of the below-market statutory copyright licenses; (v) the critical role played by the Rules in promoting the core value of localism; and (vi) the substantial reliance placed on the Rules by industry participants.

MVPD commenters—ironically advocating for a return to "normal marketplace dynamics"[5]—in fact seek an unfair competitive advantage in a carefully balanced, robustly

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[4] *See, e.g.*, Comments of CenturyLink, MB No. 10-71 (June 26, 2014) ("CenturyLink Comments"), at 1 (urging the Commission to "promptly eliminate" the Rules); Comments of Time Warner Cable, Inc., MB No. 10-71 (June 26, 2014) ("TWC Comments"), at 4-9, 15 (describing the Rules as "anachronistic" and "relics of a bygone era" and urging the Commission to "move swiftly to eliminate them"); Comments of the United States Telecom Association, MB No. 10-71 (June 26, 2014) ("USTA Comments"), at 8; Comments of the American Public Power Association, MB No. 10-71 (June 26, 2014) ("APPA Comments"), at 13, 16-17 (urging the Commission to "eliminat[e] or substantially modify[] the non-duplication rules"); Joint Comments of DIRECTV, LLC and DISH Network LLC, on Syndicated Exclusivity and Network Non-Duplication, MB No. 10-71 (June 26, 2014) ("DIRECTV/DISH Joint Comments"), at 8 (supporting elimination of the Rules along with other reforms); Comments of Verizon, MB No. 10-71 (June 26, 2014) ("Verizon Comments"), at 8.

[5] *See* Verizon Comments at 3.

competitive marketplace that has developed against the backdrop of the mosaic of statutes and rules designed to encourage precisely such competition. As NAB's opening comments explained, the Rules provide an effective and efficient enforcement mechanism for exclusivity rights privately negotiated at arm's length; they promote the development and dissemination of locally-oriented broadcast programming by allowing broadcasters to obtain fair advertising revenue; and they encourage competition in the video programming marketplace to the ultimate benefit of the viewing public.

I. Comments Calling for the Elimination of the Exclusivity Rules Ignore Decades of Legislative History and Commission Precedent and the Robust Competition That Characterizes the Marketplace

A. Congressional and Commission Declarations Foreclose Any Argument That the Commission Can or Should Eliminate the Rules

The extensive statutory, legislative, and regulatory history detailed in NAB's opening comments[6] makes abundantly clear that the Rules are an essential component of the complex, interrelated, and carefully balanced regulatory regime governing the distribution of television programming. Decades of congressional and Commission history detail the intricate and interdependent copyright and communications regimes that Congress has established to govern the licensing and distribution of television programming.[7]

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[6] *See* Comments of the National Association of Broadcasters, MB No. 10-71 (June 26, 2014) ("NAB Comments"), Appendix A.

[7] Indeed, in prior proceedings, MVPDs too have acknowledged that the Rules are closely and inextricably intertwined with provisions of the Copyright and Communications Acts. *See* Comments of the CBS Television Network Affiliates Association, MB No. 10-71 (June 26, 2014) ("CBS Affiliates Comments"), at 10-11 (summarizing MVPD comments).

MVPD commenters either diminish the legislative history or ignore it altogether—or, in at least one case, read isolated statements out of context. As an illustration of the point, one commenter, CenturyLink, insists that the Senate Report[8] on the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")[9] indicates congressional intent only to "rel[y] on the exclusivity rules to protect local broadcasters who elect must-carry."[10] That argument mischaracterizes the Senate Report and ignores the long history of congressional and Commission reliance on the Exclusivity Rules that predated the advent of the retransmission consent regime and continued long thereafter.[11]

Read fully and properly in context, the Senate Report flatly contradicts the notion that the Exclusivity Rules have a role to play only in the must-carry context. The key portion of the Senate Report reveals CenturyLink's misreading:

> In most respects, however, the Committee believes that the rights granted to stations under section 325 and under sections 614 and 615 can be exercised harmoniously, and *it anticipates that the FCC will undertake to promulgate regulations which will permit the fullest applications of whichever rights each television station elects to exercise*.
>
> In that connection, the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12.[12]

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[8] S. REP. 102-92 (1992).

[9] PUB. L. NO. 102-385, 106 Stat. 1460 (1992).

[10] CenturyLink Comments at 9.

[11] *See generally* NAB Comments, Appendix A.

[12] S. REP. 102-92 (1992), at 38 (emphasis added).

CenturyLink truncates the quoted language, omitting the italicized portion of the first sentence. Read in its entirety, the passage makes clear that the FCC's regulatory framework should protect broadcasters, whether the station elects must-carry or retransmission consent.

In keeping with that language, soon after enactment of the 1992 Cable Act, the Commission foreclosed the argument CenturyLink now advances when it confirmed that "Congress intended that local stations electing retransmission consent should be able to invoke network nonduplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system."[13] CenturyLink relegates its discussion of this contrary authority to a footnote, in which it simply urges the Commission to change its interpretation of the Act and "conclud[e] differently here."[14] What CenturyLink effectively seeks, however, is not a "reinterpretation" of statutory language but a re-writing of the long-settled history of congressional intent motivating the Cable Act. The Commission should reject CenturyLink's request.

B. The Exclusivity Rules Are Inextricably Intertwined with the Statutory Copyright Licenses and the Retransmission Consent Regime

MVPD commenters insist that changes in the marketplace have obviated the need for the Rules. But, no supposed "change in the marketplace" could justify elimination of the Exclusivity

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[13] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965 (1993) ("*Signal Carriage Order*"), at ¶ 180; *see also* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005), ¶ 50, *available at* <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf> ("*2005 FCC Retransmission Consent Report*")("Based on this legislative history, the Commission previously has refused to find that the network non-duplication rules do not apply to stations that elect to exercise retransmission consent rights with respect to a cable system.").

[14] *See* CenturyLink Comments at 10 n.25.

Rules. As NAB has detailed, Congress' repeated citation to and reliance upon the Rules in decades of amendments to the Copyright and Communications Acts as well as the Commission's own longstanding precedent demonstrates that the Rules cannot be altered in isolation. Any change to the Rules would upset the balance carefully crafted by Congress over decades of legislative enactments and reenactments.[15]

Some MVPD commenters nevertheless point to the 1992 advent of the retransmission consent regime as a "change" to justify elimination of the Rules.[16] In fact, the Senate Report quoted above makes evident that the Exclusivity Rules are a critical element of the "balancing" that Congress undertook when it implemented the retransmission consent regime, as multiple commenters have noted.[17] There is no merit to the argument that the retransmission consent regime "fills the gap" that would be left by elimination of the Rules. To the contrary, as NAB has explained, the protection provided to local stations by the retransmission consent requirement is imperfect at best: MVPDs have claimed that they have obtained retransmission consent from out-

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[15] *See* NAB Comments at 6-13 & Appendix A; *see also* Comments of the NBC Television Affiliates, MB No. 10-71 (June 26, 2014), at 7-9 (observing that, "for over twenty-five years there has been widespread agreement by Congress, the Commission, and the full range of industry stakeholders that the exclusivity rules and compulsory copyright licenses are necessarily interlinked and must be examined together").

[16] *See, e.g.,* CenturyLink Comments at 12-13 (proposing that the retransmission consent requirement eliminates the need for the Exclusivity Rules); Comments of AT&T, MB No. 10-71 (June 26, 2014) ("AT&T Comments"), at 3 (citing "statutory and regulatory retransmission consent rights" as a "change[] in the law" that "rendered the exclusivity rules' rationale moot and their effects counterproductive").

[17] *See, e.g.,* Comments of the ABC Television Affiliates Association, MB No. 10-71 (June 26, 2014), at 9-10; Comments of the Walt Disney Company, MB No. 10-71 (June 26, 2014), at 5-7.

of-market stations and coupled that with the statutory copyright license to import out-of-market programming.[18]

Some commenters insist that the statutory copyright license does not weigh in favor of preserving the Rules.[19] That argument, too, ignores abundant legislative and regulatory history. Nearly a decade ago, the Commission noted that the "government-established copyright fee for distant signals . . . operates together with the network non-duplication and syndicated exclusivity rules to encourage MVPD carriage of local broadcast signals."[20] As broadcasters' opening comments showed, from the inception of the statutory license, the Exclusivity Rules have been an essential component of the statutory and regulatory balance struck by Congress.[21]

C. Actual Carriage Is Not a Prerequisite to Enforcement of Exclusivity Rights

A major theme sounded in several MVPD comments is that the Exclusivity Rules should only apply when the local station has granted retransmission consent and *not* when the station and

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[18] *See* NAB Comments at 50-57 (noting that the statutory copyright licenses "skew the balance otherwise created by market forces in favor of MVPDs" and that "no obvious barrier to retransmission of [a distant] signal throughout a local market would exist absent the Rules").

[19] *See, e.g.*, TWC Comments at 15-16.

[20] *See, e.g.*, *2005 FCC Retransmission Consent Report* at ¶ 33; *see also, e.g.*, H.R. REP. NO. 94-1476 (1976), at 89 (quoted in NAB Comments, App. A, at 5-6).

[21] *See* NAB Comments at 50-57; NBC Affiliates Comments at 7-8 (pointing out that the Rules "correct for th[e] distortion" created by the statutory copyright licenses "by enabling broadcasters to enforce the exclusivity rights they have bargained for—rights that would otherwise be undermined by the compulsory copyright regime"); CBS Affiliates Comments at 8 (arguing that, because the Rules and "the compulsory distant signal licenses . . . operate as a whole," and because the Commission cannot amend the Copyright Act, it should not modify or eliminate the Exclusivity Rules). *See also* CBS Affiliates Comments at 9 (arguing that "[t]he exclusivity rules allow for a functioning market by providing broadcasters with a limited means of asserting their local exclusivity in the face of a government-created compulsory license").

an MVPD have been unable to reach a retransmission consent agreement. Several commenters urge the Commission, for example, to adopt an exemption to the Rules where a broadcaster "withholds" retransmission consent or to suspend the Rules during negotiation impasses.[22] DIRECTV and DISH seek a similar change designed to advantage them in the event of an impasse: They urge the Commission, should it decide to eliminate the Rules applicable to cable, to make it a *per se* violation of the good faith negotiation standard for a broadcaster to withhold retransmission consent from a satellite carrier without granting a temporary waiver permitting importation of distant signals until the parties reach a carriage agreement.[23] Several commenters propose that the Exclusivity Rules should be inapplicable, and contractual exclusivity provisions should be unenforceable, whenever the local station is not *actually carried* by the MVPD.[24] As is apparent on their face, all of those "wish list" proposals are intended to have the Commission put its thumb on MVPDs' side of the scale and to distort arm's-length marketplace negotiations.

As NAB's opening comments pointed out, when a station negotiates exclusivity with a content provider, it obtains exclusive rights whether a particular MVPD carries that station or not: The Rules "protect contractual rights and *apply even if the programming is not shown at all or if the subscribers subject to the deletion do not have another source to receive the programming*."[25]

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[22] *See, e.g.,* CenturyLink Comments at 18.

[23] *See* DIRECTV/DISH Joint Comments at 4.

[24] *See, e.g.,* TWC Comments at 16 (arguing that Rules should not apply if a station withholds retrans consent); Comments of the American Cable Association, MB No. 10-71 (June 26, 2014) ("ACA Comments"), at 27-29; Joint Cablevision/Charter Comments at 9-10; APPA Comments at 19.

[25] NAB Comments at 38 (quoting *Implementation of the Satellite Home Viewer Improvement act of 1999*, Report and Order, 15 FCC Rcd 21688 (2000) ("*2000 Satellite Exclusivity Order*"), at ¶ 19) (emphasis added).

The Commission confirmed as much more than twenty years ago, when it noted Congress' "clear" intent "that local stations electing retransmission consent should be able to invoke network nonduplication protection and syndicated exclusivity rights, *whether or not these stations are actually carried by a cable system*."[26] In short, it has long been clear that exclusivity rights are meaningful and enforceable without reference to actual carriage of a local station's signal.[27]

In all events, suspension of the Rules during retransmission consent impasses would improperly favor MVPDs over broadcasters at the most critical point in the retransmission consent negotiation process. The proposals to eliminate or suspend the Rules to allow MVPDs to import distant signals whenever the parties cannot agree on retransmission consent terms inevitably would increase the number and duration of retransmission consent impasses, at the expense of local viewers, to whom local news and emergency programming would be unavailable from that MVPD.[28] In sum, every proposal to suspend the Rules in the event of an impasse or to declare them unavailable unless a broadcaster consents to importation of a distant signal in the event of an

[26] *Signal Carriage Order* ¶ 180.

[27] In a related context, the Commission long ago rejected the notion that a broadcast station would violate the good faith negotiation requirement by proposing to prohibit an MVPD from importing a duplicating signal as one term of a retransmission consent agreement, expressing its belief that "[p]roposals that specifically foreclose carriage of other programming services by the MVPD *that do not substantially duplicate the proposing broadcaster's programming*" would not be consistent with the good faith negotiation requirement—and, by implication, proposals to foreclose carriage of duplicating programming would not violate the good faith negotiation rules. *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*Good Faith Negotiation Order*"), ¶ 58 (emphasis added).

[28] NAB Comments at 32-38 (noting that MVPDs will "gain significant leverage vis-à-vis broadcasters if the parties know that the MVPD can import a distant signal in the event of a negotiating impasse" and discussing viewer confusion resulting from importation of distant signals during a retransmission consent dispute between Time Warner Cable and Smith Media).

impasse would "flatly contravene Congress' and the Commission's fundamental charge with respect to the broadcast marketplace: to promote localism."[29]

D. The Application of the Exclusivity Rules Does Not Depend on the Reach or Quality of a Local Station's Signal

Some commenters urge that exclusivity protection should only apply in broadcasters' over-the-air service area.[30] That argument is misguided, because television markets are not defined by the reach of an individual station's over-the-air signal. Instead, markets are defined by Nielsen Media Research in terms of actual viewership of a multiplicity of stations across all distribution means, so that when a predominance of viewers in a particular county watch stations from a particular area, that county becomes part of that viewer-defined market. *That* is the market in which program suppliers and broadcasters negotiate for exclusivity, one based on actual viewership of programming. No limitation on the reach of the Exclusivity Rules derived from a station's over-the-air signal is needed in any event, because the Rules already limit the geographic extent of exclusivity protection for cable providers.[31]

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[29] NAB Comments at 37 & n.115.

[30] *See, e.g.*, TWC Comments at 16-17; *cf.* ACA Comments at 29-32.

[31] *See* 47 C.F.R. §§ 76.92, 76.101. The Commission should also reject the suggestion that the Commission should "harmonize" the exceptions to the Exclusivity Rules by applying syndex's Grade B exception to the network non-duplication rules. *See* APPA Comments at 23. The Grade B exception originally arose from a time when the Commission sought to balance 35-mile zones (intended to aid nascent weak analog UHF stations), significantly viewed areas, and Grade B coverage areas for purposes of its 1972 must carry requirements. *See, e.g.*, *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Report and Order, 36 FCC 2d 143 (1972), at ¶¶ 81-84. The current must carry structure for commercial television stations does not rely on such proxies, and, indeed, the Grade B (or noise-limited) coverage area is just one of four statutory factors that Congress directed to be used in television market modification proceedings. *See* 47 C.F.R. § 76.55(e); 47 U.S.C. § 534(h)(1)(C)(ii) (listing four statutory factors for television market determinations).

Another commenter argues similarly that MVPDs should be permitted to import distant signals whenever a local station cannot deliver a "clean" or "consistent quality" signal.[32] Whatever a "clean" signal might be, the proposal ignores altogether the Commission's long-settled position that a broadcaster need not deliver a signal to an MVPD *at all* in order to enforce its exclusivity rights. As noted above, the Commission has long made clear that the Rules "apply even if the programming is not shown at all or if the subscribers subject to the deletion do not have another source to receive the programming."[33] That long-settled rule undermines any suggestion that exclusivity rights should be conditioned on the delivery of a signal of a certain (undefined) quality to each individual MVPD. Exclusivity rights are simply not dependent upon any carriage whatsoever.

E. The Retransmission Consent System Is Not "Broken"

MVPD proposals for reform of the exclusivity and retransmission consent paradigms are based on the false assumption that the current retrans system is "broken," a fact they see reflected

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[32] APPA Comments at 21. APPA also proposes that MVPDs should be permitted to import out-of-market signals that are within the home state of the MVPD. *See* APPA Comments at 21-22. Such a "reform" is unnecessary because local stations can and do consent regularly to the retransmission of their local programming. *See* NAB Comments, MB Docket No. 10-238 (Jan. 24, 2011) (citing multiple examples of local stations "grant[ing] MVPDs a private copyright license and retransmission consent to 'export' their local news, weather, sports, public safety, and informational programming across DMA lines to serve in-state viewers in other DMAs" in New Mexico, Virginia, North and South Carolina, Colorado, Tennessee, and Georgia). MVPDs have no need to import duplicating national programming from stations outside the DMA for all the reasons NAB explained in its opening comments.

[33] *2000 Satellite Exclusivity Order* at ¶ 19.

in escalating, supposedly "excessive" retransmission consent fees and increased "blackouts."[34] MVPD commenters believe that retransmission consent prices are somehow higher than they "should" be and, for that reason, the Commission should act to modify the prices being negotiated in the marketplace and the legal rules under which those negotiations take place,[35] and they contend MVPD subscribers are "cut off" from programming during retransmission consent stalemates. Both arguments for reformation of the retransmission consent regime are unfounded.

First, there is nothing to suggest that retransmission consent prices are "too high." Indeed, virtually every MVPD that urges "reform" also admits that television broadcast signals represent a "must have" component of the programming packages they resell to subscribers.[36] The significant demand by subscribers—and, in turn, by MVPDs—for broadcast signals itself demonstrates that those signals are extremely valuable. It follows that those signals can and should garner higher fees than programming that is less valued by MVPD subscribers. But, as NAB and others have shown repeatedly, broadcast signals *do not* garner fees that are higher than, or even comparable to, cable programming fees on a per subscriber/ratings point basis. A recent analyst report examining both the history of programming fees paid by MVPDs and their projected growth confirms that: (i) the fees paid by MVPDs for carriage of regional sports networks alone "*well*

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[34] *See, e.g.*, Verizon Comments at 2-5; USTA Comments at 2-8.

[35] Verizon Comments at 2 (claiming that MVPDs are increasingly paying "above-market fees"); APPA Comments at 9-10; TWC Comments at 8; AT&T Comments at 5; Comments of Block Communications, Inc., MB No. 10-71 (June 26, 2014), at 6-8 (claiming that the current rules are "being manipulated to achieve super-competitive [sic] rates").

[36] *See, e.g.*, AT&T Comments at 4; Joint Comments of Cablevision Systems Corp. and Charter Communications, Inc., MB No. 10-71 (June 26, 2014) ("Joint Cablevision/Charter Comments"), at 2; CenturyLink Comments at 4; Comments of The Independent Telephone & Telecommunications Alliance, MB No. 10-71 (June 26, 2014) ("ITTA Comments"), at 5; USTA Comments at 12.

exceed" those paid to broadcast stations; (ii) the fees paid for carriage of basic cable networks "*dwarf*" the fees paid for carriage of broadcast signals; and (iii) broadcast retrans fees are predicted to be just 12.6% of the fees paid to basic cable networks and regional sports networks in 2017.[37] That independent report cites several cable networks that receive a higher rate per subscriber than broadcast stations, despite considerably lower ratings.[38] As other analysts have observed previously, television broadcast stations "capture[] 35% of the audience, [but] get[] 7% of programming fees."[39]

An examination of cable revenue similarly shows that broadcast retransmission fees do not drive MVPD subscription fees. One estimate by *Multichannel News* found that only *two cents* of every dollar of cable revenue go to broadcast retransmission consent fees, while *20 cents* of every dollar go to cable programming fees.[40] More recent SNL Kagan data show that retransmission consent fees are equivalent to only 2.7 percent of the cable industry's *video-only* revenues (and would be a considerably smaller percentage of total revenues).[41] Thus, contrary to the MVPDs' claims, the blame for rising pay TV subscription rates does not rest upon any aspect of retransmission consent negotiations.[42]

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[37] Robin Flynn, *Putting Retrans Fees in Perspective Following FCC's Recent Retrans Ruling*, SNL Kagan (Apr. 14, 2014) (emphasis added).

[38] *Id.*

[39] Diana Marszalek, *Ryvicker: Stations Losing $10.4B In Retrans*, TVNewsCheck (Sept. 18, 2013) (quoting Wells Fargo analyst Marci Ryvicker).

[40] *Where Your Cable Dollar Goes*, Multichannel News (Mar. 28, 2011), at 10-11.

[41] Comments of the National Association of Broadcasters, MB No. 10-71 (May 27, 2011) ("2011 NAB Comments"), at 45.

[42] Previous studies in the retransmission consent docket have confirmed that retransmission consent fees are not responsible for rising consumer rates for MVPD service. *See, e.g.*, Declaration of Jeffrey A. Eisenach and Kevin W. Caves (May 27, 2011) ("2011 Declaration"), at 11-12 attached as Attachment A to 2011 NAB Comments.

Second, if retransmission consent fees were in fact "too high," there would be widespread unavailability of broadcast signals because retransmission consent agreements would not be reached. At some point, negotiations would simply end because MVPDs would decide they were unwilling to pay "unreasonably high" prices for retransmission consent, and broadcast signals would not be carried. But, to the contrary, the overwhelming majority of negotiations continue to result in successful agreements with no interruptions in MVPD carriage of broadcast signals. A study filed in this proceeding in 2011 showed that carriage disputes in the period from 2006 to 2011 affected only one one-hundredth of one percent of U.S. television viewing hours and that MVPD subscribers were more likely to lose access to their favorite programming because of power outages or MVPD system failures.[43] The study also documented that the length of any given disruption was declining over time.[44] Although certain MVPDs contend that the number of disruptions has "escalated,"[45] even if disruptions had somehow increased 10-fold since the 2011 study—which they have not—they would affect only *one tenth of one percent* (0.1%) of U.S. television viewing hours. It remains far more likely that a consumer will lose access to a program of his or her choice because of power or MVPD service outages. For example, TVfreedom.org recently studied the number of outages reported by consumers via DownDetector.com and identified **3,050 outages** involving just five MVPDs over a period of five months.[46]

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[43] *See* 2011 Declaration at 25-31 (citing SNL Kagan data).

[44] 2011 Declaration at 31.

[45] Verizon Comments at 4. *See also* APPA Comments at 11 (contending that disruptions have become "routine"); USTA Comments at 9-10.

[46] *See* Letter from Robert C. Kenny, Director of Public Affairs, TVfreedom.org, to the Honorable Claire McCaskill, Chairman, Subcommittee on Consumer Protection, Product Safety

As these data make clear, bald, generalized assertions that retransmission consent fees are excessively "high" must be carefully analyzed and considered.[47] Increases in retransmission consent fees in fact suggest only that the marketplace is finally beginning to reflect the real value of broadcast signals.

MVPD commenters' suggestion that reforms are needed because retransmission consent fees are being "passed along" to subscribers[48] likewise provides no basis for intrusive regulation of retransmission consent. MVPDs claim that the only way to protect consumers from increased MVPD subscription rates is to regulate the rates they pay (in a highly competitive market) for the right to retransmit, mark up, and re-sell local broadcast signals to their subscribers at a profit. But unless there is corresponding regulation of the rates MVPDs actually charge subscribers, it cannot be assumed that additional retransmission consent regulation will result in changes in consumer rates. As NAB and other broadcasters pointed out in previous comments in this proceeding, "[i]t is absurd for [MVPDs]—some of the largest media companies in the world—to suggest that Commission regulation of the rates broadcast stations charge MVPDs for the right to retransmit and re-sell broadcast signals is necessary to protect MVPD subscribers against escalating MVPD subscription rates (when retransmission consent rates are but a small fraction of the rates MVPDs

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and Insurance Member, Committee on Commerce, Science and Transportation, United States Senate (July 9, 2014), *available at* <http://tvfreedom.org/docs/PayTVLetterMcCaskill7814.pdf.>

[47] *See, e.g.,* LIN Comments at 13-14 (changes in retransmission consent fees "tell little without reference to the overall market" and policy changes should not be made without considering additional facts such as whether retransmission consent fees were previously below their natural market levels, increasing costs of producing programming, and rising competition for advertising revenue from MVPDs).

[48] *See, e.g.,* TWC Comments at 10 (alleging that consumers are harmed when broadcasters "extract" fee increases from MVPDs); Block Comments at 7 (claiming that broadcaster leverage in retransmission consent negotiations results in "higher consumer bills").

charge their subscribers) while at the same time opposing rate regulation of their own service to consumers."[49]

MVPDs' unmeritorious, self-serving "consumer welfare" argument has not grown more persuasive with the passage of time. Even if the Commission had the authority to regulate retransmission consent fees, regulation would not guarantee that MVPD subscriber retail rates would decline. The Commission recognized as much in connection with its recent decision regarding joint broadcaster negotiations for retransmission consent, where it stated that its decision was "not premised on rate increases at the retail level" and that "[c]able operators are not required to pass through any savings derived from lower retransmission consent fees."[50] Thus, even if MVPDs' proposed regulation of retransmission consent were lawful, such regulation cannot be justified on grounds that consumers will benefit. MVPD proposals for asymmetrical retrans price regulation would result in nothing but a regulatory subsidy to MVPDs that assures them windfall profits.

Third, and finally, MVPDs argue that the failure of the retransmission consent marketplace also is reflected in what they characterize as increasingly frequent "blackouts" of local stations' signals during retransmission consent disputes.[51] Those arguments mischaracterize the true meaning of a "blackout": The local station's signal in fact remains available at all times over the air and (in most markets) via at least two other MVPDs in the market. What MVPD commenters

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[49] Reply Comments of Broadcaster Associations, MB No. 10-71 (June 3, 2010) ("2010 Broadcaster Associations Reply Comments"), at 30.

[50] *Exclusivity Notice* at ¶ 17.

[51] *See, e.g.*, APPA Comments at 11 (insisting that "blackouts routinely now occur, the pace of blackouts has also increased dramatically over the past four years"); USTA Comments at 8-11; Verizon Comments at 2-5.

disparage as "blackouts" simply reflect the parties' mutual failure or inability to negotiate the terms of a retransmission consent agreement—under the Commission's good faith negotiation rules—at that point in time. And in any event, the vast majority of "blackouts" have involved just three MVPDs, DISH, DIRECTV, and Time Warner Cable,[52] a fact suggesting that if any "problem" exists at all, it is one confined to those providers, who may choose to cause them for reasons of political expediency, and is not caused by a failure of the retransmission consent regime.

II. The Exclusivity Rules Affirmatively Further Competition and Promote Localism

A. Broadcasters Do Not Have "Monopoly" Power, and the Rules Raise No Antitrust Concerns

MVPD commenters also suggest that the video distribution marketplace has developed from one in which cable operators had significantly greater leverage to one in which local stations exercise "monopoly" power.[53] From that premise, they reason that the Rules foster an anti-competitive environment in which MVPDs are at the mercy of broadcasters wielding market power derived from their exclusivity rights. Accordingly, MVPD commenters ask the Commission to

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[52] According to publicly available information compiled by an advocacy group for the MVPDs, from 2010 to the present, 55 of 79 disruptions in service arising from retransmission consent disputes involved either DISH, DIRECTV, or Time Warner. *See* American Television Alliance, Blackout List 2010-2014, *available at* <http://www.americantelevisionalliance.org/media-center/> (last viewed July 21, 2014).

[53] *See* Joint Cablevision/Charter Comments at 8 (arguing that "[b]ecause most broadcast networks have only a single affiliate in a given market, the exclusivity rules effectively grant local broadcast stations a monopoly over network and syndicated programming in that market"); Verizon Comments at 5-6 (arguing that the Rules "effectively make one broadcast station the sole source of certain programming, and so the station enters into retransmission consent negotiations with an upper hand"); CenturyLink Comments at 4 (arguing that the Rules and exclusive agreements "give broadcasters a monopoly over the distribution of *national* (not uniquely local) network and syndicated programming"); *id*. at 15-16. *Cf.* APPA Comments at 9-10 (declaring that broadcasters "are in a position of dominance" and "hold all the cards").

prohibit broadcasters from entering into private exclusivity agreements with content providers or, alternatively, to declare such agreements contrary to public policy and unenforceable, on the theory that exclusivity agreements are unreasonable restraints on trade under traditional antitrust and unfair competition principles.

Those commenters casually and inaccurately use the language of antitrust without close analysis or careful consideration of the relevant marketplace dynamics. In fact, the exclusivity paradigm is not anti-competitive; instead, it affirmatively fosters competition, as NAB and other commenters pointed out[54] and the Commission itself has recognized.[55] Abundant legislative history, real-world data, and the expert analysis summarized in NAB's opening comments leave no room for doubt that the Rules affirmatively *promote* competition. Antitrust concerns voiced by MVPDs are misplaced.

In particular, in the competitive environment fostered by the Rules, MVPD commenters' insistence that broadcasters have a "monopoly" on sought-after network and syndicated programming is nonsensical. The television programming marketplace is highly competitive, characterized by increasingly broad and varied sources of high-quality video programming

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[54] NAB Comments at 25-26 (explaining why honoring exclusivity rights affirmatively promotes competition in the video programming marketplace in light of the asymmetry resulting from other content providers' ability to ensure exclusivity). *See also, e.g.*, NBC Affiliates Comments at 10-13 (describing pro-competitive effects of exclusive arrangements and the risk of migration of programming to pay services absent exclusivity); *see also* Comments of the NFL, MB No. 10-71 (June 26, 2014), at 2-4 (explaining that eliminating the Rules "could lead to the migration of some of the most popular programs from broadcast to pay television" because "advertising revenues are tied to viewership" and reduction in revenues would "reduce the ability of local broadcasters to provide high-value programming, such as professional sports").

[55] *See, e.g., 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) (*"1988 Program Exclusivity Order"*), at ¶ 51 (discussing syndex).

available to MVPDs and local stations alike from a variety of sources, including cable channels and online video distributors. Today, a number of very popular programs—*Mad Men, Breaking Bad*, and *Game of Thrones*, to name a few—are available on non-broadcast channels. It is not a "monopoly" for those channels to be the one source for particular programming at a particular time. Simply put, the local network affiliate is no more a monopolist than HBO, Showtime or any other programming channel carried by any given MVPD. That affiliate is simply the source of the particular programming carried on its signal in its market. Just as a cable system is not allowed to gain access to a channel like HBO or AMC by taking the channel from DIRECTV's programming stream, MVPDs should not be able to claim some right to go to a distant station to obtain either syndicated or network programming that a local station has bargained to distribute in a given area.

B. The Rules Promote Rather Than Hinder Localism

MVPD commenters claim that elimination of the Rules would *promote* localism by incenting local stations to offer more and better local content.[56] In support of that argument, several commenters declare that broadcasters are offering increasingly less local content, suggesting by implication that the Rules are not promoting but instead detracting from the creation of locally-oriented programming.[57]

The argument is, in fact, specious. Local broadcasters are offering *more*, not less, local content, and recent market analyses confirm that local stations continue to offer substantial local

[56] *See* DIRECTV/DISH Joint Comments at 2 (arguing that elimination of the Rules would "strengthen incentives for broadcasters to focus on localism as a way to differentiate themselves from out-of-market stations"); *cf.* APPA Comments at 18 (arguing that the Rules protect only "network programming and syndicated programming, not locally-originated programming").

[57] *See* ITTA Comments at 6 (declaring without citation that "broadcasters are scaling back the amount of local programming they provide"); USTA Comments at 7 (citing FCC Media

news programming.[58] And for the reasons explained in NAB's opening comments, the Exclusivity Rules are an essential part of the legal landscape that encourages and enables the development of such local content: Put simply, the Rules allow local stations to obtain audience shares and advertising revenues, that, in turn, enhance their ability to create and distribute high-quality, locally-oriented programming. As the Compass Lexecon June 2014 Report explains, exclusivity ensures a vibrant market for local television content that enhances competition and incentivizes the creation of locally-oriented programming.[59] That expert analysis is confirmed by real-word data: NAB's opening comments described several circumstances that most closely mimic local markets operating with and without the application of the Rules, all of which demonstrate the significant positive effects of the Rules on broadcast stations' ratings, revenues, and ability to

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Ownership Study #4); TWC Comments at 13-14 (declaring that local stations "are curtailing local news operations and original reporting"); CenturyLink Comments at 16-17 (arguing that "the increase in retransmission fees has coincided with *reduced* local programming" and that the Commission would "enhance localism by getting rid of the artificial monopoly on national and syndicated programming") (emphasis in original) (citing Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism* (Nov. 2011), *available at* <http://www.americantelevisionalliance.org/wp-content/uploads/2013/07/ Retransmission_Consent_and_Localism_Paper_by_Napoli_FINAL.pdf.>

[58] A recent survey found that the average local television station broadcasts more than five hours of local news per weekday. *See* Robert Papper, *TV and Radio Staffing and News Profitability Survey 2012*, RTDNA/Hofstra University Survey (2012), at Part II, page 1, *available at* < http://www.rtdna.org/uploads/files/vv2.pdf>. After a peak in 2011 (as reported in the 2012 Papper survey), those numbers dropped just slightly in 2012 and 2013, but the average is still above five hours per weekday. *See* Robert Papper, *More stations producing local news* (June 16, 2014), available at <http://www.rtdna.org/article/more_stations _producing_local_news#.U82YP-NdXTo> (summarizing 2013 survey results).

[59] *See* NAB Comments at 19-24 & Appendix B (summarizing and attaching Declaration of Mark Israel and Allan Shampine of Compass Lexecon (June 26, 2014) ("Initial Compass Lexecon Declaration")).

produce and provide local content.[60] In every case described in those comments, ratings and revenues would *increase* if the affected local stations were able to enforce contractual exclusivity rights against duplicative programming streams. And the converse is true as well: Absent exclusivity protection, fragmentation of audiences leads directly to decreased ad revenues that, in turn, limits local stations' ability to offer local programming.[61]

Numerous other commenters confirm the point, noting that the Rules are essential to broadcasters' ability to provide locally-oriented programming to their communities of license.[62] As the NBC Television Affiliates observed, the contrary argument is illogical, because

> [r]epealing the exclusivity rules would harm local advertisers by impairing their ability to reach local viewers, since viewers who watch a distant signal are completely lost to the local car dealer or retail outlet. In turn, viewers receiving remote television stations would not receive information pertinent to businesses in their local communities. Quite simply, such a change would harm the entire community. Moreover, distant signals would not provide local information to viewers. A New York television station will not inform Cleveland viewers about what is happening in their communities. In other words, repealing the exclusivity rules would

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[60] NAB Comments at 40-50.

[61] *See* NAB Comments at 50.

[62] *See, e.g.*, ABC Affiliates Comments at 14-18; NBC Affiliates Comments at 2-6 (observing that "[b]asic economic principles dictate that broadcasters will receive less advertising revenue if the local cable company imports duplicative national programming into the market despite privately negotiated programming exclusivity"); CBS Affiliates Comments at 2, 4 (explaining that the Rules "provide important support for broadcasters' ability to provide programming of local interest" because "[e]xclusivity within a market allows stations to maximize viewership and local advertising revenues, and thereby to invest further in quality local programming"; consequently, "the loss of exclusivity would severely impair local broadcasters' ability to underwrite the substantial costs associated with providing strong and unique local news and other local programming, a vital public service"); *cf.* Comments by Association of National Advertisers (ANA) and American Association of Advertising Agencies, MB No. 10-71 (June 26, 2014) ("4A's"), at 1 (observing that the Rules both "ensure that [local stations] can attract advertisers who wish to reach their viewers and "protect advertisers by ensuring that they can reach their desired targets and control which regions of the country see their messages").

> not only hinder local stations' ability to produce local information; it also would reduce the opportunities for individuals to *receive* the information.[63]

Additional empirical research and analysis has confirmed NAB's conclusions. A further report prepared by Compass Lexecon analyzed the impact of the grant of significantly viewed petitions involving ten stations in eight markets of various sizes.[64] The Compass Lexecon regression analysis shows that "when a local broadcast station gains exclusivity" because of the loss of significantly viewed status by a distant station, "its ratings increase by a statistically and economically significant amount."[65] This "robust" finding, which "holds across a wide range of specifications" and controls for various factors, "supports [Compass Lexecon's] conclusion from [its] initial declaration that the elimination or weakening of the Commission's exclusivity rules is likely to have an economically significant impact on local stations and their incentives to invest" in local content, "including local news, sports, weather, and emergency information."[66]

The record clearly demonstrates that broadcasters' ability to negotiate and efficiently enforce exclusivity promotes both localism and competition in the video marketplace. Exclusivity enables broadcasters to invest in content that "enhances competition among broadcasters and between broadcasters and other content providers, thus increasing viewer and advertiser welfare."[67] As several commenters have pointed out, the Rules provide an efficient, cost-effective

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[63] NBC Affiliates Comments at 7.

[64] *See* Supplemental Declaration of Mark Israel and Allan Shampine of Compass Lexecon (July 24, 2014), attached as Appendix A ("Supplemental Compass Lexecon Declaration") at ¶ 4, Table 1.

[65] *Id.* at ¶ 2.

[66] *Id.* at ¶¶ 1- 2.

[67] Initial Compass Lexecon Declaration at ¶ 3.

administrative enforcement mechanism essential to full protection of privately-negotiated contractual exclusivity rights.[68] None of the MVPD commenters identify a viable alternative enforcement mechanism. Accordingly, the Commission should retain the Rules in order to promote localism and competition in the video marketplace.

III. Privately Negotiated Contracts, Not the Commission's Rules, Confer Exclusivity Rights, and the Commission Should Not Attempt to Regulate the Terms of Those Agreements

Several MVPD commenters attribute a number of supposedly anti-competitive effects to the Exclusivity Rules, describing them variously as "effectively mak[ing] one broadcast station the sole source of certain programming,"[69] "prevent[ing] . . . MVPD[s] from delivering . . . out-of-market programming to consumers,"[70] "allow[ing] the local broadcast station to usurp the bargaining rights of an out-of-market broadcast station that may be a competitive alternative or at least a partial substitute for the negotiating MVPD and its subscribers,"[71] and "block[ing] an MVPD from contracting with an out-of-market television station to acquire popular network or syndicated programming also offered by the local television station."[72] Those comments misunderstand the nature and operation of the Rules: The Exclusivity Rules do not *confer* any exclusivity rights at all, they simply provide an enforcement mechanism for contractual distribution rights privately negotiated by copyright holders. In fact, the Rules limit the geographic

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[68] *See, e.g.,* Comments of Lin Television Corporation d/b/a Lin Media, MB No. 10-71 (June 26, 2014) at 38-41; Comments of the Walt Disney Company, MB No. 10-71 (June 26, 2014) at 7-11; NAB Comments at 57-69.

[69] Verizon Comments at 5.

[70] Verizon Comments at 3.

[71] Verizon Comments at 7.

[72] AT&T Comments at 4.

area in which contracting parties can seek enforcement of exclusivity rights via the Commission. Exclusivity *rights* themselves are the product of private contracts negotiated at arms' length by industry participants.

Notwithstanding this misunderstanding, as noted above, multiple commenters urge the Commission not only to do away with the Rules as an enforcement mechanism, but also to declare agreements conferring exclusivity rights unenforceable as contrary to public policy, restraints on trade, and in violation of antitrust rules and principles.[73] Other commenters reach essentially the same result by urging the FCC to prohibit broadcasters from entering into an agreement with any party that limits the ability of an MVPD to obtain retransmission consent to carry an out-of-market station during a retransmission "blackout"—essentially a rule that would prohibit all exclusive agreements with program suppliers, so that MVPDs would be free to seek broad retransmission consent from out-of-market stations.[74] Still others seek a Commission rule that would limit broadcast stations' invocation of bargained-for exclusivity rights at the time when exclusivity protection is most necessary and most valuable to local stations—when the parties reach a retransmission consent negotiation impasse[75] (or, as discussed more fully above,[76] when the local

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[73] *See, e.g.*, APPA Comments at 19-20; CenturyLink Comments at 2-3, 18-22; Joint Cablevision/Charter Comments at 8-9. *See also* ACA Comments at 13 (seeking Commission prohibition on network affiliation agreement provisions restricting local stations' ability to grant retransmission consent to MVPDs for out-of-market carriage).

[74] *See, e.g.*, Joint Comments of Mediacom Communications Corporation, Cequel Communications, LLC d/b/a Suddenlink Communications, and Bright House Networks, LLC, MB No. 10-71 (June 26, 2014), at 14-18; ACA Comments at 18-19; DIRECTV/DISH Joint Comments at 7 (proposing that broadcasters should be precluded from negotiating prohibitions on MVPD carriage of "legally available" out-of-market signals as a condition of retransmission consent).

[75] TWC Comments at 16.

[76] *See* Section I.C, *supra*.

station is not actually carried by the MVPD). Each of these proposals, and several other "reforms" discussed below, are essentially attempts to make an end run around the Exclusivity Rules and the important interests they are intended to protect.

The Commission has no authority to interfere with or invalidate privately negotiated contracts containing valid exclusivity provisions. To the contrary, Congress has *relied* expressly and extensively on the exclusivity paradigm in decades of legislating in this area, so that Commission action that eliminates or restricts the availability of bargained-for exclusivity would be flatly contrary to congressional purpose. Nothing in the Commission's authority to regulate the good faith negotiation of retransmission consent agreements[77] vests the Commission with authority to prohibit private parties from contracting for exclusivity. Good faith in a negotiation process cannot be stretched to be a restriction on the right to enter contracts with program suppliers before any negotiation ensues. Not surprisingly, MVPD commenters cite no statutory directive ordering the Commission to prohibit or limit the enforceability of privately-negotiated exclusivity rights, either in the retransmission consent context, during a retransmission consent impasse, or otherwise. The Commission should decline to do so in this proceeding.

IV. The Satellite Carriers' Request to Modify the "Unserved Household" Predictive Methodology Is Unwarranted

MVPD commenters' calls for wholesale elimination of the Rules ignore or refuse to acknowledge the serious regulatory imbalance that would result. As NAB and other commenters pointed out, cable providers are subject to the Commission's *regulatory* exclusivity regime, while satellite carriers' ability to import duplicating programming is limited by the terms of the *statutory*

[77] 47 U.S.C. § 325(b)(3)(C).

satellite copyright license.[78] Aware of this statutory/regulatory distinction and agreeing that elimination of the Rules (alone) would create an unacceptable regulatory imbalance, DIRECTV and DISH urge the Commission instead to meddle with the satellite side of the cable/satellite playing field.[79] Most significantly, the satellite commenters ask the Commission to revise the predictive model used to identify "unserved households" by (at least as an initial step) adopting the Commission's new *TV Study* software for predicting which households are "unserved," on the ground that the current methodology (the Individual Location Longley-Rice model ("ILLR"))[80] under-predicts lack of service.[81]

Such changes in the predictive methodology are both unnecessary and unwarranted. First, as the satellite carriers admit, the "if local, no distant" principle adopted by Congress prohibits the importation of out-of-market signals when a satellite carrier offers local-into-local satellite service in a DMA.[82] Both satellite carriers offer local-into-local service: DISH offers local-to-local service in all 210 markets, and DIRECTV offers local-to-local in 197 markets—that is, to 99.2

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[78] *See* NAB Comments at 39-40 (arguing that "[e]liminating the Rules applicable to cable would create an unjustifiable competitive imbalance favoring cable over satellite, and thus would be arbitrary and capricious"); *id*. at 9-13 (noting that the structure and limitations of the statutory copyright license available to satellite carriers are intended to serve as a "surrogate" for the network non-duplication rules); *see also, e.g.*, ABC Affiliates Comments at 10-13.

[79] *See* DIRECTV/DISH Joint Comments at 2-4 (noting that the Rules "apply differently today to cable and satellite" and that if the Rules were eliminated, "cable operators alone would be allowed to import competing network-affiliated broadcast signals from adjacent markets").

[80] *See, e.g., Establishment of a Model for Predicting Digital Broadcast Television Field Strength Received at Individual Locations*, Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 16426 (2010), at ¶ 1.

[81] DIRECTV/DISH Joint Comments at 5-6.

[82] DIRECTV/DISH Joint Comments at 3 (noting that Section 119 allows satellite carriers to provide out-of-market broadcast signals only when "the satellite carrier does not make available the local affiliate for the same network"); *id*. at 5.

percent of all television households.[83] In those markets, neither satellite carrier can import a distant signal in any event, not because the predictive model supposedly under-predicts unserved households but because the statute flatly prohibits them from doing so.[84] The *statute*, not the predictive model, effectively makes the entire market "exclusive."

Second, the premise of the satellite carriers' request is flawed: The ILLR model used by the Commission to predict television service does not, in fact, under-predict unserved households. NAB previously has submitted empirical data demonstrating that, if anything, the digital ILLR model actually *over-predicts* those households that are unserved.[85] Indeed, the Commission has repeatedly concluded that the current ILLR model is appropriate.[86] Moreover, the statute itself

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[83] *See* 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-relese/programming/dish-network-become-first-pay-tv-provider-offer-local-broadcast-channels-a>; DIRECTV HD Locals, *available at* <http://www.directv.com/DTVAPP/content/hd/hd_locals> (last viewed July 21, 2014).

[84] In "short" markets, the satellite carriers can import distant network signals of the missing network to all of their subscribers there: By definition, all those subscribers are "unserved," and no predictive model is even necessary to that determination.

[85] *See* NAB Comments, ET Docket No. 05-182 (June 17, 2005) at 39 (citing Engineering Statement of Meintel, Sgrignoli & Wallace).

[86] *See Establishment of a Model for Predicting Digital Broadcast Television Field Strength Received at Individual Locations*, Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 16426 (2010), at ¶ 46 ("Analysis of the data on the model's performance shows that using the values used in the SHVIA ILLR model produce approximately an equal number of over-predictions as under-predictions."); *The Satellite Home Viewer Extension and Reauthorization Act of 2004; Study Of Digital Television Field Strength Standards And Testing Procedures*, Report to Congress, 20 FCC Rcd 19504 (2005), at ¶ 148 ("For the analog model, we believe that we struck the correct balance for clutter loss. This has been borne out by the data on the record of its performance, which shows that using the values adopted by the Commission the ILLR model produces approximately an equal number of over predictions as under predictions."); *Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations*, Memorandum Opinion and Order on Reconsideration, 19 FCC Rcd 9964 (2004), at ¶ 11 (noting that EchoStar's own data analysis indicated possible under-prediction of service in the ILLR model); *Establishment of an Improved Model for Predicting the*

includes a failsafe: Any subscriber whose household is predicted by the digital ILLR model to be served by the local station can request an on-site test of actual signal strength.[87] The statute thereby makes accommodation for any "unreliability" inherent in the predictive model.

In short, no sound reason supports replacement of a model that does *not*, in fact, over-predict unserved households with any alleged detriment to satellite carriers.

V. Other "Reforms" Proposed by MVPD Commenters Are Unwarranted

The *Exclusivity Notice* invited comment on numerous issues relating to the Exclusivity Rules but did not seek further specific comment on the litany of other MVPD requests for government intervention in the retransmission consent process. Nevertheless, numerous MVPD commenters move beyond the Rules to urge more sweeping reforms, including numerous alterations to the good faith negotiation requirement. In doing so, they reiterate many proposals that have been repeatedly considered and rejected by the Commission as beyond the scope of its statutory authority, inconsistent with Congressional intent, and contrary to the public interest. MVPD commenters essentially seek to eviscerate the retransmission consent regime to the advantage of cable systems and satellite carriers by adopting "reforms" that go well beyond the scope of the current phase of this proceeding, which is focused on the Exclusivity Rules themselves.[88]

Broadcast Television Field Strength Received at Individual Locations, First Report and Order, 15 FCC Rcd 12118 (2000), at ¶ 14 (noting that the ILLR model "already produces more under-predictions than over-predictions [of service] (a condition which favors the interests of satellite service providers)").

[87] *See* 47 U.S.C. § 339(a)(2)(D)(i); *id*. § 339(c)(4).

[88] MVPD commenters' requests are presumably based on the Commission's brief invitation to comment on additional modifications that ought to be considered if the Rules are

These comments are inappropriate in the context of this aspect of this proceeding. In any event, each proposal should be rejected as a transparent attempt to tip the retransmission consent balance even further in favor of MVPDs and away from local stations. Every one of these proposals ignores the competitive balance carefully established and repeatedly refined by Congress and the Commission over several decades. Nothing in the MVPD comments, let alone any directive by Congress, warrants the Commission altering that balance under the supposed auspices of the good faith negotiation rule or otherwise.[89]

A. Proposals for Mandatory Interim Carriage or Dispute Resolution Are Precluded by Section 325 of the Communications Act

The *Exclusivity Notice* recounts the Commission's conclusion at the outset of this proceeding that it lacked authority to adopt proposals for mandatory interim carriage or mandatory dispute resolution procedures "in light of 'the statutory mandate in Section 325 and the restrictions imposed by the [Administrative Dispute Resolution Act].'"[90] The Commission's statutory authority remains unchanged. Nevertheless, multiple MVPDs continue to urge the "adoption of a

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retained. *Exclusivity Notice*, ¶ 73. Even if the notice-and-comment requirement of the Administrative Procedure Act, 5 U.S.C. § 553, countenanced Commission consideration of these far more sweeping proposals—a dubious proposition—the Commission should reject MVPD requests to make dramatic changes to the retransmission consent regime in this proceeding for the reasons outlined below and in numerous prior submissions by NAB and other broadcasters in this docket.

[89] Nor is any change in the balance necessary. Even Comcast, the nation's largest MVPD, told Congress just weeks ago that the retransmission consent marketplace is not "broken" but is functioning as intended. *See* 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.>

[90] *Exclusivity Notice* at ¶ 2 (quoting and citing NPRM at ¶ 19).

dispute resolution mechanism and provi[sion] for interim carriage while a retransmission consent dispute is pending before the Commission,"[91] or seek other forms of mandatory interim carriage.[92] There is no means by which the Commission could lawfully adopt any such proposals given the plain language of the Communications Act.[93] As was the case the first several times MVPDs made such proposals, Section 325(b) continues unequivocally to prohibit the retransmission of a television broadcast station's signal without the station's express consent: The statute declares that no MVPD "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station."[94] Allowing carriage of a signal without the express consent of the originating broadcast station not only would violate the unambiguous mandate of Section 325(b) but also would be inconsistent with the statute's legislative history, which makes clear that Congress intended to provide broadcast stations with the exclusive right to control others'

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[91] TWC Comments at 20-21. *See also* Verizon Comments at 11; DIRECTV/DISH Joint Comments at 8 (in the event of an impasse, FCC should impose a mandatory standstill, establish a "cooling off period" in which parties would meet with Commission staff regarding their negotiations, and if an agreement still is not reached, be required to participate in "baseball"-style arbitration); USTA Comments at 15-16.

[92] Joint Cablevision/Charter Comments at 13-16; DIRECTV/DISH Joint Comments at 7 (FCC should prohibit broadcasters from terminating carriage near "marquee" events such as the Super Bowl, World Series, and Academy Awards).

[93] A fuller discussion of the limits of the Commission's authority with regard to mandatory interim carriage and mandatory arbitration can be found as follows: 2011 NAB Comments at 17-22; 2011 NAB Reply Comments at 24-29; Opposition of the Broadcaster Associations, MB Docket No. 10-71 (filed May 18, 2010) ("Opposition of the Broadcaster Associations") at 63-72; *see also* 2010 Broadcaster Associations Reply Comments at 2-6.

[94] 47 U.S.C. § 325(b)(1)(A). *See also Good Faith Negotiation Order* at ¶ 60 (holding that Section 325(b) of the Act prevents a MVPD "from retransmitting a broadcaster's signal if it has not obtained express retransmission consent").

retransmission of their signals and to negotiate the terms and conditions of such retransmission through private agreements.[95]

Based upon the clear language and legislative history of Section 325(b), the Commission has consistently and correctly concluded that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent"[96] as the substantive terms and conditions of carriage are to be negotiated privately by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith. The Commission has found repeatedly that it has "no latitude . . . to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission."[97] As NAB previously explained, proposals to require broadcasters to make their signals available—even briefly or during so-called "marquee" events—are entirely inconsistent with the system established by Congress.[98]

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[95] *See* S. REP. 102-92 at 34-35, 37 (1991) ("Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means" and "[c]arriage and channel positioning for such stations will be entirely a matter of negotiation between the broadcasters and the cable system").

[96] *Good Faith Negotiation Order* at ¶14; *accord Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965 (1993) ("*Consumer Protection Order*"); *see also Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 35 (2007) ("*Mediacom/Sinclair Order*").

[97] *Good Faith Negotiation Order* at ¶¶ 60, 84 ("upon expiration of an MVPD's carriage rights under . . . an existing retransmission consent agreement, an MVPD may not continue carriage of a broadcaster's signal while a retransmission consent complaint is pending at the Commission"); *see also Mediacom/Sinclair Order* at ¶ 25 (stating that the Commission "would not have authority to order continued carriage" of a television station's signal absent the station's consent).

[98] 2011 NAB Reply Comments at 28-29 (MVPD proposals that would result in carriage without broadcasters' express consent all "suffer from the same legal infirmity—they would require a television station to grant retransmission consent for some period of time against the

Just as the Commission lacks authority to mandate interim carriage over the objection of a broadcaster, so too it lacks authority to mandate involuntary arbitration to resolve retransmission consent disputes.[99] The plain language of Section 325(b) makes clear that no party—neither the FCC nor an arbitrator—can authorize an MVPD to transmit a station's broadcast signal without the broadcaster's consent. Adoption of an arbitration requirement would, by definition, result in a decision about whether the broadcaster or the MVPD is "right." If the broadcaster "loses," the MVPD could be granted the right to retransmit the station's signal although the broadcaster never consented to carriage on the arbitrator's terms or authorized the carriage—and most troubling, even if the broadcaster strongly objected to such carriage. Thus, the adoption of mandatory arbitration as a mechanism to resolve retransmission consent disputes contravenes the plain language of Section 325(b) because it would permit the arbitrator, not the broadcaster, to decide the terms upon which to grant permission to an MVPD to carry a broadcaster's signal.

In addition to being squarely at odds with the plain language of the statute, mandatory arbitration is contrary to the most fundamental premise of the retransmission consent marketplace established by Congress, in which local television stations have the opportunity to negotiate for

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station's own volition. But Congress has made clear that under no circumstances should an MVPD retransmit a station's signal without the express consent of the broadcaster, and the Commission must reject any proposal to penalize a broadcaster for asserting its Section 325 rights."). There, NAB also explained that DISH's proposals to curb a station's retransmission consent rights because of limitations on the reach of its over-the-air signal would be equally inconsistent with Section 325. *Id.* (citing Comments of DISH Network, LLC in MB Docket No. 10-71 (May 27, 2011)). For the same reasons, the DIRECTV and DISH proposal in response to the *Exclusivity Notice* to prohibit stations from asserting their retransmission consent rights where they do not provide an over-the-air signal to a "materially large" number of "subscribers" must be rejected. *See* DIRECTV/DISH Joint Comments at 7.

[99] *Exclusivity Notice* at ¶ 18.

compensation from MVPDs in exchange for the right to retransmit and resell their broadcast signals.[100] Congress made it unmistakably clear that the retransmission consent marketplace ought to function without government intervention. Commenter proposals for "cooling off periods" during which parties would "discuss the impasse" with FCC staff and government-mandated arbitration proceedings to "evaluate[] each party's best offer and select[] the one that most accurately reflects a fair market price"[101] are completely contrary to what Congress intended when it rejected the notion that it or the Commission should or would "dictate the outcome" of the negotiations between broadcasters and MVPDs.[102]

The FCC's conclusion that it lacks authority to adopt interim carriage or mandatory arbitration is fully consistent with the plain language of the retransmission consent statute, congressional intent, and the FCC's past decisions interpreting and applying the statutory scheme.[103] No commenter calling for these modifications has presented any new argument or evidence demonstrating an error in the Commission's legal analysis.

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[100] *See* S. REP. 102-92 (1992), at 36 (stating that the 1992 Cable Act created a "marketplace for the disposition of the rights to retransmit broadcast signals").

[101] DIRECTV/DISH Joint Comments at 8.

[102] S. REP. 102-92 (1992), at 36.

[103] *See* 2011 NAB Comments at 17.

B. Commenters' Proposals for Regulation of Retransmission Consent Fees Are Contrary to Section 325 and Longstanding Commission Precedent

Several commenters again advance a variety of proposals to regulate retransmission consent fees,[104] limit in-kind compensation,[105] or require disclosure of retransmission consent rates.[106] As the record demonstrates, such proposals fly in the face of the retransmission consent statute, Congressional intent, and prior Commission decisions.[107]

Cablevision and Charter state that the Commission should "clarify" that the obligation to negotiate in good faith requires broadcasters to offer "non-discriminatory" rates to MVPDs in the same market. In Cablevision's view, price "discrimination" would mean *any* difference in price that is not based exclusively on the cost of delivering the signal to the MVPD. Such a "clarification" directly contravenes the statute, legislative history, and Commission decisions interpreting the good faith standard. Section 325(b)(3)(C) provides that "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, *including price terms*, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."[108]

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[104] *See, e.g.*, Joint Cablevision/Charter Comments at 12.

[105] *See* DIRECTV/DISH Joint Comments at 7; NTCA Comments at 8-10; Joint Cablevision/Charter Comments at 10-11.

[106] NTCA Comments at 7-8; Joint Cablevision/Charter Comments at 11-12

[107] *See., e.g.,* 2011 NAB Reply Comments at 34-45 (discussing why proposals to place regulatory constraints on the prices, terms and conditions of retransmission consent agreements would result in excessive government intervention into the free market retransmission consent system established by Congress).

[108] 47 U.S.C. § 325(b)(3)(C)(ii) (emphasis added).

In adopting rules to implement the good faith standard, the Commission explicitly held that bargaining proposals that are "presumptively consistent with competitive marketplace considerations and the good faith negotiation requirement" include "[p]roposals for compensation above that agreed to with other MVPDs in the same market."[109] As the Commission observed in adopting this standard, "arbitrarily limit[ing] the range or type of proposals that the parties may raise in the context of retransmission consent" would "make it more difficult for broadcasters and MVPDs to reach agreement."[110]

The Commission has repeatedly rejected calls by MVPDs that it mandate uniform pricing or require broadcasters to offer any MVPD a price consistent with that offered to any other MVPD.[111] The Commission also has rejected requests that it establish a list of competitive marketplace considerations, stating that such "detailed substantive oversight" of retransmission consent negotiations was not consistent with Congress' intended role for the Commission, and that there are no "objective competitive marketplace factors that broadcasters must ascertain and base

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[109] *Good Faith Negotiation Order* at ¶ 56.

[110] *Good Faith Negotiation Order* at ¶ 56.

[111] *Good Faith Negotiation Order* at ¶ 47 (rejecting ACA proposal to require broadcasters to "offer smaller MVPDs terms and conditions, including price terms, at least as favorable as those offered to competitors."). *See also EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070 (2001), at ¶ 29 (a broadcaster's decision not to accept an MVPD's offer to pay retransmission consent fees pursuant to a most favored nation clause that would set fees based on what the MVPD pays any other broadcaster or what another MVPD paid that broadcaster was consistent with the good faith requirement). The Commission has likewise stated that "[p]roposals for compensation that are different from the compensation offered by other broadcasters in the market" are presumptively consistent with the good faith standard. *Good Faith Negotiation Order* at ¶ 56. Thus the DIRECTV and DISH proposal that the standalone price of broadcast signal carriage be evaluated against "the standalone prices for other similar broadcast channels in the same local market" would also violate the statutory and regulatory regime governing retransmission consent. *See* DIRECTV/DISH Joint Comments at 7.

any negotiations and offers on."[112] Rather, the Commission determined that retransmission consent negotiations themselves form "the market through which the relative benefits and costs to the broadcaster and MVPD are established."[113] Adopting a good faith standard that requires uniform pricing would violate the statutory good faith standard, Congressional intent in establishing a marketplace for retransmission consent negotiations, and prior FCC decisions. Even if it were lawful, as the Commission has explained, such limitations would only hinder parties' ability to "craft solutions" and successfully reach retransmission consent agreements.[114]

For many of the same reasons, the Commission has rejected the same sorts of MVPD proposals to limit "in-kind" forms of compensation as commenters have (again) raised in response to the *Exclusivity Notice*.[115] Instead, the Commission has repeatedly held that "[p]roposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station in the same or a different market" and proposals "in the form of commitments to purchase advertising time" are presumptively consistent with the good faith negotiation requirement.[116] No matter how many

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[112] *Good Faith Negotiation Order* at ¶ 53.

[113] *Good Faith Negotiation Order* at ¶ 53.

[114] *Good Faith Negotiation Order* at ¶ 56.

[115] Joint Cablevision/Charter Comments at 10-11 (the Commission should ban all forms of non-cash consideration for retransmission consent, including marketing support, advertising time, or carriage of affiliated programming); DIRECTV/DISH Joint Comments at 7 (bundled programming should be available on a standalone basis at the same price as in the bundle unless the price differential is based on "cost of the sale, delivery, or transmission of the programming"); NTCA Comments at 8-10 (the Commission should prohibit compensation in the form of carriage of affiliated programming, promotion of broadcaster-affiliated websites, or compensation for online content).

[116] *Good Faith Negotiation Order* at ¶ 56. *See also Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining*

times MVPDs use the misnomer "tying" (a prohibited practice under antitrust law) to describe non-cash forms of retransmission consent compensation,[117] it will not change the facts that such compensation began because MVPDs jointly refused to pay cash compensation for retransmission consent,[118] or that the Commission has explicitly and repeatedly held that such compensation is lawful. No MVPD commenter complaining of "tying" has provided any evidence of a broadcaster's refusal to "unbundle" a proposal for carriage of its broadcast signal from carriage of other programming or other non-cash negotiation terms.[119] Indeed, the good faith negotiation rules

Obligation, Report and Order, 20 FCC Rcd 10339 (2005), ¶ 17 (reiterating that negotiations of carriage of other programming is presumptively consistent with good faith rules and rejecting ACA proposal to exempt multicast signal carriage negotiations from good faith requirements); *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070 (2001), ¶ 29 (proposals for carriage of more than one television broadcast station were consistent with the good faith negotiation requirement).

[117] CenturyLink's use of the term "predatory pricing" to refer to the prices it pays broadcasters for retransmission consent is equally misplaced. CenturyLink Comments at 15. Predatory pricing refers to the use of "below-cost pricing" by a "dominant competitor to knock its rivals out of the market and then raise prices to above-market levels for a substantial time." Federal Trade Commission, Guide to Antitrust Laws, Predatory or Below Market Pricing, *available at* <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost> (last viewed July 15, 2014). The one claim no MVPD has made in this proceeding is that broadcasters are charging retransmission consent prices that are too low in an effort to drive rival stations and programmers out of business, so the use of this term is entirely inapposite.

[118] *See 2005 FCC Retransmission Consent Report* at ¶ 10 (although broadcasters initially sought cash compensation during the first round of retransmission consent negotiations, most cable operators were "not willing to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross-promotions, and carriage of affiliated channels. . . . Twelve years later, cash still has not emerged as a principal form of consideration for retransmission consent.").

[119] NTCA further contends that the Commission should prohibit broadcasters from negotiating compensation based on the number of broadband subscribers an MVPD has because it "amounts to" payment for "access to online content." NTCA comments at 9-10. There is no reason that the value of a broadcasters' online content cannot or should not be considered as part

already specify that a party's refusal "to put forth more than a single, unilateral proposal" is prohibited.[120] Thus, conduct involving "take it or leave it" proposals would already be encompassed by existing good faith standards and no further regulation is needed. There continues to be no basis for the Commission to modify its good faith rules to limit the ability of either MVPDs or broadcasters to negotiate non-cash compensation for retransmission consent.

The Commission also should not require broadcasters to disclose the terms of their privately-negotiated retransmission consent agreements.[121] It would be unfair to require broadcasters alone to disclose commercially-sensitive programming agreements when no other programmer (many of which are owned or under common control with MVPDs) would be required to do so. Such a disclosure requirement would give MVPDs an additional competitive advantage in the negotiating process, with no offsetting benefit for consumers.[122] In any event, such a requirement would flatly contravene the Commission's public disclosure rules.[123] In short, the Commission should reject proposals to require public disclosure of retransmission consent agreements or retrans fees.

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of retransmission consent negotiations. Broadcasters, like all video providers, should be permitted to control their digital rights and realize value from any form of distribution of their signals.

[120] 47 C.F.R. § 76.65(b)(1)(iv).

[121] 2011 NAB Reply Comments at 61-64.

[122] *Id.* at 62.

[123] *See* 2011 NAB Reply Comments at 63-64 (citing 47 C.F.R. §0.457(d)(iv)). The FCC's public disclosure requirements are based on the provisions in the Freedom of Information Act ("FOIA"). While the FOIA requires agencies to disclose information to members of the public, certain types of sensitive information are exempt from public disclosure, such as trade secrets and commercial and financial information. Similarly, Section 0.457(d)(iv) of the FCC's rules exempts from public disclosure agreements that contain "commercial and financial information." The Commission generally has exercised its discretion to release public information falling within Section 0.475(d)(iv) only in very limited circumstances.

C. The Commission Should Not Expand the Prohibition on Joint Negotiations

TWC urges the Commission to expand its newly adopted ban on joint negotiations for retransmission consent involving top-four-ranked stations in a DMA to prohibit joint negotiations among *any* same-market stations.[124] As NAB previously has explained, joint negotiations serve the public interest by creating efficiencies, reducing transaction costs, and helping to balance the disparate bargaining positions of broadcasters versus highly consolidated MVPDs.[125] Indeed, analysis of MVPDs' own lists of broadcasters that have allegedly engaged in joint retransmission consent negotiations suggests that joint negotiations by broadcasters result in fewer retransmission consent impasses.[126] The Commission nonetheless has opted to prohibit joint negotiations among top-four-ranked stations. In declining to adopt a broader prohibition affecting non-top four stations, the Commission specifically stated that it lacked evidence of the potential impact of joint negotiations involving stations outside the top four.[127] No additional evidence has been submitted

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[124] *See* TWC Comments at 17-18.

[125] *See* 2011 NAB Reply Comments at 47-53.

[126] *Id.*

[127] See *Exclusivity Notice* at ¶ 10. There, the Commission cited "evidence" submitted by ACA and certain other cable operators regarding stations that they contend are affiliated with one of the four major broadcast networks and are allegedly engaged in joint retransmission negotiations. *Exclusivity Notice* at ¶ 16 (*citing* Comments of ACA in MB No. 10-71 (May 18, 2010) at Appendix B, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and its Effects on Retransmission Consent Fees*, William P. Rogerson, May 18, 2010; Letter from Scott Ulsaker, Pioneer Telephone Cooperative, to Marlene H. Dortch, Secretary, FCC, at 1 (Feb. 20, 2014) (discussing negotiations with "separately owned, same market stations affiliated with Big 4 networks"); Letter from Christopher A. Dyrek, Cable America Missouri LLC, to Marlene H. Dortch, Secretary, FCC (Feb. 20, 2014), at 1 (discussing the "average carriage fee paid to separately owned, same market stations affiliated with Big 4 networks"); Letter from Stuart Gilbertson, USA Communications, to Marlene H. Dortch, Secretary, FCC (Feb. 24, 2014), at 1 (describing "average carriage fee paid to separately owned, same market stations affiliated with Big 4 networks that coordinated their retransmission consent negotiations")). As far as NAB is

by TWC or any other party in this round of comment in support of such a ban. TWC also did not seek Commission reconsideration or court review of the Commission's decision to limit its ban on joint negotiations to the top four-ranked stations, making its request that the Commission re-examine this issue untimely and misplaced.

D. The Commission Should Reject Calls to "Reform" the Market Modification Procedures

WTA urges the Commission to "reform[] the waiver method through which MVPDs can change the designated market areas in which all or portions of their service are located."[128] In fact, the Commission does not administer any "waiver method" by which interested parties can seek to change DMA boundaries or assignments; Nielsen Media Research establishes those boundaries. The Commission thus has no authority to "simplify the DMA classification process."[129] To the extent that WTA intends to refer to FCC rules governing the definition of a television broadcast station's market for purposes of cable carriage and market modifications, the standards that the Commission must apply when it considers market modification petitions are set forth in Section

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aware, no evidence of the ratings of any broadcast stations allegedly engaged in joint negotiations was entered into the record in this proceeding to show that any station was ranked among the top four in terms of audience share based on all-day audience share as measured by Nielsen. In fact, neither ACA nor any other cable operator asserted that these stations were *ranked* among the top four in any given market, only that they were affiliated with one of the four major broadcast networks. Moreover, NAB knows know of no independent Commission analysis as to whether any of the stations identified in the cable operators' "data" actually were separately owned stations, whether they were involved in joint retransmission consent negotiations, or any independent Commission analysis of underlying data in support of these claims (such as review of specific prices, terms and conditions of retransmission consent fees paid by any MVPD to any broadcaster). So it is unclear on what basis the Commission determined that any stations, or top four-ranked stations in particular, should be prohibited from jointly negotiating retransmission consent.

[128] Comments of WTA, MB No. 10-71 (June 26, 2014) ("WTA Comments"), at 6.

[129] WTA Comments at 7.

614(h) of the Communications Act.[130] Although those standards already account for consumer viewing preferences,[131] if WTA would prefer different standards, it must address its request to Congress, which alone has authority to make changes to the statute.

E. No Reason Exists for Modification of the Basic Tier Requirement

At least one commenter calls for the Commission to remove "must buy" and basic tier requirements, describing them as "artificial legal benefits for broadcasters that skew the retransmission consent negotiation process in their favor" and that must be eliminated to "enable[e] normal marketplace negotiations to occur."[132] The Commission cannot legally revise or remove the basic tier requirements given their statutory origins. *See* 47 U.S.C. § 543(b)(7)(A) ("Each

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[130] Section 614(h)(1)(C) provides that the Commission may, "with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's market to better effectuate the purposes of this section." 47 U.S.C. § 534(h)(1)(C). *See also* 47 C.F.R. § 76.59. In considering such requests, the Act provides that the Commission shall afford particular attention to the value of localism by taking into account such factors as (i) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; (ii) whether the television station provides coverage or other local service to such community; (iii) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and (iv) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community. 47 U.S.C. § 534(h)(1)(C).

[131] WTA believes that the "DMA classification process" should rely on customer surveys conducted by MVPDs, rather than standardized, objective data such as "[p]ublished audience data for the relevant station showing its average all day audience (*i.e.*, the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records." *See* 47 C.F.R. § 76.59(b)(6).

[132] USTA Comments at 16; *see also* TWC Comments at 18-19 (urging the Commission to "reaffirm that the Act's tier-placement requirements are inapplicable in areas where a cable operator faces effective competition").

cable operator of a cable system *shall* provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier *shall*, at a minimum, consist of the following: (i) All signals carried in fulfillment of the requirements of [47 U.S.C. §§ 534 and 535]." (emphases added)); 47 U.S.C. § 534(a) ("Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section."). The basic tier requirement established by Congress ensures that channels offering certain critical local information are available on a nondiscriminatory basis to all cable subscribers, including television broadcast stations and cable public, educational, and governmental access channels. If any change is to be made to the "basic tier" requirement, it is for Congress, not the Commission, to undertake.

F. Calls for Modification of the Small System Exemption Ignore the Very Reason for the Exemption

Some commenters urge the Commission to revise the small system exemption from the Exclusivity Rules[133] to exempt systems with 2,500 subscribers (excluding systems affiliated with MSOs that serve more than ten percent of the market)[134] or even 25,000 subscribers[135] from the obligation to delete duplicative programming. The proposals cite "changed" market conditions as warranting an increase in the size of "small systems" entitled to the exemption, declaring that "[i]n today's marketplace . . . the risk of harmful competition from small cable systems to broadcast stations has greatly diminished."[136] That argument misunderstands the very reason for the

[133] 47 C.F.R. § 76.95(a); 47 C.F.R. § 76.106(b).

[134] ACA Comments at 20-26.

[135] APPA Comments at 23-24.

[136] ACA Comments at 23.

existence of the exemption: At its inception, the small systems exemption was not based on the presence or absence of competition; instead, it acknowledged that small systems—those with less than 1,000 subscribers—were likely to be unable to afford the equipment necessary to implement the Exclusivity Rules.[137] Thus, given that any system with more than 1,000 subscribers was required to obtain that equipment in order to comply with the Rules more than 25 years ago, the reason for exempting small systems does not apply.

In all events, NAB urges the Commission to clarify that cable systems seeking to invoke the exemption are required to disclose—and submit to the Commission—information confirming their system size, their number of subscribers, and any other information relevant to their eligibility for the exemption.[138]

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[137] *See Amendment of Section 74.1103 of the Commission's Rules and Regulations as it Relates to CATV Systems with Fewer Than 500 Subscribers*, Report and Order, 46 FCC 2d 94 (1974), at ¶¶ 20, 22 (adopting small-system exemption because, among other things, "the costs of equipment and manpower needed by small systems in order to comply with the non-duplication rules does have a substantial financial impact on such systems when viewed in relation to their gross revenues"); *see also 1988 Program Exclusivity Order* at ¶ 86 (noting that "the costs of obtaining such equipment fall more heavily on smaller systems, when examined on a per subscriber basis"); *id* ¶ 94.

[138] As NAB has observed previously, the Commission sometimes lacks basic information about MVPDs that is relevant to both its decision-making and its ability to monitor compliance with its own rules. *See, e.g.,* NAB Comments in GN Docket No. 14-25 (Mar. 31, 2014) (supporting FCC proposal to initiate a rulemaking to update Annual Cable Operator Report Form 325 to capture additional data); NAB 2011 Comments at 15-17 (the FCC should consider requiring MVPDs to file data on their ownership, operation, and geographic coverage in order to promote timely carriage elections and retransmission consent-related communications); Petition for Reconsideration of NAB and the Association for Maximum Service Television, Inc., Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120 (Nov. 17, 2008) (urging FCC to adopt a notice requirement for cable operators that believe they qualify for an exemption to the material degradation standard because "[u]p-to-date information on the subscribership, technical capacity, and ownership structure of individual cable systems is not readily available via the Commission's website or public files.").

G. Requests for a Prohibition on Internet Blocking Should Be Rejected

The only argument that has not already been rejected out of hand by the Commission or refuted in prior rounds of comment in this proceeding is the request by some MVPDs that the Commission adopt a new regulation limiting local stations' ability to fully control video content on their websites.[139] Those MVPDs contend that the Commission should find broadcasters in violation of their duty to negotiate retransmission consent in good faith if they limit access to online video content. It is ironic that parties that have devoted so many resources to confining the FCC's authority to regulate the Internet would call for such a rule.[140] But as is the case with the majority of MVPD commenters' proposals for "reform," such regulatory shoes are perfectly acceptable as long as they are being placed only on a broadcast competitor's foot. As NAB explained in connection with similar proposals raised *ex parte*[141] and in the Video Competition NOI proceeding,[142] video content on websites operated by video content providers is not—and should not be—regulated by the Commission or any other entity.[143] No content provider is under

[139] *See* TWC Comments at 22; Verizon Comments at 10-11; DIRECTV/DISH Joint Comments at 7; Joint Cablevision/Charter Comments at 16-18; USTA Comments at 11; NTCA Comments at 9-10.

[140] *See, e.g.*, Comments of Verizon, GN No. 09-191 (Jan. 14, 2010), at 86; Reply Comments of Verizon, GN No. 09-191 (Apr. 26, 2010), at 81. Indeed, Verizon appealed the FCC's *2010 Open Internet Order* to the U.S. Court of Appeals for the D.C. Circuit, which led to remand of several aspects of the Order. *See Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014). *See also* Comments of TWC, GN No. 09-191 and WC No. 07-52 (Jan. 14, 2010); Reply Comments of TWC, GN No. 09-191 and WC No. 07-52 (Apr. 26, 2010).

[141] Letter from Marc Lawrence-Apfelbaum of Time Warner Cable Inc. ("TWC") to Marlene H. Dortch, FCC Secretary, MB No. 10-71 (Oct. 17, 2013) ("TWC Ex Parte").

[142] Verizon Comments, MB Docket No. 14-16 (Mar. 21, 2014), at 12.

[143] *See* Ex Parte Letter of NAB, MB No. 10-71 (Nov. 15, 2013). There, NAB observed that video content "may—or may not—be available via the Internet under a wide range of prices, terms

any legal or regulatory obligation to offer online content—and there is no statutory authority for the Commission to compel any video provider, including broadcasters, to do so. Offering online content allows many broadcasters to connect with their local communities and individual viewers in unique and varied ways.[144] But MVPDs' contention that broadcasters—and only broadcasters—should be penalized for seeking to control their digital rights is simply wrong on its face.

Conclusion

For the reasons explained in NAB's opening comments and herein, elimination of the Exclusivity Rules would destroy the closely intertwined statutory and regulatory "mosaic" that governs the distribution of television programming, would seriously harm local television broadcasters and the important public interests they serve, and would usurp the only viable and efficient enforcement mechanism for contractual exclusivity rights. The Commission should not modify or eliminate its pro-competitive network non-duplication and syndicated exclusivity rules.

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and conditions" and that video content providers typically set the terms for access to their content. *See also* NAB Reply Comments, MB No. 14-16 (Apr. 21, 2014).

[144] *See, e.g.*, NAB Comments, MB No. 14-16 (Mar. 21, 2014), at 10-11.

Respectfully submitted,

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Appendix A

Supplemental Declaration of Mark Israel and Allan Shampine

Before the Federal Communications Commission

MB Docket No. 10-71

July 24, 2014

I. SUMMARY

1. Our initial declaration in this proceeding evaluated the effect of the Commission's non-duplication and syndicated exclusivity rules (collectively, the "exclusivity rules") on competition and consumer welfare in the television industry, and demonstrated the likely harmful effects of removing the exclusivity rules.[1] In this declaration, we supplement our initial findings with an empirical analysis of the effect of exclusivity on television station performance, as measured by ratings. In particular, we conduct an ordinary least squares (OLS) regression analysis to measure the effect of exclusivity on local station ratings, controlling for national ratings of the associated broadcast network and other relevant factors.

2. *We find that when a local broadcast station gains exclusivity, its ratings increase by a statistically and economically significant amount.* This finding is robust: It holds across a wide range of specifications of our regression model. This finding supports our conclusion from our initial declaration that the elimination or weakening of the Commission's exclusivity rules is likely to have an economically significant impact on local stations and their incentives to invest. As described in our initial declaration, the relevant investments include investments in local content, including local news, sports, weather, and emergency information.[2]

II. OVERVIEW OF APPROACH AND DATA

A. Overview of Approach

3. We test the effects of changes in exclusivity by looking at instances in which a local television station did not have exclusivity for some period of time because of the application of the "significantly viewed" provisions of the Commission's rules, but then successfully petitioned for waiver of the rules in order to enforce their exclusivity rights. In particular, when a local television station is in a market that is "heavily overshadowed by a non-local station from an adjacent market that is affiliated with the same network and that is significantly viewed, the local station cannot exercise network non-duplication against the overshadowing station."[3] The same

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[1] Declaration of Mark Israel and Allan Shampine, *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, June 26, 2014.

[2] *Id.*, Section III.B and Section III.C.

[3] Comments of the National Association of Broadcasters, *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, June 26, 2014, p. 41.

applies for syndicated exclusivity. However, under some circumstances the local station can petition the FCC to demonstrate that the adjacent market station is no longer significantly viewed in specified communities within a DMA and thus enforce exclusivity in those communities.

4. Table 1 below lists ten such successful petitions across eight different DMAs identified for us by the National Association of Broadcasters, which provide the basis for our analysis of the effect on ratings of gaining exclusivity. Due to confidentiality restrictions, we do not identify the specific DMA or station in question but instead provide an indication of the size rank of the affected DMA. Although data limitations make precise measurement of the magnitude of the effect of exclusivity on ratings difficult, the directional result from study of these events is clear and robust: Gaining exclusivity has a significant positive effect on ratings.

Table 1 – Successful Exclusivity Petitions

Date of Action	DMA Ranking	Petitioning Station Affiliation	Ratings Date Range
Dec 2013	>100	CBS	Feb 2013-Feb 2014
Nov 2013	51-75	CBS	Feb 2013-Feb 2014
Aug 2013	>100	NBC, CBS	Feb 2013-Feb 2014
Dec 2012	1-50	ABC	Nov 2012-Nov 2013
Dec 2011	>100	ABC	Nov 2011-Nov 2012
Oct 2011	>100	NBC, CBS	Feb 2011-Feb 2012
Jul 2010	1-50	ABC	Feb 2010-Feb 2011
Apr 2010	1-50	NBC	Feb 2010-Feb 2011

Source: NAB research

B. DATA

5. Our data are drawn from three principal sources: (i) DMA level (“local”) Nielsen ratings for stations in the eight DMAs listed in Table 1; (ii) national Nielsen ratings for the “Big 4” networks’ affiliates; and (iii) DMA level gross advertising revenue, by station and year, from SNL Kagan.

6. With regard to local ratings data, we obtained television ratings data for stations associated with each of the “Big 4” broadcast television networks in the eight DMAs listed in

Table 1.[4] These local ratings observations correspond to a "sweeps" period, which lasts for about a month in February and again in November of each year.[5] For any given sweeps period, we obtained ratings for each station for three "dayparts" (6am-6am, broadcast prime time, and 9am to midnight) and four demographic groups (TV households, persons 2+, persons 18-49, and persons 25-54). Combining these data, an observation in our analysis corresponds to the ratings for a given station*daypart*demographic group*sweeps period.

7 Notably, for each station*daypart*demographic group, we observe ratings for the same sweeps period in two consecutive years: either February-February or November-November, depending on when the exclusivity petition was granted. The earlier observation then corresponds to ratings before exclusivity was gained and the latter observation corresponds to post-exclusivity ratings.

8. In our regression analysis, our dependent variable (the variable the regression model seeks to explain as a function of the "explanatory variables," discussed below) is the percentage change in Nielsen ratings from the first (pre-exclusivity) observation to the second (post-exclusivity) observation.[6] To evaluate the sensitivity of our results to the specification of the dependent variable, we also estimate a version of the model in which the dependent variable is defined as the change in the level of ratings (instead of the percentage change).

9. We include as an explanatory variable a dummy variable indicating whether a particular station obtained exclusivity as a result of a successful petition. Thus, for each DMA*daypart*demographic group, we have one or two "treatment" stations (affiliated with one of the Big 4 national networks) that gained exclusivity and several "control" stations (affiliated with the other Big 4 national networks) that were not subject to a successful exclusivity petition and thus had no change in exclusivity status.

10. In our primary specification, we also control for national ratings changes, the DMA, the daypart and demographic group. By including these controls, we can isolate the local changes of

4 The raw local ratings data also include ratings for stations not affiliated with "Big 4" broadcast television networks (e.g., Univision, the CW, etc.). We drop these stations from the analysis because we obtained national ratings data only for stations associated with the "Big 4" broadcast television networks.

5 Sweeps also occur during May and July, but more people watch television during the February and November sweeps.

6 Nielsen ratings are defined as the proportion of the universe of TV households that are tuned to a specific program or station.

interest, notably the change in exclusivity status. With respect to national ratings, for each local station*daypart*demographic group observation, we calculate the corresponding national change in ratings for that station's national network over the same time horizon as measured for the local ratings.[7] As an additional robustness check, we also run a version of the model that adds an additional control for year-on-year changes in gross advertising revenue.[8, 9]

11. Before estimating the model, we cleaned the data as follows. First, we dropped all other stations with the same affiliation as the petitioning station in a given DMA.[10,11] Second, to avoid issues arising from small starting values for ratings, we dropped "small" observations, defined as observations where the station*daypart*demographic group has a rating below one percent in its first year of observation.[12] Dropping these small observations also addresses the fact that, as shown in Table 2 below, such observations have significantly greater variation in their ratings over time, and such outliers may have undue influence on regression coefficients.[13] Importantly, as demonstrated below, our results are robust to changes in the treatment or definition of small observations.

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7 The local ratings data also vary by "timeshift", which represents how Nielsen collected the ratings data. In larger markets, the ratings are collected electronically, but in smaller markets, Nielsen uses diaries that are filled out by survey respondents. There are two timeshifts: "Live +7" for larger markets and "Live + 1 (24 hours)" for smaller markets. The local ratings data are collected for a single timeshift, whereas the national ratings data are available for both timeshifts. Depending on which timeshift was relevant for each DMA, we matched each station*daypart*demographic group*timeshift with its corresponding national network*daypart*demographic group*timeshift.

8 SNL Kagan collects data on calendar year gross advertising revenue by station, which we aggregate nationally for each of the Big 4 networks. SNL Kagan, "U.S. Rated TV Stations by Market Rank." Thus, for every local station, we measure the change in nationally aggregated gross advertising revenue for the associated Big 4 network over the relevant time period.

9 Since the revenue data are collected on a calendar year basis, we determined which years to use based on the ratings data being used. For example, for a petition granted in June 2012, the ratings data cover February 2012 through February 2013 and we used the year-on-year revenue changes in national gross advertising revenue from 2012 to 2013. Because the timing of these revenue changes does not correspond directly with the timing of the ratings changes, we only include the advertising revenue controls as a robustness check, rather than in our base specification.

10 Stations may broadcast only in certain portions of a DMA. When the petitioned-against station exits, a station with the same affiliation as the petitioning station may incidentally obtain exclusivity in some part of the DMA. However, we cannot clearly identify which stations might gain such benefits, or to what degree.

11 The stations dropped from our analysis include those stations that were petitioned against. These stations are not valid "treatments," since they did not gain exclusivity, but they are also not valid controls since their status changed with the approval of the petition.

12 Nine station*daypart*demographic group observations in our treatment group were classified as "small" and thus excluded from the analysis. Alternative runs that included these observations yielded no substantive changes in our results or conclusions.

13 Jeffrey M. Wooldridge, *Introductory Econometrics* (South-Western Cengage Learning, 2009), pp. 325-329.

Table 2 – "Small" Observations Have Greater Variation in Ratings

	x = .5	x = 1	x = 1.5
Small = 0			
Number of Obs	365	308	240
Mean Pct. Change in Rating	0.084	0.049	-0.021
Std. Dev. Pct. Change in Rating	0.639	0.630	0.522
Small = 1			
Number of Obs	204	258	326
Mean Pct. Change in Rating	1.087	0.919	0.789
Std. Dev. Pct. Change in Rating	2.110	1.927	1.778

III. REGRESSION SPECIFICATION

12. Using the data described above, we estimate an econometric model to identify the effect of gained exclusivity on local broadcast station ratings. With this model, we are able to compare the changes in viewership ratings for the stations that gained exclusivity (relative to the national ratings for stations with the same affiliation) to the changes in viewership ratings for stations that were not subject to a successful exclusivity petition (again relative to the national ratings for stations with the same affiliation).

13. In particular, our baseline regression specification is as follows. (For ease of exposition, we express the baseline regression at the station-time (*it*) level; in our model, the exact unit of observation is actually a station*daypart*demographic group*sweeps period). For a station *i* affiliated with broadcast network *n*[14] at time *t*[15]:

$$\%\Delta R_{it} = \beta_0 + \beta_1 * E_i + \beta_2 * \%\Delta R_{nt} + X + Y + Z.$$

$\%\Delta R_{it}$ represents the percentage change in local ratings from the November/February prior to the petition to the November/February following the petition.

$$\%\Delta R_{it} = \frac{R_{it} - R_{i,t-1}}{R_{i,t-1}}.$$

[14] In this case, *n* represents one of CBS, ABC, NBC, or FOX.
[15] The time period under consideration is the same month in consecutive calendar years.

E_i is an indicator variable indicating whether the station gained exclusivity (i.e., is a petitioning station), $\%\Delta R_{nt}$ represents the percentage change in the national Nielsen rating for the corresponding broadcast network relative to the same month in the previous year, and X, Y, and Z are fixed effects for DMA, daypart, and demographic group, respectively.

14. Using this specification, β_1 measures the effect of exclusivity on the change in ratings, controlling for national ratings, as well as DMA-, daypart-, and demographic-group-specific effects.

IV. RESULTS

15. The results of our baseline model are presented in Column (1) of Table 3. They indicate that a local station's ratings increase significantly when it gains exclusivity. The coefficient on the gained exclusivity dummy is positive and statistically significant. The magnitude of the coefficient is also large, indicating that one would expect the change in ratings from year to year to be 16.3 percentage points higher than it would have been if exclusivity had not been granted, all else equal.[16] When focusing on prime time ratings in particular, where the effect of exclusive distribution of network content would likely be largest, the effect of exclusivity rises to 24.4 percentage points. It is also noteworthy that the coefficient on the national percent change in ratings is roughly equal to one; this implies that, as expected, local ratings (all else equal) tend to move 1-to-1 with national ratings. The fact that the coefficient on national ratings is sensible provides further support for the reliability of our regression model.

16. The remaining columns present the results from alternative specifications that collectively demonstrate the robustness of our findings.

- In Column (2), we change the dependent variable from the percentage change in ratings to the change in ratings (measured in levels) from one year to the next. We also change the national ratings control accordingly. While the coefficient on the gained exclusivity dummy is not directly comparable with that in Column (1) due to differences in how the dependent variable is measured (one is a percent change and the other is a level change), the result remains positive and statistically significant.

[16] As shown in Table 2 above, the mean change in ratings for stations in this sample is 4.9 percentage points.

- The specification in Column (3) includes the "small" observations in the estimation and controls for their volatility by adding an indicator variable equal to one when the observation meets our definition of "small" (pre-exclusivity ratings below one percent). The coefficient on the gained exclusivity dummy is almost identical to the baseline specification and remains statistically significant.

- Columns (4) and (5) estimate the same model as Column (1), but with different cutoffs for determining the "small" observations that are excluded. In each case, exclusivity is associated with a statistically significant increase in ratings.

- As noted earlier, the unit of observation for our dependent variable is a station*time*daypart*demographic group. We test whether results are driven by viewership during a specific daypart by estimating the model for each daypart separately. The results are given in Columns (6) through (8). In each case, the coefficient on the gained exclusivity dummy remains positive and statistically significant.

- In Column (9), we look at a single demographic group—TV Households— rather than including all the demographic groups as separate observations. Despite a smaller sample size, the coefficient on the gained exclusivity dummy is again positive and statistically significant.

- Finally, in Column (10), we add an additional explanatory variable, changes in national advertising revenue by network. Once again, the coefficient on the gained exclusivity dummy is positive and statistically significant.

V. CONCLUSION

17. We find that gaining exclusivity has a significant positive effect on ratings and that this result is robust to a variety of model specifications. This finding supports our conclusion from our initial declaration that the elimination or weakening of the Commission's exclusivity rules is likely to have an economically significant impact on local stations and their incentives to invest.

Table 3 - Regression Results

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
"Small" Cutoff	Small cutoff = 1			Small cutoff = .5	Small cutoff = 1.5	Small cutoff = 1				
Filter	Excl. "Small"		Incl. "Small"	Excl. "Small"	Excl. "Small"	Daypart = Day	Daypart = 9am - 12am	Daypart = Prime	Demo = TV Households	
Dependent Variable	%Δ Rating	Δ Rating	%Δ Rating	%Δ Rating	%Δ Rating	%Δ Rating	%Δ Rating	%Δ Rating	%Δ Rating	%Δ Rating
Gained Exclusivity Dummy	0.163***	0.313***	0.164**	0.152***	0.181***	0.0792**	0.124***	0.244***	0.177**	0.227***
	(0.0406)	(0.106)	(0.0652)	(0.0384)	(0.0463)	(0.0352)	(0.0309)	(0.0854)	(0.0713)	(0.0430)
"Small" (Rating < x)			0.710***							
			(0.135)							
National Change in Rating		1.070***								
		(0.0901)								
National % Change in Rating	1.168***		0.971***	1.053***	1.118***	0.973***	1.065***	1.189***	1.159***	1.229***
	(0.105)		(0.133)	(0.0935)	(0.114)	(0.0857)	(0.0657)	(0.116)	(0.209)	(0.107)
National % Change in Revenue										-9.329***
										(2.733)
DMA 1 Fixed Effect (DMA Rank 1-50)	0.101***	0.249*	-1.120***	0.101***	0.0572	0.112**	0.0737	0.117*	0.0872	0.101***
	(0.0312)	(0.138)	(0.260)	(0.0311)	(0.0362)	(0.0537)	(0.0533)	(0.0636)	(0.0653)	(0.0350)
DMA 2 Fixed Effect (DMA Rank >100)	0.0844	0.390**	-1.068***	0.144**	0.0123	0.00885	-0.0262	0.239	0.104	1.712***
	(0.0678)	(0.187)	(0.270)	(0.0631)	(0.0745)	(0.0461)	(0.0478)	(0.170)	(0.135)	(0.502)
DMA 3 Fixed Effect (DMA Rank >100)	0.265***	0.555***	-1.129***	0.131**	0.243***	0.258***	0.208***	0.313**	0.110	1.902***
	(0.0522)	(0.180)	(0.323)	(0.0652)	(0.0408)	(0.0626)	(0.0520)	(0.121)	(0.113)	(0.486)
DMA 4 Fixed Effect (DMA Rank 1-50)	0.0168	0.130	-1.035***	0.0246	-0.00393	0.0421	0.0419	-0.0225	-0.0319	0.0360
	(0.0278)	(0.0863)	(0.278)	(0.0239)	(0.0312)	(0.0328)	(0.0402)	(0.0575)	(0.0611)	(0.0334)
DMA 5 Fixed Effect (DMA Rank >100)	-0.0547	0.185	-1.175***	-0.00614	0.0154	0.108**	0.0178	-0.177	-0.0225	1.676***
	(0.0641)	(0.174)	(0.271)	(0.0450)	(0.0613)	(0.0493)	(0.0475)	(0.139)	(0.0835)	(0.480)
DMA 6 Fixed Effect (DMA Rank 51-75)	-0.150***	0.311***	-1.011***	-0.0731*	-0.163***	-0.0696	-0.107*	-0.171**	-0.123	1.495***
	(0.0526)	(0.111)	(0.282)	(0.0407)	(0.0606)	(0.0620)	(0.0559)	(0.0838)	(0.0885)	(0.474)
DMA 7 Fixed Effect (DMA Rank >100)	-0.167***	-0.206	-0.858***	-0.182***	-0.164***	-0.0604	-0.159***	-0.211**	-0.157**	1.401***
	(0.0429)	(0.139)	(0.292)	(0.0393)	(0.0534)	(0.0441)	(0.0584)	(0.0824)	(0.0644)	(0.460)
Daypart = 6am - 6am	-0.0316	-0.124	-0.384***	-0.0353	-0.0359				-0.0431	-0.0360
	(0.0326)	(0.120)	(0.147)	(0.0356)	(0.0330)				(0.0635)	(0.0322)
Daypart = 9am - midnight	-0.0303	-0.114	-0.277*	-0.0242	-0.0314				-0.0355	-0.0360
	(0.0317)	(0.116)	(0.148)	(0.0368)	(0.0300)				(0.0656)	(0.0315)
Demo = Persons 18-49	0.0181	0.0209	0.0711	0.0196	0.00267	0.0420	0.0128	0.0103		0.0163
	(0.0435)	(0.136)	(0.166)	(0.0448)	(0.0400)	(0.0451)	(0.0427)	(0.0984)		(0.0409)
Demo = Persons 2+	0.0122	0.00347	-0.161	0.0143	-0.0473	0.0233	0.00507	0.0212		0.000777
	(0.0465)	(0.127)	(0.140)	(0.0485)	(0.0361)	(0.0400)	(0.0375)	(0.115)		(0.0444)
Demo = Persons 25-54	0.0173	0.0294	0.0905	0.0227	0.00547	0.0383	0.00693	0.00629		0.00860
	(0.0385)	(0.131)	(0.149)	(0.0394)	(0.0399)	(0.0378)	(0.0349)	(0.0934)		(0.0368)
Constant	-0.0331	-0.183	1.083***	-0.0423	-0.0133	-0.0779**	-0.0419	-0.0603	-0.0172	-0.630***
	(0.0415)	(0.171)	(0.305)	(0.0391)	(0.0420)	(0.0384)	(0.0402)	(0.0821)	(0.0669)	(0.174)
Observations	308	308	566	362	240	88	102	118	88	308
R-squared	0.821	0.787	0.302	0.787	0.826	0.803	0.860	0.835	0.830	0.838

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1
Each specification includes dummies for DMA, daypart, and demo where applicable.