August 7, 2015

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

Re: Notice of Ex Parte Communication, MB Docket Nos. 10-71, 13-249, 15-149

Dear Ms. Dortch:

On Wednesday, August 5, 2015, the undersigned of the National Association of Broadcasters (NAB) met with Chanelle Hardy of the Office of Commissioner Clyburn and spoke by telephone with Valery Galasso of the Office of Commissioner Rosenworcel. On that same date, Rick Kaplan of NAB spoke by telephone with Matthew Berry of the Office of Commissioner Pai.

During our calls and meeting, NAB representatives stated that reports indicate that the Commission is presently considering an order that would modify its treatment of material that is not routinely made available for public inspection under Section 0.457 of the FCC’s rules. We stated that NAB opposes any changes to the FCC’s policies and procedures that would reduce the protections for commercially sensitive, confidential information. NAB intervened in recent litigation concerning FCC protective orders that did not sufficiently limit third party access to commercially and competitively sensitive material.1 As explained in our brief in that case, NAB does not object to Commission review of such material, but knows of no persuasive reason for third party access to such documents.2 As evidenced by the Commission’s review of numerous transactions, including its most recent major transaction approval,3 the Commission’s analysis of the potential harms and benefits of a proposed merger is not impeded by limitations on third party access to confidential material. We urged the Commission to move forward on its review of the Charter-Time Warner Cable transaction without further delay by following an approach similar to that used in the AT&T Inc.-DIRECTV proceeding, and to commence a notice-and-comment rulemaking proceeding to evaluate its policies and procedures affecting confidential material. Such a proceeding would be

---

1 CBS Corp. v. FCC, 785 F.3d 699 (D.C. Cir. 2015).
3 Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, MB Docket No. 14-90, FCC No. 15-94 (Jul. 28, 2015).
consistent with the Commission’s obligations under the Administrative Procedure Act, and would allow the Commission the benefit of input from affected parties.

During the meeting with Ms. Hardy, I discussed two other issues: (i) the importance of adopting proposals to revitalize the AM band, including opening an FM translator application window for AM licensees; and (ii) the value of the Commission’s network nonduplication and syndicated exclusivity rules to the provision of local broadcast service, raising the points summarized in the attached slides (which were presented at the meeting).

Respectfully submitted,

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

Enc.

cc: Chanelle Hardy, Valery Galasso, Matthew Berry

---


Network Non-Duplication & Syndicated Exclusivity:

If the FCC eliminates its exclusivity rules, consumers pay the price
What Is “Exclusivity”? 

Two rules:

• Network Non-Duplication
  – Protects a local broadcast TV station’s right to be exclusive distributor of network programming within specified zone
  – Allows local broadcast TV stations to protect exclusive distribution rights they negotiated with broadcast networks in geographic zone not to exceed 35 miles (55 miles in smaller markets)

• Syndicated Exclusivity
  – Similar to the network non-duplication, but applies to exclusive contracts for syndicated, rather than network, programming
Why Exclusivity Rules Matter

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

• Without them, localism fades
  – Stations need a meaningful remedy as litigation not practical
    ▪ Contractual remedies fall short, given a lack of privity, litigation expense and conflicting incentives for enforcement
  – Without rules, larger stations have ability to expand reach to detriment of small-market stations

• Serve as counterweight to government’s significant compulsory copyright subsidy to cable industry

• Protect consumers from disruption, confusion
The Exclusivity Rules
Make a Meaningful Difference
Effective Remedy

• Exclusivity rules are an essential enforcement mechanism; boundary enforcement far less practical without FCC mechanism.
Small Market Issues

- Today, FCC rules protect local TV exclusivity within a geographic zone of 35 miles (or 55 miles in smaller markets).
- Broadcasters have incorporated this geographic limitation into their contracts and, because of the rules, stations do not negotiate for coverage beyond those distances.
- Eliminating the rule may incentivize stronger, large-market stations to seek to expand their exclusive service areas.
Government’s Cable Subsidy

- Compulsory licenses are an exception to copyright owners’ exclusive right to choose whether and on what terms to license their content.
- It is widely understood that the cable industry pays below market rates, with almost no transaction costs, for the underlying broadcast content.
- The cable distant signal license thus acts as a significant, government-granted subsidy for cable industry.
- Government should not, on one hand, make it incredibly convenient and inexpensive for cable to import distant signals while, on the other, make it more difficult for broadcasters to find a way to enforce their market-negotiated exclusive rights.
Pay TV Seeking To Use Consumers As Pawns
Consumers will be harmed without FCC enforcement of exclusivity rules. Their repeal would lead to, among other things:

- More frequent and protracted retransmission consent disputes
- More consumer confusion
- More of the same rising cable bills they’ve been saddled with for decades
Protracted Retrans Disputes

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

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

• When distant signals are pulled into the local market, consumers ultimately suffer
  – What happens if emergencies arise in the distant or local market? How will viewers receive timely, accurate information?
• If distant signals could be imported absent FCC’s exclusivity rules, the FCC would have to put in place new rules to require cable operators to protect consumers from harm due to out-of-market signal importation
Cable Price Hikes Nothing New

• Cable prices have **long been outpacing the price of inflation**, but now cable wants the FCC to believe that its high prices are related to retransmission consent fees

• Has the FCC explored what makes up a consumer’s cable bill?
  – A tiny percentage would be attributable to broadcast TV, by far the most-watched stations across the board

• Has the FCC explored questionable cable billing practices?
  – Cable industry consumer failings are well documented; that is the place for FCC involvement if consumers really matter
Cable’s Longstanding Rate Rise

Money Meet Mouth

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

• Cable operators that import distant signals should be required to identify the amount they “saved” on consumer bills as a result of exclusivity rules changes and reduce consumer bills by that amount.

• FCC should require such disclosure as a matter of truth-in-billing.