September 9, 2015

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

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

Dear Ms. Dortch:

On September 2, 2015, the attached list of broadcasters and broadcast representatives, as well as the undersigned state broadcast association presidents, met with Commissioner O’Rielly and Robin Colwell, his Chief of Staff and Senior Legal Advisor, to discuss the FCC’s proposal to eliminate the program exclusivity rules. All the broadcasters and their representatives strongly opposed the current proposal.

During the meeting, the broadcasters discussed the many ways they serve their communities in all of the markets represented, from South Carolina and Louisiana to Ohio and Virginia. They explained that local stations would be unable to afford the production of expensive local programming, including news, without the viewers – and thus the advertisers – that exclusive national network and syndicated programming attracts. Independent stations, for example, without access to popular network programing, rarely maintain local news operations or create significant local content. The broadcasters also attested from their own experiences that local stations’ viewership and revenues are rapidly and very significantly eroded by the loss of program exclusivity.

The local broadcasters emphasized the importance of the FCC’s rules in maintaining exclusivity. They explained that, in the absence of the rules, cable operators would be incentivized to import distant stations, citing past examples of multichannel video programming distributors (MVPDs) importing stations from distant markets into local communities. If exclusivity is weakened, viewers in Buffalo, for example, might receive “local” news and emergency information from Tampa Bay, New York City or other markets not relevant to Buffalo residents. The broadcasters also noted that local businesses, which advertise on local television stations to reach their potential customers, would be harmed by the importation of large market distant signals into local markets. For instance, car dealers in Buffalo would not be able to afford to advertise on distant stations imported into Buffalo from New York City, where stations have much higher advertising rates.

The broadcasters at the meeting additionally explained why they cannot rely on private enforcement of program exclusivity contracts. Judicial recourse would be extremely uncertain. It
is not even clear what type of private action a local station could bring to attempt to enforce its exclusivity rights. The entity most likely to import a distant, duplicating signal – the cable operator – has copyright clearances to the programming contained in that signal through its statutory license, and is not a party to the local station’s contracts with its network and its syndicated programming suppliers. The only way to stop the violation of a local station’s exclusivity rights could be for the network or a syndicator to cease delivering its programming to the distant station whose signal is being imported—an action that networks and syndicators might well be reluctant to take and which would harm the local viewers of that distant station.

Even assuming that a local station whose exclusivity rights are being violated could overcome problems with privity of contract and bring a lawsuit, the length of time and exorbitant cost associated with such a suit would break the budgets of most broadcasters. In this regard, the broadcasters specifically referred to earlier litigation against EchoStar (the predecessor to DISH Network), which had imported distant signals into local markets in violation of its statutory exclusivity requirement. That litigation cost the plaintiff broadcast networks and affiliate associations millions of dollars and dragged on for close to a decade. In sharp contrast, the current rules allowing for enforcement of program exclusivity agreements at the FCC operate efficiently and effectively, without burdening broadcasters, cable operators or Commission staff.

The broadcasters strongly believe that the exclusivity rules are not outdated or irrelevant in today’s marketplace. These rules correctly recognize that large national cable operators have the incentive and the ability (given their compulsory copyright license) to import distant signals into local communities, thereby greatly increasing their already substantial leverage in retransmission consent negotiations with local stations. Cable operators also have no interest in fostering a locally-oriented, free over-the-air broadcast system that directly competes with their subscription services for viewers and local and national advertising. Given, however, the public interest in maintaining a free television option for consumers, the Commission should not eliminate its program exclusivity rules, which would tilt the competitive playing field further in favor pay TV providers over local broadcast television stations.

Thank you for meeting with us and listening to our concerns. If you have any further questions, please feel free to contact us.

Sincerely,

/s/ Christine Merritt         /s/ Doug Easter

Christine Merritt          Doug Easter
President               President
Ohio Association of Broadcasters        Virginia Association of Broadcasters

/s/ Polly Prince Johnson

Polly Prince Johnson
President/CEO
Louisiana Association of Broadcasters
Broadcasters and broadcast representatives also in attendance:

Jeff Brogan, WCPO-TV, Cincinnati, OH
Dominic Mancuso, WOIO-TV/WUAB-TV, Cleveland, OH
Jack Dempsey, WCYB-TV, Bristol, VA
Sandy Breland, Group Vice President, Raycom Media
Randy Ingram, WBTW, Myrtle Beach/Florence, SC
Bill Huggins, WPDE/WWMB, Myrtle Beach/Florence, SC
Jimmy Cromwell, WJTV-TV, Jackson, MS
Richard Howe, KAZT-TV, Prescott/Phoenix, AZ
Charles Marshall, Brooks, Pierce, McLendon, Humphrey & Leonard
Justin Faulb, National Association of Broadcasters

cc: Commissioner O’Rielly
    Robin Colwell