October 5, 2015

VIA ECFS

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

Re: Ex Parte Communication of the American Cable Association; Amendment to the Commission’s Rules Related to Retransmission Consent, MB Docket No. 10-71

Dear Ms. Dortch:

Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association, and the undersigned, along with Tom Larsen, Senior Vice President of Government and Public Relations of Mediacom Communications Corporation, and Cristina Pauzé, Vice President of Regulatory Affairs, Time Warner Cable Inc., met with Matthew Berry, Chief of Staff to Commissioner Pai, on October 1, 2015, to discuss the Commission’s proposal to repeal the network non-duplication and syndicated exclusivity rules. On October 5, 2015, Cristina Pauzé, along with Seth Davidson of Mintz Levin Cohn Ferris Glovsky and Popeo PC (on behalf of Mediacom), and the undersigned met with Robin Colwell, Chief of Staff and Senior Legal Advisor to Commissioner O’Rielly.

At both meetings we explained that, similar to the recently repealed Sports Blackout Rule, the Commission’s broadcast exclusivity rules are no longer necessary, as the program exclusivity rights of local broadcasters can be protected and enforced through contractual agreements. Broadcasters that wish to retain the benefits that flow from the broadcast exclusivity rules can and should do so by negotiating for the protection of their programming exclusivity rights in their retransmission consent agreements with cable operators. We also explained that there is no reason to believe that a repeal of the exclusivity rules would necessitate a repeal of the compulsory copyright license, and discussed the legislative history of the 1992 Cable Act, which supports the Commission’s authority to act if a change in circumstances warrants the repeal of the rules.

Chairman Wheeler has made clear that the agency’s broadcast exclusivity rules insert the Commission into contractual agreements that are best resolved through marketplace negotiations between the parties. Under the current rules, the FCC places its thumb on the side of local broadcasters,

permitting them to rely entirely on cable operators to protect exclusivity rights that were negotiated by the broadcaster with a third party (e.g., a network affiliate). As a result, cable operators are saddled with costly obligations for which they receive no commensurate consideration. This cost is no different from other costs that are passed along to consumers in the form of higher pay television fees.

In the absence of the broadcast exclusivity rules, local broadcasters could still seek to retain exclusivity protection through their retransmission consent agreements with the cable operators, and it is perfectly fair to expect these parties to negotiate for some or all of the following:

A guarantee that the cable operator will black out some or all duplicate network or syndicated programming that airs on other stations carried by the cable operator. Current rules require cable operators to enforce their local broadcast stations’ exclusivity protections by blacking out duplicative programming on other broadcast stations they carry. Local broadcast stations thus receive this specific benefit without providing any consideration to cable operators in exchange. It would be more equitable and consistent with free market principles for broadcasters to negotiate for this right from cable operators through retransmission consent negotiations.

The means by which a cable operator would identify the programming to black out on another station carried by the cable operator. Under the current rules, the burden of determining whether and when other stations carried by the operator broadcast programming subject to blackout protection falls on the operator in the first instance. The station requesting protection is under no obligation to provide that information. In a free marketplace, broadcasters would be required to negotiate with cable operators over which party is responsible for identifying any programming that must be blacked out on other stations carried by cable operators. In a negotiation, the parties could determine whether the burden of identifying such programming should be borne by the broadcast station, the cable operator or shared between the two.

The manner in which disputes are resolved. Current rules provide broadcasters a right to file a complaint against a cable operator that the station believes is not complying with its obligation to protect the broadcaster’s exclusivity. This right is a costly burden on cable operators for which the broadcaster provides no consideration in return. A more equitable regime would require broadcasters to negotiate over how any disputes over cable operators’ protection of the local broadcasters’ exclusivity are resolved. In a negotiation, the parties may decide a dispute resolution mechanism that is most efficient for both parties, which may include mediation, arbitration, or any other processes other than a traditional complaint action at the FCC.

The parties also discussed the interplay of the broadcast exclusivity rules and the cable compulsory copyright license. As ACA has previously explained, there is no reason to believe – as broadcast interests have suggested – that the Commission “cannot eliminate the exclusivity rules without eliminating the compulsory license.” The rules themselves date back to the mid-1960s – a time when there was no compulsory license and no retransmission consent. At the time the rules were adopted, even broadcasters conceded that retransmission consent would obviate the need for government mandated

今天的视频市场（“在这一项中，委员会卸下其秤砣，让这种排他性被当事人决定。”）


exclusivity rules.\textsuperscript{5} Further, the broadcast exclusivity rules are not needed to “balance” the compulsory license, as the compulsory license itself contains provisions providing for the adjustment of royalty rates, based on a “fair market value” standard, if the FCC repeals or otherwise modifies the broadcast exclusivity rules.

As support for their opposition to any change in the broadcast exclusivity rules, the broadcast industry has also pointed to a statement in the Report of the Commerce Committee that accompanied the Senate’s consideration of the 1992 Cable Act indicating that, in the Committee’s view, amendments to the broadcast exclusivity rules would be “inconsistent with the regulatory structure” created by the bill.\textsuperscript{6} However, the Committee Report is not the last word on Congress’ intent. The Conference Report on the Act, which post-dated the Senate Commerce Committee report, notably does not repeat this statement, even as it reiterates a number of other portions of the Commerce Committee Report. Moreover, the Act itself, as approved by the Conference Committee and enacted into law, does not codify (or even mention) the exclusivity rules; to the contrary, it expressly disavows any intent to alter the Copyright Act, which contains provisions that expressly contemplate the FCC taking action to amend or even repeal the exclusivity rules.

Further, in affirming its decision to allow stations electing retransmission consent to assert network non-duplication and syndicated exclusivity protection, the Commission relied not on the language from the Committee Report but rather on its own belief that “there are incentives for both parties to come to mutually-beneficial agreements,” because “[l]ocal broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals.”\textsuperscript{7} Today, of course, the bi-lateral monopoly that the Commission relied on no longer exists, as evidenced by the rapidly rising retransmission consent fees and the ever increasing number of broadcast station blackouts that are happening across the country. Given that the Commission has an obligation to monitor how its rules are working and make adjustments when warranted by changed circumstances, it is entirely appropriate for the Commission to revisit whether the broadcast exclusivity rules continue to serve the public interest.

For all of these reasons, it is beyond time for the Commission to repeal the outdated syndicated exclusivity and network non-duplication rules.

\textsuperscript{5} The Commission first adopted broadcast exclusivity rules in 1965. \textit{Amendment of Subpart L, Part 91, to adopt rules and regulations to govern the grant of authorizations in the Business Radio Service for microwave stations to relay television signals to community antenna systems, et al.}, First Report and Order, 4 RR2d 1725 (1965). At the time, even some broadcasters admitted that the adoption of a retransmission consent requirement giving stations retransmission consent rights would “obviate the need for [non-duplication] regulations.” \textit{Amendment of Subpart L, Part 91, to adopt rules and regulations to govern the grant of authorizations in the Business Radio Service for microwave stations to relay television signals to community antenna systems, et al.}, Second Report and Order, 6 RR2d 1717, ¶ 32 (1966).


This letter is being filed electronically pursuant to section 1.1206 of the Commission’s rules.

Sincerely,

Mary C. Lovejoy

cc: Matthew Berry
    Robin Colwell