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	)	

COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

June 26, 2014

Table of Contents

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	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response 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 many reasons discussed below, the Commission should retain its Rules.

Introduction and Summary

The Exclusivity Rules are an essential component of a competitive television marketplace that serves local viewers. To "implement key policy goals," Congress and the Commission together have, over time, carefully constructed a "mosaic of . . . regulatory and statutory provisions (*e.g.*, territorial exclusivity, copyright compulsory licensing, and mandatory carriage)"

---

[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.

relating to the marketplace for the creation and distribution of television programming.[4] Among those "key policy goals" are (1) promoting the core principle of localism;[5] (2) ensuring that local broadcasters, like other programming distributors, have the ability to bargain for and enforce exclusive contracts with program suppliers;[6] and (3) promoting competition among participants in the video marketplace while preventing individual participants from gaining an unfair advantage that ultimately could harm the viewing public.[7] Each element of the statutory and regulatory landscape directly and substantially supports these longstanding goals.[8]

Elimination of the Exclusivity Rules would undermine Congress' and the Commission's policy goals and be seriously detrimental to the public's access to local television. The Commission's authority to eliminate the Rules altogether is doubtful at best,[9] especially given Congress' express reliance on those Rules in multiple statutes for a quarter of a century. Even assuming, however, that authority exists, it should not be exercised. The *Notice* offers no rationale—let alone a persuasive one—for repealing the Rules. Indeed, eliminating them would be arbitrary and capricious for numerous reasons.

---

[4] 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), ¶ 33, *available at* <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf> ("*2005 FCC Retransmission Consent Report*").

[5] *See* Section II.A, *infra*.

[6] *See* Section II.C., II.D, *infra*.

[7] *See* Section II.C., II.E, II.F., *infra*.

[8] These "key policy goals" have remained consistent since 1965, when the Commission first recognized that the nascent cable television industry had a structural advantage over broadcasters "with respect to the market for program product." *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, First Report and Order, 38 F.C.C. 683 (1965) ("*1965 Network Exclusivity Order*"), at ¶ 57.

[9] *See* Section I., *infra*.

First, as the Commission has recognized repeatedly, the statutes and regulations governing program exclusivity, retransmission consent, copyright licensing, and mandatory carriage are both interrelated and complementary, such that "when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination."[10] More significantly, Congress has relied on the FCC's Exclusivity Rules in adopting several laws, including multiple amendments to the Copyright and Communications Acts. Eliminating or changing the Exclusivity Rules would upset the balance upon which Congress relied in establishing the legal regime governing the creation and distribution of television programming, including essential local programming that local stations provide.

Second, elimination of the Exclusivity Rules would deter investment in broadcast content, including local content, and inflict serious harm on local broadcasters and the audiences they serve. The attached economic declaration by Compass Lexecon explains in detail the significant positive effects exclusivity has on broadcast investment generally and in local content specifically.[11] It also discusses how importing distant programming would divert audiences away from local television stations. Diversion of audience would devalue the advertising spots that allow advertisers to reach their intended local customers, ultimately resulting in a loss of advertising revenue for local stations. As 85% of all station revenues are generated through advertising,[12] local stations would have fewer resources to devote to local news, weather,

---

[10] *2005 FCC Retransmission Consent Report* at ¶ 33.

[11] Declaration of Mark Israel and Allan Shampine of Compass Lexecon (Jun. 26, 2014)(attached hereto as Appendix B) ("Compass Lexecon Report") at ¶ 4.

[12] *See Exclusivity Notice* at ¶ 59.

emergency, and other public affairs programming vital to Congress' and the Commission's longstanding localism goal. Specific case studies presented in these comments demonstrate the very real economic harms inflicted by the lack of program exclusivity in local markets.

Third, the elimination of the Exclusivity Rules will skew the competitive marketplace for programming distribution rights, contrary to Congress' and the Commission's important goal of ensuring that exclusivity rights bargained for in the marketplace can be enforced. In fact, the Commission acknowledged in 1988 that its mistaken prior elimination of the syndicated exclusivity rules ("syndex rules") harmed competition.[13] That conclusion is no less true today. The Compass Lexecon Report concludes that the "Commission's exclusivity rules are pro-competitive," and explains how the Rules promote investment and enhance competition among broadcasters and between broadcasters and other programming providers, ultimately "increasing viewer and advertiser welfare."[14] The Report also examines the increased competition for providing television content since the Commission originally adopted the Rules, finding that any possible "theoretical concerns about exclusive contracts are even less relevant than when the rules were adopted."[15]

Fourth, given the existence of statutory compulsory copyright licenses available to both cable systems and satellite providers (and the below-market royalties they entail), the Exclusivity Rules are essential to preserve broadcasters' bargained-for exclusivity rights. These statutory licenses abrogate copyright owners' rights to control distribution of their copyrighted works

---

[13] *See 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 ¶ 23.

[14] Compass Lexecon Report at ¶ 3.

[15] Compass Lexecon Report at ¶ 26.

pursuant to Section 106(3) of the Copyright Act, and the retransmission consent right provided by Section 325(b) of the Communications Act does not fully counterbalance the statutory licenses. In short, as long as the statutory licenses exist, the Exclusivity Rules are essential to maintaining the valuable rights of content creators and television stations.

Fifth, elimination of the Exclusivity Rules would create a substantial asymmetry between cable operators and satellite carriers. Network non-duplication protection is fundamental to the statutory structure established for satellite delivery of certain television signals, which the Commission cannot alter. If the Commission eliminated the Exclusivity Rules, cable operators would no longer be limited by regulation from importing a distant network signal to households throughout a television market, but satellite carriers would remain prohibited by statute from doing the same in most cases.

Sixth, and finally, the wholesale elimination of the Exclusivity Rules inevitably would upend innumerable existing contracts between and among local television stations, networks, syndicators, and multichannel video programming distributors ("MVPDs"). In fact, existing contractual exclusivity provisions are structured around the scope of the Exclusivity Rules in their current form. Elimination of the Rules would upset the settled expectations of contracting parties, nullify bargained-for contractual protections, and require the vast majority of network affiliation and syndicated programming agreements to be renegotiated.

Unfortunately, those urging the Commission to abandon the Exclusivity Rules fail to acknowledge the critical policy interests they serve; the complicated interrelationship between the relevant statutory and regulatory regimes (including copyright) and the Rules; and the long settled expectations dependent upon the Rules. Importantly, they fail to identify any public policy reason to repeal the Rules. As the Commission learned during its earlier, short-lived decision to eliminate the syndex rules, such a drastic shift in the legal landscape will significantly undermine key competition and localism goals. As a practical matter, elimination of the Exclusivity Rules would leave broadcasters (and broadcasters alone) with no effective, efficient way to enforce their privately-negotiated exclusivity agreements, and would benefit cable operators at the expense of broadcasters and satellite carriers. Even more troubling, removal of the Rules would inflict real financial harm on broadcasters (both in the loss of advertising revenues and in the negotiation of retransmission consent agreements) and thus on their ability to provide essential local programming, in contravention of Congress' and the Commission's longstanding commitment to broadcast localism.

I. The Commission's Authority to Eliminate the Exclusivity Rules Is Questionable at Best

The *Exclusivity Notice* "tentatively conclude[s]" that the Commission has the legal authority to eliminate the Exclusivity Rules for cable operators, satellite carriers, and open video systems.[16] To support this tentative conclusion, the *Notice* cites one case, without exposition;[17] quotes the order from 1965 in which the Commission adopted the first network non-duplication rule, a statement obviously made before the ensuing 50 year history to follow;[18] and suggests that, because the Commission adopted syndex rules in 1972, repealed them in 1980, and reinstated them in 1988, the Commission can repeal all of the Exclusivity Rules now. The *Notice* fails to acknowledge, however, the history since 1988 of repeated congressional and

---

[16] *Exclusivity Notice* at ¶ 56.

[17] *See Exclusivity Notice* at ¶ 56 n.206 (citing *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989)).

[18] *See Exclusivity Notice* at ¶ 57 ("As the Commission has previously stated, . . . '[i]f the [exclusivity] [*sic*] rules should ultimately prove unnecessary or need modification in light of the passage of time, congressional action or other factors, they can be modified or rescinded." (quoting *1965 Network Exclusivity Order* at ¶ 82)).

Commission reliance on the Rules' existence and scope, or the essential role the Rules play in promoting localism.[19] In this context, the tentative conclusion that the Commission has the legal authority to eliminate the Exclusivity Rules across the board is seriously questionable.

Careful examination of *United Video, Inc. v. FCC* leads to a conclusion that the Commission should not eliminate the Rules. In that case, the United States Court of Appeals for the D.C. Circuit upheld the Commission's authority to reinstate syndex rules in 1988 because those rules "were reasonably adopted in furtherance of a valid communications policy goal" and were not "'inconsistent with law.'"[20] Given that the fundamental economic principles upon which the Commission relied in reinstating syndex are still valid today, it is difficult to imagine any contrary policy goal supporting elimination of the Exclusivity Rules. Unsurprisingly, no such goal is presented in the *Exclusivity Notice.* More significantly, the history of the Exclusivity Rules establishes that, while it was not "inconsistent with law" to reinstate syndex in 1988, it would be inconsistent with law to eliminate all the Exclusivity Rules now.[21]

In reinstituting the syndex rules in 1988, the Commission determined that it had previously tilted the competitive playing field in cable's favor since cable operators had the ability to enter into exclusive contracts with program suppliers, but broadcast stations did not.[22] Because the Section 111 cable compulsory license enacted as part of the Copyright Act of 1976

---

[19] *See Exclusivity Notice* at ¶ 57.

[20] *United Video*, 890 F.2d at 1183 (quoting *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 796 (1978)).

[21] *See generally Program Exclusivity, Congress, and the FCC: A History of the "Mosaic" of Statutes and Regulations That Govern the Distribution of Television Programming* ("*History of Program Exclusivity*"), Appendix A hereto.

[22] *See Exclusivity Notice* at ¶ 49; *see also 1988 Program Exclusivity Order* at ¶ 5; *United Video*, 890 F.2d at 1179 ("Even more telling, cable companies themselves regularly take advantage of their ability to obtain exclusive rights in programming.").

had already intruded into the video marketplace by abrogating full copyright liability, when the FCC repealed syndex in 1980, it "moved the marketplace *further away* from effective freedom of contract."[23]

The Commission saw that this lack of contractual parity had skewed the video programming market, to the detriment not only of broadcasters and their advertisers but also of television viewers. Broadcasters' "inability to enforce exclusive contracts puts them at a competitive disadvantage relative to their rivals who can enforce exclusive contracts; their advertisers' abilities to reach as wide an audience as possible are impaired; and consumers are denied the benefits of full and fair competition: higher quality and more diverse programming, delivered to them in the most efficient possible way."[24] Therefore, the Commission decided that it needed to minimize government interference so

> (1) that its regulations foster a level playing field among the various competitors, including those who produce and those who distribute [programming]; and (2) that freedom of contract, and thus private property rights, are unimpeded by the Commission's regulation or deregulation of the industries.[25]

In short, the *1987 Program Exclusivity NOI/NPRM* and the *1988 Program Exclusivity Order* articulate core principles central to our national communications policy: promotion of competition, a level playing field, freedom of contract and enforceable property rights. It is hardly surprising that the court in *United Video* found the syndex rules reasonably furthered a

---

[23] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rulemaking, 2 FCC Rcd 2393 (1987) ("*1987 Program Exclusivity NOI/NPRM*"), at ¶ 26 (emphasis in original).

[24] *1988 Program Exclusivity Order* at ¶ 62.

[25] *1987 Program Exclusivity NOI/NPRM* at ¶ 5.

valid communications policy goal. Those principles are still in force today.

To the extent that the *Notice* cites *United Video* for the proposition that the 1976 Copyright Act may have left the Commission the authority to change or rescind its syndex rules, that is not dispositive. The Commission's authority is also constrained by subsequent developments that were not at issue in *United Video*.[26]

To support the Commission's alleged continuing authority to now eliminate the Exclusivity Rules, the *Notice* relies almost entirely on the fact that the Commission "made significant adjustments to the exclusivity regulatory scheme" in 1972, 1980, and 1988, and, from this, concludes that "Congress nonetheless left intact the Commission's general rulemaking power with respect to the cable exclusivity rules."[27] This, too, is not dispositive.

The Commission must consider its authority to eliminate the Exclusivity Rules in light of the Satellite Home Viewer Act of 1988 and subsequent satellite legislation.[28] SHVA established a statutory copyright license to cover certain satellite retransmissions of television programming, but, critically, restricted satellite carriers' distribution of distant network signals to "unserved

---

[26] Similarly, the Commission cannot rely on *Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2d Cir. 1981), to support its conclusion that it has legal authority to eliminate the Exclusivity Rules. Although *Malrite T.V.* concludes that the Commission had authority to eliminate the syndex rules in 1980, that decision focused on the 1976 Copyright Act revisions alone, just as *United Video*. The Second Circuit did not, in 1981, have the benefit of the next 30+ years of congressional enactments, policy declarations, and regulatory action. It may be that Congress did not intend *by virtue of the 1976 Copyright Act alone* to limit the Commission's authority to eliminate the Exclusivity Rules, but the assessment of the Commission's authority today must be far more nuanced.

[27] *Exclusivity Notice* at ¶ 57.

[28] Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (1988) ("SHVA").

households," meaning a household unable to receive an adequate broadcast signal over the air.[29] In fact, "Congress designed the unserved household provision to serve as a *surrogate for the FCC network nonduplication rules applicable to the cable industry*."[30] And, it did so in express reliance on the existence and structure of the Exclusivity Rules.[31]

SHVA was intended to strengthen broadcast localism in part by preserving the exclusive relationships that were "integral" to the network-affiliate structure.[32] In drafting SHVA, the House Energy and Commerce Committee was particularly "concerned that retransmissions of broadcast television programming to home earth stations could violate the exclusive program contracts that have been purchased by local television stations," deprive them of their ability to enforce their program contracts, and "cause an erosion of audiences for such local stations."[33] The House Judiciary Committee similarly noted that the statutory license "establishes certain restrictions on the retransmission of network signals in order to prevent disruption of the

---

[29] *See* SHVA § 202.

[30] Report of the Register of Copyrights, United States Copyright Office, *Satellite Home Viewer Extension and Reauthorization § 110 Report* (Feb. 2006) ("*Section 110 Report*"), at 8 (emphasis added). *See also id.* at iii ("The unserved household is an important term of the statutory license because it enables broadcasters to maintain market exclusivity and reap the economic benefits that flow from that control, and it promotes localism by providing access to local voices, weather, news and advertising.").

[31] *See* Report of the Register of Copyrights, United States Copyright Office, *Satellite Home Viewer Extension and Reauthorization Section 109 Report* (June 2008) ("*Section 109 Report*"), at 5 ("The structure of the Section 111 license, however, was not created in a vacuum. To fully understand the historic development of Section 111 and its terms, it is necessary to explicitly discuss the FCC's rules that were incorporated into the structure of the statute.").

[32] *See* H.R. REP. 100-887, pt. II (1988), at 20 (confirming that a central premise of SHVA was "preserving the exclusivity that is an integral part of today's network-affiliate relationship").

[33] H.R. REP. 100-887, pt. II (1988), at 26.

networks' special exclusivity arrangements with their numerous affiliates."[34]

SHVA also created a structural asymmetry that is central to the instant proceeding: After SHVA, the network non-duplication rules relating to cable are regulatory in nature, while the core exclusivity restriction on satellite—i.e., the unserved household restriction, the surrogate for network non-duplication—is statutory. Critically, Congress knew what it was doing when it created this asymmetry: It was relying on the Commission's cable non-duplication rules which, by that time, had been in place nearly a quarter of a century.

In fact, Congress has repeatedly recognized the importance of exclusivity when reauthorizing SHVA and the unserved household limitation. The legislative history of the Satellite Home Viewer Improvement Act of 1999,[35] for example, explains that

> Broadcast networks give local affiliates an exclusive license to distribute network programming in a given market. Local affiliates, in turn, rely upon and market this exclusivity to attract commercial advertisers. . . . Thus, when a satellite television operator distributes out-of-market, or distant, network signals to households that can otherwise receive local signals over the air, the local broadcast station's viewership (and hence, advertising revenue) necessarily declines. The unserved household limitation therefore has helped to preserve local affiliates' bargained-for exclusivity, and in doing so, promoted the development of local programming and free, over-the-air television.[36]

Indeed, Congress felt so strongly about the importance of exclusivity that it directed the Commission in SHVIA to extend all of its exclusivity "protections" to the satellite

---

[34] H.R. REP. 100-887, pt. I (1988), at 15.

[35] Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999) ("SHVIA").

[36] H.R. REP. 106-79, pt. I (1999), at 13; *see also* S. REP. 106-42 (1999), at 11.

retransmission of nationally-distributed superstations.[37]

Subsequently, when it enacted the Satellite Home Viewer Extension and Reauthorization Act of 2004,[38] Congress re-affirmed its view that an effective marketplace for video programming depends on robust exclusivity protections, including the unserved household restriction.[39] Most recently, the Satellite Television and Localism Extension Act of 2010[40] maintained the exclusivity protection inherent in the distant network signal license, expressly recognizing the purposes served by the distant signal limitation: "to preserve 'localism' and to prevent non-local or 'distant' signals from taking viewers away from local stations that provide community-focused programming such as local news and weather."[41]

In sum, with each new reauthorization of the regime governing satellite carriers' distribution of broadcast signals, congressional reliance on the "mosaic"—the statutory copyright license and the Commission's Exclusivity Rules—has become more deeply ingrained in the

---

[37] 47 U.S.C. § 339(b)(1)(A). This provision also demonstrates Congress' intent that the rules for satellite "be as similar and possible to that applicable to cable services." H.R. Conf. Rep. 106-464 (1999), at 103.

[38] Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809 (2004) ("SHVERA").

[39] *See* H.R. REP. 108-660 (2004), at 11. In fact, SHVERA tightened even more the applicability of the Section 119 distant network signal license, and consequently expanded the protections for network exclusivity and localism, by introducing the principle known as "if local, no distant." Pursuant to this concept, codified in the statutory distant signal license, *see* 17 U.S.C. § 119(a)(3), a satellite carrier cannot deliver a distant network signal to new subscribers if the satellite carrier is already making available local-into-local service pursuant to the Section 122 local-into-local license.

[40] Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111–175, 124 Stat. 1218 (2010) ("STELA").

[41] S. Rep. 111-385 (2010), at 2.

statutory structure.[42] Since at least 1988, Congress has made it a policy priority to promote localism and maintain a balanced marketplace through broadcasters' exclusive arrangements. Just as the Commission did in 1988, Congress has repeatedly recognized that, where MVPDs can avail themselves of a statutory copyright license in "derogation" of program creators' and broadcasters' valuable property rights, exclusivity protections are an essential counterweight.[43]

This statutory overlay must be considered when determining authority to eliminate the Exclusivity Rules for cable systems. The Commission *cannot* eliminate the *statutory* unserved household restriction that has been in place since SHVA and has been reauthorized by Congress four times. Where Congress not only has approved of, but has affirmatively relied upon, the existence and scope of the Commission's Exclusivity Rules as they currently exist,[44] the Commission cannot modify or eliminate those Rules without upsetting decades of statutory and regulatory development and undermining settled expectations of Congress and industry participants, all to the detriment of the viewing public.

For these reasons, the Commission should not adopt the *Exclusivity Notice*'s "tentative" conclusion that it has the authority to eliminate the Exclusivity Rules.

---

[42] *See Section 110 Report* at 22 ("Congress has repeatedly endorsed the program exclusivity protection of the unserved household limitation by renewing the provision in 1994, 1999 and 2004. Likewise, the Copyright Office has favored the protection of the limitation and stated that its removal from the copyright law would harm copyright owners as well as broadcasters.").

[43] *See, e.g.*, *Section 109 Report* at 10 ("If there were not a section 111 or 119 statutory license, copyright owners of broadcast programming would be able to exercise the exclusive rights of copyright ownership granted to them under section 106 of the Copyright Act."). The Copyright Office plainly intends to preserve copyright owners' exclusive distribution rights. The Commission should take particular care not to interfere with settled copyright principles.

[44] *See History of Program Exclusivity*, Appendix A.

II. Even If the Commission Has the Authority to Eliminate the Exclusivity Rules, Such Action Would Be Arbitrary and Capricious

Even if the Commission has the authority to eliminate the Exclusivity Rules, doing so would be arbitrary and capricious. It would ignore decades of statutory and regulatory development, Congress' repeated reliance on the Rules in enacting other statutes, the settled expectations of industry participants, and the Commission's own thorough analysis of the desirability of program exclusivity in its 1988 rulemaking. It would also ignore an extensive economic literature on the benefits of exclusive arrangements generally and in the broadcast industry specifically.[45]

The Supreme Court made clear in *State Farm* that an agency's regulatory change of course must be sufficiently justified and must be accompanied by a reasoned analysis.[46] More recently, in *FCC v. Fox Television Stations, Inc.*,[47] the Supreme Court elaborated on the *State Farm* rule, noting that while an "agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate . . . [s]ometimes it must."[48] In particular, when the agency's existing policy "has engendered serious reliance interests . . . [i]t would be arbitrary or capricious to ignore such matters."[49] In this case, the Exclusivity Rules

---

[45] *See* Compass Lexecon Report at ¶¶ 9-22.

[46] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.") (quoting *Atchison, T. & S. F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973)).

[47] 556 U.S. 502 (2009).

[48] *Fox*, 556 U.S. at 515.

[49] *Fox*, 556 U.S. at 515-16 (citing *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)).

have engendered "serious reliance interests" that require strong reasons for their elimination or modification, reasons that the *Notice* fails to offer and the Commission cannot provide.

To the extent that the Commission claims authority to *interpret* the statutory and regulatory exclusivity regime, interpretive authority does not allow the Commission to rewrite history—that is, the long and detailed history of program exclusivity recounted in Appendix A. Dismantling a statutory and regulatory structure that has been decades in the making and has engendered immense reliance by Congress and industry participants would be flatly contrary to *State Farm*'s admonition that a regulatory change of course must be justified.

A. The Exclusivity Rules Promote Localism

Localism is the central tenet of national broadcast policy and an important statutory principle guiding the Commission. The Commission "has a longstanding policy favoring the provision of local broadcast service to communities, and the Commission expects and indeed *requires* broadcasters to serve the needs and interests of their local communities."[50] For decades,

---

[50] *2005 FCC Retransmission Consent Report* ¶ 50 (emphasis added). *See also Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 (2004), ¶¶ 1, 4 ("[L]ocalism has been a cornerstone of broadcast regulation for decades."); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 2(a)(10), 106 Stat. 1460, 1460-61 (1992) ("1992 Cable Act") ("A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation."); *accord* Intellectual Property and Communications Omnibus Reform Act of 1999, H.R. CONF. REP. 106-464 (1999) ("SHVIA Report"), at 92, 101 (containing Satellite Home Viewer Improvement Act) ("[T]elevision broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements, and information related to local activities."); *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324 (2007), ¶ 6 ("[O]ur broadcast regulatory framework is designed to foster a system of local stations that respond to the unique concerns and interests of audiences within the stations' respective service areas."); *Cable Television Syndicated Program Exclusivity Rules*, Notice of Proposed Rulemaking, 71 F.C.C.2d 1004 (1979) ("*1979 Syndex NPRM*"), ¶ 51 ("Briefly, our concern with localism in the context of broadcasting may be characterized as a concern with externalities—
(continued . . .)

this policy has served the American people very well. Across the country, Americans can turn on their televisions and access information pertinent to their communities: news, weather, emergency alerts and more.[51] Plus, they can access the most popular entertainment programming available—either free over-the-air or via MVPDs.

The policies that promote localism remain as important today as they were when the

---

(. . . continued)
that is, the true value of local news and public affairs programming may not be reflected in the number of individuals who view it or the value they place on it but in the value it has to our society as a whole and especially in the functioning of our democratic institutions."); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 663 (1994) (recognizing that "the importance of local broadcasting outlets can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population"; likewise, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment" (internal quotations omitted)); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968) (declaring local broadcasting to be "demonstrably a principal source of information and entertainment for a great part of the Nation's population").

[51] Local broadcasters remain the go-to source for local news and investigative reporting; coverage of local sports, weather, and traffic; and important local political and public affairs programming, including candidate debates and interviews that viewers across the nation trust, value, and rely upon. *See, e.g*, Pew Research Ctr., Pew Internet & American Life Project, Understanding the Participatory News Consumer 3 (Mar. 1, 2010), *available at* <http://www.pewinternet.org/~/media/Files/Reports/2010/PIP_Understanding_the_Participatory_News_Consumer.pdf> (on a typical day, "78% of Americans say they get news from a local TV station"); Television Bureau of Advertising, TV Basics Report 25-26 (June 2012), *available at* <http://www.tvb.org/media/file/TV_Basics.pdf> ("TV Basics") (most consumers choose local stations for this information); National USC Annenberg-Los Angeles Times Poll Shows Local Television News Rules With Voters, USC Annenberg News (Aug. 24, 2012), *available at* <http://annenberg.usc.edu/News%20and%20Events/News/120824LATimesPoll.aspx> (voters rely more on local broadcast television news for daily news than any other source); Pew Research Center for People & the Press, Further Decline in Credibility Ratings for Most News Organizations (Aug. 16, 2012), *available at* <http://www.people-press.org/files/2012/08/8-16-2012-Media-Believability1.pdf> (finding higher credibility ratings for local TV news outlets compared to cable news outlets); Pew Research Center, "State of the News Media," p. 6 (March 26, 2014), *available at* <http://www.journalism.org/files/2014/03/Overview.pdf> (noting that local television "reaches about nine in ten U.S. adults").

Commission first adopted the Exclusivity Rules. And yet, as we explain below, elimination of the Exclusivity Rules would almost certainly undermine broadcasters' ability to provide quality local programming. It would be arbitrary and capricious for the Commission to eliminate the Rules when this action will undermine broadcasters' ability to satisfy their statutory obligations to meet the needs and interests of their local communities.

It is an elementary principle that, "[i]n order for television programming to be produced, program producers and distributors must be compensated in such a way that they will have incentives to produce the amount and types of programming that viewers desire."[52] Investments in the creation and distribution of local programming are funded principally by advertising revenues.[53] Advertisers, in turn, expect exclusivity.[54] If advertisers cannot be assured that their ads will reach local audiences without dilution or diminution by virtue of the retransmission of competing (out-of-market) programming streams, local broadcasters will find it increasingly difficult to raise the capital necessary to produce and provide local programming.[55]

These concerns are not merely speculative. The attached report from Compass Lexecon

---

[52] *1988 Program Exclusivity Order* at ¶ 54.

[53] *See Exclusivity Notice* at ¶ 59 (observing that on-air advertising revenues constitute about 85% of broadcasters' revenues).

[54] *See, e.g.*, NAB Comments in MB Docket No. 10-238 (filed Jan. 24, 2011) at Attachment B, Norman Hecht Research, Inc., Designated Market Areas: How They Relate to Viewers and a Vital Local Television Marketplace (Sept. 2009) at 3-4 (observing that "[l]ocal advertisers are interested in having their advertising messages reach consumers who can purchase their products and services locally," and national advertisers buy time on local stations so that they can target specific geographic areas (e.g., seasonal products, limited release films). "Advertisers need to know who they are reaching.").

[55] *See* Compass Lexecon Report at Section III.B.; *see also 1988 Program Exclusivity Order* at ¶ 50 (noting that absent the syndex rules, "broadcasters and their viewers might well be particularly harmed by . . . reduced incentives to produce programming intended to be funded by advertiser support. Ultimately, and in a variety of ways, the television viewer, whose options are reduced, suffers as a result of the absence of exclusivity.").

explains in detail the importance of exclusivity to investment.[56] The lack or loss of exclusivity protection also has demonstrably impacted stations' audiences and advertising revenues. For example, as shown in Section III, *infra*, a multicast channel affiliated with one of the four major ("Big 4") broadcast networks suffered a huge disparity in advertising revenue (a 78% differential) compared with the same station's primary channel (affiliated with a different Big 4 network) because the multicast channel was overshadowed by an adjacent market station affiliated with the same network and the incumbent MSO retransmitted both duplicating channels to 80% of its subscribers.

Local stations cannot lose these levels of audience share and advertising revenue and still provide valued and costly programming to their communities. As the Commission has long recognized, "[t]he main purpose and effect [of exclusivity] is to allow the local affiliates to protect their revenues in order to make them better able to fulfill their responsibilities as licensees of the Commission."[57] Elimination of the Rules—or even a material reduction in the

---

[56] *See* Compass Lexecon Report at Section II.

[57] *1987 Program Exclusivity NOI/NPRM* at ¶ 48 ("In essence, because the network program material is identical, what these rules protect is the local advertising and public service announcements within and adjacent to network programming. The protection is triggered by a request from the station, not from the network. Network advertising is already sold on a national or regional basis, so the rules do not allow the network to gain compensation for any viewers for whom it would otherwise have been unable to charge. The main purpose and effect is to allow the local affiliates to protect their revenues in order to make them better able to fulfill their responsibilities as licensees of the Commission. To the extent that this makes the station more popular locally and indirectly increases the audience for network fare, the networks may wish their affiliates to have local exclusivity. It is our hypothesis that the broadcasters, in turn, should have the freedom to contract for such exclusivity. Thus, the same policy arguments about enhancing diversity of programming and efficient distribution that we have developed above would appear to apply here as well. In any event, the difference between the network non-duplication rules and the former syndicated exclusivity rules appears to be more one of degree than of kind. Both rules permit broadcasters to negotiate for and enforce exclusivity provisions in their program contracts. Indeed, as mentioned [above], the syndicated exclusivity rules were

(continued . . .)

scope and strength of the protection they provide to local stations—will undermine stations' incentive and ability to acquire and produce locally-oriented programming, to the ultimate detriment of the viewing public.[58]

Especially where, as here, there is no reason to eliminate a longstanding rule based on sound economic principles, it would be arbitrary and capricious for the Commission to eliminate the Rules without clear evidence that such elimination would not undermine broadcasters' ability to attract audiences and advertising dollars and their incentives to invest in local content. The Commission cannot square its commitment to localism with any policy change that undercuts the economic foundation of local programming.

B. The Exclusivity Rules Are Pro-Competitive

The Exclusivity Rules play an important role in affirmatively fostering competition—and thereby promoting consumer welfare—in the television marketplace. In its attached report, Compass Lexecon explains how and why the Rules enhance competition and advance consumer welfare. As the Report demonstrates, the Rules are pro-competitive in several important aspects, chiefly by incentivizing the creation of local television programming. A vibrant market for local television content in turn "enhances competition" among broadcasters and between broadcasters

---

(. . . continued)
adopted as an extension of the network exclusivity rules."); *see also Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Program Exclusivity Protection by Cable Television Systems*, Notice of Inquiry and Notice of Proposed Rulemaking, 46 F.C.C.2d 1164 (1974) ("*1974 Network Exclusivity NOI/NPRM*"), ¶ 3 ("The primary purpose of network program exclusivity has been to prevent the erosion or fractionalization of local television station audiences which could precipitate a substantial decrease in the advertising revenues of local stations and, thereby, threaten their continued economic viability.").

[58] *See* Compass Lexecon Report at ¶ 4 ("If exclusivity were eliminated or weakened, the incentives for local broadcast stations to invest in local content . . . would be diminished").

and other content providers, "thus increasing viewer and advertiser welfare."[59]

Exclusivity rights are essential to the broadcast television model, and thus beneficial to competition in the video programming marketplace, because exclusivity encourages investment in the creation and distribution of content in two critical respects: It both diminishes "opportunistic behavior" by MVPDs and helps broadcasters achieve economies of scale and scope that promote the development of both network and syndicated content, on the one hand, and local content, on the other.[60]

1. The Exclusivity Rules Prevent Opportunistic Behavior by MVPDs

Exclusivity ensures that local television stations need not face MVPDs' importation of (or threats to import) duplicative programming from distant stations, with the attendant negative consequences for local stations' revenues and incentives:

> In the broadcasting context, broadcast networks and syndicators rely on local broadcast stations to distribute national content, create or tailor news, weather, sports, advertising and other content to local markets, and market the overall package in those local markets. Each of these investments is largely a sunk cost once made (meaning hard to recover even if the broadcast station were to end the associated activity or cease operation altogether) and thus is the type of investment that exclusivity can be particularly important in protecting. In the absence of exclusivity requirements, MVPDs could bring in signals from distant stations, free-riding on broadcast stations' efforts and investments.[61]

Absent the Rules, then, local stations' ability to generate revenues via affiliation with a broadcast network or arrangements with syndicators would be undercut. As Compass Lexecon explains,

---

[59] Compass Lexecon Report at ¶ 3.

[60] Compass Lexecon Report at ¶¶ 8-22; 48-52.

[61] Compass Lexecon Report at ¶¶ 10-11.

MVPDs would have ready access to programming from out-of-market stations.[62] And if duplicative programming were readily available from out-of-market stations, local stations' ratings would drop, negatively impacting advertising and retransmission consent revenue and thereby weakening local stations' incentives and ability to generate local content—a serious threat not only to the broadcast television business model but to the public interest in accessing diverse, locally-oriented programming.[63]

The Rules play an important part in ensuring that both major sources of local broadcast station revenues—advertising revenues and retransmission consent fees—are not unfairly diminished to the detriment of Congress' and the Commission's localism goals. With respect to advertising revenues, as noted in Section III, empirical evidence derived from situations that most closely approximate marketplaces operating without the benefit of the Exclusivity Rules (or where exclusivity has been regained) makes clear that station revenues are, in fact, negatively impacted absent exclusivity—a conclusion logically in keeping with the diversion of viewers discussed above. Importantly, too, the sale of local advertising spots is an area in which MVPDs and local stations directly compete with one another, such that an MVPD's ability to import duplicative programming from an out-of-market station "could further weaken local broadcast

---

[62] *See* Compass Lexecon Report at ¶ 18.

[63] *See* Compass Lexecon Report at ¶¶ 4, 36-47; *see also id*. ¶ 37 (observing that "the costs of providing valuable local content can be large relative to advertising revenues received, especially in smaller markets," and citing data reflecting average gross advertising revenues and average news budgets of NBC affiliate stations in the twenty smallest DMAs); *id*. ¶ 39 (observing that "even a small change in revenue due to importation of distant signals could change local broadcast stations' investment decisions, reducing or eliminating investment in local content"). NAB has previously demonstrated the economic difficulties many smaller market television stations experience in maintaining local news operations. *See, e.g.*, Ex Parte Submission of NAB in MB Docket Nos. 09-182, 07-294, and 04-256 (Mar. 21, 2014) at 6-10 and Attachments A and B.

stations' ability to compete for local ad spots."[64]

With respect to retransmission consent fees, elimination of the exclusivity rules would further tip the scales in favor of the consolidated MVPD industry and against broadcasters. The absence of exclusivity requirements would incent cable systems to import distant signals (or threaten to do so) during retransmission consent negotiation disputes, thereby increasing their leverage and almost surely decreasing local stations' retransmission fees.[65] Here, too, empirical evidence confirms that, absent exclusivity protection, retransmission consent revenues will decline.[66]

The empirical evidence is buttressed by a wealth of economic literature that makes plain that exclusive distribution rights can function as important tools to encourage investment and that these "investment enhancing effects of exclusivity are particularly large when investment requires firms to sink large costs," as in broadcast television.[67] Indeed, as the Commission previously recognized, a "program supplier is interested in reaching as large an audience as possible with its program, as long as increasing the size of the audience increases the amount the supplier will be paid for the program."[68] By entering into enforceable exclusive distribution arrangements, a program supplier can demand a higher price for its product, which encourages the program supplier to create more and better content. The broadcaster, in turn, has an incentive

---

[64] Compass Lexecon Report at ¶ 42.

[65] *See* Compass Lexecon Report at ¶¶ 44-45.

[66] Compass Lexecon Report at ¶ 47 (citing confidential information furnished by local stations indicating that retransmission consent fees are significantly lower when a significantly viewed station is imported into a market).

[67] Compass Lexecon Report at ¶ 4.

[68] *1988 Program Exclusivity Order* at ¶ 60.

to promote the exclusive program, which "translates into larger revenues for the exhibitor and larger payments to the program supplier."[69]

In sum, exclusivity reduces the risk of opportunistic "hold-up"—that is, the risk that MVPDs will import duplicating programming from distant stations and thereby "exploit[] the broadcast stations' sunk investment costs in a way that lessens broadcast station revenues and potentially makes it difficult to recoup the upfront investment costs," which in turn "may deter local stations from undertaking such investments in local content in the first place."[70]

2. The Exclusivity Rules Promote Economies of Scale and Scope

The Exclusivity Rules additionally help achieve economies of scale and scope, thereby reducing local stations' costs, which may be "particularly important" for the production of local content, including news.[71] Economies of scale and scope are generally "associated with falling unit costs of production – that is, with the production of more output at lower average cost – and hence are *prima facie* welfare enhancing."[72] There are "significant economies of scale in broadcast television" in particular, because the development and creation of video programming "has high up-front or fixed costs relative to a near zero marginal cost of broadcasting to

---

[69] *1988 Program Exclusivity Order* at ¶ 60.

[70] Compass Lexecon Report at ¶ 4.

[71] *See* Compass Lexecon Report at ¶¶ 19-22, 48-52. Previous economic studies have similarly concluded that television programming, and local news production specifically, are "subject to strong economies of both scale and scope." J.A. Eisenach and K.W. Caves, The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting (June 2011) at 1-2, Attachment A to Reply Decl. of J.A. Eisenach and C.W. Caves (June 27, 2011) (Reply Decl.) in NAB Reply Comments, MB Docket No. 10-71, at Appendix A (June 27, 2011).

[72] J.A. Eisenach and K.W. Caves, The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting (June 2011) at 1-2, Attachment A to Reply Decl. of J.A. Eisenach and C.W. Caves (June 27, 2011) (Reply Decl.) in NAB Reply Comments, MB Docket No. 10-71, at Appendix A (June 27, 2011).

additional homes."[73] Put differently, "'[o]nce a piece of content has been produced, the marginal cost of making that information available to another consumer is often close to or equal to zero.'"[74] Because the Rules promote these scale and scope efficiencies, broadcasters can create more, and more diverse, programming at lower average cost, to the benefit of the viewing public. As discussed by Compass Lexecon, empirical evidence indicates that television stations able to take advantage of economies of scale are "financially stronger stations," which are "more likely to offer local news programming."[75]

An absence of exclusivity produces the opposite outcome: Local stations are unfairly denied revenue they would otherwise have booked, thereby reducing their ability to invest the high up-front costs necessary to produce local programming or to acquire that mix of network and syndicated programming that will attract audiences—which are, in turn, attractive to advertisers. Local stations are forced to risk that, after programming costs are sunk, "alternative sources of the associated network and syndicated content will be imported (perhaps via opportunistic, strategic behavior by MVPDs)."[76] The negative impact on investment in and the production and distribution of quality local programming is obvious.

---

[73] Compass Lexecon Report at ¶ 48.

[74] Compass Lexecon Report at ¶ 20 (quoting OECD Competition Committee, 1998, *Regulation and Competition Issues in Broadcasting in the Light of Convergence*, OECD Policy Roundtables, pp. 7, 66).

[75] Compass Lexecon Report at ¶ 50 (also noting that, among stations providing local news programming, increases in station revenues were associated with increases in the amount of news programming).

[76] Compass Lexecon Report at ¶ 53.

3. Honoring Exclusivity Rights in the Television Broadcasting Context Is Not Anti-Competitive and in Fact Promotes Competition in the Video Marketplace

It is important to note that in the television programming context, the vibrant and steadily increasing competition among video content providers ameliorates any concern about any purported anticompetitive effects of exclusivity[77]—a fact the Commission itself has recognized. Today, to a far greater extent than when the Rules were first implemented, local stations are one among many sources of video programming for MVPDs in a marketplace with hundreds of cable networks, video-on-demand-options, online outlets, and more. Among those many content providers, however, only local television stations face the threat posed by lack of exclusivity. Eliminating or weakening the Exclusivity Rules would allow MVPDs to force broadcasters to compete with other stations offering the same video programming—"a situation that other content providers do not face."[78] The resulting asymmetrical video content marketplace would be flatly contrary to longstanding Commission policies and goals: Because the broadcast television model is the "one model that emphasizes local content, it would be counter to the Commission's stated commitment to local content to weaken that business model in this way."[79]

The economic analysis of the importance of the Rules to competition in the television programming marketplace poses another threat to consumer welfare: If the broadcast television business model were to be undermined by elimination or modification of the Exclusivity Rules, there would be a very real risk that network and syndicated programming would migrate to pay

---

[77] *See* Compass Lexecon Report at ¶¶ 4, 23-24, 26-35.

[78] Compass Lexecon Report at ¶ 34.

[79] Compass Lexecon Report at ¶ 34.

television.[80] This would harm the viewing public in at least two significant ways. First, programming no longer made available via broadcast television would be denied to the tens of millions of viewers who rely, in increasing numbers, on the free, over-the-air delivery model.[81] And, second, for the reasons stated above, local stations would be forced to curtail the production of costly local content, including news, weather, emergency, and public affairs programming, that is available from virtually no other source. Either result would be inimical to the goals of our national communications policy.

As the Compass Lexecon Report shows, the Exclusivity Rules are pro-competitive, and the Commission cannot justify their elimination on the grounds that they are contrary to either competition policy or economic theory. Either purported rationale would, in fact, represent an abrupt and indefensible departure from longstanding Commission explications of the structural importance of the Exclusivity Rules to a competitive marketplace for the distribution of television programming and would constitute arbitrary and capricious decision making.

---

[80] *See* Compass Lexecon Report at ¶ 57 ("If lack of exclusivity undermined the current business model, the result might be broadcast networks and distributors of syndicated content shifting additional content to pay distribution platforms.").

[81] *See, e.g.*, "Over-the-Air TV Renaissance Continues as Pay TV Cord-Cutting Rises" *available at* http://www.nab.org/documents/newsroom/pressRelease.asp?id=3168 (June 21, 2013) (citing research showing that "the estimated number of Americans now relying exclusively on over-the-air (OTA) television broadcasting increased to 59.7 million, up from 54 million just a year ago" and that "[t]he percentage of TV households currently OTA reliant has now grown from 14% in 2010 to 19.3% in the current survey, a 38% increase in just four years").

C. As the Commission Has Already Recognized, Eliminating the Exclusivity Rules Would Skew the Marketplace and Diminish Competition for Programming

The Exclusivity Rules are expressly intended to further competition.[82] The Commission recognized as much when it reinstituted syndex protection in 1988, acknowledging that "the repeal of syndicated exclusivity may have unduly shifted the competitive balance in cable's favor and against other programming outlets" and "restricted the ability of broadcasters and program producers to negotiate freely enforceable contracts."[83] And, the Commission also recognized that, in light of the statutory copyright licensing scheme, the Exclusivity Rules are necessary to avoid the "asymmetric treatment of competitors."[84] In a marketplace built around

---

[82] *See, e.g.*, *1965 Network Exclusivity Order* at ¶ 57 ("In light of the unequal footing on which broadcasters and [cable] systems now stand with respect to the market for program product, we cannot regard a [cable] system's duplication of local programming via signals of distant stations as a fair method of competition."); *1987 Program Exclusivity NOI/NPRM*, ¶ 24 ("The public's long-run interests, we believe, will best be served by facilitating a competitive market that is not skewed in favor of any competitor. This in turn, can only serve to encourage as full and diverse a supply of creative programming as the public is willing to pay for. Not only do the links between demand and production appear to be weakened, but the current regulatory scheme appears to put broadcasters at a disadvantage in competing with other media for product from which the programming producers can receive full value. Such a situation would be the antithesis of the fair competition on a level playing field that this Commission has attempted to provide in all of its industry regulation."); *1988 Program Exclusivity Order* ¶ 74 ("Promoting fair competition between free, over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible. Local broadcast signals make a significant contribution to this diverse mix. As we documented previously, the absence of syndicated exclusivity places local broadcasters at a competitive disadvantage. Lack of exclusivity protection distorts the local television market to the detriment of the viewing public, especially those who do not subscribe to cable. Our regulatory scheme should not be structured so as to impair a local broadcaster's ability to compete, thereby hindering its ability to serve its community of license."). *See also* H.R. REP. 98-934 (1984), at 22 ("[T]he Committee is concerned that Federal law not provide the cable industry with an unfair advantage in the delivery of video programming.").

[83] *1987 Program Exclusivity NOI/NPRM* at ¶ 7.

[84] *1988 Program Exclusivity Order* at ¶ 5.

statutory licenses, the Exclusivity Rules must "be part of such a pro-competitive regulatory framework."[85]

No marketplace changes in the past three decades support returning to a failed policy. While competition from satellite carriers (and now telcos) has grown substantially since 1988, that does not affect the need for local broadcast exclusivity. Since that time, Congress has enacted statutory exclusivity restrictions on satellite, as well as expressing its clear intent that the exclusivity rules governing cable and satellite be as similar as possible. Similarly, the fact that consumers access broadcast programming via MVPDs at a much higher rate today than they did when the Commission reinstituted syndex supports retention of the Exclusivity Rules.[86] Cable is a much more substantial competitor to broadcast both for highly valued programming, including major sports, and for local and national advertising than in 1988.[87] This is especially important because the Commission reversed its 1980 decision to eliminate the syndex rules to correct a faulty assumption that cable would not emerge as a viable competitor to over-the-air broadcast, especially in major metropolitan areas.[88] Now, 25 years after the Commission corrected this competitive imbalance, every metric by which the Commission determined that cable was a competitor to broadcast—subscribers, share of the TV audience, cable revenues—has increased exponentially. All these marketplace developments in fact make maintenance of a level

---

[85] *1988 Program Exclusivity Order* at ¶ 51.

[86] *1988 Program Exclusivity Order* at ¶ 26 (The FCC noted that roughly 50 percent of TV households subscribed to cable in 1987); Compass Lexecon Report at ¶ 30.

[87] Compass Lexecon Report at ¶¶ 30, 42.

[88] *1988 Program Exclusivity Order* at ¶ 25.

competitive playing field between MVPDs and broadcasters even more important today.[89]

Tellingly, the *Exclusivity Notice* offers no rationale for reversing course, but asks simply whether the Exclusivity Rules are "still necessary" to ensure proper competition for programming, and whether "alternative remedies" might be available to private parties.[90] Because, as explained above, the economic and policy rationale undergirding the Commission's 1988 decision still holds today, the Commission must consequently conclude that allowing broadcasters to secure and enforce exclusive distribution rights is "still necessary" to promote competition. Recreating a competitive imbalance in the television distribution marketplace by eliminating the Rules would be arbitrary and capricious.[91]

D. Congress and Marketplace Participants Have Repeatedly Relied on the Exclusivity Rules

Eliminating the Exclusivity Rules now would also ignore Congress' reliance on the Rules to design legislation ensuring a competitive and equitable marketplace for video programming and a robust local broadcast system. And, on a practical level, elimination of the Rules would undermine existing contracts that specifically cite the Rules and broadcaster investments made in reliance on them.

---

[89] *See* Compass Lexecon Report at ¶¶ 30-35; *id.* at ¶ 30 (since 1988, marketplace changes have "reinforce[d] the Commission's rationale for restoring the syndicated exclusivity rules and expanding the non-duplication rules.").

[90] *Exclusivity Notice* at ¶ 61.

[91] It is not clear what the Commission means when it asks about "alternative remedies" for private parties. If it is asking whether parties could effectuate beneficial exclusivity arrangements through contractual and judicially-enforced means, as we show in more detail below, there are a host of problems with this approach. *See infra*, Section V. The existing Exclusivity Rules have proved a remarkably efficient mechanism to ensure broadcasters can rely on their bargained-for exclusive distribution rights. No alternative exists that would ensure comparable results with little-to-no cost for marketplace participants.

As discussed above and in Appendix A, Congress relied on the network non-duplication and syndex rules when it enacted the statutory license for cable in the 1976 Copyright Act, and, indeed, the license itself is predicated on compliance with the "rules, regulations, or authorizations of the Federal Communications Commission,"[92] which include the Exclusivity Rules.[93] But for the statutory license, cable operators would face copyright liability for their unlicensed retransmission of broadcast programming. Part of the bargain in creating that statutory regime was that all market participants were subject to the Exclusivity Rules. In short, Congress agreed to a limited abrogation of the rights of copyright owners in reliance on the counterweight that the Exclusivity Rules provided.[94] Similar congressional reliance undergirds SHVA, the retransmission consent requirement implemented by the 1992 Cable Act, SHVIA, SHVERA, and, finally, STELA.[95]

This congressional reliance is matched by reliance by participants in the private marketplace. For decades, networks and local affiliates have negotiated the exclusivity provisions of their agreements with program suppliers against the backdrop of the Exclusivity Rules,[96] and have made investments in content assuming "that exclusivity is enforceable through

---

[92] 47 U.S.C. § 111(c).

[93] *See* Appendix A at 4-6.

[94] *See Section 110 Report* at 50-51 ("It has long been recognized that in the context of statutory licenses, copyright owners may be harmed when their works, which are licensed for transmission in one market, are retransmitted to a distant market, sometimes competing with a copyright owner's licensee for the same work in that distant market. Such harm can be mitigated by syndicated exclusivity rules, network non-duplication rules and retransmission consent requirements. These rules are consistent with copyright law.").

[95] *See supra*, Section I and Appendix A at 11-21.

[96] *See 2005 FCC Retransmission Consent Report* at ¶ 50 ("To the extent that cable operators are asking the Commission to modify the network non-duplication and syndicated exclusivity rules such that they would supersede contract arrangements between broadcasters and (continued . . .)

the Commission's rules."[97] The standard exclusivity provision in each of the ABC,[98] CBS,[99] FOX,[100] and NBC[101] network affiliation agreements, as well as syndicated programming

---

(. . . continued)
their programming suppliers that are permitted by the rules, we cannot endorse or recommend such modifications.").

[97] Compass Lexecon Report at ¶ 59.

[98] The standard ABC provision provides:

> Station shall be entitled to assert simultaneous Network non-duplication protection against MVPD carriage of other television Stations' digital broadcast of Network programs, to the extent set out by Section 76.92 of the FCC rules . . . .

[99] The standard CBS provision provides:

> Broadcaster shall be entitled to exercise, within Affiliated Station's Network Exclusivity Zone, the protection against duplication of network programming, as provided by Sections 76.92 through 76.95 and Sections 76.120 through 76.122 of the FCC's rules, with respect to a Network Program . . . .

[100] The standard FOX provision provides:

> Licensee shall by the terms of this Amendment be entitled to invoke protection within the geographic zone described herein against duplication of FOX programming by any other analog or digital television station carried by a Multichannel Video Programming Distributor against which and to the extent Licensee is entitled to assert nonduplication protection under the Communications Act, the Satellite Home Viewer Extension and Reauthorization Act of 2004, including any amendments thereto, and any successor or replacement law or statute ("SHVERA") and the rules and regulations of the FCC.

[101] The standard NBC provision provides:

> During the term of the Agreement, Station shall, by the terms of this amendment, be entitled to invoke protection against the simultaneous duplication of NBC's network programming, as carried by the Station, imported within a radius from the Station's designated community of license as defined in Section 73.606 of the Rules of the Federal Communications Commission ("FCC") to the maximum geographic extent from such community of license permitted under the present Sections 76.92, 76.122 and 73.658(m)

(continued . . .)

agreements,[102] is entirely predicated on the continuing existence of the Commission's Exclusivity Rules. If the Rules were eliminated, virtually every agreement with a program supplier would need to be renegotiated because otherwise the local station would have no contractual right to exclusivity, which is clearly not the parties' intent.

Moreover, as Compass Lexecon explains, "[r]emoving the Commission's exclusivity rules would reduce the value" of investments made under the current regulatory regime and could also "discourage future investments by raising concerns" that they "may similarly be devalued."[103] Beyond the costs of "rewriting" existing programming contracts, eliminating the Rules would create additional substantial direct and indirect "transition costs," including "learning to do business under a new regulatory regime" and "increased uncertainty."[104]

In light of these "serious reliance interests,"[105] the Commission would be required to articulate an adequate reason for the wholesale elimination (or even significant modification) of the Exclusivity Rules—and the resulting upset of more than 25 years of settled expectations by both Congress and industry stakeholders. Thus far, no such rationale has been advanced.

E. Eliminating the Exclusivity Rules Would Improperly Tilt the Retransmission Consent Playing Field

The Commission specifically seeks comment on the advisability of eliminating the

---

(. . . continued)

> of the FCC's Rules and in accordance with the terms and conditions of said Rules.

[102] In order for stations to seek enforcement of their rights under the syndex rules, their contracts are required to cross-reference the rules. 47 C.F.R. § 76.109. For this reason, virtually all syndex agreements include such references.

[103] Compass Lexecon Report at ¶ 62.

[104] Compass Lexecon Report at ¶¶ 59-61.

[105] *Fox*, 556 U.S. at 515-16.

Exclusivity Rules in the context of retransmission consent disputes.[106] MVPDs have argued that when retransmission consent negotiations reach an impasse and MVPDs lose the right to retransmit a local signal, they should be allowed to import distant signals, notwithstanding the Exclusivity Rules and local stations' bargained-for rights. Although this proposal appears, on its face, somewhat more modest than the full-scale elimination of the Exclusivity Rules, its effect on the marketplace would be equally deleterious to local broadcasters and the communities they serve.

In essence, MVPDs are asking the Commission to place a thumb on the scales in their favor during the most critical point of retransmission consent negotiations. Allowing MVPDs to import a duplicating distant signal during a negotiating impasse would unfairly favor MVPDs over broadcasters. By so upsetting the marketplace balance, the Commission would ensure that MVPDs would be *more willing* to take an unreasonably hard line during negotiations and *more willing* to declare an impasse because the option of importing a duplicating signal would be fully available to the MVPD in light of the statutory license and the MVPD's other carriage agreements.

The inevitable result of the Commission putting its thumb on the MVPD's side of the scale would be an increase in the number and duration of negotiation impasses, with clear potential for local news and emergency programming to be unavailable to viewers during these impasses. And, such an increase in the number or duration of retransmission consent disputes, coupled with more frequent importation of out-of-market signals during disputes, is almost certain to generate significant viewer confusion.

---

[106] *See Exclusivity Notice* at ¶ 65.

As just one example, during the retransmission consent dispute between Time Warner Cable ("TWC") and Smith Media in 2010, TWC retransmitted a distant NBC affiliate from Pennsylvania into the Utica, New York, DMA. The Utica mayor's office subsequently received a call from a confused citizen about flooding that was occurring in the distant market.[107] During the same dispute, state and local officials in New York expressed concern that important information about weather emergencies, school, business, and road closings, and issues affecting the public health was not reaching local citizens.[108]

In these situations, NAB stresses that it is the substitution of duplicative programming from a distant station that causes viewer confusion. Had the NBC network programming been unavailable on the TWC system in Utica during the dispute, viewers still could have watched NBC programming from the local NBC affiliate over the air (where it remained available, for free), or switched to an alternative MVPD still retransmitting the local affiliate.[109] Either way, absent TWC's importation of a distant signal, local viewers would not have received confusing emergency information that was inapplicable to them, and they could have received relevant emergency information, either from the local NBC affiliate or another local station.

---

[107] *See* "Utica Mayor May Boot Time Warner Cable Out of Town" *available at* <http://rbr.com/utica-mayor-may-boot-time-warner-cable-out-of-town/#HelQtqXoXeDfLJLG>99> (Jan. 3, 2011) (recounting Utica mayor's concern that TWC's importation of programming from Pennsylvania was causing viewer confusion).

[108] "State and Local Officials Ask FCC to Help Resolve Time Warner/Smith Media Contract Dispute" *available at* <http://www.wktv.com/news/local/112568334.html> (Dec. 28, 2010) (noting that "Time Warner's replacement for WKTV" during the impasse was "WBRE, a broadcast station serving the Wilkes-Barre-Scranton area in Pennsylvania, and that the station does not provide any local news or local programming of interest to viewers in the Utica area").

[109] Viewers could more easily switch MVPDs if they did not impose unreasonably high early termination fees on consumers. NAB again urges the Commission to focus on the harm these fees cause to consumers.

Eliminating the Exclusivity Rules also will harm the local stations that local viewers rely upon by skewing the retransmission consent marketplace. 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 this new and undue leverage will have an effect not only at the point of an impasse, but at all times in negotiations.[110]

As both the Commission and the Copyright Office have acknowledged, statutory copyright license fees are not market-based and, in fact, "bear no direct relationship to the value of the specific programs carried on specific distant signals."[111] Today, many retransmission consent agreements that permit out-of-market carriage where the station is significantly viewed or has been historically carried do not charge any retransmission consent fees at all for such carriage (or charge reduced fees). It follows that, because distant signal copyright royalty fees are significantly below market rates, in the absence of rules protecting exclusivity, cable operators would find it profitable to arbitrage the combined cost of the distant station's retransmission consent fee and the statutory royalty fee against the in-market station's retransmission consent fee. In fact, it will almost always be profitable for a cable operator to arbitrage some combination of a distant station's retransmission consent fees and the

---

[110] *See* Compass Lexecon Report at ¶¶ 44-45.

[111] *1988 Program Exclusivity Order* at ¶ 69; H.R. REP. 108-660 (2004), at 10 ("In spite of increased costs for program production and the cumulative effects of inflation, these royalty rates have been unchanged throughout the current extension of § 119. This has eroded the real value of the royalties paid under the license, inuring greatly to the benefit of the DBS industry."). *See also 1987 Program Exclusivity NOI/NPRM* at ¶ 19 ("The copyright owner, however, was to be compensated, albeit at a rate not set by the market, for the adverse effects that distant signal carriage of non-network programming might have on the value of copyrighted works."); *Section 109 Report* at 70 ("Based on the record in this proceeding, and the data submitted by copyright owners, it appears that the distant signal licenses set royalties at below-market levels. That is one of the principal reasons why the cable and satellite industries have supported their retention.").

below-market copyright royalty fee because when the MSO and the local station are negotiating a new retransmission consent agreement, the local station will be seeking then-current market rates, representing an increase over the rates reflected in the expiring agreement, whereas the distant station's retransmission consent rates will be lower than current market rates because they will reflect marketplace considerations from a prior time.[112] Given this arbitrage advantage, MSOs will be able to lower retransmission consent fees in markets where they can import, or even credibly threaten to import, a distant duplicating station.

The impact of such leverage on retransmission consent negotiations can already be observed where a local station lacks exclusivity because its market is heavily overshadowed by a non-local station from an adjacent market that is affiliated with the same network and that is significantly viewed. Because the non-local station is significantly viewed, the local station cannot exercise network non-duplication against the overshadowing station. In these markets, cable systems are paying broadcasters retransmission consent fees that are dramatically different depending on whether the duplicating significantly viewed signal is available in that particular part of the market. In one such instance, a cable system paid retransmission fees to a Big 4 affiliate in a larger market (ranked 25-50) that were discounted by **73%** for carriage in areas with duplicating significantly viewed stations versus areas where that affiliate could enforce exclusivity (i.e., \$0.12/subscriber vs. \$0.45/subscriber). In another case involving a Big 4 affiliate in a market ranked 50-75, the cable system paid rates that were **67%** lower in significantly viewed areas versus areas where the station could enforce its exclusive rights (i.e.,

[112] Thus, for example, Time Warner Cable presumably found it profitable to pay distant signal royalty fees and the distant station's retransmission consent fees, if any, when it imported stations into distant markets during certain retransmission consent impasses. *See infra*, 55-56.

$0.267/subscriber vs. $.80/subscriber). Another major market network affiliate (located within the top 10 DMAs) was compensated at rates **50%** lower in the three counties within its market where a significantly viewed signal of a distant network affiliate was carried.[113]

As this evidence demonstrates, where MVPDs have the ability to choose between more than one network affiliate, they pay dramatically reduced rates for retransmission consent. The resulting reductions in the retransmission consent fees that local stations would be able to negotiate with cable operators, together with the inevitable loss of advertising revenues from decreased viewership, would reduce local stations' revenues both for funding program acquisition (i.e., network and syndicated programming) and for creating valuable local programming (i.e., local news, public affairs, emergency reporting, etc.).[114] Such an outcome would flatly contravene Congress' and the Commission's fundamental charge with respect to the broadcast marketplace: to promote localism.[115]

Even more troubling, the proposal to suspend the Exclusivity Rules during retransmission consent impasses ignores the very nature of the exclusivity rights that local stations have negotiated with networks and other program suppliers. When a station purchases a right to exclusivity, it obtains that exclusivity whether a particular MVPD carries that station or not; no *other* signal containing the duplicative programming can be retransmitted in the zone of

---

[113] Because of the sensitive nature of this data, the stations that provided information for use in this filing requested that it be anonymized.

[114] *See* Compass Lexecon Report at ¶¶ 44-45.

[115] A suspension of the Rules during retransmission consent impasses would also accentuate the asymmetry of the cable and satellite exclusivity regimes, discussed below at Section II.F., by allowing cable systems, but not satellite providers, to avoid exclusivity limitations during a negotiation impasse—an imbalance not warranted by any legislative or regulatory policy.

protection.[116] The Commission's understanding of this critical aspect of exclusivity could hardly be clearer:

> [U]nder both of these cable rules [i.e., network non-duplication and syndicated exclusivity], it is not necessary that the broadcast station or rights holder asserting protection actually be carried on the cable system in question, nor is it required that the rights holder asserting its rights actually display the programming for which it asserts protection. *These cable 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.*[117]

Furthermore, the existence of a retransmission consent dispute with *one* MVPD does not warrant abrogation of the local station's contractual exclusivity rights (an abrogation that could not occur absent the statutory license in any event), particularly because other MVPDs in the market will still be carrying that station and honoring the exclusivity protection—an outcome that would be patently unfair both to the station and to the competing MVPDs.

In short, suspension of the Rules during retransmission consent disputes effectively ignores local stations' bargained-for exclusivity rights to "protect" (certain) MVPDs. No principled legal or policy reason warrants Commission action that would abrogate broadcasters' contractual exclusivity rights to benefit one side of a private contractual (retransmission consent) negotiation over the other.

---

[116] *See 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 ("It seems clear 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.").

[117] *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).

F. Eliminating the Exclusivity Rules Applicable to Cable Would Create a Competitive Imbalance Vis-à-Vis Satellite Carriers

Even assuming the Commission has authority to eliminate the Exclusivity Rules applicable to cable (which, as discussed above, NAB questions), it has no ability to modify the statutory provisions that establish exclusivity in the satellite context. Eliminating the Rules applicable to cable would create an unjustifiable competitive imbalance favoring cable over satellite, and thus would be arbitrary and capricious.

The Exclusivity Rules relating to cable systems were initially regulatory in nature, while the exclusivity protections governing satellite retransmissions of broadcast signals derive from *congressional* action in SHVA and its various reauthorizations. Because the "unserved household" limitation on the satellite retransmission of distant network signals is statutory, it is beyond the purview of the Commission and cannot be withdrawn.[118] Thus, eliminating the Exclusivity Rules for cable would create a structural asymmetry that favors cable over satellite. The Commission has no basis for acting contrary to Congressional intent and creating a clear competitive imbalance[119]—especially when DBS is often the only source of head-to-head

[118] *See supra* Section I. As discussed above and in Appendix A, the "unserved household" limitation is the core exclusivity provision applicable to satellite operators and is part of the satellite statutory compulsory license.

[119] As discussed in Section I and Appendix A, Congress intended in SHVA and SHVIA to establish a level playing field between cable and satellite MVPDs. *See also 2005 FCC Retransmission Consent Report* at ¶ 75 ("[E]very effort should be made to apply the same rules to cable operators, DBS operators, and other MVPDs. Thus, to the extent the Commission's exclusivity and retransmission consent rules are different with respect to cable and DBS and create distortions in the competitive landscape, we generally recommend that Congress continue its efforts to harmonize applicable laws to the extent feasible in light of differences in technology.").

competition to cable in a given geographic area.[120]

*   *   *

In sum, multiple factors conclusively weigh against elimination of the Exclusivity Rules: the adverse impact on broadcasters' ability to serve their local communities, contrary to the Commission's statutory responsibility to promote localism; the pro-competitive nature of the Rules, especially their incentives for stations to produce local content; the long-standing, settled reliance on the Rules by Congress and the television marketplace and the significant attendant costs of upending the Rules; the likely skewing of the marketplace in favor of a single competitor, rather than enhancing competition; the unjustifiable imbalance in favor of cable providers that would be created by suspending the Rules during retransmission consent disputes; and creating a competitive advantage for cable over satellite carriers. Any one of these considerations, standing alone, would render the Commission's elimination or significant modification of the existing Exclusivity Rules arbitrary and capricious. Eliminating or modifying the Rules given all these multiple adverse effects would be the very essence of arbitrary and capricious decision-making.

III. Available Data Show that Eliminating the Exclusivity Rules Would Harm Local Stations and Impede Their Ability to Provide Quality Service to Viewers

The *Exclusivity Notice* specifically inquires about the availability of data establishing the

---

[120] According to the FCC's most recent Video Competition Report, only 35.3% of homes have access to four or more choices of MVPD. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Fifteenth Annual Report, 28 FCC Rcd 10496 (2013), at ¶ 36, Table 2. This means that the majority of homes are likely choosing between cable and the two satellite carriers. Satellite is thus an important source of competition and consumer choice.

extent of harm that would befall local stations if the Exclusivity Rules were eliminated.[121] That harm is certain to occur, difficult to quantify, and among the most compelling reasons for retaining the Rules in their current form.

Because the network non-duplication rules have been in place for nearly 50 years, virtually the entire existence of the cable industry, there is no direct data of the economic harm that would befall local television stations if the Rules were to be repealed. However, by examining circumstances in which the Rules are inapplicable, or in which they were inapplicable but, through a petition for special relief, became applicable, it is possible to obtain partial proxies for the economic loss to local stations if stations could no longer enforce network exclusivity through the Commission's rules.

Examples of such proxies may be obtained in four circumstances:

(1) Local television markets in which there exist two local stations affiliated with the same network. Depending on the proximity of the two similarly-affiliated stations and their significantly viewed status, the stations may not be able to exercise exclusivity against one another in certain parts of their markets.

(2) A local television station whose market is heavily overshadowed by a non-local station from an adjacent market that is affiliated with the same network and that is significantly viewed. Because the non-local station is significantly viewed, the local station cannot exercise network non-duplication against the overshadowing station.

(3) A low power local television station that is the exclusive affiliate of a network in a market and whose network programming is not simultaneously broadcast on a multicast

---

[121] *See, e.g.*, *Exclusivity Notice* at ¶¶ 58-59, 69.

channel of a co-owned full power station in the market. Because low power stations are not entitled to the protections of the network non-duplication rules, such a station has no protection from importation of duplicating network programming on non-local stations by local cable systems.

In each of these first three categories, the diversion of audience from one station to the other is indicative of the effect that the lack of network exclusivity has on a local station.

(4) The final category is the same as (2) above, except in this circumstance the local station has filed a successful petition demonstrating that the non-local station no longer satisfies the "significantly viewed" criteria in certain communities pursuant to 47 C.F.R. § 76.54. This example may show the gain to the local station once it was able to exercise its network non-duplication rights under the Commission's rules.[122]

A. Markets With Two Affiliates of the Same Network

Stations WFTS-TV, Tampa, Florida, and WWSB(TV), Sarasota, Florida, are both affiliated with the ABC television network in the Tampa-St. Petersburg (Sarasota) DMA (DMA 14).[123] Because Station WWSB is not significantly viewed throughout the entire DMA, Station WFTS can and does exercise its cable network non-duplication rights in the northern portion of the market outside of WWSB's 35-mile zone of protection. Given the structure of the Rules, the

[122] The effect is not pure, however, because the original 1972 significantly viewed list contained significantly viewed areas by county but petitions to show that a station no longer satisfies the criteria can only proceed with respect to individual communities within that county. Thus, the "delisting" process results in a Swiss cheese effect where the non-local station remains significantly viewed in certain areas and so complete program exclusivity may not be achievable by the local station.

[123] Scripps Media, Inc., licensee of Station WFTS-TV, provided the information in this example.

statutory scheme, and the market, WFTS is unable to exercise network non-duplication rights against WWSB on satellite; DIRECTV and DISH carry both stations throughout the DMA, although both satellite carriers retransmit WWSB only in SD format. Satellite penetration is approximately 15% in the market. In addition, approximately 28% of television households receive both stations via cable, whose penetration is 77% in the market, and approximately 4% of television households in the DMA receive both stations only over the air. In total, approximately 47% of television households in the DMA receive both stations.

According to Station WFTS, its ratings for ABC network programming would have been 16.5% higher in the fourth quarter of 2013 were WWSB not in the 47% duplicative portion of the market and WFTS had full exclusivity for ABC network programming. Because advertising is priced differently in different dayparts, WFTS estimates that its advertising revenue during ABC network programming would have been 36% higher but for WWSB's duplicative network programming, based on Kantar data made available to the station, which, on an annualized basis, amounts to approximately $6,410,000. Were WFTS unable to exercise the limited network non-duplication rights that it does have and WWSB were made available to all viewers (rather than just the 47% that currently receive it), WFTS could be expected to have suffered a projected audience diversion of more than 35% in the fourth quarter of 2013 with respect to ABC network programming and a concomitant revenue loss of more than $13.6 million on an annualized basis.[124] An actual revenue loss of that magnitude would subsume the entire news operating and

[124] In fact, the audience diversion and revenue loss would be even greater if the two DBS carriers retransmitted WWSB in HD format rather than just SD format.

news capital budgets of the average station in the top 25 DMAs.[125]

Conversely, WWSB can exercise no network non-duplication protection against WFTS and, but for the fact that Comcast does not retransmit WFTS on its Sarasota systems, WWSB would have no exclusivity at all. Were WFTS not in the market and WWSB the exclusive ABC affiliate, WWSB's ratings during network programming are projected to be more than 600% higher and its revenue during network programming more than 275% higher, or nearly $18 million higher on an annualized basis.

B. Markets Heavily Overshadowed by Another Market With Affiliates of the Same Network

In the second category of proxies, overshadowing can have a substantial impact on revenues, particularly in smaller markets. For example, in one small market (below DMA 150) a local broadcaster owns a single station which is affiliated with a Big 4 network on its primary channel and, because this was previously a "short" market, is now affiliated with a second Big 4 network on a multicast channel.[126] This market has traditionally been heavily overshadowed by a substantially larger market and, because it was previously "short," the "missing" network (now on the local station's multicast channel) even today continues to be carried, via the neighboring market station, by the dominant incumbent MSO to approximately 80% of its cable subscribers. As a result of this overshadowing, and the concomitant lack of network exclusivity for this

---

[125] *See Examination of the Future of Media and Information Needs of Communities in a Digital Age*, Comments of NAB, GN Docket No. 10-25 (filed May 7, 2010), Appendix B, *The Economic Realities of Local Television News—2010* ("*NAB Local Television News Study*"), Table 3, at 13 (reporting that the average news operating budget among stations in DMAs 1-25 is $10,830,833 and the average news capital budget for such stations is $1,408,200).

[126] Because of the sensitivity of the financial data, this smaller market broadcaster requested that its data be anonymized.

second Big 4 network, the local station sees a huge disparity in its advertising revenues for the primary channel (approximately $3,700,000 for 2013) compared with its advertising revenues for its multicast channel (approximately $800,000 for 2013). The difference is not attributable to a ratings differential between the two Big 4 networks, whose ratings are not substantially different on a national basis, but, rather is due to the fact that the duplicating station prevents the multicast from hitting its ratings minimums. Advertisers perceive, due to the lack of exclusivity, that they have only a hit or miss chance of viewers seeing their ads on the multicast channel. The station's revenues are obviously constrained by the lack of network exclusivity for programming on its multicast channel.

Station WNCT-TV, Greenville, North Carolina, the CBS affiliate in the Greenville-New Bern-Washington DMA (DMA 99), is another example in this category.[127] WNCT's 2013 four-book average shows that duplication from a significantly viewed adjacent market station, WRAL-TV, Raleigh, North Carolina, in the Raleigh-Durham (Fayetteville) DMA (DMA 24), has an approximately 6.5% effect on WNCT's ratings for network primetime programming for A25-54, i.e., WNCT's ratings would be 6.5% higher in primetime were a portion of its viewers not diverted to WRAL. WNCT estimates the revenue loss resulting from this diversion at more than $300,000 per year. However, in this market only approximately 19% of the television households receive the duplicating station WRAL. If the network non-duplication rules were repealed and WRAL made available throughout the market, WNCT would see its ratings affected substantially more. The potential audience diversion could reach over 34%, and the revenue loss would be correspondingly higher, perhaps more than $1,575,000 per year, which

[127] Media General Communications Holding, LLC, licensee of Station WNCT-TV, provided the information in this example.

would represent as much as 36% of WNCT's advertising revenue during network programming. An actual revenue loss of that magnitude is equivalent to about 90% of the entire news operating budget of a station in such a mid-sized market.[128]

A third station in this category is a Big 4 network affiliate in a small market (ranked 150-175), which reports that it loses an estimated 50% of its potential audience during network programming hours to two significantly viewed stations affiliated with the same Big 4 network in neighboring markets. The station reports that this translates into a revenue deficit of approximately $750,000 per year, which adversely "affects [its] ability to invest in local news and weather assets and staffing and programming."[129] The impact on the station's ability to invest is unsurprising, given that the reported revenue deficit is larger than the average news operating budget among stations in markets of this size.[130]

C. Markets with a Low Power Affiliate

In this category, consider the case of a low power Big 4 affiliate in a market below DMA 125, which is not entitled to enforce exclusivity under the Commission's network non-duplication rules. This low power station's market contains a number of cable systems, not all of them MSOs with the capability to easily retransmit duplicating stations, and it is also bordered,

---

[128] *See NAB Local Television News Study*, Table 3, at 13. Since the average news operating budget among stations in DMAs 51-100 is $2,240,324 and the average news operating budget among stations in DMAs 101-150 is $1,260,542, it is reasonable to assume that the average news operating budget of a station in a market that essentially straddles those two groupings, as Station WNCT does in DMA 99, is the average of the budgets for DMAs 51-150, which is $1,750,433.

[129] Because of the sensitivity of the financial data, the broadcaster requested that its data be anonymized.

[130] *See NAB Local Television News Study*, Table 3, at 13 (the average news operating budget among stations in DMAs 151-210 is $694,210).

in part, by a market in which the same broadcaster owns a full power station affiliated with the same network. Because the broadcaster does not allow cable companies to import this full power station and cannibalize the viewership of its low power station, there is less audience diversion than would otherwise be expected. Nevertheless, approximately 21% of the television households in the market receive a duplicating network station. (Satellite must provide network non-duplication protection via the Section 119 license restrictions even for low power stations.) Based on ratings data from the November 2013 and February 2014 books, duplication has approximately an 8% effect on the low power station's ratings for network primetime programming for all households, i.e., its ratings would be 8% higher during primetime were 21% of its viewers not diverted to the other station. This diversion results in a revenue loss of more than $300,000 on an annual basis. If a duplicating non-local network station were made available to all viewers (and not just to 21%), then this station could expect to see a diversion of approximately 38% of its viewers during primetime, and, with that, a loss in revenue of more than $1.44 million on an annual basis, which is more than 41% of the station's annual revenue. Once again, an actual revenue loss of this magnitude would subsume the entire news operating budget of the average station in a market of this size.[131] And the effect would even be greater if duplicating non-primetime network programming and syndicated programming were considered.

D. Markets Where the FCC Has Reclassified a Significantly Viewed Station

Finally, representative of the fourth category of proxies is Station WPBF(TV), Tequesta, Florida, the ABC affiliate in the West Palm Beach-Ft. Pierce DMA, which successfully

---

[131] *See NAB Local Television News Study*, Table 3, at 13 (reporting that the average news operating budget among stations in DMAs 101-150 is $1,260,542 and among stations in DMAs 151-210 is $694,210).

petitioned the FCC to establish that Station WPLG(TV), Miami, Florida, the ABC affiliate in the Miami-Ft. Lauderdale DMA, no longer satisfied the "significantly viewed" criteria of the Commission's rules.[132] In this case, WPBF (DMA 38 at the time) was heavily overshadowed by WPLG (DMA 17 at the time), which was then significantly viewed in the southern portions of the West Palm Beach-Ft. Pierce DMA and retransmitted by Comcast, the dominant incumbent MSO, to approximately 39% of all television households in the market. After the successful petition,[133] WPBF was able to assert its program exclusivity rights pursuant to its various contracts with its network and syndicators.

In comparing the May 2010 sweeps when WPBF could not exercise exclusivity protection with the May 2011 sweeps when the station could exercise such protection, WPBF experienced an 18.6% increase in ratings during primetime for A25-54 and a concomitant increase in local network advertising revenue. Indeed, it appears that WPBF's inability to assert its network non-duplication rights represented an opportunity cost of more than $500,000 on an annual basis. Were there no network non-duplication rules and had WPLG been retransmitted throughout the market, the difference in ratings is projected to have been substantially higher, reflecting a potential audience diversion of nearly 48%, and the opportunity cost of lost local network advertising revenue would have been, correspondingly, substantially greater as well.

In this example, WPBF also benefited from an ability to exercise syndex rights following its successful petition. More particularly, WPBF and WPLG both broadcast the same two syndicated programs, *Wheel of Fortune* and *Jeopardy!*, in the prime access period (7:00-8:00 pm

---

[132] Hearst Properties Inc., the licensee of Station WPBF(TV), provided the information in this example.

[133] *See WPBF-TV Company, Petition for Waiver of Sections 76.92(f) and 76.106(a) of the Commission's Rules*, Memorandum Opinion and Order, 25 FCC Rcd 9102 (2010).

ET). Prior to the petition, WPBF's audience for these shows was being heavily diverted to WPLG. After the successful petition, WPBF saw its ratings in prime access increase dramatically, with *Wheel of Fortune* more than doubling its A25-54 demo rating from 1.7, in May 2010, before the station could exercise its syndex rights, to 3.9, in November 2010, after it exercised those rights (an increase of nearly 130%), and *Jeopardy!* nearly doubled its A25-54 rating from 2.5 to 4.7 (an increase of 88%) in those same measurement periods. A contributing factor to the much larger increase in the prime access ratings is the fact that duplicative network evening news (ABC's *World News*) was no longer available from WPLG following WPBF's exercise of its network non-duplication rights. That is, the fact that the network evening newscast was now available on an exclusive basis, which is the lead-in to prime access, translated into an even higher increase in prime access ratings than seen in primetime network programming.[134] WPBF was able to monetize this exclusivity and increase in ratings in prime access by increasing the average unit rate in this daypart by 14% by May 2011. Once again, had these prime access syndicated shows been available throughout the market without any syndex protection, the difference in the average unit rate would have been on the order of 36% (rather than 14%).

[134] This point is instructive more generally. Even had the non-local station not duplicated the two syndicated programs in prime access, the local station would have likely seen increases in its prime access ratings for these shows merely from the fact that the network evening newscast, the lead-in, was now exclusive to the local affiliate. Thus, the lack of program exclusivity harms local stations not only with respect to lower advertising revenue generated from the duplicated programming itself but also from a more general diversion of audience due to the presence of a substantial duplicative alternative. *Cf. Section 110 Report* at 23 ("In this heavily duplicative environment, the share of audience that watched the top programs (many of them U.S. network prime time shows) on distant satellite signals rather than the local station ranged from 12.9% to 69.1%." (citing March 2001 study examining Canadian experience without exclusivity protections)).

Following WPBF's successful petition, the station increased its coverage of traffic and weather reporting and alerts in this South Florida region. It also launched a highly successful series of health and wellness festivals, headlined by syndicated programming host Dr. Oz, and also featuring numerous local doctors and medical practices.[135] In short, since the station has been able to exercise its exclusivity rights, it has been better able to fulfill its own high standards of public service to the local community.

These various proxies show that local stations would be substantially harmed economically, as result of audience diversion and consequent loss of advertising revenues, if the Commission were to eliminate its Exclusivity Rules.[136] In view of this severe economic harm, local stations would be hard-pressed to continue to fund, let alone expand, essential local programming services, such as local news, weather, emergency, and public affairs programming. The core communications policy of localism would be critically undermined, contrary to long-established Congressional and Commission intent.

IV. The Existence of the Statutory Copyright Licenses Requires Exclusivity Rules As a Counterweight

Any contemplation of the elimination of the Exclusivity Rules cannot be considered in a vacuum for the multiple reasons explained above. In fact, their interdependence with the statutory copyright licenses available to cable systems and satellite providers requires

---

[135] *See, e.g.*, *WPBF 25 Health & Wellness Festival 2014 Featuring Dr. Oz*, *available at* <http://www.wpbf.com/health-droz-event>.

[136] *See, e.g.*, *Exclusivity Notice* at ¶ 59 (seeking comment on potential audience diversion and likely effect on advertising revenues). *See also 1988 Program Exclusivity Order* at ¶ 41 ("Diversion imposes economic harm on local broadcasters that is the result of inequitable competitive rules rather than an inability to provide a good service responsive to viewers' wishes. A drop of even a single rating point may represent a loss of 1/3 to 1/2 of a broadcaster's potential audience. Audience diversion translates directly into lost revenue for local broadcasters.").

particularly careful consideration, because the statutory licenses skew the balance otherwise created by market forces in favor of MVPDs. Since the Commission has viewed the Exclusivity Rules as a counterweight to the compulsory license scheme, their elimination would require the rebalancing of all affected interests—a rebalancing beyond the FCC's authority.

As a general rule, beneficial owners of copyrighted programming can sue for infringement under the Copyright Act if (among other things) the copyrighted work is transmitted without a license.[137] In fact, the Copyright Act specifically describes television broadcasters as beneficial owners entitled to sue for infringement.[138]

MVPDs are not, however, required to negotiate individual copyright licenses for every

---

[137] *See* 17 U.S.C. § 501(b) ("The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411 [17 U.S.C. § 411], to institute an action for any infringement of that particular right committed while he or she is the owner of it.").

[138] *See* 17 U.S.C. § 501(c) ("For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station."); *id*. § 501(e) ("With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 119(a)(5), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station."). *See also* 17 U.S.C. § 501(d) ("For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs."); *id*. § 501(f)(1) ("With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 122, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local market of that station.").

broadcast program they retransmit because they can invoke a statutory license.[139] The availability of these statutory licenses renders the protections provided by the Exclusivity Rules absolutely essential to broadcasters, because the statutory license fundamentally alters the legal landscape in the broadcast setting: If MVPDs abide by the statutory license provisions, the beneficial owner would have no (copyright) recourse. Absent the Exclusivity Rules, MVPDs would have a significant regulatory advantage, because broadcasters cannot sue for copyright infringement as beneficial owners in light of the statutory license. The resulting imbalance is evident.

The retransmission consent regime does not bridge the gap; it is imperfect and incomplete at best. MVPDs are required to obtain retransmission consent from every broadcast station that does not elect must-carry, subject to few exceptions.[140] But if a cable or satellite operator obtains sufficiently broad retransmission rights from a distant or out-of-market station, no obvious barrier to retransmission of that signal throughout a local market would exist absent the Rules. The Rules, then, ensure that MVPDs cannot simply make an "end run" around a local station by seeking broad retransmission consent from an out-of-market station that offers duplicating programming; it is for that reason that the retransmission consent regime *does not* "adequately address[] the Commission's regulatory goals and thus undercut[] the basis for the exclusivity rules."[141] For this reason, Congress recognized the importance of maintaining the

---

[139] *See* 47 U.S.C. § 111 (cable); *id*. §§ 119, 122 (satellite).

[140] Exceptions include satellite and cable retransmission of certain superstations, *see* 47 U.S.C. § 325(b)(2)(B), (D), satellite retransmission of distant network signals to unserved households, *see id.* § 325(b)(2)(C), and retransmission of local broadcast signals by master antenna television facilities under certain circumstances, *see* 47 C.F.R. § 76.64(e).

[141] *Exclusivity Notice* at ¶ 58.

Exclusivity Rules in adopting the retransmission consent requirement, as discussed above.[142]

This is not merely a theoretical concern. For example, the Commission itself held that Station WMGT-TV, Macon, Georgia, an NBC affiliate, granted essentially unlimited retransmission consent to Monroe Utilities Network, a municipally-owned cable operator, despite the fact that WMGT's network affiliation agreement prohibited it from granting retransmission consent to any MVPD outside the Macon DMA. Monroe Utilities had sought retransmission consent from WMGT after it was unable to reach a retransmission consent agreement with Station WXIA-TV, the local NBC affiliate in the Atlanta DMA. The Commission found that WMGT had "granted express authority under Section 325(b)(1) for the retransmission of the Station's signal on the Monroe Utilities cable system" as a distant station in the Atlanta DMA.[143] The Commission, as is its customary habit, refused to consider whether WMGT's grant of retransmission consent was consistent with its contractual agreements.[144]

Other stations may grant broad retransmission consent inadvertently.[145] A local station that has freely and fairly negotiated for network non-duplication and/or syndex rights in its

---

[142] *See* Appendix A at Section IV.

[143] *Monroe, Georgia Water Light & Gas Comm'n d/b/a Monroe Utils. Network v. Morris Network, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 13977 (2004) ("*Monroe Utilities Network*"), ¶¶ 4, 8.

[144] *See Monroe Utilities Network* at ¶ 10 ("Our decision here is not intended to suggest any opinion as to whether Morris's grant of retransmission consent for WMGT is consistent with any contractual agreement to which it may be a party. We will not interject ourselves into specific arguments concerning private agreements between broadcasters and MVPDs. Contractual issues are to be resolved by the parties or by courts of proper jurisdiction." (citations omitted)).

[145] *See, e.g.*, Retransmission Consent Agreement dated June 30, 2009, between Nexstar Broadcasting, Inc., Mission Broadcasting, Inc., and Four Points Media Group Holding LLC and Time Warner Cable Inc., attached as Exhibit 1 to Verified Complaint and Application for Temporary Restraining Order and Other Injunctive Relief, *Nexstar Broadcasting, Inc. v. Time Warner Cable Inc.*, No. 3-12-CV-2390P (N.D. Tex., filed July 16, 2012).

market with its program suppliers is an innocent bystander to the joint conduct of the MVPD and an (inadvertent) distant station in this scenario. Because of statutory copyright licenses, that local station would have no apparent legal recourse against the importation of a distant signal containing duplicative programming absent the Exclusivity Rules.

If a non-local station grants broader retransmission rights than it is authorized to grant under its network affiliation agreement, the *network* would have the right to address that conduct using whatever remedies are provided under the terms of its affiliation agreement. The station that is facing audience diversion, reduced advertising revenue, and/or an inappropriately weaker position vis-à-vis cable systems in retransmission consent negotiations has *no ability* to address this conduct. Assuming that the network opts to take remedial steps, such as a lawsuit, that lawsuit would do nothing to block the MVPD's retransmission of the distant signal, because the MVPD would have both retransmission consent (from the distant station) and the statutory copyright license.

Moreover, other potential remedies available to a network under these circumstances, such as terminating its relationship with the affiliate, would be both impractical and potentially disruptive to local viewers. If the network stripped the offending station of its affiliation, local viewers in the distant market could be harmed for several reasons: (1) the station which loses the affiliation may no longer have the resources to produce local programming, including news; (2) there may be no immediate local station with which the affiliation can be placed; and (3) even if affiliating with a new station is immediate, the new affiliate may not have the resources to launch the quantity and quality of local newscasts, weather, and public affairs programming that previously appeared on the prior affiliate. In short, localism would suffer in one or both markets affected by the circumstances of duplication in this situation: Either the market of the local station that has lost its exclusivity is harmed, for all the reasons set forth herein, or the market of the distant station is harmed if the network sues and/or strips the distant station of its affiliation for breach of contract. Given the Commission's statutory responsibility to foster localism, it should not eliminate a simple enforcement mechanism that avoids these situations and prevents harm to local viewers.

Like the WMGT example discussed above, the scenario of stations granting overly broad retransmission consent rights is not hypothetical. In at least two instances in recent years, Time Warner Cable ("TWC") imported the signals of distant Nexstar stations into the markets of local stations with which TWC was engaged in retransmission consent disputes, relying on broad retransmission consent rights allegedly granted by Nexstar. Between December 16, 2010 and January 8, 2011, TWC imported an out-of-market Nexstar station during a retransmission consent dispute with Smith Media; it repeated that behavior during a retransmission consent dispute in 2012.[146] TWC was able to circumvent the local stations' exclusivity rights because it had both the statutory copyright license and claimed a broad grant of retransmission consent from Nexstar.[147]

---

[146] Both instances effectively illustrate the likely scenario faced by stations if the Rules are eliminated.

[147] Nexstar challenged TWC's out-of-market retransmission as a violation of the Nexstar-TWC retransmission consent agreement on both occasions. In the Smith Media/TWC dispute, Nexstar filed a complaint with the Commission, which was subsequently mooted by the resolution of the Smith Media/TWC impasse. *See Emergency Petition for Injunction Prohibiting Carriage in Violation of the Commission's Rules*, File No. CSR-8382-C (filed Dec. 28, 2010). In the 2012 dispute, Nexstar sued TWC for breach of its retransmission consent agreement. The United States Court of Appeals for the Fifth Circuit, however, disagreed with Nexstar's interpretation of the agreement, finding that Nexstar had, in fact, consented to the retransmission of its stations' signals on any TWC system, without geographic or market restriction. *See Nexstar Broadcasting, Inc. v. Time Warner Cable, Inc.*, 524 Fed. Appx. 977, 981-82 (5th Cir. May 30, 2013) ("[T]he plain language of [the retransmission consent agreement] does not proscribe Time Warner's retransmission authority to local television markets; instead, it allows Time Warner to retransmit Nexstar signals on every 'System' as defined in the contract. . . .
(continued . . .)

Were the Exclusivity Rules eliminated, it is likely that some small broadcasters, due to their lack of leverage, would be pressured by large MSOs to grant expansive (or at least ambiguous) retransmission consent rights. Even if an MSO did not engage in bad faith negotiating tactics to obtain such broad rights, some broadcast stations may be induced to grant such rights. For instance, an MSO might offer a small market station $5.00 per in-market subscriber per month in exchange for free out-of-market carriage rights, which could quickly pay for itself by the MSO's increased leverage in retransmission consent negotiations with other stations in other markets. Alternatively, the MSO could offer the station a modest fee for all carriage, including on out-of-market systems. Because the marginal cost to the station to grant such out-of-market carriage rights is essentially zero, the station would effectively earn a windfall if those rights were exercised by the MSO.[148] In any of these instances, the local station would be harmed yet have no clear path of recourse.

As both these actual and hypothetical examples illustrate, the Exclusivity Rules are a critical element of the means by which local broadcasters and their program suppliers effectuate their private contractual and intellectual property rights. Absent the Rules, local stations would be left with no effective remedy when an MVPD threatens or chooses to import a duplicating distant signal pursuant to an (overly broad) retransmission consent agreement with the an out-of-market station, because the MVPD can rely on the statutory license to avoid copyright liability.

(. . . continued)
[The Agreement], then, grants Time Warner the ability to retransmit Nexstar signals over every system—not just systems in local markets."). Thus, the fact that "contractual arrangements between networks and their affiliates may bar a broadcaster from agreeing to the importation of its distant signal," *Exclusivity Notice* at ¶ 58, does not negate the need for the protection of the Exclusivity Rules.

[148] *See* Compass Lexecon Report at ¶ 18.

Congress, first in crafting the statutory license, and then in crafting the retransmission consent requirement, never intended such a result, which is why it relied on the Commission's Exclusivity Rules in establishing these statutory provisions.

V. Broadcasters Cannot Achieve the Same Important Exclusivity Protections Solely Via Private Contract

The *Exclusivity Notice* asks whether there is "any legitimate reason that the Commission should provide a regulatory mechanism for enforcement of private exclusivity agreements."[149] The answer to that question is emphatically yes, because the Commission's rules-based enforcement mechanism is essential to ensure full protection of the interests the Exclusivity Rules are intended to serve. Judicial enforcement of privately-negotiated agreements simply cannot provide the same protection. In fact, the Commission's *elimination* of the existing regulatory mechanism for enforcing bargained-for exclusivity would be arbitrary and capricious because that enforcement mechanism is essential to full, effective, and consistent enforcement of broadcasters' and program suppliers' exclusivity rights.

A. The Commission Is the Appropriate and Most Efficient Forum for Enforcing Exclusivity Rights

For all the ink that has been spilled since 1965 in the Commission and elsewhere discussing the Exclusivity Rules, there is one critical fact: The Rules work. There have been very few disputes involving the Commission's Exclusivity Rules because they are effectively self-policing. Neither broadcasters, nor MVPDs, nor the Commission have been forced to expend substantial resources resolving particular disputes about the Exclusivity Rules during

[149] *Exclusivity Notice* at ¶ 66.

their long history.[150]

Nonetheless, the *Exclusivity Notice* considers requiring parties seeking to enforce private contracts conferring exclusivity rights to "seek recourse from the courts . . . rather than the Commission."[151] Such a proposal is impractical and inefficient.[152] Absent the deterrent effect of current, well-established enforcement mechanisms, disputes between and among program suppliers, broadcasters, and MVPDs will rise.[153] Elimination of the Rules on the ground that private enforcement of contract rights provides a functionally equivalent alternative mechanism for ensuring program exclusivity would be arbitrary and capricious.

B. The Privity Problem May Be Insurmountable

The *Exclusivity Notice* acknowledges that one legal obstacle to requiring broadcasters to enforce their privately-negotiated exclusivity rights in the courts, rather than via the Commission, is that courts typically require "privity of contract" between the party seeking to

---

[150] *See Exclusivity Notice* at ¶ 66 n.249 (citing just four complaints to the Commission seeking enforcement of the Exclusivity Rules). Indeed, NAB's research indicates that there have been just a small number of such complaints in the past 30 years. In addition to the four complaints cited in the *Exclusivity Notice*, see *Board of Water, Light & Sinking Fund Cmmn'rs of the City of Dalton, Georgia*, Memorandum Opinion and Order, 19 FCC Rcd 19534 (2004) (finding that WRCB-TV was entitled to non-duplication protection); *Monroe Utilities Network* at ¶ 9 (refusing to reach merits of network non-duplication complaint because of decision on scope of retransmission consent agreement); *Retlaw Ent., Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 7413 (1987) (finding that KMST was entitled to non-duplication protection); *Raystay Co. d/b/a TV Cable of Carlisle*, Memorandum Opinion and Order, 1 FCC Rcd 117 (1986) (denying petition to review dismissal of exclusivity complaint filed by licensee of WLYH-TV).

[151] *Exclusivity Notice* at ¶ 66.

[152] *See* Compass Lexecon Report at ¶¶ 63-67.

[153] Compass Lexecon Report at ¶ 65 (enforcement without the rules, "even after a transition period, [is] likely to face certain difficulties and uncertainties" in part because "new contractual language would be untested and the interpretation subject to dispute.").

enforce the contract and the party being sued.[154] In ordinary circumstances, however, a local broadcaster may have no contractual relationship at all—or at least no contractual relationship that would permit enforcement of exclusivity rights embodied in a contract between the local station and a network or program syndicator—with either of the parties responsible for the retransmission of the offending duplicating distant station (i.e., the MVPD who is retransmitting the duplicating distant station into the local station's market, with which the local broadcaster does not have a contract because of an ongoing retransmission consent dispute, or the broadcaster in the distant market who purportedly granted the MVPD such rights).[155]

Lacking a contractual relationship with either the MVPD or the distant station, the local station's only clear option is to sue the network or the program supplier (on a theory, perhaps, of facilitating or allowing a breach of the exclusivity provision)—a step that could substantially damage the network-affiliate relationship that both Congress and the Commission have long been committed to respecting and preserving.[156] Given the legal complexities and uncertainties

---

[154] *See Exclusivity Notice* at ¶ 66; *see also id*. at ¶ 41 (observing that the Rules "provide an extra-contractual mechanism for broadcasters to enforce their contractual exclusivity rights against MVPDs, which are not parties to those exclusivity agreements").

[155] Because a local broadcaster would almost certainly not be an "intended" beneficiary of a contract between an MVPD and another distant broadcaster, the local broadcaster would most likely not be able to proceed on a "third-party beneficiary" theory.

[156] *See, e.g.*, H.R. REP. 100-887, pt. I (1988), at 19-20 (1988) ("The Committee believes that historically and currently the network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby the special strengths of national and local program service support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well."). The nature of the network-affiliate relationship makes it unlikely that the network will side with one affiliate station over another affiliate that arguably has granted overly broad retransmission consent rights and thereby has undermined the first station's exclusivity rights as conferred by the network. *See* Compass Lexecon Report at ¶ 67 (broadcast networks and syndicators' ability to prevent such behavior
(continued . . .)

with privity of contract, the Commission should not eliminate its "well-established," "well understood" and "effective" mechanism for enforcing exclusivity rights.[157]

C. Private Enforcement Would Be Slow, Expensive, and Uncertain

Even assuming the absence of contractual privity is not an insurmountable problem, requiring broadcasters to enforce their private exclusivity rights through the courts will unquestionably be more expensive, more time-consuming, and far more likely to result in disparate rulings around the country than the current, Rules-based system of enforcement before the Commission.

1. Private Enforcement Is More Expensive and Time-Consuming

In the *Exclusivity Notice*, the Commission asks for specific data supporting the argument that judicial enforcement of exclusivity agreements would be too costly for most broadcasters.[158] The long-running litigation between EchoStar and the broadcast networks and affiliates provides a useful data point, as it mirrors the sort of litigation that could be expected if parties are required to enforce exclusivity in the courts.[159] In *EchoStar*, a group of broadcasters filed suit in 1998 against the predecessor to satellite provider DISH Network, asserting that the satellite carrier was retransmitting distant network signals to "served" households, in violation of SHVA's "unserved household" limitation embodied in the statutory copyright license—and thereby in violation of

---

(. . . continued)
would, in the absence of the exclusivity rules, be more limited, and complicated by the fact that the broadcast network or syndicator has relationships with both parties that it needs to preserve).

[157] Compass Lexecon Report at ¶ 65.

[158] *See Exclusivity Notice* at ¶ 66.

[159] *See generally CBS Broad. Inc. v. EchoStar Commc'ns Inc.*, 450 F.3d 505 (11th Cir. 2006), *cert denied*, 549 U.S. 1113 (2007).

the statutory exclusivity requirement. After a bench trial, two trips to the United States Court of Appeals for the Eleventh Circuit, two petitions for rehearing *en banc*, and two petitions for certiorari to the United States Supreme Court, the broadcasters secured a permanent injunction against EchoStar—which, because of EchoStar's pattern and practice of violations, resulted in EchoStar's loss of eligibility to utilize the Section 119 license.[160]

As is apparent from the district court docket in *EchoStar*,[161] which contains more than 1,200 entries, the litigation was bitterly fought. Ultimately, the plaintiff broadcasters filed fee requests in 2006 for nearly $6.5 million, reflecting the work of three separate law firms spanning eight years.[162] It should be noted that while *EchoStar* involved a national satellite carrier against several networks and network affiliate associations, the more likely litigation posture if enforcement of exclusivity agreements is shifted from the Commission to the courts will be a suit brought by a single local broadcaster against a national MVPD. The sort of commitment and financial investment required to fully litigate *EchoStar* is not a realistic option for virtually any local broadcaster. Large MVPDs will have incentives to engage in litigation tactics designed to increase costs and run out the clock, rendering judicial relief effectively unavailable for the local station whose exclusivity rights have been breached.[163]

---

[160] *See Echostar*, 450 F.3d at 523.

[161] S.D. Fla. Case No. 98-2651-Civ.

[162] Of course, the litigation did not end in 2006, as the case went back to the Eleventh Circuit in 2008 on a claim that EchoStar had violated the injunction. *See CBS Broad. Inc. v. EchoStar Commc'ns Inc.*, 532 F.2d 1294 (11th Cir. 2008).

[163] For example, in *EchoStar*, the Eleventh Circuit characterized EchoStar's willful violation of SHVA as follows: "[W]e have found no indication that EchoStar was ever interested in complying with the Act. Indeed, based on the district court's findings, we seem to have discerned a 'pattern' and 'practice' of violating the Act in every way imaginable. . . . EchoStar has disregarded the limitations of its statutory license and sought to avoid its

(continued . . .)

The *EchoStar* case is by no means an outlier. Litigation is inherently expensive. A review of recent federal court opinions in breach of contract cases indicates that a local broadcaster seeking to enforce its exclusivity rights in court would be forced to shoulder a substantial financial burden, even in the simplest cases.

Examples of Duration of Cases and Attorneys' Fees in Breach of Contract Lawsuits

Case Name	**Description**	**Approximate Duration**	**Approximate Attorneys' Fees/Costs**
Novus Franchising, Inc. v. AZ Glassworks, LLC, No. 12-1771, 2013 U.S. Dist. LEXIS 36830 (D. Minn. Mar. 18, 2013)	Breach of franchise agreement, Lanham Act, and other claims. Plaintiff sought a default judgment and a preliminary injunction. Defendant never responded to the complaint.	8 months	$43,000 awarded to prevailing party
Southern Wine and Spirits of Nevada v. Mountain Valley Spring Co., LLC, 712 F.3d 397 (8th Cir. 2013) (appeal from W.D. Ark.)	Claim and counterclaim for breach of contract. Court denied summary judgment. At trial, both sides were found to have some liability. After appeal of the underlying judgments, the parties appealed the fee award.	5.5 years	Plaintiff sought $2.7 million Defendant sought $1.3 million
Carco Group, Inc. v. Maconachy, 718 F.3d 72 (2d Cir. 2013) (appeal from E.D.N.Y.)	Claim and counterclaim for breach of contract, among others. After prior appeal and then trial, parties appealed judgment and attorneys' fee award.	7.5 years	More than $4 million sought by prevailing party

(. . . continued)
obligations under the Act at every turn." *CBS Broad.*, 450 F.3d at 526. The court further expressed its own frustration at EchoStar's litigation tactics, noting that the district court was forced to deal with a complicated matter "oftentimes in spite of, rather than with the aid of, defendant's cooperation," *id*. at 517, and the court expressly "second guess[ed] the strategic decisions of counsel" to advance a number of "patently unmeritorious claims of error," *id.* at 523.

Case Name	Description	Approximate Duration	Approximate Attorneys' Fees/Costs
Taurus IP, LLC v. DaimlerChrysler Corp., 726 F.3d 1306 (Fed. Cir. 2013) (appeal from W.D. Wisc.)	In relevant part, a patent claim with a counterclaim for breach of warranty that resulted in extensive motions practice, including summary judgment, and a jury trial.	6 years	Plaintiff awarded $1.35 million in fees solely for prosecution of the breach of warranty claim
Coral Group, Inc. v. Shell Oil Co., No. 5:04-CV-0633, 2013 U.S. Dist. LEXIS 113219 (W.D. Mo. Aug. 12, 2013)	Various claims arising from franchise relationship. After extensive briefing and discovery, claims were dismissed prior to trial. That order was affirmed on appeal, and then fees were awarded.	8 years	$3.1 million sought by prevailing party
Dallas Gas Partners, L.P. v. Prospect Energy Corp., 733 F.3d 148 (5th Cir. 2013) (appeal from S.D. Tex.)	Claim for breach of covenant not to sue. District court granted claimant's motion for summary judgment and awarded attorneys' fees. That judgment, among others, was appealed.	8.5 years	$1.3 million awarded to prevailing party
Playboy Ent., Inc. v. Sanchez-Campuzano, No. 12-40544, 2013 U.S. App. LEXIS 25710 (5th Cir. Dec. 23, 2013) (appeal from S.D. Tex.)	Litigation to enforce judgment arising from breach of licensing agreement. Defendant appealed award of attorneys' fees in enforcement action.	12 years	$433,000 sought by prevailing party
Advanced Nano Coating, Inc. v. Hanafin, No. 13-20109, 2014 U.S. App. LEXIS 3021 (5th Cir. Feb. 19, 2014)	Breach of employment contract claim resulting in an appeal of summary judgment and then a bench trial.	5 years	$418,000 sought by prevailing party
Jimico Ent., Inc. v. Lehigh Gas Corp., No. 1:07-CV-0578, 2014 U.S. Dist. LEXIS 38930 (N.D.N.Y. March 25, 2014)	Claim for attorneys' fees solely for appeal of judgment for breach of contract and for other post-judgment litigation.	7 years	$194,000 sought by prevailing party
Wifiland, LLP v. R.V.C., Inc., No. 13-1480-cv, 2014 U.S. App. LEXIS 8530 (2d Cir. May 5, 2014) (appeal from D. Conn.)	Claim for breach of contract. After bench trial, plaintiff appealed trial court's dismissal of its claims and award of attorneys' fees to defendant.	2.5 years	$190,000 sought by prevailing party

Case Name	Description	Approximate Duration	Approximate Attorneys' Fees/Costs
DocMagic, Inc. v. The Mortgage Partnership of Am., L.L.C., 729 F.3d 808 (8th Cir. 2013) (appeal from E.D. Mo.)	Various claims and counterclaims arising from service contract. After summary judgment briefing and trial, both parties sought attorneys' fees.	4 years	Plaintiff sought $510,000 Defendant sought $460,000

In one recent case in federal court in Minnesota, the plaintiffs filed a complaint for, among other things, breach of a franchise agreement and sought a preliminary injunction. Because the defendants never responded to the complaint, the plaintiffs faced no opposition at all to their breach of contract claim, which still required *eight months* of litigation to obtain preliminary injunctive relief. Following a single hearing on plaintiffs' motion for a default judgment and on the preliminary injunction, the court ruled in favor of the plaintiffs and awarded them nearly $43,000 in fees.[164]

In the more typical case involving a sophisticated defendant with substantial resources (like an MVPD), the cost of litigation increases exponentially. For example, a case from the Eastern District of New York, involving claims and counterclaims for breach of contract, took eight years to litigate and included a trial and two appeals. The prevailing party in that litigation sought more than $4 million in attorneys' fees and costs.[165]

A case in federal court in Arkansas involving claims and counterclaims for breach of contract took more than five years to resolve and involved summary judgment briefing (the motion was denied) and a trial, at which both parties were found to have liability. In that case,

---

[164] *See Novus Franchising, Inc. v. AZ Glassworks, LLC*, No. 12-1771, 2013 U.S. Dist. LEXIS 36830 (D. Minn. Mar. 18, 2013).

[165] *See Carco Group, Inc. v. Maconachy*, 718 F.3d 72 (2d Cir. 2013) (appeal from E.D.N.Y.).

the plaintiff sought $2.7 million in attorneys' fees and costs, and the defendants sought $1.3 million.[166]

As the chart above details, litigation of a breach of contract claim is likely to cost at least $200,000 for each side, and it could very easily take years and run into millions of dollars. With the exception of a few jurisdictions, an award of attorneys' fees in a breach of contract case is not available unless the contract specifically includes a "fee-shifting" provision. Current network affiliation and syndication agreements do not provide for an award of attorneys' fees. Thus, in most cases a local broadcaster would be litigating at great expense with no hope of recovering its attorneys' fees, even if the broadcaster prevails.

Moreover, as a practical matter, it is not clear what relief a local broadcaster could obtain in court, even if successful. The local broadcaster's primary concern would be removal of the duplicating distant station on the offending MVPD's distribution platform, but it is unlikely that a court would enforce such injunctive relief on the MVPD retransmitting such duplicating station unless the local broadcaster is able to overcome the privity problem.[167] In the absence of injunctive relief, the local broadcaster would be left trying to prove money damages, which would be complex and time-consuming.

The administrative complaint resolution process at the Commission is, by comparison, inexpensive and straightforward. The complaints cited in the *Exclusivity Notice*[168] demonstrate

---

[166] *See Southern Wine and Spirits of Nevada v. Mountain Valley Spring Co., LLC*, 712 F.3d 397 (8th Cir. 2013) (appeal from W.D. Ark.).

[167] In any event, as detailed above, getting injunctive relief could take many months, even in a case where the plaintiff is unopposed. *See Novus Franchising, Inc. v. AZ Glassworks, LLC*, No. 12-1771, 2013 U.S. Dist. LEXIS 36830 (D. Minn. Mar. 18, 2013).

[168] *See Exclusivity Notice* at ¶ 66 n.249.

the efficiencies that would be lost by forcing broadcasters to enforce exclusivity in the courts. For example, in *Nexstar Broad., Inc. v. Cable One, Inc.*,[169] an NAL was issued against Cable One seven months after Cable One initiated a preemptive proceeding by filing an application for a waiver of the network non-duplication requirements. Similarly, the two decisions cited in the *Exclusivity Notice* involving Northland Cable Television, Inc. were each issued less than a year after the complaints were filed.[170] And, of course, the Commission permits aggrieved parties to file complaints on an emergency basis when circumstances warrant, and the Commission endeavors to be responsive in such cases.

It is beyond dispute that the costs to a local broadcaster associated with preparing a typical program exclusivity complaint for filing with the Commission will be far less than those associated with similar litigation in state or federal court.[171] For example, the Commission's procedure does not require, or even allow, for the extensive written and deposition discovery relating to the parties' claims and defenses that is standard in any business litigation. Nor does Commission procedure require multiple rounds of briefing of dispositive motions or the substantial time involved in preparing for a trial. Its streamlined and simpler process is precisely why the Commission should remain available as a forum for resolution of program exclusivity disputes.

---

[169] *Nexstar Broadcasting, Inc. v. Cable One, Inc*., Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 18160 (2005).

[170] *See Northland Cable Television, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7865 (2008); *Northland Cable Television, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7872 (2008).

[171] Upon information and belief, the costs to prepare and file a straightforward complaint with the Commission alleging violation of the Exclusivity Rules, and prepare and file a straightforward reply to any opposition, would range between $10,000 - $20,000.

2. Private Enforcement Would Lead to Inconsistent Results

A central purpose of the Communications Act is to ensure a uniform national policy for the nation's broadcasting stations. That purpose would be thwarted by piecemeal litigation of program exclusivity disputes and the inconsistent results that are sure to follow.

In *EchoStar*, the broadcaster-plaintiffs' significant investment of time and resources at least resulted in a nationwide injunction, providing relief to broadcasters across the country. If individual local stations are required to seek judicial enforcement of the exclusivity provisions of their individual exclusivity agreements, by contrast, the inevitable result will be a mish-mash of rulings from state and federal courts nationwide. Broadcasters and MVPDs could have no reasonable expectation of a consistent set of rulings governing exclusivity contracts, making each "unique" contract dispute more likely to be litigated.

In a different context, many of the same concerns are reflected in the myriad litigation between broadcasters, on one the hand, and Internet video services Aereo and FilmOn X on the other. Starting in 2012, multiple television networks and local broadcast stations brought multiple lawsuits against these Internet retransmission services, asserting that their unlicensed retransmission of live television broadcasts over the Internet violates the copyright owners' exclusive rights under the Copyright Act. The multiple cases spanned a half-dozen federal district courts in five states and the District of Columbia,[172] generated appeals in the

[172] *See ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012); *Fox TV Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30 (D.D.C. 2013); *Hearst Stations Inc. d/b/a WCVB-TV v. Aereo, Inc.*, No. 13-11649-NMG, 2013 U.S. Dist. LEXIS 146825 (D. Mass. Oct. 8, 2013); *Community TV of Utah d/b/a KSTU Fox 13 v. Aereo, Inc.*, No. 2:13-cv-910, 2014 U.S. Dist. LEXIS 21434 (D. Utah Feb. 19, 2014); *FilmOn X, LLC v. Window to the World Communications, Inc.*, No. 1:13-cv-08451 (N.D. Ill.).

First,[173] Second,[174] Ninth,[175] Tenth,[176] and D.C.[177] Circuits, and resulted in a grant of certiorari by the United States Supreme Court. These various litigations produced conflicting results: Three federal district courts (in California, Utah, and the District of Columbia) preliminarily enjoined the Internet-based services and two (in New York and Massachusetts) refused to do so,[178] a fact that almost surely contributed to the Supreme Court's decision to review the Second Circuit's decision despite the absence of a final decision from any other federal appellate court.

Broadcasters' investment of time and resources in the litigation against Aereo and FilmOn X cannot be described as anything other than massive, and would have been even greater had the Supreme Court not resolved the cases in broadcasters' favor relatively expeditiously.[179] This litigation further illustrates that judicial enforcement of broadcasters' copyright infringement claims, like claims of breach of contractual exclusivity rights, often is a cumbersome, inefficient, and expensive process.

In short, if the Commission eliminates the Exclusivity Rules and requires parties to enforce exclusivity agreements in court, broadcasters will be left with two choices: either forego their important contractual exclusivity rights rather than invest in costly and uncertain litigation or increase their litigation budgets, draining dollars away from their core missions of service to

---

[173] *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-2282 (1st Cir.).

[174] *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *reh'g denied*, 722 F.3d 500 (2d Cir. 2013).

[175] *Fox Television Stations, Inc. v. FilmOn X, LLC*, No. 13-55156 (9th Cir.).

[176] *Community TV of Utah v. Aereo, Inc.*, No. 14-4020 (10th Cir.).

[177] *Fox Television Stations, Inc. v. FilmOn.TV Networks Inc.*, No. 13-7145 (D.C. Cir.).

[178] The litigation in the Northern District of Illinois was stayed pending the Supreme Court's decision before any motion for injunctive relief was filed.

[179] *See ABC, Inc. v. Aereo, Inc.*, No. 13-461 (U.S. S. Ct.) (June 25, 2014).

their communities of license. Neither outcome is desirable. Although litigators would benefit, the viewing public would undoubtedly suffer.

Conclusion

Elimination of the Exclusivity Rules would destroy the closely intertwined statutory and regulatory "mosaic" that governs the distribution of television programming, seriously harm local television broadcasters and the important public interests they serve, and skew the marketplace by favoring cable providers over broadcasters and satellite operators. For decades, Congress has relied on the Exclusivity Rules in creating the regime that governs copyright licensing, retransmission consent, and satellite distribution of television programming, and, in turn, industry participants—networks, syndicators, local broadcasters, and MVPDs—have relied on the Rules in structuring the legal relationships that govern the creation and distribution of television programming. Those settled reliance interests should not be upended. For all of the reasons set forth herein, the Commission should not modify or eliminate its pro-competitive network non-duplication and syndicated exclusivity rules.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

Jane E. Mago
Jerianne Timmerman
Erin L. Dozier
Scott A. Goodwin
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

June 26, 2014

APPENDIX A

Program Exclusivity, Congress, and the FCC:

A History of the "Mosaic" of Statutes and Regulations That Govern the Distribution of Television Programming

Program Exclusivity, Congress, and the FCC:

A History of the "Mosaic" of Statutes and Regulations That Govern the Distribution of Television Programming

Exclusive contracts are common throughout our marketplace-based economic system. In the television industry, exclusive contracts have, for many decades, encouraged program creators to develop entertaining and thought-provoking television content for viewers while receiving appropriate returns on their investments.

Television networks and program syndicators, on the one hand, and local television stations, on the other hand, routinely enter into agreements pursuant to which the stations exhibit and promote the creative content of their programming suppliers. In many cases, these agreements grant local stations rights to be the exclusive source of the programming in the local television market.

Over the past five decades, as the broadcasting, cable, and, later, satellite industries have grown and matured, the Federal Communications Commission ("Commission") and Congress have developed a tightly woven, interlocking scheme of regulations and statutes—what the Commission would later call a "mosaic"[1]—that limits the ability of third parties to interfere with the contractual exclusivity negotiated in these programming agreements. In their regulatory form, these limitations provide a forum and regulatory mechanism to prevent unrestricted duplication of network programming (network non-duplication) or of syndicated programming (syndicated exclusivity or "syndex") in limited geographic areas and are collectively known as

[1] *See* 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), ¶ 33, *available at* <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf> ("*2005 FCC Retransmission Consent Report*").

the program exclusivity rules ("Exclusivity Rules").[2] Recently, the Commission issued a Further Notice of Proposed Rulemaking ("*Exclusivity Notice*" or "*Notice*")[3] seeking comment on whether the Commission should modify or eliminate these Exclusivity Rules.

Since their inception, the Exclusivity Rules have been designed to promote localism and the private contractual rights of broadcasters and, thus, to further the broad distribution of diverse programming to the public. While the *Exclusivity Notice* recounts some of the history of the promulgation and scope of the Exclusivity Rules,[4] the summary contained in the *Notice* is incomplete. It largely ignores the Commission's 1988 proceeding reinstating syndex rules, particularly the economic rationales. And it further ignores, or misapprehends, Congress's subsequent and repeated reliance on the Rules in enacting the retransmission consent regime and the Satellite Home Viewer Act and its various reauthorizations.

The full history of the Exclusivity Rules underscores their essential function in the television programming distribution marketplace, including their roles in balancing competition, copyright, and communications goals and policies.

I. The Exclusivity Rules Were Central to the Grand Bargain Underlying the 1976 Copyright Act

The Commission promulgated the first program exclusivity rule, a predecessor to the current network non-duplication rule, due to concerns that cable systems had the potential to have a "substantial adverse impact on local stations" because they would divert viewers from

---

[2] *See* 47 C.F.R. §§ 76.92-76.95, 76.120-76.122 (network non-duplication rules); 47 C.F.R. §§ 76.101-76.110, 76.120, 76.123-76.125 (syndex rules).

[3] *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) ("*Exclusivity Notice*").

[4] *See Exclusivity Notice* at ¶¶ 41-52.

broadcast stations to cable systems, with a corresponding drop in local stations' ability to sell advertising and, therefore, to generate revenue.[5] Recognizing that cable systems had total control over the distribution of programming on their systems, in contrast with television stations that could only control redistribution by other television stations, the Commission concluded that, "we cannot regard a CATV system's duplication of local programming via signals of distant stations as a fair method of competition."[6] Thus, to ensure a more level playing field between cable systems and broadcast stations, the Commission expressly recognized "that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program

---

[5] *See Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, First Report and Order, 38 F.C.C. 683 (1965) ("*1965 Network Exclusivity Order*"), ¶¶ 1, 15.

[6] *See 1965 Network Exclusivity Order* at ¶ 57. The advent of the retransmission consent regime in 1992 does not alter the fundamental principles upon which the Commission initially acted. Congress itself relied upon the Exclusivity Rules in enacting the Cable Television Consumer Protection and Competition Act of 1992, making plain that Congress did not believe that retransmission consent altered the balance. *See* S. REP. 102-92 (1991), at 38 (noting that Congress "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."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994) ("*1994 Cable Order*"), ¶ 114 ("Network non-duplication and syndicated exclusivity rights protect the exclusivity that broadcasters have acquired from their program suppliers, including their network partners, while retransmission consent allows broadcasters to control the redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view."); *2005 FCC Retransmission Consent Report* at ¶ 33 ("[C]opyright law and retransmission consent rules operate in a complementary fashion. The statutory compulsory license compensates rights holders for use of their property, while permitting MVPDs to retransmit their programming without costly and time-consuming negotiations with individual copyright holders. Further, the government-established copyright fee for distant signals, which is higher than that for local stations, operates together with the network non-duplication and syndicated exclusivity rules to encourage MVPD carriage of local broadcast signals."). And even with retransmission consent rules in place, perverse incentives would continue to exist absent exclusivity protection.

suppliers to protect the value of their product and for stations to protect their investment in programs."[7]

In the following decade, the Commission noted repeatedly the central role that the Exclusivity Rules play in "maintaining a healthy and viable nationwide television broadcast service."[8] When the Commission adopted a comprehensive set of regulations for cable systems in 1972, those regulations included the first syndex rule, which provided protection for non-network programming broadcast by television stations in certain markets and which was adopted as a result of a "Consensus Agreement" that had been negotiated by the cable, broadcast, and program production industries to facilitate passage of copyright legislation.[9] The Commission expressed the view that "[t]he additional program exclusivity rules are designed both to protect local broadcasters and to insure the continued supply of television programming. The latter, of course, is fundamental to the continued functioning of broadcast and cable television alike."[10]

The Exclusivity Rules were, accordingly, a central part of the grand bargain that

---

[7] *1965 Network Exclusivity Order* at ¶ 57.

[8] *Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Program Exclusivity Protection by Cable Television Systems*, Notice of Inquiry and Notice of Proposed Rulemaking, 46 F.C.C.2d 1164 (1974) ("*1974 Network Exclusivity NOI/NPRM*"), ¶ 18.

[9] *See Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Report and Order, 36 F.C.C.2d 143 (1972) ("*1972 Cable TV Report & Order*"), ¶ 73.

[10] *1972 Cable TV Report & Order* at ¶ 73. Subsequently, there was no surprise when, in 1975, the Commission reviewed its Exclusivity Rules and broadcasters highlighted the fact that the "erosion of the limitations on the importation of outside signals and the decisions by the Commission under both the former and present cable rules illustrate *interdependence* of the availability of outside signals and the existence of present non-duplication rules." *Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Program Exclusivity Protection by Cable Television Systems*, First Report and Order, 52 F.C.C.2d 519 (1975) ("*1975 Network Exclusivity Order*"), ¶ 51 (emphasis added).

motivated Congress to finally pass the major reform of the Copyright Act in 1976.[11] Not only was Congress aware of the adoption of the syndex rules as part of the Consensus Agreement, but both the language and legislative history of the Act also confirm that Congress took account of this regulatory landscape in crafting the statutory copyright license, one of the Act's signature features. The Section 111 license is specifically conditioned upon compliance with the Commission's "rules, regulations, or authorizations,"[12] including, as the Commission later acknowledged, the syndex rules.[13] And the House Judiciary Committee stated that "any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry."[14]

Also, in making significant reforms to the Copyright Act, Congress

---

[11] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2451 (1976).

[12] 47 U.S.C. § 111(c).

[13] *See Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers*, Report and Order, 6 FCC Rcd 725 (1991) ("*1991 SHVA Report & Order*"), at ¶ 4 ("The Copyright Act of 1976 extended copyright protection to television broadcast programs retransmitted for cable viewing. This copyright protection was tempered by freely permitting retransmission of broadcast signals within their coverage area and by allowing cable operators the choice of either purchasing the rights to the programs carried by the distant signals, or paying a statutory copyright royalty fee for a compulsory license to retransmit the programs. The cable compulsory license is explicitly conditioned upon this Commission's cable carriage regulations, which at the time of enactment included syndicated exclusivity provisions adopted in contemplation of the Copyright Act's compulsory license for cable."). *See also Cable Television Syndicated Program Exclusivity Rules*, Report, 71 F.C.C.2d 951 (1979) ("*1979 Syndex Report*), at ¶ 39 (noting that Congress "took cognizance" of the Commission's Exclusivity Rules in enacting the Copyright Act revisions); *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*"), ¶ 130 ("Congress was aware of the Commission's syndicated exclusivity rules and expressly accommodated them within the new Copyright law.").

[14] H.R. REP. 94-1476 (1976), at 89.

> urge[d] the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or *increased use of imported distant signals*. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.[15]

Congress thus made clear that "significant changes in the delicate balance of regulations," including those dealing with imported distant signals, "should be left" to it.[16]

II. The Commission Eliminated, but Then Reinstated, Its Syndex Rules, Correctly Recognizing That the Rules Are Critical to a Level Competitive Playing Field

Despite Congress's express reliance on the Exclusivity Rules in crafting the 1976 Act, the Commission soon took the view that the unfair competition between cable operators and broadcast stations that the syndex rules were aimed at ameliorating was actually coextensive with the issue of copyright liability, which had just been resolved in the 1976 Act, so that there remained no reason to retain the syndex rules. Because the Commission determined that the potential effect of eliminating its syndex rules both on local station audiences and on program supply would be minor, the FCC repealed the rules in 1980.[17]

The House Judiciary Committee, however, subsequently expressed "concern[] that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming."[18] Offered in the context of the Committee's consideration of the 1984 Cable Communications Policy Act, this statement cast doubt on the Commission's assertion that

[15] H.R. REP. 94-1476 (1976), at 89 (emphasis added).

[16] *Id.*

[17] *See Cable Television Syndicated Program Exclusivity Rules*, Report and Order, 79 F.C.C.2d 663 (1980) ("*1980 Syndex Report and Order*"), ¶ 1.

[18] H.R. REP. 98-934 (1984), at 22.

earlier expressions of concern with "unfair competition" were limited to copyright liability.[19]

By the late 1980s, the Commission found that its earlier analysis leading to the repeal of the syndex rules had been misdirected.[20] In reinstituting syndex rules in 1988, while maintaining its network non-duplication rules, the Commission properly refocused on how the competitive market operates and sought "to remove anticompetitive restrictions on the ability of broadcasters to serve their viewers."[21] Because the Section 111 cable compulsory license enacted as part of the Copyright Act already intruded in the marketplace by abrogating full copyright liability, the repeal of syndex, "given the existence of the compulsory license, moved the marketplace *further away* from effective freedom of contract."[22] Competition had suffered as a consequence, since, as the Commission recognized, "[f]reedom of contract and, in general, enforceable property rights, are essential elements of a competitive marketplace."[23]

Therefore, the Commission determined to minimize government intrusion so

> (1) that its regulations foster a level playing field among the various competitors, including those who produce and those who distribute [programming]; and (2) that freedom of contract, and thus private property rights, are unimpeded by the Commission's regulation or deregulation of the industries.[24]

---

[19] *See Cable Television Syndicated Program Exclusivity Rules*, Notice of Proposed Rulemaking, 71 F.C.C.2d 1004 (1979) ("*1979 Syndex NPRM*"), at ¶ 61.

[20] Among other things, the Commission itself "expressly reject[ed the] view" that "unfair competition" between cable operators and broadcasters had been resolved by the Copyright Act revisions in 1976. *1988 Program Exclusivity Order* at ¶ 131 n.256.

[21] *1988 Program Exclusivity Order* at ¶ 1.

[22] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rulemaking, 2 FCC Rcd 2393 (1987) ("*1987 Program Exclusivity NOI/NPRM*"), at ¶ 26 (emphasis in original).

[23] *1987 Program Exclusivity NOI/NPRM* at ¶ 26.

[24] *1987 Program Exclusivity NOI/NPRM* at ¶ 5.

The Commission observed further:

> For competition to maximize consumer benefits, it is important that a property rights framework be applied that permits markets to operate effectively. Failure to supply an appropriate structure of rules and regulations will lead to market failures in satisfying consumer preferences. To ensure free and efficient functioning of competitive market processes, the Commission seeks to permit equality, to the extent possible within our regulatory framework, of contractual opportunity among competing modes of distribution. In the instant setting, that means permitting broadcasters to acquire and enforce the same kinds of exclusive performance rights that competing suppliers are now permitted to exercise. Failure to supply parity in contractual freedom will bias the nature of competitive rivalry among competing suppliers in ways not grounded in operating efficiencies but instead based on artificial handicaps exacerbated by disparate regulatory treatment.[25]

The 1980 removal of syndex rules had tilted the competitive playing field in cable's favor since cable operators had the ability to enter into exclusive contracts with program suppliers, but broadcast stations did not.[26] The Commission saw that this lack of contractual parity had skewed the video programming market, to the detriment not only of broadcasters and their advertisers

[25] *1987 Program Exclusivity NOI/NPRM* at ¶ 12.

[26] *See Exclusivity Notice* at ¶ 49; *see also 1988 Program Exclusivity Order*, at ¶ 5 ("Although the ability to show programs on an exclusive basis is generally recognized as a valuable and legitimate business practice in the television and cable industries, broadcasters of syndicated programs are prevented by the current lack of rules from obtaining exclusivity against duplication of their programs through cable retransmission of distant broadcast signals. Only broadcasters of syndicated programming are denied this ability in the delivery of video product. All others, including broadcasters of network programming, enjoy the ability to obtain exclusivity. Our current network non-duplication rules also limit the ability of broadcasters to obtain the degree of program exclusivity that they would like with respect to cable systems and that would be appropriate to promote competitive market efficiency. Cable operators, in contrast, can directly obtain any and all programming for distribution on an exclusive basis. In addition, they can acquire broadcast signals for retransmission regardless of any exclusivity agreements the broadcasters may have purportedly obtained from the producer. We find no compelling public interest argument that would justify such an asymmetric treatment of competitors and, more importantly, we see many reasons to think that viewers and the public interest are being poorly served by these arrangements.").

but also of television viewers. Broadcasters' "inability to enforce exclusive contracts puts them at a competitive disadvantage relative to their rivals who can enforce exclusive contracts; their advertisers' abilities to reach as wide an audience as possible are impaired; and consumers are denied the benefits of full and fair competition: higher quality and more diverse programming, delivered to them in the most efficient possible way."[27]

Ultimately, the Commission concluded that syndex *was* necessary as a counterweight to an imperfect statutory license where copyright holders are *not* paid full value for the right to distribute their works, i.e., copyright holders are paid a price not set by the marketplace. The

---

[27] *1988 Program Exclusivity Order* at ¶ 62. *See also* H.R. REP. 100-887, pt. II (1988), at 26 ("The Committee is concerned that retransmissions of broadcast television programming to home earth stations could violate the exclusive program contracts that have been purchased by local television stations. Depriving local stations of the ability to enforce their program contracts could cause an erosion of audiences for such local stations because their programming would no longer be unique and distinctive."); *1987 Program Exclusivity NOI/NPRM* at ¶ 5 ("[T]he Commission can help to achieve diversity by ensuring, to the extent possible . . . that freedom of contract, and thus private property rights, are unimpeded by the Commission's regulation or deregulation of the industries."). The Commission found the illogic of the lack of syndex protection particularly telling:

> Normally, firms suffer their most severe losses to competitors when they fail to offer the services most desired by the public. In the absence of syndicated exclusivity, extensive duplication reverses this relationship for broadcasters—they suffer their most severe loss precisely when they offer programming most desired by audiences; thus diversion is an indication of a competitive imbalance that results from the absence of the rules. Firms that choose to exhibit programming on an enforceable exclusive basis (e.g., cablecasters) generally do not face the problem of audience diversion to duplicative product. The fact that only broadcasters suffer this kind of diversion is stark evidence, *not* of inferior ability to be responsive to viewers' preferences, but rather of the fact that broadcasters operate under a different set of competitive rules. All programmers face competition from alternative sources of programming. Only broadcasters face, and are powerless to prevent, competition from the programming they themselves offer to viewers.

Id. at ¶ 42 (emphasis in original).

Commission determined that the potential negative effect of the disincentive to produce and distribute programming that consumers might desire could be countered by reestablishing parity in property rights in the form of syndex. As the Commission stated, "syndicated exclusivity rules are an important component of a sound communications policy designed to foster full and fair competition among competing television media. Without syndicated exclusivity, there is a likelihood that programs will not be distributed efficiently among alternative outlets and that viewers will not get the most efficient quantity and diversity of programming."[28]

The fundamental problem with the Commission's 1980 decision was that Congress had enacted the statutory copyright license for cable systems in 1976 against the backdrop of the complex set of regulations protecting program exclusivity. With the statutory license at one end and the Exclusivity Rules at the other, the competitive marketplace for cable providers and local broadcast stations was largely in balance.[29]

Thus, when it reinstated the syndex rules, the Commission acknowledged that the Exclusivity Rules are tightly interwoven with other statutory and regulatory provisions that make up the "mosaic" of rules governing the distribution of television programming. Any alteration of the Exclusivity Rules must carefully account for the relevant statutes (and other regulations) that might be impacted by regulatory changes. Most significantly, because the Commission cannot change the *statutory* copyright license that occupies one end of the scale, it can only add or remove elements on the other end of the scale if those changes will not impact the overall balance. Past experience demonstrates that the Commission cannot simply eliminate the

[28] *1988 Program Exclusivity Order* at ¶ 75.

[29] *See 1987 Program Exclusivity NOI/NPRM* at ¶ 20 ("The limitations caused by the compulsory license were tempered in part by the Commission's syndicated exclusivity rule, which did permit control over individual programs.").

Exclusivity Rules and still have a balanced marketplace.

III. Congress Enacted the Satellite Home Viewer Act in Reliance on the Exclusivity Rules

At the same time the Commission reinstated the syndex rules, Congress passed the Satellite Home Viewer Act of 1988 ("SHVA").[30] SHVA established a statutory copyright license to cover certain satellite retransmissions of television programming, but, critically, restricted satellite carriers' distribution of distant network signals to "unserved households," meaning a household unable to receive an adequate broadcast signal over the air.[31] Thus, "when the satellite license was first conceived, Congress designed the unserved household provision to serve as a surrogate for the FCC network nonduplication rules applicable to the cable industry."[32] SHVA was intended to strengthen broadcast localism in part by preserving the exclusive relationships that were "integral" to the network-affiliate structure. In short, as it had in 1976, Congress in 1988 enacted legislation governing the video distribution marketplace in express

[30] Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (1988) ("SHVA").

[31] *See* SHVA § 202.

[32] Report of the Register of Copyrights, United States Copyright Office, *Satellite Home Viewer Extension and Reauthorization § 110 Report* (Feb. 2006) ("*Section 110 Report*"), at 8. *See also id.* at iii ("The unserved household is an important term of the statutory license because it enables broadcasters to maintain market exclusivity and reap the economic benefits that flow from that control, and it promotes localism by providing access to local voices, weather, news and advertising."); H. R. REP. 100-887, pt. I (1988), at 15 ("[The bill] provides carriers with an interim statutory license to cover both types of retransmissions, but establishes certain restrictions on the retransmission of network signals in order to prevent disruption of the networks' special exclusivity arrangements with their numerous affiliates. In essence, the statutory license for network signals applies in areas where the signals cannot be received via rooftop antennas or cable.").

reliance on the existence and structure of the Exclusivity Rules.[33]

Two House committees repeatedly affirmed that SHVA had two primary purposes: "bringing network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship."[34] The House Energy and Commerce Committee was particularly

> concerned that retransmissions of broadcast television programming to home earth stations could violate the exclusive program contracts that have been purchased by local television stations. Depriving local stations of the ability to enforce their program contracts could cause an erosion of audiences for such local stations because their programming would no longer be unique and distinctive.[35]

The Committee also expressed its belief that "the cable television syndicated exclusivity rules could serve as a model for rules governing the satellite industry."[36] The House Judiciary Committee similarly noted that one of the "principal purposes of the legislation [was] to establish

---

[33] *See* Report of the Register of Copyrights, United States Copyright Office, *Satellite Home Viewer Extension and Reauthorization Section 109 Report*, (June 2008) ("*Section 109 Report*"), at 5 ("The structure of the Section 111 license, however, was not created in a vacuum. To fully understand the historic development of Section 111 and its terms, it is necessary to explicitly discuss the FCC's rules that were incorporated into the structure of the statute."); *id*. at 10 ("The unserved household provision was intended to protect the historic network-affiliate relationship as well as the program exclusivity enjoyed by television broadcast stations in their local markets.").

[34] H.R. REP. 100-887, pt. II (1988), at 20; *see also* H.R. REP. 100-887, pt. I (1988), at 14-15 ("The bill preserves and promotes competition in the electronic marketplace. Moreover, the bill respects the network/affiliate relationship and promotes localism. Further, the bill takes affirmative steps to treat similarly the measure of copyright protection accorded to television programming distributed by national television networks and nonnetwork programming distributed by independent television stations. In short, the bill meets the public interest test for intellectual property legislation.").

[35] H.R. REP. 100-887, pt. II (1988), at 26.

[36] H.R. REP. 100-887, pt. II (1988), at 27.

a level playing field between the cable television and earth station industries"[37] and observed that the statutory license "establishes certain restrictions on the retransmission of network signals in order to prevent disruption of the networks' special exclusivity arrangements with their numerous affiliates."[38]

Even as it attempted to create a level playing field between cable systems and satellite providers with respect to program exclusivity, SHVA also created a structural asymmetry. After SHVA, the network non-duplication rules relating to cable were regulatory in nature, while the core exclusivity restriction on satellite—i.e., the unserved household restriction—was statutory, and, therefore, beyond the purview of the Commission. Congress knew what it was doing when it created this asymmetry: It was relying on the Commission's cable network non-duplication rules which, by that time, had been in place nearly a quarter of a century.

IV. Congress Enacted the 1992 Cable Act in Reliance on the Exclusivity Rules

Soon thereafter, Congress began drafting additional legislation impacting the video marketplace as it considered what would become the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). Among other provisions, the 1992 Cable Act amended 47 U.S.C. § 325 to establish a retransmission consent requirement for MVPDs.

The public policy underlying retransmission consent is grounded in fundamental notions of equity. Just as a television station is not permitted to retransmit the signal of another station without its consent,[39] a cable system should not be permitted to retransmit the signal of a

[37] H.R. REP. 100-887, pt. I (1988), at 28.

[38] H.R. REP. 100-887, pt. I (1988), at 15.

[39] *See* 47 U.S.C. § 325(a).

television station without its consent. By the time of the 1992 Cable Act, Congress recognized that the cable system exception to retransmission consent

> has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting. Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.[40]

Congress was especially concerned that broadcasters had been competitively encumbered and that the absence of a retransmission consent requirement "will continue to harm the system of free, universally available, local broadcasting which was central to the scheme created by the 1934 Act."[41] In eliminating the retransmission consent exception for MVPDs, Congress sought to "establish a marketplace for the disposition of the rights to retransmit broadcast signals" but cautioned that it was not its intent to "dictate the outcome of the ensuing marketplace negotiations" for retransmission of broadcast stations.[42]

When Congress established the modern retransmission consent regime and attempted to re-balance the then un-level competitive playing field, it expressly relied upon the enforcement

---

[40] S. REP. 102-92 (1992), at 35; *see also* H.R. CONF. REP. 102-862 (1992), at 58 ("Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the two industries.").

[41] S. REP. 102-92 (1992), at 55-56; *see also* H.R. CONF. REP. 102-862 (1992), at 57. The Commission at the time also recognized that one of the principal goals of the 1992 Cable Act was to "help preserve local broadcast service to the public." *1994 Cable Order* at ¶ 104.

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

mechanisms available to local broadcast stations in the Exclusivity Rules.[43] In fact, the Senate Report observed that Congress

> 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.[44]

The *Exclusivity Notice* now seeks to limit the import of this statement by asserting, without citation, that in the context of a retransmission consent negotiating impasse "Congress might favor the importation of a distant station."[45] The *Notice* suggests that the plainly contrary legislative history should be given no weight because "this sentiment is not reflected in the actual text of the statute."[46] Certainly, ignoring legislative history is not the law of the land.[47] And, certainly neither the statute nor the legislative history reflects the *Notice*'s assertion about what Congress "might favor."

In fact, the Commission itself previously affirmed that "Congress intended that local

---

[43] *See, e.g., 2005 FCC Retransmission Consent Report* at ¶ 50 (stating that the "legislative history of the 1992 Act indicates that the network non-duplication and syndicated exclusivity rules were viewed as integral to achieving congressional objectives").

[44] S. REP. 102-92 (1991), at 38; *see also 1994 Cable Order* at ¶ 114 (noting that the policies of both retransmission consent and program exclusivity "promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view"); H.R. REP. 102-628 (1992), at 92 ("Nothing in this provision, however, is intended to affect federal copyright law, nor is this provision intended to affect the FCC's authority to *restrict* the retransmission by cable operators of particular copyrighted broadcast programs on distant broadcast stations where local broadcast stations have secured the exclusive local rights to such programs, or to make other appropriate changes in its regulations." (emphasis added)).

[45] *Exclusivity Notice* at ¶ 57 n.210.

[46] *Exclusivity Notice* at ¶ 57 n.210.

[47] *See ABC, Inc. v. Aereo, Inc.*, No. 13-461 (U.S. S.Ct. June 25, 2014).

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."[48] It also has soundly rejected the suggestion the *Exclusivity Notice* now seems to make:

> To the extent that cable operators are asking the Commission to modify the network non-duplication and syndicated exclusivity rules such that they would supersede contract arrangements between broadcasters and their programming suppliers that are permitted by the rules, we cannot endorse or recommend such modifications. . . . Except in cases where a contract violates the Commission's rules, we do not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our policy goals.[49]

In sum, Congress and the Commission have recognized on multiple occasions that the twin goals of preserving localism and promoting fair competition in the video programming marketplace are predicated on the existence and continued application of the Exclusivity Rules.

V. Congress Has Repeatedly Reauthorized SHVA in Reliance on the Exclusivity Rules

While the Exclusivity Rules themselves have remained essentially unchanged from 1990 through the present,[50] Congress has periodically re-examined and reauthorized SHVA, each time

---

[48] *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 2005 FCC Retransmission Consent Report* at ¶ 50 ("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.").

[49] *2005 FCC Retransmission Consent Report* at ¶ 50.

[50] The only significant change was the Commission's adoption of special exclusivity rules for satellite in 2000 at the direction of Congress. *See Implementation of the Satellite Home*

weaving the interlocking regulatory and statutory schemes ever tighter.[51] The legislative history of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),[52] for example, confirms that, in extending the "unserved household" limitation on satellite carriers' statutory license, Congress had three primary principles in mind.

First, the unserved household limitation is a key part of "preserv[ing] local affiliates' bargained-for exclusivity, and promot[ing] the development of local programming and free, over-the-air television."[53] As the legislative history explained:

> The unserved household limitation is intended to protect the traditional network-affiliate relationship. Broadcast networks give local affiliates an exclusive license to distribute network programming in a given market. Local affiliates, in turn, rely upon and market this exclusivity to attract commercial advertisers. . . . Thus, when a satellite television operator distributes out-of-market, or distant, network signals to households that can otherwise receive local signals over the air, the local broadcast station's viewership (and hence, advertising revenue) necessarily declines. The unserved household limitation therefore has helped to preserve local affiliates' bargained-for exclusivity, and in doing so, promoted the development of local programming and free, over-the-air television.[54]

Second, by creating the statutory licenses for satellite (as the 1976 Copyright Act did for cable), including the new local-into-local license codified in Section 122, Congress recognized

---

Viewer Improvement Act of 1999, Report and Order, 15 FCC Rcd 21688 (2000) ("*2000 Satellite Exclusivity Order*").

[51] Each of these reauthorizations and extensions post-dated the enactment of the retransmission consent regime, demonstrating that the retransmission consent requirement did not alter the congressional reliance on the Exclusivity Rules.

[52] Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999) ("SHVIA").

[53] H.R. REP. 106-79, pt. I (1999).

[54] H.R. REP. 106-79, pt. I (1999), at 13; *see also* S. REP. 106-42 (1999), at 11.

that it was

> acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and that it therefore needs to act as narrowly as possible. . . . [C]opyright licensing practices in this area take into account the national network structure, which grants exclusive territorial rights to programming in a local market to local stations either directly or through affiliation agreements . . . . By contrast, allowing the importation of distant or out-of-market network stations in derogation of the local stations' exclusive right—bought and paid for in market-negotiated arrangements—to show the works in question undermines those market arrangements. Therefore, the specific goal of the 119 license, which is to allow for a lifeline network television service to those homes beyond the reach of their local television stations, must be met by only allowing distant network service to those homes which cannot receive the local network television stations.[55]

Critically, the Conference Report acknowledged that "the 'unserved household' limitation . . . has been in the license since its inception. The Committee is mindful and respectful of the interrelationship between the communications policy of 'localism' . . . and property rights considerations in copyright law, and seeks a proper balance between the two."[56]

Third, as with SHVA, the intent of SHVIA was that "the rules [for satellite] should be as similar as possible to that applicable to cable services."[57] Indeed, Congress felt so strongly that it directed the Commission to "apply network non-duplication protection (47 C.F.R. 76.92), syndicated exclusivity protection (47 C.F.R. 76.151), and sports blackout protection (47 C.F.R. 76.67) to the retransmission of the signals of nationally-distributed superstations by satellite carriers to subscribers."[58] The Commission expressly recognized Congress's intent when it

---

[55] H.R. CONF. REP. 106-464 (1999), at 10-11.

[56] H.R. CONF. REP. 106-464 (1999), at 93.

[57] H.R. CONF. REP. 106-464 (1999), at 103.

[58] 47 U.S.C. § 339(b)(1)(A). These rules were to be applied only to nationally-distributed superstations because the "unserved household" limitation in the Section 119 license applied

adopted the statutorily required regulations the following year: "By applying the cable exclusivity rules to satellite carriers, Congress sought to keep the competitive marketplace in balance by protecting the broadcasters' private contractual arrangements and ensuring that satellite carriers have regulatory obligations that are as similar as possible to cable operators."[59]

Subsequently, when it enacted the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"),[60] Congress re-affirmed its view that an effective marketplace for video programming depends on robust exclusivity protections, including the unserved household restriction:

> Where a satellite provider can retransmit a local station's exclusive network programming but chooses to substitute identical programming from a distant network affiliate of the same network instead, the satellite carrier undermines the value of the license negotiated by the local broadcast station as well as the continued viability of the network-local affiliate relationship. . . .
> Accordingly, a second purpose of the unserved household limitation is to confine the abrogation of interests borne by copyright holders and local network broadcasters to only those circumstances that are absolutely necessary to provide the "life-line" service. . . . *The provision of such [distant] signals runs afoul of congressional policy that recognizes the importance of the network-affiliate exclusive licensing relationship, which is intended to promote the continued production and dissemination of local programming*.[61]

In fact, SHVERA tightened even more the applicability of the Section 119 distant network signal

---

only to network stations. Thus, because nationally-distributed superstations could be delivered by satellite to both "served" and "unserved" households, local stations had no exclusivity protection against such importation. Accordingly, Congress balanced the cable and satellite schemes by requiring that satellite be subject to the Exclusivity Rules applicable to cable with respect to the six nationally-distributed superstations.

[59] *2000 Satellite Exclusivity Order* at ¶ 5.

[60] Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809 (2004) ("SHVERA").

[61] H.R. REP. 108-660 (2004), at 11 (emphasis added).

license, and consequently expanded the protections for network exclusivity and localism, by introducing the principle known as "if local, no distant." This requirement, codified in the statutory distant signal license,[62] prohibits a satellite carrier from delivering a distant network signal to new subscribers if the satellite carrier is already making available local-into-local service pursuant to the Section 122 license.

Most recently, the Satellite Television Extension and Localism Act of 2010 ("STELA")[63] brought the satellite copyright licenses into even closer alignment with the cable license: For instance, STELA moved the statutory license for "significantly viewed" stations from the Section 119 distant signal license provision into the permanent Section 122 local license, because "significantly viewed" stations have traditionally been considered local (and hence do not require payment of a copyright royalty). Importantly, STELA preserved the remainder of the statutory scheme, including the exclusivity protection inherent in the distant network signal license, in recognition of the important purposes served by the distant signal limitation: "to preserve 'localism' and to prevent non-local or 'distant' signals from taking viewers away from local stations that provide community-focused programming such as local news and weather."[64]

Finally, the exclusivity protections are so central to the entire satellite carriage governing scheme that Congress established severe penalties (and even increased them in successive reauthorizations) in the event they are violated. Thus, currently if a satellite carrier violates the territorial restrictions of the Section 119 license, a court may order statutory damages of as much as $2,500,000 for each three-month period during which a pattern or practice of violations was

---

[62] *See* 17 U.S.C. § 119(a)(3).

[63] Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111–175, 124 Stat. 1218 (2010) ("STELA").

[64] S. REP. 111-385 (2010), at 2.

carried out, and the court is required to issue a permanent injunction barring further use of the statutory license by the infringing satellite carrier.[65] In addition, violation of the carriage limitations for distant signals, including the "if local, no distant" requirement, is further subject to a forfeiture penalty under the Communications Act in the amount of $50,000 for each violation or each day of a continuing violation.[66] The amount of these penalties shows how seriously Congress regards satellite carriers' violation of the territorial restrictions and exclusivity protections of the law.

In short, with each new reauthorization of the regime governing satellite carriers' distribution of broadcast signals, congressional reliance on the "mosaic"—the statutory copyright license structure and the Commission's Exclusivity Rules—has become more deeply ingrained in the statutory structure.[67] Since at least 1988, Congress has made it a policy priority to preserve broadcasters' exclusive arrangements to promote localism and maintain a competitively balanced marketplace. Congress has repeatedly recognized that, where MVPDs can avail themselves of a statutory copyright license, which is in "derogation" of program creators' and broadcasters'

[65] *See* 17 U.S.C. § 119(a)(6)(B). Previously, EchoStar, the predecessor of DISH Network, had been subject to such a permanent injunction until its eligibility was restored by Congress in STELA subject to multiple conditions and requirements. *See* 17 U.S.C. § 119(g).

[66] *See* 47 U.S.C. § 339(a)(3).

[67] *See Section 110 Report* at 22 ("Congress has repeatedly endorsed the program exclusivity protection of the unserved household limitation by renewing the provision in 1994, 1999 and 2004. Likewise, the Copyright Office has favored the protection of the limitation and stated that its removal from the copyright law would harm copyright owners as well as broadcasters. This position remains well-founded in light of the Canadian experience where a decision to permit virtually unlimited satellite retransmission of distant television signals into local markets served by stations carrying the same programming resulted in a sharp decline in viewership of local signals.").

valuable property rights, exclusivity protections are an essential counterweight.[68]

* * *

The long history of interplay between statutory enactment and regulatory action has created what the Commission in 2005 called a "mosaic" of laws and regulations so intertwined and so interdependent that a change in any of the constituent elements will almost certainly result in a cascade of consequences—intended and otherwise—across the video distribution marketplace.[69] Even MVPDs have characterized the Exclusivity Rules as "entwined with

---

[68] *See, e.g.*, H.R. CONF. REP. 106-464 (1999), at 93 ("[A]llowing the importation of distant or out-of-market network stations in derogation of the local stations' exclusive right—bought and paid for in market-negotiated arrangements—to show the works in question undermines those market arrangements."); *Section 109 Report* at 10 ("If there were not a section 111 or 119 statutory license, copyright owners of broadcast programming would be able to exercise the exclusive rights of copyright ownership granted to them under section 106 of the Copyright Act."). The Copyright Office plainly intends to preserve copyright owners' exclusive distribution rights. The Commission should take particular care not to interfere with settled copyright principles.

[69] *See 2005 FCC Retransmission Consent Report* at ¶ 33 ("It is essential to bear in mind that the four rules considered in this Report do not operate in a vacuum. They are part of a mosaic of other regulatory and statutory provisions (*e.g.*, territorial exclusivity, copyright compulsory licensing, and mandatory carriage) to implement key policy goals. For example, territorial exclusivity protects localism by preventing local broadcasters from contracting for exclusivity outside their local markets, while network non-duplication and syndicated exclusivity protect localism by facilitating enforcement of contractual arrangements that limit importation of duplicative distant broadcast signals into local markets."). *See also 1975 Network Exclusivity Order*, ¶ 51 ("The erosion of the limitations on the importation of outside signals and the decisions by the Commission under both the former and present cable rules illustrate the interdependence of the availability of outside signals and the existence of present non-duplication rules."); *1991 SHVA Report & Order*, ¶ 4 n.8 ("Thus, in the cable context no less than in the satellite carrier context, the statutory compulsory copyright license and the Commission's syndicated exclusivity rules, fashioned to balance the competing needs and interests of broadcasters and cable operators, are interrelated."); *1979 Syndex NPRM*, at ¶ 5 ("The Commission's ability to achieve these goals depends, in part, on the arrangement of economic transactions between program suppliers, broadcast stations, cable systems and other industry participants. These arrangements are, in turn, fundamentally dependent on the nature of the property rights in programming established by the copyright laws and by related administrative regulations.").

communications policy."[70]

As this history demonstrates, the Commission has long recognized the important public policy objectives served by the Exclusivity Rules, in both the cable and satellite contexts. Significantly, these Rules do *not* mandate exclusivity or even provide program exclusivity to broadcasters—the rules only enable broadcasters to enforce the private contractual arrangements they make to secure programming that serves the needs and interests of local audiences and communities. Any weakening of the Exclusivity Rules will surely lead to the same results that followed the earlier elimination of the syndex rules—"tilting the playing field in favor of cable and against broadcasters"—with all of the attendant negative consequences for local broadcasters and the viewing public.[71]

---

[70] *Section 109 Report to Congress*, Written Statement and Comments of the National Cable & Telecommunications Association, U.S. Copyright Office, Docket No. 2007-1 (filed July 2, 2007), at 27; *see also Section 109 Report to Congress*, Comments of EchoStar Satellite, LLC, U.S. Copyright Office, Docket No. 2007-1 (filed July 2, 2007), at 13 (noting "the interdependence of copyright and communications law" and asserting that "[a] piecemeal change to a provision of copyright law or communications law risks unsettling policy determinations of the other agency predicated upon the existing rules"); *Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License*, Comments of the National Cable & Telecommunications Association, U.S. Copyright Office, Docket No. RM-2005-5 (filed July 31, 2008), at 9 ("For many cable operators and their customers, the complement of local and distant signals carried has been well-settled for decades, influenced by FCC signal carriage rules adopted in the 1970s and essentially incorporated into the workings of the compulsory license.").

[71] *1987 Program Exclusivity NOI/NPRM* at ¶ 11 ("The Commission's repeal of the syndicated exclusivity rule may have introduced troubling anomalies into the competitive process governing the production and distribution of video programming to consumers. In terms of the contractual freedom afforded to competing modes of operation and specific competitors, it has been argued that repeal of the exclusivity rule has had the unintended effect of tilting the playing field in favor of cable and against broadcasters. This anomalistic treatment may distort the operation of competitive processes in ways that reduce the benefits the public derives from an efficiently functioning broadcast service. The absence of the syndicated exclusivity regulations may facilitate imbalance now because while cable can obtain exclusive distribution rights, an independent broadcaster or network affiliate cannot for their syndicated programs. Similarly, while the networks and their affiliates can contract for exclusive performance rights for network programming and enforce them through the network non-duplication rule, independent broadcasters cannot acquire and enforce such rights.").

Appendix B

Declaration of Mark Israel and Allan Shampine

Before the Federal Communications Commission

MB Docket No. 10-71

June 26, 2014

TABLE OF CONTENTS

I. QUALIFICATIONS, ASSIGNMENT, AND SUMMARY OF CONCLUSIONS

A. MARK ISRAEL

1. I am an Executive Vice President at Compass Lexecon, an economic consulting firm, and Managing Director of Compass Lexecon's Washington, DC office. From August 2000 to June 2006, I served as a full-time member of the faculty at Kellogg School of Management, Northwestern University. I received my Ph.D. in economics from Stanford University in 2001. My research has been published in leading economics journals including the *American Economic Review,* the *Rand Journal of Economics,* the *Review of Industrial Organization,* and *The Review of Network Economics.* At Compass Lexecon, my work has focused on the application of theoretical models and econometric methods to the analysis of mergers, antitrust issues including a wide variety of single-firm and multi-firm conduct, class certification, and damages estimation. My work has involved a range of industries including broadcast and cable television, wired and wireless telecommunications, other high technology industries, airlines, retail, consumer beverages, financial markets, pharmaceuticals, and publishing. I have authored expert reports, declarations, and affidavits that have been submitted to government agencies and federal courts, including work that has been cited to and relied on by the U.S. Federal Communications Commission ("the Commission") in reaching its decisions.[1] My qualifications are described in more detail in my curriculum vitae, attached as Appendix A to this report

B. ALLAN SHAMPINE

2. I am an Executive Vice-President of Compass Lexecon. I received a B.S. in Economics and Systems Analysis s*umma cum laude* from Southern Methodist University in 1991, an M.A. in Economics from the University of Chicago in 1993, and a Ph.D. in Economics from the University of Chicago in 1996. I have been with Compass Lexecon (previously Lexecon) since 1996. I specialize in applied microeconomic analysis and have done extensive analysis of network industries, including telecommunications and payment systems. I am the editor of the

1 *See, e.g.*, FCC, *Report and Order*, *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket Nos. 12-68, 07-18, & 05-192, rel. October 5, 2012 (*available at:* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-12-123A1.pdf), citing evidence I submitted on behalf of National Cable and Telecommunications Association (Mark A. Israel, *An Economic Assessment of the Prohibition on Exclusive Contracts for Satellite-Delivered, Cable-Affiliated Networks,* September 6, 2012).

book *Down to the Wire: Studies in the Diffusion and Regulation of Telecommunications Technologies,* and I have published a variety of articles on, among other topics, the economics of telecommunications, investment and antitrust. I am an editor of the American Bar Association journal *Antitrust Source*. In addition, I have previously provided economic testimony on telecommunications issues on a variety of matters before the European Commission, the U.S. Federal Communications Commission and state public utility commissions. A copy of my curriculum vitae is provided as Appendix B.

C. ASSIGNMENT AND CONCLUSIONS

3. We have been asked by the National Association of Broadcasters to evaluate the effect of the Commission's network non-duplication and syndicated exclusivity rules (collectively, the "exclusivity rules")[2] on competition and consumer welfare in the television industry, and to assess the potential effects of removing or modifying those rules. Based on our analysis, we have reached the following primary conclusion: *The Commission's exclusivity rules are pro-competitive. They support the broadcast television business model by creating incentives to invest in local content, which enhances competition among broadcasters and between broadcasters and other content providers, thus increasing viewer and advertiser welfare.*

4. This primary conclusion is supported by the following more detailed conclusions, developed in the remainder of this Declaration:

- *Economic literature is clear that exclusivity can be an important tool to encourage investment.* These investment incentives arise from a variety of forces, including the ability to take advantage of economies of scale and the avoidance of free-riding by firms that could otherwise occur if one firm were opportunistically to take advantage of another firm's investments.

- *The investment enhancing effects of exclusivity are particularly large when investments require firms to sink large costs.* In the broadcast television context, the fact that investments in content, once made, are largely sunk (and do not vary with

2 Networks create content that is distributed to many stations simultaneously, while syndicated content is distributed non-simultaneously. However, the impact of exclusivity on incentives to invest is substantively the same and, unless otherwise stated, our analysis considers both sets of exclusivity rules together.

the number of markets[3] or households in which content is viewed)[4] heightens the importance of strong exclusivity rules in at least two ways:

- Absent exclusivity, multichannel video programming distributors ("MVPDs") in a given market may feel free to import broadcast network or syndicated content from other markets without fear that the local content on local broadcast stations would completely disappear in the short term (since the investment has already been sunk). Critically, the risk that MVPDs will ultimately engage in such opportunistic "hold-up," exploiting the broadcast stations' sunk investment costs in a way that lessens broadcast station revenues and potentially makes it difficult to recoup the upfront investment costs, may deter local stations from undertaking such investments in local content in the first place. This is a specific example of a general concept known as the "hold-up" problem, which is well established in the economic literature.

- If a broadcast station from one market is able to export its content to another DMA, *any* money it gets (from retransmission consent or any possible advertising) is pure profit with little or no incremental cost. In combination with the previous point, this may create strong incentives and greater ability for MVPDs to seek out low cost, out-of-market options for broadcast network and syndicated content. In the absence of strong exclusivity rules, the risk of this outcome is likely to depress investments in local content by local broadcast stations.

- *If exclusivity were eliminated or weakened, the incentives for local broadcast stations to invest in local content, and for broadcast networks and syndicators to invest in content, would be diminished*. Exclusive distribution of content by local broadcast stations in their markets is central to the broadcast television model. The returns that local broadcast stations can generate via affiliation with a broadcast network are

[3] In this industry, different geographic areas are commonly referred to as "markets" or Nielsen Designated Market Areas ("DMAs"). In this Declaration, when we refer to geographic areas as markets we mean in the sense commonly used in the industry, not in the antitrust sense.

[4] To be more precise, the initial cost of creating local content may vary based on the size of the market, but stations do not receive refunds on those costs if an MVPD begins retransmitting another station affiliated with the same network.

important in incentivizing investments in local content. If program exclusivity were eliminated or weakened, MVPDs would have the economic incentive and ability to reduce returns to local broadcast stations, either by importing broadcast and syndicated network content from a distant station or credibly threatening to do so in order to alter the terms of retransmission consent negotiations. Advertising returns for broadcasters would also likely fall as ad revenues are typically tied to ratings, and ratings would be expected to drop in the absence of exclusivity. Hence, a threat to the exclusive rights to network and syndicated content would threaten local broadcast stations' ability to generate returns, thus reducing their incentives to invest in local content. By preventing such an outcome, strong exclusivity rules support the development of local content, a key goal of the Commission and Congress.[5]

- *Competition among content providers has steadily increased in recent years, implying that there should be little concern about any possible vertical foreclosure or related issues from exclusivity.* The economic literature is clear that concerns about exclusivity—particularly concerns sufficient to overcome the benefits described above—arise only in situations in which the firms engaging in exclusivity have significant market power, such as that associated with a critical input. In contrast, broadcast networks, syndicators and local broadcast stations compete in a content marketplace characterized by an ever-increasing set of content alternatives, including hundreds of cable networks, video on demand ("VOD") options, online platforms (many of which include original content), and so on. Increased competition for the provision of video content means that any theoretical concerns about exclusionary arrangements are even less relevant today than when the Commission established the exclusivity rules.

5 *See, e.g., Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (September 8, 2005), *hereinafter "2005 FCC Retransmission Consent Report,"* ¶50 ("Moreover, the Commission has a longstanding policy favoring the provision of local broadcast service to communities, and the Commission expects and indeed requires broadcasters to serve the needs and interests of their local communities. Except in cases where a contract violates the Commission's rules, we do not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our policy goals.").

- *Eliminating the Commission's exclusivity rules would cause significant disruption to the established environment in which broadcasters acquire, schedule and distribute programming*. The exclusivity rules are part of a "mosaic of other regulatory and statutory provisions (*e.g.*, territorial exclusivity, copyright compulsory licensing, and mandatory carriage) to implement key policy goals."[6] Eliminating one part of the "mosaic" – the exclusivity rules – would likely trigger significant transition costs for the industry, introduce confusion and uncertainty to a well-established process, and potentially increase the frequency of retransmission consent disputes and court actions.

- *The Commission's exclusivity rules are efficient mechanisms for enforcing exclusivity arrangements, and there appears to be little or no benefit to attempting to move to a new system*. We understand that enforcement of contractual arrangements without the Commission's exclusivity rules may not be possible, as the affected station has no direct contract with the imported station, and may have no contract with the MVPD that governs this particular conduct. In particular, we understand that it may be impossible to enforce broadcast exclusivity contractually in the face of the existing compulsory copyright license rules. We also understand that, at minimum, elimination of the exclusivity rules would increase the costs of enforcing the private contractual territorial exclusivity arrangements negotiated between local broadcast stations, broadcast networks and syndicators.

II. THE ECONOMIC LITERATURE ESTABLISHES THAT EXCLUSIVITY IS A VALUABLE MEANS FOR ENCOURAGING INVESTMENT

A. INDUSTRY CONTEXT

5. Before turning to the economic literature, a bit of industry background is helpful to set the context for our discussion. There are two primary models for distributing video content in the United States.[7] On the one hand, cable networks produce content and distribute it nationally,

---

6 *2005 FCC Retransmission Consent Report*, ¶33.

7 Video content is also distributed by online video distributors ("OVDs") such as Netflix, Amazon, Apple, Google and Microsoft, which operate using a variety of business models. FCC, *Fifteenth Report in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 13-99, July 22, 2013, §III.C – Online Video Distributors.

selling rights directly to MVPDs. On the other hand, broadcast networks and syndicators have adopted a business model with an important role for local content, relying on affiliated local broadcast stations to create local content and to distribute both that local content and the national content supplied by the network or syndicator.

6. In this industry setting, the Commission has recognized that "the ability to enter into exclusive contracts is a widely used competitive tool that is important to program suppliers, cable operators, and broadcasters."[8] Indeed, the broadcaster model is premised on the ability to ensure that local broadcast stations have exclusive rights to distribute content in their service areas—otherwise, broadcasters end up competing against themselves in addition to many other sources of content that we discuss later, and the incentives to create local content break down.

7. As explained in this section, the incentive problems arising from lack of exclusivity are well known in the economic literature, and can be avoided either by exclusive territories—the solution currently used by broadcasters—or by turning to the solution currently used by cable networks and simply not distributing through local broadcast stations. As we explain in the remainder of this section, the use of exclusive territories is widely recognized in the economics literature as an efficient means to provide incentives for investment, such as is required for the creation of the local content that is at the heart of the broadcast television business model.

B. The Importance of Exclusivity for Investment

8. We describe here two ways in which exclusivity encourages investment. First, exclusivity provides a means of addressing fears about opportunistic behavior when a firm makes sunk investments as part of a relationship. Second, exclusivity provides a means of achieving economies of scale, thus improving economic efficiency.

1. Opportunistic Behavior

9. Exclusivity, a form of vertical restraint, can be a valuable means of encouraging investment, particularly when firms must incur sunk costs specific to a particular relationship, *e.g.*, investing in product quality or marketing, costs that other firms may take advantage of

[8] FCC, *Report and Order, In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries*, GEN. Docket No. 87-24, July 15, 1988, *hereinafter "1988 Program Exclusivity Order,"* ¶60.

through opportunistic behavior or "free-riding." Developing this logic, the Organisation for Economic Cooperation and Development ("OECD") Competition Committee has explained that vertical restraints can be particularly important when:[9]

> The *downstream firms need to supply inputs* which make the product more attractive to consumers. For example, where the downstream firms must make investments in marketing and promotion, if the upstream firm simply sold to all downstream firms at a simple linear price, some of the downstream firms could "free-ride" on the promotional effort of others. The equilibrium level of promotion would be inefficiently low or zero. Again, the upstream firm can increase overall welfare by selling the right to market the product downstream to a single downstream firm (within each downstream market)…
>
> [And when the] downstream firms must *incur a sunk cost*, specific to the relationship with the upstream firm, in order to produce the final product, such as an invest[ment] in capacity or specific equipment. Selling to more than one downstream firm inefficiently leads to the duplication of this cost.[10] [We return to this latter point in the next section when we discuss economies of scale.]

Similarly, the American Bar Association ("ABA") Section on Antitrust Law has noted how vertical restraints can prevent free-riding among dealers on costly pre- and post-sale services that increase demand for the manufacturer's product and quality certification services such as attractive showrooms and good customer service; can prevent free-riding by dealers on the manufacturer's reputation; and can prevent free-riding by other manufacturers on the manufacturer's demand-enhancing investments.[11]

10. In the broadcasting context, broadcast networks and syndicators rely on local broadcast stations to distribute national content, create or tailor local news, weather, sports, advertising and other content to local markets, and market the overall package in those local markets. Each of these investments is largely a sunk cost once made (meaning hard to recover even if the broadcast station were to end the associated activity or cease operation altogether) and thus is the type of investment that exclusivity can be particularly important in protecting.

11. In the absence of exclusivity requirements, MVPDs could bring in signals from distant stations, free-riding on broadcast stations' efforts and investments. To prevent this behavior,

---

9 We focus here on those concerns most relevant to the broadcast industry. There are other circumstances where vertical restraints can create efficiencies as well.

10 OECD Competition Committee.1998. *Regulation and Competition Issues in Broadcasting in the Light of Convergence*, OECD Policy Roundtables, p. 58. Emphasis in original.

11 ABA. 2006. *Antitrust Law and Economics of Product Distribution*, pp. 163-171.

exclusive territories such as those granted to local broadcast stations serve as "a type of vertical restraint in which an upstream supplier sells a product to a downstream firm that has exclusive distribution rights within a specific, well-defined geographic area" and are "one example of a vertical restraint that can give a downstream distributor protection from price competition from other distributors of that brand as an incentive for greater investment in brand-specific practices that will enhance the brand's competitive position."[12] To be clear, this "protection from price competition" means only that the broadcaster is not forced to compete against itself with *intrabrand competition* that reduces incentives for local investment—a concern that the Commission focused on when reinstituting the syndicated exclusivity rules. This protection *does not* create broader competitive concerns: As we discuss later, there is substantial, and increasing, competition between content providers (*interbrand competition*).

12. More specifically, the potential benefits of exclusive territories arise from what is known in the economics literature as a "principal-agent" problem. As explained in the ABA's *Antitrust Law and Economics of Product Distribution*, "the incentives and goals of the downstream firm are not necessarily aligned with those of the upstream firm" since "behavior that maximizes profits for the downstream firm does not necessarily maximize profits for its upstream supplier."[13] For example, a downstream firm may have an incentive to free-ride on the demand-enhancing investments of its rivals. The result is underinvestment in such services. The use of exclusive territories can resolve the principle-agent problem by offering a degree of protection from free-riding, thereby creating incentives for firms to make demand-enhancing investments, since they will capture the stream of economic returns from those investments. Indeed, much of the theory of the firm is about organizing to solve principle-agent problems,[14] and this is one reason that firms are generally allowed great leeway to organize production unless there is a clear competitive harm.

---

12 *Id.*, p. 168.

13 *Id.*, p. 168.

14 *See, e.g.*, *Principals and Agents: The Structure of Business* (J. Pratt & R. Zeckhauser eds. 1985), p. ix ("As ancient as the division of labor, the agency problem has confronted every human generation from cavedwellers to cosmonauts. … In particular, the agency paradigm sheds light on a wide variety of phenomena in the world of business, from employment contracts to agreements between limited and general partners, from executive compensation to transfer prices between corporate subdivisions.").

13. In addition to those discussed above, many other reputable and influential sources have recognized these benefits from exclusivity. For example, according to the U.S. Supreme Court in its *Sylvania* decision:

> Vertical restraints promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products… For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required… Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. … Because of market imperfections such as the so-called "free-rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.[15]

14. These benefits have also been recognized by Vincent Verouden, Deputy Chief Economist at DG Competition (European Commission). Dr. Verouden explained that when a specific investment is undertaken by either the supplier or the distributor, "each party … knows that if there are no checks and balances on each other's behavior the parties may have an incentive to enter into opportunistic behavior the moment at which the other party has invested in an attempt to obtain a greater part of the surplus" and, "[t]o the extent that a substantial part of the value of the investment has become stuck in the relationship, the party that has invested a lot finds itself in a weak bargaining position vis-à-vis the party that has not invested as much in the relationship."[16] The implication is that "the weak bargaining situation ex post is likely to change the incentives to invest ex ante and to lead to investment levels that are too low from the viewpoint of the vertical structure."[17] This underinvestment problem can be addressed via exclusive territories, *i.e.*, "when the distributor is the party that has to make the specific investments, a contract granting an exclusive territory to this distributor has the effect of reducing the outside opportunities for the supplier."[18] Again, investments in local content are sunk costs—costs that are particularly vulnerable to this sort of *ex post* opportunism.

---

15 Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 (1977).

16 Verouden, Vincent. 2008. "Vertical Agreements: Motivation and Impact," chapter 72 of the ABA's *Issues in Competition Law and Policy*, p. 1826.

17 *Id.*

18 *Id.*

15. The OECD Competition Committee has also discussed the benefits of exclusive territories *specifically with respect to broadcasting*:

> Exclusive arrangements may be necessary to obtain certain efficiencies or to exploit the full value of a piece of content. For example, an exclusive territory may be necessary to induce the broadcaster to invest in promoting the content. Alternatively, it may not be possible for the content provider to extract the full value of the content when sold on a non-exclusive basis.[19]

16. Even scholarship skeptical of the extent of free-rider concerns has acknowledged their importance with respect to exclusive territories. For example, Warren Grimes has argued that free-rider concerns articulated in *Sylvania* may not apply in some circumstances, but specifically noted that "manufacturers impose these restraints to create incentives for downstream dealers to carry and promote a manufacturer's brand." He also noted that "[r]estraints that restrict distribution of the manufacturer's brand may limit dealer free riding because they restrict intrabrand competition among dealers. Such restraints may be warranted when they are ancillary to procompetitive investment by the dealer in carrying and promoting the manufacturer's line."[20]

17. And perhaps most relevant and succinct, according to the Commission in its 1988 order, "[u]ltimately, and in a variety of ways, the television viewer, whose options are reduced, suffers as a result of the absence of exclusivity."[21]

18. When evaluating the role of sunk costs in motivating the need for exclusivity in the broadcast television context, two important points are worth re-emphasizing. ***First***, if a local broadcast station is able to export its content to another DMA, *any* money it gets (from retransmission consent or any possible advertising) is pure profit. The costs of the relationship and of production of the content are already sunk. Thus, the fact that there is very little incremental cost to distributing a signal further means that, absent exclusivity requirements, there is a substantial threat of distant signals being imported.[22] ***Second***, absent exclusivity, MVPDs

[19] OECD Competition Committee. 1998, *Regulation and Competition Issues in Broadcasting in the Light of Convergence*, OECD Policy Roundtables, p. 14.

[20] Grimes, Warren S. 2008. "The *Sylvania* Free Rider Justification for Downstream-Power Vertical Restraints: Truth or Invitation for Pretext?", in Robert Pitofsky, ed., *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford University Press, p. 182.

[21] *1988 Program Exclusivity Order*, ¶50.

[22] As we discuss in more detail below, alternative efforts to enforce exclusivity are likely to be less effective. Our point here is that exclusivity arrangements exist precisely because there are strong incentives for

may feel free to import broadcast network or syndicated content from other markets without fear that the local content—for which costs may already be largely sunk—would completely disappear (since the investment has already been made). The possibility of such opportunistic "hold-up" based on sunk investment costs may deter local stations from undertaking investments in local content in the first place.

2. Economies of Scale

19. The alleviation of free-rider/opportunistic-behavior problems is not the only pro-competitive effect of exclusive territories: As we noted earlier, exclusive territories can help achieve economies of scale, thus reducing costs. For example, Profs. Viscusi, Harrington and Vernon have explained in their textbook *Economics of Regulation and Antitrust*:

> An important social benefit of territorial restraints is that distribution costs might be lowered by enabling each dealer to obtain scale economies. That is, by spreading fixed costs over a higher volume of sales, the costs of distribution can be reduced.[23]

20. Again, the OECD Competition Committee has noted the importance of economies of scale specifically with respect to broadcasting:

> Like the wider media industry, broadcasting features economies of scale in production. Once a piece of content has been produced, the marginal cost of making that information available to another consumer is often close to or equal to zero. …
>
> An important characteristic of media is the strong economies of scale. The cost of producing a piece of content is essentially fixed and independent of the size of the audience. Once it is produced, the marginal cost of consumption by another consumer is relatively small or zero. As a result, there is an inherent tendency for all media to be focused on larger markets. Larger markets are likely to be served with more and better quality products than smaller markets.[24]

21. Economies of scale may be particularly important with respect to the production of local, news, and public affairs content. For example, Commissioner O'Rielly has noted that:

---

broadcast stations to allow their signals to be exported, even though doing so undermines the broadcast television business model.

[23] Viscusi, W. Kip, Joseph E. Harrington, Jr. & John M. Vernon. 2005. *Economics of Regulation and Antitrust*, MIT Press, p. 287.

[24] OECD Competition Committee. 1998. *Regulation and Competition Issues in Broadcasting in the Light of Convergence*, OECD Policy Roundtables, pp. 7, 66.

> Local programming, especially news, is expensive to create but highly sought after by consumers. Some television broadcasters, especially in small and mid-sized markets, have employed contractual relationships called Joint Sales Agreements (JSAs) and Shared Service Agreements (SSAs) to streamline certain overlapping functions in order to increase efficiencies and reduce costs. While critics voice concern that that JSAs and SSAs are "covert consolidation" amounting to an end run around the media ownership limits that are designed to protect diversity and localism, there is evidence of significant benefits from these arrangements, including saving stations from going dark, adding diverse voices to a market, and enabling local news where it would otherwise be cost prohibitive.[25]

22. The economic literature has also documented the importance of economies of scale and of organizational structures, such as exclusive territories, that facilitate economies of scale and thus encourage greater production of programming. For example, Profs. Yan and Napoli write:

> It is well understood that there can be significant economies of scale in the production of media products, particularly given that media products are characterized by high first-copy costs and relatively low marginal costs (Owen & Wildman, 1992). From this standpoint, organizational structures that facilitate the exploitation of economies of scale in content production may facilitate greater production of programming such as news and public affairs.[26]

Exclusive territories are one such "organizational structure" for facilitating economies of scale in content production.

C. Competitive Concerns That Can Arise with Significant Market Power Do Not Apply Here

23. To be clear, there are circumstances where vertical restraints, including exclusive territories, can raise competitive concerns. However, as we explain in the next section, such concerns rest on a lack of sufficient competition in the markets in question and, in particular, significant market power by the firm(s) engaging in exclusivity, such as that associated with provision of a critical input. Hence, in the television industry, any such concerns are even less relevant today than when the exclusivity rules were established, and certainly do not provide an economic basis for weakening or removing the exclusivity rules.

---

25 O'Rielly, Michael. 2014. "Commissioner O'Rielly's Thoughts on Broadcast Television JSAs and SSAs," (February 18, 2014), available at http://www.fcc.gov/blog/commissioner-o-rielly-s-thoughts-broadcast-television-jsas-and-ssas.

26 Yan, Michael Zhaoxu, & Philip M. Napoli. 2006. "Market Competition, Station Ownership, and Local Public Affairs Programming on Broadcast Television," 56 *Journal of Communication* 795-812, p. 797.

24. The Commission has recognized the role of sufficient competition in eliminating any concerns about exclusivity. For example, the Commission has previously explained that "[p]rogram exclusivity is one of several types of vertical arrangements that antitrust economists and the courts once regarded with concern. However, the modern theory of vertical contracts, and increasingly court decisions, recognize that vertical contracts should generally be presumed to confer consumer benefits in industries that are reasonably competitive."[27] The Commission has also noted that exclusivity is efficient and procompetitive in general in broadcasting, and, in the rare instances when exclusivity may raise competitive concerns in broadcasting, those instances can be addressed through antitrust enforcement: "As long as there is reasonable competition among suppliers and distributors, exclusivity is a competitive tool that fosters the efficient channeling of programming to its most appropriate outlets, thereby maximizing the extent and diversity of programming available to viewers. In this context the antitrust laws are the appropriate vehicle for dealing with those relatively rare situations in which exclusivity can be used to hinder competition."[28] As we will show in the next section, there are many providers of video content today and thus "vertical contracts should generally be presumed to confer consumer benefits…"

III. THE TELEVISION INDUSTRY IS AN EXCELLENT EXAMPLE OF THE ECONOMIC CASE FOR EXCLUSIVITY

25. In this section we describe increased competition in content provision since the Commission first adopted the exclusivity rules, evidence on the deleterious effects of weakened exclusivity on broadcast networks and stations, and the importance of investment in local content.

A. Increased Competition for Providing Television Content Means That any Theoretical Concerns About Exclusive Contracts are Even Less Relevant Than When the Rules Were Adopted

26. The industry has changed since the Commission originally adopted the exclusivity rules, and those changes—in particular, increasing competition for television content—mean that any

27 *1988 Program Exclusivity Order*, note 141.
28 *1988 Program Exclusivity Order*, ¶64.

theoretical concerns about exclusive contracts are even less relevant than when the rules were adopted.

27. As background for our discussion of competition in the television, it is important to keep in mind that local broadcast stations and MVPDs are not competitors for *subscribers* to any great degree.[29] Rather, as the Commission has noted, local broadcast stations' signals are "an input for MVPD services"[30]—it is a vertical relationship in this context. Hence, the question at hand is not about what would be "fair" in broadcaster/MVPD competition, but whether a particular provider of inputs to MVPDs – one of many providers of content inputs – should be allowed to choose how to organize its own production.

28. In 1965, the Commission first adopted "uniform non-duplication rules to protect both network programming and syndicated programming for which local broadcasters had negotiated exclusive exhibition rights."[31] Syndicated exclusivity rules were introduced in the 1972 Cable Television Report and Order, which "authorized local stations which had purchased exclusive exhibition rights to syndicated programming to demand that cable systems located in the station's service area delete such programming from imported distant signals."[32] The justification provided when the non-duplication rules were adopted still holds today: "to preserve to local stations the credit to which they are entitled – in the eyes of advertisers and the public – for presenting programs for which they had bargained and paid in the competitive program market."[33]

29. Syndicated exclusivity rules were repealed in 1980, when the Commission concluded that "the effects of the rules' repeal on broadcasters and on program supply would be minimal because the growth in demand for advertising would increase the revenues of all participants in the local distribution market, with or without syndicated exclusivity rules."[34] However, by 1988, the Commission concluded that its reasoning had been flawed in two significant respects. "First,

---

29 There is competition between over the air broadcasts and MVPDs with respect to *viewers*.

30 FCC, *Fifteenth Report in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 13-99, July 22, 2013, ¶145.

31 *1988 Program Exclusivity Order,* ¶9.

32 *1988 Program Exclusivity Order,* ¶¶12-14.

33 FCC, *First Report and Order, In the Matter of Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, 38 FCC 683 (1965), ¶80.

34 *1988 Program Exclusivity Order*, ¶21.

the Commission justified the rules' repeal based on an analysis of how their repeal or retention would affect particular competitors, rather than competition itself, in the local television distribution market. … Second, the Commission failed to analyze the effects on the local television market of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights when they had to compete with cable operators who could enter into such contracts."[35] In 1988, the Commission found "that viewers and the public interest are being poorly served" by the existing arrangements,[36] reintroduced syndicated exclusivity rules and extended the non-duplication rules to any retransmissions of broadcast network programming.[37]

30. The Commission cited "changed circumstances" as its primary justification for modifying the program exclusivity rules in 1988. Since that ruling, circumstances have continued to change in ways that reinforce the Commission's rationale for restoring the syndicated exclusivity rules and expanding the non-duplication rules. For example, the Commission in 1980 did not anticipate that cable operators (and, presumably, MVPDs generally) would become "a full player in the video marketplace, and a vigorous competitor for programming, audiences, and advertising revenues."[38] However, by 1988, when the Commission reinstituted the syndicated exclusivity rules, the level of cable penetration, although much higher than previously expected, was still only 51 percent.[39] Since then, MVPD penetration (including satellite MVPDs that were not of great commercial significance in 1988) has grown well past that projection, reaching 80 percent to 90 percent.[40] That is, most consumers access the content offered by local broadcast stations via an MVPD, and, while broadcasters continue to provide over-the-air service, they reach more viewers as an input into MVPD content packages.

31. Even more importantly, broadcast stations' signals are just one input for MVPDs, competing with hundreds of cable networks, and video on demand options as well. The

---

35 *1988 Program Exclusivity Order*, ¶23.

36 *1988 Program Exclusivity Order*, ¶5.

37 *1988 Program Exclusivity Order*, ¶6.

38 *1988 Program Exclusivity Order*, ¶30.

39 *1988 Program Exclusivity Order*, ¶30

40 *See* http://www.tvb.org/research/media_comparisons/4729/72512. Satellite MVPDs are included in the Alternative Delivery Systems ("Total ADS") series. Estimates vary. See, for example, FCC, *Fifteenth Report in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 13-99, July 22, 2013, ¶198, citing Nielsen data that 9.6% of households used only over-the-air, and GFK-Knowledge Networks data that 17.8% do so.

Commission estimated there were approximately 800 national cable networks as of 2012.[41] Broadcast stations may air multiple channels of programming, but any individual station's channels are only a small number compared to the number of cable networks.[42] Even counting just broadcast networks, there are four "major" broadcast networks along with other broadcast networks, so this is not a setting with one or two critical inputs.

32. More generally, it is indisputably the case that competition for television content is far greater today than when the Commission established the exclusivity rules. Using average 24-hour ratings by network to construct viewership shares, the four firm concentration ratio for broadcast and basic cable networks was 63 percent in 1994, but fell to under 30 percent in 2012, with the industry characterized by an increasingly large number of firms, each with low shares.[43] A similar trend can be seen by tracking ratings using an HHI (a measure of concentration). The figure below shows that the HHI has been declining continuously over the last 20 years, falling from 1,071 in 1994 to 267 in 2012. According to the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, markets with an HHI under 1,500 can be classified as unconcentrated.[44]

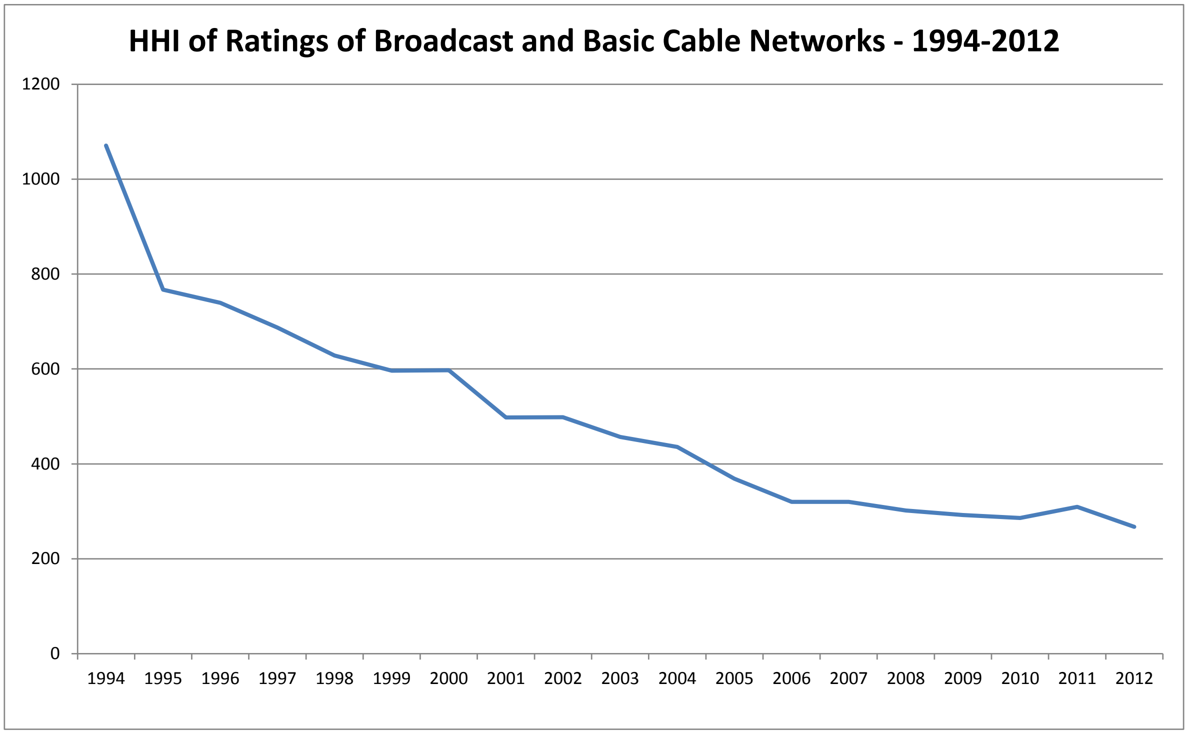
---

41 FCC, *Fourteenth Annual Report on the Status of Competition in the Market for the Delivery of Video Programming*, FCC 12-81, July 20, 2012, note 96.

42 According to SNL Kagan, the total number of live over-the-air broadcast channels aired by full-power, Class A and low power television stations is an estimated 5,511 channels. *See* Justin Nielson, *SNL Kagan TV Stations Multiplatform Analysis 2014*, March 12, 2014.

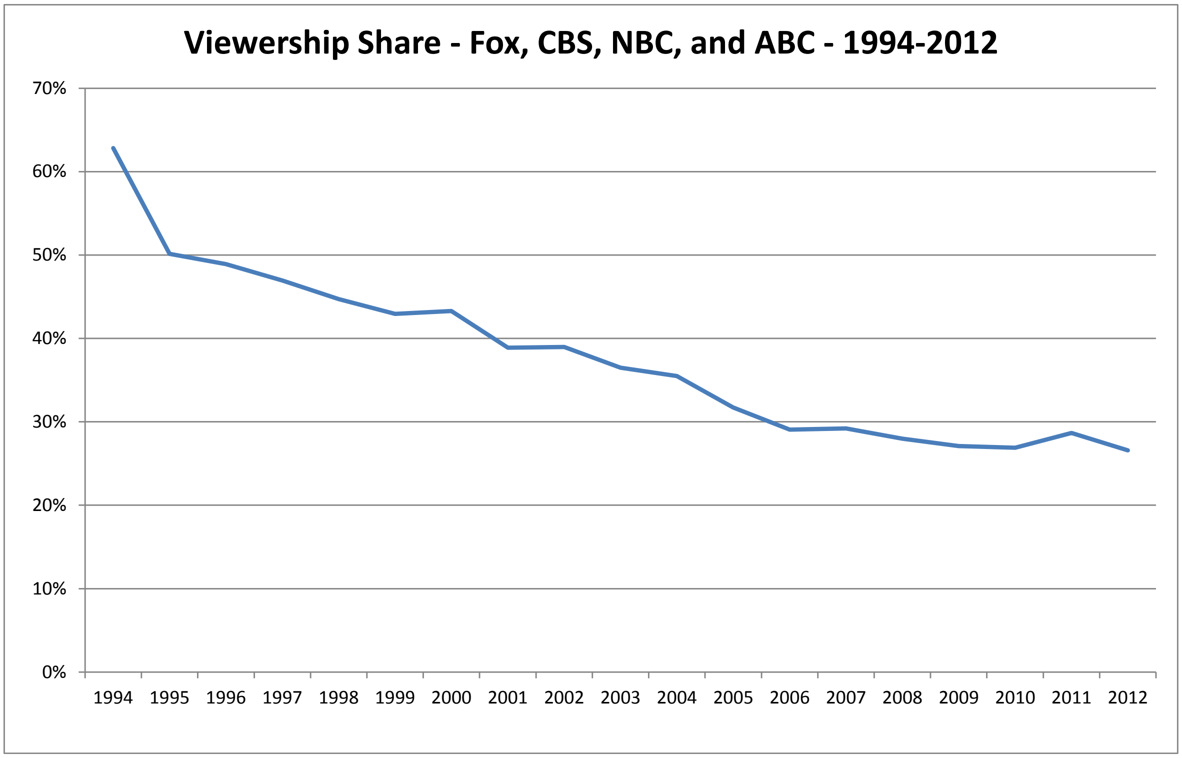
43 SNL Kagan, *TV Network Summary*. The series "Average 24 Hour Rating" was downloaded from 1994 (the first year that ratings are available for the main broadcast networks) to 2012, for broadcast and basic cable networks. The average 24 hour rating is defined as "average percent of the universe of households viewing a network during the average minute according to Nielsen Media Research." Each network's annual viewership share is video economics calculated as its average 24 hour rating divided by the sum of the average 24 hour ratings for all (broadcast plus cable) networks. The four firm concentration ratio is measured as the market share of the four largest firms in an industry; Fox, CBS, NBC, and ABC have the four largest viewership shares in every year.

44 U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 5.3 (2010). In presenting these statistics, we are not claiming to have defined relevant antitrust markets but rather are simply using these statistics to illustrate the large number of players and low concentration levels in the television industry.



33. Broadcast networks' shares of television viewership have fallen. For example, in 1994, Fox, CBS, NBC, and ABC had a combined share of more than 60 percent of all broadcast and basic cable networks. This share fell by more than half over the next ten years, and has continued to fall since then to below 30 percent in the most recent data.[45]

45 SNL Kagan, *TV Network Summary*. Each network's annual viewership share is calculated as its average 24 hour rating divided by the sum of the average 24 hour ratings for all (broadcast plus cable) networks.



34. Among this broad range of competing content, only broadcasters—due to their strategy built around provision of local content (along with national network and syndicated content)—must deal with the concerns raised by possible lack of exclusivity. In particular, although all programmers face competition from an ever-increasing set of programming options, "[o]nly broadcasters face, and are powerless to prevent, competition from the programming they themselves offer to viewers;"[46] cable networks are effectively exclusive by virtue of their distribution strategy. Removing or weakening exclusivity can allow MVPDs to force broadcasters to compete with themselves – a situation that other content providers do not face. As the broadcast television model is the one model that emphasizes local content, it would be counter to the Commission's stated commitment to local content to weaken that business model in this way.

35. In addition to the broad range of competing networks, consumers have an increased ability to watch programming at any time with digital video recorders ("DVRs") and video on demand. Indeed, suggested benefits of the repeal of syndicated exclusivity rules in 1980 included "increased program diversity through time and episode diversity" that was expected to

---

[46] *1988 Program Exclusivity Order*, ¶42.

"outweigh any negative effects on broadcasters' revenues and program supply."[47] However, the increasing availability of VCRs, and, more recently, DVRs and on-demand content has all but eliminated any benefits to consumers from time diversity through importation of signals. Even in 1988 the Commission acknowledged that "the increasing availability of VCRs reduces the need to achieve time diversity through cable's importation of distant signals."[48] Indeed, we understand that even commenters in favor of removing the exclusivity rules have not suggested that increased time diversity would be a resulting benefit.

B. GIVING MVPDS THE ABILITY TO IMPORT DISTANT SIGNALS WOULD UNDERMINE BROADCASTERS' BUSINESS MODEL AND ABILITY TO PRODUCE LOCAL CONTENT

36. As noted above, the distinguishing feature of the broadcast business model (relative to cable networks or other forms of content) is the focus on integrating local content into the overall portfolio of content offered. However, the continued provision of local content should not be taken for granted. To the contrary, provision of local content is a high-cost enterprise, with the small revenue base available in many local areas heightening the risk that these high costs may not be recouped.

37. For instance, NBC affiliates in the twenty smallest DMAs earned an average of $2.4 million in gross advertising revenue in 2012.[49] Stations' annual news budgets averaged $1.64 million (operating and capital budgets) in markets ranked 101-150 in 2010.[50] Another source estimated that the "average small or mid-sized market station budgets approximately $1.8 million per year for capital and operating expenses to produce its local news."[51] Thus, the costs of providing valuable local content can be large relative to advertising revenues received, especially in smaller markets.

---

47 *1988 Program Exclusivity Order*, ¶45.

48 *1988 Program Exclusivity Order*, ¶47.

49 SNL Kagan, *US TV Station-Level Ad Revenue by Market Rank and Owner 2013-2018*.

50 Prak, Mark J., David Kushner, and Eric M. David, *The Economic Realities of Local Television News – 2010 – A Report for the National Association of Broadcasters*, April 30, 2010, Attachment B to *Comments of the National Association of Broadcasters, In the Matter of Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25, May 7, 2010, p.13.

51 *Comments of Gray Television, Inc., In the Matter of 2010 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, March 5, 2012, p. 10.

38. In this setting, exclusivity is important to the maintenance of incentives to invest in local content for several reasons, developed in the remainder of this section.

1. Effects of weakened exclusivity on local broadcast station revenue and returns to investment

39. First and most basically, exclusivity helps maintain the revenues that local broadcast stations earn within their territories, thus enhancing the possibility of sufficient returns to motivate investments in local content. With news expenses constituting approximately one quarter of local broadcast stations' total expenses,[52] even a small change in revenue due to importation of distant signals could change the local broadcast stations' investment decisions, reducing or eliminating investment in local content. Indeed, concerns about local broadcast stations discontinuing or scaling back production of local content highlight the marginal nature of the financial decision for some stations, and how changes in their financial situations from eliminating the exclusivity rules could impact their investment decisions. For example, financial struggles, driven by declines in advertising revenue and/or increasing costs, have resulted in "reduction or elimination of localized service to the communities served by smaller market stations," including cancellations of nightly news broadcasts in markets such as Topeka, Kansas; Portland, Maine; Lexington, Kentucky; and Yakima, Washington.[53]

40. Eliminating or weakening exclusivity would reduce both main sources of broadcast station revenues, advertising and retransmission consent fees. We discuss each in turn.

41. With respect to advertising, recent examples (gathered by the NAB through confidential discussions with local broadcast stations)[54] illustrate that weakened exclusivity has a negative effect on station revenues. Below we point to some of the examples that NAB collected; more examples and details are in the NAB comments.

---

[52] *See Ex Parte Submission of the NAB*, MB Docket No. 09-182, No. 07-294 and 04-256, March 21, 2014, Attachment A.

[53] *See, e.g., Coalition of Smaller Market Television Stations Comments*, MB Docket No. 06-121 *et al.*, pp. 9-10 (October 23, 2006), and S. Schechner and R. Dan, "Local TV Stations Face a Fuzzy Future," *The Wall Street Journal,* February 10, 2009.

[54] We were not privy to these confidential interviews with stations, so we rely on NAB's reporting of their content, as documented in Section III of *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. All discussion of these examples is drawn from that section of the NAB Comments.

- One example is the Tampa-St. Petersburg (Sarasota) DMA, where two ABC-affiliated stations, WWSB and WFTS are duplicatively received by 47% of television households because of WWSB's significantly viewed status in part of the DMA. WFTS estimates that its advertising revenue during ABC network programming would have been 36%, or roughly $6.4 million per year, higher if not for WWSB's duplicative programming.
- Another example comes from the Greenville-New Bern-Washington DMA, where local affiliate WNCT's CBS programming is duplicated in approximately 19% of households by the significantly-viewed Raleigh CBS affiliate, WRAL. Despite a relatively low duplication rate, WNCT estimates that advertising revenue losses resulting from diversion to WRAL amount to more than $300,000 per year.
- A third example comes from a Big 4 network in a DMA ranked 150-175 where "overshadowing" by two significantly viewed stations with the same affiliation results in the network losing 50% of its potential audience, or an estimated $750,000 per year.

These examples highlight the negative impact of duplication on station revenues, despite the fact that the duplicative signal is received in only a subset of each DMA. If repeal of the exclusivity rules led to duplication in a full DMA, the effects on station revenues would likely be correspondingly greater.

42. In considering effects of exclusivity on advertising revenue, it is also important to recall that the sale of local ad spots is one area where MVPDs and local broadcast stations compete with one another.[55] Competition for local (and national) advertising revenue has intensified with the increased use of "interconnects" – combined platforms of multiple cable operators, satellite providers, and telephone companies that allow advertisers to purchase local advertising in many regions and on many channels from multiple MVPDs through a single contract.[56] Local broadcast stations "frequently lose sales to jointly sold interconnect advertising."[57] For example, a broadcaster in the small market of Chico, California estimates that the cable interconnect there

55 *See, e.g., NAB Comments* in MB Docket No. 09-182 (July 12, 2010), pp. 6-15; *NAB Comments* in MB Docket No. 09-182 (Mar. 5, 2012), pp. 5-8, 12-16; *NAB Reply Comments* in MB Docket No. 09-182 (Apr. 17, 2012), pp. 2-10.

56 *Ex Parte Submission of the NAB* in MB Docket No. 09-182, No. 07-294, and No. 04-256 (March 18, 2014), p. 5.

57 *Ex Parte Submission of the NAB* in MB Docket No. 09-182, No. 07-294, and No. 04-256 (March 21, 2014), p. 5.

takes "some $3 to $4 million in local advertising that formerly would have been likely to go to local television stations."[58] Allowing MVPDs to obtain a replacement signal from a different city could further weaken local broadcast stations' ability to compete for local ad spots. Indeed, one motivation for MVPDs to weaken the exclusivity rights of broadcasters may be to reduce local broadcasters' ability to sell advertisements.

43. In considering advertising competition when the syndicated exclusivity rules were repealed (in 1980), the Commission predicted that "cable's importation of duplicate distant signals would not divert a significant number of viewers from the local broadcaster" and "any audience diversion that might occur would nevertheless be harmless because advertising revenues were expected to increase for all participants in the distribution market (which did not at that time include cable in any meaningful way)."[59] However, by 1988, the Commission found that indeed there had been significant duplication and diversion.[60] Furthermore, the existence of significant diversion can be inferred from MVPDs' desire to use imported signals during retransmission consent disputes with local stations.

44. With respect to retransmission consent revenues, some commenters have suggested that removal of exclusivity rules would be innocuous, or even beneficial, because MVPDs would only take advantage of the removal during (generally short) disputes over retransmission fees, where MVPDs could obtain a replacement signal should the local station refuse to meet the MVPD's terms.[61] However, such ability is <u>not</u> innocuous. The thrust of the MVPDs' argument is that MVPDs will have the economic incentive and ability to take advantage of these proposed rule changes to strengthen their bargaining position by, in effect, forcing broadcasters to compete against themselves, resulting in lower retransmission fees and reducing the ability of local broadcast stations to compete with the MVPDs for advertising. The idea that this sort of

---

58 *Ex Parte Submission of the NAB* in MB Docket No. 09-182, No. 07-294, and No. 04-256 (March 14, 2014), p. 2.

59 *1988 Program Exclusivity Order*, ¶33.

60 *1988 Program Exclusivity Order*, ¶¶34-36 ("It is clear from the evidence that substantial diversion occurs. Estimates of viewer diversion range between 5 percent and 80 percent of the audiences broadcasters are able to achieve, with most of the estimates lying in the 25 to 45 percent range. The strongest evidence of diversion is ratings information for programming that is simultaneously duplicated. Here, information contained in the record evidences as much as 50 percent of some programs' audiences being diverted to the simultaneously duplicating imported signal.").

61 *See*, for example, *Comments of Time Warner Cable, Inc.* in MB Docket No. 10-71, pp. 22-27 (May 27, 2011); *Reply Comments of Time Warner Cable, Inc*. in MB Docket No. 10-71, pp. 11-19 (Jun. 27, 2011).

behavior would occur "just" during disputes ignores the fact that disputes might run for long periods, even months, especially in the absence of the exclusivity rules. If MVPDs can sustain a retransmission dispute for very long periods at minimal cost to them (because their customers can still at least view broadcast network and syndicated programming during the dispute), they will have gained a significant bargaining advantage.

45. In any event, the impact of eliminating the Commission's exclusivity rules would extend well beyond just the extreme case of disputes where a broadcast signal is removed from an MVPD. Instead, the ability to obtain a replacement signal will impact negotiations even if the MVPDs do not exercise it. That is, negotiations will take place in the shadow of the MVPDs' newfound ability to import signals and force broadcasters to compete against themselves, thus shifting bargaining power toward MVPDs and reducing broadcast stations' ability to generate revenues.

46. MVPDs may also claim that shifting revenues from local stations to the MVPDs is a good thing, allowing MVPDs to obtain lower costs and pass those reduced costs on to consumers. This sort of argument is often advanced with respect to intellectual property and patent protection. In the short term, revoking intellectual property rights can result in lower prices for consumers, but in the longer term, innovation and investment are reduced. That is, claims that removing exclusivity is good because it reduces MVPD costs ignore the likely impact on broadcasters' business model, syndicators and local broadcast stations' investments and the production of local content.

47. Empirical evidence, derived from the limited set of instances where exclusivity does not exist, or has been rescinded or reinstated, is also informative on the effect of weakened exclusivity on retransmission consent revenues. According to information received from local stations, retransmission consent fees are lower when a significantly viewed station from another market is imported into a particular DMA. Based on confidential responses provided to the National Association of Broadcasters, local broadcast stations affiliated with one of the four largest broadcast networks receive retransmission consent fees in the range of \$0.45 and \$0.80 per subscriber in two markets where exclusivity is present, but only \$0.12 and \$0.27 per

subscriber, respectively, when a significantly viewed station is imported into that DMA.[62] Fees in the range of a quarter per sub per month (or lower) move these broadcast stations down into the range of fees received by relatively low rated cable networks such as the Game Show Network, E!, and TLC, which is not consistent with the broadcast networks' status as the most highly viewed networks nor with a high value on the important local content produced by local broadcast stations.[63]

2. Importance of economies of scale and scope

48. Second, the use of exclusive territories is efficient and conducive to content investments given the large economies of scale and scope in the production of television content.[64] We described earlier how exclusive territories help firms to take better advantage of economies of scale and scope. New programming has high up-front or fixed costs relative to a near zero marginal cost of broadcasting to additional homes, so there are significant economies of scale in broadcast television. This leads to potential efficiency gains if there is more programming obtained from relatively fewer inputs.

49. Empirical evidence supports the existence of economies of scale in television broadcasting. For example, in 2008, the average revenue per employee at stations with $50 million-$75 million in annual revenue was more than double the average revenue per employee at stations with $8 million-$10 million in revenue.[65]

50. And, importantly, the ability to exploit these economies appears to be related to local content investment. A study by Profs. Napoli and Yan found that, controlling for other market and station characteristics, "financially stronger stations…were more likely to offer local news programming" and that, among stations that did provide local news programming, an increase of

---

62 To protect anonymity, the names of the MVPDs and local broadcasters in these examples have been removed.

63 SNL Kagan, *TV Network Summary*, series "Affiliate Revenue Per Average Sub/Month" for 2013.

64 For television broadcasting, economies of scale are generally associated with declining average costs per viewer. *See, e.g.*, Bruce M.Owen and Steven S. Wildman, *Video Economics* (Harvard University Press. 1992), p. 3.

65 Eisenach, Jeffrey and Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, June 2011, p. 9.

$1 million in station revenues is associated with an increase in the amount of programming by .2 hours per two weeks, all else equal.[66]

51. Economies of scope, which exist when it is less expensive for a single firm to produce two types of output jointly than it would be for two firms to produce the same outputs separately, are also present in the television industry.[67] For example, one study found that "broadcasters which provide both television and radio services save 12% of cost at the sample mean, as compared to providing each service separately."[68] And like economies of scale, the existence of such economies of scope leads to increased investment in news programming. For example, using panel data representing programming during one week each in May and November from 2002 through 2005 and a robust set of controls for station and market characteristics, a Commission study found that cross-ownership of local stations with newspapers significantly increased the amount of local news programming a station provided.[69] Other empirical studies similarly have found that newspaper/television cross-ownership increased the amount of local news programming on the station.[70]

52. Since exclusivity helps promote economies of scale and scope, efforts to reduce broadcasters' and syndicators' ability to enforce exclusivity will also likely reduce economies of scale and scope, leading to corresponding reductions in investment in local content as described above. This should not be a surprising result, as the existing business model that produces local content through local affiliates is predicated on in-market exclusivity. When MVPDs undermine that exclusivity, as they make clear they wish to do through this proceeding, this will likely adversely impact broadcasters' incentives to invest.

---

66 Napoli, Philip and Michael Zhaoxu Yan, "Media Ownership Regulations and Local News Programming on Broadcast Television: an Empirical Analysis," *Journal of Broadcasting and Electronic Media* 51:1 (March 2007), pp. 47-48, 50-51. In Table 4, Outcome Model, the coefficient on Station Revenues, which is measured in millions of dollars, is 0.2, indicating that $1 million in additional station revenues is associated with an additional .2 hours of programming over the two week sample period.

67 *See, e.g.,* John C. Panzar and Robert D. Willig, "Economies of Scope," *American Economic Review* 71: 2 (May 1981), p. 268.

68 Sumiko Asai, "Scale Economies and Scope Economies in the Japanese Broadcasting Market," *Information Economics and Policy* 18 (2006), p. 321.

69 Shiman, Daniel, "The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming," FCC Media Study 4, 24 July 2007.

70 Eisenach, Jeffrey and Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, June 2011, pp. 44-45.

3. Effects of weakened exclusivity on risk

53. Finally, in addition to the adverse effects of weakened exclusivity on revenues actually received by broadcast stations, one must also consider the effect of weakened exclusivity on the risk of investment. Because of its high up-front costs, local programming requires significant investment on the part of local stations, and economic theory is clear that increases in risk deter such investments.[71] The contractual and territorial certainty that exclusivity provides helps to mitigate these risks, including by mitigating or eliminating the risk that *after* a broadcast station has sunk investment costs in local content, alternative sources of the associated network and syndicated content will be imported (perhaps via opportunistic, strategic behavior by MVPDs, as discussed above), thus greatly reducing the returns on the original investment. As a result, by limiting the risk they face, exclusivity increases local broadcast stations' willingness to invest in local programming.

C. THE COMMISSION HAS LONG RECOGNIZED THE VALUE OF LOCAL CONTENT

54. As we have stated repeatedly, the broadcast model is built around the partnership of national and local entities, with local content being an important competitive differentiator for this business model. The Commission has a long history of support for local content. The Commission noted in its 1988 reinstatement of syndicated exclusivity rules that "the public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations."[72] Launching an inquiry into broadcast localism in 2003, then Chairman Michael Powell noted that "[f]ostering localism is one of this Commission's core missions and one of three policy goals, along with diversity and competition, which have driven much of our radio and television broadcast regulation during the past 70 years."[73] Again in 2005, the Commission noted that it "has a longstanding policy favoring the provision of local broadcast service to communities, and the Commission expects and indeed requires broadcasters to serve

---

71 That is, the up-front costs are large in the scale of local broadcast station operations and revenues. *See, e.g.*, Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (4th ed., 2005), p. 251, noting that "Investors dislike risk and must be compensated for bearing it: The greater the risk, the higher the expected rate of return," and discussing the commonly used Capital Asset Pricing Model that reflects the need for higher rates of return on riskier projects to induce investment.

72 *1988 Program Exclusivity Order,* ¶74.

73 Steve Waldman and the Working Group on Information Needs of Communities, "The Information Needs of Communities – The changing media landscape in a broadband age," July 2011, Chapter 26, pp. 291-294 (available at http://transition.fcc.gov/osp/inc-report/INoC-26-Broadcast.pdf).

the needs and interests of their local communities."[74] In 2010, then Chairman Genachowski noted that "[m]any broadcasters still supply important connective tissue holding our communities together" and that the transition to digital television underscored "the original vision of the value of what broadcasting can bring to our country: Local news. Weather. Sports. Emergency information. A platform for diverse voices and creative programming. Educational programming for our kids."[75] And this year, the Commission reiterated that its broadcast ownership rules furthered its "longstanding policy goals" of localism, competition and diversity.[76]

55. In addition to deterring investment in local content, the importation of distant signals can cause consumer confusion and difficulties for state officials attempting to disseminate information, thus undermining one of the important roles of local content. During a retransmission consent dispute between Time Warner Cable ("TWC") and Smith Media in 2010, TWC retransmitted a distant television station into the Utica DMA. The Utica mayor's office received a call from a confused citizen about flooding in Utica, which was actually occurring in distant Wilkes-Barre, PA.[77] By contrast, local broadcasts, properly used, can save lives, highlighting the importance of immediate and widespread dissemination of emergency information. For example, the Joint Broadcasters have noted that in Joplin, MO, local coverage of an imminent tornado saved lives. "If a Joplin resident watching television on the evening of Sunday, May 22, 2011, had been watching '60 Minutes' on a distant CBS affiliate imported into the Joplin market, he or she would not have received emergency coverage delivered by the local CBS affiliate about the proximity of the tornadoes."[78]

56. Locally-licensed television broadcast stations play a unique role in the provision of local content—the element of "localness" is a large part of what distinguishes broadcasters from the

---

74 *2005 FCC Retransmission Consent Report*, ¶50.

75 Prepared Remarks of Chairman Julius Genachowski, NAB Show 2010, Las Vegas, Nevada (April 13, 2010), p. 2.

76 *See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50, FNPRM and Report and Order, FCC 14-28, April 15, 2014, ¶14.

77 See "Utica Mayor May Boot Time Warner Cable Out of Town" (Jan. 3, 2011), available at http://rbr.com/utica-mayor-may-boot-time-warner-cable-out-of-town/#HelQtqXoXeDfLJLG>99 (recounting Utica mayor's concern that TWC's importation of programming from Pennsylvania was causing viewer confusion).

78 *Joint Comments of Barrington Broadcast Group, LLC et al.*, MB Docket No. 10-71, May 27, 2011, p. 8.

cable and satellite providers. Importantly, the broadcast business model requires sufficient trust on both sides of the relationship to continue to make investments without fear that the other side will exploit relationship-specific investments in an opportunistic way (the economic concept of hold-up), allow others to free-ride off the investments, etc. Hence, elimination of the exclusivity rule could "lead to the unavailability of local programming in a cable subscriber's local market."[79]

D. SUMMARY

57. In summary, the television industry is an excellent example of the economic case for exclusivity for several reasons:

- First, broadcast networks and local broadcast stations have chosen to organize their distribution of national content and production of local content through local broadcast stations. This lets them compete via a mix of national and local programming. Their key differentiating feature is a strong local presence. And this differentiating feature is conducive to the Commission's long-stated goal of supporting investment in and distribution of high quality local content.

- Second, the ability to establish exclusive territories for local broadcast stations is at the heart of this local-content-focused business strategy. If MVPDs are permitted to import duplicate broadcast network or syndicated programming, the local station's ratings and advertising revenues decline, limiting its ability to invest in local programming or local promotion. In the Commission's summary in 1988, it concluded that costs from removing syndicated exclusivity protection had proven to be significant, while benefits had proven small and able to be satisfied in other ways.[80] If anything, trends in the industry since 1988 have strengthened the basis for this conclusion.

- Third, as a matter of economics, firms should generally be free to organize their production in the manner they find most efficient unless there is some significant competition concern arising as a result. Here, there is no such competitive concern. Any

---

79 *Reply 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 27, 2011, p. 58.

80 *1988 Program Exclusivity Order*, ¶48.

theoretical concerns about competitive concerns due to exclusive contracts are even less relevant today than when the Commission established the exclusivity rules given the growth in the number of competing sources of video content.

- Fourth, regulators should be especially leery about efforts by a competitor to dictate another competitor's business model so as to gain an advantage. It was in part a concern about "the effects on the local television market of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights when they had to compete with cable operators who could enter into such contracts"[81] that led the Commission to reinstate the syndicated exclusivity rules.

- Finally, if MVPDs were allowed to undo the broadcasters' business model, then content producers and sellers might change their distribution policies to better control distribution of their content, such as no longer distributing through local broadcast stations. Producers of national (or regional) content would have to ask whether the competitive advantage provided by distributing that content through a local broadcast station that also offered local content and local promotion was worth the cost of having to compete against one's own content due to problems in enforcing exclusivity with MVPDs. If lack of exclusivity undermined the current business model, the result might be broadcast networks and distributors of syndicated content shifting additional content to pay distribution platforms.

IV. THE CURRENT EXCLUSIVITY RULES OFFER ADVANTAGES OVER ALTERNATIVE ARRANGEMENTS

A. ELIMINATING THE COMMISSION'S EXCLUSIVITY RULES IS LIKELY TO IMPOSE SIGNIFICANT TRANSITION COSTS AND CREATE UNCERTAINTY FOR THE INDUSTRY

58. The proposed elimination of the Commission's exclusivity rules would be a significant change in the existing regulatory framework. Changes in regulation often have significant economic costs, related both to the specific changes in question and to the increases in uncertainty as to what a regulator may do in the future. That is, the question at hand is not

81 *1988 Program Exclusivity Order*, ¶23.

whether, if the Commission had never had the exclusivity rules, contracts between broadcast networks, syndicators and local broadcast stations could have filled a similar role (although we address that question next), but what impact changing those rules today is likely to have. Even if there were a clean slate, there are good reasons to support the Commission's creation of the exclusivity rules, but the fact that there is not a clean slate is an additional reason not to weaken or remove the rules.

59. First, it is important to note that existing contracts have been written under the assumption that the exclusivity rules are present, and existing investments in local content have similarly been made under the assumption that exclusivity is enforceable through the Commission's rules. Eliminating the rules would require, at a minimum, rewriting of current program exclusivity contracts,[82] and likely a lengthy period of adjustment during which it might be difficult or impossible to enforce exclusivity. Even given a transition period before a rule change went into effect, the direct transition costs would remain. As explained by Profs. Quinn and Trebilcock, transition costs include the cost of learning to do business under a new regulatory regime (although, as we discuss in the next section, there will likely be less ability to enforce exclusivity arrangements through other means—a point emphasized by MVPDs in their advocacy to remove the Commission's rules), the increased uncertainty that comes with novelty, and the mistakes that are inevitable during the process.[83] These transition costs should be taken into account when considering whether to change an existing policy, and, as Quinn and Trebilcock noted, failure to account for transition costs can lead to economically inefficient distortions in policy-making.[84]

60. The required changes stemming from a removal of the exclusivity rules may be extensive, as the exclusivity rules do not exist in a legal vacuum, but rather complement existing rules governing territorial exclusivity, copyright compulsory licensing, mandatory carriage, and retransmission consent. As the Commission has put it, the existing rules are part of a "mosaic of other regulatory and statutory provisions" and because of "the interplay among these various

82 Among other things, we understand that for stations to seek enforcement under the exclusivity rules, their contracts are required to cross-reference the rules (except with respect to the cable network non-duplication rule), and thus existing contracts typically contain such cross-references.

83 Quinn, John and Michael J. Trebilcock, "Compensation, Transition Costs, and Regulatory Change", *University of Toronto Law Journal*, Vol. 32 (1982), pp. 117-118.

84 *Id.*, pp. 117-118.

laws and rules, when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination."[85]

61. The transition costs do not stop with the direct costs from adapting to this change in regulation; the indirect costs may well be even more substantial. As Prof. Dorfman has noted in an article on the transition costs of changing regulations, regulatory changes inevitably increase "uncertainty about what the government will do next. Every regulatory change, except complete withdrawal from a sector, enhances this kind of uncertainty by reinforcing the recognition that regulations change and that the present regime cannot be expected to endure. This increased uncertainty is one of the costs of the regulatory change, and one that is exceedingly difficult to measure."[86]

62. Applied to the present context, we note that existing investments were made under the current regulatory regime. Removing the Commission's exclusivity rules would reduce the value of those investments. This can discourage future investments by raising concerns that future investments may similarly be devalued. As Prof. Stennek has noted in an article on exclusive distribution, "as the firms are likely to foresee future enforcement decisions when making their investments, antitrust authorities must commit to give due credit to the investments in quality, even when they are sunk."[87]

B. The Commission's Exclusivity Rules are an Efficient Means of Handling Exclusivity Enforcement

63. There seems to be little question that removing the Commission's exclusivity rules would reduce the ability of broadcasters to enforce exclusivity. Indeed, we understand that much of the MVPDs' advocacy for a rule change centers on the expectation that in the absence of the Commission's rules, MVPDs will be able to import distant signals to gain advantages in retransmission consent negotiations with local broadcast stations. Nonetheless, it is worthwhile to explore how broadcast networks and syndicators might try to enforce exclusivity in the absence of the Commission's rules and how effective those efforts might be.

---

85 *2005 FCC Retransmission Consent Report*, ¶33.

86 Dorfman, Robert, "Transition Costs of Changing Regulations," *Attacking Regulatory Problems,* ed. Allen R. Ferguson, Cambridge: Ballinger Publishing Company, 1981, p. 53.

87 Stennek, Johan, "Exclusive quality – Why exclusive distribution may benefit the TV-viewers," *Information Economics and Policy*, Vol. 26 (2014), p. 53.

64. The actual terms of any exclusivity arrangement are a matter of private contractual agreement negotiated by the program supplier and the local television station. The Commission's exclusivity rules do not provide program exclusivity, but rather "(a) provide a forum for adjudication of program exclusivity disputes, (b) limit and restrict the geographic scope of a program exclusivity arrangement between a program supplier and a local television station, and (c) impose certain formal notice requirements on local television stations as a condition to enforcement."[88] The syndicated exclusivity rules "are similar in operation to the network non-duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming."[89]

65. As noted above, the mere fact that the Commission's exclusivity rules are well established, well understood, and have been effective for many years is an advantage over moving to an untried new regime. Commenters have stated that enforcement under the exclusivity rules is rapid and low cost, and this claim does not appear to be in dispute.[90] By contrast, contractual provisions alone, even after a transition period, are likely to face certain difficulties and uncertainties. Indeed, MVPD commenters have suggested that "private contractual exclusivity arrangements for retransmission consent likely would not be enforceable absent the regulatory blessing [broadcasters] currently enjoy…"[91] Whereas interpretation of the Commission's rules is well established, new contractual language would be untested and the interpretation subject to dispute.

66. Also, we understand there is tension between any new efforts to enforce exclusivity and the cable compulsory copyright license that MVPDs may assert to prevent efforts to enforce exclusivity contractually. Indeed, we understand that eliminating the exclusivity rules, while maintaining the cable compulsory license, would severely limit broadcasters' ability to enforce

88 *Opposition of the Broadcaster Associations, In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, May 18, 2010, p. 23.

89 Federal Communications Commission, *Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, FCC 14-29, March 31, 2014, ¶47.

90 *See, e.g., Comments of Sony Pictures Television*, MB Docket No. 10-71, May 27, 2011, pp. 11-12 ("The Commission's syndicated exclusivity rules provide an efficient, cost-effective, and timely remedy for enforcing broadcasters' bargained for rights to exclusivity."); *Reply Comments of Tribune Broadcasting Co*., MB Docket No. 10-71, June 27, 2011, p. 4 ("The [exclusivity] rules are a model of administrative efficiency — the Commission expends virtually no resources in enforcing them.").

91 *Reply Comments of Time Warner Cable, Inc.* in MB Docket No. 10-71, June 27, 2011, p. 12.

program exclusivity rights in their local markets. Specifically, the cable compulsory license provides cable operators with a statutory copyright license that permits them to retransmit broadcast signals without having to negotiate with any of the program suppliers in those signals. But for the statutory license, cable operators would have to negotiate with stations and their program suppliers over the copyright terms and conditions for retransmitting the programming, including exclusivity, and a breach of those contracts could provide a means for stations to enforce exclusivity rights against cable systems. Maintaining the compulsory license, which precludes one means for stations to enforce exclusivity, while eliminating the exclusivity rules, which provides another way to enforce exclusivity, may leave no effective avenue remaining.

67. More generally, incentives among the parties are not as well aligned with contractual restrictions alone as with the Commission's current rules. For example, the Commission's current rules enable a local broadcast station faced with an unauthorized imported signal to obtain a remedy from the Commission. By contrast, under a system of contractual restrictions alone, the local broadcast station losing audiences and advertising would have no direct remedy available. Rather, the broadcast network or syndicator would have to enforce the contract, but these parties have relationships with *both* the local and the distant stations. And unfortunately, as we discussed earlier, there is a free riding problem: Each station has an incentive to provide signals to out-of-region MVPDs (and to resist pressure from the broadcast network or syndicator to stop doing so) because it benefits the providing station, even though it harms other stations and undermines the business model as a whole. The broadcast networks and syndicators' ability to prevent such behavior would, in the absence of the exclusivity rules, be more limited, and complicated by the fact that the broadcast network or syndicator has relationships with both parties that it needs to preserve.

68. The exclusivity rules thus enable enforcement of privately negotiated exclusivity rights that provide an important competitive balance against the cable compulsory copyright license. Elimination of the rules would make it easier for MVPDs to import a duplicative distant signal into a local market, which risks reducing viewership, advertising revenue, retransmission fees, and thus investment in local programming.