

October 5, 2015

VIA ECFS

EX PARTE NOTICE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Implementation of Section 103 of the STELA Reauthorization Act of 2015, MB Docket No. 15-216, Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71*

Dear Ms. Dortch:

On October 1, 2015, Micah Caldwell of ITTA, John Bergmayer of Public Knowledge, Kevin Rupy of USTelecom, Jill Canfield from NTCA, and the undersigned counsel from COMPTTEL met with Matthew Barry of Commissioner Ajit Pai's office to discuss the Commission's proposal to eliminate its network non-duplication and syndicated exclusivity rules ("exclusivity rules"). During the meeting, we explained that the Commission should repeal the exclusivity rules as they are no longer necessary to enforce contractual exclusivity agreements between broadcasters and program suppliers.

The exclusivity rules were first enacted before cable providers were required to get copyright clearance for the broadcast programming they retransmitted, and before they were required to obtain consent of the broadcaster for use of its signal. Given legal and marketplace changes, the rules are at best redundant, since they only allow for FCC enforcement of contractual rights. Stated another way, the FCC's program exclusivity rules do not themselves confer exclusivity on broadcast stations. Rather, they merely serve as an additional (and unnecessary) means of enforcing contractual exclusivity agreements between broadcasters and program suppliers – a right it appears that few, if any, broadcasters have exercised as evidenced by the dearth of complaints filed at the Commission. In reality, the rules likely distort the marketplace. By giving regulatory special treatment to some kinds of contractual arrangements between programmers, networks, and local stations, the rules can encourage players to continue entering into these arrangements instead of exploring new ways to deliver programming to viewers.

That said, repealing the rules would not lead to any immediate changes in the video marketplace, because affiliation agreements between broadcast stations and networks and retransmission consent agreements between local stations and multichannel video programming

distributors (“MVPDs”) can and do limit the ability of cable operators to import distant signals. These contracts typically provide more expansive protection than the exclusivity rules, which apply only within narrow geographic zones. We suggested that allowing the terms of a station’s exclusivity to continue to be negotiated in this manner is more consistent with a free market approach than perpetuating outdated rules that entail unnecessary regulatory involvement in private contractual relationships. We also proposed that the Commission’s proposal is analogous to the situation presented by the sports blackout rules, which were repealed last year based on the recognition that the protection afforded by the rules was better left to the marketplace, not federal regulation.

Additionally, we emphasized that changes in the video programming industry and the Commission’s rules since the exclusivity rules were adopted have undercut the basis for these protections. New entrants, like communications and DBS providers, have entered a retail MVPD marketplace in which consumers expect and demand the ability to purchase video service alongside broadband Internet access service. Yet local broadcasters remain the only source for the programming that consumers demand as part of their MVPD subscription. In this market, the exclusivity rules have shifted bargaining power to broadcasters who use their sole supplier bargaining leverage to demand exorbitant retransmission consent fees. As a result, many MVPDs, particularly smaller and new entrant providers, sell video services at a loss while maintaining the complementary voice and data service subscriptions that utilize other investments in their network. These perpetually rising costs for consumer-demanded programming ensure that smaller and new entrant MVPDs have less capital with which to deploy and/or upgrade their networks.

During the meeting, we emphasized that the Commission’s commitment to localism is equally important to MVPDs, who desire to enhance their customer’s video offering by providing access to local programming at reasonable prices. MVPDs have a vested interest in carrying the stations that their subscribers want to watch. Out-of-market signals are only carried in the limited instances where subscriber demand justifies the cost of obtaining retransmission consent and paying much higher copyright fees associated with distant signal carriage. Indeed, carriage of distant signals has been in decline because such fees have become increasingly cost prohibitive.

Additionally, we discussed how the legislative history does not support the view that the rules should stay in place. While the broadcasters have cited certain language from a Senate report indicating that amendments or deletions of the exclusivity rules would be “inconsistent with the regulatory structure” of the 1992 Cable Act,¹ that language only suggests that the Commission should hesitate to change its rules in a manner that would allow distant stations to export their signals to markets where a local station has bargained-for exclusivity. However, we explained that repealing the Commission’s exclusivity rules would not allow for this, because

¹ S. Rep. No. 92, 102d Cong., 1st Sess. 38 (1991).

doing so would almost certainly be prohibited by the distant station's own contractual arrangements.

We further discussed how specific Commission rules are not needed to deal with the hypothetical problem of "rogue affiliates"—stations that grant MVPDs retransmission consent rights they do not have the authority to grant. In the exceedingly unlikely event that a broadcaster granted a distant MVPD retransmission rights in violation of its own contractual obligations, the affiliate's network or other programming supplier would have ample recourse in the courts. Business disputes of this kind would not call for Commission involvement.

Finally, we indicated that the exclusivity rules are not needed to balance the compulsory copyright license which was granted to MVPDs by Congress. The compulsory license itself contains provisions providing for the adjustment of royalty rates, based on a fair market value standard, if the Commission repeals or otherwise modifies the exclusivity rules.

Please do not hesitate to contact me if you have questions about this submission.

Respectfully submitted,

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cc: Matthew Barry