June 29, 2018

Douglas Rathbun
Competition Policy and Advocacy Section
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW, Room 3413
Washington, DC 20530
CompReg3@usdoj.gov

Re: Roundtable on Anticompetitive Regulations

Dear Mr. Rathbun:

The National Association of Broadcasters (NAB) appreciates the opportunity to respond to comments on the roundtable on anticompetitive regulations held by the Antitrust Division (Division) of the United States Department of Justice (DOJ). NAB understands that this roundtable was intended to consider "the consumer costs of anticompetitive regulations." Specifically, the Division observed that "[w]here regulation requires centralized decisions that can depart from the dynamic realities of the market and supplant free market processes, regulation poses a threat to competition and the ability of antitrust enforcement to fully protect consumers and innovation." In response, one roundtable participant and one commenter proposed elimination of the Federal Communications Commission's program exclusivity rules and changes to the good faith standards governing retransmission consent negotiations.[1] These proposals are entirely misplaced in the context of this roundtable. The rules do not interfere with marketplace realities or the operation of free market processes. They do not threaten competition or otherwise result in any harm to consumers. To the contrary, the proposed rule changes will result in direct and significant consumer harm by impeding the ability of local television viewers to access news and other local content that is specifically developed for their communities.

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[1] DOJ Roundtable on Anticompetitive Regulations, Submission of John Bergmayer, Senior Counsel, Public Knowledge (PK) (May 31, 2018) (PK Statement); Letter from Timothy Lee of the Center for Individual Freedom (CFIF) to Douglas Rathbun, Antitrust Division, DOJ (May 29, 2018) (CFIF Comments).

1771 N Street NW
Washington DC 20036 2800
Phone 202 429 5300
www.nab.org

I. Background

As NAB previously recounted, the history of the 1992 Cable Act and subsequent regulations demonstrate a keen awareness by the Commission and Congress that the interrelated retransmission consent, network non-duplication and syndicated programming exclusivity rules work together to "eliminate the 'artificial handicaps exacerbated by disparate regulatory treatment.'"[2] Together, these rules "promote localism and the private contractual rights of broadcasters and program suppliers and, in turn, . . . promote the broad distribution of diverse programming to the public."[3] As the Commission appropriately recognized one year ago when it declined to modify the retransmission consent framework following an extensive review, "it is clear that more rules in this area are not what we need at this point."[4] PK's and CFIF's proposals tilt the playing field even more heavily in favor of multichannel video programming distributors (MVPDs), such as AT&T, Charter Communications and DISH Network, who already possess ample bargaining power.

II. Program Exclusivity Rules Promote Viewers' Access to Local News and Information and Avoid Transaction Costs

The FCC's program exclusivity rules do not grant any exclusive rights to any party. Rather, they merely operate as an enforcement mechanism for rights privately negotiated between television broadcast stations and program suppliers. Under the rules, if a broadcast station has entered into an agreement to exclusively air programming within a certain geographic area and notifies cable operators of those agreements, cable operators are required to honor the agreements by not carrying other broadcast signals with the same programming to its subscribers.[5] The exclusivity rules were enacted as a compliment to Congress's grant of the distant signal compulsory license, which could otherwise unintentionally permit cable operators to circumvent market-negotiated exclusivity rights of stations. The rules simply

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[2] See Comments of the National Association of Broadcasters, MB Docket No. 10-71, at 56-57 (May 27, 2011) (quoting Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Report and Order, 2 FCC Rcd 2393 at ¶ 12 (1988)).

[3] *Id*. at 56, 59 ("The non-duplication and syndicated exclusivity rules themselves do not mandate program exclusivity. . . The actual terms and conditions for network non-duplication and syndicated program exclusivity are a matter of negotiated private contractual agreement between the program supplier and the local television station. Neither the Commission nor its rules provide or enforce program exclusivity provisions or arrangements not agreed to by the program supplier and the local station.").

[4] Tom Wheeler, An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules (July 14, 2016) available at https://www.fcc.gov/newsevents/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiationrules.

[5] *See* 47 C.F.R. §§ 76.92-76.95 (network non-duplication); 47 C.F.R. §§ 76.101-76.110, 76.120 (syndicated exclusivity).

allow Commission enforcement of these agreements, which helps reduce the significant transaction costs and delays that litigation would otherwise impose on all parties.

Parties that support elimination of the exclusivity rules—generally MVPDs—have suggested on various occasions that the exclusivity rules should be eliminated because they are unnecessary. PK similarly contends that there is “no need for special rules or processes” to enforce broadcasters’ bargained for exclusive rights with programmers.[6] CFIF asserts that “parties could negotiate their own versions of network non-duplication and syndicated exclusivity arrangements” and would “do a better job of negotiating agreements finely tuned to match their own particular circumstances.”[7]

The idea that exclusive rights can be easily enforced absent the rules ignores practical challenges that would make it nearly impossible to recreate the equilibrium that exists today. The lack of privity between the aggrieved station and the offending station (let alone the cable company instigator), make any attempt to prevent signal importation complex and uncertain. A broadcaster whose exclusive rights are being infringed by importation of a distant signal does not have a clear path to relief by suing anyone. Even worse, elimination of the rules means that a consumer paying for a package of MVPD programming that includes local broadcast channels would be entirely without recourse to regain access to its local signal(s) and would instead be viewing out-of-market news and public affairs content. For example:

- *Third Party Clauses*. While a local station could theoretically sue a distant station under a third-party liability clause, this approach does not address the underlying problem. Even if the station wins that lawsuit, the cable operator is not bound by the court’s decision and could continue importing distant programming. In the meantime, consumers are deprived of their local news, weather and emergency coverage, and are getting local news about some other distant community.

- *Liquidated Damages Clauses*. Some say liquidated damages clauses would solve the challenges of private enforcement. But courts disfavor liquidated damages clauses that are used as a penalty, rather than a means to provide tailored compensatory damages. Liquidated damages also are generally appropriate where monetary damages are easy to quantify, which will not be the case. Even if a court ultimately upheld a liquidated damages provision, the program supplier—not the affected local station—would be the one to receive some form of payment for the breach. And local viewers, who would continue to be unable to watch the local station via their MVPD service, would have no recourse.

Even if one of the above options was a viable replacement for the current system, all of them would introduce cost, uncertainty and complexity into a system that is functioning with

[6] PK Statement at 1-2.

[7] CFIF Comments at 3-4.

little or no expense to anyone today. In contrast, not a single party has ever identified any benefit to the public from eliminating these rules.

III. PK's Retransmission Consent Proposals Would Only Benefit Consolidated MVPDs

PK further asserts that the FCC's retransmission consent rules should ultimately benefit the public.[8] NAB agrees. But PK is not interested in a level playing field, and instead proposes a variety of limitations that would be placed only on the terms and manner of broadcasters' negotiations.[9] Because the pay TV industry has become exponentially more horizontally concentrated and vertically integrated over time, broadcasters routinely are sitting at the negotiating table with pay TV providers that are many times larger.[10] AT&T having swallowed up DirecTV and now Time Warner, Inc. is a case in point. Stations can't afford to walk away from these negotiations because they will fail to reach most of their local audiences, harming their principal revenue source—advertising.[11] Stations also are dependent on retransmission consent compensation to help them address the rising costs of producing original local news and public affairs content, and the increasing costs associated with developing and acquiring high-quality network and syndicated programming.

With their increasing local, regional and national consolidation, large market capitalizations and ability to earn revenue from multiple business lines (e.g., selling video, broadband, voice via fiber or wireless to consumers; selling programming to other pay TV providers),[12] MVPDs don't need the government's assistance to effectively negotiate retransmission consent with broadcast stations. Rather, the current system is an effective model of a functioning,

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[8] PK Statement at 3.

[9] *Id.*

[10] *See, e.g.,* NAB Comments in MB Docket No. 15-216 at 17 (Dec. 1, 2015) (NAB Retransmission Consent Comments)(the top four MVPDs control 79 percent of the MVPD market, as compared to only 50.5 percent in 2002); *id.* at 18-19 (large MVPDs dwarf even larger broadcast groups, with AT&T's market capitalization 201 times larger than that of Scripps and Nexstar); NAB Reply Comments in MB Docket No. 15-158 at 2-5 (Sept. 15, 2015); NAB Comments in MB Docket No. 15-158 at 16-21 (Aug. 21, 2015).

[11] NAB Retransmission Consent Comments at 16 (observing that Charter would control 40 percent or more of the MVPD market in 112 Nielsen Designated Market Areas following its merger with Time Warner Cable); *id.* at 20-22 ("due to continuing consolidation, there are often only one or two dominant MVPDs, each serving a high proportion of TV households in many local markets").

[12] NAB Retransmission Consent Comments at 21 ("most MVPDs today enjoy a dual gatekeeper role, as both a multichannel video and broadband provider" making them even more powerful bottlenecks today than they were at the time of the 1992 Cable Act).

market-based system that produces real benefits to the public.

IV. Conclusion

The retransmission consent, network non-duplication and syndicated exclusivity rules are neither outdated, unnecessary nor unduly burdensome, and modifying them would not be deregulatory. On the contrary, this trio of inter-related rules ensures that broadcasters have the ability to engage in free-market negotiations with MVPDs to retransmit their signals as Congress intended. Moreover, the exclusivity rules are model regulations, as they serve to eliminate unnecessary transaction costs on parties operating in the marketplace. By ensuring that parties can come to the FCC to resolve disputes, these rules eliminate wasteful spending on protracted litigation with little cost in terms of time or expense for anyone.

Respectfully submitted,

Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs