pillsbury

Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street NW | Washington, DC20036-3006 | tel2026638000 | fax 2026638007

Scott R. Flick
tel: 202.663.8167
scott.flick@pillsburylaw.com

September 9, 2015

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

Re: Notice of Ex Parte Communication, MB Docket No. 10-71[1]

Dear Ms. Dortch:

On August 31, 2015, the following members of the Texas Association of Broadcasters ("TAB"), along with Pillsbury attorneys Scott R. Flick and Jessica Nyman, met with the FCC representatives listed in Exhibit A to discuss the Commission's proposed elimination of the network non-duplication and syndicated exclusivity rules (the "Exclusivity Rules"):

- **Oscar Rodriguez**—TAB President
- **Roger Bare**—KDAF-TV, Dallas, Texas and KIAH-TV, Houston, Texas
- **Amie Hudspeth**—KAVU-TV/KVCT, Victoria, Texas
- **John Kittleman**—KRGV-TV, Rio Grande Valley, Texas
- **Jerry Martin**—KPRC-TV, Houston, Texas
- **Julie Pruett**—Regional Manager of Nexstar Broadcasting Group (formerly with KFDX-TV, Wichita Falls, TX)
- **John Seabers**—WOAI-TV, San Antonio, Texas
- **Patrick Stacey**—KLTV, Tyler, Texas
- **John Treviño**—KXTX-TV, Fort Worth, Texas

In each of these meetings, the TAB urged the Commission to preserve the Exclusivity Rules, noting that these rules elegantly and with minimal governmental resources or intervention promote a number of the Commission's fundamental objectives, not the least of which is localism. Each of the members of the TAB delegation presented real-world examples of how importation of distant signals will directly harm and confuse local audiences that depend on timely and accurate information from their local stations—information that will not be available on an

[1] This filing is timely pursuant to the Commission's Public Notice, *Certain FCC Databases Will Be Unavailable and Filing Deadlines Will Be Extended in Early September to Accommodate a Significant FCC IT Upgrade*, DA 15-940 (rel. Aug. 20, 2015).

imported distant signal—and affect local businesses and political candidates, who depend on local TV stations to cost-effectively reach those audiences. By ensuring the viability of local broadcast stations and the uniquely local services they provide, the Exclusivity Rules protect local economies while promoting the FCC's statutory mandate to ensure and foster a robust system of local broadcast service.

In its meetings, the TAB noted that the only reasons the FCC has provided for eliminating the Exclusivity Rules—that they are old and ostensibly unnecessary on the theory that parties can accomplish a similar result via contractual rights enforced in the courts—are legally and factually insufficient to support elimination of these rules.

The Exclusivity Rules Are Hardly Outdated, and in Fact, More Vital Than Ever.

The TAB fully agrees that all rules should be subject to regular review to ensure they continue to serve the public interest, and the Exclusivity Rules should not be exempt from such a review. However, even a cursory examination reveals that these rules continue to serve an important purpose and in fact have become more important as competing programming sources increasingly rely on their own program exclusivity to compete for audiences and advertisers.

That a rule is old of course has no bearing on its efficacy, and the Further Notice of Proposed Rulemaking ("FNPRM")[2] implicitly acknowledges the validity of the rules' objectives by suggesting that the reason to eliminate them is not that the rules themselves are flawed in any way, but that their objectives can be achieved via private contracts enforced in the courts. As discussed below, that is a factually incorrect assumption with no legal basis.

There Is No Contractual Alternative to the Exclusivity Rules.

Note that the above statement is not a qualified one. As the TAB noted in its meetings, the problem is not just that enforcing contractual exclusivity is more costly, less efficient, and more time-consuming—it is all of those things—but that enforcing a station's program exclusivity against cable signal importation contractually is simply impossible. The Commission has failed to demonstrate how any contractual arrangement could even imperfectly replace the Exclusivity Rules, and lacking that, the FCC has no basis for even contemplating replacement of the Exclusivity Rules with a contractual regime.

---

[2] *Amendment of the Commission's Rule Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 03351 (2014).

First, even accepting as a truism (as the FNPRM does) that private contracts are an alternative, you would still retain the Exclusivity Rules. Eliminating a uniform national exclusivity standard governed by a single expert agency that has never had to expend significant resources enforcing it, and replacing it with a miasma of varying exclusivity zones and contractual clauses, enforced at great expense in a variety of courts inexperienced with the highly complex interplay of Copyright Law and TV Retransmission Consent Law, makes little sense. It's not just that conflicting rulings and extended appeals would occur (they would); it's that rulings from different courts based on different contract clauses would provide little useful precedent, resulting in yet more litigation, forum shopping, and uncertainty.

Such an approach is not just inefficient and harmful to the litigants; it is an inefficient use of government resources. Given that the FCC is expending more of its resources on conducting this rulemaking than it has likely expended in a decade of enforcing the Exclusivity Rules,[3] burdening courts, TV stations, and cable operators with the cost of building a new body of precedent in what will be a novel area of law is inefficient in the extreme for government, and a diversion of station resources from serving the public. It also will not—as seems to be the unspoken assumption—lower cable subscriber fees, as the cost of such inefficient litigation can only ultimately come from one source: the public.

Second, as noted above, such litigation cannot achieve through alternate means the objective of the Exclusivity Rules. There are two independent reasons for this, which the TAB discussed at its meetings:

A. TV Stations Cannot Contractually Block Importation of a Distant TV Station.

A TV station's contract with a network or other program supplier providing for local exclusivity provides the station with enforcement rights only against that network. No other entity is a party to that contract and therefore no other entity is bound by its terms. As a result, if a station were to bring a legal action against its network, it would need to allege that the network breached the contract by entering into an agreement that conflicts with the station's geographic exclusivity. In the context of a violation of the Exclusivity Rules, no such breach has occurred; the network's contract with the distant station being imported correctly limits the distant station to carriage of the network's programming only in that distant market. The local TV station therefore has no legal remedy available against its network, much less against the distant station being imported or the cable system importing it.

---

[3] *See* FNPRM ¶ 66 n.249.

In most cases, that will be the end of it, with the local station having no contractual right a court could recognize to prevent importation of another station duplicating its exclusive programming. But let's assume for the moment that the network, even though it is not in breach, decides to enter the fray to assist the local station in protecting its exclusivity. The network brings pressure to bear upon the distant station, including a legal action asserting that the distant affiliate breached its network contract by signing a retransmission agreement that doesn't explicitly limit retransmission to that station's DMA. The network can arguably win a damages award for breach of contract against the distant station, but that does nothing for the local station being imported upon, and certainly does not replicate in any way the protection currently provided by the Exclusivity Rules. Meanwhile, the cable system suffers no consequences for the damages its strategy is causing to the local station, the distant station, and the public in both markets.

So, even with the network's involvement, contracts provide the local station with no protection against cable importation of the network programming. But let's assume the network is so incensed that it puts immense business pressure on the distant station, or in fact sues the distant station for injunctive relief. In either case, the network demands that the distant station prevent the cable system from retransmitting that station's signal into another market. Even if an injunction were issued against the distant station, however (which is doubtful given that it would solve a breach of the network agreement by requiring a breach of the retransmission agreement), the distant station has no method of stopping the retransmission. That is because the agreement regarding retransmission *of its signal* is enforceable even though the station doesn't have the rights to the programming *in* that signal outside of its local area.[4]

As a legal matter, the distant station therefore has no power to prevent the retransmission of its signal once it has signed the retransmission agreement. As a practical matter, there is no physical way of stopping the retransmission either, because the distant station has no way of cutting off its signal to the cable operator short of going off the air entirely (and depriving its home market of service). The cable operator can just pick the signal up over-the-air. The result is that the die was cast the moment the distant station improvidently signed the retransmission agreement. At that point, there is no contractual way (or even a physical way) of preventing retransmission of the signal and its programming into another affiliate's market.

---

[4] See *Nexstar Broadcasting, Inc. v. Time Warner Cable, Inc.*, 524 Fed. Appx. 977, 978 n.1 (5th Cir., 2013).

So even if a local station could use contracts and courts to compel cooperation of its network/program supplier AND the distant station (which of course it can't), or if the network and distant station wanted to fully cooperate with the local station, they could still not prevent the exportation of the distant station's signal.[5]

Given that there would be no legal or physical way to prevent distant retransmission of the station's signal, the only possible solution for preventing retransmission of the exclusive programming *in* that signal is for the network/program supplier to declare breach, terminate the program contract, and thereby deprive the station, the retransmitting cable system, and the entirety of the distant station's market of that programming—a drastic and disruptive solution that protects program exclusivity in one market by depriving another market of that programming entirely—hardly a good result for the public.

Alternatively, the FCC could merely retain its "outdated" Exclusivity Rules and avoid all of this.

B. *The Commission's Rules Specifically Prevent a Contractual Exclusivity Approach in Any Event.*

As the above illustrates, there is no contractual substitute, imperfect or otherwise, for the Exclusivity Rules, and that should be the end of the analysis. The Exclusivity Rules are critical to a system of local broadcasting, and alternative enforcement mechanisms are not merely costly and inefficient, but entirely unavailable.

Even if that were not the case, however, there is another impediment—the FCC itself.

In the alternate contractual dimension dreamt of in the FNPRM, TV stations and program suppliers would negotiate the terms of their program arrangement, including the extent of geographic exclusivity, unfettered by the Commission, and somehow be able to enforce those contractual rights against unrelated third parties in court. As the FNPRM states:

> We note that upon elimination of our exclusivity rules, free market negotiations between broadcasters and networks or syndicated program suppliers would continue to determine the exclusivity terms

---

[5] *See id.* (denying Nexstar's motion for preliminary injunction seeking to prevent Time Warner's importation of Nexstar's signals into a distant market where the affiliation agreement prohibited distant retransmission and such importation infringed on the local affiliate's exclusivity).

> of affiliation and syndicated programming agreements, and broadcasters and MVPDs would continue to conduct retransmission consent negotiations in light of these privately negotiated agreements, but without Commission intrusion in the form of a regulatory enforcement mechanism.[6]

There is a fundamental problem with this vision—the FCC forbids it.

Section 73.658(b) of the Commission's Rules states:

> No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders … another broadcast station located in a different community from broadcasting any program of the network organization.

This rule is not even mentioned in the Commission's FNPRM in this proceeding. By preventing, however, a station from contracting with its network for exclusivity throughout its DMA, the FCC has left the station unable to contractually obtain, much less enforce, its program exclusivity beyond the city limits of its community of license. As a result, the Commission's Exclusivity Rules represent the ONLY form of program exclusivity the FCC allows a station beyond its city limits.

To put that in a real-world context, imagine being the licensee of station KAZD(TV) in Lake Dallas, Texas. The Commission's Rules prohibit you from contracting with your network for exclusivity beyond the 7,337 residents of Lake Dallas[7] itself, arbitrarily making you the only form of media prohibited from contracting for program exclusivity for the entire Dallas-Ft. Worth DMA and its **7.3 million residents**.[8]

For the FNPRM to suggest eliminating the Exclusivity Rules because they can be replaced by contracts, while simultaneously prohibiting stations from entering into such contracts, is disingenuous. More important, the linchpin of this entire

---

6 FNPRM ¶ 66.

7 *See* U.S. Census Bureau, Lake Dallas (city), Texas, http://quickfacts.census.gov/qfd/states/48/4840516.html (last visited Sept. 9, 2015).

8 *See* NIELSEN, LOCAL TELEVISION MARKET UNIVERSE ESTIMATES (2015), *available at* http://www.nielsen.com/content/dam/corporate/us/en/docs/solutions/measurement/television/2015-2016-dma-ranks.pdf. Nielsen's TV Households count equates to approximately 7.3 million residents. *See* DMNMedia, *About North Texas*, http://dmnmedia.com/resources/about-north-texas/ (last visited Sept. 9, 2015).

proceeding—the notion that stations are free to contract for exclusive program rights like other media—is demonstrably false. The alternative upon which the FCC is attempting to rely is entirely illusory.

Thus, the claim that eliminating the Exclusivity Rules "takes [the FCC's] thumb off the scales and leaves the scope of such exclusivity to be decided by the parties"[9] is not only false, but ignores the fact that the FCC already has both feet planted firmly on the opposite side of that scale by prohibiting such freedom of contract.

Where a contractual exclusivity approach enforced through the courts cannot even begin to achieve the objectives of the Exclusivity Rules, and the FCC's Rules explicitly prohibit even attempting such an effort, the notion of eliminating the Exclusivity Rules is extremely misguided. Such a proposal attacks the very essence of local broadcast service, and is harmful to the public that relies on that service—both over-the-air and via retransmission by MVPDs.

Premising Elimination of the Exclusivity Rules on the Assumption That No TV Station Will Grant Retransmission Rights Outside of Its DMA Is Misguided.

The FNPRM states:

> We further note that, given the prohibition on unauthorized retransmission of broadcast stations, a distant station would have to agree to be imported in such circumstances and that contractual arrangements between networks and their affiliates may bar a broadcaster from agreeing to the importation of its distant signal.[10]

As discussed above, however, whether a station's network affiliation agreement bars exportation of the programming to other markets is irrelevant, and has no bearing on the legal ability of a local station to block such importation in the absence of the Exclusivity Rules. The assertion that importation is unlikely because "a distant station would have to agree to be imported" is equally flawed.

First, the contractual default goes the other direction. A retransmission agreement isn't limited to the local DMA in the absence of language specifically extending retransmission rights to other DMAs; a retransmission agreement is

---

[9] Official FCC Blog, FCC Chairman Tom Wheeler, *Upgrading Media Rules to Better Serve Consumers in Today's Video Marketplace* (Aug. 12, 2014), https://www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace.

[10] FNPRM ¶ 58.

geographically unlimited unless language is specifically inserted restricting the geographic extent of retransmission consent. So, for example, a TV station signing a retransmission agreement that states "Station hereby grants retransmission consent for Cable Operator to retransmit the Station on its systems" has just granted nationwide retransmission rights.[11] In the absence of Exclusivity Rules, that station can now be imported into every DMA in the country by that cable operator, and no local station could prevent it. MVPDs are well aware of this, and present stations with contracts containing just such language (and more camouflaged versions of it) to see if the broadcaster catches it.

Which brings us to the second point: it only takes a single station in the entire United States to wipe out the program exclusivity of every other station carrying the same programming in the absence of exclusivity rules. Would any other business be satisfied with local exclusivity over a product line that is only effective until someone else unilaterally decides to sell it in your market? There is a word for such exclusivity; that word is "worthless".

Third, a great many stations negotiate and sign retransmission agreements without counsel, and a great many more do so without counsel experienced in retransmission contracts. As a result, the question is not whether one station will sign an open-ended retransmission agreement, but how many stations will do so.

Fourth, even if every station in the country was very careful about the language in its retransmission agreements, an MVPD just has to separate one small station from the herd by demanding that contract language and blacking out the station until it has no choice but to buckle. The Commission could unrealistically claim that such a station should file a Good Faith complaint with the FCC, but the economic reality is that if such a station can't afford the legal costs and advertising losses from even a short blackout by the MVPD, it certainly can't withstand the cost and delay of a Good Faith violation proceeding. If only one out of every 200 TV stations buckles under such pressure, the MVPD has succeeded in obtaining its nationwide source of programming to export to other markets.

Finally, it has been suggested that perhaps a station's network could police all affiliates' retransmission agreements to ensure no affiliate accepts terms that could violate the network's affiliation contract. However, the confidentiality clauses demanded by MVPDs in retransmission agreements prohibit disclosure of any terms of the agreement, much less review by a third party, and MVPDs are increasingly

---

[11] *See, e.g.*, *Nexstar*, 524 Fed. Appx. at 979-80 ("The RCA broadly defines 'System' to mean all Time Warner Systems—it does not limit the term to only those Time Warner Systems servicing the relevant local television markets").

asking for confidentiality clauses that specifically name the network as a party prohibited from being given access to any terms of the retransmission agreement. Regardless, such an approach would be extremely impractical ("I can't sign this agreement until I hear back from my network and they say it's okay"), and is a *per se* violation of the FCC's Good Faith rule since a station is required to "designate a representative with authority to make binding representations on retransmission consent"[12] and can't do so if the agreement has to be reviewed and approved by a third party before any binding commitment can be made.

The Exclusivity Rules Should Be Retained.

There can be no doubt that the Exclusivity Rules serve an important purpose in preserving local broadcast outlets and promoting local service that no distant stations can provide. The FNPRM effectively concedes this, focusing instead on whether these same results could be achieved through private contracts. They cannot, and even were that not the case, Section 73.658(b) blocks TV stations from pursuing that path.

Importation of distant signals, and even the threat of importation, will harm localism. When a local station's audience is split between that station and an imported station carrying the same programming, viewers are confused, local businesses are harmed, and local station ratings and revenue are reduced, resulting in diminished funds for local news and other programming. Asking stations to expend these already reduced resources in the courts trying to stop such importation only further diverts station resources from service to the public.

Retaining the Exclusivity Rules elegantly eliminates all of these problems while also conserving Commission resources, as the resources expended on enforcing the Exclusivity Rules are paltry compared to those the Commission would need to expend processing the resulting Good Faith violation complaints.

Why? Because the very definition of bad faith is an MVPD claiming it has obtained the right to export programming to other markets from a TV station that it knows full well never had those rights to give to it in the first place. MVPDs complaining about the Exclusivity Rules are akin to the person who claims he bought the Brooklyn Bridge from a street vendor and is now incensed that the government refuses to let him charge a toll for crossing "his" bridge.

[12] 47 C.F.R. § 76.65(b)(1)(ii).

The TAB is hopeful that the Commission will give these points deep consideration and maintain the Exclusivity Rules, which are integral to the preservation and viability of local television.

Sincerely,

/s/

Scott R. Flick

cc:
Maria Kirby
Jessica Rosenworcel
Valery Galasso
Robin Colwell
Mignon Clyburn
Chanelle Hardy
Alison Nemeth
Nancy Murphy
Mary Beth Murphy
Steven Broeckaert
Kathy Berthot

EXHIBIT A

10:00 am	Maria Kirby, Media Legal Advisor to Chairman Tom Wheeler
11:00 am	Commissioner Jessica Rosenworcel Valery Galasso, Media Policy Advisor
11:30 am	Robin Colwell, Chief of Staff and Senior Media Legal Advisor to Commissioner Michael O'Rielly
1:00 pm	Commissioner Mignon Clyburn Chanelle Hardy, Chief of Staff and Media Legal Advisor
2:00 pm[13]	Alison Nemeth, Media Legal Advisor to Commissioner Ajit Pai
2:30 pm[14]	Nancy Murphy, Media Bureau, Associate Bureau Chief Mary Beth Murphy, Media Bureau, Policy Division Chief Steven Broeckaert, Media Bureau, Policy Division Senior Deputy Division Chief Kathy Berthot, Media Bureau, Policy Division

[13] Roger Bare did not attend this meeting.

[14] Roger Bare and John Kittleman did not attend this meeting.