FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

November 10, 2015

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Feinstein:

Thank you for your recent correspondence regarding the impact that the Commission's proposal to eliminate existing non-duplication and syndication exclusivity rules will have on consumers. Your views will be entered into the record of both our ongoing retransmission consent and exclusivity proceedings.

Congress instructed the Commission in the Satellite Television Extension and Localism Act Reauthorization Act (STELAR) to open a proceeding to examine the "totality of circumstances" involved in retransmission consent negotiations. The purpose of this proceeding, which is ongoing at the Commission, is to examine both forces that act to drive up cable rates, as well as the ability of consumers to fairly access video programming. An integral part of any review of the retransmission consent regime is consideration of the Commission's exclusivity rules.

As you are aware, consumers are often the victims of retransmission disputes. Frequent press accounts have highlighted that the negotiations between broadcasters and cable operators over retransmission rights often result in program blackouts where cable consumers are denied the ability to see a particular channel until the dispute is resolved. The Commission's exclusivity rules serve to exacerbate this problem for consumers by prohibiting the importation of distant signals, as well as strengthen the position of broadcasters in retransmission disputes, thereby constituting a distortion of free market processes.

In the early days of the cable industry, cable companies often supplemented their programming with signals imported from distant broadcasters. Congress provided a compulsory copyright license for the programming carried on the distant signals with an important condition: that the signals and their constituent programming would only be covered by the compulsory license if the importation of the distant signals were consistent with FCC rules. This statutory provision, codified at 17 U.S.C. 111 and 119, is the reason that the FCC exclusivity rules have any relevance today.

A great deal has changed since the compulsory copyright law was enacted. Two things seem especially relevant: private contracts between and among programmers, networks, and broadcasters typically include exclusivity provisions; and, in 1992, Congress passed retransmission consent legislation giving broadcasters the right to negotiate with cable and DBS companies over the right to transmit their signals.

There are many who argue that retransmission fees drive up consumers' cable bills without any corresponding benefit. Indeed, some broadcasters have told Wall Street they expect continuing double digit increases in the retransmission fees they charge cable companies. These fees, of course, are ultimately paid by consumers.

An elimination of the exclusivity rules is unlikely to have an immediate effect on programmers, broadcasters, cable companies, or consumers. This is because, as noted, current broadcast program contracts and network affiliation agreements normally contain their own exclusivity provisions prohibiting a program from being imported into a market if it is being shown on a local broadcast station. In these circumstances, retaining the exclusivity provisions may well be redundant and a federal intrusion, without cause, into the marketplace.

Faith in the free market would suggest that government get out of the way, absent an indication of harm. Since the rules appear redundant to existing contractual provisions based on the record, their elimination would not be the trigger for such harm. However, the presence of the exclusivity rules prohibits the market from operating in a fair and efficient manner and aggravates the harm to consumers during retransmission consent disputes. Simply put, there is a possibility that the exclusivity rules protect broadcasters from the marketplace by substituting an anti-market government mandate and in the process contribute to high cable and DBS prices.

I appreciate your thoughtful input on this issue. I am sure it will continue to be discussed as we pursue Congress's mandate on retransmission consent negotiations.

Sincerely,

Tom Wheeler