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BROADCAST EXCLUSIVITY RULES

Effects of Elimination Would Depend on Other Federal Actions and Industry Response

Accessible Version

GAO-15-441

GAO Highlights

Highlights of GAO-15-441, a report to congressional requesters

BROADCAST EXCLUSIVITY RULES

Effects of Elimination Would Depend on Other Federal Actions and Industry Response

Why GAO Did This Study

Local television stations negotiate with content providers—including national broadcast networks, such as ABC—for the right to be the exclusive provider of content in their markets. FCC's network non-duplication and syndicated exclusivity rules ("exclusivity rules") help protect these contractual rights. In 2014, FCC issued a further notice of proposed rulemaking (FNPRM) to consider eliminating or modifying the rules in part to determine if the rules are still needed given changes in recent years to the video marketplace.

GAO was asked to review the exclusivity rules and the potential effects of eliminating them. This report examines (1) industry stakeholder views on the need for and effects of the exclusivity rules and (2) the potential effects that removing the exclusivity rules may have on the production and distribution of content, including local news and community-oriented content.

GAO reviewed all 31 comments filed by industry stakeholders with FCC in response to its FNPRM. GAO also interviewed 27 of those industry stakeholders and FCC officials. GAO also analyzed—in light of general economic principles—stakeholder views on the potential effects of eliminating the rules.

FCC reviewed a draft of this report and provided technical comments that GAO incorporated as appropriate.

View GAO-15-441. For more information, contact Mark Goldstein at (202) 512-2834 or goldsteinm@gao.gov.

What GAO Found

Broadcast industry stakeholders that GAO interviewed (including national broadcast networks, such as ABC, and local television stations) report that the exclusivity rules are needed to protect local television stations' contractual rights to be the exclusive providers of network content, such as primetime dramas, and syndicated content, such as game shows, in their markets. These stakeholders report that by protecting exclusivity, the rules support station revenues, including fees from cable operators paid in return for retransmitting (or providing) the stations to their subscribers (known as retransmission consent fees). Conversely, cable industry stakeholders report that the rules limit options for providing high-demand content, such as professional sports, to their subscribers by requiring them to do so by retransmitting the local stations in the markets they serve. As a result, these stakeholders report that the rules may lead to higher retransmission consent fees, which may increase the fees households pay for cable service.

Based on GAO's analysis of industry stakeholder views, expressed in comments to the Federal Communications Commission (FCC) and interviews, eliminating the exclusivity rules may have varying effects.

- If the rules were eliminated and cable operators can provide television stations from other markets to their subscribers (or "import" a "distant station"), local stations may no longer be the exclusive providers of network and syndicated content in their markets. This situation could reduce stations' bargaining position when negotiating with cable operators for retransmission consent. As a result, stations may agree to lower retransmission consent fees. This potential reduction in revenues could reduce stations' investments in content, including local news and community-oriented content; the fees households pay for cable television service may also be affected. Because multiple factors may influence investment in content and fees, GAO cannot quantify these effects.
- If the rules were eliminated, other federal and industry actions could limit cable operators' ability to import distant stations. For example, if copyright law was amended in certain ways, cable operators could face challenges importing distant stations. A cable operator could be required to secure approval from all copyright holders (such as the National Football League) whose content appears on a distant station the cable operator wants to import; with possibly hundreds of copyright holders in a day's programming, the transaction costs would make it unlikely that a cable operator would import a distant station. Also, broadcast networks may be able to provide oversight of retransmission consent agreements if FCC rules were to allow it. Cable operators may only import distant stations if retransmission consent agreements with those stations permit it, and stations' agreements with broadcast networks generally prohibit stations from granting such retransmission. If FCC rules allowed it, broadcast networks could provide oversight to help ensure such agreements do not grant retransmission outside the stations' local markets. Under these two scenarios, local stations may remain the exclusive providers of content in their markets, their bargaining position may remain unchanged, and there may be limited effects on content and fees for cable service.

Contents

Abbreviations

DMA	designated market areas
FCC	Federal Communications Commission
FNPRM	further notice of proposed rulemaking
MVPD	multichannel video-programming distributor
NFL	National Football League
TWC	Time Warner Cable

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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April 14, 2015

The Honorable Fred Upton
Chairman
The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

The Honorable Greg Walden
Chairman
The Honorable Anna G. Eshoo
Ranking Member
Subcommittee on Communications and Technology
Committee on Energy and Commerce
House of Representatives

Local television stations often provide national content, such as national news and primetime dramas, and local content, such as local news and emergency alerts, over the air to the public. Many of these stations are affiliated with national broadcast networks, such as the "top four" networks—ABC, CBS, Fox, and NBC. Despite the availability of free over-the-air content, about 85 to 90 percent of U.S. households pay for and receive television service from a multichannel video programming distributor (MVPD), such as a cable or satellite operator, which provides a secondary transmission (or retransmission) of local television stations' content, as well as transmission of cable networks unavailable over the air. Local television stations generally obtain the exclusive right to air content in their local markets through negotiations and contracts with national broadcast networks that supply national news and sports and primetime shows, and syndicators that provide content such as game shows and reruns. The Federal Communications Commission's (FCC) network non-duplication and syndicated exclusivity rules (exclusivity rules) help local television stations enforce these exclusive rights, in part by requiring cable operators[1] to block duplicative network and syndicated

[1]FCC's exclusivity rules apply equally to cable operators and open video system operators. For the purposes of this report, we refer to both as "cable operators." However, FCC's rules generally do not apply to satellite operators such as Dish Network; satellite operators are subject to similar restrictions under copyright law.

content; specifically, cable operators must block duplicative content when they retransmit the signal of a television station from another market (a "distant market") in a local station's market. For example, if a cable operator retransmits (or "imports") WTVR, the CBS affiliate in Richmond, Virginia, in Washington, D.C., the exclusivity rules allow WUSA, the CBS affiliate in Washington, to require the cable operator to block the duplicate national CBS and syndicated content as long as WUSA has received rights from CBS and the providers of syndicated content to be the exclusive provider of such content in the Washington, D.C. market and has appropriately invoked those rights.[2]

In 2014, FCC issued a further notice of proposed rulemaking (FNPRM) to consider eliminating or modifying the exclusivity rules,[3] in part to determine if the rules are still needed given changes to the video marketplace since the rules were first promulgated in 1966 (network non-duplication rule)[4] and 1972 (syndicated exclusivity rule).[5] You asked us to review FCC's exclusivity rules and the potential effects of removing them. This report examines (1) industry stakeholder views on the need for and effects of the exclusivity rules and (2) the potential effects that removing the exclusivity rules may have on the production and distribution of content, including local news and community-oriented content.

[2]In this example, the exclusivity rules allow other stations in the Washington, D.C. market to require the cable operator to block syndicated content on WTVR that duplicates syndicated content they broadcast. In order to invoke their exclusivity protections, local television stations must provide written notification, within 60 days of signing an affiliation agreement or contract providing exclusive content, to each cable operator in their market notifying them that they are exclusive providers of network and syndicated content and informing the cable operator that it cannot show duplicative content from another television station in their market. 47 C.F.R. §§ 76.94, 76.105.

[3]Any potential elimination of the exclusivity rules would not address the similar restrictions that apply to satellite operators under copyright law. *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).

[4]*See Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay TV Signals to Community Antenna Systems and Other Amendments, Second Report & Order, 2 FCC 2d 725* (1966).

[5]*See Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals and Other Amendments*, Cable Television Report and Order, 36 FCC 2d 141 (1972).

To address these objectives, we reviewed and analyzed all public comments submitted by industry stakeholders in response to FCC's FNPRM regarding the potential elimination or modification of the exclusivity rules. Our review included 31 formal comments filed by industry stakeholders that included cable and satellite operators, national broadcast networks, local television stations, industry associations, and content copyright holders.[6] We analyzed these comments, focusing on stakeholder views on the need for and effects of the rules and the potential effects of eliminating the rules. We also conducted semi-structured interviews with 27 industry stakeholders, including broadcasters, cable and satellite operators, industry associations, and content copyright holders that filed comments with FCC regarding these issues.[7] We interviewed FCC officials regarding the rules. We also interviewed industry analysts that study the broadcasting and cable industries; we selected industry analysts by identifying analysts who study and make recommendations on the stocks of publicly traded companies that we interviewed as part of our review and whom we had interviewed on prior engagements. We reviewed prior GAO reports that cover related issues. We also conducted a literature search and did not find any studies directly relevant to our work. For our second objective, in addition to gathering information about industry stakeholders' views, we also analyzed those views in light of general economic principles to understand more fully the potential effects of eliminating the exclusivity rules. For more information on our scope and methodology, see app. I.

We conducted this performance audit from October 2014 through April 2015 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

[6] We did not review reply comments or letters filed by individuals.

[7] We attempted to interview at least one industry stakeholder representing the 31 public comments filed; 4 stakeholders did not respond to our request for interviews.

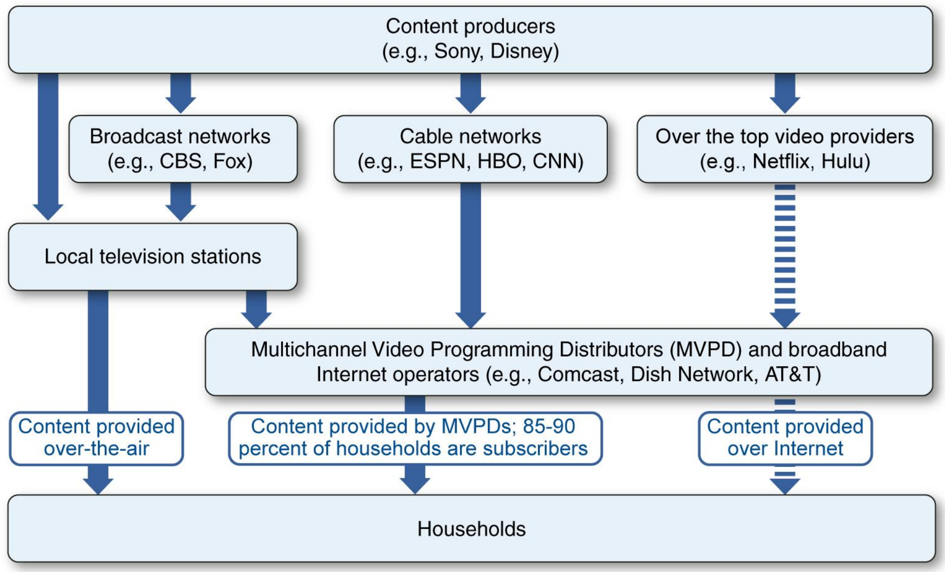
Background

Flow of Television Content

Many entities are involved in the production and distribution of television content to households, as shown in figure 1. Local television stations may acquire network content from the national broadcast networks that they are affiliated with, such as CBS; from syndicators for syndicated content, such as game shows and reruns; or from both.[8] Stations also create their own content, including local news. Stations provide content to households directly through over the air transmission, which households can receive free of charge, and through retransmission by MVPDs, such as cable and satellite operators. Content producers, such as Sony and Disney, also distribute content through cable networks, such as ESPN, that are carried by MVPDs. “Over-the-top” providers, such as Netflix, provide content to consumers through Internet connections often provided by MVPDs.

[8]In this report, we only consider commercial local television stations; some stations are noncommercial, such as those affiliated with the Public Broadcasting System. Commercial stations can be affiliated with a national broadcast network, such as ABC, or independent, that is, not affiliated with a network. Those stations affiliated with a national broadcast network enter affiliation agreements with the network. Broadcast networks own and operate some local television stations. For example, CBS owns and operates 16 local television stations, including those in Atlanta, New York, and Pittsburgh. Under federal law, a single entity can own any number of television stations nationwide as long as the stations collectively reach no more than 39 percent of national television households. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629,118 Stat. 3, 99 (2004).

Figure 1: Broadcasting Industry Participants and Flow of Television Content



Source: GAO. | GAO-15-441

According to FCC, local television stations' affiliation agreements with networks and contracts with syndicators[9] generally grant a station the right to be the exclusive provider of that network's or syndicator's content in the station's local market.[10] Broadcasting industry stakeholders and economic theory note that exclusive territories can provide economic benefits to local television stations, broadcast networks, and viewers. Local television stations benefit from being the exclusive providers in their markets of high-demand network content, such as professional sports and primetime dramas. Being the exclusive provider supports stations' viewership levels, which strengthens their revenues, allowing them to invest in the production of local content, among other things. For broadcast networks, exclusivity can help increase the value of each local

[9]In this report, we consider both affiliation agreements with national broadcast networks and contracts with syndicators to be contracts.

[10]Television markets are typically defined by designated market areas (DMA). To measure television viewing, Nielsen Media Research has divided the country into 210 local television markets, also referred to as DMAs. Each DMA consists of all the counties whose largest viewing share is given to stations of the same market area.

station and create efficiencies in the distribution of network content. Thus, while exclusive territories reduce competition between some stations (e.g., local NBC stations in different geographic markets do not compete), the exclusive territories could provide incentives for stations to invest more heavily in the development of content and thus promote greater competition between stations in the same geographic market (e.g., local ABC and NBC stations in the same market compete), which can benefit viewers.

Exclusivity Rules and Related Rules and Laws

FCC's exclusivity rules are an administrative mechanism for local television stations to enforce their exclusive rights obtained through contracts with broadcast networks and syndicators.

- *Network non-duplication*. This rule protects a local television station's right to be the exclusive provider of network content in its market. FCC promulgated the rule in 1966 to protect local television stations from competition from cable operators that might retransmit the signals of stations from distant markets. FCC was concerned that the ability of cable operators to import the signals of stations in distant markets into a local market was unfair to local television stations with exclusive contractual rights to air network content in their local market. The rule allows exclusivity within the area of geographic protection agreed to by the network and the station, so long as that region is within a radius of 35 miles—for large markets—or 55 miles—for small markets—from the station (see fig. 2).[11]

[11]There are some limited exceptions. For example, the network non-duplication rule does not apply to distant signals that are "significantly viewed," within a given market. FCC publishes a list of stations that are deemed to be significantly viewed outside their DMA.

Figure 2: Examples of the Network Non-Duplication Rule Area of Exclusivity for Small and Large Markets

Sources: GAO and Map Resources. | GAO-15-441

Note: Stations in large markets have a 35-mile area of exclusivity; stations in small markets have a 55-mile area of exclusivity.

- *Syndicated exclusivity*. This rule protects a local television station's right to be the exclusive provider of syndicated content in its market. FCC first promulgated the rule in 1972 to protect local television stations and ensure the continued supply of content.[12] This rule applies within an area of geographic protection agreed to by the syndicator and the station, so long as that region is within a 35-mile radius from the station.

The exclusivity rules—when invoked by local television stations—require cable operators to block duplicative content carried on a distant signal imported into the station's protected area by cable operators. For example, these rules allow WJZ, the CBS-affiliated local television station in Baltimore, to prohibit a cable operator from showing duplicative network content on another market's CBS station that the cable operator imports into Baltimore. Similarly, the rules allow WJZ to prohibit a cable operator from showing any duplicated syndicated content on any other market's station the cable operator imports into Baltimore. Local television stations are able to invoke the exclusivity rules regardless of whether their signals are retransmitted by a cable operator or not. For example, even if WJZ is not retransmitted by a particular cable operator in Baltimore, WJZ can invoke its exclusivity rights against that cable operator, requiring it to block duplicative content.[13] FCC has statutory authority to administratively review complaints of violation of these rules (e.g., if a local television station believes a cable operator imported a distant signal into its market even though the station invoked its exclusivity protections) when such complaints are formally brought before the Commission. FCC officials said that the Commission addresses such complaints on a case-by-case basis.

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[12]FCC repealed the syndicated exclusivity rule in 1980, stating that doing so would have negligible impact on local television stations. *See Cable Television Syndicated Program Exclusivity Rules; Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, Report and Order*, 79 FCC 2d 663, 734 (1980). However, FCC reinstated the rule in 1988 stating that the analysis underlying the repeal of the rule was flawed. *Amendment of Parts 73 & 76 of the Commission's Rules Relating to Program Exclusivity in the Cable & Broadcast Industry*, Report & Order, 3 FCC Rcd. 5299, 5303 (1988).

[13]Under the rules, a cable operator could import a signal from a distant market and show non-duplicative content from the distant market station, such as local news. For example, an official with one national network we interviewed said that it allows cable operators in Harrisburg, Pennsylvania to import its affiliate from Philadelphia, which the network owns, and show the Philadelphia local news; all national network content provided in Harrisburg, however, is provided by the local affiliate.

The broadcast industry is governed by a number of other rules and statutes that interplay with the exclusivity rules. These rules and laws include the following:

- *Must carry*. Must carry refers to the right of a local television station to require that cable operators that serve households in the station's market retransmit its signal in that local market.[14] The choice to invoke must carry is made every 3 years by stations. Cable operators carrying stations under the must-carry rule may not accept or request any fee in exchange for coverage.

- *Retransmission consent*. Retransmission consent refers to permission given by television stations who do not choose must carry to allow a cable or satellite operator to retransmit their signals. Stations invoke either retransmission consent or must carry. Retransmission consent was enacted in 1992; at the time, Congress determined that cable operators obtained great benefit from the broadcast signals that they were able to carry without broadcaster consent, which resulted in an effective subsidy to cable operators.[15] Retransmission rights are negotiated directly between a local television station and cable and satellite operators. By opting for retransmission consent, stations give up the guarantee that cable and satellite operators will carry their signal under must carry in exchange for the right to negotiate compensation for their retransmission. Cable and satellite operators are unable to retransmit the signal of a local television station that has chosen retransmission consent without its permission. If, despite negotiations, a local television station and a cable or satellite operator do not reach agreement, the local television station may prohibit the cable or satellite operator from retransmitting its signal, commonly referred to as a "blackout." FCC rules require local television stations and cable or satellite operators to negotiate for retransmission

[14]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 4, 106 Stat. 1460, 1471 (1992). The must-carry rule applies to cable operators. A similar rule, carry-one-carry-all, applies to satellite operators.

[15]Pub. L. No. 102-385, § 2(a)(19), 106 Stat. 1460, 1462.

consent in “good faith.”[16] FCC’s rules set a number of good faith standards, including a requirement that parties designate an individual with decision-making power to lead negotiations.

- *Compulsory copyright*. Must carry and retransmission consent pertain to the retransmission of a local television station’s signal. The content within that signal is protected by copyright. For example, the National Football League (NFL) holds the copyright for its games that are broadcast on CBS, Fox, and NBC. Generally, any potential user (other than the copyright holder) intending to transmit copyright protected content must obtain permission from the copyright holder beforehand. The compulsory copyright licenses, enacted in 1976, allow cable operators to retransmit all content on a local television station without negotiating with the copyright holders.[17] To make use of the compulsory copyright, the cable operator must follow relevant FCC rules and pay royalties to the Copyright Office within the Library of Congress.[18] The Copyright Act establishes the royalties that a cable operator must pay to carry television stations’ signals. A cable operator pays a minimum royalty fee regardless of the number of local or distant television station signals it carries, and the royalties for local signals are less than those for distant signals.

[16]The Communications Act requires that FCC promulgate rules requiring MVPDs and local television stations to negotiate retransmission consent agreements in good faith. 47 U.S.C. 325(b)(3)(C)(ii). The rules subsequently promulgated by FCC define good faith standards and prohibit, among other things, refusal by one entity to negotiate and refusal by one entity to respond to a proposal made by another entity. *See* 47 C.F.R. § 76.65(b)(1).

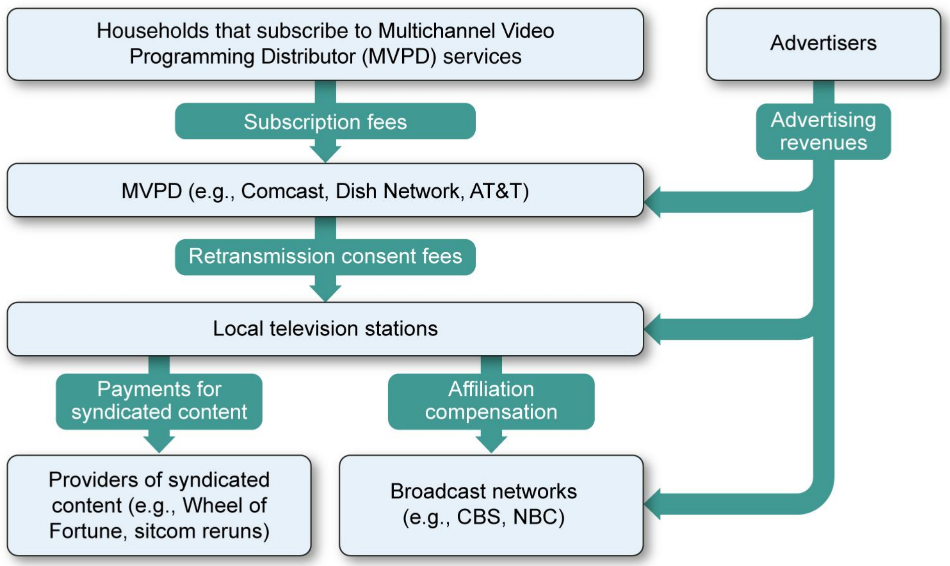
[17]The compulsory copyright also applies to satellite operators. The compulsory copyright ensures that copyright holders are compensated for the retransmission of their content and that cable and satellite operators do not have to negotiate individually with each copyright holder. *See* 17 U.S.C. §§ 111, 119. According to FCC officials, however, it is not clear if the compulsory copyright applies to open video systems. Although the Copyright Office recommended to Congress in 1997 that copyright law be amended to include open video systems, Congress has not acted on that recommendation. *See* U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (Washington, D.C.: Aug. 1, 1997).

[18]The Copyright Office disburses these royalties to copyright holders. See 17 U.S.C. § 111(d)(3).

Flow of Fees, Revenues, and Compensation in the Broadcasting Industry

Compensation for television content flows through industry participants in a number of ways that are relevant to the exclusivity rules, as seen in figure 3.

Figure 3: Flow of Money in the Broadcasting Industry



Source: GAO. | GAO-15-441

Households that subscribe to television service with an MVPD pay subscription fees; FCC reported that the average monthly fee for expanded-basic service was $64.41 on January 1, 2013.[19] Those MVPDs, including cable and satellite operators, pay retransmission consent fees to local television stations that opt for retransmission consent; as discussed above, the fees are determined in negotiations between stations and MVPDs. Advertisers purchase time from local television stations, broadcast networks, and MVPDs. Local television stations provide compensation to their affiliated national broadcast networks and to the providers of syndicated content in exchange for the rights to be the

[19]FCC defined expanded-basic service as the combination of basic service and the most subscribed to cable programming service tier. This excludes service from satellite operators. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* Report on Cable Industry Prices, 29 FCC Rcd. 5280, 5282 (2014).

exclusive provider of that content in their market. Local television stations also use their advertising and retransmission consent revenues to develop their own content, including local news.[20]

FCC Rulemaking on Exclusivity Rules

In 2014, FCC issued a FNPRM to consider eliminating or modifying the exclusivity rules, in part to determine if the rules are still needed given changes to the video marketplace since the rules were first promulgated. FCC asked for comments on, among other things, the potential effects of eliminating the rules. In response to the FNPRM, FCC received 72 records during the open comment period, including letters from individuals, and comments and reply comments from industry stakeholders. FCC officials said that the Media Bureau is working on a recommendation for the FCC Chairman’s consideration on whether to repeal or modify the exclusivity rules; there is no firm timeframe for when the bureau may make a recommendation.

Industry Stakeholders Have Differing Views of the Need for and Effects of Exclusivity Rules

[20]According to Nielsen data from February 2013, almost three out of four U.S. adults (71 percent) watch local television news over the course of a month. Kenneth Olmstead et al., “How Americans Get TV News at Home,” Pew Research Center Journalism Project (Oct. 11, 2013), accessed March 5, 2014, http://www.journalism.org/2013/10/11/how-americans-get-tv-news-at-home/.

Broadcast Industry Stakeholders Report That Exclusivity Rules Are Needed to Protect Exclusive Rights and Support Production of Local Content

All 13 broadcast industry stakeholders (local television stations, national broadcast networks, and relevant industry associations) we interviewed and whose comments to FCC we reviewed report that the exclusivity rules are needed to help protect stations' exclusive contractual rights to air network and syndicated content in their markets. Those stakeholders reported that the rules provide an efficient enforcement mechanism to protect the exclusivity that local television stations negotiate for and obtain in agreements with networks and syndicators; in the absence of the rules, enforcement of exclusivity would have to take place in the courts, which would be difficult and inefficient for several reasons.

- These stakeholders report that if a local television station believes that a cable operator improperly imported duplicative content on a distant signal into its market, the station will be unable to bring legal action to stop the airing of this duplicative content. Specifically, the cable operator may have an agreement with a station in a distant market that allows it to retransmit that station's signal in other markets. Since the affected local station might not have a contract with either the cable operator that is importing the distant station or the distant station, these stakeholders report that the local station cannot bring legal action. In 2012, for example, cable operator Time Warner Cable (TWC) did not reach a retransmission consent agreement with Hearst broadcast stations in five markets. TWC's contract with another broadcaster, Nexstar, did not explicitly prohibit retransmission of Nexstar's signals into distant markets,[21] and TWC imported Nexstar stations into Hearst's markets.[22] However, according to one broadcast industry stakeholder, because of a lack of contractual relationship between Hearst and TWC regarding the retransmission of Nexstar's signals, it would have been very difficult for Hearst to take a breach of contract action.

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[21]According to FCC, affiliation agreements generally prohibit local stations from granting retransmission of their signals outside their local market.

[22]Nexstar filed a breach of contract and a copyright infringement claim against TWC in federal court, arguing, among other things, that its retransmission consent agreement with TWC did not permit the out-of-market retransmission of its stations' signals. Nexstar moved for a preliminary injunction, to prohibit TWC from retransmitting its signals into distant markets. Nexstar's motion was denied, as the United States Court of Appeals for the Fifth Circuit affirmed that Nexstar was unlikely to succeed on the merits because its retransmission consent agreement with TWC allowed out-of-market retransmission of Nexstar's signals. *See Nexstar Broadcasting, Inc. v. Time Warner Cable, Inc*,. 524 Fed. Appx. 977 (2013).

- Even if a local station could bring legal action, these broadcast industry stakeholders added that enforcing exclusivity through courts would be more time consuming and resource intensive than using FCC administrative review to determine or uphold exclusive rights that parties negotiated in contracts.

Furthermore, all 13 broadcast industry stakeholders we interviewed and whose comments to FCC we reviewed report that exclusivity rules are needed to help protect stations' revenues. These stakeholders report that because the rules protect the contractual exclusivity rights of local television stations, stations can maintain their bargaining position in retransmission consent negotiations with cable operators, allowing them to obtain what they consider to be fair retransmission consent fees based on the value of the content in their signal. If a local station does not grant a cable operator retransmission consent, the cable operator cannot provide any network or syndicated content that the station provides, including high-demand content. By contrast, if cable operators could import duplicative content on a distant signal, even on a temporary basis to avoid not showing national network content during a retransmission consent impasse, these stakeholders report that the bargaining position of local television stations will decline, with a commensurate decline in retransmission consent fees and the value of the local television station, as the station will no longer be the exclusive content provider. In addition, because the rules ensure that local television stations' audiences are not reduced by the availability of duplicative content on signals from distant markets (for example, all households in a given market who watch popular NBC prime-time dramas will do so on their local NBC affiliate, as households are unable to do so on a NBC station from another market), they report that the rules help protect their audience share. This in turn, allows local television stations to obtain higher advertising revenues than they would if they were not the exclusive provider of network and syndicated content in their market. These broadcasting industry stakeholders also reported that by strengthening local stations' revenues, the rules help them invest in developing and providing local news, emergency alerts, and community-oriented content, in support of FCC's localism goals.[23]

However, the majority of cable industry stakeholders we interviewed and whose comments to FCC we reviewed reported that many local television stations have reduced their investments in local news in recent years despite the existence of the rules. In addition, we previously found that local television stations are increasingly sharing services, such as equipment and staff, for local news production.[24] For example, stations can have arrangements wherein one station produces another station's news content and also provides operational, administrative, and programming support. In addition, viewership for local news has declined in recent years—according to the Pew Research Center's analysis of 2013 Nielsen data, the viewership for early evening newscasts had declined 12 percent since 2007.[25] During this time, Americans have increasingly turned to other devices—such as computers and mobile devices—to access news on the Internet. For example, the Pew Research Center also reported in 2013 that 54 percent of Americans said they access news on mobile devices and 82 percent said they do on a desktop or laptop computer.[26]

[23]Localism is a policy that encourages local over-the-air broadcasting and ensures that some programming is produced at the local level with the local audience in mind. The concept of localism derives from title III of the Communications Act, which instructs FCC to regulate broadcasting in the public interest by, among other things, licensing broadcast stations among communities as to provide a fair, efficient, and equitable distribution around the country. Congress has viewed localism as a primary legislative objective with television broadcast stations serving as important sources of local news and public affairs programming. Pub. L. No. 102-385, § 2(a)(9), 104 Stat. 1460, 1461.

[24]GAO, *Media Ownership: FCC Should Review the Effects of Broadcaster Agreements on its Media Policy Goals,* GAO-14-558 (Washington, D.C.: June 27, 2014). FCC recently took action related to its ownership attribution rules and joint sales agreements, which may limit the extent to which local television stations enter such agreements. *See Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd. 4371, 4527 (2014).

[25]Katerina Eva Matsa, "Local TV Audiences Bounce Back," Pew Research Center (Jan. 28, 2014), accessed March 4, 2015, http://www.pewresearch.org/fact-tank/2014/01/28/local-tv-audiences-bounce-back/.

[26]Pew Research Center, *"Key Indicators in Media & News, State of the News Media 2014"* (Mar. 26, 2014), accessed March 5, 2015, http://www.journalism.org/2014/03/26/state-of-the-news-media-2014-key-indicators-in-media-and-news/.

Cable Industry Stakeholders Report That Exclusivity Rules Lead to Increased Retransmission Consent Fees

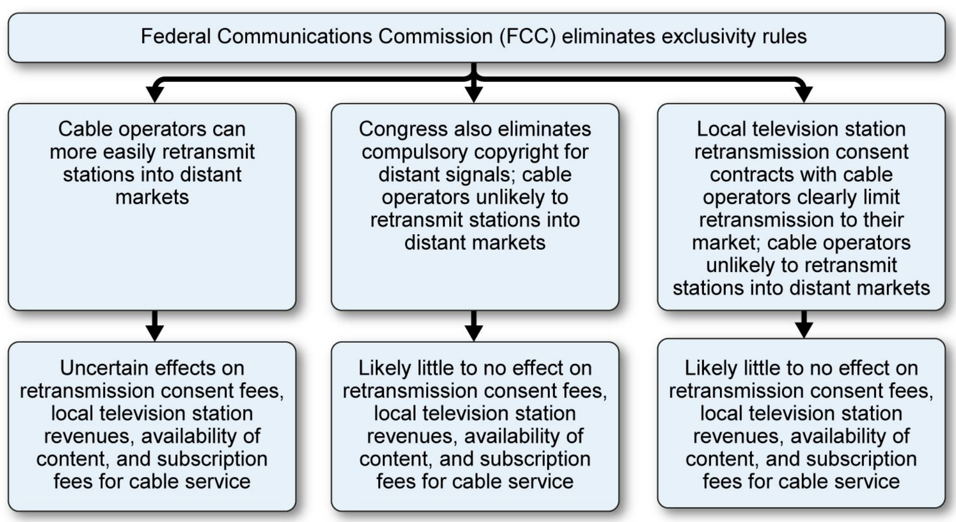
Eight of 12 cable industry stakeholders we interviewed and whose comments to FCC we reviewed reported that because the rules help local television stations be the exclusive provider of network content in their market, the rules allow local television stations to demand increasingly higher retransmission consent fees from cable operators, which some said can lead to higher fees that households pay for cable television service. Because local television stations are the exclusive providers of network content in their markets (e.g., the NBC affiliate in San Diego is the only provider of popular NBC prime-time dramas in that market), cable operators report that they are forced to pay increasingly higher retransmission consent fees. They report that this occurs because if a local television station cannot reach agreement with the cable operator regarding retransmission consent and does not grant retransmission rights to the cable operator, the cable operator cannot import a signal from a distant market to provide network content and the cable operator's subscribers lose access to network content. This puts the cable operator at risk for losing subscribers to competitors, such as other cable and satellite operators, who continue to carry the local television station and its network content. While 5 of 12 cable industry stakeholders we interviewed and whose comments to FCC we reviewed said that they prefer to retransmit the local station instead of a distant market station, they feel that the exclusivity rules limit their ability to seek alternatives if they are unable to agree to retransmission consent fees with a local station. Eight cable industry stakeholders reported that as a result, the rules have led to sharp and rapidly increasing retransmission consent fees in recent years—a trend that they expect to continue—which can lead to higher cable fees for households. SNL Kagan, a media research firm, has projected that retransmission consent fees will increase from $4.9 billion in 2014 to more than $9.3 billion in 2020.[27] However, 4 of 13 broadcast industry stakeholders we interviewed and whose comments to FCC we reviewed stated that cable networks—such as ESPN, TBS, and AMC—also have exclusive distribution. For example, a cable operator wishing to carry ESPN can only obtain rights to do so from ESPN.

[27]SNL Kagan Press Release, *SNL Kagan Releases Updated Industry Retransmission Fee Projections: U.S. TV station owners' retrans fees expected to reach $9.3 billion by 2020, versus the projected level of $4.9 billion this year according to SNL Kagan analysis* (Monterrey, CA: Oct. 27, 2014).

The Effects of Eliminating the Exclusivity Rules on Content Depend on Related Federal Actions and the Response of Industry Participants

Industry stakeholders we interviewed and whose comments to FCC we reviewed discussed different scenarios under which eliminating the exclusivity rules may lead to varying effects (see fig. 4).[28] In one scenario, eliminating the exclusivity rules may provide cable operators with opportunities to import distant signals into local markets. This could potentially reduce the bargaining position of local television stations in retransmission consent negotiations, which could reduce station revenues with varying effects on the availability of content and households; however, the magnitude of these effects is uncertain. In two other scenarios, eliminating the exclusivity rules may have little effect as local television stations could maintain their position as the exclusive provider of network and syndicated content. As a result, retransmission consent negotiations may be unlikely to change, likely resulting in minimal effects on content and households.

Figure 4: Potential Scenarios Under Which Elimination of Exclusivity Rules May Have Varying Effects



Source: GAO analysis of comments filed with FCC and interviews with industry stakeholders. | GAO-15-441

[28]Our analysis of the potential effects of eliminating the exclusivity rules is based on these stakeholder views expressed in both their comments filed with FCC and interviews with us, in light of general economic principles.

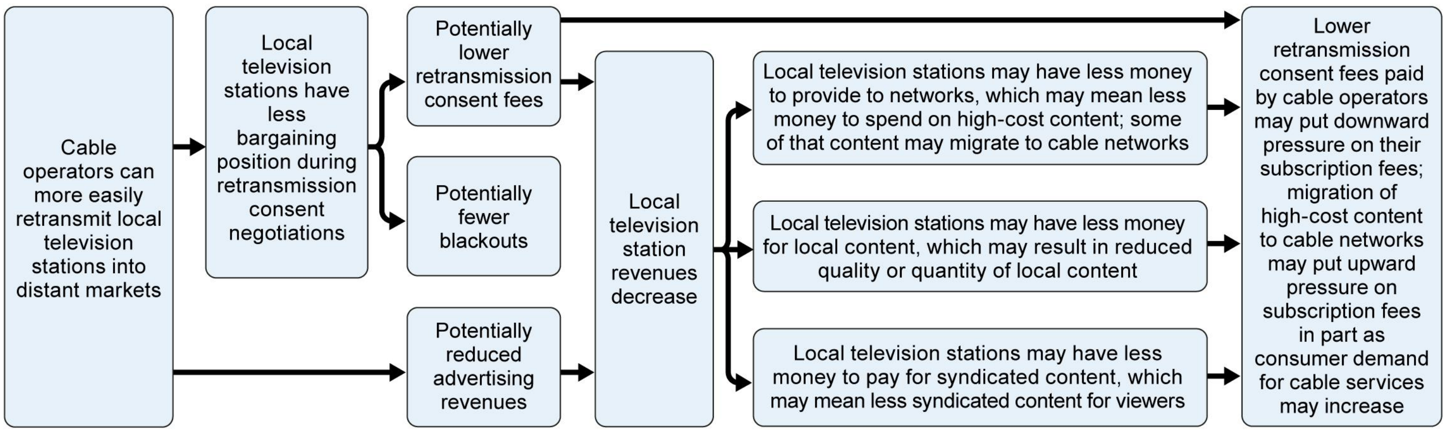
If Contractual Exclusivity is Difficult to Enforce, Removing the Exclusivity Rules May Have Uncertain Effects on Content and Fees Households Pay for Television Service

Eleven of 13 broadcast industry stakeholders we interviewed and whose comments to FCC we reviewed said that in the absence of the exclusivity rules, some local television station contracts with cable operators may allow for retransmission of their signals to distant markets. This may happen if contracts between local television stations and cable operators do not clearly prohibit retransmission outside of the stations' local markets, as was the case in Nexstar's contract with TWC discussed earlier. Two of these stakeholders said this could happen with small broadcasters that might lack the financial resources to cover legal counsel during their negotiations with cable operators. Broadcast networks could provide such assistance. However, officials from all three broadcast networks we interviewed told us that they currently do not oversee their affiliates' retransmission consent agreements. In comments to FCC, one cable industry association suggested that FCC prohibit network involvement in the retransmission consent negotiations of their affiliates. Depending on how FCC interprets or amends its good-faith rules, broadcast networks may be unable to take a more active role in the retransmission consent negotiations between their affiliates and cable operators.[29] Even if just one local television station allowed a cable operator to retransmit its signal outside its local market, the cable operator could retransmit that signal in any other market that it served; this could potential harm the exclusivity of local television stations affiliated with the same broadcast network in those markets served by the cable operator.

The potential ability of a cable operator to import a distant signal, and the potential weakening of exclusivity that could result, may lead to a series of effects on the distribution of content—including local content—and on households and the fees they pay for cable television service (see fig. 5).

[29]FCC sought public comment on the potential role of networks in good-faith negotiations, including whether to make it a *per se* violation of the rules for a local television station to give its affiliated national broadcast network the right to approve a retransmission consent agreement with a cable operator. *See Amendment of the Commission's Rules Related to Retransmission Consent, Notice of Proposed Rulemaking*, 26 FCC Rcd. 2718, 2729-35 (2011).

Figure 5: Potential Effects of Eliminating the Federal Communication Commission's Exclusivity Rules



Source: GAO analysis of comments filed with FCC and interviews with industry stakeholders. | GAO-15-441

The majority of both cable and broadcast industry stakeholders we interviewed and whose comments to FCC we reviewed stated that as a result of the potential of a cable operator retransmitting a distant station's signal into a local market, local television stations may have reduced bargaining position during retransmission consent negotiations with cable operators. As stated earlier, the fact that local television stations are the exclusive provider in their markets of high-demand national content provides them with a strong bargaining position in negotiations with cable operators. However, if during retransmission consent negotiations, a cable operator can provide certain content by retransmitting the signal of a station affiliated with the same broadcast network in another market, the local station's bargaining position declines because it is no longer the exclusive provider of the national network content available to the cable operator in the station's market. This reduction in bargaining position may lead to fewer black outs and a reduction in retransmission consent fees.

- With the exclusivity rules in place, a local television station may be willing to pull its signal from a cable operator (that is, have a blackout) knowing that the cable operator has no alternative for providing high-demand network and syndicated content.[30] However, without the

[30]In the current environment, a local television station considering pulling its signal from a cable operator likely weighs a temporary reduction in retransmission consent and advertising revenues that would result when its station is not provided to cable subscribers against a potential longer-term increase in retransmission consent fee revenues.

rules, the local television station may be less willing to pull its signal from the cable operator, as the cable operator could provide the same high-demand content to its customers by importing a station from a distant market. For example, if a cable operator in Baltimore could import the Atlanta NBC affiliate into Baltimore when it does not reach a retransmission consent agreement with the Baltimore NBC affiliate, the Baltimore affiliate stands to gain little from pulling its signal, and thus not be retransmitted, since households served by the cable operator in Baltimore could still access NBC network content on the imported Atlanta station. With fewer blackouts, consumers would be less likely to lose access to broadcast network and syndicated content they demand.

- With reduced bargaining position, local television stations may agree to retransmission consent fees that are lower than they otherwise would be because local television stations want to avoid their signals being replaced by another television station's signal from a distant market. This may mean that retransmission fees could decrease or increase at slower rate than they would if broadcasters maintained the same bargaining position they have now. For example, the NBC affiliate in Baltimore may be willing to accept lower retransmission consent fees from a cable operator knowing that the cable operator can import NBC content from another market if they did not reach agreement on retransmission consent.

In addition, to the extent that a cable operator does import a distant signal into a given market, the local station in that market may lose some viewers who watch duplicative content on the imported station. To the extent this happens, advertisers may spend less on advertising time given the reduction in audience and the advertising revenues of the local television station may decline.[31]

The potential reduction of local stations' retransmission consent and advertising revenues could affect the content stations can produce and distribute to households, including local content, in multiple ways, as described below. However, the nature of these effects is unknown.

[31]Two industry analysts we interviewed said that advertising revenues provide the majority of local television station revenues.

- Local television stations may have fewer resources to pay in compensation to their affiliated broadcast networks.[32] If so, the resulting reduction in revenues for national broadcast networks may reduce their ability to produce, obtain, and distribute high-cost and widely viewed content, such as national sports and primetime dramas. This potential outcome may result in the migration of some content to cable networks to the extent that cable networks outbid broadcast networks for this high-cost content (e.g., if ESPN outbids Fox for NFL coverage or more high-cost dramas are provided by the cable network AMC instead of broadcast networks).[33] If this happens, consumers who rely on free over-the-air television and do not subscribe to cable television service may not be able to view certain content that has traditionally been available on over-the-air television unless they begin to subscribe to a cable operator's service.

- Twelve of 13 broadcast industry stakeholders we interviewed and whose comments to FCC we reviewed said that local television stations may have fewer resources to invest in local content. This could reduce the quality or quantity of local content provided to viewing households. Nine of these stakeholders reported that local news is a major cost for local television stations.

- Local television stations may have fewer resources to pay for syndicated content. If so, syndicators could be less able to produce, obtain, and distribute syndicated content, which could affect the type and quantity of syndicated content that households are able to view.

In addition to these potential changes in content, eliminating the exclusivity rules may affect the fees consumers pay for cable television service. However, because multiple factors may influence fees and the extent to which that happens is unknown, we cannot quantify the effect. To the extent that eliminating the exclusivity rules causes retransmission consent fees paid by cable operators to be lower than they otherwise would be, cable operators may pass some of these savings along to

[32]Three industry analysts told us that, on average, local television stations keep about 50 percent of their retransmission consent revenues and provide the rest to their national networks.

[33]Some high-cost content previously on free over-the-air television has already migrated to cable networks. For example, some collegiate football bowl games previously shown on broadcast networks are now shown on cable networks. In addition, some content could migrate to over-the-top providers such as Netflix.

consumers in the form of lower subscription fees. However, as we have noted, eliminating the rules could lead to a migration of some highly viewed and high-cost content to cable networks from free over-the-air local television stations. This content migration could also affect fees for cable service; cable networks that obtain such content may experience additional costs for content and thus charge cable operators more to carry their networks. Thus, cable operator cost savings on retransmission consent fees could be offset to some extent by higher cable network fees. Furthermore, migration of such content could cause some households that do not subscribe to cable services to begin doing so, or cause some households to upgrade their service to obtain additional cable networks. This increased demand for cable service could also lead to some upward pressure on cable subscription fees.

If the Distant Signal Compulsory Copyright Is Repealed, Removing the Exclusivity Rules May Have Minimal Effect

Eleven of 13 broadcast industry stakeholders we interviewed and whose comments to FCC we reviewed stated that in the absence of the exclusivity rules, the compulsory copyright license for distant signals may allow a cable operator to retransmit a local television stations' signal into another market as the cable operator does not need to obtain approval from copyright holders.[34] Nine of these 13 stakeholders stated that this compulsory copyright may not have been enacted if the exclusivity rules did not already exist. Six of these 13 stated that, as a result, if FCC eliminates the exclusivity rules, statutory changes would also be needed to eliminate the compulsory copyright license for distant signals.

Assuming that retransmission of the content in a televisions station's broadcast retains copyright protection,[35] if Copyright Law was amended to remove the compulsory copyright for distant signals, a cable operator wishing to retransmit a station's signal into a distant market would need to clear the copyrights with the copyright holders, such as the NFL, of all content included on the television station's signal. However, we have previously found that obtaining the copyright holders' permission for all this content would be challenging. Each television program may have

[34]In this scenario, a cable operator would need to obtain the local television station's consent to retransmit its signal in a distant market. Affiliation agreements generally prohibit local television stations from granting this permission.

[35]The Copyright Act of 1976 provided copyright protection to the retransmission of television station signals. *See* 17 U.S.C. § 111.

multiple copyright holders, and rebroadcasting an entire day of content may require obtaining permission from hundreds of copyright holders. The transaction costs of doing so make this impractical for cable operators.[36] Furthermore, as broadcast networks are also copyright holders for some content that their affiliated local television stations air, such as the network's national news,[37] they may be unwilling to grant such copyright licenses to cable operators wishing to retransmit that content on an distant signal, given networks' interests in preserving their system of affiliate exclusivity, as discussed earlier. In such a scenario, cable operators may be unable to import distant signals and local television stations may not face the threat of duplicative network and syndicated content on a distant signal. Local television stations may retain the same bargaining position that they currently have during retransmission consent negotiations. As a result, there may not be any change in the likelihood of a blackout, retransmission consent fees, the quantity and quality of content, and fees for cable television service.[38]

If Local Television Station Contracts with Broadcast Networks and Cable Operators Ensure Exclusivity, Removing the Exclusivity Rules May Have Minimal Effect

Nine of 12 cable industry stakeholders we interviewed and whose comments to FCC we reviewed suggested that if the exclusivity rules were eliminated, there may be minimal effects as exclusivity would continue to exist in contracts. According to FCC, the affiliation agreements between local television stations and broadcast networks generally define exclusive territories for the affiliate stations and prohibit stations from granting retransmission consent outside their local markets. However, as we discussed earlier, only one local television station granting retransmission consent outside its local market to a cable operator could undermine the exclusivity of all the affiliates of a broadcast network in markets served by that cable operator. Broadcast industry stakeholders report that broadcast networks could take legal action against local television stations that violate terms of the affiliation agreements by granting retransmission consent outside their local

[36] GAO-12-75.

[37] Local television stations generally hold the copyrights for any local content that they produce, such as local news.

[38] If the compulsory copyright for distant signals were eliminated, cable operators may also be unlikely to import a distant signal into significantly viewed markets as they are able to do now. To prevent this effect, additional action, such as creation of a compulsory copyright for such cases, would be necessary.

market. However, two broadcast networks we interviewed said that they are reluctant to sue their affiliates because they prefer not to take legal action against their business partners; one added that such a suit could take a long time to be resolved.[39]

Depending on FCC's interpretation of or amendment to its good-faith rules, local television stations and broadcast networks may be able to take actions to protect against stations' granting retransmission consent outside their local markets, thereby protecting stations' exclusive territories. Assuming FCC's good faith rules permit such actions, broadcast networks may choose to take a more proactive role in their affiliates' retransmission consent negotiations with cable operators. As we discuss earlier, networks have an incentive to maintain stations' exclusive territories and potentially could provide input to stations' retransmission consent negotiations to help prevent stations' granting retransmission consent outside their local markets if that input is allowed under FCC's interpretation of the good-faith rules. For example, if FCC found it permissible, networks potentially could provide suggested contract language that clearly limits retransmission by cable operators to the station's local market.[40]

With contracts clearly protecting the exclusivity of local television stations and preventing cable operators from retransmitting signals to distant markets, cable operators may be unlikely to import distant signals as doing so would be a clear contractual violation of their retransmission consent contract. In this scenario, local television stations may retain their exclusivity and may not have any change to their bargaining position during retransmission consent negotiations. Therefore, stations' retransmission consent fees and revenue, the quantity and quality of content, and cable subscription fees may not change.

[39]According to FCC, in addition to taking legal action, broadcast networks generally have the option under their affiliation agreements with local television stations to terminate the agreement immediately if an affiliated station grants retransmission consent to a cable operator outside of its local market.

[40]In order to help ensure all their affiliated local television stations maintain their exclusivity, networks would need to do this with all their affiliates.

Concluding Observations

FCC's exclusivity rules are part of a broader broadcasting industry legal and regulatory framework, including must carry, retransmission consent, and compulsory copyrights. The exclusivity rules predate many of these laws and rules, and in some instances, the development of these other laws was premised on the existence of the exclusivity rules. The effects of eliminating the exclusivity rules are uncertain, because the outcome depends on whether related laws and rules are changed and how industry participants respond. For example, if the compulsory copyright license for distant signals were eliminated, as some broadcast industry stakeholders suggest, removing the exclusivity rules may have little effect. In contrast, if FCC were to interpret good faith in its rules to limit the extent to which broadcast networks can influence retransmission consent negotiations between their affiliated stations and cable operators, as one cable industry association suggests, removing the exclusivity rules could lead to a series of events, the outcome of which could be a reduction in the quality or quantity of local content and potential changes in the fees households pay for cable television service.

Agency Comments

We provided a draft of this report to FCC for review and comment. FCC provided technical comments via email that we incorporated as appropriate.

We are sending copies of this report to interested congressional committees and the Chairman of the FCC. In addition, the report will be available at no charge on the GAO website at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-2834 or goldsteinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made significant contributions to this report are listed in appendix III.

Mark Goldstein
Director, Physical Infrastructure Issues

Appendix I: Objectives, Scope, and Methodology

The objectives of this report were to examine (1) industry stakeholder views on the need for and effects of the exclusivity rules and (2) the potential effects that removing the exclusivity rules may have on the production and distribution of content, including local news and community-oriented content.

To address both objectives, we reviewed all public comments filed by industry stakeholders with the Federal Communications Commission (FCC) as part of its further notice of proposed rulemaking (FNPRM)—FCC docket 10-71—considering elimination or modification of the network non-duplication and syndicated exclusivity rules (exclusivity rules). We did not review comments filed by individuals and only reviewed those from industry stakeholders, such as local television stations or companies, multichannel video programming distributors (MVPD), including cable and satellite operators, national broadcast networks, industry associations representing such companies, and content copyright holders. In total, we reviewed 31 public comments. Of those 31 comments, 14 were from broadcasting industry stakeholders, 13 were from cable industry stakeholders, 1 was from a satellite industry stakeholder, 1 stakeholder was both a broadcaster and a cable operator, 1 was from a content provider, and 1 was from a related industry association. We reviewed these public comments for stakeholder views on the rules, the current effects of the rules, and the potential effects of eliminating the rules.

In addition, we reviewed relevant rules and statutes, such as FCC's exclusivity rules and relevant rulemaking documents, such as FCC's FNPRM. We also reviewed affiliation agreements between broadcast networks and local television stations relevant to recent legal action regarding the exclusivity rules. We did not review retransmission consent agreements between local television stations and cable operators, however, as these agreements are not publicly available.

We also conducted a literature review for studies related to FCC's exclusivity rules, including any studies focused on the potential effects of eliminating the rules. To identify existing studies from peer-reviewed journals, we conducted searches of various databases, such as EconLit and ProQuest. We searched these and other databases using search terms including "exclusivity," "network non-duplication," and "syndicated exclusivity" and looked for publications in the past 5 years. We reviewed studies that resulted from our search and found that none of them were directly relevant to our work. We reviewed prior GAO reports that cover relevant issues, such as retransmission consent and copyrights.

We also conducted semi-structured interviews with the industry stakeholders that filed public comments with FCC as part of its FNPRM considering eliminating or modifying the exclusivity rules. In some cases, multiple stakeholders co-signed and co-filed public comments; in these instances, we interviewed at least one of those stakeholders. While we attempted to interview at least one stakeholder for each of the 31 formal comments filed, four stakeholders did not respond to our requests for interviews. We interviewed 1 content provider, 13 broadcast industry stakeholders, 12 cable industry stakeholders, and 1 satellite industry stakeholder. During these interviews, we asked stakeholders about their views of FCC's exclusivity rules, the effects of the rules, and the effects of potentially eliminating the rules on retransmission consent fees, broadcaster revenues, and the distribution of content, including locally-oriented content, among other things. In addition, we interviewed selected industry analysts who study the broadcasting and cable industries regarding the rules and the potential effects of eliminating the rules. We selected analysts to interview by identifying ones who analyze and make recommendations on the stocks of publicly traded companies that we interviewed as part of our review and whom we had interviewed as part of prior engagements. We also interviewed FCC officials regarding these rules and FCC's rulemaking process.

For our second objective, in addition to gathering information about industry stakeholder views on the potential effects of eliminating the exclusivity rules, we also analyzed those views in light of general economic principles to understand more fully the potential effects of eliminating the exclusivity rules.

Appendix II: GAO Contact and Staff Acknowledgments

GAO Contact

Mark L. Goldstein, (202) 512-2834 or goldsteinm@gao.gov.

Staff Acknowledgments

In addition to the contact above, Michael Clements, Assistant Director; Amy Abramowitz; Mya Dinh; Gerald Leverich; Josh Ormond; Amy Rosewarne; Matthew Rosenberg; and Elizabeth Wood made key contributions to this report.

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