Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules Related to Retransmission Consent	)	MB Docket No. 10-71
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	)	
	)	

To: The Commission

COMMENTS OF LIN TELEVISION CORPORATION

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Summary

When Congress enacted the 1992 Cable Act, it plainly anticipated that some broadcast stations would seek cash compensation, and that, as a result, some stations electing retransmission consent would not be carried on some MVPD systems. Nonetheless, the FCC is now considering significant changes to the so-called good faith bargaining rules because broadcasters are seeking cash compensation, a change in the market that is supposedly leading to an increase in retransmission rights negotiation impasses.

The NPRM's logic – that the FCC should consider new substantive rules because of changes in the retransmission rights market – completely misses the point of the good faith negotiating regime. Neither the statute imposing good faith bargaining obligations nor the FCC's implementing rules were ever intended to prevent service disruptions or act as a curb on the amount or type of consideration a broadcaster can seek for retransmission rights. The rules are intended only to ensure that both parties show up and negotiate with a sincere intention of reaching a deal. Although the NPRM suggests otherwise, the Commission did not adopt these narrowly tailored rules because retransmission disputes were rare at the time. The FCC adopted narrow rules because that is all Congress authorized it to do.

This proceeding is not a forum for a debate about the wisdom of Congress' 1992 decision to ensure that broadcasters have the right to control their signals. Its express purpose is to consider whether changes to the FCC's good faith bargaining rules are appropriate in light of changes in the television distribution market. The FCC certainly has the power to modify the good faith rules, but it cannot adopt changes that would fundamentally expand the role of the FCC in carriage negotiations or amount to substantive limits on the permissible terms of individual retransmission agreements. And the FCC cannot adopt changes that would result in

asymmetric burdens on broadcasters as compared to MVPDs in negotiations. The good faith bargaining rules must be reciprocal as Congress intended.

The purpose of the *per se* standards is to identify situations in which a party does not have a sincere intent of trying to reach an agreement acceptable to both parties. They are procedural, guiding the actions of the parties, rather than substantive rules intended to affect the outcome of negotiations or the terms of agreements. The FCC has repeatedly acknowledged that Congress never intended for the FCC to involve itself in the substance of retransmission consent negotiations. But the proposed *per se* rules would do exactly that – establishing "negotiating" standards that would severely curb the market terms sought by all broadcasters even when they have every intention of reaching an agreement in good faith.

LIN also notes that the majority of the proposed *per se* rules are directed exclusively at broadcasters. By their terms, the proposed restrictions on joint negotiations and network affiliation agreements apply to broadcasters only. They are not reciprocal, and they are not negotiating rules at all. They are substantive, market-skewing rules thinly disguised as negotiating standards.

Although the FCC lacks statutory authority to prohibit joint negotiations involving LMAs, SSAs and JSAs, there is no reason to do so anyway. Those arrangements are marketplace responses to broadcast ownership rules that are hopelessly out of date. In any case, the purpose of those rules is to ensure a diversity of media voices in each community, not to ensure that MVPDs have the benefit of negotiating with each station individually for carriage rights.

Neither can the FCC prohibit contractual arrangements between networks and affiliates pertaining to retransmission rights. If the FCC believes those arrangements are a problem, the solution is to eliminate or greatly relax the FCC's broadcast ownership rules. Those rules assure that networks will always have the upper hand in negotiating with affiliate stations. To correct this and many other market imbalances, instead of piling yet more regulations on broadcasters, the FCC should move swiftly and resolutely to revise or eliminate its outdated ownership rules. Ownership reform, specifically through the quadrennial ownership review, is how Congress has ordered the FCC to address market changes.

Program exclusivity is created by contract, not by the FCC's program exclusivity rules. But virtually every broadcast programming contract is written with reference to the FCC's rules. Elimination of the program exclusivity rules would lead to an extended and tumultuous period of transition. During this period the lack of an FCC enforcement mechanism could allow multiple signals to be imported into every market in the country, potentially for years, until contract amendments and court actions put a stop to it. There is little to be gained from elimination of the exclusivity rules and much to lose.

LIN strongly supports FCC action to ensure that MVPD subscribers receive timely, accurate and honest information so they can make informed decisions. In LIN's experience, most MVPDs give only technical notice, typically in newspaper classifieds, while actually telling subscribers that no loss of service will actually occur. The FCC should admonish operators subject to Section 76.1603 that they must provide clear, actual notice of potential service loss to subscribers at least 30 days before the end of a retransmission agreement term if a new agreement has not been reached, and may not give subscribers other, conflicting or inconsistent information.

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LIN Television Corporation d/b/a LIN Media ("LIN") hereby responds to the Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking* in the above-captioned proceeding.[1] LIN is a local television and digital media company that owns, operates or services 32 network-affiliated television stations in 17 midsized markets across the country. LIN is a leader in the convergence of local broadcast television and the Internet through its station web sites and a growing number of local interactive initiatives, including popular mobile applications.

I. Background

The impetus for the FCC's *NPRM* was a Petition for Rulemaking filed by fourteen non-broadcasters in March of 2010.[2] The *NPRM* essentially accepts the premise of the Petition for

[1] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent,* Notice of Proposed Rulemaking, FCC 11-31 (rel. Mar. 3, 2011) ("*NPRM*").

[2] *See* Time Warner Cable Inc. *et al.* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71, at 1 (filed Mar. 9, 2010) ("MVPD Petition"). The Petition was filed by: American Cable Association; Bright House Networks, LLC; Cablevision Systems Corp.; Charter Communications, Inc.; DIRECTV, Inc.; DISH Network LLC; Insight Communications Company, Inc.; Mediacom Communications Corp.; New America Foundation; OPASTCO; Public Knowledge; Suddenlink Communications; Time Warner Cable Inc.; and Verizon ("MVPD Petitioners").

Rulemaking that "significant changes in the video programming marketplace" since Congress enacted the retransmission consent regime in 1992 necessitate modification of the Commission's rules.[3] The *NPRM* cites two market changes in particular: (1) a "change [in] the form of compensation sought by broadcasters" from in-kind compensation to cash compensation and (2) the emergence of competitors to single cable providers that monopolized pay television distribution in 1992.[4] The *NPRM* asserts (without providing any supporting data) that the Commission "recently [has] seen a rise in negotiation impasses that have affected millions of consumers."[5] The Commission adopted the *NPRM* to seek comment on rule changes because of "consumer harm caused by retransmission consent negotiation impasses and near impasses."[6]

LIN divides these comments into two sections.[7] The first section explains why these changes in the market for broadcast retransmission rights are good for consumers and do not necessitate changes to the FCC's retransmission consent rules. The second section explains why adoption of most of the *NPRM*'s proposed rule changes would exceed the FCC's authority.

II. Retransmission Market Changes are Good for Consumers and Counsel Against the Proposed Changes in the FCC's Good Faith Negotiating Rules

A. This Proceeding is About the Good Faith Bargaining Rules. It is Not a Forum for Reconsideration of the Retransmission Policy of the 1992 Cable Act

In this proceeding, the FCC is considering making significant changes to the so-called good faith bargaining rules in response to two changes in "market conditions" that the FCC has

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[3] *NPRM* at ¶ 2.

[4] *Id.*

[5] *Id.*

[6] *Id.* at ¶ 16.

[7] LIN agrees with the Commission's conclusion that the FCC lacks statutory authority to adopt rules that could, directly or indirectly, result in retransmission of a broadcast station's signal without that station's express consent.

identified.[8] The *NPRM* aptly recounts the history of retransmission consent, especially the Cable Television Consumer Protection and Competition Act of 1992 ("Act" or "Cable Act") and the later statutes and regulations that establish the reciprocal good faith bargaining obligations.[9] A very brief summary here will help establish a point that is fundamental to this proceeding.

In 1992 Congress adopted retransmission consent provisions that allow broadcasters to negotiate to receive compensation for the value of their signals when retransmitted by multichannel video programming distributors ("MVPDs"). This was designed to eliminate a subsidy of MVPDs by broadcasters that resulted from legal anomalies. It is abundantly clear from the legislative history and the text of the FCC's implementing orders that Congress did not give the FCC any role in determining appropriate compensation or any power to limit carriage interruptions. The FCC's role was essentially limited to adopting the mechanics of the retransmission consent-good faith election process.[10]

In the Satellite Home Viewer Improvement Act of 1999 ("SHVIA")[11] Congress amended Section 325 of the Act to require broadcasters to negotiate retransmission rights in good faith. In 2000, the FCC adopted narrowly tailored implementing rules.[12] The FCC rejected arguments that SHVIA authorized the FCC to engage in substantive oversight of retransmission negotiations or the substantive terms of agreements.[13]

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[8] *See NPRM* at ¶ 2.

[9] *Id.* at ¶¶ 4-12.

[10] *See* S. Rep. No. 102-92 at 1 (1991) (directing the FCC "to adopt regulations aimed at curbing the cable operators' and programmers' market power and addressing certain technical and technological issues").

[11] *See* Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999).

[12] *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5448, ¶ 39 (2000) ("*2000 Good Faith Order*").

[13] *Id.* at ¶ 6 ("the statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission").

The impetus for the good faith bargaining requirement was SHVIA itself, which first gave direct broadcast service ("DBS") providers the ability to retransmit local broadcast signals into local television markets. The concern behind Section 325(b)(3)(C) was not the inconvenience to consumers of a temporary interruption of carriage or even the effects of rising retransmission rights payments on MVPD charges. The concern was that broadcasters would refuse to negotiate with DBS providers at all or would demand terms that were driven by motives other than competitive market considerations.[14] The FCC therefore adopted a two-part good faith negotiations framework that, in essence, required broadcasters to show up, negotiate fairly, make proposals consistent with competitive marketplace circumstances, reduce agreements to writing and not grant exclusivity to one MVPD over another.[15] In the words of the *2000 Good Faith Order*, the rules were "intended to identify those situations in which a broadcaster did not enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties."[16]

The *NPRM*'s line of logic – that the FCC should consider new substantive rules because of changes in the retransmission rights market – completely misses the point of the good faith negotiating regime. Neither the statute nor the FCC's implementing rules were ever intended to prevent service disruptions or act as a curb on the amount or type of consideration a broadcaster can seek for retransmission rights. The FCC's narrowly tailored good faith bargaining rules in 2000 did not result from market conditions at the time. The FCC adopted narrow rules in 2000 because that is all Congress authorized it to do.[17]

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[14] *Id.* at ¶ 11.

[15] *See 2000 Good Faith Order*.

[16] *Id.* at ¶ 39.

[17] *See 2000 Good Faith Order* at ¶¶ 13-14 (finding that the language of the SHVIA precludes FCC intrusion on the substance of retransmission consent. The FCC should facilitate a marketplace for retransmission, but not determine the outcome of the transactions that occur in that marketplace).

LIN will address below the changes proposed in the *NPRM*. But it is important to understand what is <u>not</u> at issue in this proceeding and to keep the debate about proposed changes in context. This proceeding is not a forum for a debate about the wisdom of Congress' 1992 decision to ensure that broadcasters have the right to control their signals. The express purpose of this proceeding is to consider whether changes to the FCC's good faith bargaining rules are appropriate in light of changes in the television distribution market. And, following Congress' extension of the good faith bargaining requirement to both sides of the negotiation, the purpose of the good faith rules remains the same as it has always been: to ensure that both parties show up at the bargaining table with an genuine interest in reaching an agreement.[18] The FCC certainly has the power to modify the good faith rules themselves, but it cannot adopt changes that would fundamentally expand the role of the FCC in carriage negotiations or amount to substantive limits on the permissible terms of individual retransmission agreements. And it cannot adopt changes that would result in asymmetric burdens on broadcasters as compared to MVPDs in negotiations. The good faith bargaining rules must be reciprocal.[19]

B. Any Proposed Rule Modifications Must Be Based on an Honest and Full View of All Market Changes, Not Just the Two Raised in the *NPRM*

The *NPRM* notes that the video distribution market has changed greatly since 1992[20] and asks whether the FCC should "update the good faith rules and remedies"[21] as a result. The goal

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[18] *See* Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809 (2004) ("SHVERA"); *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, ¶¶ 8, 13-14 (2005) ("*Reciprocal Bargaining Order*").

[19] *See SHVERA* Sec. 207; *Reciprocal Bargaining Order*, *passim* (rejecting various arguments by MVPDs that they should be held to different standards under the good faith bargaining rules).

[20] *NPRM* at ¶ 4.

[21] *Id.* at ¶ 17.

of any rule changes would be to "to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services."[22]

It is questionable whether the FCC has the legal authority to pursue this goal regardless of the stated basis for doing so. But, if the FCC does decide to take the unusual step of modifying purely procedural rules because of market changes, it must at least base those changes on a diverse and thorough assessment of the still-developing market for retransmission of broadcast programming. The artificially constrained analysis found in the Petition for Rulemaking and resultant *NPRM* narrowly focuses on only two alleged conditions: the assertion that broadcasters are increasingly seeking cash compensation rather than carriage of non-broadcast channels, and the claim that there has been a recent increase in negotiation "impasses" resulting in a temporary interruption of service.[23] As Congress specifically enabled the former, and acknowledged the inevitability of the latter, when it adopted the requirement that parties negotiate in good faith, neither is surprising. When Congress enacted the 1992 Cable Act, it plainly anticipated that some broadcast stations would seek cash compensation,[24] and that, as a result, some stations electing retransmission consent would not be carried on some MVPD systems.[25] The only surprise is that it took so long for Congress's original structural vision for the retransmission market to come to fruition.

So the two new "developments" claimed by the *NPRM* are not new at all. On the other hand, Congress in 1992 did *not* anticipate that MVPD programming would quickly expand to hundreds of channels and that the most popular of those channels would be owned by some of the same entities that operate the major broadcast networks. Congress also could not know that

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22 *Id.* at ¶ 17.
23 *Id.* at ¶¶ 2, 16.
24 S. Rep. No. 102-92 at 35-36 (1991).
25 *Id.*

millions of households would eventually be spending nearly $90 per month on pay television,[26] with programming payments for non-broadcast channels accounting for the largest single element of that cost.

It is equally unlikely that Congress foresaw that cable systems would spend a decade consolidating into large clusters that would compete head-on with broadcasters for both programming and local advertising dollars through regional interconnects. Congress therefore could not know that despite this increased competitiveness, and after almost two decades of steadily increasing profits from both local advertising and subscription revenue, MVPDs would reinvest essentially none of their profits into the production of high quality local news and public affairs programming.

More broadly, few in 1992 could have foreseen that Internet web services like Craigslist and eBay would undermine the economic model of local newspapers, leaving broadcast stations as the last reliable source of local news and information in many communities. Nor did Congress likely anticipate that the economics of MVPD distribution would become so favorable that every year more and more marquee sporting events would become unavailable to households that rely exclusively on free over-the-air television.[27]

Thus, the "developments" claimed by the *NPRM* to be game changers were fully anticipated by Congress in creating the current retransmission model, while many other developments which Congress could not have predicted deserve far more consideration in this proceeding. Assuming the FCC possesses the authority to modify the good faith bargaining rules

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[26] *See* DIRECTV Announces First Quarter 2011 Results, (undated), *available at* http://investor.directv.com/releasedetail.cfm?ReleaseID=574719 (last visited May 26, 2011) (showing DIRECTV average revenue per subscriber of $88.79 per month).

[27] But even without foreseeing these, things Congress was concerned, even in 1992, that high cost, high value programming might migrate from free over-the-air broadcast television to pay-only cable services. *See, e.g.*, Cable Act, PL 102-385 at § 26.

because of changing market conditions, market conditions today warrant changes that would shore up local broadcasting against the vastly larger broadband, telephone, television and entertainment conglomerates that control the great majority of television distribution revenue. Certainly the FCC should not adopt new policies or rules that would accelerate or exacerbate the loss of free, over-the-air, local broadcast programming. Unfortunately, that is exactly what most of the rules under consideration in the *NPRM* would do.

The Commission must also be cautious, in considering the market for retransmission rights, to distinguish between retransmission rights negotiated by broadcast networks on behalf of their owned and operated stations, and rights negotiated by "pure play" broadcast companies like LIN. The MVPD Petitioners do not make any distinctions. But the substantial difference in negotiating dynamics when rights are being negotiated by "pure play" broadcasters on one hand, and companies such as Disney or Comcast/NBCU on the other hand, cannot be ignored. This is particularly relevant to the "market change" at the heart of the *NPRM*: the assertion that broadcasters are increasingly seeking cash compensation in exchange for retransmission rights rather than carriage of associated non-broadcast channels. Most "pure play" broadcasters, like LIN, do not have non-broadcast programming assets over which to barter. For LIN and most other broadcasters, cash and cash equivalents are the first and only meaningful compensation they have ever received. For most broadcasters, there is no shift in the form of retransmission revenue – all of the revenue is new, and critically needed, as broadcast networks increasingly demand that broadcast affiliates pay in cash for network programming that, in 1992, was provided exclusively on a barter basis.

C. The Good Faith Bargaining Obligation Was Never Intended to Restrict the Type of Compensation Broadcasters May Seek or to Prevent Legitimate Impasses in Retransmission Rights Negotiations

Neither cash compensation to broadcasters nor the rare negotiation impasse is a valid reason for the FCC to heap new and onerous rules on broadcasters. Congress intended to allow broadcasters to seek cash compensation and it understood that not all negotiations would be successful.

Cash compensation. The *NPRM*'s assertion that retransmission rules should be changed because broadcasters are being paid cash compensation for retransmission rights is alarming. As noted by the FCC in the *NPRM*, in enacting the 1992 Act, Congress recognized that the failure of cable operators to pay broadcasters for the right to carry the most popular programming on cable systems constituted an effective subsidy to cable operators.[28] Due to years of entrenched monopoly power on the part of cable operators, and the success of network program suppliers in persuading MVPDs to launch and pay for non-broadcast networks as compensation for carriage rights, television stations that are not owned by networks have only recently been successful in *reducing* that subsidy. The subsidy will not be eliminated entirely until the retransmission of broadcast programming by non-network owned stations is compensated at levels commensurate with similarly-rated non-broadcast programming. Where, nearly 20 years after the 1992 Cable Act, broadcasters have still not been able to eliminate their subsidy of cable operators, any claim of excessive market power on the part of broadcasters rings hollow. Congress clearly intended

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[28] *See NPRM* at ¶ 4. The Senate Commerce Committee described the situation as follows:

> Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems . . . . It follows logically, therefore, that a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals.

See S. Rep. No. 102-92, at 35 (1991).

that broadcasters be treated the same as cable channels with respect to cash payments, and the Commission's second-guessing of Congress's reasoning for this treatment is baffling.

Regardless, the FCC has no authority to regulate the prices charged by suppliers to MVPDs, and it cannot attempt to do indirectly that which it cannot do directly. The FCC has no role in the rates charged for the retransmission of broadcast programming.[29] If the Commission's concern is about the rates cable television operators charge their customers, Congress has provided clear authority for the FCC to regulate those rates where Congress believes it appropriate.[30] If the FCC feels the need to intervene to protect the public from high cable rates, the answer is to focus directly on that issue, and not on requiring others to subsidize MVPDs. It is certainly true that a cable system's costs could be reduced by having the government require suppliers of coaxial cable and set top boxes to sell their product to MVPDs at artificially reduced prices, but no one would realistically suggest that is an answer to high cable rates. There is no reason why broadcasters alone should be forced to subsidize MVPDs through below-market pricing of their programming, particularly where the MVPD is a direct competitor of the broadcaster.

The FCC should carefully consider the incentives it would create by adopting "bargaining" rules that are really substantive limits on market-negotiated deals. Notably, the same entities that provide network programming to broadcast stations also own and operate highly profitable non-broadcast networks. Those companies acquire programming and sell that programming through channels that are most profitable. If the government indirectly curbs what Fox, Disney, NBCU/Comcast or CBS can charge for programming on broadcast networks, those companies can and will place that same programming on a non-broadcast network when

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[29] *See 2000 Good Faith Order* at ¶ 14.
[30] *See* Cable Act, PL 102-385 at § 3 (rate regulation provisions).

profitability dictates. MVPDs pay for the programming either way. But over time, that high cost programming becomes unavailable altogether to consumers that choose not to pay for television. A public policy that creates financial disincentives for a programmer to make its service available through free-to-air channels would be unfortunate.

A rise in negotiation impasses. The *NPRM* seemingly assumes that the FCC has a duty to ensure that all broadcast stations are included in the lineups of all multichannel video providers at all times. The *NPRM* states that when the FCC adopted the good faith rules in 2000, programming disruptions due to retransmission consent disputes were rare.[31] According to the *NPRM*, a rise in service disruptions justifies a review of, and possible changes to, the good faith negotiating rules in order to protect innocent consumers.[32] However, as explained above, the FCC did not adopt narrowly tailored good faith bargaining rules in 2000 because retransmission disputes were rare. It adopted narrow rules because Congress only authorized narrow, procedural rules that would not affect the outcome of negotiations.[33] Limiting the frequency of temporary carriage interruptions was never considered an objective of the good faith rules, because the Commission has always recognized that its rules are not about the outcome of negotiations, they are about the process of negotiations.[34] The FCC has no authority to control the outcome of negotiations. And a loss of carriage, whether temporary or permanent, is an outcome of negotiations, something the FCC is not empowered to alter.[35]

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[31] *See NPRM* at 20. Of course, programming disruptions are still rare today.

[32] *Id.*

[33] *See 2000 Good Faith Order* at ¶ 14-15.

[34] *Id.*

[35] In any case, carriage disputes that lead to service disruptions remain exceedingly rare. Virtually all carriage negotiations are resolved quietly without any public hint that a negotiation occurred. Tellingly, the MVPD Petition counted only thirteen instances since 2000 when a broadcaster and MVPD were even temporarily unable to reach an agreement out of the tens of thousands of retransmission consent negotiations that have occurred since that time. *See, e.g.*, National Association of Broadcasters, *Notice of Ex Parte Communication*, in MB Docket No. 10-71, at 3 (filed May 6, 2010); ATV Broadcast, LLC, *Comments*, in MB Docket No. 10-71, at 2 (filed Apr. 28,

It is surprising that the *NPRM* concludes that it is appropriate for the FCC to attempt to use its good faith rules to limit temporary service disruptions when the FCC itself admits it has no jurisdiction to limit permanent service disruptions where negotiations fail altogether. How is the FCC to determine, *a priori*, which service interruptions are temporary and which are permanent? There is no dispute that once negotiations fail, and both carriage and negotiations have ended, the FCC's jurisdiction ends.[36]

III. The Proposed Rule Changes Are Unnecessary and Would Be Harmful

With one exception, the rule changes that are proposed range from unnecessary to damaging. The one exception is potential changes to the notice provisions to provide consumers with a more useful opportunity to investigate their options should a carriage impasse occur. The goals of that proposal, however, can be effectuated under the Commission's existing rules with some changes in interpretation.

The *NPRM*'s proposals, if adopted, would fundamentally change the nature, purpose and effects of the good faith rules, expanding them to do things Congress never intended and impacting the results (not the procedure) of the retransmission consent marketplace. Expanding the rules for this purpose would not only be impermissible, it would be bad for broadcasters and bad for the public. The changed rules would skew the market significantly, establishing a new set of non-market based incentives affecting the behavior of market participants on all sides. The predictable results would be bad, and the unpredictable results could be worse.

2010) (stating that as of a year ago, ATV has been involved in more than 7,000 carriage negotiations since 1993 and only four resulted in a temporary service disruption).

[36] *See In the Matter of Satellite Home Viewer Extension and Reauthorization Act of 2004 (Reciprocal Bargaining Obligation),* Report and Order, 20 FCC Rcd 10339, ¶ 14 (rel. Jun. 7, 2005) ("*Reciprocal Bargaining Order*"); *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc. Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith,* Memorandum Opinion and Order, 22 FCC Rcd 47, ¶ 24 (rel. Jan. 4 2007) ("Even with good faith, impasse is possible").

A. Additional *Per Se* Violations Are Inappropriate Because, in Eleven Years, Only Once Has the FCC Found a Party to Be Negotiating in Bad Faith

The current good faith bargaining rules apply equally to both participants in a retransmission consent negotiation, and this is what Congress intended.[37] The *NPRM* recounts the history of good faith bargaining litigation and identifies only five complaints, total, alleging violations of the FCC's good faith bargaining rules.[38] Of those, in only one case did the FCC find that a party had negotiated in bad faith, and that party was a cable operator, not a broadcaster.[39] As the good faith rules were adopted more than a decade ago and many tens of thousands of agreements have been negotiated since then, the dearth of good faith complaints and the absence of *any* finding that *any* broadcaster *ever* negotiated in bad faith is evidence that all parties, and television broadcasters in particular, have an exceptionally reliable record of negotiating in good faith.

The FCC has repeatedly acknowledged that Congress never intended for the FCC to involve itself in the substance of retransmission consent negotiations.[40] But the proposed *per se* rules would do exactly that – establishing "negotiating" standards that would severely curb the behavior of parties that already had every intention of reaching an agreement in good faith. While the MVPD Petitioners would prefer that the Commission attempt to influence the outcome of marketplace negotiations in MVPDs' favor, Congress decided that consumers are best served by an open and competitive market for the disposition of retransmission rights.

LIN also notes that the majority of the proposed *per se* rules are directed exclusively at broadcasters. None of the existing good faith rules are so one-sided—they apply equally to

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[37] *See Reciprocal Bargaining Order* at ¶ 1.

[38] *NPRM* at ¶ 12.

[39] *See* Letter to Jorge L. Bauermeister, 22 FCC Rcd. 4933 (MB 2007).

[40] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 (rel. Mar. 29, 1993); *2000 Good Faith Order* at ¶ 14.

broadcasters and MVPDs. Using language identical to the section of SHVIA that imposed a good faith bargaining obligation on broadcasters, Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA")[41] amended Section 325(b)(3)(C) of the Communications Act to impose a reciprocal good faith retransmission consent bargaining obligation on MVPDs. When it adopted rules to implement Section 207, the Commission rejected arguments that MVPDs should be subject to different, less restrictive good faith negotiating parameters than broadcasters.[42] The Commission correctly concluded that Congress intended for the rules to apply to both sides equally.[43] The FCC does not have authority to adopt *per se* rules that impose special bargaining restrictions on broadcasters that do not apply to MVPDs.

1. The FCC Does Not Have the Authority to Prohibit One Station From Negotiating on Behalf of Another Station Pursuant to an LMA, SSA and/or JSA, and the Broadcast Ownership Rules Are Not Intended to Protect MVPDs in Signal Carriage Negotiations

The *NPRM* asks whether the FCC should adopt a new *per se* rule prohibiting a station from granting another station or group the right to negotiate retransmission consent on its behalf if the stations are not commonly owned.[44] The proposal stems from the assertions of some commenters that "noted problems" with these arrangements. The *NPRM* states that the Commission "believes" that these arrangements may lead to delays in the negotiation process or make negotiations unnecessarily complicated, but does not cite any examples of "delays" or "unnecessary complication," both of which are vague, subjective terms.

Four reasons counsel against adoption of this new *per se* rule.

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[41] *See SHVERA* Sec. 207.
[42] *See Reciprocal Bargaining Order* at ¶¶ 8, 13-14 (2005).
[43] *Id.* at ¶ 8.
[44] *NPRM* at ¶ 23.

First, this would not be a procedural negotiating rule. It would be a substantive, market-skewing rule thinly disguised as a rule to ensure good faith negotiations.[45] The FCC cannot expect to adopt rules that would prevent all "delays" and "problems" in the negotiating process, even if it had legal authority to do so. No party has asserted or offered evidence that broadcasters negotiating jointly do not come to the bargaining table with the good faith intention of actually reaching a deal. Under Congress's directive, that must be the end of the FCC's inquiry.

Second, this rule would not apply equally to broadcasters and MVPDs; it would burden broadcasters only. It would run contrary to the intent of Congress that the good faith bargaining obligation be reciprocal and leave MVPDs at a substantive advantage. We note that the second largest cable operator, Time Warner Cable ("TWC"), routinely negotiates retransmission rights jointly on behalf of itself and Bright House Networks, which is the tenth largest cable operator.[46] Those two parties presumably engage in joint negotiations for the economic efficiencies involved, and not because they have a "bad faith" desire to refuse to negotiate with broadcasters for retransmission consent.

Third, local marketing agreements ("LMAs"), shared services agreements ("SSAs") and joint sales agreements ("JSAs") are marketplace responses to broadcast ownership rules that are hopelessly out of date. The purpose of those ownership rules is to ensure a diversity of media voices in each community, not to ensure that MVPDs have the benefit of negotiating with each station individually for carriage rights. MVPDs are not the intended beneficiaries of the multiple ownership rules, and application of those rules in this alternate context would be arbitrary and

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[45] *See 2000 Good Faith Order* at ¶ 14 (stating that the Commission, in regulating "good faith negotiations" should not "assume a substantive role in the negotiation of the terms and conditions of retransmission consent").

[46] *See* NCTA, Top 25 Multichannel Video Programming Distributors as of Dec. 2010 (available at http://www.ncta.com/Stats/TopMSOs.aspx) (link last checked May 26, 2011).

capricious. A *per se* rule that would flatly prohibit a station from negotiating on behalf of stations with LMA, SSA, or JSA agreements would press both the multiple ownership rules and the good faith rules far beyond their intended purposes.

Fourth, the FCC does not have the authority to micromanage broadcasters' exercise of their right to control retransmission consent, or to adopt a rule that would directly prohibit a broadcaster from subcontracting its retransmission negotiations to a third party. The Senate Report accompanying the 1992 Cable Act plainly states, "[i]t is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."[47] Nothing in the Act, nothing in the legislative history, and nothing in the FCC's orders implementing the 1992 Cable Act offers any suggestion that Congress intended to prohibit joint negotiations by broadcasters when otherwise permitted by law. The FCC cannot adopt a new substantive limitation on the scope of basic retransmission rights through the ruse of a good faith bargaining rule.

2. The Balance of Power Between Networks and Affiliates Should Be Addressed Promptly in the Appropriate Context of the Quadrennial Review

The *NPRM* also asks whether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.[48] If a station's grant of such rights to a network is a problem, the solution is not the adoption of yet more rules that regulate the conduct of broadcast business operations. The solution is to eliminate or greatly relax the FCC's broadcast ownership rules. Those rules have been relics for years, and their market-skewing

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[47] S. Rep. No. 102-92 at 36.
[48] *NPRM* at ¶ 22.

effects become more harmful every day. Among many other damaging effects, the ownership rules assure that in negotiations between broadcast stations and their network suppliers, the networks will always have vastly greater negotiating leverage.

LIN does not suggest that the networks are to blame for these conditions. As for-profit companies, they should be expected to demand the most favorable terms they can obtain in the marketplace. It is the FCC's broadcast ownership rules that create this imbalance. Those rules permanently render owners of network-affiliated broadcast stations small enterprises as compared to their network program suppliers.[49] To fix these market imbalances, instead of promulgating new regulation of broadcasters, the FCC should move swiftly and resolutely to revise or eliminate its outdated broadcast ownership rules. That revision – specifically through quadrennial ownership review – is how Congress has ordered the FCC to address market changes.

B. Changes to the FCC's Program Exclusivity Rules Would Have No Impact on Retransmission Consent Negotiations and Would Introduce Uncertainty and Confusion

The *NPRM* asks for comment on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity.[50] As the *NPRM* acknowledges, the Commission's rules do not grant exclusivity rights to broadcasters. In fact, they restrict the geographic area within which broadcasters may enforce programming exclusivity rights they have contractually obtained from their suppliers, while permitting broadcasters to assert their FCC-limited rights by using Commission-defined

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[49] Notably, the network-affiliated station groups are also far smaller enterprises than the largest MVPDs, many of which are among the MVPD Petitioners. The enterprise value of DIRECTV alone is many times the combined enterprise value of all of the publicly traded pure play television broadcast station groups.

[50] *See NPRM* at ¶¶ 42-45. *See also,* 47 C.F.R. §§ 76.92 *et seq.*, 76.101 *et seq.*, 76.122, 76.123.

notification procedures.[51] The proposal to eliminate the program exclusivity rules is driven by MVPDs, which argue that territorial exclusivity arrangements give broadcasters excessive market power.[52] However, like all other programmers, it is broadcasters' contracts with their program suppliers, not the FCC, that determine whether program exclusivity is available. Though MVPDs believe they should have the right to import distant broadcast signals without regard to contractual exclusivity rights held by the local broadcaster, they fail to explain why broadcasters, among all programmers, should be so uniquely disadvantaged.

The MVPD Petitioners apparently believe they should have multiple choices as to which broadcast stations they can deliver to subscribers, and they complain that the broadcaster's exclusive local rights to network programming skews retransmission negotiations. But territorial exclusivity does not provide market power, and competition law does not prohibit exclusive distribution territories. Exclusive territories can provide substantial public benefits, including the incentive of the exclusive distributor to make significant investments in serving its assigned territory. In the case of broadcast markets, network and syndicated program exclusivity translates into larger investments in local programming as well as local infrastructure and jobs.

Nor would eliminating the exclusivity rules likely result in less exclusivity, as the MVPD Petitioners suggest. The likely result of eliminating the exclusivity rules would be a substantial expansion of exclusivity, because most broadcast network affiliation and syndicated programming agreements grant exclusivity to the entire Designated Market Area ("DMA"), subject to restrictions imposed by the FCC's rules. Because the FCC rules are incorporated into many contracts and all the industry players are well acquainted with the rules and the enforcement process, elimination of the rules would create ambiguity in the allocation of rights

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[51] *NPRM* at n. 128.

[52] *See* MVPD Petition at 13-14.

and obligations between parties to thousands of programming agreements, which commonly have terms as long as five or ten years.

If the FCC eliminated its program exclusivity rules, the market would face an extended and tumultuous period of transition. During this period, the lack of an FCC enforcement mechanism could allow multiple signals to be imported into every market in the country, potentially for years, until contract amendments and court actions put a stop to it. Many broadcast stations could suffer irreparable harm, losing advertising and any hope of collecting retransmission fees to offset programming costs. Eventually, MVPDs would be required once again to respect exclusivity rights, probably within the entire DMA of the broadcaster. But enforcement costs would be far higher, disproportionately affecting smaller market and economically marginal stations.

There is little to be gained from eliminating the FCC's exclusivity rules, and much to lose. The FCC has a public interest mandate to facilitate localism, and carriage of out-of-market signals for several years while the market adjusts to the regulatory vacuum would undermine localism where it is most vulnerable. FCC action that facilitates distant signal importation, even for a few years of transition, would reflect a basic policy decision by the Commission that low retransmission fees for broadcast signals (without any obligation on MVPDs to pass savings on to customers) is more important than localism.

C. The FCC Should Require MVPDs to Comply with the Subscriber Notice Provisions of the Commission's Rules and Adopt an NPRM to Examine the Effects of Early Termination Fees on MVPD Subscribers

The *NPRM* asks whether the FCC should require cable operators to give notice of the *potential* deletion of a broadcast signal if an agreement is within thirty days of expiration, unless a renewal or extension has been signed.[53] LIN is a strong supporter of giving consumers timely, accurate and honest information so they can make informed decisions.[54]

The FCC's rules, as currently interpreted, give a cable provider wide discretion in how to provide notice—it may provide notice to subscribers "using any reasonable written means at its sole discretion."[55] But in LIN's experience, most MVPDs give only technical notice, typically, publication in newspaper classifieds. Some MVPDs do not give notice at all, apparently gambling that retransmission agreements will be concluded within the 30 day period or that the parties will agree to an extension. This is usually a safe bet, because actual carriage interruptions are exceedingly rare. But in practice, many MVPDs do nothing to give consumers *actual* notice of the potential service disruption. In some cases, MVPDs not only avoid giving notice to consumers, they make affirmative efforts to prevent broadcasters from giving notice.[56] Furthermore, MVPDs often give contradictory and confusing notice to their consumers.

Given the general failure of MVPDs to provide meaningful advance notice of service losses to consumers, LIN does not rely on MVPDs to give notice. When LIN believes that a carriage interruption may occur, LIN begins alerting viewers that the agreement between LIN and the MPVD will end on a certain date and that, absent a new agreement, the MVPD will not be permitted to carry LIN's signals after that date.

The *NPRM* asks whether the notice provisions should be changed. It is clear from LIN's experience that, whether as a lack of adequate rules or insufficient enforcement, today MVPDs'

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[53] *NPRM* at ¶ 37.

[54] LIN incorporates by reference its earlier comments regarding subscriber notice in this docket. See Comments of LIN Television Corporation, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, dated May 18, 2010 at 12-15 ("*LIN Petition for Rulemaking Comments*").

[55] 47 C.F.R. § 76.1603(e).

[56] During the course of its recent negotiations with DISH Network, LIN notified the Commission of actions by DISH aimed at preventing LIN from notifying DISH subscribers of a possible programming disruption. *See* Letter to William Lake, attached as Exhibit A.

notice practices do not give consumers timely information that they can act on, contrary to Congress's intent.[57] LIN takes no position on whether changes to the notice rules are necessary. But at a minimum the FCC should promptly issue a public notice advising operators subject to Section 76.1603 that they must provide clear, actual notice of potential service loss to subscribers at least 30 days before the end of a retransmission agreement term if a new agreement has not been reached. The FCC should not prescribe the specific methods the MVPD should use in each case, because circumstances vary. But the MVPD notice to subscribers should be clear, consistent, and factually accurate.[58] This simple step would help assure that consumers actually receive the notice that the FCC's rules already require MVPDs to give.[59] At the same time, it would provide strong incentives for MVPDs and broadcasters to conclude renewal negotiations at least 30 days before an existing agreement expires.

The *NPRM* also asks whether the FCC should impose notice requirements on broadcasters before MVPDs drop broadcast signals.[60] Although LIN gives advance notice when it appears to LIN that a carriage interruption will occur, new rules requiring broadcasters to give notice could be problematic. Broadcasters have no privity with MVPD subscribers. Broadcaster's agreements are with MVPDs. It is the MVPDs that make service commitments to

[57] Even when consumers do receive timely notice, their efforts to mitigate signal loss are often frustrated by early termination fees imposed by MVPDs. *See LIN Petition for Rulemaking Comments, supra note 54*, at 15. Some MVPDs' subscriber terms and conditions provide for negative option (automatic) renewals of term commitments and impose stiff early termination fees, even when the MVPD stops carrying popular programming. Like the failure to give clear notice that carriage of a channel may be discontinued, this sort of MVPD business practice undermines the ability of MVPD subscribers to respond to service changes and even price hikes by their providers. The NPRM asks what steps the FCC can take to mitigate the problems caused by early termination fees. The FCC should rule that MVPDs may not impose early termination fees on subscribers that have lost access to broadcast signals as the result of a retransmission negotiation impasse.

[58] *See LIN Petition for Rulemaking Comments, supra note 54*, at 9, describing Time Warner Cable's efforts in 2008 to persuade subscribers that no signal interruption would occur.

[59] Although the Commission may not be able to impose 30 day notice requirements on non-cable MVPDs without a rulemaking proceeding, the Commission can state that it will consider clear advance notice to non-cable subscribers (or the lack of notice) as a factor bearing on the MVPD's good faith bargaining.

[60] *NPRM* at ¶¶ 34-37.

their subscribers. LIN never has access to a MVPD's subscriber list and cannot reach the subscribers of any one MVPD directly. LIN can only address notice to the population generally. If LIN were required to give market-wide notice of the imminent termination of a retransmission agreement with a small MVPD with a handful of subscribers (or a large MVPD with few subscribers in that particular market), that notice could confuse a much larger number of subscribers to other MVPDs. In addition, notice overload could defeat the point of consumer notice. For example, in an area with 20 MVPDs, consumers could see 19 notices and ignore the 20th notice – the one that applies to them.

Plainly, if the Commission fully considers how the interests of consumers can be protected when programmers and MVPDs disagree on terms of carriage agreements, it will issue a further NPRM to examine the full range of MVPD business practices that impact consumers when negotiations reach impasse.

IV. Conclusion

Congress has not given the FCC any authority to regulate the retransmission rights marketplace and it has admonished the FCC not to attempt to determine the outcome of rights negotiations. The Commission's authority is limited to establishing rules for the retransmission consent/must-carry election process and to ensure that both parties actually negotiate with the intention of reaching agreement based on competitive marketplace considerations. That authority does not extend to creating new substantive rules that would, by their terms, proscribe certain types of negotiations or agreements.

For the reasons explained in these comments, the Commission should reject the proposed rule changes and begin enforcing the subscriber notice provisions of Section 76.1603 of its rules.

Respectfully submitted,

LIN TELEVISION CORPORATION

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May 27, 2011

EXHIBIT A

lin media

February 28, 2011

Via Hand Delivery and E-mail

Mr. William Lake
Chief, Media Bureau
Federal Communications Commission
445 Street, S.W., Room 8-A302
Washington, D.C. 20554

Re: DISH Network Termination of Carriage of LIN Television Stations

Dear Mr. Lake:

At 11:59 p.m. Mountain Time on Friday, March 4, we expect DISH Network, LLC ("DISH") to terminate carriage of signals of television stations owned or serviced by LIN Television Corporation ("LIN") and its subsidiaries in 17 television markets. The affected stations will begin giving notice of the carriage interruption this afternoon.

We want to emphasize that DISH made the decision to terminate carriage. When LIN realized that negotiations were unlikely to conclude by 11:59 p.m. today, the end of the term of our existing retransmission agreement with DISH, LIN proposed to extend its existing agreement for an additional month, with no change in compensation or other terms during the extended period. We hoped to prevent an interruption of service to our viewers and DISH's subscribers. DISH refused that offer. DISH proposed a day-to-day extension provided that LIN did not give notice to viewers that carriage might be disrupted.

LIN is unwilling to put viewers at risk of losing access to LIN's signals with no prior notice, so we rejected DISH's proposed day-to-day extension subject to no consumer notice. We told DISH that we would extend the existing agreement for more or less than one month, but would not agree to an extension so short as to preclude reasonable consumer notice. Late last week DISH finally agreed to a four-day extension, until 11:59 p.m. on Friday of this week. However, DISH was unavailable to negotiate over this past weekend, and it now appears unlikely that negotiations will conclude this week.

We at LIN were surprised that DISH would refuse our offer to carry these signals under terms of the expiring agreement for another month in an effort to reach a new agreement without disrupting service to DISH's subscribers. DISH has asked the FCC to require parties to continue carriage on terms of expiring retransmission agreements, so we did not expect DISH to refuse the identical relief when voluntarily offered by LIN.

One West Exchange Street, Suite 5A, Providence RI 02903 | p 401.457.9500 f 401.454.2817 | www.linmedia.com

LIN has made every effort to avoid this disruption. However, now that DISH has made the decision to terminate carriage, we are working hard to alert viewers and to ensure that all viewers will continue to have access to the affected television stations' signals while we continue our efforts to negotiate a carriage agreement with DISH.

What LIN is doing to mitigate viewer disruption. All affected stations broadcast from state-of-the-art technical facilities that provide excellent over-the-air coverage to the great majority of households in every market we serve. In addition, LIN has retransmission agreements in effect with all other multichannel video distributors serving our markets. Essentially all LIN viewers now served by DISH can receive these signals over-the-air or through another multichannel distributor. The great majority of affected DISH subscribers have three or more options to receive affected television programming.

This afternoon LIN will launch a coordinated initiative in every affected market with three goals: (i) to inform affected subscribers that DISH might not carry these stations after midnight on Friday of this week; (ii) to educate affected viewers about their other options for receiving these signals; and (iii) to provide assistance in taking the steps necessary to ensure uninterrupted service. Specifically:

- Beginning today, each affected station will run crawls and special announcements informing viewers that the station may not be available on DISH after Friday, March 4.

- We are establishing a call center reachable by special toll-free telephone numbers that consumers can call 24/7 for more information.

- Each station has designated staff to read and respond to emails and telephone calls from viewers.

- We will establish a series of special web pages that provide information about alternative ways DISH subscribers can continue to receive the signals.

- We will launch a print, broadcast, and web campaign informing viewers of alternative ways to receive affected signals.

- Before Friday we will provide community leaders in each market with advance notice and we will keep them informed throughout the process.

- We will notify our other distribution partners and encourage them to make extra efforts to be responsive to inquiries from DISH subscribers in LIN markets.

Ideally, we would have begun these efforts earlier than today, but we did not expect DISH to decline our offer to extend our existing agreement.

I assure you that LIN will continue to take all reasonable steps to educate viewers about their options for continued access to these stations, which are among the most widely viewed television channels in each market we serve. We believe the best result for all parties would be a final agreement that assures continued carriage. We are actively working on this process, and we will continue to devote all necessary resources to reaching a fair agreement with DISH as quickly as possible.

Please feel free to contact me if you have any questions about these events or would like more information.

Respectfully,

/s/ Rebecca Duke

Rebecca Duke
Vice President of Distribution

cc: Mary Beth Murphy
Diana Sokolow
Steven Broeckaert