

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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

**REPLY COMMENTS**

Journal Broadcast Corporation (“Journal”), by its attorneys, hereby files these reply comments to support comments submitted by multiple other broadcast companies in response to the above-referenced Notice of Proposed Rulemaking (“NPRM”) regarding the Commission’s rules governing the retransmission consent process.<sup>1</sup> Journal is the licensee of eleven full power television stations located in medium and small markets (as well as two low power television and several radio stations). Journal has negotiated more than sixty retransmission consent agreements. None of these negotiations has reached impasse or resulted in removal of Journal stations from an MVPD’s channel line-up. Journal agrees with the numerous broadcasters that have submitted comments that there is no basis to make changes to the FCC’s rules implementing broadcasters’ statutory right to negotiate with MVPDs for retransmission of their signals. As several commenters point out, the suggestions in the NPRM that the FCC should consider new substantive rules because of changes in the retransmission rights market ignore the basis on which the retransmission consent good faith negotiation regime is based.<sup>2</sup> As the

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<sup>1</sup> *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71 (2011) (published in the Federal Register at 76 Fed. Reg. 17071).

<sup>2</sup> *See, e.g.*, Comments of LIN Television Corporation, MB Docket No. 10-71, at 7-9 (May 27, 2011) (“LIN Comments”) (“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

experience of Journal and many other broadcasters that have participated in this proceeding makes clear, the current market-oriented retransmission consent regime is working in the manner that was intended by Congress when it enacted the Cable Television Consumer Protection and Competition Act of 1992, and the Commission should not take any actions that would disrupt the existing system.<sup>3</sup>

**1. The Network Non-Duplication And Syndicated Exclusivity Rules Should Be Retained.**

Journal agrees with other commenters that elimination of the network non-duplication and syndicated exclusivity rules (together, the “exclusivity rules”): (a) would strip broadcasters of an efficient enforcement mechanism for the “contractual exclusivity . . . that broadcasters pay significant sums to obtain,” (b) would destabilize the current regime in the short term due to the extent to which privately negotiated contracts presume the existence of the exclusivity rules, (c) would negatively affect localism, and (d) would not improve the retransmission consent negotiation process.<sup>4</sup> Journal also agrees that the applicability of the network non-duplication rule should not depend on whether a local broadcast station has granted retransmission consent.<sup>5</sup> MVPDs argue that there is no longer a policy justification for permitting broadcasters to invoke the protections the exclusivity rules provide.<sup>6</sup> This claim is incorrect. As other broadcasters

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authorized it to do.”); Comments of Sinclair Broadcast Group, Inc., MB Docket No. 10-71, at 7-10 (May 27, 2011) (“Sinclair Comments”).

<sup>3</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub L. No. 102-385, 106 Stat. 1460 (1992). *See, e.g.*, Comments of Belo Corp., MB Docket No. 10-71, at 1-2 (May 27, 2011) (“Belo Comments”) (“The existing ‘good faith’ standard provides negotiating parties with the flexibility to pursue creative solutions that are uniquely tailored to each negotiation.”)

<sup>4</sup> Belo Comments at 26 and 2, 4, 28-29; *see* LIN Comments at 21-23; Comments of the National Association of Broadcasters, MB Docket No. 10-71, at 55-64 (May 27, 2011) (“NAB Comments”).

<sup>5</sup> *See* Belo Comments at 30.

<sup>6</sup> *See, e.g.*, Joint Comments of MediaCom Communications Corporation, MB Docket No. 10-71, at 15-16 (May 27, 2011) (“MediaCom Comments”).

have explained, the exclusivity rules are important to offset the effects of statutory copyrights for distant signals, which encourage the importation of duplicative programming.<sup>7</sup>

Journal, like other commenters, also believes that broadcasters would suffer irreparable harm if the exclusivity rules were eliminated because the cost to broadcasters of enforcing their contractual exclusivity rights would increase significantly.<sup>8</sup> In addition, as several commenters note, network affiliation agreements generally reference FCC rules in defining the extent of exclusivity granted.<sup>9</sup>

Furthermore, the fact that the elimination of the exclusivity rules may facilitate carriage of out-of-market signals, even in the short term, would have a negative impact on localism. Exclusivity allows a station to maximize viewership and advertising revenues, which, in turn, help increase the ability of broadcasters to invest in local programming.<sup>10</sup> Most significantly, as others have emphasized repeatedly, both Congress and the Commission have recognized the critical role of exclusivity in the free, over-the-air, local broadcasting system and have realized the importance of providing broadcasters with an effective means to enforce exclusive programming rights.<sup>11</sup>

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<sup>7</sup> Comments of NBC Affiliates, MB Docket No. 10-71, at 2 (May 27, 2011) (“NBC Affiliates Comments”).

<sup>8</sup> See, e.g., Belo Comments at 26-28; LIN Comments at 22-23.

<sup>9</sup> See, e.g., LIN Comments at 22; NBC Affiliates Comments at 10.

<sup>10</sup> Belo Comments at 30; NAB Comments at 3, 59.

<sup>11</sup> See, e.g., Joint Comments of Small- and Mid-Sized Market Broadcasters, MB Docket No. 10-71, at 14-16 (May 27, 2011); NAB Comments at 56 n. 165 (citing *FCC, Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* at ¶ 33 (Sept. 8, 2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-260936A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf)), 59.

**2. Granting Another Station Or Station Group The Right To Negotiate A Retransmission Consent Agreement Should Not Give Rise To A *Per Se* Violation Of The Requirement To Negotiate In Good Faith.**

As other commenters have emphasized, granting another station or station group the right to negotiate a retransmission consent agreement should not give rise to a *per se* violation of the requirement to negotiate in good faith.<sup>12</sup> Certain MVPD commenters allege, for example, that the Commission has been “overly permissive” in permitting sharing arrangements between stations, and that this approach “has facilitated collusive negotiations.”<sup>13</sup> The fact is that hundreds of LMAs, JSAs and management agreements have been reviewed and approved by the Commission. For many years, the Commission has correctly recognized that these arrangements help broadcasters realize certain efficiencies and, thereby, increase their abilities to meet their public interest obligations.<sup>14</sup> In any case, any substantive changes to rules with respect to such arrangements that MVPDs may believe are necessary are beyond the scope of this rulemaking.

As other commenters observe, it is not a violation of the obligation to negotiate in good faith to appoint a third party to assist in retransmission consent negotiations.<sup>15</sup> In fact, both broadcasters and MVPDs do so.<sup>16</sup> Further, as several commenters correctly note, unlawful collusion is prohibited under antitrust laws, which are intended to gauge whether a particular

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<sup>12</sup> See, e.g., Belo Comments at 23; LIN Comments at 18-20.

<sup>13</sup> Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 35 (May 27, 2011); see also MediaCom Comments at 19-20; Comments of American Cable Association, MB Docket No. 10-71 (May 27, 2011).

<sup>14</sup> See, e.g., 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13683 ¶ 164 (2003).

<sup>15</sup> See NBC Affiliates Comments at 18; Sinclair Comments at 26.

<sup>16</sup> See *id.*

joint negotiation constitutes an abuse of power in a particular market.<sup>17</sup> The local television ownership rules, including Commission-approval of these kinds of non-ownership arrangements, already prevent the kind of market concentration about which the Commission is most concerned.<sup>18</sup>

Finally, and perhaps most importantly, Journal agrees with other broadcasters that the Commission lacks the authority to involve itself in the substance of retransmission consent negotiations, and the proposed rule regarding joint negotiations would do just that.<sup>19</sup> Further, the proposed requirement would not apply equally to broadcasters and MVPDs and would therefore be contrary to the statutory intent that the good faith bargaining obligation be reciprocal.<sup>20</sup>

**3. The Commission Lacks Authority To Find That Refusing To Agree To Nonbinding Mediation When Parties Reach An Impasse Would Constitute A *Per Se* Violation Of The Requirement To Negotiate In Good Faith.**

Both the Commission and other broadcasters recognize that the agency lacks the authority to require binding dispute resolution if a negotiation reaches impasse.<sup>21</sup> Similarly, the Commission has neither the authority nor a factual basis to mandate non-binding dispute resolution. Even certain MVPDs have acknowledged that: “Mandating non-binding mediation for the parties in drawn out retransmission consent negotiations, seems to require more

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<sup>17</sup> See, e.g., Sinclair Comments at 23-24; see also NAB Comments at 23 (noting that the antitrust standards “act as safeguards against anti-competitive behavior”).

<sup>18</sup> See NAB Comments at 28 (“The negotiation of retransmission agreements involves the terms for carriage of stations’ signals on MVPDs, and such negotiations (whether joint or not) do not directly implicate the diversity or the content of the viewpoints expressed on the programming contained within those signals.”); see also LIN Comments at 19 (“The purpose of [the] 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 . . .”).

<sup>19</sup> See LIN Comments at 17-20.

<sup>20</sup> See *id.* at 19.

<sup>21</sup> See NPRM at ¶¶ 18-19; see, e.g., NBC Affiliates Comments at 16-17.

procedural hoops without any certainty that an agreement will be reached. Mandating what may be a fruitless endeavor seems impractical and not useful for accomplishing any Commission objective.”<sup>22</sup>

Further, as multiple broadcasters have demonstrated, there is no reason for the Commission to expand its rules to provide that a party’s refusal to agree to nonbinding mediation thirty days before an agreement expires would be a *per se* violation of the requirement to negotiate in good faith.<sup>23</sup> As noted above, Journal has successfully negotiated scores of retransmission consent agreements. Some negotiations have been relatively straightforward; others have not. Regardless of how early negotiations have begun, however, several of Journal’s retransmission consent negotiations have been successfully concluded shortly before an agreement expires. As multiple commenters have explained, effectively requiring mandatory nonbinding arbitration would disrupt the ongoing negotiations and unnecessarily divert the limited resources of both parties to the negotiation.<sup>24</sup>

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<sup>22</sup> Comments of CenturyLink, MB Docket No. 10-71, at 7 (May 27, 2011).

<sup>23</sup> See, e.g., NAB Comments at 35-39.

<sup>24</sup> See, e.g., Belo Comments at 19-20.

**4. Conclusion**

For the reasons set forth herein, Journal hereby respectfully requests that the Commission refrain from making changes to the exclusivity rules or to the retransmission consent good faith negotiation standards.

Respectfully submitted,

JOURNAL BROADCAST CORPORATION

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/s/

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