Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY COMMENTS OF DISH NETWORK L.L.C.

DISH Network L.L.C. ("DISH Network") respectfully submits these reply comments in response to the Commission's March 3, 2011 Notice of Proposed Rulemaking regarding much-needed reforms to the retransmission consent process.[1]

I. INTRODUCTION AND SUMMARY.

The current retransmission consent process is broken and in need of reform. The Commission should deem it a "per se" violation of the good faith standard when a broadcaster, among other things, (a) takes down programming during a bona fide retransmission consent negotiation; (b) demands discriminatory terms between competing Multichannel Video Programming Distributors ("MVPDs"); or (c) establishes an anti-competitive "tying" arrangement by demanding that an MVPD purchase non-broadcast programming as a condition of receiving retransmission consent.

In response to the proposal that the exclusivity rules favoring broadcasters be waived during a programming take-down, so that the affected MVPD may at least offer an adjacent market affiliate's programming, some broadcasters argued that this would undermine localism

[1] Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 FCC Rcd. 2718 (2011) ("*Notice*").

and the statutory compulsory copyright regime. DISH Network disagrees. Localism actually would be better served by such a reform, because broadcasters would be incentivized to invest more in the best possible local programming in order to render the adjacent market affiliate a seemingly weak substitute. In addition, a temporary waiver of the exclusivity rules does not eviscerate the compulsory copyright regime because it would last only for as long as the broadcaster took down its programming. The broadcaster would retain complete control over when the exclusivity rules would and would not be in effect.

II. THE COMMISSION SHOULD EXPAND THE LIST OF "PER SE" VIOLATIONS OF THE GOOD FAITH STANDARD.

By issuing its *Notice*, the Commission acknowledges the central premise that the current retransmission consent process is broken and in need of reform. To that end, among other things, DISH Network and multiple other parties recommend a variety of ways to strengthen the existing good faith standard by adding to the list of "per se" violations of the standard. Broadcasters almost uniformly oppose any strengthening of the list of "per se" good faith violations as an unnecessary interference with a properly functioning market.[2] DISH Network believes, on the other hand, that the current regulatory regime's failure to avoid consumer harm and market disruption should impel the Commission to adopt improved rules of the road to help prevent abusive and anti-competitive behavior of parties during retransmission consent negotiations.[3]

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[2] *See* National Association of Broadcasters Comments at 22; Sinclair Broadcast Group, Inc. Comments at 16; CBS Television Network Affiliates Association Comments at 18-21; NBC Television Affiliates Comments at 18-20; LIN Television Corp. Comments at 6; Joint Broadcasters Comments at 18-22.

[3] *Accord*, American Cable Association ("ACA") Comments at 5, 26; AT&T Comments at 17; CenturyLink Comments at 5, 10; DIRECTV Comments at 13-20, 22-25; Joint Comments of OPASTCO, National Telecommunications Cooperative Association ("NTCA"), Independent

One of the most important amendments to the "per se" violation standard would be to deem it bad faith to refuse a temporary contract extension while parties are engaged in bona fide negotiations. Many commenters sought to curtail broadcasters' ability to take down programming during negotiations through mandatory interim carriage and mandatory arbitration.[4] DISH Network agrees, but if those measures are not adopted, the addition of programming take-downs to the list of "per se" violations of the good faith standard is critical. When a broadcaster and MVPD are engaged in bona fide negotiations and the broadcaster pulls its programming in order to gain negotiation leverage, the broadcaster cannot claim to be acting in the best interest of consumers or the marketplace. Refusals of any contract extensions during bona fide negotiations are the epitome of bad faith.[5]

In applying this standard, the Commission should confirm that parties are engaged in bona fide negotiations if, for example, they have exchanged written terms and conditions. LIN Television Corporation's ("LIN") behavior in its recent retransmission consent negotiations with DISH Network illustrates the need for such a rule. DISH Network repeatedly offered to extend the then-existing retransmission consent agreement to allow for further negotiations, consistent with the letter and spirit of the good faith standard, but was rebuffed. Consumers in markets

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Telephone and Telecommunications Alliance ("ITTA"), Western Telecommunications Alliance, ("WTA") and Rural Independent Competitive Alliance ("RICA") at 6-16; USTA Comments at 20-24; Public Knowledge and New America Foundation Comments at 7.

[4] *See* ACA Comments at 71; AT&T at 12; Joint Comments of OPASTCO/NTCA/ITTA/WTA/RICA at 23; Verizon Comments at 3; Public Knowledge and New America Foundation Comments at 2-4.

[5] *See* DISH Network Comments at 20-25.

across the country lost valuable local and network programming as a result.[6] Ironically, LIN opposes any changes to the good faith standard due to what it claims is the rarity of violations.[7]

In the final analysis, the Commission must decide whether denying consumers a service they already paid for, often containing critical safety and other local information, and heavily subsidized by regulatory protections and vast grants of spectrum, is a reasonable means to achieve leverage in a commercial negotiation. DISH Network believes that it is not. The Commission can and should ensure that broadcasters no longer abuse the retransmission consent system by taking down programming during bona fide retransmission consent negotiations.

DISH Network also supports Cablevision's proposals. First, the program access non-discrimination principle should apply to the good faith standard. DISH Network agrees with Cablevision that charging discriminatory retransmission consent fees to different MVPDs in the same market should be a "per se" violation of the good faith standard.[8] Some commenters mistakenly characterize this as a "Most Favored Nation" or "MFN" requirement.[9] An MFN is something that two parties in a private negotiation agree to, based on traded equities, in order to assure that one of those parties receives at least as good a bargain as its peers in the marketplace. A non-discrimination principle, by contrast, is required where one party, such as a vertically integrated cable operator in the case of program access rules or a broadcaster in this case, possesses unilateral market power and is able to abuse that market power by willfully discriminating against certain competitors. The relief sought by Cablevision and supported by DISH Network here fits the non-discrimination category and should be adopted by the

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[6] DISH Network Comments at 22-23.

[7] LIN Television Corporation Comments at 17.

[8] Cablevision Comments at 11.

[9] Joint Broadcasters Comments at 23.

Commission. Broadcasters should not be permitted to abuse their government-sanctioned monopoly over network programming to unilaterally discriminate against competing MVPDs.

Second, DISH Network agrees with Cablevision that the list of "per se" violations should include the tying of non-broadcast programming to retransmission consent rights.[10] In its original implementing order, the Commission explicitly sought to curtail anti-competitive acts under the good faith standard:

> [A]ny effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement. . . . Conduct that is violative of national policies favoring competition – [that for example] involves the **exercise of market power in one market in order to foreclose competitors from participation in another** market -- is not within the [scope of permissible activities] in the statute.[11]

Under this principle laid down by the Commission, tying arrangements whereby a broadcaster with power in the network broadcast market demands the purchase of an unrelated non-broadcast programming service is, on its face, anti-competitive. The Commission should establish such behavior as bad faith.

III. TEMPORARILY WAIVING EXCLUSIVITY RULES WILL FACILITATE MARKET-BASED AGREEMENTS AND NOT UNDERMINE LOCALISM OR THE COMPULSORY COPYRIGHT REGIME.

In response to the proposal that programming exclusivity rules be waived or eliminated in order to bring the same kind of competition to the broadcasters currently experienced by MVPDs, broadcasters and networks claim that eliminating syndicated exclusivity and network

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[10] Cablevision Comments at 15.

[11] DISH Network Comments at 20 (*quoting* Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, *First Report and Order*, 15 FCC Rcd. 5445 ¶ 58 (2000) (emphasis added).

non-duplication rules would harm localism.[12] Some also argue that eliminating the exclusivity rules would undermine the compulsory copyright regime.[13] Neither argument passes muster.

While many commenters support the complete elimination of the exclusivity rules,[14] DISH Network believes that at the very least, such rules should be waived temporarily during a retransmission consent dispute in which the broadcaster has taken down its programming.[15] Doing so would reduce harm to consumers by allowing an MVPD to import an adjacent market network affiliate's programming as a near-substitute to the programming taken down by the local broadcaster. This also would better motivate the parties to reach an agreement because the broadcaster would face a competitive cost in taking down its programming, just as the MVPD suffers competitive harm when it loses such programming.

Localism would not suffer as the result of this change. The effect of such a waiver would be to expedite resolution of carriage disputes and limit consumers' loss of local programming. Moreover, local broadcasters would be incentivized to invest more in local programming in order to make the adjacent market affiliate's product appear to be a poor substitute. Such investment is precisely the outcome policymakers seek in promoting localism. If consumers highly value a broadcaster's local programming, they will let the MVPD know during a take-down that the

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[12] *See*, *e.g.*, CBS Corp. Comments at 15, 28.

[13] *See*, *e.g.*, The Walt Disney Company Comments at 19 (exclusivity rules must be preserved to maintain the balance Congress sought with the compulsory license regime and to allow for "efficient and direct enforcement of programming rights negotiated in the market").

[14] *See*, *e.g.*, AT&T Comments at 16; USTA Comments at 20-24; Discovery Communications LLC Comments at 12.

[15] *Accord*, CenturyLink Comments at 9; Starz Entertainment, LLC Comments at 12.

neighboring market's programming is not enough to keep them satisfied and the MVPD will be more inclined to reach an agreement and restore the local broadcaster's fare.[16]

Neither would the compulsory copyright statutes be undermined by a temporary waiver of exclusivity rules. Compulsory copyright statutes operate alongside Communications Act provisions that call for encouraging competition. Temporarily lifting the exclusivity rules in order to foster more competitive markets and expedite agreements would not eviscerate the compulsory copyright regime. Broadcasters would maintain exclusivity over network and syndicated programming as long as the retransmission agreements were in place. They would lose it only temporarily during take-downs, and only to the extent necessary to incentivize the parties to reach an agreement.

IV. CONCLUSION.

The record shows evidence of consumer harm caused by broadcasters during retransmission consent disputes. The Commission can and should promote the public interest by updating the retransmission consent rules and fulfilling Congress' vision of a functioning marketplace that aids consumers through the fruits of true competition.

Respectfully submitted,

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[16] *Accord* DIRECTV Comments at 11-12, n.25 (if consumers value local programming as much as broadcasters claim they do—despite broadcasters' frequent failure in reality to provide local programming of interest—then MVPDs will have an incentive to reach an agreement with the local broadcaster instead of importing neighboring affiliates' signals).

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