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

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| In the Matter of: | ) | |
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| 2010 Quadrennial Regulatory Review – | ) | MB Docket No. 09-182 |
| Review of the Commission's Broadcast | ) | |
| Ownership Rules and Other Rules Adopted | ) | |
| Pursuant to Section 202 of the | ) | |
| Telecommunications Act of 1996 | ) | |
| | ) | |
| Promoting Diversification of Ownership | ) | MB Docket No. 07-294 |
| In the Broadcasting Services | ) | |

# COMMENTS OF LIN TELEVISION CORPORATION

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**Summary**

The FCC's Quadrennial Review should focus on the task Congress set for the Commission: reviewing its local ownership rules in light of changing competition and modifying or discarding those that are no longer necessary. Using the Quadrennial Review to impose new, more restrictive rules is antithetical to Section 202(h). And using this proceeding as a proxy to place the government's finger on the scale of retransmission negotiations by imposing new rules on broadcasters, when the FCC lacks authority to directly interfere with the market for broadcast signal carriage rights, would work a double injustice to the detriment of viewers.

LIN Television Corporation (d/b/a LIN Media) ("LIN") specifically addresses four topics on which the FCC has requested comment. First, we oppose ownership attribution based simply on a supply or services contract, and we provide examples of how sharing arrangements have brought enhanced localism, expanded diversity and increased competition.

Second, we respond to the Commission's request for comment on the costs of prohibiting common ownership of two stations in a local market.

Third, we explain that proposals asking the FCC to regulate station programming would, if adopted, be both unconstitutional and unworkable.

Fourth, we support waiver of the eight voices test and the prohibition on owning two top four stations, under appropriate circumstances, in small markets. We propose clear, objective, and pragmatic standards for determining whether waiver is appropriate.

Proposals to use the Quadrennial Review process to impose new ownership regulations on television broadcasters are driven by the desire of MVPDs to skew the market for broadcast signal carriage rights in their favor. This market is finally beginning to work as Congress intended. MVPDs now seek to thwart that success by persuading the FCC to impose new rules that would render local broadcasting less efficient and less productive, simply to benefit MVPDs in private negotiations with broadcasters. The FCC should reject this bid by MVPDs to put their own interests ahead of the public interest.

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**COMMENTS OF LIN TELEVISION CORPORATION**

More than sixteen years ago, on February 8, 1996, President Clinton signed the Telecommunications Act of 1996[1] in the main reading room of the Library of Congress. No one in attendance, with the possible exception of the President himself, had broadband at home on that day. No one had ever watched a television program online. More than a third of Americans received all of their television either over the air or on rented videocassettes. DIRECTV was in its infancy, DISH Network hadn't yet launched service, and no "telcos" yet provided competing multichannel video service. Even the first DSL deployments to residential areas were years in the future.

But the 1996 Act was all about enabling competition. Congress knew that with new competition, much of legacy FCC regulation would become unnecessary and even counterproductive. So in addition to requiring the FCC to adopt specific regulations to implement the new law immediately, it also required the FCC to regularly adapt its

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) ("1996 Act").

regulations to the ever-changing competitive landscape that the 1996 Act was intended to foster. Among many other deregulatory provisions, the 1996 Act specifically required the FCC to review its media ownership rules every two[2] years to determine "whether they are necessary in the public interest as a result of competition"[3] and to "repeal or modify any regulation it determines to be no longer in the public interest."[4]

Sixteen years after the signing of the 1996 Act, the FCC's television ownership rules are scarcely changed from those that applied when the 1996 Act was signed into law. Indeed, as the Commission attempts to fulfill its deregulatory review obligations in the 2010 Quadrennial Review NPRM,[5] the Commission surprisingly concludes that:

- the local television ownership regulations are still necessary and in the public interest regardless of staggering growth in competition;
- the FCC should not repeal any local ownership regulations; and
- the enormous growth in competition requires the FCC to regulate local television ownership even more strictly than it did in 1996.

In this proceeding, proponents of maintaining the existing local television ownership rules should be called upon to explain why those rules are necessary. If they cannot make a persuasive case that the nineties-era rules are still *necessary* in the public interest, given that media competition has grown more in the last decade than it did in the five decades before, then those rules should be repealed or modified as appropriate.

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2 Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note. In 2004, Congress revised the then biennial review requirement to require such reviews quadrennially.

3 Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note.

4 *Id.*

5 *In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 11-186, MB Docket Nos. 09-182 and 07-294 (rel. December 22, 2011) ("NPRM").

The NPRM proposes not to "repeal or modify" regulations in response to competition, but instead to impose onerous new regulations on local television broadcasters, not in response to but in spite of enormous growth in competition. This does not meet the requirements of Section 202(h) of the 1996 Act.

Beyond a general objection to the NPRM on grounds that it does not meet the statutory mandate in light of increased competition in the media marketplace, LIN Television Corporation (d/b/a LIN Media) ("LIN")[6] will comment on four matters. First, LIN opposes ownership attribution based simply on a supply or services contract. We provide examples of how sharing arrangements have brought more and better local service to viewers in response to the NPRM's request. Second, we address the NPRM's request for comment on the costs of prohibiting common ownership of two stations in a local market. Third, we comment on the proposal that the FCC regulate station programming. Fourth, we support waiver of the eight voices test in small markets and we propose a clear, objective, and pragmatic standard for determining whether a waiver is appropriate.

## Discussion

### I. The NPRM Ignores Increased Competition Since the 1996 Act and The Deregulatory Intent of the Quadrennial Review Process

Growing competition from other media services has had a profound and lasting impact on local television markets. Competition from cable and satellite television and online media has driven local television revenues down, both as a percentage of local

[6] LIN Media is a local multimedia company that operates or services 32 network-affiliated television stations plus local interactive web sites and mobile products.

media revenues and in absolute terms. And competition has also changed consumers' expectations. Consumers want their information and entertainment programming on their own schedule and in multiple formats. Both of these changes from a fragmenting market compel broadcasters to make their services available at more times and in more places. With a few exceptions, a standalone television station today does not have sufficient scale to be competitive and, if it is providing local news, it is providing less than it could provide with a second local television outlet.

The Commission's failure to repeal or modify long-restrictive local television ownership limits and its proposals for further ownership regulation make little sense in light of the hyper-competitive media environment that has come about since the 1996 Act and the 1996 Act's deregulatory aims. The great majority of LIN's operations today are more appropriately described as local news and information publishing than television broadcast operations. Specifically, LIN employs more than 750 people devoted to producing local content, on-air, online, and on mobile platforms. LIN therefore disagrees with the Commission's assertion that competition can only be measured as between two television broadcast stations. To the extent that the Commission's Quadrennial Review focuses on the provision of news content,[7] LIN believes that the Commission should view media competition as medium agnostic. Local news, including video news, competes with local news no matter the silo re-regulatory proponents wish to place it in.[8]

As described above, increased competition across media platforms has created fragmentation of advertising revenues. Fragmentation of advertising revenues and

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7 *See, e.g,* NPRM at ¶*6 (*"the Commission reaffirms that a major goal of the rules is to encourage the provision of local news").

8 *See* http://www.ajr.org/article.asp?id=4428.

audiences, in turn, poses a particular challenge for local news organizations, because local news creation has high fixed costs. There is no playbook that describes how traditional media can adapt to revenue and audience fragmentation, and different companies have taken different approaches. LIN's historical focus on strong local programming has given its stations more flexibility to adapt to changing consumer tastes and use patterns compared to stations that rely exclusively on third party and non-local programming. Highly rated locally produced programming can be more profitable than network and syndicated programming. Strong local newscasts can also boost the ratings of network and syndicated programming. LIN stations consistently outperform national averages for other stations affiliated with the same networks,[9] in large measure because of our long term commitment to high quality local news and information programming. We have been able to make that long term commitment based in large part upon the economies of scale that we have been able to achieve in local markets. The Commission should recognize the competition-enhancing benefits of economies of scale and scope in its Quadrennial Review process.

Network and syndicated program suppliers increasingly distribute content through alternative channels, often in competition with local broadcast stations, but LIN typically owns all rights in the programming its stations produce locally. LIN can, and does, freely package and distribute its locally produced content online and via mobile platforms. But LIN has also maintained critical mass in a fragmenting market by becoming far more efficient in its local television operations. LIN owns two stations in eight of its sixteen

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[9] *See* Comments of LIN Television Corporation d/b/a LIN Media, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25, filed May 7, 2010, Attachment 1 ("*LIN Future of Media Comments*"). LIN's comments in Docket No. GN 10-25 address the importance of scale generally and of duopolies specifically in the production and distribution of high quality local news. We hereby incorporate those comments by reference.

markets, has grandfathered LMAs in two markets, and in two markets, LIN provides non-programming services to other local stations that it does not own.  These relationships, whether through ownership or service contracts, help these television stations remain competitive in the current media marketplace.

In spite of LIN's success publishing our local content online and on mobile platforms, broadcast operations still contribute the lion's share of our revenues. While developing our online and mobile local news platforms, we have also increased both the amount and quality of our local news broadcasts in markets where we operate two or more broadcast stations.  Attachment 1 hereto shows the number of hours of local programming LIN stations provide in ten markets in which LIN owns more than one station or provides services under a grandfathered local marketing agreement for a second in-market station. The stations share staff, equipment and other high cost resources in each market, but we produce unique local programming for each station.  As described further below, without these ownership or service contract relationships, many of LIN's stations would not be able to compete in the high-quality local news game without the support of a stronger in-market station.

In LIN's medium-sized to small markets, LIN's primary network-affiliated stations provide critical mass revenue to support the high fixed costs of local news, while the servicing of other stations allows us to provide our communities with news and other locally produced programming in other time periods.  For example, in the Hartford-New Haven DMA, LIN provides a 3 hour block of local programming from 5 – 8 a.m. each weekday morning.  WTNH (ABC) broadcasts *Good Morning Connecticut* from 5 – 7 a.m. weekdays.  At 7 a.m., WTNH picks up ABC's *Good Morning America,* while *Good*

*Morning Connecticut* continues on WCTX (MyNetwork) with an original hour of local programming from 7 – 8 a.m. If WTNH and WCTX were operated independently, *Good Morning Connecticut* would end at 7 a.m., and a stand-alone MyNetwork station would not be able to support the high cost of a locally produced morning show and would therefore likely be unable to effectively compete in the local media marketplace.

Economies of scale and efficiency also allow broadcasters to compete apply across media platforms. For example, LIN recently invested considerable capital in the installation of an online streaming platform, and has used this platform to stream live breaking news and weather to its apps for users on the go. In another example of using our resources across platforms, TVNewscheck.com recently recognized an online-only show about the local entertainment scene produced by WVBT, Virginia Beach, Virginia.[10] The show's host, Tracie Paige, appears on the station's regular programs, but supplements that programming in his online episodes. Without the support of co-owned WAVY-TV, such an expenditure would be impossible for a station that was formerly a standalone shopping network station under a previous owner.

As the advertising revenue available in each local market shrinks, each local news producer must either cut costs or find additional outlets on which to air local programming. The fixed cost of local news production is high, but the variable cost of additional programming hours is relatively lower once the fixed costs have been covered. By operating or servicing two broadcast stations in a market, LIN can produce and air more local programming of higher quality at a lower marginal cost per hour and utilize that content on new media platforms. As we explain below, far from displacing local

[10] *See* http://www.netnewscheck.com/article/2012/02/15/16985/wvbt-raises-ante-in-norfolk-digital-battle.

news voices, in this hyper-competitive local media environment, LIN has brought unique, locally produced programming to stations that previously had none.

The Commission's Quadrennial Review should recognize the increased competition facing television broadcasters. Rather than placing roadblocks for television broadcasters attempting to reshape themselves in the new local media marketplace, the Commission should encourage such endeavors so that television broadcasters can be stronger competitors in this market, especially with regards to local news.

## II. The FCC Should Not Attribute Ownership Based on Supply or Service Contracts

As an example of the further roadblocks the NPRM appears to be placing before broadcasters as they strive to compete in the new paradigm, the NPRM asks if the FCC should adopt a new rule that would effectively prohibit service contracts between stations that cannot be commonly owned under the FCC's existing ownership rules.[11] As we have noted, the mandatory Section 202(h) review does not contemplate adoption of new or more stringent local ownership rules, and we believe the proposed attribution rule must be rejected on that basis alone. But the rule would also have severe adverse effects on viewers, particularly in smaller markets where the cost of operating television stations and providing local programming are very high relative to the available revenue. Service contracts promote the public interest by making local television better.

[11] The Commission specifically requests comments on Shared Services Agreements and Local News Service agreements. NPRM at ¶195. The Commission, however, also alarmingly asks about any service arrangement that a local television station may enter, no matter the type of arrangement. NPRM at ¶207. Furthermore, LIN notes that the Austin arrangement described in footnote 500 of the NPRM would not qualify as a LNS agreement under the Commission's definition because it merely operated as a pool arrangement, as pool arrangements have been structured for decades.

LIN has previously explained to the FCC that larger markets with more available revenue can support more local news organizations than can smaller markets.[12] LIN believes the 25 largest US markets generally can support four to six independent local news "voices", including daily newspapers of general circulation and television broadcast newsrooms. LIN also believes that markets 26-50 can support three or four local news voices, and markets 51-100 can support perhaps two or three newsrooms. Most of LIN's stations operate in the 25th to 75th largest DMAs. In almost all cases, the number of separately owned television operations in those markets is greater than the number of high quality news operations that the market can reasonably support with available revenue.[13] Attributing ownership when stations share resources to reduce costs or increase output would have a direct and adverse impact on the quantity and diversity of local news in the markets where competition is already most at risk. Would Dayton, Ohio have even one local newspaper if the government mandated that at least eight separate papers compete in the market with no ability to divide costs or share resources? LIN discusses benefits of service contracts on localism, diversity, and competition below – and they are simply illustrative of LIN's experience – which would disappear under a rule attributing ownership of a station based simply on a supply or services contract.

### *A. Sharing arrangements serve the public interest*

LIN's experience demonstrates that sharing arrangements increase localism by allowing limited resources to be allocated to local content rather than duplicative non-programming operations. The examples below are merely illustrative of LIN's experience.

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[12] *See LIN Future of Media Comments* at 9.
[13] *Id.*

*Sharing Arrangements Increase Localism*

Sharing arrangements allow stations with little or no local news to dramatically increase the amount and quality of local news. For example, when LIN's station WPRI (CBS) began its sharing arrangement with WNAC (Fox) in the Providence, Rhode Island market in 1996, WNAC had no local news. WNAC now offers 16 hours a week, much of which is <u>at times when there is no other local television news coverage available</u>. WPRI and WNAC share an investigative crew that is actually growing, not decreasing. Many of the investigations first air on the WNAC 10 p.m. newscast even before they air on WPRI, using different scripts. In political years, at least one debate airs exclusively on WNAC. Providing this level of dedicated investigative and political reporting is extremely expensive, and would be impossible for a station that did no news at all prior to the sharing arrangement. In 2008, when the severe recession was forcing many television stations to cut newscasts, 54 Broadcasting, Inc.'s KNVA (CW), Austin, Texas (which is LIN's grandfathered LMA counterparty) launched a new 9 p.m. newscast. The newscast is unique – it airs at that time period on KNVA and is not a simulcast or repeat. Without sharing the news resources of KXAN (NBC), KNVA would never have been able to add expensive local programming in a time of economic contractions.

In addition to local news, sharing arrangements can increase other local programming and community involvement. For example, after entering into a sharing arrangement with LIN, WBDT (CW), Dayton, Ohio used the promotion and marketing resources of LIN's station WDTN (NBC) to launch the "CW Star" contest, bringing the station its first local, on-air talent. The CW Star attends community events, appears on-air on WBDT, and assists community organizations. CW Star Emily Szink explains

WBDT's new commitment to localism well when she said "I get frustrated hearing people say that Dayton is dying or that there's nothing going on around town. All people really need to do is discover Dayton! I hope to reveal Dayton's many offerings."[14]

*Sharing Arrangements Increase Competition*

As LIN noted above, sharing arrangements also benefit competition in the local media space. LIN provides some specific examples of increased competition from its own experience below.

LIN has seen a great number of standalone stations enter or come close to bankruptcy. LIN believes that sharing arrangements can alleviate such financial issues. For example, ACME Communications, Inc., the previous owner of Dayton's WBDT (CW), had announced it was on the brink of bankruptcy and was selling its stations. Without a purchase by Vaughan Media and the Shared Services Agreement/Joint Sales Agreement with LIN (as approved by the Commission), the station might be bankrupt today. Similar to the WBDT example, WLNE, the ABC affiliate in Rhode Island, which is a standalone station, went into receivership last year. A sharing relationship with WPRI has kept WNAC from the same fate. Similarly, sharing arrangements may save a local voice entirely. KNVA (CW), Austin, Texas, probably would not exist at all but for sharing arrangements. KNVA was an unbuilt station before the KNVA permittee and LIN, which owned KXAN (NBC) in Austin, entered into a LMA.

Continuing the theme of multi-platform local media competition discussed above, WBDT's website has received 20-fold increase in hits since WDTN began providing web services, helping WBDT to provide a whole new competitive voice in the Dayton online

[14] *See* http://www.daytonscw.com/dpp/cw_star/emilys-bio.

media market.  In Rhode Island, WPRI and WNAC were the first stations in Rhode Island to introduce high definition programming.  HD capability is extremely expensive, but necessary in the competitive environment when consumers expect to be able to use the HD capabilities of their devices.

Austin's KNVA (CW) probably would not exist at all but for a sharing arrangement with LIN.  KNVA was an unbuilt construction permit before its permittee entered into a Local Marketing Agreement with LIN.  Yet in 2001 KNVA launched a digital signal with a maximum power of 700 kW.  Covering the cost of the digital transition, especially including the very high cost of operating such a high power transmitter, would have been almost impossible for a small operator.  Instead, KNVA now serves a wider audience and better competes because of the investment in facilities made possible in large measure by the sharing arrangement with LIN's Austin operations.

*Sharing arrangements increase diversity*

Sharing arrangements also promote diversity.  Dayton's WBDT (CW) added to program diversity (and diversity in general) by adding the Bounce multicast network after Vaughan Media purchased the station last year.[15]  Bounce was able to launch by focusing on and getting commitments from larger station groups, including LIN.  LIN offered Vaughan Media access to LIN's connections with Bounce, and Vaughan Media chose to air Bounce on its D2 channel.  Similarly, with the promotional support of LIN's KXAN (NBC), Austin's KNVA was able to hire two previous African-American CW Stars with non-traditional backgrounds to serve as on-air personalities.

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[15] The FCC approved the Shared Services Agreement and Joint Sales Agreement with WDTN.  FCC File No. BALCDT-20100917AAT.

LIN's sharing arrangement with WNAC, Providence, also added to programming diversity in Rhode Island by assisting WNAC in bringing the first MyNetwork affiliation to Rhode Island with WNACD2, MyRI. In 2011, MyRI broadcast, for what LIN believes was the first time on over-the-air television, the Governor's Cup football game between the University of Rhode Island and Brown University. The MyNetwork multicast was able to do this only with the assistance of WPRI's production capabilities.

### B. *The FCC should not place MVPD's interests in greater profits ahead of the interest of consumers in greater local programming or the interest of broadcasters in lower costs and greater local output*

As noted in the NPRM, several multichannel video program distributors ("MVPDs") have been the driving force behind the FCC's questions on attribution of sharing arrangements.[16] MVPDs – which generally do not provide local news and information at all – are merely trying to gain leverage over broadcasters in this proceeding, urging the FCC to prohibit efficient market behavior to keep broadcasting enterprises small and weak relative to the size and scope of MVPDs that dominate the television distribution landscape. The Commission must recognize these anti-competitive goals and enable broadcasters to continue and grow as strong competitors.

For MVPDs, whose collective penetration appears to have peaked, the availability of a free, over the air television service with compelling news, sports and entertainment programming is a market-limiting force. By opposing service contracts that help broadcasters deliver higher quality programming, MVPDs are placing their own profits and growth ambitions over the best interests of viewers. The MVPDs' efforts in this

[16] *NPRM* at ¶200.

proceeding ignore the competitive landscape and the public interest.[17] The FCC should reject MVPD calls to impose, through transparent back door rules, limits on retransmission consent negotiations and terms that the FCC has no authority to regulate.[18]

At the baseline, even members of the American Cable Association, a frequent proponent of additional FCC regulation of broadcasters, such as Mediacom Communications Corporation, are far larger in size and scope than LIN. MVPDs that account for much of the retransmission of LIN's stations are vastly larger than LIN, not only nationally, but often in the local markets LIN serves. Even with their larger size advantage, MVPDs still have far less competition than even SSA/JSA broadcasters due to franchising (which almost guarantees each MVPD a large local market share), cable advertising interconnects, and national consolidation (not to mention vertical integration). MVPDs are not constrained by any local ownership rules, and in many markets, a single local cable system dominates television distribution.

Furthermore, retransmission consent fees help spur local programming, stronger competition, and other public interest benefits. In the end, strengthening a weak

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[17] MVPDs often reference a particular Department of Justice decision in opposition to services contracts. *See U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Co., and K-Six Television, Inc.*, Complaint, (Feb. 2, 1996), *available at* http://www.justice.gov/atr/cases/f0700/0745.pdf (last visited March 3, 2012). *See also U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Co., and K-Six Television, Inc.*, Competitive Impact Statement, *available at* http://www.justice.gov/atr/cases/f0700/0746.pdf (last visited March 3, 2012). The Department of Justice alleged that several stations in the market had conspired to set a fixed price for retransmission consent and to reject any terms that would disadvantage one of the alleged conspirators. It does not appear that the stations had any operating relationship other than the alleged price fixing and boycotting related to retransmission rights. In contrast, various forms of local sharing arrangements, beginning with LMAs, have been standard practice in the broadcast business since long before stations received any retransmission fees. They have many market-enhancing benefits. Suggestions that broadcasters developed these arrangements, which predate retransmission fees and extend to aspects of station operations that have nothing to do with retransmission rights, are unfounded. Sharing arrangements emerged in response to the operating inefficiencies imposed by the FCC's local ownership rules, which prohibit many mergers that would be perfectly consistent with competition law.

[18] *See* Comments of LIN Television Corporation, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, filed May 27, 2011 at pp. 14, 18-19. We hereby incorporate by reference LIN's comments in MB Docket No. 10-71.

broadcast competitor (who MVPDs want to take advantage of) actually increases competition in video market.

### *C. The Commission has long recognized the public interest benefits of service contracts*

Even in the face of the MVPDs' self-serving arguments, the FCC has long known about and approved sharing arrangements, recognizing the substantial public interest benefits of these arrangements. For example, as noted above,[19] the Commission approved LIN's original SSA/JSA with ACME and LIN's current SSA/JSA with Vaughan Media, LLC for WBDT over a Petition to Deny by Time Warner Cable.[20]

More importantly, there are significant First Amendment concerns when the FCC begins micro-managing day-to-day broadcast operations. The FCC certainly would not say that it has the authority to decide which journalists a station hires, so why should it have authority on hiring an outside company to assist operations?[21]

## III. The Costs of Prohibiting Common Local Ownership of Television Stations

The Commission requests comments on the costs of prohibiting local television combinations that are currently impermissible and of the benefits of permitting those

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[19] *See ACME Television Licenses of Ohio, LLC*, 26 FCC Rcd 5198 (MB 2011).

[20] Since the review period has passed on this and other adjudications, the FCC must be cognizant that any rule that fails to grandfather these combinations would face challenges over improper retroactivity. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 215 (1988). In *Bowen v. Georgetown University Hospital*, the Supreme Court held that agencies may not adopt retroactive rules without explicit congressional authorization. The Court stated that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." LIN therefore believes that to the extent that the Commission places any limits on service contracts, the Commission must grandfather any existing arrangements. LIN uses examples from its grandfathered LMA stations herein, but notes that the Commission has not requested comments on grandfathered LMAs.

[21] As described below, the FCC's questions regarding FCC control of programming also bring about these concerns.

combinations.[22] In addition to the risk of dismantling many of the same localism, competition, and diversity benefits described above for local service contracts, LIN notes below other costs associated with the inability to own a second station in a market.

*First, s*maller entities may not have the resources to be able to bring network affiliations into a market. LIN was able to turn WVBT, once a shopping station, into a Fox affiliate based on LIN's group programming resources.

*Second*, standalone stations are limited in the amount of local programming they can air, and stations affiliated with CBS, ABC and NBC are particularly constrained in the hours available for local news. Affiliates use strong local newscasts to lead into and to follow network programming blocks. The best times for local newscasts on those stations are before the network morning shows and before and after prime time. But those blocks are so spread apart in each day that in markets with no sharing, entire news teams must assemble for a thirty minute or one hour news program at dispersed times and intervals. Those teams could easily support additional newscasts at a modest incremental cost compared to the high fixed cost of producing the first thirty or sixty minutes of news, but with network programming before or after the local news block (and on both ends between prime time and late night), these stations have no additional slots to carry the local news that could otherwise be made available. This means standalone stations that absorb high costs of producing local news are often producing and airing less local news than they could.

To that point, duopolies allow more program diversity by better-resourced entities with more time to fill that can afford local production. Pairing an ABC, CBS or NBC

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[22] *See* NPRM at ¶23.

station with a station affiliated with a network that fills fewer dayparts can and often does mean a substantial net increase in the amount of local news output. And, importantly, it can mean an increase of local news at *different times*. Arguments that duopolies harm diversity uniformly fail to recognize the benefits of *time diversity*. Even assuming a market could support them, are four totally independent newscasts at 6 a.m. preferable to three totally independent newscasts at 6 a.m., plus a fourth newscast at 7 a.m. that shares resources with one of the 6 a.m. newscasts?

Having more timeslots available to program locally can improve quantity and diversity of local programming. For example, LIN owns both WISH (CBS) and WNDY (MyNetwork) in Indianapolis. That combination allows LIN to often not have to choose between preempting CBS programming and carrying other programming of special local interest, especially news and sports. WNDY airs a weekly long form interview program hosted by WISH's legendary news anchor, Mike Ahern. "Mike Ahern One On One" features interviews of national and local newsmakers. WNDY also carries a substantial amount of sports programming, including locally produced sporting events, that otherwise would not always be compatible with the CBS programming carried on WISH. As an example, WNDY has aired a number of high school football games including the annual Peyback Classic, which is part of Peyton Manning's Peyback Foundation. WNDY also produces and airs NCAA Butler University Basketball and carries the Mid-American conference college football games from ESPN. Furthermore, the station broadcasts Indianapolis Colts NFL football games that it licenses directly from the team and weekly Colts programs. WNDY is able to produce and acquire rights to this programming, all of great local interest, because of the relatively light footprint of the

MyNetwork network program schedule (10 hours per week versus the 92 hours of CBS programming that WISH carries each week on average) and the financial and operational efficiencies of the WISH/WNDY combination.

The pattern of available resources from a larger station and available time slots from a weaker station holds true in other markets as well. LIN owns both WTNH (ABC) and WCTX (MyNetwork) in the Hartford-New Haven market. Because of LIN's financial resources, WCTX is able to carry New York Yankees baseball, New England Patriots pre-season football, and 20 hours of high school football. And in Green Bay LIN's ownership of both WLUK (Fox) and WCWF (CW) allows WCWF to carry significant local programming that otherwise would not be feasible for a stand-alone CW station in a market of this size. For example, WCWF recently carried the Governor's State of the State address in January 2012.

*Third,* single stations often lack the ability to create viable market niches. For example, in Grand Rapids LIN's WOTV (ABC) is launching a female-focused brand using some of the resources of co-owned WOOD-TV.[23] While some re-regulatory proponents have argued that such niche broadcasting can be accomplished by multicasting and that multicasting makes co-owned or service contract combinations unnecessary, those arguments fail to recognize the inherent advantages of a full power television station in the current local media marketplace. Specifically, any claims that multicasting obviates the need to own multiple full-power television stations in a market in order to bring the greatest diversity ignores the fact that multicast channels do not have guaranteed MVPD carriage, lack HD capability, and generally cannot provide mobile

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[23] *See* http://www.wotv4women.com.

feeds.  To provide programming diversity that reaches a wide audience (even a large niche audience, like women) a programmer needs cable carriage, HD, and (likely in the future) mobile DTV.

*Fourth,* standalone stations often must often displease one set of viewers in favor of a different set of viewers.  For example, when sports runs over on WLUK (Fox, Green Bay), which happened 23 times in 2011, LIN was able to provide news content on sister station WCWF (CW) instead, satisfying football fans and the news viewers alike. Without a combination, one of the two market segments would not have received its preferred content.

*Fifth,* as explained at pages 9-10 above, non-Big Four stations often cannot afford local news without an in-market partner.  Attachment 1 illustrates how LIN has successfully used shared resources helped expand the supply of local news and other local programming in markets where it owns more than one station or provides services via a grandfathered Local Marketing Agreement to more than one station.

Finally, the ability to cross-promote local programming on two stations can lead to bigger audiences for the local programming on both stations.  Single stations lack those promotional opportunities.  Smaller, lower-rated co-owned stations, and often stations in sharing arrangements, get free promotion on the "bigger" co-owned station in market, promotion that could not be bought without a high advertising budget.

## IV. The FCC Should Not Attempt to Regulate a Television Station's Choice of Programming

Like the Commission's proposals to deprive viewers of the benefits of sharing arrangements, proposals to prohibit stations from increasing value and better serving the public interest by changing network affiliation raise many thorny problems.[24] First and most obviously, if a broadcaster has the right to own a station it should not be penalized for improving the station. A company that builds a new station or builds up an underperforming station through work and investment should be commended, not penalized. A rule that would require an operator to sell a station that becomes too popular would create perverse incentives. Since the Commission's role in the Quadrennial Review process is to increase competition, it seems contradictory that the Commission would consider adopting a rule that disfavors the building of stronger stations.

But more fundamentally, any attempt by the FCC to regulate a station's programming decisions directly – including its choice of network and syndicated programming – would be plainly in conflict with the First Amendment. Surely the Framers would have balked at requiring the New York Times to receive the approval of the President before running a political cartoon from an outside source. And a rule requiring a newspaper to choose to affiliate with one and only one news cooperative or syndicate (for example, either AP or Reuters, but not both) would be antithetical to the First Amendment. Why should broadcasters be any more burdened with a federal agency exercising prior restraint by approving or disapproving editorial judgments? Would the

[24] *See NPRM* at ¶ 45.

station be prevented from making any programming changes – and labor under FCC-imposed forced speech pending FCC approval of a change in network affiliation?

Beyond competition and constitutional concerns, practical considerations abound. Even if it were true that all of the top four rated stations in each market were all affiliated with today's "Big Four" networks, how would an FCC rule prohibiting affiliation changes work? And if not based on affiliation changes, how would a general programming rule work? In a market in which the fourth and fifth ranked stations were neck and neck, would the FCC insist on rights to approve the right of the fifth station to outbid the fourth ranked station for a very popular syndicated programming package? To hire the leading news anchor or news team away from the top ranked station? To add a multicast network to deliver new programming to a market? And how would the FCC determine whether the programming change would result in the station going over the threshold, since it is well know that different programs and even different networks perform differently in different markets and depending on lead-in?

LIN is skeptical that the FCC can tailor a constitutionally sound rule pursuant to which the FCC would veto a station's programming decisions, either directly or by the proxy of required divestiture. We urge the FCC to avoid the temptation to attempt to do so.

## V. The FCC Should Waive The Eight Voices Test and the Top Four Duopoly Prohibition In Small Markets When Appropriate

In keeping with LIN's belief in purpose of the Quadrennial Review to spur competition, localism, and diversity, and for the many reasons expounded above, LIN supports adoption of a policy of waiving the eight voices test in small markets. LIN's proposal would waive this limitation when the facts show that application of the rule would prohibit combinations that would improve service to the public.[25] Waivers should be granted liberally when either the market in which the station operates is poor or underperforming, or the station itself is poor and underperforming. Objective criteria will enable broadcasters to know in advance the opportunities for growth. Operators like LIN will therefore be able to identify low-performing stations that would benefit from an influx of resources to better serve the public interest. LIN therefore proposes that the FCC waive the eight voices test and the Big Four duopoly prohibition in smaller markets in the following limited circumstances.

*Waiver for financially weak or shrinking local markets*. LIN proposes that the Commission should waive the eight voices requirement for markets smaller than 25[26] if at least 3 of the 5 following criteria are met:

- ***Market Size Dropping*** – The DMA has decreased in size for each of the previous two Nielsen DMA ranking years.
- ***Market Revenue Drop*** – The market's total television revenue has dropped in the previous three consecutive calendar years.
- ***Three Independent Newsrooms*** – After the transaction, the market will still contain three professional independent newsrooms (regardless of the medium – print, radio, television or new media).
- ***No Out of Market Buyer Available*** – The applicant shows sufficient unsuccessful attempts to find an out-of-market buyer (similar to failing station waiver standard).
- ***Committed Public Interest Benefits*** – Applicant commits to increase local newscasts in a market that hada low amount of local news.

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[25] LIN opposes other changes that would prohibit common ownership of stations in circumstances in which common ownership would be permitted today (*e.g.*, expanding top four to top five or top six.) This would be contrary to Section 202(h).

[26] This market line is drawn based on the electronic newsroom technique standard in the captioning context. In that context, the Commission has recognized the costs on newsgathering and news broadcasts in markets smaller than 25. *See* 47 C.F.R. §79.1(e)(3).

*Waiver for poor station*. LIN proposes that the Commission would waive the Big Four duopoly prohibition outside of the Top 25 markets if at least 3 of the 5 following criteria are met:

- ***Low Market Revenue Share*** – One of the Big Four-affiliated stations has captured less than 15% of market revenue share previous two consecutive years.
- ***Trailing 4th Place Station*** – One of the stations is (and has been for at least 2 calendar years) a 4th place station that trails the 3rd place station by at least 25% in either audience or revenue share.
- ***Bankruptcy*** – One of the stations is in bankruptcy (or similar state action) at the time of application.
- ***No Out of Market Buyer Available*** – The applicant shows sufficient unsuccessful attempts to find an out-of-market buyer (similar to failing station waiver standard).
- ***Committed Public Interest Benefits*** – The applicant commits to increase local newscasts in a market with a low amount of local news for the three years preceding the application.

LIN believes clearly defined standards such as these meet the requirements of Section 202(h) and will permit local combinations where consolidation will bring real public interest benefits. And, in the 2014 Quadrennial Review the commenters and the stakeholders will have the benefit of information gleaned from waivers – both those granted and those denied – leading to a better record for future ownership reviews.

## Conclusion

Unlike the theoretical, undocumented and imagined harms claimed by MVPDs that compete with local broadcasters, combining the resources of two or more local television stations, either through ownership or through legal operating arrangements, has real-world benefits. When the dominant daily newspapers in most markets are struggling to survive, slashing the ranks of reporters and editors while relying more and more on syndicated news (and in many cases relying on local television stations for some local content), the notion that eight independent television voices can each produce high quality local content is simply not realistic. Sharing arrangements are not only beneficial, they are essential, and will become more so until the FCC takes seriously its obligations under Section 202(h).

Local sharing arrangements do not hurt MVPDs: the MVPDs believe they would gain a competitive advantage if those arrangements were restricted or prohibited through adoption of new local ownership rules. But the ownership rules were never intended to give MVPDs an advantage in signal carriage negotiations. Many MVPDs often enjoy substantially larger local market shares than do local broadcasters, even broadcasters that own or operate two or more stations in a single market. Misguided governmental efforts to impose some sort of artificial symmetry in signal carriage negotiations by arbitrarily limiting the local market scale of one party but not the other would necessarily fail.

Respectfully submitted,

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## Attachment 1

Weekly Hours of Local Programming in Markets Where LIN Owns More than One Station or Participates in a Grandfathered Local Marketing Agreement

| DMA | DMA Rank | Station | Network Affiliation | Network Programming | Local News | Other Local Programming | Total Local |
|---|---|---|---|---|---|---|---|
| Albuquerque, NM | 45 | KASA-TV | Fox | 26 | 14 | 6 | 20 |
| Albuquerque, NM | 45 | KRQE(TV) | CBS | 100 | 31 | 1 | 32 |
| Austin, TX | 47 | KBVO(TV)* | MyNetwork | 10 | 3 | 1 | 4 |
| Austin, TX | 47 | KNVA(TV)** | CW | 20 | 4 | 0 | 4 |
| Austin, TX | 47 | KXAN-TV | NBC | 95 | 31 | 1 | 32 |
| Buffalo, NY | 51 | WIVB-TV | CBS | 100 | 28 | 1 | 29 |
| Buffalo, NY | 51 | WNLO(TV) | CW | 28 | 14 | 6 | 20 |
| Grand Rapids-Kalamazoo-Battle Creek, MI | 42 | WOOD-TV | NBC | 98 | 32 | 7 | 39 |
| Grand Rapids-Kalamazoo-Battle Creek, MI | 42 | WOTV(TV) | ABC | 86 | 9 | 1 | 10 |
| Grand Rapids-Kalamazoo-Battle Creek, MI | 42 | WXSP-CD | MyNetwork | 10 | 4 | 0 | 4 |
| Green Bay-Appleton, WI | 69 | WCWF(TV) | CW | 20 | 0 | 1 | 1 |
| Green Bay-Appleton, WI | 69 | WLUK-TV | Fox | 26 | 43 | 7 | 50 |
| Hartford-New Haven, CT | 30 | WCTX(TV) | MyNetwork | 10 | 9 | 1 | 10 |
| Hartford-New Haven, CT | 30 | WTNH(TV) | ABC | 86 | 29 | 3 | 32 |
| Indianapolis, IN | 26 | WISH-TV | CBS | 92 | 35 | 7 | 42 |
| Indianapolis, IN | 26 | WNDY-TV | MyNetwork | 13 | 10 | 2 | 12 |
| Mobile, AL-Pensacola, FL | 60 | WALA-TV | Fox | 26 | 32 | 6 | 38 |
| Mobile, AL-Pensacola, FL | 60 | WFNA(TV) | CW | 20 | 0 | 0 | 0 |
| Norfolk-Portsmouth-Newport News, VA | 43 | WAVY-TV | NBC | 96 | 35 | 6 | 41 |
| Norfolk-Portsmouth-Newport News, VA | 43 | WVBT(TV) | Fox | 26 | 5 | 3 | 8 |
| Providence, RI-New Bedford, MA | 53 | WNAC-TV (D2)** | Fox | 10 | 0 | 1 | 1 |
| Providence, RI-New Bedford, MA | 53 | WNAC-TV** | MyNetwork | 26 | 10 | 7 | 17 |
| Providence, RI-New Bedford, MA | 53 | WPRI-TV | CBS | 100 | 32 | 1 | 33 |
| **Totals** | | | | **1,124** | **410** | **69** | **479** |
| * Satellite waiver | ** Grandfathered LMA | | | | | | |