

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

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

To: The Commission

REPLY COMMENTS OF LIN TELEVISION CORPORATION D/B/A LIN MEDIA

In this filing, LIN Television Corporation d/b/a LIN Media (“LIN”) briefly responds to comments submitted by other parties in response to the FCC’s *Further Notice*.¹

I. MVPD PROPOSALS ARE BEYOND THE SCOPE OF THIS PROCEEDING

As a general matter, LIN takes issue with the several MVPD commenters who take the position that the Commission should expand the scope of this proceeding and consider adopting even more rules intended to enhance the relative bargaining power of MVPDs in retransmission negotiations. The Notice of Proposed Rulemaking² in this docket sought comment on additional issues related to retransmission consent, including imposing specific additional *per se* good faith negotiation standards on broadcasters,³ clarifying the totality of the circumstances good faith negotiation standard, revising the notice requirements related to dropping carriage of a television

¹ *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-29, at ¶¶ 40-73 (released March 31, 2014) (“*Further Notice*”). See also Public Notice, DA 14-525 (released April 22, 2014) (extending the reply comment deadline to July 24, 2014).

² *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011) (“*NPRM*”).

³ Those changes include new *per se* rules prohibiting (a) a station giving a network the right to approve a retransmission consent agreement with an MVPD; (b) joint negotiations by stations in the same market that are not commonly owned; (c) broadcasters and MVPDs from refusing to put forth bona fide proposals on important issues; (d) refusal to agree to non-binding mediation; (e) “unreasonable delay” of negotiations; (f) a broadcaster from prohibiting carriage of an out of market “significantly viewed” signal as a condition of granting retransmission consent. See *id.* at ¶¶ 20-30.

station, and applying the sweeps prohibition to retransmission consent disputes.⁴ The *Report and Order* addressed joint negotiations. The *Further Notice* addressed the exclusivity rules and left the record open for further comment on the remaining issues expressly raised in the *NPRM*.⁵

Several of the MVPD comments submitted in response to the *Further Notice*, though, ask the FCC to impose a wide range of additional limitations on broadcasters' ability to negotiate freely for the sale of retransmission rights and otherwise to conduct their business. Most of these requests are not contemplated in the *Further Notice* and, apart from their substantive infirmities, are beyond the scope of this proceeding.

Adopting proposed rules that were not carried forward in the *Further Notice* from the *NPRM* would be inconsistent with the requirements of the Administrative Procedure Act.⁶ LIN objects to the implicit position of some MVPDs that the FCC should conduct an expansive, ongoing, and boundless inquiry to discover all potential limitations on broadcasters' freedom to negotiate retransmission rights.

II. THE COMMISSION MUST NOT ATTEMPT TO REGULATE RETRANSMISSION CONSENT FEES

LIN also notes that the express purpose of the *NPRM* was to consider rule changes that would “minimize video programming service disruptions to consumers.”⁷ The *NPRM* did not propose to impose rules intended to minimize, reduce, lower or abate the level of fees broadcasters would otherwise be able to negotiate in a free market. Yet many of the retransmission reforms proposed by MVPDs are intended to limit broadcasters' ability to

⁴ See *id.* at ¶¶ 31-41.

⁵ See *Further Notice* at n.5.

⁶ See 5 U.S.C. § 553 (providing for the notice-and-comment rulemaking process).

⁷ *NPRM* at ¶ 1. See also *id.* at ¶ 17 (“[o]ur goal in this proceeding is to take appropriate action, within our existing authority, to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services.”)

negotiate freely for retransmission fees and are intended to limit or reduce retransmission fees.⁸

Those proposals are beyond the scope of the *NPRM* and the *Further Notice* and must be rejected.

III. LIN RESPONDS TO CERTAIN MVPD COMMENTERS

In addition to this general objection to MVPD requests, LIN briefly responds to some specific MVPD comments.

The American Cable Association (“ACA”) asks the FCC to adopt rules to prohibit “third party interference” with “the rights of MVPDs to carry distant signals.”⁹ Specifically, ACA wants the FCC to prohibit networks from placing geographic limitations on its affiliates’ ability to authorize retransmission of network programming outside of a station’s local market and to prohibit stations from exercising the geographic exclusivity rights they have freely negotiated with their program suppliers.¹⁰ In other words, ACA wants the FCC to require that all broadcast stations have the right to permit retransmission anywhere, without regard to geographic limitations, and that no broadcaster electing retransmission consent has the right to enforce exclusivity. To ACA, these longstanding and perfectly normal marketplace agreements – which are in fact essential to the system of local over-the-air broadcasting - constitute “third party interference” with the MVPD’s “right” to carry whatever stations it wants to carry.

⁸ See, e.g., Comments of American Public Power Association, MB Docket No. 10-71 (filed June 26, 2014) (arguing throughout that the FCC should adopt additional regulations to limit retransmission fees) (“APPA Comments”); Comments of Centurylink, MB Docket No. 10-71, at 6 (filed June 26, 2014) (“[e]liminating the exclusivity rules and agreements would reduce the enormous bargaining imbalance between MVPDs such as CenturyLink and at least stem the extraordinary pace of growth of retransmission consent fees”) (“CenturyLink Comments”); Comments of Mediacom Communications Corporation, Cequel Communications, LLC D/B/A Suddenlink Communications, and Bright House Networks LLC, MB Docket No. 10-71, at 3-4 (filed June 26, 2014) (“Mediacom Comments”); Comments of Cablevision Systems Corporation and Charter Communications, Inc., MB Docket No. 10-71, at 10-12 (filed June 26, 2014) (“Cablevision Comments”).

⁹ Comments of the American Cable Association, MB Docket No. 10-71, at 8-9 (filed June 26, 2014). This proposal is among many proposed by MVPDs that are beyond the scope of the *Further Notice* and the *NPRM*.

¹⁰ *Id.* at 8-10. See also Emmanuel P. Mastromanolis, *Insights From U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of A New Legal Standard for European Union Competition Law*, 15 U. Pa. J. Int’l Bus. L. 559, 588-92 (1994) (describing the benefits of exclusive distribution territories).

ACA apparently recognizes that the FCC lacks authority to prohibit these established commercial practices directly, so the ACA proposes that the FCC adopt a wide-ranging, industry-changing substantive regulation as a “good faith” bargaining rule. Although networks and stations presumably would remain free to enter into exclusivity agreements, stations electing retransmission consent would be prohibited from *enforcing* those rights either at the FCC or in court, because *enforcement* of validly negotiated rights, according to the ACA, would amount to *per se* bad faith bargaining.¹¹ Under the ACA proposal, only must-carry stations would therefore be able to attempt to enforce bargained-for exclusivity, albeit with much difficulty.

ACA has plenty of self-serving reasons for proposing this far-fetched approach. Though elimination of the FCC’s exclusivity rules would rest great harm on local broadcasting and its viewers, it would not go far enough for ACA, and in fact, it might have some downsides for MVPDs. Though enforcement of rights by broadcasters would be cumbersome, difficult and perhaps ineffective in many cases, the area of exclusivity stations would obtain from programmers might well expand beyond the 35 and 55 mile zones specified in the FCC’s rules. For the ACA, the solution is simply to prohibit stations electing retransmission consent from enforcing non-duplication rights at all. ACA safely predicts that if stations had to choose between exclusivity and retransmission consent, some may choose to forego their right to retransmission consent in totality.

One of many problems with ACA’s assertion that stations should be “free” to grant retransmission consent everywhere is that in most retransmission negotiations, the MVPD is the

¹¹ Other MVPD commenters in this proceeding have made similar or even more aggressive proposals. *See, e.g.*, APPA Comments, at 19-20 (FCC should prohibit enforcement of exclusivity rights in any forum); Cablevision Comments at 8-9 (FCC should ban exclusivity provisions); Mediacom Comments, at 5 (agreements for territorial exclusivity should be deemed to be violations of good faith bargaining requirements). We disagree with those comments for the same reasons stated here in response to the ACA’s comments.

party with the greatest bargaining power, as is increasingly reflected in the correlation of “blackouts” with three of the four largest MVPDs, which frequently “blackout” the signals of very small broadcasters.¹² Under ACA’s formulation, all an MVPD would have to do to secure a definitive, insurmountable advantage in retransmission negotiations with all broadcasters is to “persuade” *one* affiliate of each major network to grant nationwide retransmission rights. And the power of large MVPDs to dictate aggressive terms in negotiations with small broadcasters should not be underestimated: it is an economically trivial matter for most MVPDs to forego carriage of one or more small broadcast stations unless and until the station grants out of market signal carriage rights. Thus, all an MVPD would need to do to be in a position to take a hard line with all broadcasters is to black out one broadcaster until that broadcaster submits to the MVPD’s demand to grant nationwide retransmission rights. As LIN has argued, the FCC *must* account for the overwhelming statistical correlation of blackouts with a few large MVPDs when adopting rules that purport to address a perceived imbalance in negotiations in favor of broadcasters.

Moreover, as Congress has repeatedly admonished or ordered the FCC to adopt and/or preserve exclusivity rules, the act of eliminating those rules and essentially prohibiting exclusivity rights themselves would be contrary to the intent and express will of Congress and not within the FCC’s authority. The FCC itself has recognized many times that the exclusivity rules are necessary to maintain a healthy, competitive local broadcast television service.¹³

¹² See Comments of LIN Television Corporation d/b/a LIN Media, MB Docket No. 10-71, at 21 (filed June 26, 2014) (citing SNL Kagan data).

¹³ *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299, at ¶ 74 (1988) (“Lack of exclusivity protection distorts the local television market to the detriment of the viewing public, especially those who do not subscribe to cable. Our regulatory scheme should not be structured so as to impair a local broadcaster’s ability to compete, thereby hindering its ability to serve its community of license.”); *Commission Implements Satellite Home Viewer*

NTCA argues that the FCC has authority under Section 706 of the Telecommunications Act of 1996 “to address retransmission consent”¹⁴ and, apparently, to regulate it pervasively: NTCA does not suggest any bounds on the FCC’s supposed authority to regulate retransmission consent under Section 706. Section 706 provides:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.¹⁵

Although no connection to broadcast signal retransmission can be gleaned from the face of Section 706, NTCA argues that the FCC has “perceived a linkage” between video and broadband services and has twice exercised its “ancillary” authority under Section 706 to “modify rules related to video services.”¹⁶ The two cases it cites both involve adoption of FCC rules that were addressed specifically and directly to actual physical deployment of broadband facilities. And in both cases, the FCC relied on other, more direct authority to adopt the regulations. In the *Local Franchising Authority Order*¹⁷ the FCC adopted rules to implement Section 621(a)(1) of the Communications Act, which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services. It

Improvement Act Sports Blackout and Program Exclusivity Rule Provisions for Satellite Carriers, Report and Order, FCC 00-388 (released November 2, 2000) (“In the context of the SHVIA, which is fundamentally part of the copyright laws, we are cognizant also of the important protection that the exclusivity rules provide to broadcasters.”).

¹⁴ Comments of NTCA – The Rural Broadband Association, MB Docket No. 10-91, at 3 (filed June 26, 2014) (“NTCA Comments”).

¹⁵ 47 U.S.C. § 1302(a).

¹⁶ NTCA Comments at 3-4.

¹⁷ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking 22 FCC Rcd 5101, MB Docket No. 05-311 (2007) (“*Local Franchising Authority Order*”).

relied on statutory authority under Section 621 and Section 201(b) but also “considered” the goals of Section 706 as being consistent with the rules adopted.¹⁸

In the *Multiple Dwelling Unit Order*¹⁹ the FCC relied on its statutory authority under Sections 628(b) and 653(c)(1) of the Act and its ancillary authority to prohibit MVPDs subject to Section 628 of the Communications Act from obtaining exclusive access to multiple dwelling units. The FCC did not purport to rely on authority under Section 706, but simply noted that the rules adopted would promote the goals of Section 706.²⁰ NTCA’s argument that Section 706 gives the FCC pervasive authority to regulate broadcasters’ exercise of their retransmission rights, which are provided for under a different section of the Communications Act and were adopted in a different session of Congress, must be rejected. The FCC has never interpreted its authority under Section 706 so broadly, and the interpretation NTCA urges is untenable. It would allow the FCC to regulate virtually any commercial activities in video distribution simply because some broadband providers also offer video services.

Time Warner Cable argues²¹ that Congress expressly anticipated that the FCC would modify its exclusivity rules in the text of the Copyright Act of 1976, citing 17 U.S.C. § 801(b)(2)(B)-(C). That section provides for adjustments to the applicable royalty rates “[i]n the event that the rules and regulations of the Federal Communications Commission are amended . . . to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals” or “in the event of any change in

¹⁸ *Id.* at ¶ 62.

¹⁹ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, MB Docket No. 07-51, (2007) (“*Multiple Dwelling Unit Order*”).

²⁰ *Id.* at ¶ 47.

²¹ Comments of Time Warner Cable, MB Docket No. 10-71, at 15-16, n.46 (filed June 26, 2014).

the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity.”²²

Time Warner Cable’s argument does not stand up to scrutiny. The language it cites was adopted in 1976 and was intended to ensure that the careful balance of the compulsory copyright regime it imposed was not unsettled by fundamental changes in the FCC’s program carriage rules. Time Warner Cable contends that this safeguard, built into the compulsory copyright language in 1976, permits the FCC to make any changes it desires in the exclusivity rules decades later, even though Congress has repeatedly ordered or admonished the FCC in succeeding years to keep the cable exclusivity rules in place and to extend them to OVS and DBS services.

IV. CONCLUSION

For the reasons explained above and in LIN’s comments filed in response to the *Further Notice*, the FCC does not have the authority to make substantive changes to the exclusivity rules. Even if it did have the authority, doing so would undermine localism in television distribution, which is provided exclusively in almost every television market by television broadcasters alone.

²² *Id.* (citing 17 U.S.C. § 801(b)(2)(B)-(C)).

Respectfully Submitted,

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