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

In the matter of	)	
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Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent	)	MB Docket No. 10-71
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COMMENTS OF GRAY TELEVISION, INC.

Gray Television, Inc. ("Gray"), by its attorneys, submits these comments in response to the Petition for Rulemaking referenced above to modify the rules governing retransmission consent. The petition should be rejected.

Gray believes—and its experience demonstrates—that the current marketplace-oriented regime governing retransmission consent benefits the viewing public by incenting broadcasters and their multichannel video programming distributor ("MVPD") partners to enter into mutually beneficial agreements for the distribution of broadcast signals. The rule changes proposed by the petitioners—in particular, granting MPVDs the unilateral right to compel "interim" carriage and imposing compulsory arbitration even absent a finding of bad faith by the broadcaster—would certainly enhance the economic well-being of MVPDs, but would impose onerous, unnecessary, and unlawful burdens on broadcasters. In the end, consumers would suffer.

Gray supports the comments filed by the National Association of Broadcasters ("NAB"), which convincingly demonstrate that the petitioners' proposed revisions to the retransmission consent rules lack any basis in history, law, or basic economics. Gray offers these separate comments to detail its experiences in negotiating carriage agreements with MVPDs and to show how the current regime functions properly, just as Congress intended.

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Gray owns 36 television stations serving 30 medium- to small-sized markets throughout the country, ranging from WVLT(TV), Knoxville, Tennessee in the nation's 59th largest Designated Market Area ("DMA"), to WTAP(TV), Parkersburg, West Virginia in the nation's 18th smallest DMA. Gray operates stations in eight state capitals and 17 major university towns.

All of Gray's facilities are affiliated with a major television network.[1] With its state-of-the-art digital facilities, Gray also multicasts 39 secondary program streams, including one affiliated with ABC, four affiliated with FOX, seven affiliated with CW, 18 affiliated with MyNetworkTV, two affiliated with Universal Sports Network, and seven local news/weather channels. Combined, Gray's stations reach over six percent of all U.S. television households.

Gray's stations have enjoyed remarkable success by providing truly local service, with an emphasis on local news strongly desired by viewers. Thus, Gray's stations are ranked number one in local news in 23 of 30 DMAs (and number two in local news in six additional markets), and number one overall in 21 DMAs. With their dedication to local programming and service, Gray's stations have earned more than 500 national, state, and local news and community services awards since 2003, including multiple Edward R. Murrow awards, regional Emmy awards, "Station of the Year" awards, "Most Outstanding News Operations" awards, and "Best Documentary" awards.

Like all broadcasters, Gray relies on MVPDs to deliver the stations' signals to the vast majority of its viewers. And although Gray's stations are preeminent in their respective markets, Gray often must negotiate for carriage of its stations with substantially larger and better financed media conglomerates. Gray estimates that only ten entities control more than seventy-five

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[1] Gray's stations are affiliated with CBS (17), NBC (10), ABC (8), and FOX (1).

percent of all MVPD homes served by Gray's stations. Moreover, MPVDs with smaller national reach control substantial portions of many of the DMAs served by Gray's stations, giving those MVPDs substantial bargaining leverage over local television stations in retransmission consent negotiations. For example, one of the petitioners, Mediacom, controls approximately three-quarters of all cable subscribers that receive the signal of Gray's WSWG(TV), Albany, Georgia station.[2]

Gray has not encountered any of the rampant brinksmanship, impasses, or consumer harms that Petitioners allege result from retransmission consent negotiations. Gray's experience is entirely to the contrary. Since 2008, Gray has successfully negotiated retransmission consent agreements with 251 MVPDs, including most of the Petitioners, *without a single subscriber losing access to a single minute of programming from a Gray station.* Gray sees no reason to change rules that clearly promote effective deal-making by broadcast stations and MVPDs.

In light of the positive experience that has benefited Gray itself, MVPDs, and their subscribers, Gray believes the circumstances that prompted Congress to adopt a market-based approach to retransmission consent remain as valid today as they were in 1992. Thus, nearly twenty years ago, Congress concluded that the ability of MVPDs to retransmit the signals of broadcast stations without consent created a "distortion in the marketplace" whereby "broadcasters in effect subsidize the establishment of their chief competitors."[3] Congress also found that, just as cable networks are compensated for the programming they provide to MVPDs, broadcasters should be compensated for the services they originate, which are profitably resold

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[2] Cable operators control, in the aggregate, just under 60% of all multichannel homes in the Albany, Georgia market. *See* http://www.tvb.org/rcentral/markettrack/Cable_and_ADS_Penetration_by_DMA.asp.

[3] Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 35 (1991).

by MVPDs.[4] Congress wisely left to the marketplace the determination of what the compensation should be, if any at all, in a particular transaction. Thus, as Congress stated at the time, the intent of the statute was to "establish" a market for the retransmission of broadcast signals, and not to "dictate the outcome of the ensuing marketplace negotiations."[5]

In implementing the statutory scheme, the FCC has properly limited its oversight to the *process* by which retransmission consent is negotiated. In recognition of "unambiguous" provisions of the statute that preclude retransmission of a broadcast signal without the station's "express consent," the Commission has repeatedly refused to interfere with the marketplace either by authorizing an MVPD to carry a station's signal without the broadcaster's consent or by imposing its own substantive terms for carriage. To the extent parties to a negotiation disagree on price (or any other term), the Commission has wisely concluded that the dispute is most efficiently resolved by the broadcaster and the MVPD. Indeed, in the extremely few instances in which the FCC has adjudicated a complaint – none of which found the broadcaster to have violated any legal duty – the Commission has held that the back-and-forth negotiations between the parties were exactly what Congress intended to occur and that, at heart, the disagreements were about the value of retransmission consent.[6] And the marketplace, not a regulatory body, was the proper forum to determine price.

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4 *Id.*

5 *Id.* at 35-36.

6 *See EchoStar Satellite Corporation v. Young Broadcasting, Inc., et al.*, 16 FCC Rcd 15070 (Cable Bur. 2001); *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, 22 FCC Rcd 35 (Med. Bur. 2007). *See also ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, 24 FCC Rcd 1645 (Med. Bur. 2009) (finding that Gray's WSWG-DT did not fail to negotiate in good faith with an out-of-market cable operator).

Contrary to petitioners' allegations, the FCC has concluded that as a general rule broadcasters and MVPDs "negotiate in the context of a level playing field," with both sides bargaining from positions of relative equality.[7] In fact, the FCC has consistently ruled that the regulatory burdens petitioners seek to impose on broadcasters here – compelled "interim carriage" and mandatory arbitration – are unwarranted, with the sole possible exception of negotiations involving a vertically-integrated MVPD and a major network broadcaster.[8] Absent that unique vertical combination, however, the Commission has found that the existing market-oriented rules governing process are adequate and appropriate to generate the public interest benefits Congress intended to derive from the retransmission consent regime.[9]

Petitioners complain that "substantial changes to the media landscape" render the current system dysfunctional, but Gray's experience is entirely to the contrary. Specifically, MVPDs continue to wield tremendous leverage in retransmission consent negotiations. As noted above, Gray often negotiates with cable operators that control access to a large majority of multichannel subscribers in an individual station's market. As the FCC recently found, cable operators are increasingly consolidating their control of local markets by engaging in system swaps to

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[7] *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, at 24-25 (¶ 44) (Sept. 8, 2005).

[8] *See General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, 565 (¶ 203) (2004) ("*Hughes-News Corp. Order*").

[9] Following News Corp.'s divestiture of its interest in DIRECTV, the FCC eliminated the arbitration conditions that had been imposed in the *Hughes-News Corp. Order* on the negotiation of retransmission consent for FOX Network's owned and operated stations. The FCC held that absent vertical integration, additional burdens like the ones proposed by petitioners here were unnecessary. *See General Motors Corporation, Hughes Electronics Corp., Transferors and The News Corporation, Limited, Transferee*, Memorandum Opinion and Order, FCC 09-50, MB Docket No. 03-124 (rel. June 15, 2009).

"cluster" systems in specific markets.[10] So, while competition among MVDPs may be on the rise generally, broadcasters still negotiate with entities that control the lion's share of local markets.

Nor have marketplace changes enabled Gray to extract any consideration that could remotely be considered unreasonable. Retransmission consent fees account for a small percentage of Gray's overall revenue.[11] Citing to large percentage increases allegedly demanded by broadcasters, the petitioners complain about "spiraling carriage fees."[12] But they omit a key fact. Until the past few years, the amount of cash paid by the vast majority of cable operators for retransmission consent, even for Gray's highly-rated stations, was *zero*. Obviously, *any* amount of money paid above *nothing* can be characterized as a substantial increase. But in Gray's view, the total amount of consideration paid by MVPDs relative to the value that they receive by reselling Gray's "must have" programming to subscribers remains extremely modest.

While retransmission consent fees remain low, and almost certainly well below the amounts MVPDs pay for comparably-rated cable network services, they are increasingly important to broadcasters' ability to deliver service that meets the needs of their communities. In Gray's case, retransmission fees have helped support the multi-million dollar capital investment needed to transition 36 television stations to digital operations. With these improved facilities, Gray also invested considerable sums to develop the dozens of multicast program

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[10] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 550 (2009).

[11] Gray's retransmission consent fees contributed only 5.8% to overall revenue in 2009. Gray Television, Inc., Form 10-K, filed April 7, 2010, available at http://ccbn.10kwizard.com/xml/download.php?repo=tenk&ipage=6878630&format=PDF.

[12] Petition at 26.

streams referenced above, including locally-originated news services.[13] Unfortunately, MVPDs have refused Gray's request for carriage of many of these secondary streams. This lack of carriage deprives Gray of valuable revenue streams to support the substantial costs incurred to provide these services to viewers, and limits multichannel subscribers' choice of programming. Of course, if Gray possessed the extraordinary power to impose the "take it or leave it" demands that petitioners allege broadcasters wield in retransmission consent negotiations, most if not all of Gray's secondary services would enjoy far greater distribution. Yet, not even Gray's number-one rated stations have the power unilaterally to dictate terms for retransmission consent.

Relying on a few isolated publicly-reported carriage disputes, the petitioners now seek to turn sound Congressional policy, which favors free market negotiations to determine the terms of private contracts, completely on its head. Thus, despite clear statutory language to the contrary, petitioners desire the right to retransmit broadcast broadcasters' signals without consent, without agreement on the terms of retransmission, and without any finding that the broadcaster has done anything wrong. Rather, under the proposals set forth by petitioners, an MVPD could retain carriage rights to broadcast signals simply by failing (or refusing) to renew a retransmission consent agreement. In addition to enabling one party effectively to extend for its own benefit the terms of an otherwise expired private contract, this outcome would destroy any incentive of the MVPD to negotiate. This is hardly a free-market outcome.

In addition, were the government to intrude on behalf of MVPDs by giving them the right effectively to modify the term of a contract, broadcasters would be deprived of their only remedy against an MVPD that refused to offer fair compensation for retransmission consent, that is, the

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[13] For example, Gray's WHSV(TV), Harrisonburg, Virginia, in cooperation with Shenandoah University in Winchester, constructed a broadcast production facility from which it originates a newscast targeted to the local community. WHSV multicasts the Winchester news service, which is carried by some, but not all, MVPDs in the area.

right to withhold consent as provided by statute. By stripping broadcasters of this critical right, MVPDs would completely eliminate the risk of losing the ability to resell for their own profit the services they would then be taking without consent from broadcasters. Again, regulation would replace the business judgment of parties to a contract and coerce one side to accept terms that could not be achieved in a fair, free-market negotiation. This irrational result would deny broadcasters the opportunity to bargain for fair value for the services that MVPDs resell to subscribers. In turn, broadcasters would lose critical revenue – revenue that their chief competitors had effectively appropriated by regulation – that is needed to maintain and improve the over-the-air services they are obligated by law to provide to their communities of license.

The petitioners' dispute resolution mechanism fairs no better. A government-mandated arbitrator could not appropriately value the numerous, important non-cash terms that are part of the typical retransmission consent agreement, including signal quality, multicast carriage rights, channel and tier placement of services, and signal delivery. In Gray's experience, many of these non-cash terms can be just as important, and just as difficult to reach agreement on, as the basic "price" to be paid for retransmission consent. No entity other than Gray and the MVPD can decide which combination of rights and obligations best meets their individual needs in a particular negotiation. The government intervention proposed by the petitioners is therefore unnecessary and extremely unwise.

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Petitioners' proposed rules should be seen for what they are—a way for MVPDs to promote their self-interest by using regulatory burdens to suppress the bargaining power of broadcasters and, ultimately, the value of their "must have" programming. Gray's experience demonstrates that the existing retransmission consent rules function appropriately and have

enabled broadcasters and MVPDs to reach thousands of carriage deals without incident for the benefit of the viewing public. Accordingly, modification of the rules governing retransmission consent is unwarranted, and the Commission should reject the Petition for Rulemaking.

Respectfully submitted,

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