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 BELO CORP.

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TABLE OF CONTENTS

Page

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Belo Corp., by its attorneys, submits these comments in response to the Petition for Rulemaking submitted by multiple entities ("Petitioners"), including some of the nation's largest and most profitable multichannel video programming distributors ("MVPDs"), to amend the Commission's rules governing retransmission consent agreements. Belo urges the FCC to reject the Petition.

I. INTRODUCTION AND SUMMARY

At bottom, Petitioners seek to advance the economic self-interest of MVPDs by injecting the government into a fundamental marketplace transaction – the negotiation of a private contract. Under current law, each party to a retransmission consent agreement must abide by a duty to negotiate in good faith, but decides for itself the proper value to be placed on distribution of a broadcast station's signals. In a radical departure from this Congressionally-mandated, market-oriented approach, Petitioners urge the Commission (a) effectively to eliminate the broadcasters' statutory retransmission consent right by enabling MVPDs unilaterally to compel "interim" carriage, (b) empower the government or its designee to dictate the terms of private contracts between broadcasters and MVPDs through mandatory arbitration or some other mechanism, and (c) declare *per se* unlawful the right of broadcasters to seek carriage of other program services as consideration for retransmission consent, even though until recently most cable operators were willing to provide *only* in-kind consideration (if any) in exchange for consent. Petitioners seek to impose these extraordinary one-sided burdens even in the absence of any finding that a broadcaster has violated any legal duty, including the obligation to negotiate in good faith, in any particular case. There simply is no basis in fact, law, or policy for such radical governmental intrusion into what Congress intended to be purely market-based transactions.

II. COMPANY OVERVIEW AND INTEREST

With roots tracing back to 1842, Belo is one of the nation's oldest publicly-traded media companies. It owns and operates 20 television stations reaching more than 14 percent of U.S. television households in 15 markets. Belo's facilities are concentrated primarily in the South, Southwest, and Northwest, and almost all are affiliated with a major broadcast television network. In addition to its stable of broadcast stations, Belo originates two regional cable news channels (Texas Cable News and NorthWest Cable News) and two local cable news channels in Boise, Idaho and New Orleans, Louisiana. Belo also operates local cable news channels in Phoenix, Arizona and Hampton/Norfolk, Virginia in partnership with Cox Communications. Belo's interactive operations include 25 Web sites, seven of which are among the 50 most-visited local television-affiliated Web sites in the United States.

With its mix of national network television programming, regional news operations, and locally-originated content, Belo has consistently delivered highly-rated and award-winning programming to viewers. Belo's distinguished journalism has received significant industry recognition, including 12 Alfred I. duPont-Columbia University Silver Baton Awards, 11 George Foster Peabody Awards, and 26 national Edward R. Murrow Awards, all since 2000, and in each case more than any other commercial station group in the nation. MVPDs often characterize this type of programming as "must have," which simply is another way of saying that the services provided by local broadcasters are highly valued by viewers. And even though consumers have the choice of receiving these services over-the-air for free, MVPDs can retransmit broadcasters' signals to subscribers for substantial profit.

Retransmission consent is the sole basis by which broadcasters can seek consideration for the significant value that MVPDs earn by reselling broadcast signals to subscribers. Thus, the proposed rule changes put forth by the Petitioners are of great concern to Belo. As explained below, Belo's experience in negotiating carriage agreements with MVPDs shows that the existing system works extremely well, with both sides able to reach fair, mutually-acceptable arrangements for the retransmission of Belo's award-winning programming, all without the need for the governmental intrusion into the marketplace sought by Petitioners.

III. BELO'S EXPERIENCE NEGOTIATING CARRIAGE AGREEMENTS DEMONSTRATES THAT THE CURRENT RETRANSMISSION CONSENT RULES ARE WORKING.

Belo has had no difficulty reaching retransmission consent agreements with all types and sizes of MVPDs throughout the country. While negotiations with some MVPDs can be exacting and some can come down to the wire, Belo and MVPDs have agreed to terms without any of the "hostage" holding, public "showdowns," or substantial loss of service alleged by Petitioners. That is because both sides recognize that they gain by agreeing to carriage, and lose if negotiations fail. In short, deals get done in the current marketplace.

Since 2006, Belo has successfully completed over 250 retransmission consent agreements with MVPDs ranging from the nation's largest to the smallest. Some of these agreements, including contracts with seven of the nation's ten largest MVPDs, cover retransmission rights for all of Belo's television stations. Some agreements are limited to the retransmission of a single station by an MVPD with fewer than 100 subscribers. Each agreement is tailored to deal with the specific stations and systems involved, and the individual needs and interests of the parties. In total, these retransmission consent agreements provide for the carriage of Belo's stations to nearly 13,000,000 MVPD subscribers throughout the United States.

Petitioners claim that broadcasters routinely engage in "brinksmanship," but Belo's experience proves that is hardly the case. Belo routinely initiates negotiations long before the expiration of existing agreements. Typically, Belo will reach out to large, multi-market MVPDs with comprehensive proposals six to twelve months before existing contracts expire. For smaller MVPDs, Belo's practice is to begin negotiations with at least four to five months remaining on the current agreements. In Belo's experience, these lead times provide the parties with ample opportunity to renew carriage terms well before existing agreements are due to expire. In fact, in many cases, little time is needed to agree on terms. Belo estimates that negotiations for more than one-third of all retransmission consent agreements were concluded with less than one hour of discussion with the MVPDs.

While many retransmission consent agreements can be negotiated swiftly, other transactions can be complex and must address multiple factors other than price. Often, MVPDs themselves insist on provisions that can have a material impact on the broadcaster beyond the consideration paid and, as a result, require time and good faith negotiation by *both* parties to resolve. For example, MVPDs typically demand the right to modify, remodulate, down-convert, or compress the stations' signals, including high definition services. This manipulation of signals can degrade the picture received by subscribers. Maintaining integrity of its stations' signal quality is of paramount importance to Belo, which has invested millions of dollars in its broadcast facilities and has been in the forefront of the transition to digital and the development of industry-leading high definition services. In many instances, Belo has encountered stiff resistance to its attempts simply to safeguard the technical quality of its program services as delivered by the MVPD to subscribers.

Similarly, many of Belo's stations multicast additional program streams, including services affiliated with the CW or MyNetwork television networks and locally-originated news and weather services. Since only a station's primary program stream is entitled to mandatory carriage, retransmission consent provides the sole means by which Belo can secure carriage for additional services. In Belo's experience, MVPDs typically demand the right, but often refuse an obligation, to retransmit multicast or other program services. Distribution is obviously critical to the success (or failure) of a program service, and lack of distribution can put a station at a significant disadvantage if its competitors' multicast services receive preferential carriage.[1]

Channel and tier placement, especially for multicast services, is another key non-monetary term critical to many retransmission consent deals. Thus, even when MVPDs agree to carry a secondary service, they often insist on the right to place the service on a tier that reaches only a limited percentage of their overall subscriber base and/or to decide channel placement. Without proper tier and channel placement, however, a broadcaster's multicast channel could be at essentially the same competitive disadvantage as had the MVPD refused to carry it at all.

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1 As the Commission has previously found, cable operators historically refused to provide any form of consideration in exchange for retransmission consent other than "in-kind." *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, (Sept. 8, 2005), at 19 (¶ 35) ("2005 Report to Congress") ("Many expected that cable operators would compensate broadcasters with cash in return for retransmission consent. In reality, much of the compensation for retransmission consent has been in-kind, including carriage of an affiliated non-broadcast channel, or other consideration such as the purchase of advertising time, cross-promotions, and carriage of local news channels."). It is therefore ironic that Petitioners now object to broadcasters seeking even that type of consideration.

Other non-monetary factors that may become significant issues in retransmission consent negotiations include duration of the agreement; the means of delivering the station's signal to the MVPD's headends, which can be scattered across a wide geographic area; the content and placement of the broadcaster's program services on electronic program guides; the right of the MVPD to deliver the station's programming on a video-on-demand or "start-over" basis; and cross-promotion of the station's and the MVPD's products and services. Parties may also have to allocate legal risks and liabilities through representations, warranties, and indemnities.

Despite the complexity of retransmission consent agreements and the variation in terms from one deal to another, Belo has enjoyed remarkable success in completing agreements on a timely, efficient, and fair basis. In fact, out of the 250 deals noted above that Belo has completed since 2006, Belo is aware of only *one* instance when carriage was temporarily disrupted as a result of the lapse of a retransmission consent agreement. Thus, in January 2008, the signals of Belo's KREM-TV (CBS) and KSKN (CW), licensed to Portland, Oregon, and KING-TV (NBC) and KONG (independent), licensed to Seattle, Washington, were dropped from a single cable headend with approximately 8,000 subscribers for approximately fourteen days. Despite dropping Belo's stations, however, this cable system, which straddles the Seattle, Washington and Portland, Oregon Designated Market Areas, continued to retransmit CBS and NBC network programming provided by competing stations.[2] Viewer interest in Belo's *local* programming, and the cable system's desire to profit from reselling it, ultimately brought the operator back to the negotiating table to conclude a fair deal within a reasonable period of time.

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[2] To Belo's knowledge, this instance of temporary loss of cable service was not widely reported, which emphasizes that retransmission consent disputes, even in the extremely rare cases in which they have arisen, can be promptly resolved by the parties involved.

IV. <u>THE PROPOSED REFORMS ARE UNLAWFUL, UNNECESSARY, AND WOULD REPRESENT A RADICAL INTRUSION INTO A FUNCTIONING MARKETPLACE.</u>

As Belo's experience shows, broadcasters and MVPDs are successfully negotiating retransmission consent agreements without the systemic service disruptions alleged by Petitioners. Thus, Petitioners are in search of a problem that does not exist. Moreover, as more fully explained in the comments by the National Association of Broadcasters, the proposed "reforms" are unlawful and would radically skew the market in favor of MVPDs, contrary to the purposes intended by Congress in adopting retransmission consent in 1992.

Most fundamentally, the Communications Act empowers the Commission to adopt rules that govern only the *process* by which the parties negotiate. As Congress explained, "[i]t is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the *outcome* of the ensuring marketplace negotiations."[3] In compliance with this limited mandate, the Commission has held that "unambiguous provisions" of law prohibit the FCC from imposing "interim" mandatory carriage as requested by Petitioners. Thus, Section 325(b) provides "*no latitude* for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission."[4] Similarly, the FCC has consistently

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3 Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 35-36 (1991) (emphasis added).

4 *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5471 (2000) (emphasis added).

rejected calls to oversee the terms of retransmission consent arrangements.[5] Simply stated, the Communications Act does not empower the FCC to permit retransmission over the broadcaster's objection or to intrude into the substance of private contracts for retransmission consent.

The right Congress gave broadcasters to grant retransmission consent necessarily includes the right to withhold consent. Without the latter, consent would be a fiction. Thus, even if the statute authorized the FCC to compel carriage or to dictate the outcome of retransmission consent deals, the proposals advanced by Petitioners would destroy the incentive of MVPDs to come to the bargaining table, substantially tilt the balance of negotiating power to the MVPD, and risk stripping retransmission consent of any meaningful market-determined value. The reasons are as simple as they are obvious. Without the *power* to terminate consent, however rarely invoked, broadcasters would no longer have any *right* to consent to retransmission. In turn, without any *risk* of losing access to broadcast signals, MVPDs would have enormous bargaining leverage in negotiations with broadcasters. Even then, MVPDs could hope to get a better deal by asking the government or its designee to dictate the outcome. In Belo's experience, the mere *existence* of the right to withhold consent is an indispensible component of the broadcaster's ability to negotiate a fair deal, and is the primary reason that Belo and its MVPD partners reached agreement without incident in a remarkable 99.6 percent of the negotiations.

Mandatory interim carriage would also artificially extend contracts beyond the terms agreed to by the parties and, in turn, unnecessarily prolong negotiations. Like any contract, retransmission consent agreements are limited to a term of years. But if the MVPD has the right to invoke at will non-consensual "interim" carriage, it can unilaterally extend the term of a

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5 *Id.* at 5458 ("We do not intend the totality of the circumstances test to serve as a 'back door' inquiry into the substantive terms negotiated between the parties.").

contract well beyond the term of years originally bargained for by the parties. This would provide the MVPD with the perverse incentive to stall negotiations to renew agreements. As discussed above, Belo reaches out to MVPDs months in advance of the expiration date of retransmission consent agreements. But under the Petitioners' proposal, there would be no incentive for Belo's negotiating partners to finalize negotiations before contracts end, since Commission rule would grant MVPDs the power to render the terms of private contracts meaningless.

The proposal for a dispute resolution mechanism is similarly unnecessary. Congress wisely concluded that the marketplace is best suited to determine the consideration, if any, to be provided for retransmission consent. Petitioners seek to strip that fundamental marketplace function from the principals to the agreement. This would flip the Congressional scheme of retransmission consent on its head, by requiring the government or its designee to dictate the prices, terms and conditions for retransmission consent. In addition, a government-mandated arbitrator could not sensibly place value on the critical non-cash components of retransmission consent agreements. Given the uniqueness of the issues to each individual negotiation, no party could better weigh the value of all components of a transaction than the broadcaster and the MVPD sitting at the table.

Contrary to Petitioners' suggestions, other rules – in particular, program exclusivity rules – do not "stack the deck" in the broadcasters' favor in retransmission consent negotiations by granting them unfettered rights to prevent cable operators from carrying duplicating network programming. Rather, Commission rules impose substantial *limits* on broadcasters' ability to exercise program exclusivity, for example, by restricting the "zone of protection" to limited geographic areas, exempting "significantly viewed" stations from program deletion, and exempting small systems from complying with the rule. Moreover, the Commission's program exclusivity rules simply prevent cable operators from undermining contractually negotiated rights to program exclusivity by requiring MVPDs to black out duplicating programming from non-exempt distant signals.[6] According to the Commission, program exclusivity, properly exercised, furthers localism by incenting content providers to create new and diverse programming valued by viewers.[7] Thus, far from distorting the free market as Petitioners seem to claim, the exclusivity rules give effect to it by protecting the integrity of private contracts that the Commission has concluded generate positive public interest benefits.

Finally, the intrusive and anti-free market burdens proposed by Petitioners are wholly unnecessary to prevent subscribers from suffering the "confusion" and "anger" that the existing retransmission consent regime allegedly causes. Of course, even in those extremely rare instances in which retransmission consent agreements expired without renewal, the public did not "lose access" to the station's programming. Rather, the station's service was available as it almost certainly had been for years – over-the-air and for free, and through another MVPD. Moreover, cable operators have a legal duty to provide notice to subscribers well in advance of deleting or repositioning the signal of a broadcast station.[8] Given the existing affirmative legal duty to advise subscribers that a broadcast signal may be deleted for any reason, cable operators have no basis to blame the Commission's retransmission consent rules for causing confusion.

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6 2005 Report to Congress at 11 (¶ 17) (Exclusivity rules "serve primarily as a means of enforcing contractual exclusivity agreements entered into between broadcasters, which purchase the distribution rights to programming, and networks and syndicators, which supply the programming.").

7 *Id.* at 18 (¶ 33). The FCC will not "interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our policy goals." *Id.* at 28 (¶ 50).

8 47 C.F.R. § 76.1601.

V. CONCLUSION

Belo's experiences demonstrate that the existing rules, which regulate the *process* but not the *outcome* of retransmission consent negotiations, are functioning well to the benefit of broadcasters, MVPDs, and the viewing public. As NAB has shown in its comments, petitioners unfairly paint a distorted picture of the history of the retransmission consent regime. In fact, there is no legal, historical, or economic basis for regulatory intervention. Since the implementation of retransmission consent in the 1990s, broadcasters and MVPDs have reached agreement on thousands of carriage deals with virtually no disruption in service. A few rare examples of carriage disputes – none of which has ever resulted in a finding by the Commission of bad faith by a broadcaster, and all of which were ultimately resolved through marketplace negotiations – cannot justify the one-sided proposals put forth by Petitioners. Accordingly, modification of the retransmission consent rules is unwarranted, and the Petition for Rulemaking should be rejected.

Respectfully submitted,

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